



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.

COPY

BRIEF OF RESPONDENT, THE BUNCH COMPANY

By Counsel

**Alex J. Shook, Esq. (W.Va. Bar No. 7506)
HAMSTEAD, WILLIAMS & SHOOK, PLLC
315 High Street
Morgantown, WV 26505
Phone: 304.296.3636
Facsimile: 304.291.5364
email: alex@wvalaw.com
*Counsel for Respondents***

**Paul T. Farrell, Jr., Esq.
(W. Va. State Bar #7443)
GREENE, KETCHUM, BAILEY
WALKER, FARRELL & TWEEL
419 Eleventh Street
Post Office Box 2389
Huntington, WV 25724-2389
Phone: (304) 525-9115
Facsimile: (304) 529-3284
Email: paul@greeneketchum.com
*Counsel for Respondents***

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Comes now the Respondent, THE BUNCH COMPANY, by counsel, and files this brief in response to the Petitioner, WEST VIRGINIA MUTUAL INSURANCE COMPANY d/b/a BRICKSTREET MUTUAL INSURANCE COMPANY's (hereinafter sometimes referred to as ("BrickStreet") and THE WEST VIRGINIA INSURANCE COMMISSIONER, *Appellants' Briefs* filed with this Honorable Court on March 23, 2012. Respondent respectfully requests that this Court uphold the Circuit Court of Kanawha County's Judgment as a Matter of Law against BrickStreet in Civil Action No. 10-AA-113 entered on October 31, 2011.

SUMMARY OF THE ARGUMENT

The Bunch Company purchased workers' compensation insurance from BrickStreet and was charged an agent commission. The Bunch Company had no agent. BrickStreet refused to refund the money. Charging an insured an expense never incurred is a *per se* violation of 85 C.S.R. 8-8.1.c ("In addition to said loss cost base rates, the premium charged by [BrickStreet] may also include ... ***"a reasonable provision for expenses related to the administration costs of the Mutual, including underwriting expenses, such as commissions to agents and brokers [...]"*** (emphasis added). BrickStreet unlawfully charged an expense never incurred.

BrickStreet admits that it charged The Bunch Company an agent commission and admits that The Bunch Company had no agent. However, it defends its position to retain the money, as well as the agent commissions charged to thousands of other West Virginia businesses that have no agent, because the West Virginia Insurance Commissioner said it was okay. Respondent respectfully submits that the West Virginia Insurance Commissioner does not have the authority to make lawful an unlawful act.

PROCEDURAL HISTORY

1. The Bunch Company originally filed a civil action against BrickStreet in the Circuit Court of Cabell County (Civil Action No. 07-C-0852). See (R. at 1)
2. BrickStreet and The Bunch Company stipulated to the facts. (R. at 1 – 5).
3. The Circuit Court of Cabell County (Cummings, J. presiding) entered summary judgment in favor of Respondent. (R. at 1 – 15). In its *Order Granting Plaintiff's Motion for Summary Judgment and Denying BrickStreet's Motion for Summary Judgment* on November 3, 2008, the Court made the following **Findings of Fact and Conclusions of Law**:

Findings of Fact and Conclusions of Law No 1. Resolution of this matter does not require an actuarial review of whether BrickStreet's rates are fair and reasonable. Rather, the sole issue is whether a component of the premium is lawful or unlawful.

Findings of Fact and Conclusions of Law No 2. 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" by BrickStreet. W. Va. Code § 23-2C-18(g).

Findings of Fact and Conclusions of Law No 3. The exempt legislative rule governing ratemaking can be found under Title 85 which states as follows:

- a. For the fiscal year beginning the first day of July, 2006, the West Virginia Employers' Mutual Insurance Company shall determine premium rates based on the actuarially determined base rates for the fiscal year. The base rates shall be calculated by the Mutual and submitted for approval by the insurance commissioner.
- b. The base rate shall be the loss cost for each classification as approved by the insurance commissioner. The loss cost base rate shall include a provision for the actuarially determined expected losses and may also include provision for some or all loss adjustment expenses, including the cost of investigation, defense, experts, legal fees, claims administration, cost containment and similar or related expenses, in accordance with generally accepted or commonly used insurance accounting practices.

- c. ***In addition to said loss cost base rates, the premium rates charged by the Mutual 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. All such provisions shall be subject to approval by the insurance commissioner.***

85 C.S.R. 8-8.1.a-c [2007] (*emphasis added*).

Findings of Fact and Conclusions of Law No 4. BrickStreet charged and received payment for an agent commission from insureds which did not use an agent. BrickStreet concedes this fact in the Stipulation of Facts, ¶¶ 14, 15 and 16 as well as during oral argument. In fact, this stipulated fact served as the basis for the parties' decision to forego discovery and submit the dispositive legal issue to the Court. As such, BrickStreet has stipulated that it charged some insureds for an expense [the agent commission] that it did not incur, and is estopped from arguing to the contrary. Riggs v. West Virginia University Hospitals, Inc., 221 W.Va. 646, 656 S.E.2d 91, Syl. Pt. 3 (2007).

Findings of Fact and Conclusions of Law No 5. Charging an insured an expense which was never incurred is a *prima facie* violation of 85 C.S.R. 8-8.1.a-c [2007] and unjustly enriches BrickStreet at the expense of a class of its insureds. BrickStreet practice is unlawful as a matter of law.

Findings of Fact and Conclusions of Law No 6. BrickStreet's argument that the agent commission "offsets" the increased costs of administering direct policies is without merit. The argument is not supported by the record and belies the fact that BrickStreet was internally administering **all** the policies **before** the agent commission was added to the premium. The original rates charged by BrickStreet presumably included the underwriting of every policy in the State of West Virginia as well as the rollover of the insureds on January 1, 2006. BrickStreet never requested a rate increase for increased internal administrative expenses. Rather, BrickStreet requested a premium increase for the added expense of agent commissions. It is difficult to understand how the internal expense of maintenance can exceed the initial cost of underwriting. Moreover, it is difficult to understand how such maintenance can increase for one premium to the next without some proof thereof. BrickStreet's argument that it incurred the expense of an agent commission, in the form of **increased** internal expenses, is without merit.

Findings of Fact and Conclusions of Law No 7. BrickStreet argues the “filed rate doctrine precludes a plaintiff in a civil action from challenging rates charged by a regulated entity when those rates have been properly filed with a regulatory agency.” See BrickStreet’s *Memorandum of Law in Support of Motion for Summary Judgment* at p.6.

Findings of Fact and Conclusions of Law No 8. The “filed rate” doctrine is nearly a century old and mandates that “the rate of the carrier duly filed is the only lawful charge.” AT & T v. Cent. Office Tel. Inc., 524 U.S. 214, 222, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998); Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990); Keogh v. Chicago & Northwestern R. Co., 260 U.S. 156, 163, 43 S.Ct. 47, 49, 67 L.Ed. 183 (1922).¹ The doctrine’s purpose is twofold: to prevent discrimination among consumers and to preserve the rate-making authority of federal agencies. Bryan v. BellSouth Communications, Inc., 377 F.3d 424, 429 (4th Cir. 2004); see also Stand Energy Corp. v. Columbia Gas Transmission Corp., 373 F.Supp.2d 631 (S.D.W.Va. 2005).

Findings of Fact and Conclusions of Law No 9. West Virginia has not adopted the “filed rate” doctrine as it relates to insurance premiums. There are two West Virginia cases which mention the doctrine. Findley v. State Farm Mut. Auto. Ins. Co., 213 W.Va. 80, 576 S.E.2d 807 (2002); West Virginia AAA Statewide Ass’n v. Public Service Com’n of West Virginia, 186 W.Va. 287, 412 S.E.2d 481 (1991).

Findings of Fact and Conclusions of Law No 10. In Findley v. State Farm Mut. Auto. Ins. Co., the Court addressed a multi-count class action including, *inter alia*, an insurance premium rebate claim. The Findley Court noted the filed rate doctrine was raised on cross assignment of error by State Farm. Findley, 213 W.Va. at 90, 576 S.E.2d at 817. However, the cross assignment of error was not considered on appeal. Id. at n.32.

Findings of Fact and Conclusions of Law No 11. In West Virginia AAA Statewide Ass’n v. Public Service Com’n of West Virginia, the Court considered the legality of a “volume discount” by an automobile club given to wrecker operators. The West Virginia AAA Statewide Association (“AAA”) contractually agreed to refer its customers to particular wrecker operators in exchange for a fixed percentage deduction in fees. The West Virginia

¹ The most frequently quoted statement of the filed doctrine dates back to a 1915 case from the United States Supreme Court:

Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable.

Louisville & Nashville R. Co. v. Maxwell, 237 U.S.94, 97, 35 S.Ct. 494, 59 L.Ed. 853 (1915).

Supreme Court found the subsidization, or discounting of fees, was contrary to W. Va. Code § 24A-2-4 which prohibits any refunds, discounts or rebates of rates ordered by the PSC. The AAA Court “buttressed” its conclusion by citing the United States Supreme Court opinion in Maislen, *supra*, which found that “secret negotiations and collections of rates lower than the filed rate” is illegal under the United States Interstate Commerce Act, 49 U.S.C. § 10101 et. seq. [1982]. See Maislen Indus. U.S. Inc. v. Primary Steel, Inc., 497 U.S. at 130.

Findings of Fact and Conclusions of Law No 12. The reference to Maislen case by the Supreme Court of Appeals of West Virginia in West Virginia AAA Statewide Ass'n v. Public Service Com'n of West Virginia, *supra*, clearly does not constitute the blanket adoption of the rate filed doctrine for every state agency or commission which accepts administrative filings in West Virginia.

Findings of Fact and Conclusions of Law No 13. Both West Virginia AAA Statewide Ass'n v. Public Service Com'n of West Virginia, *supra*, and Maislen Indus. U.S. Inc. v. Primary Steel, Inc., *supra*, are predicated upon enabling statutory language. For instance, West Virginia AAA Statewide Ass'n v. Public Service Com'n of West Virginia relies upon W. Va. Code § 24A-2-4 [1937] which states:

All rates, fares and charges made by any common carrier by motor vehicle shall be just and reasonable, and shall not be unlawfully discriminatory, prejudicial nor preferential. No such carrier shall charge, demand, collect, or receive a greater or less or different remuneration for the transportation of passengers or property, or for any service in connection therewith, than the rates, fares, and charges which have been legally established and filed with the commission; nor shall any such carrier refund, remit, discount or rebate in any manner or by any device any portion of the rates, fares, and charges required to be collected by the tariffs on file with or ordered by the commission.

BrickStreet argues that W. Va. Code § 24A-2-4 closely mirrors the federal Interstate Commerce Act.² Since the Maislen Court applied the filed rate doctrine to the federal Interstate Commerce Act, BrickStreet argues that West Virginia has adopted a *statewide* filed rate doctrine.

² The original enactment of the Interstate Commerce Act, upon which the filed rate doctrine originated, provides that “[W]hen any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect or receive from any persons or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force.” U.S. Inc. v. Primary Steel, Inc., 497 U.S. 116 at 139 (Stevens, J., dissenting).

Findings of Fact and Conclusions of Law No 14. However, W. Va. Code § 24A-2-4 only applies to the public service commission of West Virginia governing common carriers by motor vehicle. No such enabling language can be found in the West Virginia EMPLOYERS' MUTUAL INSURANCE COMPANY ACT, W. Va. § 23-2C-1 *et seq.* nor Chapter 33 of the West Virginia Code. If indeed, the enabling language found in W. Va. Code § 24A-2-4 implicitly adopts the rate filed doctrine for public service commission filings, then the absence of such language in Chapter 23, Article 2C of the West Virginia Code means the same is inapplicable to BrickStreet filings under the sage principle of *expressio unius est exclusio alterius*. Phillips v. Larry's Drive-In Pharmacy, Inc., 220 W.Va. 484, 647 S.E.2d 920 (2007) (the express mention of one thing implies the exclusion of another)

Findings of Fact and Conclusions of Law No 15. BrickStreet claims such language can be found in W. Va. Code § 33-6-30(b)(5) which states that "the provisions of this chapter do not provide and were not intended to provide the basis for monetary damages in the form of premium refunds."

Findings of Fact and Conclusions of Law No 16. The 2002 West Virginia Legislature amended W.Va. Code §33-6-30 in an attempt to legislatively reverse the holding in Mitchell v. Broadnax, 208 W.Va. 36, 537 S.E.2d 882 (2000) and "clarify" the meaning of W. Va. Code § 33-6-31(k). This "special interpretative statute" announced that "[n]othing in this chapter may be construed as requiring specific line item premium discounts or rate adjustments corresponding to any exclusion...in any policy of insurance[...]" W. Va. Code § 33-6-30(c). Such language stops far short of invoking the filed rate doctrine, does not invoke exclusive jurisdiction with the OIC and certainly does not abrogate common law remedies such as unjust enrichment.

Findings of Fact and Conclusions of Law No 17. Moreover, W. Va. Code § 33-6-30(c) may supercede the traditional filed rate doctrine, to the extent it already exists in West Virginia, by affixing only a "presumption of legality" to the OIC stamp of approval. A "presumption" of legality is far different that "preclusion" from civil liability (as argued by BrickStreet).

Findings of Fact and Conclusions of Law No 18. The Court hereby declines to invoke the filed rate doctrine in the context of BrickStreet's filings as lacking an adequate basis in West Virginia statutory law.

Findings of Fact and Conclusions of Law No 19. Moreover, even if West Virginia adopts the filed rate doctrine, the Court finds the same is inapplicable to the matter *sub judice*.

Findings of Fact and Conclusions of Law No 20. First, this case does not challenge the “base rate”³ charged by BrickStreet.

Findings of Fact and Conclusions of Law No 21. This case involves a challenge to an administrative expense charged to certain insureds in the form of an agent commission. West Virginia law provides that “***in addition to said loss cost base rates***, the premium charged by [BrickStreet] may also include ... a reasonable provision for expenses related to the administration costs of the Mutual, including underwriting expenses, such as commissions to agents and brokers [...]” 85 C.S.R. 8-8.1.c [2007] (emphasis added).

Findings of Fact and Conclusions of Law No 22. An administrative expense is not a component of the base rate.⁴ It is a premium “in addition to” the base rate. BrickStreet’s base rates are not implicated.

Findings of Fact and Conclusions of Law No 23. West Virginia law clearly permits BrickStreet to charge an appropriate premium for certain administrative expenses. However, the term “expenses” infers BrickStreet has actually incurred the expense. Charging a premium for an expense never incurred violates 85 C.S.R. 8-8.1.c.

Findings of Fact and Conclusions of Law No 24. Second, the approval by the West Virginia Office of the Insurance Commissioner of a rate filing creates a “presumption that the policy forms and rate structure are in full compliance with the requirements of [Chapter 33 of the West Virginia Code]. W. Va. Code § 33-6-30(c)[2002]. This presumption falls short of the traditional filed rate doctrine.

Findings of Fact and Conclusions of Law No 25. Plaintiffs have rebutted the presumption and established a prima facie violation of 85 C.S.R. 8-8.1.c [2007]. BrickStreet is not entitled to wield OIC approval of its rate filing as a preclusion to civil liability for unlawful conduct. The OIC does not have the authority to permit BrickStreet to deviate from governing West

³ The “base rate” is the “loss cost for each classification as approved by the insurance commissioner.” The “loss cost base rate” is defined as “the actuarially determined expected losses and may also include provision for some or all loss adjustment expenses, including the cost of investigation, defense, experts, legal fees, claims administration, cost containment and similar or related expenses, in accordance with generally accepted or commonly used insurance accounting practices.” 85 C.S.R. 8-8.1.b [2007].

⁴ A recent amendment to the exempt legislature rule rolls the agent commission into the base rate (beginning July 1, 2008). 85 C.S.R. 8-11.2 (“The base rates charged by the private carriers may also include...a reasonable provision for expenses related to the administrative costs of the private carrier, including underwriting expenses, such as commissions to agents and brokers [...]”). Thus, the agent commission was not considered a component of the base rate during the 30 month monopoly by BRICKSTREET.

Virginia law. Rather the OIC has the duty to enforce West Virginia law and it has failed to do so in this instance.

Findings of Fact and Conclusions of Law No 26. Third, the express purpose of the rate filed doctrine is to prevent price discrimination and anti-competitive conduct in heavily regulated industries such as “intentionally misquoting rates to shippers as a means of offering them rebates.” Maislen Indus. U.S. Inc. v. Primary Steel, Inc., 497 U.S. at 127. In this instance, there was no competition. BrickStreet was operating as a statutory monopoly during the timeframe of the allegations in the *Amended Complaint*. Anti-competitive behavior is impossible because, *inter alia*, there was no competition. BrickStreet’s invocation of the filed rate doctrine attempts to shield its rates from collateral attack rather than promote fair competition in the industry. The purpose of the filed rate doctrine does not apply to the matter *sub judice*.

Findings of Fact and Conclusions of Law No 27. Fourth, BrickStreet argues the filed rate doctrine should be adopted because the Plaintiffs have administrative remedies to challenge rates. However, the West Virginia Legislature did not grant the power to the OIC to retrospectively disapprove rates. W. Va. Code § 33-20-5(c) and (d) (“...[s]aid order [disapproving a rate filing] shall not affect any contract or policy made or issued prior to the expiration of the period set forth in said order.” The absence of a remedy for damages for retrospective unlawful conduct militates in favor of rejecting the filed rate doctrine.

Findings of Fact and Conclusions of Law No 28. Finally, BrickStreet informed its insureds the “agent commission percentage is absorbed by BrickStreet as a cost of doing business. It is not charged directly to businesses that have chosen to work with an agent; likewise, agent percentages are not discounted for businesses that opt to deal directly with us.” See Inside BrickStreet, Vol. 2, Issue 4, p.3 (Winter 2007). Plaintiffs’ claim this statement contradicts BrickStreet’s representations to the Court. Plaintiffs’ claim BrickStreet is charging businesses directly for an agent commission in an attempt to induce insureds to “marry” a registered BrickStreet agent in anticipation of the end of the 30 month monopoly. West Virginia law specifically prohibits false advertising of insurance policies. W. Va. Code § 33-11-4 [2002]. The filed rate doctrine is not an absolute bar to recovery and is subject to equitable remedies. See American Bankers Ins. Co. of Florida v. Alexander, 818 So.2d 1073 (2001).

Findings of Fact and Conclusions of Law No 29. BrickStreet’s conduct violated West Virginia law. Tacit approval from the OIC does not render lawful an otherwise unlawful act. This Court is not inclined to invoke the severe consequences of the filed rate doctrine absent a clear expression

of the same from the West Virginia Legislature and/or a mandate from the West Virginia Supreme Court.

4. The Circuit Court of Cabell County (Hustead, J. presiding) thereafter reversed summary judgment and dismissed the case for failure to exhaust administrative remedies pursuant to State ex rel. Citifinancial, Inc. v. Madden, 223 W. Va. 229, 672 S.E. 2d 365 (2008). (R. at 17 – 25).

5. Respondent filed an administrative complaint with the West Virginia Insurance Commissioner on February 15, 2010. (R. at 27 – 38). Respondent was denied discovery. Respondent was denied the opportunity to make a proffer for the record. Respondent was denied the opportunity to submit a brief. Respondent was denied a hearing.

6. The Insurance Commissioner summarily entered its *Findings of Fact and Conclusions of Law and Final Order Denying Hearing Request of Complainant* on July 9, 2010. (R. 77 – 89).

7. Respondent filed an administrative appeal to the Circuit Court of Kanawha County, on July 23, 2010.

8. The WVOIC designated the record on August 6, 2010. (R. at 151 – 154). The record was not made available to Respondent during the pendency of the administrative complaint. In fact, Respondent was unaware a record existed until the WVOIC designated the record to the Circuit Court of Kanawha County.

9. Respondent filed a motion to supplement the record and/or conduct discovery. Petitioner BrickStreet opposed the motion. The Circuit Court considered the cross motions for summary judgment on the record designated by the WVOIC.

10. By Order entered on October 31, 2011, the Circuit Court of Kanawha County, The Honorable Judge Tod Kaufman, entered a *Judgment as a Matter of Law* in favor of the Respondents (Petitioners below), holding in part that the WVOIC erred by allowing BrickStreet to charge for an agent commission when no such expense was incurred. (R. at 351-359).

11. BrickStreet and the WVOIC, by counsel, appealed the Circuit Court of Kanawha County's decision and Order of October 31, 2011, by filing a Notice of Appeal on November 22, 2011.

STATEMENT OF THE FACTS OF THE CASE

The litigants entered into *Stipulation of Facts* on April 30, 2008, in the form of seventeen (17) paragraphs which are restated as follows:

Stipulation of Facts ¶1: In his first official act as West Virginia's 34th governor, Gov. 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].

Stipulation of Facts ¶2: 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.

Stipulation of Facts ¶3: 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].

Stipulation of Facts ¶4: 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].

Stipulation of Facts ¶5: West Virginia law provides that BrickStreet shall be the sole source of workers' compensation insurance

coverage for all employers doing business in West Virginia beginning on January 1, 2006 through June 30, 2008 (commonly referred to as the "Transition Period"). Effective July 1, 2008, other licensed property and casualty carriers are allowed to write workers' compensation insurance in West Virginia.

Stipulation of Facts ¶6: The rates charged by BrickStreet for workers' compensation insurance must not be excessive, inadequate or unfairly discriminatory. W. Va. Code § 23-2C-18(f)(1); W. Va. Code § 33-20-3(b).

Stipulation of Facts ¶7: West Virginia law also 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" by BrickStreet. W. Va. Code § 23-2C-18(g).

Stipulation of Facts ¶8: The exempt 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, 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. 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."

Stipulation of Facts ¶9: The October 31, 2007 version of the Rule, specifically §-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...[.]"

Stipulation of Facts ¶10: BrickStreet became licensed with the West Virginia Offices of the Insurance Commissioner (“OIC”) to transact the business of insurance in the State of West Virginia and began a collaborative effort to create a rate making system.

Stipulation of Facts ¶11: The National Council on Compensation Insurers (“NCCI”) was designated by the OIC to be the rate making entity in West Virginia and specifically to set so-called “Loss Cost” rates for each of the 400+ classifications that were adopted in West Virginia. Loss Cost rates are simply one component of the rates necessary to cover the losses, medical and indemnity, for each classification.

Stipulation of Facts ¶12: BrickStreet also 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 such things as the costs associated with adjusting claims, defending its insureds in claim litigation, purchasing reinsurance, subscribing to NCCI, and achieving a reasonable profit.

Stipulation of Facts ¶13: 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 LCM calculation. The OIC approved an LCM of 1.105.

Stipulation of Facts ¶14: 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. The same LCM must be applied to determine the premium rates for all insureds.

Stipulation of Facts ¶15: Not all BrickStreet insureds have an agent.

Stipulation of Facts ¶16: 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.

Stipulation of Facts ¶17: 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. (R. at 1 - 5).

STANDARD OF REVIEW

On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4(a) (1964) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong. Philyaw v. Gatson, 195 W.Va. 474 (1995), W. Va. Code § 29A-5-4(a) (1964). In cases where the circuit court has amended the results before the administrative agency, this Court reviews the final order of the circuit court and ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law *de novo*. Muscatell v. Cline, 196 W.Va. 588, 594-5 (1996).

LEGAL ARGUMENTS

It is noteworthy that two circuit courts have reviewed this matter on the merits and have found BrickStreet in clear violation of 85 C.S.R. 8-8.1.c [2007]. First, Judge Cummings from the Circuit Court of Cabell County ruled in favor of the Respondent as a matter of law on the stipulated record of the parties, and then Judge Kaufman ruled in favor of the respondent in the administrative appeal below on the record designated by the WVOIC. The Circuit Court below did not abuse its discretion in finding as a matter of law that charging an insured for an expense the insured never incurred violated the law. The Bunch Company submits the following analysis in response to the Petitioners:

- (1) The Circuit Court of Kanawha County was correct in finding that the WVOIC was clearly wrong in concluding that BrickStreet's rate filing complied with West Virginia law.**

This Court should uphold the Circuit Court of Kanawha County's ruling that the WVOIC erred by concluding that BrickStreet's rate complied with West Virginia law. West Virginia law provides regulatory authority over workers' compensation insurance to the WVOIC to "issue an exempt legislative rule to govern ratemaking and premium collection by [BrickStreet]." W. Va. Code § 23-2C-18(g) [2005]; W. Va. Code § 23-1-1a(j)(3); W. Va. Code § 33-2-10(b); W. Va. Code § 33-2-21. The workers' compensation rules proposed by the Insurance Commissioner and approved by the Industrial Council are not subject to legislative approval. W. Va. Code §§ 23-2C-5(c)(2) and 33-2-10(b).

The law governing Ratemaking was originally found at 85 C.S.R. 8-8-1 *et seq.* (2005-2007) and later moved to 85 C.S.R. 8-11 [2007 to present]. The specific provision relating to charging an insured for an agent commission states:

In addition to said loss cost base rates, the premium rated charged by the Mutual may also include ... a reasonable provision for expenses related to the administration costs of the Mutual, including underwriting expenses, such as commissions to agents and brokers [...].

85 C.S.R. 8-8.1.c [2005]. The same provision was re-affirmed, in large part, when the Ratemaking rule was moved to a different section and reads as follows:

The base rates charged by the private carriers may also include ... a reasonable provision for expenses related to the administration costs of the private carrier, including underwriting expenses, such as commissions to agents and brokers [...].

85 C.S.R. 8-8.11.2 [2007].⁵ A legislative rule "has the force and effect of law." State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell, 226 W. Va. 138, 697 S.E. 2d 730, Syl. Pt. 6 (2010).

⁵ The subtle change in the introductory language of the 2005 version ("In addition to said loss cost base rates...") to the introductory language of the 2007 version ("The base rates charged by the insurer...") does not appear to be relevant to the WVOIC decision. Petitioner reserves the right to address the same if needed.

In this case, BrickStreet charged The Bunch Company for an agent's commission when no agent was used. The WVOIC erred as a matter of law by failing to enforce its legislative rule. The Circuit Court of Cabell County first determined that BrickStreet committed a *per se* violation of this legislative rule:

Charging an insured an expense which was never incurred is a *prima facie* violation of 85 C.S.R. 8-8.1.a-c [2007] and unjustly enriches BrickStreet at the expense of a class of its insureds. BrickStreet's practice is unlawful as a matter of law.

See Circuit Court of Cabell County, *Order Granting Plaintiffs' Motion For Summary Judgment And Denying BrickStreet's Motion For Summary Judgment*, Findings of Fact and Conclusion of Law ¶5 (R. at 7).

The WVOIC administrative order fails to even mention the regulatory rule at issue in this matter. See WVOIC, *Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Complainant* (R. at 77 – 89). Instead, it relies upon the “rubber stamp” provision of W. Va. Code 33-20-4(e) (“... A filing shall be deemed to meet the requirements of this article unless disapproved by the commissioner within the waiting period.”) WVOIC, *Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Complainant*, Conclusion of Law ¶3 (R. at 87).

“Tacit approval from the OIC does not render lawful an otherwise unlawful act.” See Circuit Court of Cabell County, *Order Granting Plaintiffs' Motion For Summary Judgment And Denying BrickStreet's Motion For Summary Judgment*, Findings of Fact and Conclusion of Law ¶29 (R. 14, 15).

As such, this Court should uphold the holding of the Circuit Court. In the Circuit Court's holding, the Hon. Judge Kaufman stated that, “The argument that BrickStreet incurred the expense of an agent commission, in the form of increased internal expenses, is

not supported by the record. There is simply no evidence in the record to support the finding that the increased costs of administering direct policies offsets the agent commission." *Final Order of the Circuit Court of Kanawha County, Conclusions of Law* (R. at 357). The factual findings and basis for the Hon. Judge Kaufman's decision are supported by the record and are uniquely transparent, verifiable, and should be upheld by this Honorable Court.

(2) The Circuit Court of Kanawha County was correct in holding that "[t]he WVOIC was clearly wrong when it concluded that charging an agent commission to [The Bunch Company], even though it did not have an agent, was justified [...]."

The WVOIC crafted a nifty "safety net" to its ruling to exculpate BrickStreet despite its clear violation of law. The record reveals that an undisclosed number of businesses, who collectively paid \$111 million in annual premiums, were charged an agent commission despite the fact that they had no agent.

The WVOIC concludes that charging an agent commission to these businesses (thought to number in the thousands), in the absence of an agent, is justified "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." *WVOIC, Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Complainant, Conclusion of Law ¶6* (R. at 88).

However, there is absolutely not a scintilla of evidence in the record to support this conclusion. None of Brickstreet's filings with the WVOIC indicate any increase in administrative costs and/or expenses incurred by BrickStreet in handling direct written business. Notably, this argument was presented and harshly rejected by the Circuit Court of Cabell County once before:

BrickStreet's argument that the agent commission "offsets" the increased costs of administering direct policies is without merit. The argument is not supported by the record and belies the fact that BrickStreet was internally administering **all** the policies **before** the agent commission was added to the premium. The original rates charged by BrickStreet presumably included the underwriting of every policy in the State of West Virginia as well as the rollover of the insureds on January 1, 2006. BrickStreet never requested a rate increase for increased internal administrative expenses. Rather, BrickStreet requested a premium increase for the added expense of agent commissions. It is difficult to understand how the internal expense of maintenance can exceed the initial cost of underwriting. Moreover, it is difficult to understand how such maintenance can increase for one premium to the next without some proof thereof. BrickStreet's argument that it incurred the expense of an agent commission, in the form of **increased** internal expenses, is without merit.

See Circuit Court of Cabell County, Order Granting Plaintiffs' Motion For Summary Judgment And Denying BrickStreet's Motion For Summary Judgment, Findings of Fact and Conclusion of Law ¶6 (R. at 7).

To be clear, BrickStreet incurred the expense of the initial underwriting of every policy in the State of West Virginia before it opened for business on January 1, 2006. It serviced each of these policies in-house through September, 2007, (three policy periods) and there were no agents involved during this period. The premiums charged during this timeframe already encompassed the in-house underwriting expenses. BrickStreet never requested a premium hike for additional expenses incurred as a result of insureds remaining in-house (direct written business). To the contrary, BrickStreet requested a premium increase for the added expense of an agent's commission.

The Petitioners attempt to justify charging for an expense never incurred by arguing that ratemaking is prospective and has a minor degree of uncertainty. However, the agent's commission was not contingent upon an uncertain loss or charged to only new or "prospective" customers. Brickstreet knowingly charged an agent's commission to existing

customers when it knew those customers did not have an agent. The excuse offered by BrickStreet and the WVOIC is fabricated from whole-cloth and contradicted by the record.

(3) The Circuit Court of Kanawha County's decision to review and vacate the decision is proper and remanding this matter for further proceedings would be futile.

The crux of Petitioners' argument is that only the WVOIC is qualified to judge whether insurance companies comply with the law with respect to rate filings, and that to rule otherwise would somehow open the door for "various judges and circuit courts" to judge what constitutes unreasonable or excessive charges. First, the issue was not whether the charge for an agent's commission was unreasonable or excessive; rather, the issue was whether BrickStreet's conduct was permitted by law. Two circuit court judges have already determined as a matter of law that the conduct was unlawful. Second, the Court's ruling below does not invite "various judges and circuit courts" to invalidate rate filings—the Petitioner is well aware that the Respondent litigated its claim through the statutory administrative process and simply prevailed on its administrative appeal. Most importantly, to adopt the Petitioners' arguments in this case would result in no meaningful judicial review for aggrieved parties, in this case West Virginia businesses, of the illegal actions of insurers and the WVOIC. The Hon. Judge Kaufman exercised legitimate judicial authority in righting the WVOIC's wrong by reversing, vacating and modifying the order of the Insurance Commissioner. W. Va. Code § 29A-5-4(g) [1998] (setting forth the six factor test under the APA to reverse, vacate or modify a decision by a state agency).

Petitioners, in their appeal brief, request that this matter be remanded to the WVOIC for a hearing that was denied repeatedly to the Respondents below, so that the WVOIC may *again* decide the matter. It is ironic that the Petitioners now want to have a hearing when

they had ample opportunity to do so at the initial administrative level. The Petitioners lost on the stipulated record before the Circuit Court of Cabell County, and lost on their own record in the Circuit Court of Kanawha County. Simply put, all administrative remedies have been exhausted. Because of an unfavorable result, BrickStreet, once again, seeks to delay final adjudication of this matter, which has been met on all judicial fronts with uniform results. As such, this Honorable Court should uphold the Circuit Court's determination.

CONCLUSION

WHEREFORE, Respondent, The Bunch Company, respectfully requests that this Court heed the Circuit Court of Kanawha County and Judge Kaufman's learned review of the WVOIC's failure to uphold the law, and that Court's decision of October 31, 2011 be upheld.

THE BUNCH COMPANY
BY COUNSEL



Paul T. Farrell, Jr., Esq. (W.Va. Bar No. 7443)
GREENE, KETCHUM, BAILEY, WALKER, FARRELL & TWEEL
419 - 11th Street / P.O. Box 2389
Huntington, West Virginia 25724-2389
Phone: 800.479.0053 or 304.525.9115
Fax: 304.529.3284
email: paul@greeneketchum.com
Counsel for Respondent

-- and --



Alex J. Shook, Esq. (W.Va. Bar No. 7506)
HAMSTEAD, WILLIAMS & SHOOK, PLLC
315 High Street
Morgantown, WV 26505

Phone: 304.296.3636
Fax: 304.291.5364
email: alex@wvalaw.com
Counsel for Respondent

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, Alex J. Shook, do hereby certify that the "**BRIEF OF RESPONDENT, THE BUNCH COMPANY**" was served upon the following counsel of record via United States Mail, first class, postage prepaid, this 2nd day of May, 2012:

Jeffrey M. Wakefield
Erica M. Baumgras
FLAHERTY SENSABAUGH BONASSO, PLLC
Post Office Box 3843
Charleston, WV 25338-3843
Telephone: (304) 354-0200
Email: jwakefield@fsblaw.com
ebaumgras@fsblaw.com
Counsel for Petitioner

Jill C. Bentz
Mychal S. Schulz
Jacob A. Manning
DINSMORE & SHOL, LLP
900 Lee St., Suite 600

Andrew R. Pauley
WV Office of the Insurance Commissioner
Post Office Box 50540
Charleston, WV 25305-0540
Telephone: (304) 558-6279 ext. 1402
Email: Andrew.Pauley@wvinsurance.gov
Counsel for Petitioner

D.C. Offutt, Jr.
Offutt Nord Burchett, PLLC
949 Third Ave. Suite 300
Post Office Box 2868
Huntington, WV 25701

Charleston, WV 25301
Telephone: (304) 357-0900
Facsimile: (304) 357-0919
*Counsel for Amicus Curiae
WV Insurance Federation*

Telephone: (304) 529-2868
Facsimile: (304) 529-2999
Email: dcoffutt@ofnlaw.com
*Counsel for Amicus Curiae
WV Mutual Insurance Company*


Alex J. Shook, Esq. (W.Va. Bar No. 7506)
HAMSTEAD, WILLIAMS & SHOOK, PLLC
315 High Street
Morgantown, WV 26505
Phone: 304.296.3636
Fax: 304.291.5364
email: alex@wvalaw.com
Counsel for Respondent

-- and --

Paul T. Farrell, Jr., Esq. (W.Va. Bar No. 7443)
GREENE, KETCHUM, BAILEY, WALKER, FARRELL & TWEEL
419 - 11th Street / P.O. Box 2389
Huntington, West Virginia 25724-2389
Phone: 800.479.0053 or 304.525.9115
Fax: 304.529.3284
email: paul@greeneketchum.com
Counsel for Respondent