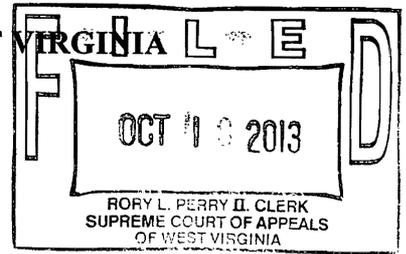


No. 13-1048

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



AT CHARLESTON

AIG DOMESTIC CLAIMS, INC.,

**Petitioner and
Defendant Below,**

v.

**Civil Action No. 05-C-550
Ohio County Circuit Court**

**THE HONORABLE LARRY V. STARCHER,
JUDGE OF THE CIRCUIT COURT OF OHIO
COUNTY, WEST VIRGINIA, and CANDY GEORGE,
Individually and as Guardian, Mother and Next of Friend
of KYLE GEORGE, a minor, and MARK
GEORGE,**

**Respondents and
Plaintiffs Below.**

**AIG DOMESTIC CLAIMS INC.'S VERIFIED PETITION FOR WRIT
OF PROHIBITION AND/OR MANDAMUS WITH ATTACHED
APPENDICES OF EXHIBITS**

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I. QUESTION PRESENTED

Whether the trial court exceeded its legitimate powers when, in a case brought under the West Virginia Unfair Trade Practices Act (“UTPA”) by third-party claimants, it allowed those claimants to seek discovery and potentially impose liability based on events that occurred after the abolition of third-party Unfair Trade Practices Act lawsuits in West Virginia. In addition, whether the trial court should issue a ruling prior to trial regarding whether third party claimants can base their UTPA lawsuit on claims handling activities of AIGDC that occurred after July 8, 2005, the date on which the West Virginia Legislature prohibited suits based on such conduct.

II. STATEMENT OF THE CASE

Defendant AIG Domestic Claims, Inc., now known as AIG Claims, Inc. (“AIGDC”) brings this Petition for Writ of Prohibition/Writ of Mandamus to prohibit the Honorable Larry V. Starcher, Judge of the Circuit Court of Ohio County, West Virginia, (sitting by assignment) from enforcing his April 11, 2013 Order, which denied AIGDC’s Motion for Protective Order to Determine the Parameters of Discovery. (See Order Denying Defendant’s Motion for Protective Order to Determine the Parameters of Discovery dated April 11, 2013 attached **Exhibit A -- Appendix pgs. 000001-000004**). In addition, AIGDC asks this Court to compel Judge Starcher to issue a ruling in regard to whether the Plaintiffs can base their lawsuit on, and therefore introduce into evidence at trial material pertaining to, AIGDC’s post-July 8, 2005 claims activities. This Court has original jurisdiction to issue the writ(s) pursuant to West Virginia Code § 53-1-1, *et seq.* and Rule 16 of the West Virginia Rules of Appellate Procedure.

A. **Factual Background.**

This third-party UTPA suit was filed by Candy George and Mark George, individually, and Candy George as Guardian, Mother and Next Friend of Kyle George (Respondents and

Plaintiffs below) and arises out of two school accidents that occurred in March 2004 when Kyle George was approximately ten years old. The first of the two underlying incidents occurred on March 18, 2004, when Kyle George fell on the playground while attempting to catch a football pass. During this incident, Kyle George allegedly hit his head and hurt his arm. He was given ice and released to his mother's care so that she could have him evaluated by a health care professional. Kyle George did not return to school until March 22 for a half day. He allegedly returned with a note to his teacher that stated he was under doctor's orders to limit his physical activity. This note was apparently misplaced or not given to the teacher, so that Kyle George was permitted to play on the playground. Two days later, Kyle George fell a second time while playing on the monkey bars. This second fall allegedly resulted in an injury to Kyle George's left elbow.

B. Claims Handling.

A few weeks after this second incident, in April 2004, Candy and Mark George submitted Kyle George's medical records to Bethlehem Elementary for payment. Bethlehem Elementary, in turn, sent the bills to the Ohio County Board of Education ("OCBOE"). Because the Ohio County Board of Education is insured under the State of West Virginia's insurance program, the Ohio County Board of Education sent Kyle George's medical bills to the West Virginia Board of Risk and Insurance Management ("BRIM"). BRIM forwarded this information to National Union Fire Insurance Company of Pittsburgh, PA ("National Union"), who is the insurer for the State of West Virginia. The Defendant AIGDC handles claims for National Union under the BRIM insurance program.

A few days later, AIGDC opened a file and Casualty Specialist Sandy Horton was assigned to investigate the first accident. Immediately after being assigned to the file, Sandy Horton began contacting the people who might have knowledge of that accident. First, she contacted the insured's

employees and then she contacted Kyle George's parents. After a complete investigation, Ms. Horton determined that the fall on the playground on March 18, 2004 was not the result of negligence on the part of the Bethlehem Elementary School but was an unavoidable accident. Accordingly, Ms. George's claim was denied and the file was closed.

After it was determined that Ms. George would be making a claim for the second accident, Casualty Claims Specialist Bret Hart was assigned to investigate that accident. Like Ms. Horton, Mr. Hart contacted the insured and Mrs. George to investigate the second fall. As part of his investigation, Mr. Hart sent Mrs. George a medical authorization to obtain Kyle George's medical records. The next month he started receiving medical subrogation letters with the amount of the medical bills but no medical records. By the end of September 2004, Mr. Hart had still not received a medical authorization, so Mr. Hart followed up with Mrs. George again by sending correspondence and making telephone calls to her. In October 2004, Attorney Shane Mallett sent a letter to Mr. Hart stating that he was representing Mr. and Mrs. George as parents and guardians of Kyle George. Mr. Mallett also requested information about the policy limits, and informed Mr. Hart that all future correspondence should be directed to him. In response, Mr. Hart sent a letter dated November 17, 2004 enclosing the declaration page of the policy.

In the beginning of 2005, Mr. Hart continued to receive subrogation letters showing that medical bills were totaling approximately \$3,000. However, Mr. Hart still had not received actual medical records or a medical authorization. Mr. Mallett sent a letter dated January 30, 2005 to Michelle Snyder, the principal of Bethlehem Elementary School, stating that Kyle was still treating and that his injuries were extensive. At the end of the letter, Mr. Mallett said he would contact Ms. Snyder to set up an appointment to discuss Kyle's academic performance. Mr. Mallett sent this same letter addressed to various people including Kyle's teachers and the school secretary. The

doctor's note that was submitted to the school around that time diagnosed Kyle George with a medical problem as a result of an alleged "severe blow to his head" and stated that Kyle George was released to participate in gym on April 26, 2004. Mr. Mallett's letters to the school were forwarded to Robert Fisher of BRIM on February 4, 2005. However, it appears that Mr. Mallett's letter of January 30, 2005 was not forwarded to Mr. Hart, but was sent to Ms. Horton on March 17, 2005. In response, she sent a letter that day to Mr. Mallett acknowledging his letter to the school, but her letter was returned on March 24, 2005 due to insufficient address.

On March 28, 2005, Mr. Hart sent another letter to the Plaintiff's attorney asking for the status of Kyle George's treatment. Mr. Mallett sent a letter dated April 16, 2005 to Sandy Horton. This letter did not provide any information regarding Kyle's condition, but requested a list of witnesses, witness statements, photos of the accident, and any reports generated in connection with the accident. On the same day, Mr. Mallett sent a letter to Mr. Hart stating that Kyle was still receiving treatment for his alleged head injuries. He advised that Kyle's medical expenses totaled \$5,408.50 and enclosed Kyle's medical bills and records from his initial treatment up through December 2004. He also requested the same information that he requested from Ms. Horton..

In response, Mr. Hart sent Mr. Mallett a letter with the names of the witnesses on the playground at the time of the March 24, 2004 incident, and informed Mr. Mallett that that there were no photographs or statements. He also asked Mr. Mallett to contact him when Kyle finished treating and he was ready to settle the claim. There was no response from Mr. Mallett until June 30, 2005, when he filed a lawsuit against the OCBOE for negligence (the "underlying lawsuit") and the third-party UTPA lawsuit against AIGDC. (See Motion and Memorandum of Law in Support of Motion For Protective Order to Determine the Parameters of Discovery in This Case dated November 21, 2012 attached as **Exhibit B --- Appendix pgs. 000005-000128**).

C. Procedural History.

The underlying lawsuit against the OCBOE settled in 2009. The only claims currently pending are the third-party UTPA claims contained in the complaint filed against AIGDC (the "Complaint"). As is the case with any other complaint, the Complaint necessarily had to be premised exclusively on alleged misconduct that had already occurred before it was filed. To confirm this obvious truism, AIGDC served discovery on the Plaintiffs on December 28, 2009. The Plaintiffs' March 31, 2010 answers contained objections to the discovery requests. To the extent answers were provided, they were ambiguous about the violations the Plaintiffs are alleging constitute the basis of this lawsuit. (See Plaintiffs' Answers to Interrogatories and Requests for Production of Documents of Chartis Claims, Inc., f/k/a AIG Domestic Claims, Inc. a/k/a American International Group, Inc., f/k/a AIG Claims Services, Inc. (First Set) dated April 2, 2010 attached as **Exhibit C--- Appendix pgs. 000129-000215**). In an attempt to determine whether the Plaintiffs would claim that activity occurring after they filed their complaint somehow formed the basis of their lawsuit, defense counsel sent numerous letters to Plaintiffs' counsel Ron Zavolta requesting supplementation and his position regarding the post-2005 conduct. (See Correspondence from Laura Hayes to Ron Zavolta dated September 26, 2012, October 29, 2012, and November 9, 2012 attached as **Exhibit D ---- Appendix pgs. 000216-000223**). However, Plaintiffs' counsel did not respond to any of these.

Because the parties were entering into the deposition phase of discovery and this important issue was unresolved, Defendant AIGDC filed a motion for protective order in the lower court to seek a ruling on whether the claims activities post-dating the change in law and the filing of the Complaint were discoverable. At the hearing held on February 15, 2013, the lower court determined that, because the underlying lawsuit was pending at the time the law

changed, post-July 8, 2005 conduct was discoverable. (See Order Denying Defendant's Motion for Protective Order to Determine the Parameters of Discovery dated April 11, 2013 attached **Exhibit A --- Appendix pgs. 000001-000004**). During the hearing on this motion, however, the trial court noted that there is a split among the circuit courts in West Virginia regarding the discoverability and admissibility of post-July 8, 2005 conduct. The trial court concluded that this issue needs to be brought before the Supreme Court of Appeals of West Virginia for resolution. (See Transcript of Hearing of February 15, 2013 attached as **Exhibit E --- Appendix pgs. 000224-000243**).

D. Judge Starcher's Order Denying AIGDC's Motion for Protective Order.

At the February 15, 2013 hearing, Judge Starcher, without making a final determination of whether West Virginia Code § 33-11-4a¹ applied to cases that were pending prior to its effective date, determined that the Plaintiffs should be entitled to discovery on claims activities that occurred after the statute went into effect. Because the lower court did not rule on the issue of whether a third party can base his or her lawsuit on claims activity that occurred post-July 8, 2005, AIGDC filed a motion for partial summary judgment asking the court to determine that West Virginia Code § 33-11-4a applies to this lawsuit and thus the post-July 8, 2005 claims activities were not actionable or admissible. In the alternative, AIGDC asked the lower court to certify a question to this Court as to whether plaintiffs can base their lawsuit on claims activities that occurred after the abolishment of third party UTPA lawsuits in West Virginia. (See Defendant AIG Domestic Claims, Inc.'s Motion for Partial Summary Judgment or In the Alternative Motion to Certify Question to the Supreme Court of Appeals of West Virginia dated May 17, 2013 attached as **Exhibit F---Appendix pgs. 000244-000395**). When the trial court did

¹ West Virginia Code § 33-11-4a abolished third-party bad faith lawsuits in West Virginia. The statute allows for an individual to file an administrative complaint with the West Virginia Insurance Commission if he or she believes that an insurance company has committed an unfair trade practice in the handling of the claim.

not rule on the Motion for Partial Summary Judgment/Motion to Certify, on August 9, 2013, AIGDC filed a motion requesting the lower court to extend the remaining Scheduling Order deadlines and continue the November 25, 2013 trial date until the issue of whether the Plaintiffs can base their lawsuit upon post-July 8, 2005 claims activities can be resolved in order to give the parties time to properly evaluate and prepare this case for settlement or trial.² (See Defendant AIG Domestic Claims, Inc.'s Motion to Extend Scheduling Order Deadlines and Continue Trial dated August 9, 2013 attached as **Exhibit G--- Appendix pgs. 000396-000403**). Without a ruling on this central issue, the parties have no idea what the scope of the trial will be.

On August 16, 2013, the lower court issued an Order denying the Motion for Partial Summary Judgment/Motion to Certify Question to this Court. However, the lower court deferred "ruling on the admissibility of any evidence as to the post July 8, 2005 claims activities of" AIGDC. (See Order Denying AIGDC's Motion for Partial Summary Judgment and Motion to Certify Question dated August 14, 2013 attached as **Exhibit H ---Appendix pgs. 000404-000405**). Therefore, the issue that really needs to be decided in this matter—whether a Plaintiff can base his or her pending third party UTPA lawsuit on activity that occurred after July 2005---still remains undecided.

With the lower court's ruling denying the motion for protective order and the deferral of a ruling in regard to the admissibility of post-July 8, 2005 claims activities, the Court is forcing AIGDC to incur the expense of producing a great deal of information that should be totally irrelevant to this lawsuit. Moreover, AIGDC's witnesses will have to testify about approximately 4 years of claims handling that should not be admissible in this case to prove alleged violations of the UTPA. As mentioned above, without a ruling on whether Plaintiffs can defy the intent of the West Virginia Legislature and seek damages for conduct that could not on

² That motion was granted by order dated October 3, 2013.

its own provide the basis for a cause of action, it will be virtually impossible for the parties to evaluate this case for settlement purposes, mediation, and trial.

The West Virginia Legislature was clear when it enacted W.Va. Code § 33-11-4a that it intended to eliminate third-party bad faith lawsuits in West Virginia premised on conduct that occurred after a specific date. Therefore, clearly the information Plaintiffs' counsel seeks is irrelevant to this lawsuit, and it would be unfairly prejudicial to AIGDC and a waste of time to permit discovery of this conduct. Moreover, if discovery is allowed to proceed on the post July 2005, the Plaintiffs will be allowed to view information that will affect the way they present evidence at trial. Once discovery is obtained regarding this material, it cannot be undone. Any evidence of AIGDC's post-July 8, 2005 claims activities should be inadmissible as evidence at trial. Finally, review of Judge Starcher's rulings of February 13, 2013 (Order entered on April 11, 2013) and August 14, 2013, is necessary to avoid the irreparable harm that will result from the uncertainty of what actions can form the basis of Plaintiffs' claims.

III. SUMMARY OF ARGUMENT

On July 8, 2005, West Virginia Code § 33-4-11a became part of the laws of the State of West Virginia. This statute was debated in the West Virginia Legislature for quite some time before it was eventually passed and enacted. One thing is eminently clear --- the West Virginia Legislature intended to put an end to third-party bad faith lawsuits in West Virginia. With that in mind, several plaintiffs' attorneys filed third-party bad faith lawsuits immediately prior to the effective date of the statute based on vague allegations of misconduct that they hoped could be developed further at a later date. The Plaintiffs' attorney in this matter was no different. In connection with a claim in which his client had not even completed medical treatment, he filed Plaintiffs' lawsuit on June 30, 2005, alleging in the vaguest way possible that AIGDC had

committed violations of the West Virginia Unfair Trade Practices Act, and is now trying to expand this claim to incorporate conduct that occurred after the filing of his lawsuit. Essentially, the third party UTPA lawsuit in this case was merely filed as a placeholder, so that the Plaintiffs could later allege violations of the UTPA. However, under West Virginia law, since July 8, 2005, a third party has not been permitted to premise a lawsuit on allegations of violations of the UTPA. Thus, Plaintiffs' counsel's attempts to circumvent the law on this issue are improper.

Because this information can never be introduced into evidence in this lawsuit, it would be unfairly prejudicial to AIGDC and a waste of time and resources for the parties to engage in discovery on this subject. Moreover, it would be prejudicial in that the Plaintiffs' counsel will not be able to erase from his mind the information concerning the post-July 8, 2005 activities that he learns in discovery and this will affect the way he tries the case to the jury. Furthermore, it would violate the Due Process rights of AIGDC because the Plaintiffs will most certainly try at trial to subject AIGDC to compensatory and punitive damages for actions that could not form the basis of a lawsuit at the time they took place. Consequently, discovery in this lawsuit of claims handling activity that occurred after July 8, 2005 should not be allowed.

Various circuit courts throughout West Virginia have dealt with this issue and have come to different conclusions. Some circuit courts have decided that West Virginia Code § 33-11-4a applies to all lawsuits and prohibit evidence of post-July 8, 2005 claims handling conduct in third-party lawsuits that were filed prior to the statute's effective date. Other courts have come to the opposite conclusion. This is the reason that Judge Starcher opined at the February 15, 2013 hearing that this issue needs to be addressed by this Court.

As noted above, Judge Starcher has denied AIGDC's request for partial summary judgment in regard to the admissibility of evidence of post-July 8, 2005 claims activities of

AIGDC. Further, Judge Starcher has refused AIGDC's request to certify the question of discovery and admissibility of such evidence to this Court. Finally, Judge Starcher has refused to rule on the admissibility of evidence of post-July 8, 2005 claims activities of AIGDC, leaving the parties unable to ascertain what the trial will be about.

Accordingly, AIGDC requests that this Court issue a Writ of Prohibition enjoining Judge Starcher from enforcing his April 11, 2013 Order. In addition, AIGDC requests this Court issue a Writ of Mandamus directing Judge Starcher to rule on AIGDC's motion for partial summary judgment regarding the admissibility of any evidence of post-July 8, 2005 claims activities of AIGDC. As discussed in greater detail below, Judge Starcher's Order concerning the discoverability of the post July 2005 conduct is contrary to law and he should be prohibited by this Court from enforcing it. Furthermore, Judge Starcher should be required to answer the basic question of whether the Plaintiffs can base their lawsuit on conduct that occurred after July 8, 2005.

IV. STATEMENT REGARDING ORAL ARGUMENT

AIGDC believes that the facts and legal arguments are not adequately presented in this Petition, and the decisional process would be significantly aided by oral argument. Therefore, pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, AIGDC states that it believes that oral argument is necessary and would like the opportunity to present oral argument on this matter.

V. ARGUMENT

A. Standard of Review for Writs of Prohibition and Mandamus³

“The Writ of Prohibition shall lie as a matter of right in all cases of usurpation and substantial abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.” W. Va. Code § 53-1-1; see also Syl. pt. 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953) (“[p]rohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for [a petition for appeal] or certiorari”).

In *State ex rel. Saylor v. Wilkes*, 216 W.Va. 766, 613 S.E.2d 914 (2005), this Court recognized that a writ of prohibition may be utilized to obtain review of a trial court’s decision when the lower court exceeds its powers. *Saylor*, 216 W.Va. at 772, 613 S.E.2d at 920; *see also State ex rel. AT&T Mobility, LLC v. Wilson*, 226 W.Va. 572, 577, 703 S.E.2d 543, 548 (2010). The standard by which the Court determines whether a trial court exceeded its legitimate powers is set forth in syllabus point four of *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996):

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an often repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors

³ AIGDC seeks relief through either a Writ of Prohibition or Writ of Mandamus. Accordingly, this Memorandum of Law will address the standard for both forms of relief in tandem.

need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Hoover, 199 W.Va. at 21, 483 S.E.2d at 21. Moreover, this Court has specifically held that “a writ of prohibition is available to correct a clear legal error resulting from a trial court’s substantial abuse of its discretion in regard to discovery orders.” Syl. Pt. 1, *State Farm Mutual Automobile Insurance Company v. Stephens*, 188 W.Va. 622, 425 S.E.2d 577 (1992). In addition, “[W]hen a discovery order involves the probable invasion of confidential materials that are exempted from discovery under Rule 26(b)(1) and (3) of the West Virginia Rules of Civil Procedure, the exercise of this Court’s original jurisdiction is appropriate.” Syl. pt. 3, *State ex rel. United States Fid. & Guar. Co. v. Canady*, 194 W.Va. 431, 460 S.E.2d 677 (1995).

A writ of mandamus is issued if three elements coexist – (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the party of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.” *Stern v. Chemtall Inc.*, 617 S.E.2d 876, 881 (W. Va. 2005) (citations omitted). Typically, this Court reviews petitions for writs of mandamus under a de novo standard of review. *See, Id.*

B. This Court has original jurisdiction pursuant to West Virginia Code § 53-1-1, et seq. to issue a writ of prohibition and/or a writ of mandamus where the trial court exceeded its legitimate powers or failed to act.

This Writ of Prohibition/Mandamus is appropriate because the trial court’s enforcement of the April 11, 2013 Order exceeds its legitimate powers, and this Court has original jurisdiction to issue a writ of prohibition and/or mandamus pursuant to West Virginia Code § 53-1-1, et seq. to prevent the trial court from continuing to act outside of its authority. West Virginia Code § 53-1-1 provides that “The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.” W. Va. Code § 53-

1-1. In addition, mandamus lies with this Court to compel a circuit court to rule on issues pending before it. *See, State ex rel. Baker Installation, Inc. v. Webster*, 2012 WL 2874102 (W. Va.) (granting a writ of mandamus compelling circuit court judge to rule on motion for new trial which had been pending for almost a year). Therefore, this Court has original jurisdiction to issue a writ of mandamus to compel the lower court to issue an order regarding the admissibility at trial of AIGDC's post-July 8, 2005 claims activities.

C. Judge Starcher's April 11, 2013 Order is clearly erroneous as a matter of law.

As previously stated, the Court considers five factors in determining whether to entertain and issue a writ of prohibition where it is claimed that the lower tribunal exceeded its legitimate powers and the existence of clear error as a matter of law is given substantial weight. Syl. Pt. 4, *Hoover*, 199 W.Va. at 21, 483 S.E.2d at 21.

In this matter, Judge Starcher's Order of April 11, 2013 presents clear error for several reasons. First, Judge Starcher is ordering AIGDC to provide information and testimony to the Plaintiffs about activities that were clearly not actionable under West Virginia law at the time those activities took place. This is wrong as a matter of common sense; if those activities could not form the basis of a lawsuit when they took place, they should not be permitted to form the basis of a claim in a pre-existing lawsuit that had to be premised on other activities. Second, it violates the Due Process rights of AIGDC by allowing the Plaintiffs to attempt to subject it to compensatory and punitive damages for conduct that it cannot be sued for under the law in effect when that conduct took place. Third, this discovery is not necessary because this information will be inadmissible at trial.

1. **In ordering that discovery proceed on the post-July 8, 2005 claims handling activity in the underlying claim, Judge Starcher has ordered Defendant to divulge information that cannot be used as evidence in this lawsuit.**

At the February 15, 2013 hearing, Judge Starcher specifically ruled that Plaintiffs' counsel could explore post-July 8, 2005 conduct in discovery even though the law clearly prohibits third parties such as the Plaintiffs from using this information to sue AIGDC.⁴ The Plaintiffs argued in their brief and at the hearing that evidence of post-July 8, 2005 claims handling practices is admissible because the West Virginia Legislature did not intend to apply W. Va. Code §33-11-4a to a third-party claimant's bad faith claims pending at the time of enactment of the statute. Instead, Plaintiffs argue, the statute only prohibited the filing of a new third-party bad faith lawsuit on or after July 8, 2005, the effective date of the statute. Plaintiffs further allege that the West Virginia Legislature failed to address pending third-party bad faith claims and intentionally failed to restrict or exclude evidence of bad faith claims handling occurring on or after July 8, 2005 in suits that had already been filed. Had the Legislature intended to exclude evidence of such conduct, Plaintiffs assert, the Legislature would have specifically indicated the same in the statute.

Plaintiffs' arguments are incorrect because the West Virginia Legislature clearly meant to exclude evidence of bad faith claims handling conduct occurring after July 8, 2005 in third-party suits. West Virginia Code §33-11-4a states:

A third-party claimant may not bring a private cause of action or any other action against any person for an unfair claims settlement practice. A third-party claimant's **sole remedy** against a person for an unfair claims settlement practice or the bad faith settlement of a claim is the filing of an administrative complaint with the Commissioner in accordance with subsection (b) of this section. A third-party claimant **may not include allegations of unfair claims settlement practices in any underlying litigation** against an insured.

⁴ If discovery on the post-July 8, 2005 conduct is allowed to proceed, the damage that will occur will most certainly be irreparable. Once that information is produced, it cannot be undone.

(emphasis added).

The clear language of the statute demonstrates that the Legislature did not intend for post-July 8, 2005 claims handling conduct to be the subject of either a pending or future bad faith action by a third-party claimant. If filing an administrative complaint is (without any qualification) a third party's sole remedy after July 8, 2005, it follows that post-July 8, 2005 conduct cannot be the basis for a bad faith claim under any circumstances, even where a third-party claimant had filed such a claim premised on different conduct before July 8, 2005. By using the words "sole remedy," the Legislature clearly intended to give third-party claimants nothing more than an administrative remedy for claims handling conduct that took place after July 8, 2005.

Moreover, the third sentence of W. Va. Code §33-11-4a also addresses third-party bad faith claims that were pending at the time of the statute's enactment. Since the statute bars a third-party claimant from including allegations of bad faith in an underlying lawsuit against an insured after July 8, 2005, logic dictates that such a claimant should not be permitted to add such allegations to a lawsuit that was filed prior to July 8, 2005, either. Had the Legislature intended to permit post-July 8, 2005 claims activities to form a partial basis of a private cause of action, it could have done so and it did not. Thus, the Legislature clearly intended that third-party bad faith claims not be added to pending lawsuits.

Absent explicit language in the statute that preserved some right to a cause of action after the effective date of the legislation, the "plain meaning" of the statute is that no claims handling activity taking place after July 8, 2005 can give rise to a private cause of action. A key tenet of statutory interpretation is the maxim *expressio unius est exclusion alterius*, the express mention of one thing implies the exclusion of another. *Savilla v. Speedway Superamerica, LLC*, 219 W.

Va. 758, 762, 639 S.E.2d 850, 854 (2006). This doctrine operates to exclude from operation those provisions not explicitly stated in a statute. *Gibson v. Northfield Ins. Co.*, 219 W. Va. 40, 47-48, 631 S.E.2d 598, 605-606 (2005). The express detail in the statute providing that administrative remedy is “a third-party claimant’s sole remedy,” coupled with the statute’s silence on the issue of post-suit activity, leads to only one reasonable interpretation of the statute: the Legislature did not intend *any* post-July 8, 2005 claims handling activity to support a private cause of action whether a lawsuit was pending on that date or not.

In addition, in the Complaint, the Plaintiffs allege that AIGDC committed bad faith during the handling of their underlying claim that allegedly constitutes a general business practice of violating the West Virginia Unfair Trade Practices Act. The Plaintiffs argued in their brief and at the February 15 hearing that post-July 8, 2005 conduct is just evidence to support that allegation. This cannot be true, however, because when Plaintiffs filed their bad faith lawsuit on June 30, 2005, there had to be a basis *at that time* for that allegation. Under Rule 11 of the West Virginia Rules of Civil Procedure, the Plaintiffs’ counsel was required to conduct an investigation and to have found a good faith basis for filing such a claim on that date. As a result, *all* of the allegations in Plaintiffs’ lawsuit had to be supported by facts existing at the time for it to be valid. If Plaintiffs’ counsel had no basis for filing this lawsuit on June 30, 2005, then he most assuredly had no basis for filing such a suit after third-party bad faith claims were eliminated.

Alleged bad faith claims handling activities that occurred after July 2005 are not continuing evidence of a pending bad faith claim. Rather, each alleged act constitutes a separate bad faith claim in and of itself. In addition, the Plaintiffs would like this Court to believe that if they were not allowed to introduce evidence in this lawsuit of alleged violations of the UTPA,

they would have not had a remedy for AIGDC's alleged bad acts. However, this is completely false. If Plaintiffs desired to hold AIGDC liable for allegedly improper claims handling activity that occurred after July 8, 2005, they should have filed an administrative complaint with the insurance commissioner. Currently, this is a third-party claimant's sole remedy for an insurance company's alleged violations of the UTPA in West Virginia. Just because Plaintiffs failed to follow the statutorily prescribed procedure for post-July 8, 2005 claims does not mean AIGDC should be subjected to a cause of action for that conduct not supported by law.

- 2. To allow the Plaintiffs to explore discovery on the post-July 8, 2005 conduct in this lawsuit would violate the Due Process rights of AIGDC in allowing the Plaintiffs to attempt to subject AIGDC to compensatory and punitive damages for conduct that it cannot be sued for under the current law.**

As mentioned previously, the trial court has ordered that discovery regarding post-July 8, 2005 claims activities is to proceed. However, it would be a violation of AIGDC's due process rights for this discovery to proceed because AIGDC cannot be sued for claims handling conduct that occurred after July 8, 2005. It is well established that changes in the law apply prospectively. "Prospective application means that, on the date of filing, the new rule will affect pending cases and all cases brought after the date of filing. In addition, the parties to the subject case will also be affected by the new rule." *People ex rel. Klaeren v. Vill. of Lisle*, 352 Ill. App. 3d 831, 838, 817 N.E.2d 147, 153 (Ill. App. Ct. 2004). When applying this definition to the present case, it is clear that Plaintiffs cannot pursue a bad faith lawsuit after July 8, 2005. To hold otherwise, would subject AIGDC to prosecution of a lawsuit that does not exist, and would not permit AIGDC to rely on the law as it stands, thus depriving AIGDC of its ability to defend itself in a court of law, which is the very essence of a procedural due process violation. See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (holding that Due Process at minimum requires that "deprivation of life, liberty or property by adjudication be

preceded by notice and opportunity for hearing appropriate to the nature of the case.”). Depriving AIGDC of the right to rely on the law as it stands, especially when applying it to *prospective* actions and not retroactively, is “the equivalent of denying them an opportunity to be heard upon their claim right.” *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971).

This Court has not addressed the issue of whether post-July 8, 2005 claims handling activities is actionable if a third-party bad faith claim had been filed prior to the enactment of W. Va. Code §33-11-4a. However, this Court has ruled on other matters in which it determined that the law in effect at the time of the alleged act should be applied to plaintiffs’ claims. *See, Adkins v. Bordenkircher*, 164 W. Va. 292, 262 S.E.2d 885 (1980) (holding that “[u]nder *ex post facto* principles of the United States and West Virginia Constitutions, a law passed after the commission of an offense which increases the punishment, lengthens the sentence or operates to the detriment of the accused, cannot be applied to him”); *Rohrbaugh v. State of W. Va.*, 216 W. Va. 298, 607 S.E.2d 404 (2004) (applying the law in effect at the time the petitioner petitioned the Court for the restoration of his firearm rights, W. Va. Code §61-7-7, and holding that the application of that law did not violate the *ex post facto* clauses of the West Virginia or United States Constitutions).

This Court has also ruled in civil matters that the law in effect at the time of the alleged violation should apply to claims arising from that violation. In *Hensley v. W. Va. Dept. of Health and Human Resources*, 203 W. Va. 456, 508 S.E.2d 616 (1998), former employees of the West Virginia Department of Health and Human Resources (“WVDHHR”) filed grievances seeking back pay as restitution for alleged multiple violations of the West Virginia statute requiring equal pay for equal work. In 1991, the plaintiffs were awarded back pay and prejudgment interest to be calculated “at the rate authorized by West Virginia statutory law.” *Id.* at 458, 618.

Plaintiffs did not receive their awards and filed a petition for writ of mandamus in the Circuit Court of Cabell County in 1992 requesting their back pay as well as prejudgment interest calculated at 10 percent. *Id.* at 459, 619. In 1993, the circuit court awarded the plaintiffs back pay and found that they were also entitled to prejudgment interest at the rate of 10 percent on the back pay. *Id.* The Court ruled that the circuit court's discretion to calculate prejudgment interest was limited to a determination of the damages and period for which prejudgment interest is recoverable; both the prejudgment interest rate at which prejudgment interest is to be calculated and the type of prejudgment interest contemplated by law were definitely established and authorized by the applicable statutory enactments and appellate court decisions interpreting and applying those provisions. *Id.* at 628.

On appeal, the WVDHHR argued, and this Court agreed, that the plaintiffs' prejudgment interest should have been calculated by the circuit court at the annual rate of six percent for their claims because the claims accrued before July 5, 1981, instead of the annual rate of ten percent, which applies to claims accruing after July 5, 1981. *Id.* at 462, 622. Specifically, the *Hensley* court noted that "[p]rejudgment interest accruing on amounts as provided by law prior to July 5, 1981, is to be calculated at a maximum annual rate of six percent under W. Va. Code §47-6-5(a) [1974], and thereafter, at a maximum annual rate of ten percent in accordance with the provisions of W. Va. Code §56-6-31 [1981]." *Id.* quoting Syl. pt. 7 of *Bell v. Inland Mut. Ins. Co.*, 175 W. Va. 165, 332 S.E.2d 127 (1985). Thus, the *Hensley* court found that prejudgment interest should not have been awarded at the rate of ten percent because there was no "statutory or decisional support to authorize the calculation of prejudgment interest at a rate of ten percent on an award of back pay where the claims for portions of this award accrued at a time prior to the legislative authorization of the ten percent interest rate." *Id.* at 463, 623. In addition, the

Hensley court held that “the appropriate rates of prejudgment interest [were] six percent for [Plaintiffs’] claims to back pay accruing before July 5, 1981, and ten percent for [Plaintiffs’] claims accruing on or after July 5, 1981.” *Id.* at 464, 624. As a result, the *Hensley* court reversed the portion of the circuit court’s order that awarded the plaintiffs prejudgment interest at the rate of ten percent for their back pay claims that accrued before July 5, 1981 (because the statute that was in effect at the time did not provide for prejudgment interest at that rate), but affirmed the award of ten percent prejudgment interest for the plaintiffs’ post-July 5, 1981 claims (because the statute that was in effect at the time did provide for prejudgment interest at that rate). *Id.*

In another civil case, *Wampler Foods, Inc. v. Workers’ Compensation Division*, 216 W. Va. 129, 602 S.E.2d 805 (2004), this Court applied the law in effect at the time the plaintiff’s claim, or award, accrued. The *Wampler* case involved an appeal from a decision rendered by the Workers’ Compensation Appeal Board against the plaintiff, Wampler Foods, from a workers’ compensation claim filed by Tammy Pancake. *Id.* at 136, 812. Ms. Pancake filed her workers’ compensation claim in August 2001 alleging a work injury during her employment at Wampler Foods. *Id.* Her claim was denied by the Workers’ Compensation Division in October 2001, but, in December 2002, the Office of Judges reversed that decision and found a compensable injury. *Id.* Wampler Foods appealed to the Workers’ Compensation Appeal Board and a hearing was held on July 2, 2003, one day after statutory changes (S.B.2013) were effected. *Id.* The Appeal Board issued an affirmation of the Offices of Judges’ decision on July 15, 2003. *Id.*

On appeal, Wampler Foods alleged that the Appeal Board failed to comply with two statutory amendments in S.B.2013 by applying the eliminated “rule of liberality” in its decision and by failing to issue a written decision that stated specific laws and facts relied upon. *Id.* at

137, 813. The employers in Wampler Foods argued that the S.B.2013 amendments apply to any actions taken in the realm of workers' compensation cases after July 1, 2003. *Id.* at 142, 818. Alternatively, the claimants argued that a claim should be processed using the law in effect on the date of the claimant's injury and that any other interpretation of the statute would violate constitutional substantive due process protections. *Id.*

The *Wampler* court noted that the Workers' Compensation Division had interpreted S.B.2013 to mean that the law in effect on the date of a compensation award controls the adjudication on that issue within a claim, not the law in effect on the date of the claimant's injury. *Id.* at 143, 819. This Court agreed and held that the Workers' Compensation Division's interpretation "preserved the fundamental fairness of the proceedings used to determine [Ms. Pancake's] right to workers' compensation benefits" because Ms. Pancake had presented her claim to both the Workers' Compensation Division and Office of Judges before July 1, 2003 with the understanding that the evidence would be examined in light of the liberality rule. *Id.* at 146, 822. Thus, the Court held that it would be unfair to hold Ms. Pancake to a theoretically different evidentiary standard at the appellate level and violate her substantive due process rights. *Id.* As a result, the Court affirmed the Appeal Board's ruling, thereby affirming a compensable claim. *Id.*

In regard to another petitioner's claim in the *Wampler* case, this Court found that W. Va. Code §23-4-6(e)(1) applies to "all awards made on or after the effective date of the amendment and reenactment of this section during the year two thousand three[.]" *Id.* at 147, 823. Thus, this Court held that the statute applies to any decision made by the Workers' Compensation Division on or after July 1, 2003 regarding the calculation of benefits. *Id.*

In the instant case, the West Virginia Legislature changed the scope of bad faith law in West Virginia by enacting W. Va. Code §33-11-4a and eliminating civil causes of action for third-party bad faith claims. In accordance with the *Hensley* and *Wampler* decisions, this Court should apply the law in effect at the time each alleged bad faith act occurred. For the bad faith conduct (if any) that Plaintiffs allege occurred before July 8, 2005, this Court should apply the law that applied at that time, which permitted third-party bad faith actions. However, for claims handling activity that occurred after the enactment of W. Va. Code §33-11-4a on July 8, 2005, this Court should apply that statute, thereby eliminating from this lawsuit Plaintiff's allegations of bad faith that accrued after that date.⁵ To do otherwise would be a violation of AIGDC's due process rights. In other words, AIGDC cannot be held liable for acts that occurred after July 8, 2005 in this matter when under the statute in effect at that time, those acts could not support a cause of action in a civil lawsuit. It makes no sense to say that just because those acts occurred during a pending lawsuit premised on other acts, AIGDC can be sued for them. The law has always supported the philosophy that you cannot do indirectly what you cannot do directly. If a third party cannot directly sue AIGDC for violations of the UTPA, a third party cannot sue AIGDC indirectly for alleged violations by relying upon them in a pending lawsuit.

- 3. The issue of the applicability of West Virginia Code § 33-11-4a has been addressed by various circuit courts in West Virginia and there is a split among the circuit courts as to this issue.**

Various circuit courts in West Virginia have made rulings consistent with AIGDC's interpretation of the statute. For example, Judge David Hummel ruled in *Miller v. Erie Insurance Property and Casualty Company* and *Keyser v. Erie Insurance Property and Casualty Company*, Circuit Court of Marshall County, West Virginia Civil Action Nos. 05-C-183 and 05-C-188 that post-July 8, 2005 conduct was not actionable under the current law, so any such

⁵ Such claims must be addressed in an administrative proceeding before the Insurance Commissioner.

claims should be dismissed as a matter of law. (See Order Granting Erie Insurance Company's Motion for Summary Judgment dated September 1, 2010 attached as **Exhibit I ---Appendix pgs. 000406-000408**). In addition, Judge Arthur Recht issued an order in *Samuel Zane Taylor v. Nationwide Assurance Company*, Circuit Court of Ohio County, West Virginia, Civil Action No. 05-C-316 that stated the following:

Plaintiff filed this action on July 5, 2005, alleging third-party bad faith causes of action against Nationwide arising out of the negotiation and settlement of Plaintiff's personal injury claim against Nationwide's insured, Mary Jo Cook. The West Virginia Legislature abolished third-party bad faith causes of action by statute on July 8, 2005, three days after Plaintiff filed the instant cause of action. *See* W. Va. Code § 33-11-4a. Because the Legislature abolished third party bad faith claims as of July 8, 2005, no conduct of an insurer after that date can be considered to be third-party bad faith, even though Plaintiff filed his Complaint before the effective date of West Virginia Code Section 33-11-4a. Further, if post-July 8, 2005 conduct may not constitute third-party bad faith, evidence of such conduct may not be offered at trial in support of Plaintiffs third-party bad faith claims. In conclusion, discovery requests seeking evidence of Nationwide's post-July 8, 2005 conduct are not reasonably calculated to lead to the discovery of admissible evidence, because such evidence may not be offered at trial in support of Plaintiffs third-party bad faith claims.

Accordingly, it is ORDERED that Nationwide's Motion for Protective Order and Motion in Limine Regarding Information and Documents Generated After July 8, 2005 is GRANTED. Plaintiff may not discover any evidence of post-July 8, 2005 conduct by Nationwide or its agents with respect to Plaintiffs personal injury claim against Nationwide's insured, and further may not introduce or reference any such evidence at trial to support his third-party bad faith claim against Nationwide.

(See Order Granting Nationwide Assurance Company's Motion for Protective Order and Motion in Limine Regarding its Post-July 8, 2005 Conduct dated February 16, 2011 attached as **Exhibit J--- Appendix pgs. 000409-000411**). It is clear from these two opinions, that at least two judges in West Virginia interpret the law to mean that a plaintiff cannot base his or her lawsuit on activities that took place after July 8, 2005.

Other circuit courts have taken another approach. For instance, Judge Ronald Wilson, in *Johnson v. Kendall*, Civil Action No. 05-C-153 filed in the Circuit Court of Brooke County, West Virginia, permitted the plaintiff in that case to obtain the production of documents generated on or after July 8, 2005, stating that discovery is liberally construed. (See Order Denying Defendant's Motion for Protective Order dated December 8, 2010 attached as **Exhibit K Appendix pgs. 000412-000413**). Later on April 27, 2012, Judge Wilson deemed the post-July 2005 conduct admissible at trial. (See Omnibus Order Denying Defendant Nationwide's Motions in Limine that Seek to Limit the Introduction of Claims Activity After June 8, 2005 (sic) dated April 27, 2012 attached as **Exhibit L--- Appendix pgs. 000414**). In that case, most of the claims handling conduct had occurred in Pennsylvania, and the only claims handling conduct in West Virginia occurred ten days after the abolishment of third-party bad faith claims in July 2005. Thus, in that case, the plaintiff's third-party bad faith lawsuit would have been eliminated in its entirety had the Court granted Nationwide's motion for summary judgment on the issue of post-July 2005 conduct.

However, in this case, unlike the plaintiff in *Johnson v. Kendall*, Plaintiffs' claims would not be entirely eliminated should this Court grant AIGDC's Motion for Protective Order because Plaintiffs would still be able to pursue their third-party bad faith allegations for the claims handling conduct that occurred during the year prior to July 2005. Thus, Plaintiffs would not be left without a remedy in the lawsuit that they filed prior to the abolition of third-party bad faith in July 2005. That remedy would simply be limited to compensation for the bad-faith conduct, if any, which occurred prior to the filing of their lawsuit.

On July 6, 2011, Judge James P. Mazzone entered an order in *Wildern v. Nationwide Assurance Company*, Civil Action No. 05-C-317 filed in the Circuit Court of Ohio County, West

Virginia denying Nationwide's Motion for Protective Order seeking to bar discovery of information and documents regarding Nationwide and its agents' conduct occurring after July 8, 2005. (See Order Denying Defendant Nationwide Assurance Company's Motion for Protective Order dated July 6, 2011 attached as **Exhibit M --- Appendix pgs. 000415-000416**). By order dated April 8, 2011, Judge Martin J. Gaughan denied Nationwide Mutual Fire Insurance Company's Motion to Exclude Evidence of Post-July 8, 2005 Claims Activity in a third-party bad faith case styled *Duggan v. Nationwide Mutual Fire Insurance Company*, Civil Action No. 05-C-336 filed in the Circuit Court of Ohio County. (See Order Denying Defendant Nationwide Mutual Fire Insurance Company's Motion to Exclude Evidence of Post- July 2005 Claims Activity dated April 8, 2011 attached as **Exhibit N --- Appendix pgs. 000417-000420**). As is evident from the orders listed above, the circuit courts are divided over the issue of whether post-July 8, 2005 claims handling conduct is actionable. Accordingly, this issue needs to be addressed by this Court.

D. AIGDC has no other adequate means to obtain relief.

In addition to considering whether the trial court's April 2013 Order was clearly erroneous as a matter of law, this Court should also consider whether the petitioner has other adequate means to obtain relief when determining whether to entertain and issue a writ of prohibition where it is claimed that the lower tribunal exceeded its legitimate powers. Syl. Pt. 4, Hoover, 199 W.Va. at 21, 483 S.E.2d at 21. The relief sought by AIGDC at this time is the prohibition of the enforcement of the April 11, 2013 Order which allows for the divulging of information that cannot be used in a third-party bad faith lawsuit against it. AIGDC cannot appeal a final judgment or pursue any other means to obtain that relief because those other means would require AIGDC to first divulge the information requested and have their witnesses endure

lengthy depositions about this inadmissible information. By that time, AIGDC would have effectively waived its right to object to the production of this information.

E. AIGDC will be damaged in a way not correctable on appeal because it will have already divulged information.

Another factor considered by the court in determining whether to entertain and issue a writ of prohibition is whether the petitioner will be damaged in a way not correctable on appeal. Syl. Pt. 4, Hoover, 199 W.Va. at 21, 483 S.E.2d at 21. AIGDC will be so damaged. If AIGDC's witnesses must sit for deposition and testify about post-July 8, 2005 conduct, they will be obligated to answer questions about conduct AIGDC cannot be sued for in West Virginia. This will give the Plaintiffs an unfair advantage in the litigation. Therefore, this Court should issue a writ of prohibition, forbidding the enforcement of Judge Starcher's April 11, 2013 Order denying AIGDC's Motion for Protective Order.

F. The required elements for a writ of mandamus are satisfied.

In addition to meeting the required elements for the issuance of a writ of prohibition, AIGDC has also met the required elements for issuance of a writ of mandamus. First, AIGDC has a clear legal right to the relief sought. As the defendant in the pending lawsuit before the lower court, AIGDC is entitled to know whether post-July 8, 2005 evidence can be considered by a jury at the trial in order to prepare its case. Without a ruling in regard to whether AIGDC's post-July 8, 2005 claims activities will be considered by a jury, AIGDC will be unable to prepare its defense for trial or evaluate the case for settlement and mediation purposes. Moreover, AIGDC must have a ruling in regard to the admissibility of this entire body of post-July 8, 2005 evidence in order to prepare its witnesses for deposition and trial testimony.

Second, the lower court, as the jurisdiction in which this case is pending, has a legal duty to issue a ruling in regard to AIGDC's motion for partial summary judgment concerning the

admissibility of post-July 8, 2005 claims activities. Again, without a ruling in this regard, AIGDC will be unable to evaluate and settle this case or prepare for trial.

Finally, as mentioned above, without a writ of mandamus compelling the lower court's ruling on AIGDC's motion for partial summary judgment, AIGDC has no other adequate remedy. In addition to a writ of prohibition, AIGDC is also seeking a writ of mandamus to compel the lower court's ruling in regard to the admissibility of evidence regarding post-July 8, 2005 claims activities, which evidence cannot be used in a third-party bad faith lawsuit against it. Again, AIGDC cannot appeal a final judgment or pursue any other means to obtain that relief because those other means would require AIGDC to first to reveal information regarding post-July 8, 2005 claims activities through document production and witness deposition testimony. By that time, AIGDC would have effectively waived its rights to object to the production of this information.

VI. CONCLUSION

Judge Starcher exceeded his legitimate powers through his erroneous Order mandating that AIGDC divulge information and have its witnesses testify in this lawsuit about claims handling conduct that occurred after the abolishment of third-party UTPA lawsuits in West Virginia. In addition, Judge Starcher's August 14, 2013 Order deferring a ruling on the admissibility of post-July 8, 2005 claims activities of AIGDC did nothing to resolve the issue before the lower court in this regard. Pursuant to Rule 16 of the West Virginia Rules of Appellate Procedure, AIGDC respectfully requests that this Court (1) issue an order staying the lower court proceedings until a decision has been rendered by this Court (2) issue a rule to show cause (3) grant a Writ of Prohibition against Judge Starcher prohibiting enforcement of his April 11, 2013 Order and (4) grant of Writ of Mandamus compelling Judge Starcher to rule on the trial

admissibility of post-July 8, 2005 claims activities of AIGDC. If allowed to stand, Judge Starcher's April 11, 2013 and August 14, 2013 Orders will unfairly punish Defendant for conduct it can no longer be sued for in West Virginia.

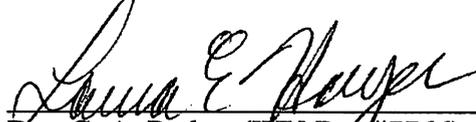
WHEREFORE, AIGDC respectfully requests that this Court:

1. Order a stay of all proceedings in the lower court;
2. Order Respondents to show cause why the Writ should not be granted;
3. Issue a Writ of Prohibition enjoining Judge Starcher from enforcing his April 11, 2013 Order;
4. Issue a Writ of Mandamus ordering Judge Starcher to rule on the admissibility at trial of post-July 8, 2005 claims activities of AIGDC; and,
5. Grant such other and further relief as the Court deems appropriate under the circumstances.

Respectfully Submitted,

AIG DOMESTIC CLAIMS, INC.

BY: SPILMAN THOMAS & BATTLE, PLLC



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Counsel for Petitioner

No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

AIG DOMESTIC CLAIMS, INC.,

**Petitioner and
Defendant Below,**

v.

**Civil Action No. 05-C-550
Ohio County Circuit Court**

**THE HONORABLE LARRY V. STARCHER,
JUDGE OF THE CIRCUIT COURT OF OHIO
COUNTY, WEST VIRGINIA, and CANDY GEORGE,
Individually and as Guardian, Mother and Next of Friend
of KYLE GEORGE, a minor, and MARK
GEORGE,**

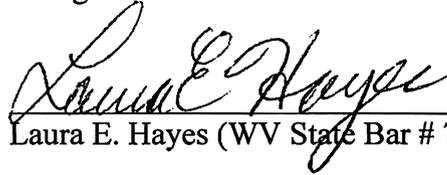
**Respondents and
Plaintiffs Below.**

**AIG DOMESTIC CLAIMS INC.'S VERIFIED PETITION FOR WRIT
OF PROHIBITION AND/OR MANDAMUS WITH ATTACHED
APPENDICES OF EXHIBITS**

VERIFICATION

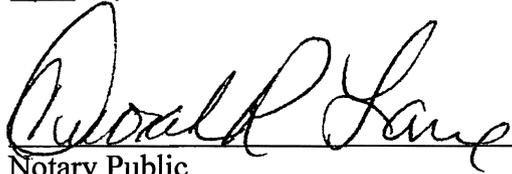
I, Laura E. Hayes, verify that I am counsel for AIG Domestic Claims, Inc. in this matter pending before the Circuit Court of Ohio County, West Virginia, and styled *Candy George, Individually and as Guardian, Mother and Next of Friend of Kyle George, a minor, and Mark George*, Civil Action Number 05-C-550.

I further verify that the information contained in the **Verified Petition for Writ of Prohibition and/or Mandamus with Attached Appendices of Exhibits** filed herewith are true and that I am familiar with the proceedings leading to the order from which relief is sought.

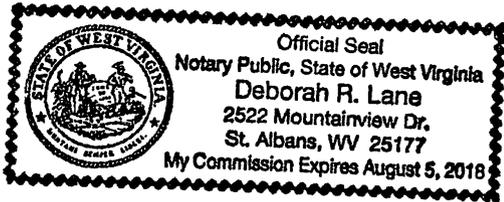


Laura E. Hayes (WV State Bar # 7345)

Subscribed and sworn before me this 18th day of October, 2013.



Notary Public



Exhibits on File in Supreme Court Clerk's Office