



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

NO. 12-0566

PAUL W. LIGHTNER

Petitioner,

v.

JANE L. CLINE, WEST VIRGINIA INSURANCE COMMISSIONER;
CITIFINANCIAL, INC.; and TRITON INSURANCE COMPANY,

Respondents.

PETITIONER'S BRIEF

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 B. The Circuit Court erred in upholding the Order of the Insurance Commissioner denying Lightner relief on his Complaint before the Insurance Commissioner in violation of *Madden*, and W.Va. Code § 29A-5-4(g),(1)(3)-(6), because the Order violates constitutional provisions (due process) was made on unlawful procedures (*inter alia*, hearing denied), shows a clear error of law (it presumed, un rebuttably, that “approved” rates were reasonable), is clearly wrong (the challenged rates are incontrovertibly unreasonable), and was arbitrary and capricious (in view of all the foregoing and related matters).

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ASSIGNMENTS OF ERROR

- A. The Circuit Court erred in upholding the Order of the Insurance Commissioner because the Insurance Commissioner refused Lightner a hearing in violation of both *State ex rel. CitiFinancial v. Madden* and express statutory language requiring such a hearing, and because the Commissioner denied Lightner other crucial due process rights as well.
- B. The Circuit Court erred in upholding the Order of the Insurance Commissioner denying Lightner relief on his Complaint before the Insurance Commissioner in violation of *Madden*, and W. Va. Code § 29A-5-4(g),(1)(3)-(6), because the Order violates constitutional provisions (due process) was made on unlawful procedures (*inter alia*, hearing denied), shows a clear error of law (it presumed, unrebuttably, that “approved” rates were reasonable), is clearly wrong (the challenged rates are incontrovertibly unreasonable), and was arbitrary and capricious (in view of all the foregoing and related matters).

STATEMENT OF THE CASE

This administrative appeal from the Circuit Court of Kanawha County presents significant legal errors made below in upholding an Insurance Commission Order denying Appellant, Lightner, both a hearing and any relief on a Complaint he filed with the Commission per this Court’s express direction in *State ex rel. CitiFinancial v. Madden*, Syl. Pt. 3, 223 W.Va. 229 (2008). Because the Commissioner denied Lightner a hearing, or even a facsimile of due process, in relation to his statutory claim that CitiFinancial, Inc. and Triton Insurance Company (hereinafter: “CitiFinancial”) charged him unreasonable rates for insurance, the Circuit Court should be reversed. Moreover, since the decision of the Insurance Commissioner is clearly wrong, the reversal should come with directions to enter a new order in favor of Lightner allowing him to proceed to the damages phase of his statutory claim.

The most crucial fact in the case is that CitiFinancial absolutely skinned Paul Lightner—and the West Virginians he seeks to represent—with its credit insurance product. CitiFinancial charged astronomical rates that reach beyond all reason and cannot qualify as “reasonable” as

required by West Virginia law, unless that law is interpreted out of existence. *See* W. Va. Code § 33-6-9 and § 46A-3-109 of the West Virginia Consumer Credit and Protection Act.

In light of this, the decision of the Insurance Commissioner to conclude that the rates are reasonable must be viewed as what it is: an attempt by the Commissioner to 1) accommodate its regulated party; 2) protect the Insurance Commissioner's turf from intrusion via a citizen complaint; and 3) Insulate from scrutiny the Insurance Commissioner's own bureaucratic failure in allowing West Virginians to be fleeced on a massive scale. A review of the rates about which Lightner complained makes the point and his factual presentation will begin there.

A. CitiFinancial's rates were unreasonable; indeed, CitiFinancial's rates were patently excessive and unconscionable.

The Insurance Code, the attendant regulations, and general insurance industry standards and practices require consideration of an insurer's loss experience and loss ratios in determining the reasonableness of credit insurance rates.¹ A "loss ratio" is the relationship between premiums charged and claims paid plus expenses. Importantly, an insurance company can make money even a loss ratio of 100% (or somewhat more), since the company enjoys the use of the premiums to invest safely and diversely in the meantime.

As a minimum benchmark, both the regulations and industry standards require credit insurance rates to result in 50% or greater loss ratios – that is the *bare minimum*, 60% is a more commonly used benchmark. *See*, 114 C.S.R. § 61-6.2 (credit property 60%); NAIC Model Laws, Regulations & Guidelines §§ 365-1-7 (credit property 60%) (A-90); *id.* § 370-1-8 (credit involuntary unemployment 60%) (A-91). In other words, premiums expected to result in loss

¹ *See, e.g.*, W.VA. CODE §§ 33-6-9; 33-20-3(b); 46A-3-109, § 33-20-3(a) ("Due consideration shall be given to past and prospective loss experience within and outside this state. . ."); 114 C.S.R. § 61-6.2 (credit property); NAIC Model Laws, Regulations & Guidelines §§ 365-1-7; 370-1-8 (credit property and credit involuntary unemployment). (A-90 & A-91)

ratios below 50% indicate that the premium charges are excessive and the rates unreasonable. As a minimum benchmark, both regulations and, where they do not explicitly reach, industry standards require 50% or 60% benchmarks; indeed, the Commissioner's Order does not disagree. Even at the permissible loss ratios (i.e., 50-60%), these credit insurance products yield enormous profits. To the extent Lightner can determine, the Insurance Commissioner of this State has *never* before approved a credit insurance rate known or projected to result in a loss ratio below 50%. But, in contrast to the permissible loss ratios established by law and industry standards, CitiFinancial's internally reported annual loss ratios on its West Virginia credit property and credit involuntary unemployment lines *never once approached that threshold*. In fact, CitiFinancial's loss ratios averaged only 25.6% (credit property) and 15.8% (credit involuntary unemployment) annually for the period 1994-2006. Petition at 5 & Exs. I & J (A-585, 752-789, 711). By comparison, slot machines in West Virginia are required to return a minimum of 80% of every dollar bet, and the average at West Virginia casinos is around 90%.² A casino operator running a machine that paid like these insurance products would go to jail, with few questions asked.

According to West Virginia regulations and industry standards, CitiFinancial should have charges rates that resulted in loss ratios of 60% or more of what it collects on these products. Yet the annual averages above show that CitiFinancial such high rates that it paid out on average only \$25.60 in loss claims on its credit property lines for a decade – between 1994 and 2003. At that point, CitiFinancial claims, it quit issuing such policies (after federal regulatory activity).

² For the one-year period from July 1, 2010 through June 30, 2011 the average return on VLT's was: 89.64% at Mountaineer Park, 90.81% at Tri-State Park, 89.81% at Wheeling Island and 89.75% at Charles Town Races. [<http://www.americancasinoguide.com/slot-machine-payback-statistics.html#West-Virginia>].

Even worse, for every \$100.00 collected on its credit involuntary unemployment lines between 1994 and 2006, CitiFinancial paid out on average *only* \$15.80. These rates are beyond the pale by any conceivable standard and the Insurance Commissioner's decision to retroactively approve of them can only beg the question – at what point would they have been disapproved? Would five percent loss ratios have been disapproved? One percent? These figures, prosaic on the page, represent highway robbery in the insurance industry with tangible results felt on a massive scale by the poorest, most vulnerable citizens of West Virginia.

Despite these results, CitiFinancial, year after year, told the Commissioner in its rate submissions that it “projected” a 50% or 51% loss ratio on its credit property and credit involuntary unemployment insurance policies even though it continued to charge the same, or actuarially equivalent, rates. These repeated representation that the rates would be within the standard provide additional proof that even CitiFinancial knows that loss ratios of 15-25% could not be put past anyone. *E.g.*, Petition at Exs. K, L, M (A-805, 821, 825, 828, 869).

The Commissioner requires insurers to submit historical loss-ratio data and loss-ratio projections along with credit insurance rate submissions. *See*, 114 C.S.R. § 67-1 *et seq.* (since repealed) (codifying the Commissioner's ruling and accompanying forms from Informational Letter No. 29 (Nov. 1984).The required forms specifically call for this information. *See* 114 C.S.R. § 67-3 Appendices F and G (PCA-R-2004 and PCA-F-2004); *see also*, Informational Letter No. 29 (attaching Forms PCPI-R-81, PCA-R-84, and PCA-F-81) (A-497-506). But instead of making full disclosures as required, CitiFinancial hoodwinked the Commissioner during the initial application process by using the designations “new program” and “N/A” where the Commissioner's forms called for loss-ratio information. Worse yet, CitiFinancial presented bogus loss-ratio projections based on irrelevant, dissimilar data rather than candid projections

based on its own historical loss experience, including the experience it had year after year raking in money from West Virginians. *See*, Affidavit of Lightner's actuarial expert, Michael L. Scruggs (A-507-511). In short, CitiFinancial concealed its ongoing bonanza from the Commissioner in order to obtain continuing approval of its exorbitant rates.

Had CitiFinancial instead disclosed its loss experience as required, the Commissioner would have disapproved the rates. Although the denial of a hearing prevented former Insurance Commissioner Hanley Clark from testifying in this case, he explains in an affidavit that his office was duped by CitiFinancial's misleading rate filings--the very rate filings at issue here: "If I had known, during my tenure at the Office of the Insurance Commissioner, that the historical loss ratios for the subject credit insurance lines were as set out above, I would have disapproved the rates and required support for such rates." Affidavit of Hanley C. Clark at ¶ H (A-82-89).

Lightner uncovered this scandal and brought it to the attention of the Circuit Court of Marshall County. At the direction of this Court, Lightner brought his claims to the Insurance Commissioner. He showed with detailed and convincing evidence how CitiFinancial swindled him and his fellow West Virginians out of millions of dollars in premiums at the patently unreasonable, indeed sky-high and unconscionable, rates described above. The situation called for the return of the ill-gotten money from CitiFinancial and imposition of proper penalties to prevent any attempt by carriers to fly beneath the radar like this again.

In the face of this wealth of evidence, which CitiFinancial never refuted, the Office of the Insurance Commissioner stood shoulder to shoulder with the insurance company and acted against the interests of citizens to protect its turf throughout the process. Rather than appointing an independent hearings examiner, swearing in witnesses, taking evidence, hearing argument, and deciding whether CitiFinancial's rates were reasonable or not, as the Insurance Code and this

Court's *CitiFinancial* decision requires, the Insurance Commissioner turned a deaf ear to Lightner's complaint and West Virginia law. In deciding that the approval of the rates by the Commissioner, without more (and without regard to the applicant's misrepresentations in the application process), makes the rates reasonable, the Commissioner winked at CitiFinancial's fraud and its windfall gains – and ignored this Court's determination that any such presumption is rebuttable. *CitiFinancial* at Syl. Pt. 4; *cf.* Commissioner's Order at 12 (A-33).

The Order of the Insurance Commissioner in this matter, though fifteen pages long, never articulates any basis to find these extraordinarily high rates “reasonable” except in a single conclusory assertion. *Id.* at 14 (A-35). No explanation *why* is ever given. In fact, the Order spends virtually its entire length explaining that the Insurance Commissioner *allowed* the rates to be charged and that they must therefore be reasonable (or else the Insurance Commissioner might have egg on its face). See, *e.g.*, *id.* at 12 (A-33).

The Order deals with Lightner's weighty evidence of unreasonableness by simply speculating that other evidence, not of record, *might* contradict it. *E.g.*, *id.* at ¶ 12, 16, 20 (claiming that the CitiFinancial filings are “very much in line” with other filings never seen, produced, or identified in the administrative record) (A-27-29). The Order repeatedly states that the obviously confiscatory ratios and premiums “may” be explained by some factor (without any showing that factor is actually in play) or that these astonishing over-reaches by CitiFinancial are justified because Lightner's contradictory data is “of limited use.” *Id.* at 6 (A-27). But nowhere is there any articulation of how such extraordinarily low ratios actually were reasonable for West Virginia, as opposed to speculation that they could have been, somehow.

Moreover, the Commissioner's Order is heavily cribbed from an actuarial report, apparently obtained *ex parte* by the Commissioner that utterly fails to support the Insurance

Commissioner's decision. Hause Actuarial Solutions Report (A-516). The Report *never* says that any rate challenged by Lightner *was* reasonable, though the Commissioner, and later the Circuit Court, cited it as though it did. The Report describes virtually every insurance company filing objected to by Lightner as "incomplete." For example, on the Involuntary Unemployment Filing, it states:

The calculation of the claim incidence rate actually used . . . and how the 'first payment rate' relates to the incidence rate . . . was not included

....

the actual continuance of unemployment that would give rise to claim severity was not provided.

....

no justification was provided for other expense components

....

I did not review the investment income derivation in any detail, and I have formed no opinion as to its appropriateness

....

if the coverage is non-standard, either an 'actuarial equivalence' to published rate must be established or a minimum anticipated loss ratio of 40-60% must be certified" [note: this never happened]

Id. at 2-4 (A-517-519). The Commissioner's expert never says the rates for Involuntary Unemployment Insurance were reasonable. *Id.*

In regard to another Involuntary Unemployment filing, the Commissioner's expert Report says:

This filing is complete *to the extent that* it [includes something]

....

No claim cost derivation or experience under the existing single premium program was provided.

....

I did not review the investment income derivation in any detail, and I have formed no opinion as to its appropriateness

....

if the coverage is non-standard, either an 'actuarial equivalence' to published rate must be established or a minimum anticipated loss ratio of 40-60% must be certified" [note: again, this never happened]

Id. at 5 (A-520) (emphasis supplied). The Commissioner’s expert never says the rates for that filing were reasonable.

Regarding a Loss of Income and Family Leave Insurance Filing, the Commissioner’s expert said:

This filing is *somewhat* complete (!)

....

The calculation of the claim incidence rate actually used . . . and how the ‘first payment rate’ relates to the incidence rate . . . was not included

....

the actual continuance of unemployment that would give rise to claim severity was not provided.

....

Derivation of the actual rates is described, but not in numerical detail [note: this report is from an *actuary*].

....

The family leave premium was justified by way of a competitor’s rate only.”

the Actuarial Memorandum indicates that the coverage is ‘bundled’ . . . but the Memorandum is not specific on that point . . . bundled coverage may exhibit different experience from non-bundled coverage. . .

Id. at 6-8 (A-521-523). The Commissioner’s expert nowhere says that the rate for Loss of Income and Family Leave Insurance was reasonable.

On a Credit Property Insurance filing, the Commissioner’s expert said:

This filing is complete to the extent that it [includes something]

....

I could not verify the adjustment for ‘average amount’ or the average amount itself, but it *seems reasonable*

....

There are adjustments for Adjustment from ACV to replacement cost, elimination of deductible and additional miscellaneous coverages for which justification was not provided.

....

No justification was provided for other expense components

....

No justification is provided for the Non-filing rates.

....

if the coverage is non-standard, either an ‘actuarial equivalence’ to published rate must be established or a minimum anticipated loss ratio of 40-60% must be certified” [note: this never happened]

Id. at 8-9 (A-523-524) (emphasis supplied). Once again, the Commissioner’s expert *never* said the rates from this filing were reasonable by any measure or standard.

On another Credit Property filing, the Commissioner’s expert continued in the same vein:

It is complete to the extent that [it includes something]

.....

The filing was incomplete in that *a program description was not provided, nor was the derivation of the proposed rate from the existing rate provided.*

.....

Credibility of the experience was not considered. This *may* not be a material omission.

.....

A catastrophe margin was not considered.

.....

The derivation of the rate adjustment, the current rate and the indicated rate were omitted from the filing

Id. at 10-11 (A-525-526).

The entire Commissioner’s expert report follows suit – nothing is complete. And the best the expert can do is guess that, perhaps, the omissions are not material (perhaps they are). But in many cases, the Report simply states that the information is not there and the expert actuary cannot, therefore, do any pertinent analysis. The Commissioner’s expert never—ever—says the rates are reasonable. The closest stab to reasonableness is the Report’s unsupported comment that CitiFinancial’s rate filings “are very much in line” with other filings.³ Those filings, if they exist, are not in the administrative record. Nor was the expert available for cross examination to test the expert’s assertion. But the Commissioner’s “actuarial report” (which contains no actuarial analysis) ends with no conclusion other than a disclaimer that the expert only had some information, that others with “significant experience with these products” might disagree, and

³ Even if true, the statement only begs the question Lightner will soon answer – i.e., was CitiFinancial conducting this scheme in other states as well.

that various factors affect loss ratios over time. On this record, the Report cannot support the Commissioner's action.

With all of its shortcomings, this Report constitutes the *only* evidence cited in the Commissioner's Order or the Circuit Court Order. This expert was never sworn in. Never deposed. Never subject to any cross-examination or discovery. But, even without the crucible of an adversary proceeding, the Commissioner's Report melts into nothing on a single reading.

The Commissioner Order attempts to re-write the statute and this Court's *CitiFinancial* decision, asserting that since the Insurance Commissioner did not put a rule into effect prohibiting the rates, CitiFinancial must be blameless and that unreasonable rates become reasonable if the Commissioner approves them so that carrier's may rely on improperly secured approvals. Commissioner's Order at ¶ 31 (A-30-31). But the law says that *unreasonable rates may not lawfully be charged*, not only that unapproved rates may not be charged. *See also, CitiFinancial* at Syl. Pt. 4 (declaring that the presumption of reasonableness for approved rates may be rebutted). The Commissioner's Order demonstrates the Commissioner's unwillingness to enforce the Legislature's rule or this Court's syllabus on behalf of the citizens of West Virginia against the interests of its regulated parties.

The Order claims the Commissioner did her job: "The Insurance Commissioner fulfilled her duty." Commissioner's Order at 5 (A-26). And the Order continues: "the Office of the Insurance Commissioner complied with the requirements of [§33-20-4(d)] and approved the filings." *Id.* (A-33). The Commissioner never adjudicated Lightner's claim; it never weighed facts against the law this Court established. The Commissioner's Order served only to *exonerate* the Insurance Commissioner for allowing so much money to be lifted from the pockets of hard-working West Virginians by declaring the money un-stolen as a matter of agency fiat. The

Commissioner's Order stands apart from any fair evaluation of what was supposed to be the question under *CitiFinancial* – whether these rates *actually were reasonable rates and in accordance with the law* or they were unreasonable rates that violate the WVCCPA.

The facts actually in the record show the rates were unreasonable. In the Order exonerating CitiFinancial, the Insurance Commissioner disregarded evidence showing that the rates at issue were far in excess of any standard for reasonableness and cited no evidence whatsoever indicating reasonableness. For example, unlike the Commissioner's Office, the Rate Specialist Bureau of the California Department of Insurance concluded in an August 2002 report that Triton and other credit insurers were dramatically overcharging California insureds. After conducting a public study of credit property and credit unemployment insurance rates, those regulators reported that Triton had been ripping off consumers.

Overall, our results indicate that the rate level for Credit Property insurance can be reduced by 87.30%. This would result in the consumer saving \$34 million per year in overcharged premiums, if the presumptive 60% loss ratio standard is imposed.

....

Overall, the results indicate that the rates for Credit Unemployment insurance can be reduced by 87.47%. This would mean a saving of \$116.5 million per year, if the presumptive 60% loss ratio standard is imposed.

California Credit Property Insurance And Credit Unemployment Insurance Experience Report, at 25 (A-150).

Similarly, the Arizona Department of Insurance issued a data call on a number of insurers, including CitiFinancial, and based on the results concluded that credit property and credit unemployment rates were dramatically high. According to these 2003 reports, CitiFinancial's Arizona credit property rate of \$2.30 per \$100 was more than 4 times the indicated rate that the Department recommended to produce a loss ratio approximating the minimum standard of 50%. Actuarial Report on Credit Property Insurance In Arizona (A-480).

Likewise, Triton and 16 other credit unemployment insurers projected loss ratios averaging 55% but experienced loss ratios totaling only 4.6%. The examination of credit unemployment insurance conducted in Arizona concludes

To correct this inequity substantial decreases in the rates for all sub-lines are indicated.

Actuarial Report on Credit Unemployment Insurance In Arizona at 2 (A-450).

The Texas Insurance Commissioner examined CitiFinancial's proposed rate for credit involuntary unemployment insurance based on an application nearly identical to the one CitiFinancial submitted in West Virginia. In Texas, the Commissioner determined that the same rates charged Lightner and other West Virginia citizens (i.e., \$5.40 per \$100.00/month) "*appear grossly excessive.*" Texas Commissioner of Insurance Letter of Mar. 30, 1999 (A-485). The Commissioner ultimately disapproved the rate as "excessive because it is *unreasonably high in relation to the prospective loss experience and because it includes an excessive margin for profit and contingencies.*" Texas Department of Insurance Letter of May 17, 1999 (A-486).

With a single sentence in her Order, Commissioner Cline perfunctorily dismissed the relevance of these significant regulatory efforts in California, Arizona, and Texas, stating, "Rates filed by insurance companies in other states are neither necessarily relevant nor dispositive as to what a rate should be in the State of West Virginia." Any quantity and any quality of evidence can be overcome (or ignored) by such question-begging sophistry. The Commissioner offered absolutely *nothing* in the way of evidence that West Virginia differed in any material way that would warrant our citizens paying four to five times more for this coverage than citizens in these other states.

Although the Order may state that the conclusions of regulators in California, Arizona, and Texas are not "dispositive," the Commissioner's callous unwillingness to allow a hearing

and consider Lightner's evidence in these circumstances amounts to an abdication of her duties,⁴ demonstrating unequivocal bias against his position. With state after state declaring these rates not merely excessive but *grossly* excessive, and not by small margins, but by multiples into tens of millions of dollars' worth of overcharging of customers, the Commissioner's Order only begs the question: *why* should West Virginians pay vastly more than their fellow Americans? This Court will find that no articulation of why West Virginians should have paid so much more appears anywhere in the Insurance Commissioner's Order (other than, perhaps, that the Commissioner allowed it to occur at the time) and the administrative action by the Commission is therefore "clearly wrong," and subject to reversal under *Jones v. Mullen*, 166 W.Va. 538, 276 S.E.2d 214 (1918) with an entry of an order in Lightner's favor.

B. The unfair and unlawful procedure dictated by the Insurance Commissioner was as illegitimate as the substantive conclusion.

Returning to the procedural history, the Court will recall that before coming to Charleston in 2008, this case began in November 2002, as a debt-collection action, when CitiFinancial sued Lightner. That action is still pending as *CitiFinancial, Inc. v. Lightner*, No. 02-273, in the Circuit Court of Marshall County, West Virginia. It has been stayed pending the outcome of this action. Lightner filed an Answer and Counterclaim in the underlying action on December 17, 2002. Lightner amended his Counterclaim on January 16, 2004, and again on October 30, 2006.

As both a defense and compulsory counterclaim, Lightner contended that he does not owe a portion of the debt CitiFinancial sued to collect because the alleged debt includes

⁴ Indeed, normalizing risks across state lines with evidentiary and "numerical" support is what actuaries and insurance companies do – but the Commissioner's actuary had no information to attempt that because CitiFinancial withheld it, first on its own, then later with the cooperation of the Commissioner who denied discovery and denied Lightner access to any submissions by CitiFinancial.

unreasonable charges for credit insurance which violate the Consumer Credit and Protection Act, W. Va. Code. §§ 46A-3-101 et seq., and the Insurance Code, *id.* §§ 33-11-3, 33-11-4.

Lightner moved for class certification in June of 2007. CitiFinancial filed an opposition to that motion as well as motions seeking a dismissal, partial summary judgment, or a stay pending an administrative proceeding. The Circuit Court ruled in favor of class certification and denied each of CitiFinancial's alternative forms of relief. The trial court entered two orders reflecting these rulings in May 2008.

Thereafter, the Circuit Court granted Lightner's motion to compel regarding discovery of rate information in the possession of CitiFinancial. On May 16, 2008, the Circuit Court issued a Commission and Letter Rogatory authorizing Lightner to issue a subpoena *duces tecum* to CitiFinancial in its home state of Texas.

That June, CitiFinancial petitioned this Court for a writ of prohibition, asking the Court to reverse the Circuit Court's order denying summary judgment or, alternatively, stay the action in favor of a § 33-20-5(d) hearing before the Insurance Commissioner. The Insurance Commissioner submitted an *amicus curiae* brief, urging that her office "would be the appropriate venue for bringing forth any concerns about the reasonableness of [CitiFinancial's credit insurance] rates." *Amicus Curiae* Br. of W. Va. Ins. Comm'r at 5.

In an opinion dated December 10, 2008, this Court accepted the Insurance Commissioner's representation and granted a writ of prohibition directing the parties to the Commission for a hearing under § 33-20-5(d). *CitiFinancial*, 223 W. Va. 229, 672 S.E.2d 365. In accordance with this Court's decision, Lightner submitted a consumer complaint to the Insurance Commissioner on September 28, 2009 (A-579). In it, Lightner demanded a hearing before a hearings examiner under §§ 33-20-5(d) and 33-2-13 of the Insurance Code and § 114-

13-1 of the Code of State Rules for the purpose of challenging the rates charged by Triton and CitiFinancial for credit property and credit involuntary unemployment insurance. In addition, Lightner requested that the Insurance Commissioner enforce Lightner's entitlement to all pertinent information regarding the rates challenged in his complaint under § 33-20-9, order a pre-hearing conference for simplifying procedural requests including Lightner's request for § 33-20-9 information, order the parties to mediate pursuant to 114 C.S.R. 13-4.2, and issue formal written notice of the hearing and pre-hearing conference. Consumer Complaint at 7-8 (A-587-588).

Six months later, the Commissioner reversed course from its position before this Court and issued her order denying Lightner *any hearing at all*. Commissioner's Order (A-22-37). Relying exclusively on a regulation her office passed in September 2003, the Commissioner disregarded these many statutory directives and announced that a hearing "would serve no useful purpose."⁵ The Commissioner likewise rejected the substance of Lightner's claim, in an order replete with arbitrary conclusions lacking support in the administrative record (in most cases, the findings did not even cite any supporting facts or standards, but were mere assertions as catalogued above).

Lightner timely appealed the Insurance Commissioner's Order to the Circuit Court of Kanawha County, filing his Petition in May 2010, but, over Lightner's objections, no substantive proceedings were held, no discovery was allowed, no testimony was taken. And the Circuit Court, after twenty-two months, endorsed the Order verbatim, in over twenty dense pages, the tendentious, self-serving, and unsupported allegations of CitiFinancial regarding this matter.

⁵ *Id.* at 14-15 (A-35-36). This is true in the sense that the Commissioner's mind was made up from day one.

Lightner also appeals from the denial of due process reflected in the Commissioner's, and later, the Circuit Court's, refusal of any meaningful process, including the denial of discovery, oaths for witnesses, cross examination of witnesses, a hearing, the right to effectively utilize his counsel and (in the Insurance Commissioner proceeding only), a fair tribunal. The denial of these basic safeguards, not merely required by, but sacred to our law, requires reversal of the decision below.

SUMMARY OF THE ARGUMENT

In addition to the narrow legal issues under the Administrative Procedure Act, this case raises much broader and more important questions regarding the rights of individual West Virginians vis à vis their government and the insurance industry. The Insurance Commissioner (and the Circuit Court) have interpreted this Court's decision in *CitiFinancial, supra*, to strip Lightner of not only his statutory cause of action, but also his basic rights to be heard, to see the evidence (alleged to be) arrayed against him, to utilize his counsel in an adversary proceeding, to cross examine opposing witnesses and to have the evidence tested by an oath or affirmation. See, *Walker v. West Virginia Ethics Commission*, 201 W.Va. 108, 492 S.E.2d 167 (1997); *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1996). The Commissioner's *ex parte* process prohibited Lightner's exercise of any of these basic rights and disposed of his claim in contravention of key points of *CitiFinancial*. The issue in this appeal is whether the Insurance Commissioner may lawfully dispense with Lightner's complaint in this fashion.

In 1980, in *Hurley v. Allied Chemical Corp.*, 164 W.Va. 268, 262 S.E.2d 757 (1980), Justice Miller first articulated West Virginia's formal test for the recognition of an implied cause of action in favor of an individual. The opinion drew on the United States Supreme Court's decision in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080 (1975). *Cort* and Justice Miller's *Hurley*

decision constituted the vanguard of the expansion and protection of individual rights in the United States through the civil law. Thereafter, the *Hurley* framework expanded the rights of West Virginians against government and corporate actors alike for several decades – including rights to protect the individual against financial defamation, insurance misconduct, dangerous products and practices, dram shop violations, and false advertising. See, e.g. *Jenkins v. JC Penney Casualty*, 167 W. Va. 597, 607-08, 280 S.E.2d 252, 258 (1981); *Mutafis v. Erie Ins. Exch.*, 561 F. Supp. 192, 201 (N.D.W. Va. 1983); *Taylor v. Nationwide Mut. Ins. Co.*, 214 W. Va. 324, 325, 589 S.E.2d 55, 56 (2003); *Reed v. Phillips*, 192 W. Va. 392, 396, 452 S.E.2d 708, 712 (1994); *Anderson v. Moulder*, 183 W. Va. 77, 84, 394 S.E.2d 61, 68 (1990). Justice Miller also indicated that *Hurley* was the proper mode of analysis for a case entitling prisoners to meaningful education and rehabilitation. *Anderson v. Moulder*, 183 W. Va. 77, 84, 394 S.E.2d 61, 68 (1990) (Miller, C.J., concurring).

Legislatures had acted, even ahead of *Cort* and *Hurley*, to provide private remedies expressly in statutory language for a variety of civil wrongs. See, e.g. W. Va. Code § 46A-5-101. But judicial doctrine was needed to determine what legislative language would be sufficient to allow a private right of action to an individual citizen. See, *Hurley*, 64 W.Va. at 271, 262 S.E.2d at 759. The doctrine developed over a period of time and devolved new rights to the individual in many cases, empowering individual citizens against larger entities and, sometimes, even against the power of the state itself.

In the decades after *Cort* and *Hurley*, government agencies and certain corporate interests, including the insurance industry, pushed back in court, seeking to strip rights from individual citizens and repose power *exclusively* in regulating agencies and to thereby return power to the regulated industries and the government. Marver H. Bernstein, *Regulating Business*

by *Independent Commission* (1955) (Greenwood Press 1977); Stigler, George, “The Theory of Economic Regulation,” *Bell Journal of Economics and Management Science*, Vol. 2 (Spring 1971)⁶; James Q. Wilson, *The Politics of Regulation*, in *Social Responsibility and the Business Predicament*, 135 (James W. McKie, ed. 1975)⁷; Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 *Colum. L. Rev.* 1, 26 (2011).⁸ Our political system, at the state and federal levels, makes it easier for industries to influence a single regulatory agency than the public at large – a fact that explains much about the legal thinking being pressed on courts by these industries. Moreover, like any institution, regulatory agencies are protective of their turf and are easily enlisted in this effort. Among the many forms of protection industry seeks from its regulators is the one at issue here – a form of price fixing.⁹

Whether the doctrine is called “preemption,” “primary jurisdiction,” or “exclusive jurisdiction,” in each arena, industry makes substantially the same argument: “the individual is interfering with the government agency by asserting her rights in court.” Industry backs the

⁶ Stigler distinguished “onerous” regulations, like the heavy taxation of whiskey for example, from “acquired” regulation that benefits industry through subsidies, anti-competitive policies and the like and advanced the compelling thesis, still vital to this day, that: “as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit.” *Id.* at p. 3. Stigler’s article is available at http://web.missouri.edu/~podgurskym/Econ_4345/syl_articles/Stigler_TheTheoryOfEconomicRegulation.pdf.

⁷ “Regulations created to impose costs on organizable sectors of the economy in order to obtain diffused benefits for the society offer the key test of the ‘capture’ hypothesis. When government attempts to prevent restraint of trade, to keep impure food and harmful drugs of the market, to improve auto safety, to eliminate unsafe toys, to end false and misleading advertising to reduce air and water pollution, or to maintain a minimum wage, it is in effect defying an industry or all of industry.”

⁸ Metzger notes that in the Supreme Court of the United States recent decision in *Wyeth v. Levine*, 555 U.S. 555, 129 S.Ct. 1187(2009) cited to material sternly questioning whether the FDA could possibly live up to its statutory responsibilities – notwithstanding the agency’s dubious, and ultimately rejected, claim that state tort lawsuits were obstructing its mission of protecting the public from dangerous drugs.

⁹ Stigler at p. 6: “Even an industry that has achieved entry control will often want price controls administered by a body with coercive powers.”

argument with a claim that the subject matter is “complex,” “sophisticated,” “best left to experts” and, therefore, must be subject to a “comprehensive” scheme of legislation and regulation handled “exclusively” by a government agency and never in civil courts.¹⁰ The regulators eagerly sign on to this seeming validation of their authority and importance.¹¹

Remarkably, this industry pushback typically seeks to take a piece of legislation specifically intended to protect individuals and use it to deny those same individuals protection they would have enjoyed had the law never been passed. Industries urge courts to find that any rule enacted for consumer safety (such as a rule requiring air bags in some cars) *immunizes* manufacturers against any claim not specifically covered by the rule (such as a claim that air bags should be present in another car). *See, Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 120 S.Ct. 1913 (2000); *but see, Wyeth v. Levine*, 555 U.S. 555 (2009) (failure-to-warn claims not preempted by FDA labeling approvals). According to the industry/regulator argument, courts should find that any action that has not been forbidden stands immune, no matter how wrongful the action. The law intended to *increase* safety in vehicles, or security for pensions, or rights of insureds, gets manipulated to immunize *unsafe* practices by negative implication, leaving intended beneficiaries of these protections worse off.

West Virginia’s experience of agency capture in the mine safety arena has been particularly devastating, of course. After more than a century of carnage underground, law

¹⁰ From an advocacy standpoint, these standard arguments always result in repetition of certain talismanic phrases designed to frighten judicial officers. These include: 1) repeated references to the number of pages in the administrative record (meaning this will be a lot of work to read all that); 2) ominous statements about the expert nature of the issues (threatening that there will be math on this test); 3) optimistic and unverified modifiers attached to the agencies action – no agency does anything that is not “exhaustive,” “extensive,” “independent,” “thorough” and most of all “comprehensive” (the Court can easily contrast these with what one hears when industry objects to agency action).

¹¹ Stigler: “So many economists have denounced the ICC for its pro-railroad policies that this has become a cliché of the literature. . . .” Stigler at 17.

enforcement has finally begun to identify and even occasionally prosecute the actions of corporate managers who become cozy enough with MSHA and other safety regulators to discover safety inspection times and dates in advance, bargain down serious safety violations to trivial charges or warnings and foster the unsafe culture that allows disasters like Sago¹² and Upper Big Branch¹³ to plague our state decades after leaders said “never again” at Farmington or Buffalo Creek. This Court will continue to confront the liability of both industry managers and regulators to the victims of those disasters in the years to come. But, in every industry, the effort to influence or capture the regulator remains. This case reflects just such a capture.

Paul Lightner’s case against CitiFinancial illustrates this conflict between the individual and the regulating agency/regulated industry combination well. Lightner has not asked any court to imply a cause of action for him under *Hurley* – he stands on an *expressly created* cause of action, provided to West Virginians by our Legislature. Confronted with his lawsuit, CitiFinancial and the Insurance Commissioner combined to persuade this Court to send CitiFinancial to its chosen briar patch, the Office of the West Virginia Insurance Commissioner, confident that an individual citizen had no chance there against the likes of it.

And so it has proved. Entitled to a hearing by law, Lightner got none. Entitled to reasonable discovery to assist his case, Lightner got none. Entitled to see the evidence against him, Lightner was denied *even that* as the Commissioner proceeded *ex parte*. Entitled to cross-examine the evidence that supposedly stood against his claim, Lightner was kept in the dark. Entitled to a hearing within 45 days under W.Va. Code § 33-2-13 & 114 C.S.R. 13, Lightner

¹² Lilly, Scott, Center for American Progress, “MSHA and the Sago Mine Disaster,” January 6th, 2006, available at <http://www.americanprogress.org/issues/regulation/news/2006/01/06/1786/msha-and-the-sago-mine-disaster/>.

¹³Ward, Ken, Jr., “Report Links MSHA Failure to UBB Blast,” The Charleston Gazette, December 7th, 2011, available at <http://wvgazette.com/News/montcoal/201112070283>.

waited six months for the Commissioner's decision and twenty-two months for a decision on his administrative appeal in Kanawha County. The Insurance Commissioner's Office refused to appoint a hearing examiner, leaving Lightner with no recourse of any kind during any part of the administrative proceeding, except to await the forgone conclusion.

Disturbingly, during its *ex parte* "investigation," the Commissioner allowed CitiFinancial and its attorneys liberal access to the Commission staff, holding undocumented conference calls with them – the record does not reflect what they discussed – exchanging emails, in one case returning documents to CitiFinancial and replacing them in the record with others, and developing a joint justification for what occurred, while declining to hear from Lightner except by allowing him, finally, to submit written documents that were disregarded. See, E-mails between the Commission and CitiFinancial's counsel (A-1513-1518). Shortly after entering the disputed Order, Commissioner Cline left public service and found employment as the "Director of Public Policy" with one of the law firms representing CitiFinancial during the Lightner proceedings before the Commission. See, Email dated October 29, 2009 from Spilman, Thomas & Battle attorneys to the Commissioner's personnel during Commissioner Cline's investigation (A-1142); Charleston Daily Mail, December 13th, 2011, "Jane Cline, Mary Jane Pickens join Spilman Thomas & Battle."

Under *Walker*, 201 W.Va. at 116, 492 S.E.2d at 175 and *Muscatell v. Cline*, 196 W.Va. 588, Syl. Pt. 1, 474 S.E.2d 518 (1996), the Circuit Court's Order and the Commissioner's Order are invalid on both procedural and substantive grounds. It is of particular significance that the Order directly contradicted this Court's *CitiFinancial* decision by finding, as a matter of law, that any rate it had approved is *ipso facto* "reasonable," turning the rebuttable presumption of syllabus point 4 of *CitiFinancial*, into an irrebuttable presumption. Cf. *CitiFinancial* at Syl. Pt. 4

with Commissioner's Order at 12, ¶¶ F-H (A-33). Moreover, the Commissioner's Order contains only speculation and argumentative commentary on the evidence, with no cogent or articulate explanation for why the decision reached is sound. The Order relies on evidence nowhere in the record – the “similar filings” that are “very much in line” with those of CitiFinancial (the Order assures us). But those records have never seen the light of day.

The Commissioner's Order should not have been affirmed in Kanawha County Circuit Court. The Circuit Court allowed no discovery and no evidentiary hearing at which the Commissioner's findings and evidence could be challenged. The twenty-two month process allowed a single opportunity for Lightner's counsel to address the Judge in a non-evidentiary hearing. The April 13th, 2012 Order of the Circuit Court of Kanawha County concluded the process to date. The twenty-one page Order is, with all due respect to the estimable Circuit Judge who endorsed it, a pure advocacy document. The Order repeats verbatim almost *seven thousand words* of exactly what CitiFinancial's attorneys asked the court to find – not so much as a comma of CitiFinancial's proposed order was amended by the trial judge. It represents the apotheosis of the agency capture theory – Lightner received an affirmance, in court, of the agency decision that was identical to the speech CitiFinancial's lawyers would have delivered had there ever been a hearing. *Id.* As this Court has observed: “the findings of facts, however, should represent the judge's own determination and not the long, often argumentative statements of successful counsel.” *S. Side Lumber Co. v. Stone Const. Co.*, 151 W. Va. 439, 443, 152 S.E.2d 721, 723 (1967). And this Court further explained the trial court's duty:

Under the rule it is the duty of the trial court to makes its findings of facts and it should not surrender or delegate this important function by any mechanical adoption of findings proposed by counsel; but the trial court, to accomplish the results intended by the rule, should at or prior to the entry of judgment carefully prepare its own findings of facts and that procedure should be adhered to by the trial courts of this State.

S. Side Lumber, 151 W. Va. at 444.

The Circuit Court Order in this case contains findings beyond the wildest dreams of starry-eyed lawyers, deciding not only what the law and the facts are, but what the Insurance Commissioner and Lightner were *thinking* as the process went forward.¹⁴ Through dozens of adverbs, argumentative remarks, and pure polemic,¹⁵ the document illustrates Lightner's point throughout – he never had a chance to vindicate his rights in this process. Of course, that is the reason CitiFinancial insisted on this process.

Lightner now comes to this Court to submit that the Insurance Commissioner's facsimile of due process obliterates rights specifically granted to him by the Legislature in a patently arbitrary and capricious fashion in violation of W.Va. Code 29A-5-4(g),(1)(3)-(6), *Walker*, and *Muscatell*. The Circuit Court should not have allowed those deprivations to stand. The totality of the circumstances makes it crystal clear that, as a tribunal, the Insurance Commissioner prejudged and misjudged this matter and return to that forum is incompatible with due process under *Jones v. Mullen, supra*, and *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W. Va. 766, 772, 197 S.E.2d 111, 115 (1973).

¹⁴ See, e.g., Circuit Court Order, at 2, ¶ 4 (describing the Commissioner's purpose and intent while intervening in the *CitiFinancial* proceedings before this Court), 13, ¶ 27 (opining on whether Lightner "truly felt aggrieved" by the denial of timely process before the Commissioner – as if he had a choice) (A-2-3, 12-13).

¹⁵ A highlight of the polemical nature of the Circuit Court's Order is its assertion that Lightner's position was "internally inconsistent" because he asserted both that his evidence was strong and that he was also entitled to rights like discovery and cross-examination to further buttress his case. Circuit Court Order at ¶ 38 (A-19). The argument the Order adopted from the pen of CitiFinancial's counsel puts one in mind of a criminal defendant who is denied counsel and (also) says he was innocent, to which CitiFinancial's drafters would reply, "well, your position is internally inconsistent, since if you were so innocent you wouldn't have needed a lawyer." In the next paragraph, the Circuit Order completely forgets whether it is talking about the right to present evidence before the Commissioner or the right to present it in Circuit Court. *Id.* at ¶ 39 (A-19). The whole document is like that – characterizations, subjective value judgments and argument – most of it would be fitting for the argument of a zealous litigator – which is its source – but it is simply not a judicial document.

Accordingly, Lightner asks that this Court VACATE the Order of the Circuit Court of Kanawha County upholding the Commissioner's actions, REQUIRE the Circuit Court of Kanawha County to enter an order upholding Lightner's Complaint that the rates were unreasonable and permit this matter to be returned to the Circuit Court of Marshall County whence it came, for recertification of the class and a determination of damages, in a forum where Lightner's rights, and those of the class he seeks to represent, can be adjudicated in a neutral and unbiased fashion, with all the features of civil justice and judicial review equally available to both parties.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Lightner submits that this case is appropriate for Rule 20 argument in light of the importance of the issue to the litigants and West Virginia and because the extent of the litigation to date has created history and issues which, while not especially complicated, do require appropriate time to explicate and analyze.

ARGUMENT

I. Standard of Review

A. Standard of Review in Regard to Administrative Agency Action

The scope of appellate review of a Circuit Court Order in an Administrative Procedure Act case has been defined as follows:

In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Phillips v. Fox, 193 W.Va. 657, 661, 458 S.E.2d 327, 331 (1995) (citation omitted).

Accordingly, this Court will not defer to the lower court's legal determinations:

[i]n reviewing the judgment of the lower court this Court does not accord special weight to the lower court's conclusions of law, and will reverse the judgment below when it is based on an incorrect conclusion of law." Syllabus Point 1, *Burks v. McNeel*, 164 W.Va. 654, 264 S.E.2d 651 (1980).

Syllabus, *Bolton v. Bechtold*, 178 W.Va. 556, 363 S.E.2d 241 (1987) (per curiam); *see also Walker*, 201 W.Va. at 116, 492 S.E.2d at 175; Syl. Pt. 1, *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996); *Groves v. Cicchirillo*, 225 W. Va. 474, 475, 694 S.E.2d 639, 640 (2010).

Of course, the basis for the deferential standard of review in regard to factual findings is the assumption that those findings emerge from a legitimate quasi-judicial process. Indeed, the original formulation was "[e]videntiary findings *made at an administrative hearing* should not be reversed unless they are clearly wrong." *Randolph County Bd. of Educ. v. Scalia*, 182 W. Va. 289, 292, 387 S.E.2d 524, 527 (1989) (emphasis supplied); *see also Petry v. Stump*, 219 W. Va. 197, 198, 632 S.E.2d 353, 354 (2006) (agencies performing quasi-judicial functions are bound by the norms of Constitutional due process).

Where, as here, any hearing at all is wrongfully denied to the complaining citizen, and where other important procedural rights, including basic discovery, cross-examination, and the right to know what evidence is being presented by other parties so as to intelligently respond to it are also denied, the basis for any deference to the agency findings quickly evaporates:

Indeed, a reviewing court cannot accord to agency findings the deference to which they are entitled *unless such attention is given to at least the critical facts upon which the agency has acted*.

Muscatell, 196 W.Va. at 598, 474 S.E.2d at 528 (emphasis supplied).

Finally, an agency order that fails to contain “cogent and convincing” reasons for the agency action may be summarily reversed and the correct decision then rendered in court, to avoid repeated remands that hinder the citizens’ exercise of their lawful rights: “[i]n circumstances where the Commissioner does not cogently and convincingly explain his reasons for the denial of a charter, the circuit court is entitled to review the evidence and enter an appropriate order without need to remand the case to the Commissioner.” *Jones*, 166 W.Va. at 544, 276 S.E.2d at 217.

B. Standard of Review in Regard to Due Process of Law

Pursuant to W. Va. Code §§ 46A-3-109, 33-6-9, 33-20-4, Lightner has a cause of action against those charging him unreasonable rates for credit insurance. A cause of action is a property right, subject to the due process analysis:

Mathews recognized that some type of an orderly hearing is the cornerstone of procedural due process. Implicit recognition was given to the fact that the range of liberty and property interest, subject to due process procedures before they can be withdrawn through State action, is almost infinite. Protected property interests have included a driver’s license, relief from garnishment of wages, welfare rights and dismissal from government employment. Goss observed “. . . that as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause.”

North v. W. Virginia Bd. of Regents, 160 W. Va. 248, 253-54, 233 S.E.2d 411, 415-16 (1977) (discussing, quoting, and applying *Mathews v. Eldridge*, 424 U.S. 319 (1976)) (footnotes omitted).

While the degree of due process varies with the nature of the right at stake, basic concepts include a “hearing [that] includes the introduction of evidence, the argument of counsel, and the pronouncement of the decree.” *W. Virginia Bd. of Regents, supra* (internal quotations omitted). It likewise requires that witnesses be sworn, that counsel be allowed the citizen and that evidence be taken at a time and place of which proper notice has been given. *Id.*

In articulating the basic standards of due process, Justice Miller concluded:

From all of these cases, certain fundamental principles in regard to procedural due process can be stated. First, the more valuable the right sought to be deprived, the more safeguards will be interposed. Second, due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise. Third, a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation.

These are the general due process concepts that are embodied in Article III, Section 10 of the West Virginia Constitution. . . .

Id. at 256, 417.

II. The Circuit Court’s Order should be reversed because Lightner was entitled to a hearing and legitimate due process under § 33-2-13 of the Insurance Code which not only requires the hearing, but one that comports with due process.

In plain, unmistakable language, the Insurance Code directs the Commissioner that she *shall* hold hearings when demanded by an aggrieved person such as Lightner. According to § 33-2-13 of the Code (entitled “Hearings”), the Commissioner “*shall hold hearings* when required by the provisions of this chapter or *upon a written demand therefore by a person aggrieved by any act or failure to act by the commissioner or by any rule, regulation or order of the commissioner.*” *Id.* (emphasis supplied); *cf. CitiFinancial*, 223 W. Va. 229, 672 S.E.2d 365, 372 (“[A]n aggrieved person or organization has the right to demand a hearing for the purpose of challenging any filing as being noncompliant with the statutory requirements that govern insurance rate setting.”). The Insurance Commissioner conceded that Lightner is entitled to demand a hearing and the Commissioner therefore could not legitimately avoid the legislative directive that she hold one.

The Circuit Court, which simply adopted the counsel-drafted findings, never even cites W.Va. Code § 33-2-13 in four pages of largely conclusory remarks on the subject. The Circuit Court’s Order actually found that the Commissioner’s completely *ex parte* investigation justifies

denying Lightner a hearing. *Id.* at ¶ 25 (A-12). The Circuit Court also repeated the number of pages in the administrative record (variously “hundreds” or “thousands”) eight different times. It referred the investigation as “extensive,” “exhaustive,” “voluminous” or “independent” on no fewer than twenty-seven occasions. Few findings failed to call for a modifier or some other type of hyperbole. *Id.*¹⁶ The Circuit Court Order illustrates why, as this Court stated: “the findings of facts, however, should represent the judge's own determination and not the long, often argumentative statements of successful counsel.” *S. Side Lumber Co. v. Stone Const. Co.*, *supra*. The document is an exercise in buzzwords and rhetoric, but contains no rejoinder to the statute and *CitiFinancial* which hold that Lightner was entitled to a hearing. That he was peremptorily denied one in violation of the law and basic due process warranting reversal.

There is more. Not only does § 33-2-13 require that the Commissioner *shall* give Lightner his hearing, but it also prescribes the procedural protections she must provide:

The commissioner shall allow any person directly affected by the hearing to *appear in person and by counsel*, to *be present during the giving of all evidence*, to *have a reasonable opportunity to inspect all documentary evidence*, to *examine witnesses and present relevant evidence*, and to *have subpoenas issued by the commissioner to compel attendance of witnesses and production of evidence* in his behalf.

(Emphasis supplied). These are the procedural rights — subpoena power, cross examination, presentation of evidence—that Lightner has demanded from the beginning. *See* Consumer Complaint to Insurance Commissioner at 3, 7, 8 (invoking § 33-2-13)(A-583, 87-88); Petition at 1, 3, 8, 9, 16 (same)(A-38, 40, 45, 46 & 53); Opening brief at 7 (same)(A-1725); *CitiFinancial*, 223 W. Va. 229, 672 S.E.2d 365, 375 (2008) (same). They are the very rights that

¹⁶ The Commissioner’s power is thus not only broad but “extremely broad,” (¶ 27), but lest that very breadth be considered a limitation, we are assured that the power is “broad *and specialized*” (¶ 24 (emphasis supplied)). Many findings appear “clearly” (numerous occasions), but this Court’s pronouncement in *CitiFinancial* that Lightner could invoke his right to a hearing qualifies only for “merely” (¶17). It was observed in the Order however that “the presentation of evidence . . . is *strictly* limited” (¶39).

Commissioner Cline disregarded and that CitiFinancial argues Lightner never had. Not only are the Commissioner's efforts to deny Lightner's rights repugnant to the notion due process, but they are also wrong as a matter of law. *See Walker, supra*.

Further, it is not merely the Commissioner's denial of Lightner's demand for a hearing, and the Circuit Court's sanctioning of the same, that was contrary to law. Without explanation the Commissioner ignored Lightner's right under § 33-20-9 to obtain from CitiFinancial "all pertinent information" regarding the rates at issue. Yet at the same time, having blocked Lightner's access to all pertinent CitiFinancial data, the Commissioner disregards all of the publically available CitiFinancial data — the data that Lightner has been able to access and present. And despite her disregard of Lightner's data, Commissioner Cline offers no data, no other evidence, and no analysis of her own in the Commissioner's Order. That is, in support of her conclusory pronouncement that the CitiFinancial rates at issue are reasonable in relation to the benefits provided, she offers nothing – no evidence or articulation of reasons to even attempt to satisfy *Muscatell, supra*. The Circuit Court's Order adds nothing to the empty findings of the Commissioner – indeed, it could not add anything, since the Circuit Court likewise refused discovery, cross-examination, hearing and other cherished procedural rights needed to ferret out the truth. In these regards, these orders cannot stand.

By denying a hearing, the Commissioner has prevented this Court from conducting the review contemplated by the Administrative Procedure Act. Evidence untested by the oath, by cross-examination – indeed, evidence never even disclosed to Lightner until he filed his appeal, is insufficient to adjudicate any right that is not *de minimis*. *North v. W. Virginia Bd. of Regents, supra*. The record simply does not contain "sufficient clarity to assure a reviewing court that all those findings have been considered and dealt with, not overlooked or concealed." *Muscatell,*

supra. Justice Albright explained, in *Muscatell*, the essential need for an agency to make such an order (if it can) in support of its decision:

Nothing in the findings of fact of the Commissioner advises this Court why the Commissioner resolved this conflict in the testimony of the trooper in favor of the direct testimony and disregarded the cross-examination. We have no separate evaluation of the evidence by the hearing examiner who observed the demeanor of the witness on this critical issue before us.

Muscatell, 196 W. Va. at 598, 474 S.E.2d at 528. The Commissioner did not swear any witnesses or test the veracity of any evidence. Nor did she allow any process by which Lightner could challenge the evidence. The Commissioner's disregard for process (and statute) leaves this Court with nothing of substance to affirm, and it was error for the Circuit Court to endorse an Order that allows the Commissioner to dispose of citizen's rights in such a deficient and *ex parte* process.

This Court reaffirmed the *Muscatell* standard just this year:

Because *Muscatell* requires that a conflict in critical evidence be resolved by a reasoned and articulate decision, weighing and explaining the choices made and rendering a decision capable of review by an appellate court, we find that the circuit court's decision to remand the matter for a full evidentiary hearing was appropriate. Accordingly, we affirm the circuit court's ruling on this issue.

Miller v. Epling, 729 S.E.2d 896 (W. Va. 2012). A reasoned and articulate decision requires a hearing out of which such a decision could reasonably be expected to arise. Without any hearing in this case, nor even any semblance of an adversary process, the Commissioner's Order cannot stand.

Most importantly, Justice Albright specifically described the reasons *why* an administrative agency must allow due process and issue reasoned decisions based on a legitimate record:

The purpose of these rules is not to burden an administrative agency with proving or recording the obvious. The purpose is to allow a reviewing court (and the public) to ascertain that the critical issues before the agency have indeed been

considered and weighed and not overlooked or concealed. *Indeed, a reviewing court cannot accord to agency findings the deference to which they are entitled unless such attention is given to at least the critical facts upon which the agency has acted.*

Muscatell, 196 W.Va. at 598, 474 S.E.2d at 528 (emphasis supplied). The Circuit Court erred in according any deference to the empty process the Commissioner imposed on Lightner, contrary to law. Since the Circuit Court expressly relied on the deferential standard it incorrectly believed applicable, its decision is wrong as a matter of law. Circuit Court's Order at ¶ 38 (specifically stating that the reason for the Circuit Court's conclusion that the rates were not unreasonable is "due to the deference it accords the Commissioner.") (A-19). Accordingly, the decision below cannot stand and should be REVERSED.

III. The Circuit Court's Order should be reversed because the Insurance Commissioner's Order is arbitrary and capricious within the meaning of the Administrative Procedure Act.

As explained in the Statement of Facts, Lightner placed a significant volume of evidence into the administrative record showing that he had been charged unreasonable rates. To find the contrary, the Commissioner would be required to locate and refer to evidence that the rates were not, in fact, unreasonable:

Where there is a direct conflict in the critical evidence upon which an agency proposes to act, the agency may not elect one version of the evidence over the conflicting version unless the conflict is resolved by a reasoned and articulate decision, weighing and explaining the choices made and rendering its decision capable of review by an appellate court.

Sims v. Miller, 227 W. Va. 395, 397, 709 S.E.2d 750, 752 (2011) (citing Syllabus point 6, *Muscatell*, 196 W.Va. 588, 474 S.E.2d 518).

However, the administrative record in this case is barren of evidence that the rates are reasonable. Not a single party offered evidence of the rate's reasonableness – nor could they. Instead, the Commissioner's Order, the actuary report, and the Circuit Court order either

speculate about possibilities of reasonableness, or apply incorrect standards – such as holding any approved rate to be reasonable *ipso facto*. Correspondingly, there is no reasoned and articulate decision as to why the Commissioner believed the rates to be reasonable. Nor could there be on this record. The Commissioner’s Order, and the Circuit Court Order following it, contain argumentative conjecture that evidence supporting Lightner *might* not be perfect, or that evidence opposing Lightner *might exist* and be persuasive. This blatant abdication of answering the key question – for lack of an answer – cannot satisfy due process or a sound substantive decision under the Administrative Procedure Act.

Even the actuarial report (which contains no numeric or mathematical analysis and is therefore not an actuarial report in the professional sense), contains not so much as the *assertion* that the rates are reasonable, let alone any evidence to support that conclusion. Like the Commissioner’s Order, the actuary’s report is all conjecture. Furthermore, the statement in the actuary report and Commissioner’s Order that the filings of CitiFinancial were “very much in line” with purportedly similar filings has no support in the record – no such filings were produced or are available to be scrutinized – but the notion is nonetheless emphatically contradicted by the numerous other states that found these rates to be dramatically outside the legitimate range.

In this case, there an overwhelming preponderance of evidence that the rates are unreasonable. They are fractions of the industry standards, below legal thresholds, oppressive and confiscatory on their face (15.8%!). And they have been found grossly excessive when challenged in other states. The contrary conclusion that the Commissioner reached in her Order, and which the Circuit Court affirmed, cannot be sustained. Therefore, under *Muscatell*, the

Order cannot stand. The Commissioner did not *pick* one side of the evidence or the other, without explaining why. The Commissioner picked a side with no evidence to support it at all.

Additionally, the Insurance Commissioner clearly concluded that an approved rate was irrebuttably presumed reasonable in contravention of this Court's holding that the presumption could be overcome:

While approved insurance rates are still subject to challenge, the burden for disproving the validity of such rates is placed on the entity who seeks to set the rates aside. *See* W.Va.Code § 33-20-5(d).

CitiFinancial, 223 W. Va. 229, 239, 672 S.E.2d 365, 375 and Syl. Pt. 4. *But see*, Commissioner's Order at ¶ 31 & p. 12, ¶¶ F-H (simply stating that the rates were approved and the Commissioner has not found them unreasonable, therefore they are reasonable or alternatively that carriers have a right to rely on approved rates, and [implicitly] therefore such rates are reasonable). (A-30-31, 33). In the Insurance Commissioner's view, the bureaucratic decision to approve the rates years ago doomed Lightner's challenge from the start (despite the affidavit by the then-sitting Commissioner that he would not have approved the rates if he had an honest submission from CitiFinancial).

This process comports with neither *CitiFinancial* nor with the Legislature's decision to provide a cause of action for victims of unreasonable insurance premium charges. Accordingly, the decision below should be REVERSED.

IV. There is no reason to remand this matter to the Commissioner and good reason not to, as the record as a whole supports the conclusion that the Commissioner prejudged the issue in Lightner's case and that he cannot receive a fair hearing before the Commissioner now. Moreover, given the passage of time, it would be unfair to force Lightner through another round of administrative procedure before allowing him to vindicate his rights in Marshall County.

In *Jones v. Mullen*, Justice Neely trenchantly observed that "[t]here must be some finality to litigation when government approval is sought by an applicant who wishes to engage in

business; matters cannot be remanded interminably when orders indicate that the conclusions drawn from the facts recited are clearly wrong.” 166 W.Va. at 544, 276 S.E.2d at 218. The individual, Paul Lightner, has been subjected to nearly a decade of litigation, *instituted by* CitiFinancial, during which nothing has occurred except the litigation of CitiFinancial’s serial objections to venue for this case in the state courts of West Virginia – notable for being *the jurisdiction in which CitiFinancial elected to sue Paul Lightner in the first place*. This Court might consider it significant that before CitiFinancial asked for this case to go to the Insurance Commissioner, it asked for federal court – so this whole proceeding has really been CitiFinancial’s *second choice*. At some point, the merits should come to the fore.

Further administrative proceedings are futile. As was the case in *Mountaineer Disposal Service, Inc.*, 156 W.Va. at 772, 197 S.E.2d at 115, “it is obvious that further pursuit of administrative remedies . . . will be unavailing,” and they should therefore be excused under the futility doctrine. “The doctrine of exhaustion of administrative remedies is inapplicable where resort to available procedures would be an exercise in futility.” Syl. Pt. 2, *Kincell v. Superintendent of Marion County Schools*, 201 W. Va. 640, 499 S.E.2d 862 (1997) (quoting Syl. Pt. 1, *State ex rel. Bd. of Educ. v. Casey*, 176 W.Va. 733, 349 S.E.2d 436 (1986)).

Further, because the Commissioner has prejudged the issues — not merely ruling against Lightner based on evidence at the time but actually asserting that allowing him a hearing and, among other things, the opportunity to present and cross examine witnesses would serve no useful purpose — a return to the Commissioner flunks the most basic requirement of due process. At a minimum, due process includes the right to “an unbiased hearing tribunal.” Syl. Pt. 3, *North*, 160 W. Va. 248, 233 S.E.2d 41. As a result, remand to the Insurance Commissioner is no remedy here and offers only an exercise in futility.

CONCLUSION

WHEREFORE, Lightner asks that this Court VACATE the Order of the Circuit Court of Kanawha County upholding the Commissioner's actions, REQUIRE the Circuit Court of Kanawha County to enter an order upholding Lightner's Complaint that the rates were unreasonable and permit this matter to be RETURNED to the Circuit Court of Marshall County whence it came, for recertification of the class and a determination of damages, in a forum where Lightner's rights, and those of the class he seeks to represent, can be adjudicated in a neutral and unbiased fashion, with all the features of civil justice and judicial review equally available to both parties.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Service of the foregoing **PETITIONER'S BRIEF** was had upon the Respondents herein via e-mail and/or by mailing a true and correct copy thereof, by regular United States Mail, postage prepaid, this 31st day of August, 2012, to the following:

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