

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

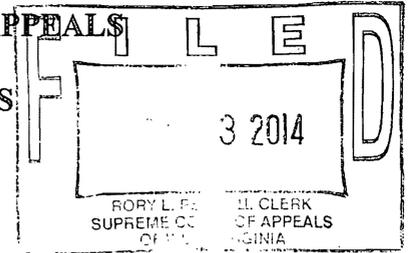
STATE OF WEST VIRGINIA EX REL SAFE-GUARD PRODUCTS  
INTERNATIONAL, LLC,

**Petitioner,**

v.

THE HONORABLE MIKI THOMPSON,  
ROBIN L. HINKLE,

**Respondents.**



**Upon Original Jurisdiction  
in Prohibition,**

No. 14-1134

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**PETITION FOR WRIT OF PROHIBITION**

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## QUESTIONS PRESENTED

1. Whether the Circuit Court clearly erred as a matter of law in finding that the Safe-Guard Guaranteed Asset Protection Plan (“GAP Agreement” or “Addendum”) was “insurance” under West Virginia Code section 33-1-1 *et seq.*

### STATEMENT OF THE CASE

**A. The Circuit Court’s Order Granting Summary Judgment Which Found that A Debt Cancellation Agreement is “Insurance”.**

On October 16, 2014, the Honorable Miki Thompson, Circuit Judge of Mingo County, West Virginia entered an Order that held, in pertinent part, that the debt cancellation agreement at issue in this action, the Safe-Guard Guaranteed Asset Protection Plan (hereinafter, “GAP Agreement” or “Addendum”) is insurance under West Virginia Code section 33-1-1 *et seq.* See October 16, 2014 Order, *A-1*. This holding is erroneous as the Addendum is unequivocally not insurance as defined by West Virginia Code and as interpreted by the West Virginia Insurance Commissioner. Safe-Guard requests entry of a writ of prohibition due to the prejudicial nature of the erroneous ruling on Safe-Guard and the impact and uncertainty that the ruling will potentially create on an entire industry within West Virginia and throughout the United States.

**B. Hinkle’s Purchase of the Addendum from C&O Motors and the Effect of Her Failure to Adhere to the Payment Terms of her Automobile Loan.**

By way of background, Respondent Robin Hinkle (“Hinkle”)<sup>1</sup> purchased a 2006 Monte Carlo at C&O Motors in St. Albans, West Virginia in July 2006. At the time of the purchase of the Monte Carlo, Hinkle also purchased the Safe-Guard Addendum from the car sales representative from C&O Motors. See *Addendum, A-302*. The total vehicle price was Twenty-

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<sup>1</sup> Hinkle purchased the vehicle with her ex-husband.

Thousand Five Hundred Fifty-Two Dollars and Seventy Cents (\$20,552.70).<sup>2</sup> Within months following the purchase of the automobile, Hinkle and her ex-husband began to fall behind in their payments. In the Retail Installment Contract and Security Agreement executed at the time the automobile was purchased, the following provision was conspicuously stated:

Late Charge: If a payment is more than ten (10) days late, you will be charged a late charge in the amount of 5% of the payment due, not to exceed \$15.

*See Retail Installment Contract and Security Agreement, A-299.* The Retail Installment Contract noted that Hinkle and her ex-husband were scheduled to make seventy-two (72) payments of \$411.38, beginning on August 28, 2006. *See Retail Installment Contract and Security Agreement, A-299.* In addition to a number of late payments, there were a number of months that Hinkle and her husband made only partial payments, deferred payments and other months where they missed entire payments.<sup>3</sup> *See Payment History, A-304.*

A June 1, 2011 automobile accident resulted in Hinkle's automobile being considered a total loss. Hinkle's insurance carrier, State Farm, appraised the value of the automobile at that time in the amount of Seven Thousand Four Hundred Dollars (\$7,400.00). *See State Farm Loss Sheet, A-320.* State-Farm issued a check in the amount of Seven Thousand Two Hundred Eighty-Five Dollars (\$7,285.00) to Santander to pay off a portion of the remaining balance on the loan.<sup>4</sup> Including late fees, deferred payments, delinquent payments, and failure to make full

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<sup>2</sup> Hinkle and her ex-husband voluntarily financed Nineteen Thousand Seven Hundred Eighteen Dollars and Twenty Cents (\$19,718.20) over a period of seventy-two (72) months with an interest rate of 14.25%.

<sup>3</sup> As a result of Hinkle's irregular payment history, at the time of the June 2011 automobile accident, she owed an amount on her automobile loan which was greater than the amount that she should have owed if all payments had been made in full and on time pursuant to the terms of her automobile loan.

<sup>4</sup> Defendant Santander acquired this automobile loan from the original lender.

payments, Hinkle had a payoff balance of Eleven Thousand Nine Hundred Eighty Three Dollars and Eighty One Cents (\$11,983.81) at the time of the accident. *See Deficiency Letter, A-793.* Had Hinkle and her ex-husband complied with the terms of the Automobile Loan, the pay-off balance at the time of the automobile accident would have been Five Thousand Two Hundred Eighty-Three Dollars and Sixty-Eight Cents (\$5,283.68). *See Safe-Guard correspondence dated July 21, 2011, A-325.*<sup>5</sup> Against this undisputed backdrop, the Circuit Court entered an Order granting summary judgment finding that the Addendum was “insurance” and further finding that the terms of the Addendum contained latent and patent ambiguities precluding summary judgment on Hinkle’s claims against Santander.

**C. Hinkle’s Claims Against Safe-Guard.**

The Complaint in this civil action asserted that the Addendum constituted insurance pursuant to chapter thirty-three of the West Virginia Code. *See Complaint, A-16.* Moreover, Hinkle alleged that Safe-Guard committed common law and statutory bad faith pursuant to the West Virginia Unfair Trade Practices Act, West Virginia Code section 33-11-1, *et seq.*, as a result of the denial of Hinkles’ requested waiver for the remaining amount on her automobile loan following the accident on June 1, 2011. Finally, Plaintiff has asserted a breach of contract claim against Safe-Guard. *See Plaintiff’s Amended Complaint, A-29.*

**D. The Addendum.**

The Order entered by the Circuit Court failed to address the specific characteristics of the Addendum. Initially, it is critical for the Court to understand the nature of Safe-Guard’s role

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<sup>5</sup> If Hinkle had not incurred late fees and made payments pursuant to the terms of automobile loan, her entire automobile loan would have been paid in full following the automobile accident. Hinkle would have likely also received a check from State Farm in the amount of approximately Two Thousand Dollars (\$2,000.00) above and beyond the payoff of her automobile. Had Hinkle made all timely payments and not incurred late charges, there would have been no reason to submit a claim to Safe-Guard to waive the deficiency.

with the Addendum purchased by Hinkle. Safe-Guard does not relieve any debt and does not indemnify the purchaser of an Addendum. Safe-Guard receives the request for a debt cancellation, such as the claim made by Hinkle in this instance, and proceeds to process the claim and inform the lender whether a purchaser of an Addendum is entitled to have the remainder of the their automobile installment loan cancelled or relieved.

Gary Volino, (hereafter, “Volino”) the Rule 30(b)(7) deponent offered by Safe-Guard confirmed this arrangement. He testified, under oath, that Safe-Guard is not, in any form, a lender or in the business of loaning money to purchase vehicles. *See Deposition of Volino*, April 23, 2013, at 19:24; 20:1-6, A-333-334. Volino also confirmed that car dealers do not act as the agent of Safe-Guard to bind purchasers of Addendums to their terms. *See id.*, at 27:21-24; 28:1-2, A-335-336.<sup>6</sup> Volino confirmed that Safe-Guard *administers* the Addendums and Safe-Guard follows the terms of the contract. *Id.* at 28:7-11, A-336. During his deposition, Volino also confirmed that the lender waives the outstanding balance of an automobile loan in the event of a loss in accordance with the terms of the Addendum. *See id.* at 42:3-11, A-339.

Volino explained that the automobile dealer (“dealer”) is the lender at the point when the automobile is being purchased. *Id.* at 44:5-6, A-340. The dealer offers the Addendum to the customer, potentially with other products. Collectively, the auto loan, Addendum and other products become the loan package that is sent to the lender. *Id.* at 44:7-11, A-340. The lender will look for the Addendum *and it is the lender that may have insurance to cover losses associated with debt cancellation.* *Id.* at 44:13-19, A-340. Safe-Guard serves as the third-party administrator of the Addendum, if there is a claim. *Id.* at 44:21-24; 45:1-3, A-340. If there is no claim, Safe-Guard does not undertake any action with respect to an Addendum, which is contrary

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<sup>6</sup> Safe-Guard specifically objected to any “agency” findings in this case, as it was not an issue that briefed or argued before the Circuit Court. When the proposed order granting summary judgment was circulated by counsel for Hinkle, Safe-Guard noted its objection to such a finding. *See A-835.*

to an insurance company, where a policy must be renewed. Additionally, the Addendum is active for a limited amount of time, which also differs from insurance.

Critically, Volino testified that if the terms of the Addendum are met, and there is a deficiency, the lender will waive the balance of the loan and seek reimbursement from an insurance company, or “CLIP.” *Id.* at 46:2-8, *A-340*. *The insurance company is not a party to the Addendum but rather stands behind the lender.* The CLIP is first-party insurance only insuring the lender. Omitted from the Court’s Order was Volino’s confirmation that Safe-Guard merely acts as a “pass-through” or “third-party administrator.” *Id.* at 49:10-15, *A-341*. Of the total \$495 paid by Plaintiff for the addendum, Safe-Guard receives a very small fee, for processing any claims. *Id.* at 51:10-13. In this instance Safe-Guard received approximately \$175.00. *Id.* at 52:5-6. Of the \$175.00,, *A-341*. Safe-Guard only receives an administration fee, which averages about \$20.00. In this particular instance, Safe-Guard only received an administrative fee of Seven Dollars (\$7.00).<sup>7</sup> *Id.* at 52:23-24; 53:1, *A-342*. The remainder of the \$175.00 is remitted to the insurance company standing behind the lender. Outside of the \$175.00, the remainder of the \$495.00 is retained by the dealer as the entity selling the product. Volino further testified that an underwriter files for approval of the CLIP in West Virginia and there has never been an issue raised. *Id.* at 130:1-6, *A-361*. A portion of the one-time fee generated by the sale of a GAP Addendum is also provided to the independent agent that markets the addendum to dealerships. *Id.* at 108:18-20, *A-356*.

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<sup>7</sup> This is a critical difference from insurance companies and insurance products. Safe-Guard receives the same small fee whether a claim is denied or whether a debt is relieved. There is no “profit centering” of the claims process by Safe-Guard, and indeed there is no motive to improperly deny a claim as there is no financial benefit to Safe-Guard. There is also no benefit to a lender to deny a claim as the “CLIP” stands ready to reimburse the lender for any relief of debt that is accepted. These undisputed facts were not even addressed by the Circuit Court and went un rebutted in the briefing submitted by Hinkle on this issue.

Recognizing the importance of this issue, significant briefing occurred before the Circuit Court of Mingo County. On or about May 7, 2013, Hinkle filed a Motion for Partial Summary Judgment on the issue of whether the Addendum constituted “insurance” pursuant to W. Va. Code section 33-1-1. *See Plaintiff’s Motion, A-44.* On or about May 14, 2013, Safe-Guard filed its response in opposition to Plaintiff’s Motion for Summary Judgment. *See Safe-Guard Response, A-266.* On or about May 17, 2013, Plaintiff filed a Reply in Support of her Motion for Partial Summary Judgment. *See Plaintiff’s Reply, A-454.* On or about May 23, 2013, Safe-Guard filed a Sur Reply Brief, further detailing the reasons why Plaintiff’s Motion for Partial Summary Judgment must be denied. *See Safe-Guard’s Sur Reply, A-485.*

By Order entered October 16, 2014, Judge Thompson “FINDS that the ‘GAP Insurance’ agreement constitutes ‘insurance’ under W. Va. Code § 33-1-1 et seq.” *See* October 16, 2014 Order at 12, ¶ 31, *A-12.* Consequently, the circuit court found that facts were in dispute as to what Safe-Guard’s statutory duties were under the West Virginia Unfair Trade Practices Act. *See id.* at ¶ 33, *A-12.* This ruling by the Circuit Court was made in direct contravention of the West Virginia Code defining insurance and in contravention of clear statutory and administrative guidance by the West Virginia Office of Insurance Commissioner as further detailed below. As a result, the October 16, 2014 Order allows Hinkle’s erroneous claims under the West Virginia Unfair Trade Practices Act to continue subjecting Safe-Guard to the “expense and time involved in going through an essentially vain process.” *Hinkle v. Black*, 164 W. Va. 112, 121, 262 S.E.2d 744, 749 (1979). Moreover, the Circuit Court’s Order becomes more egregious and clear as the overwhelming majority of other jurisdictions who have examined debt cancellation agreements, such as the one at issue in this case, have found that such agreements are not insurance.

## SUMMARY OF ARGUMENT

There is a clear difference between a debt cancellation agreement between a lender and a borrower, which is *not* regulated as insurance in a majority of the states, and an insurance policy purchased from a third party insurance company. Most states, including West Virginia, recognize this distinction; however, the Circuit Court of Mingo County failed to acknowledge this difference. *See October 16, 2014 Order, A-1*. This distinction has been explained as follows:

The transference of risk is a hallmark of insurance. In a credit insurance transaction, for example, there are three parties involved: a creditor, who makes a loan; a borrower, who assumes an obligation to repay the loan and agrees to pay premiums for the credit insurance; and an insurance company, which agrees to assume the obligation to repay the loan if a specified event occurs. In other words, in a credit insurance transaction, there is transference of risk from the borrower and the creditor to the insurer.

There is no similar transference of risk in a DCC or DSA transaction. A DCC/DSA involves only two parties: (1) a creditor, which makes a loan and, in exchange for a fee paid by the borrower, agrees to suspend or cancel all or part of the loan upon the occurrence of a specified event; and (2) a borrower, who pays a fee for that protection. In other words, in a DCC or DSA transaction the creditor retains all the risk. If a specified event occurs, the creditor cancels or suspends the debt.

Barnett, Sivon & Natter, P.C. and McIntyre & Lemon, PLLC, *Debt Cancellation Contracts and Debt Suspension Agreements* 6. *See also American Bankers Ins. Group, Inc. v. Board of Governors of Federal Reserve System*, 3 F. Supp.2d 37 (D.D.C. 1998) (“Credit insurance is a product under which a debtor pays premiums in exchange for an insurance policy that will serve to discharge the balance of a debt in the event of a covered contingency. It is the type of insurance that is issued solely by licensed insurers who must comply with strict and extensive regulatory insurance requirements determined by each state. Debt cancellation agreements also

provide that a borrower's obligation to repay all or part of a debt will be discharged if a specified event occurs, such as the death, disability or unemployment of the obligor.”).

The October 16, 2014 Order finding that the GAP Agreement is insurance is a substantial, clear-cut, legal error in contravention of clear statutory and administrative law. Allowing trial to proceed under the October 16, 2014 Order will magnify this error and will result in unnecessary expenditures of resources by the parties and the Court. The key facts related to this issue are not in dispute and resolution of this issue is critical to the proper disposition of the case, thereby conserving costs to the parties and economizing judicial resources. *See State ex rel. Allstate Ins. Co. v. Karl*, 190 W.Va. 176, 437 S.E.2d 749 (1993). Additionally, the circuit court’s ruling casts significant uncertainty over an entire market of products in West Virginia that have not historically been regulated as “insurance.” Consequently, an immediate ruling by the West Virginia Supreme Court of Appeals on this issue is necessary to allow certainty for not only Safe-Guard but other companies with similar products as well.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Under West Virginia Rules of Appellate Procedure 18(a), Petitioner respectfully requests Rule 20 oral argument. This Petition is appropriate for oral argument pursuant to Rule of Appellate Procedure 20(a)(1), (2), and (4). Specifically, this Petition raises an issue of first impression in West Virginia: whether a debt cancellation agreement is insurance pursuant to West Virginia law. This is an issue of fundamental importance to the West Virginia citizens that purchase debt cancellation agreements, the automotive industry and dealerships that market and sell these products and the companies that offer these products for sale.<sup>8</sup> Finally, this issue is

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<sup>8</sup> Safe-Guard’s debt cancellation agreements are marketed and sold by automobile dealerships. To the extent that this product constitutes “insurance” these dealerships may unwittingly be considered “insurance agents” pursuant to W. Va. Code § 33-1-12. Such an incredible rewriting of debt

repeatedly arising before West Virginia trial courts and should be resolved by this Court. Accordingly, oral argument is both necessary and appropriate.

### ARGUMENT

#### A. Standard.

This Petition for Writ of Prohibition is filed pursuant to Article VIII (8), Section Three (3) of the West Virginia Constitution, granting the Supreme Court of Appeals original jurisdiction in prohibition, and pursuant to West Virginia Code Chapter 53, Article 1, Section 1.

“The writ of prohibition lies as a matter of right in all cases of usurpation and abuse of power when the court does not have jurisdiction of the subject matter in controversy, or having such jurisdiction, exceeds its legitimate powers.” *State ex el. Lynn v. Eddy*, 152 W. Va. 345, 163 S.E.2d 472 (1968); West Virginia Code Chapter 53, Article 1 (§53-1-1). “The writ is no longer a matter of sound discretion, but a matter of right; it lies in all proper cases whether there is other remedy or not.” *Norfolk & W. Ry. V. Pinnacle Coal Co.*, 44 W. Va. 574, 576, 30 S.E. 196, 197 (1898).

Although traditionally, “the Writ of Prohibition speaks purely to jurisdictional matters,” *State ex rel. Williams v. Narick*, 164 W. Va. 632, 635, 264 S.E.2d 851, 854 (1980), the scope of the writ of prohibition has been greatly expanded under West Virginia law including cases to correct clear-cut legal errors in contravention of clear statutory, constitutional or common law mandates where there is a high probability that the trial will be completely reversed if not corrected in advance. *See Syl. pt. 1, Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979).

In determining whether to grant a writ to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use

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cancellation agreements and the role of automobile dealerships in the sale of these products necessitates finality provided by a ruling of this Court.

prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

*Id.*<sup>9</sup> “The prohibition standard set out in Syllabus Point 1 of *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979), permits an original prohibition proceeding in this Court to correct substantial legal errors where the facts are undisputed and resolution of the errors is critical to the proper disposition of the case, thereby conserving costs to the parties and economizing judicial resources.” Syl. pt. 1, *State ex rel. Allstate Ins. Co. v. Karl*, 190 W. Va. 176, 437 S.E.2d 749 (1993). “Where prohibition is sought to restrain a trial court from abuse of its legitimate powers, rather than its jurisdiction, the appellate court should review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate, ...,” Syl. pt. 2, *Woodall v. Laurita*, 156 W. Va. 707, 195 S.E.2d 717 (1973).

**B. The October 16, 2014 Order finding that the GAP Agreement is insurance is a substantial, clear-cut, legal error in contravention of a clear statutory, constitutional, administrative or common law mandate.**

The most important factor in evaluating a petition for a Writ of Prohibition is “whether the lower tribunal’s order is clearly erroneous as a matter of law”. *State ex rel. State Farm Mut.*

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<sup>9</sup> See also Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 14-15, 483 S.E.2d 12, 14-5 (1996) (“[T]his 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 oft 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 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.”).

*Auto. Ins. Co. v. Bedell*, 226 W. Va. 138, 145, 697 S.E.2d 730, 737 (2010). “A finding is “clearly erroneous” when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.” Syl. pt. 1, in part, *In the interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996). The October 16, 2014 Order from the Circuit Court of Mingo County finding that the debt cancellation agreement was insurance was clearly erroneous as shown by the West Virginia Code, decisions of this Court, the regulatory guidance provided by the State of West Virginia and the vast majority of jurisdictions that have addressed this issue.

***1) The October 16, 2014 Order Rewrites the Definition of “Insurance” Contained in West Virginia Code Section 33-1-1 Which Exceeds the Court’ Authority.***

Initially, the debt cancellation agreement at issue in this case is not insurance because there is no third-party indemnification of the automobile purchaser. West Virginia Code section 33-1-1 defines insurance as:

a contract whereby one agrees to indemnify another or pay a specified amount upon determinable contingencies.

W. Va. Code § 33-1-1.<sup>10</sup> Black’s Law Dictionary defines “indemnify” as “1. To reimburse (another) for a loss suffered because of a third party’s act or default. 2. To promise to reimburse (another) for such a loss. 3. To give (another) security against such a loss.” *Black’s Law Dictionary* 616 (Abrid. 7<sup>th</sup> ed. 2000). *See also Webster’s Third New International Dictionary of*

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<sup>10</sup> Under the simplest reading of this section of the West Virginia Code, every contract entered into in the State of West Virginia is potentially a contract of insurance. “All contracts wither expressly or implicitly allocate risk in one way or another.” Jerry, Robert J., *Understanding Insurance Law* 16 (2<sup>nd</sup> ed. 1999).

*the English Language Unabridged* 1147 (1970) (defining “indemnify” as “to make compensation to for incurred hurt or loss or damage”). In that debt cancellation agreements extinguish debt, and there is no payment to the automobile purchaser upon a certain contingency, the Addendum does not meet the definition of insurance under West Virginia law.<sup>11</sup>

In addition to a plain reading of West Virginia Code, this Court has required third-party indemnification for a particular transaction to be considered insurance. For example, this Court has addressed the issue of whether a “home warranty contract” was insurance pursuant to West Virginia Code section 33-1-1 in *Riffe v. Home Finders Associates, Inc.*, 205 W.Va. 216, 517 S.E.2d 313 (1999). In *Riffe*, the “home warranty contract” purported to indemnify the homeowner for any repairs that might be necessary after a seller sold a home to a buyer. Specifically, this Court addressed the issue of whether a “service contract” where a third-party, “who is neither the buyer or seller of property, contracts with the buyer to indemnify him or her for repairs made to the property for a certain period of time after a sale.” In finding that the “service contract” was insurance, this Court noted the importance of the third party indemnification writing,

Under the plan, a homeowner would file a claim, have the repair made, and would be indemnified by home security for the cost of a covered repair, minus any deductible. There can be no question that the contract offered by Home Security “is a contract whereby one undertakes to indemnify another or to pay a specified amount upon determinable contingencies.” W. Va. Code § 33-1-1 (1957). . . An analysis of the cases set forth above reveals that a warranty and a service contract have many of the same features. Nonetheless, the distinguishing feature which sets them apart from an insurance policy is the fact that the respective companies manufacture or sell the products which they agreed to repair or replace. No third parties are involved nor is there a risk accepted which the company, because of its

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<sup>11</sup> Safe-Guard notes that there is a very limited, unique circumstance where a debtor/purchaser may be paid the value of the deficiency in the automobile loan. This would only happen in a circumstance where the debtor unilaterally paid the lender the balance of the remaining automobile loan prior to the adjustment and waiver of the remaining debt. In this very limited circumstance, Safe-Guard makes a direct payment to the debtor in order to assure that the debtor receives the consideration due under the GAP Addendum.



This finding is presumably based on the definition of “indemnity” found on the previous page of the Order. If so, this ruling is directly contradicted by the Office of the Insurance Commissioner’s interpretative guidelines for debt cancellation agreements, as well as the clear and conspicuous language of West Virginia Code section 33-1-1, which specifically states that insurance “is a contract whereby one undertakes to indemnify another or to pay a specified amount upon determinable contingencies.” *See* W. Va. Code § 33-1-1 (1957). Additionally, in *Riffle, supra*, this Court clearly stated that there must be “indemnity” for a product to be considered insurance. The Court’s ruling broadly sweeps up all debt cancellation agreements into the realm of “insurance” simply by virtue of the fact that it is debt cancellation. Through its ruling, the Court has eliminated the critical distinction between debt cancellation agreements and insurance; rendered an entire industry (which may also include banking and lending institutions) subject to insurance regulations that were not contemplated and judicially rewrote clear and conspicuous regulatory provisions addressing debt cancellation agreements rendering them void; and ignored the specific guidelines of the Insurance Commissioner concerning what products were to be considered debt cancellation agreements.

Succinctly stated, there is a clear difference between debt cancellation contracts and insurance that was overlooked by the Respondent and the Circuit Court of Mingo County. This distinction has been explained as follows:

The transference of risk is a hallmark of insurance. In a credit insurance transaction, for example, there are three parties involved: a creditor, who makes a loan; a borrower, who assumes an obligation to repay the loan and agrees to pay premiums for the credit insurance; and an insurance company, which agrees to assume the obligation to repay the loan if a specified event occurs. In other words, in a credit insurance transaction, there is transference of risk from the borrower and the creditor to the insurer.

There is no similar transference of risk in a DCC or DSA transaction. A DCC/DSA involves only two parties: (1) a creditor, which makes a loan and, in

exchange for a fee paid by the borrower, agrees to suspend or cancel all or part of the loan upon the occurrence of a specified event; and (2) a borrower, who pays a fee for that protection. In other words, in a DCC or DSA transaction the creditor retains all the risk. If a specified event occurs, the creditor cancels or suspends the debt.

Barnett, Sivon & Natter, P.C. and McIntyre & Lemon, PLLC, *Debt Cancellation Contracts and Debt Suspension Agreements* 6. See also *American Bankers Ins. Group, Inc. v. Board of Governors of Federal Reserve System*, 3 F. Supp.2d 37 (D.D.C. 1998). (“Credit insurance is a product under which a debtor pays premiums in exchange for an insurance policy that will serve to discharge the balance of a debt in the event of a covered contingency. It is the type of insurance that is issued solely by licensed insurers who must comply with strict and extensive regulatory insurance requirements determined by each state. Debt cancellation agreements also provide that a borrower's obligation to repay all or part of a debt will be discharged if a specified event occurs, such as the death, disability or unemployment of the obligor.”). The Court’s ruling has improperly broadened the definition of “insurance” to include products that were never intended or contemplated to be “insurance.”

**2) *The October 16, 2014 Order Eliminates the Clear Distinction Between “Insurance” and “Debt Cancellation Agreements” Formalized in the West Virginia Code of State Rules.***

In direct juxtaposition of the Circuit Court of Mingo County’s October, 16, 2014 Order, the West Virginia Code of State Rules specifically recognizes the distinction between debt cancellation contracts, such as the one at issue in this case, and insurance. West Virginia Code of State Rules 106-11-6 sets forth a six part test to determine whether a particular debt cancellation agreement is a permissible charge. See W. Va. C.S.R. § 106-11-6.<sup>13</sup> Directly

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<sup>13</sup> Stating:

6.1. Fee for Cancellation of Debt. -- A lender or creditor may charge and collect a fee in connection with a contract to cancel (i) all of the debtor's liability for non-delinquent

following this provision, there is a provision for GAP Insurance for Cancellation of Debt.<sup>14</sup> The distinction between the two is the third-party indemnification of the borrower. In the debt

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amounts which exceed the value received by the creditor or its assignee for the collateral securing the obligation, or (ii) the remaining liability in the event of the loss of life, health, or income of the debtor, or in case of an accident. The fee is a permissible additional charge: Provided, That,

6.1.a. The debt cancellation agreement is not required by the lender or the creditor, and this fact is disclosed in writing;

6.1.b. The fee is disclosed in writing and the term of the agreement is equal to the term of the loan or credit transaction;

6.1.c. The borrower signs or initials an affirmative written request for the plan after receiving the disclosures required by subdivisions a and b of this subsection;

6.1.d. In the case of a debt cancellation plan for collateral, the amount of the debt at the time of the contract, excluding any insurance or additional charges, exceeds \$2,000;

6.1.e. In the case of a debt cancellation plan for loss of life, health, or income or in case of an accident, the contract is sold in lieu of corresponding credit life, health, loss of income or accident insurance; and

6.1.f. The debt cancellation fee is one which is not treated as a finance charge for purposes of the federal Truth-in-Lending Act.

<sup>14</sup> Stating:

6.2. Fee for GAP Insurance for Cancellation of Debt-- A lender or creditor may impose and collect a fee in connection with an insurance contract for Guaranteed Automobile Protection ("GAP") to cancel all of the debtor's liability for non-delinquent amounts which exceed the value received by the creditor or its assignee for the collateral securing the obligation: Provided, That,

6.2.a. The loan or credit sale is secured by a motor vehicle and the amount of the debt at the time of the contract, excluding any insurance or additional charges, exceeds \$2,000;

6.2.b. The GAP insurance agreement canceling the debt is not required by the lender or the creditor, and this fact is disclosed in writing;

6.2.c. The premium fee is disclosed in writing and the term of the policy coverage is equal to the term of the loan or credit transaction;

6.2.d. The borrower signs or initials an affirmative written request for coverage after receiving the disclosures required by subdivisions b and c of this subsection; and

cancellation agreement, the lender “forgives” or “cancels” the debt owed on the happening of certain contingencies. Under GAP Insurance, an insurance company makes payment to the lender on the happening of certain contingencies. In this case, absent very unusual circumstances, there is never any payment made to a borrower and such a payment is never contemplated in the language of the Addendum. Finally, the West Virginia Code of State Rules specifically state that the “Commissioner of Insurance retains the authority to determine whether any debt cancellation agreement constitutes an insurance product.” *Id.* at 6.3.<sup>15</sup> The Circuit Court of Mingo County’s October, 16, 2014 Order completely ignores this administrative guidance, all of which favor a finding that the Addendum at issue in this case is not insurance.

**3) *The October 16, 2014 Order Ignored the Interpretation of the West Virginia Office of the Insurance Commissioner Which Strongly Supports a Finding that the Addendum is Not Insurance.***

The West Virginia Office of the Insurance Commissioner, (hereinafter, “OIC”), has issued guidance on the classification of debt cancellation agreements which were ignored by the Circuit Court of Mingo County in the October 16, 2014 Order. The Circuit Court of Mingo County’s October, 16, 2014 Order ignores this interpretation and does not address the 2008 Opinion Letter, which was addressed in *Justice v. Branch Banking and Trust Company*, in any detail.<sup>16</sup>

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6.2.e. The GAP insurance policy fee is one which is not treated as a finance charge for purposes of the federal Truth-in-Lending Act.

<sup>15</sup> Federal Regulations also support the contention that debt cancellation contracts are banking products and not insurance. *See* 67 Fed. Reg. at 58962, 58975 (stating that debt cancellation contracts and debt suspension agreements are banking products, not insurance.).

<sup>16</sup> It is also clear that the factors noted by the OIC in the 2008 letter were all met by the Addendum, supporting the rationale that this product was not insurance. All of the five (5) factors

Additionally, a 2009 Informational Letter from the West Virginia Office of the Insurance Commissioner provides clarification on the issue of whether debt cancellation agreements constitute insurance. In this Informational Letter, the West Virginia Insurance Commissioner noted with approval the use of debt cancellation agreements and debt suspension agreements writing,

Debt cancellation contracts and debt suspension agreements are defined by the United States Department of Treasury as follows:

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support a finding that the Addendum is not insurance. First, Hinkle conceded that she was not required to enter into the Addendum. In addition, the Addendum was incidental to the lender's services as they constitute a service which is only offered if an automobile is financed through a particular lending institution or through a particular automotive dealership. Additionally, the GAP Addendum is not a "profit center." Volino testified that Safe-Guard collected a seven (\$7.00) fee for this addendum. The lender does not retain any money from the Addendum. Hinkle attempted to muddy the waters by arguing that the CLIP is the profit center. There is no difference on the fee received by Safe-Guard if the claim is accepted or denied. Moreover, it is beyond dispute that the Addendum provides only for a waiver of the loan balance and no other benefits for the borrower. The Addendum does not vary with the borrower's age health or other underwriting standards. Finally, the party offering the Addendum cannot state or imply that the contract is insurance.

The Court's ruling is likely based on the fifth factor noted above. Specifically, during discovery, Hinkle produced an affidavit asserting that C&O Motors salesman Paul Waugh used the term "insurance" when describing the product. To be clear, nothing on the Addendum states or implies that the Addendum should be considered "insurance." Whether or not Hinkle's affidavit is accurate, Safe-Guard cannot be bound by insurance regulations solely because a used car salesman may have used the term "insurance" without the knowledge or approval of Safe-Guard. *See Affidavit of Damon Wiener, A-383, at ¶6.* ("We have not marketed the deficiency waiver addendum as insurance to anyone in West Virginia.")

To disregard the significant efforts Safe-Guard has made to comply with the pertinent regulations and guidelines based solely on unconfirmed representations of the C&O salesman would perpetrate a grievous wrong against Safe-Guard. The Circuit Court's order also repeatedly describes the Safe-Guard Addendum as "GAP Insurance." The Circuit Court's order fails to address the undisputed fact that the Safe-Guard documents provided to Hinkle did not utilize the term "insurance." The only use of the term "insurance" was allegedly by Paul Waugh, a used car salesman for C&O Motors and in a C&O generated document that was never received by, approved or made known to Safe-Guard until Hinkle's claim was submitted in 2011. *See Circuit Court's October 16, 2014 order, at pp. 1-4.*

The Addendum does not state that is insurance. The Circuit Court's order confirmed this undisputed fact. *See Order, at p. 11; ¶ 28, A-11.* The Circuit Court's order erroneously states that the parties "acquiesced to and/or adopted" to the term GAP insurance during the hearing. This is not true. While copies of the transcript of the various hearings on this issue are not yet available, Safe-Guard did not adopt the term "GAP Insurance" and argued strenuously against a finding that the Addendum was "insurance."

Debt cancellation contract means a loan term or a contractual arrangement modifying loan terms under which a lender agrees to cancel all or part of a customer's obligation to repay an extension of credit from that lender upon the occurrence of a specified event. The agreement may be separate from or a part of other loan documents. 12 CFR 37.2(f).

Debt suspension agreement means a loan term or contractual arrangement modifying loan terms under which a lender agrees to suspend all or part of a customer's obligation to repay an extension of credit from that lender upon the occurrence of a specified event. The agreement may be separate from or a part of other loan documents. The term debt suspension agreement does not include loan payment deferral arrangements in which the triggering event is the borrower's unilateral election to defer repayment, or the bank's unilateral decision to allow a deferral of repayment. 12 CFR 37.2(g).

Cline, Jane L., *West Virginia Informational Letter No. 171* (September 2009). This Informational Letter firmly establishes the position of the Office of the Insurance Commissioner that Debt Cancellation Agreements are not insurance stating,

***The OIC does not consider debt cancellation contracts or debt suspension agreements (sometimes collectively hereinafter referred to as "the Contracts"), as defined above, to be insurance products because the Contracts neither require the lender to indemnify another nor require a payment upon a determinable contingency.*** In other words, the Contracts do not require the lender to reimburse or make a payment to the borrower as a result of the occurrence of a certain event. The Contracts also do not require a third party to reimburse the lender for its loss as a result of the borrower's failure to repay the loan after a certain event occurs. Instead, the Contracts simply require the lender to cancel or waive the borrower's debt upon the happening of a specified event.

In order to fall outside OIC regulation, the cancellation or waiver of the debt must be directly provided by the lender. A contract in which a third party is obligated to indemnify the lender -- as a result of a specified event that causes the lender to not be repaid by the borrower -- is not a debt cancellation contract or debt suspension agreement. This type of contract is an insurance transaction and is subject to the insurance laws of the State of West Virginia. A third party includes, but is not limited to, a subsidiary or affiliated company of the lender.

*Id.* (emphasis added).

The Circuit Court of Mingo County and the Respondent misconstrued the nature of the Addendum as related to the issue of whether it is insurance. If certain contingencies are met, the debt is extinguished or cancelled and no payment is made to the borrower or consumer. This failure to recognize the distinction between debt cancellation agreements and insurance is clear legal error in violation of West Virginia Code and authoritative regulatory guidance.

**C. The Requested Writ of Prohibition is Safe-Guard's Only Available Means or Relief and Absent the Requested Writ Safe-Guard Will Suffer Irreparable Harm.**

A Writ should be issued because Safe-Guard "has no other adequate means, such as direct appeal, to obtain the desired relief." *State ex rel. Hoover v. Berger*, 199 W. Va. at 21, 483 S.E.2d at 21. Moreover, absent the requested Writ, Safe-Guard will be irreparably harmed in a manner that is uncorrectable on appeal. *See id.* (stating that another factor the West Virginia Supreme Court of Appeals relies upon to determine whether to issue a Writ of Prohibition is "whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal.").

Initially, interlocutory appeal is unavailable to Safe-Guard. Moreover, a direct appeal at the conclusion of this case would only exacerbate the harm to Safe-Guard and to the entire automotive industry in West Virginia. The October 16, 2014 Order finding that the Addendum is insurance will subject Safe-Guard to pre-trial motions, jury instructions, attorney fees and a multitude of lawyer hours preparing a case for trial under the West Virginia Unfair Trade Practices Act.<sup>17</sup> After days of testimony, the jury will be instructed on the West Virginia Unfair

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<sup>17</sup> In that debt cancellation agreements are two-party transactions, the West Virginia Unfair Trade Practices Act should not apply to debt cancellation agreements such as the Addendum in this case. In a similar vein, the West Virginia Supreme Court of Appeals has ruled that "[a] self-insured entity is not in the business of insurance." *Hawkins v. Ford Motor Co.*, 211 W.Va. 487, 492, 566 S.E.2d 624, 629 (2002). As such, "[t]he Unfair Trade Practices Act, W. Va. Code §§ 33-11-1 to 10, and the tort of bad faith apply only to those persons or entities and their agents who are engaged in the business of insurance." Syl. pt. 2, *Hawkins*, 211 W.Va. 487, 566 S.E.2d 624. As the debt cancellation is not

Trade Practices Act, its elements and its remedies. After verdict and the time and expense of the Court, the lawyers, the parties and the jurors, Safe-Guard will then appeal the October 16, 2014 Order to this Court for relief. Then, this Court will have the opportunity to address the clear error of law contained in the October 16, 2014 Order finding the Addendum “insurance”. Given the statutory and regulatory guidance by West Virginia, other states, and the federal courts and regulations, the October 17, 2014 Order presents compelling evidence that this Court would rule that the Circuit Court’s ruling was erroneous. This reversal will not undue the harm that the Court, the jurors and the parties will undergo in the next several months. Additionally, it is probable that the erroneous ruling by the Circuit Court of Mingo County may spawn additional claims and suits across West Virginia involving similar products. Accordingly, a writ of prohibition should be issued to prevent this waste of judicial economy and resources.

**D. The Frequency of this Issue Weighs in Favor of Granting the Requested Writ.**

Another factor relied upon by the West Virginia Supreme Court of Appeals in determining whether to issue a writ of prohibition is “whether the lower tribunal’s order is an oft repeated error or manifest persistent disregard for either procedural or substantive law.” *State ex rel Hoover v. Berger*, 199 W. Va. at 21, 483 S.E. 2d at 21. The distinction between debt cancellation agreements and insurance is being increasingly confronted by West Virginia trial courts. Given the number of consumer transactions, including but not limited to the automobile loans, in West Virginia, the argument regarding debt cancellation agreements and insurance is almost certainly going to be presented to trial courts with increasingly frequency, especially in light of the circuit court’s ruling. Absent the requested writ, these courts will continually have to confront this issue without authoritative guidance from this Court.

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insurance under West Virginia law, it is logical that the Unfair Trade Practices Act cannot form the basis for a cause of action against Safe-Guard. As the Addendum is not insurance under West Virginia law, the Unfair Trade Practices Act cannot form the basis for a cause of action against Safe-Guard.

For example, the Circuit Court of Mercer County has confronted this issue in *Dixon v. Branch Banking & Trust Co.*, 07-C-626, and considered whether a debt cancellation agreement was “insurance.” On June 24, 2009, Judge Swope entered an *agreed* order, which specifically found that the debt cancellation agreement at issue was *not insurance*. See June 24, 2009 Order of the Circuit Court of Mercer County, A-286. The Mercer County Order specifically found that the contract “was a two party contract between a lender and a borrower that cancels or reduces the borrower’s loan payments upon the happening of a protected event.” *Id.* at ¶ 5. Similar to this case, the contract “. . . does not state or imply that it is insurance.”

Moreover, both the Northern and Southern District Courts of West Virginia have confronted the distinction between debt cancellation agreements and insurance in recent years. In *Justice v. BB&T*, 2009 U.S. Dist. LEXIS 24668 (S.D.W. Va. 2009), the Court undertook a brief discussion of debt cancellation agreements in the context of a pending motion to dismiss Plaintiff’s claims. However, the Court did not substantively address any of the issues concerning whether a GAP Addendum, such as the one in this case, constituted an insurance product. Finding a lack of West Virginia authority, the Southern District of West Virginia sidestepped the issue writing,

[w]ithout resolving whether the Payment Protection Contract is a contract of insurance, the possibility exists that it is. The conclusion is reached largely by negative implication. Nothing in either federal law, or the law of West Virginia, precludes such a finding.

*Id.* at \*37.

Similarly, the Northern District of West Virginia confronted debt cancellation agreements in the contest of a home equity loan in *Stanley v. Huntington Nat. Bank*, 2012 WL 254135 (N.D.W. Va. 2012). Similar to *Justice*, above, Judge Stamp avoided the distinction between a debt cancellation agreement and insurance writing,

“[i]t can hardly be disputed that debt cancellation agreements and credit insurance serve the same basic purpose. Although they differ somewhat in legal form, each product extinguishes the remaining balance of the consumer's loan in the event of a covered contingency.” *Am. Bankers Inc. Group, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 3 F.Supp.2d 37, 44 (D.D.C.1998). As explained above, even if this Court were to characterize the Rider as an insurance contract, it does not alter this Court’s finding that the doctrine of reasonable expectations does not apply because the language of the Rider clearly sets forth the exclusions.

*Stanley v. Huntington Nat. Bank*, 2012 WL 254135 (N.D.W. Va. 2012).

Debt cancellation agreements have a long and extensive history finding their roots in antiquity in such notable foundational documents as the Code of Hammurabi,<sup>18</sup> the Bible,<sup>19</sup> the law of ancient Greece<sup>20</sup> and the Qur’an.<sup>21</sup> Today, debt cancellation agreements are prevalent in an increasingly credit based society. Consumer transactions such as home loans, home equity loans, credit cards, and automobile loans are a necessary part of everyday life for most families and each offer debt cancellation products in various nomenclatures. Given the thousands of consumer transactions occurring in the State of West Virginia each year, the sheer number of potential disputes between lenders and borrowers has the potential to flood our trial courts with litigation over the present uncertainty existing in West Virginia law.

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<sup>18</sup> Harper, Robert Francis. *The Code of Hammurabi King of Babylon about 2250 B.C.* § 48 (University of Chicago Press 1904) (“If a man owe a debt and Adad inundate his field and carry away the produce, or, through lack of water, grain have not grown in the field, in that year he shall not make any return of grain to the creditor, he shall alter his contract-tablet and he shall not pay the interest for that year.”) (available at [http://upload.wikimedia.org/wikipedia/en/4/4e/The\\_code\\_of\\_Hammurabi.pdf](http://upload.wikimedia.org/wikipedia/en/4/4e/The_code_of_Hammurabi.pdf)).

<sup>19</sup> Deuteronomy 15:1-2 (“At the end of every seven years thou shalt make a release. And this is the manner of the release: Every creditor that lendeth ought unto his neighbour shall release it; he shall not exact it of his neighbour, or of his brother; because it is called the LORD'S release.”).

<sup>20</sup> See <http://www.britannica.com/EBchecked/topic/329193/land-reform/61984/Ancient-reforms#ref320298> (“When Solon was elected archon, or chief magistrate, c. 594 bce, his main objective was to free the land and destroy the *horoi*. His reform law, known as the *seisachtheia*, or “shaking-off the burdens,” cancelled all debts, freed the *hektēmoroi*, destroyed the *horoi*, and restored land to its constitutional holders. Solon also prohibited the mortgaging of land or of personal freedom on account of debt.”).

<sup>21</sup> See Qur'an 2:280 (“If the debtor is in difficulty, grant him time till it is easy for him to repay. But, if ye remit it by way of charity, that is best for you if ye only knew.”).

**E. The Requested Writ Raises an Issue of First Impression in West Virginia.**

The Writ requested by Safe-Guard raises an issue not previously addressed by this Court. Although this Court has not addressed the issue of whether a debt cancellation contract or deficiency waiver addendum is insurance, almost every state in the nation has done so either through Appellate Courts of record or appropriate regulation. *See First Nat. Bank of Eastern Arkansas v. Taylor*, 907 F.2d 775 (8<sup>th</sup> Cir. 1990) (debt cancellation agreements differ from insurance in that debt cancellation agreements do not require a lender “to take an investment risk or to make payment to the borrower's estate. The debt is simply extinguished when the borrower dies. Thus, the primary and traditional concern behind state insurance regulation—the prevention of insolvency—is not of concern to a borrower who opts for a debt cancellation contract.”).

For example, in an October 17, 1994 Opinion, the Insurance Commissioner of Maryland found that GAP Addendums were not insurance and cited to a California opinion for the following:

Since the lessor [here, the lender] is not agreeing to pay anybody anything, but is simply agreeing not to hold the lessee [here, the borrower] liable, there is no need for accumulating reserves. The solvency or insolvency of the lessor does not affect this contractual provision.

*See Opinion of the Maryland Insurance Commissioner Finding GAP Products Were Not Insurance, A-373.*

Similarly, Arkansas has recognized that debt cancellation agreements are not insurance in Arkansas Insurance Bulletin 2-2008, which unequivocally confirms that:

The Department does not consider two-party loan addendum contracts or GAP contracts between a lender and a debtor, in the context of an extension of credit, i.e., execution of a finance note or loan offered to a debtor to buy or lease an automobile or other personal property on time using installment payments, to be insurance products.

*See Arkansas Insurance Bulletin 2-2008, A-381.*

New York's statutory law, at NY CLS Ins. § 1101(b)(3), clearly notes that GAP Addendums, sold incidental to the purchase of an automobile do not constitute insurance.<sup>22</sup> Other states recognize the distinction between debt cancellation agreements and insurance.<sup>23</sup>

Against this backdrop of guidance, West Virginia has not definitely answered the question.<sup>24</sup> As recently as 2009, Judge Copenhaver of the District Court for the Southern District of West Virginia recognized the lack of authority in West Virginia writing,

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<sup>22</sup> The New York statute, with emphasis added, provides:

*(3) Notwithstanding the foregoing, the making of an agreement pursuant to which a lessor of personal property, a creditor making a loan or other credit transaction on personal property or, in the absence of a waiver by the lessor or creditor, the lessor's or creditor's assignee waives the obligation of the lessee or debtor for the gap amount, as such term is defined in paragraph fifty-two of subsection (a) of section one hundred seven of this chapter, shall not constitute, or be deemed to constitute, the doing of an insurance business if:*

*(I) the lessor or creditor or, in the absence of a waiver by the lessor or creditor, the assignee waives any and all obligations of the lessee or debtor for the gap amount and the lessee or debtor is discharged from any and all further obligation to pay the gap amount;*

*(ii) the waiver applies only in the event of a total loss of the personal property occasioned by its theft or physical damage;*

*(iii) in the event the lessor, creditor or assignee purchases lessor or creditor gap insurance, the charge to the lessee or debtor for the waiver does not exceed the cost of the lessor or creditor gap insurance coverage; provided, however, that nothing contained herein shall be construed to prohibit the lessor from including the charge for the waiver in the capitalized cost as that term is defined in subdivision eleven of section three hundred thirty-one of the personal property law.*

<sup>23</sup> See Ala. Admin. Code r. 482-1-111-.03(j); Del. Code Ann. tit. 5, § 2907(e)(4); GA Stat. §§33-63-1; 33-63-2(c); Idaho Code Ann. § 28-41-106(5); Iowa Code Ann. §322.19 ; KY Rev. Stat. Ann. §190.100(7); Mont. Code Ann. §30-14-151(4); NE Rev. Stat. §45-1102(3); N.C. Gen. Stat. §66-442; OH Stat. §1317.05(B); Vt. Stat. tit. 8 §10405(a).

<sup>24</sup> While this Court has not yet addressed the issue, the West Virginia OIC and the legislature have addressed the issue. The OIC's 2008 and 2009 Informational Letters establish a very strong presumption in favor of a finding that debt cancellation agreements are not insurance. Additionally, the Code of State Rules contains very clear guidance that debt cancellation agreements are not to be construed as insurance, absent a series of very particularized findings which are not present here. If the OIC letters are to be considered "interpretative rules" this Court has previously noted the following:

Contracts like the Payment Protection Plan are known as “debt cancellation contracts” or “debt cancellation agreements.” Deceptive in its simplicity, W. Va. Code § 33-1-1 provides that, “[i]nsurance is a contract whereby one undertakes to indemnify another or to pay a specified amount upon determinable contingencies.” Generally, insurance “can be variously defined with no suitable definition for all purposes and situations.” 1-1 APPLEMAN ON INSURANCE § 1.4 (2d 2008). The Supreme Court of Appeals of West Virginia has never considered whether a debt cancellation contract is, or is not, a contract of insurance. Beyond concurring in the proposition that “[i]nsurance policies ... are generally issued by third parties and are based on a theory of distributing risk among many customers,” *Riffe v. Home Finders Assoc., Inc.*, 205 W. Va. 216, 517 S.E.2d 313, 318 (W. Va. 1999) (quoting *Griffin Sys., Inc. v. Washburn*, 153 Ill. App. 3d 113, 106 Ill. Dec. 330, 505 N.E.2d 1121, 1124 (Ill. App. Ct.1987)), the Supreme Court of Appeals has offered no guidance as to how to determine whether a contract constitutes insurance. Consequently, this court finds itself in relatively uncharted waters as far as the law of West Virginia is concerned.

*Justice v. Branch Banking and Trust Co.*, 2009 WL 853993 (S.D.W. Va. 2009). These uncharted waters need explored and this issue of first impression resolved. The increasing frequency of the issue and its importance to significant numbers of West Virginians who purchase or who are offered debt cancellation agreements weighs heavily in granting a writ of prohibition to address this important and timely legal issue.<sup>25</sup>

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‘We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.’

*Appalachian Power Co. v. State Tax Dep't of W. Virginia*, 195 W. Va. 573, 583, 466 S.E.2d 424, 434 (1995) (internal citations omitted).

<sup>25</sup> The Circuit Court of Mingo County’s October 16, 2014 Order also contains a number of other appealable errors. For example, West Virginia case law has confirmed that an award of summary judgment must contain very specific findings of fact and conclusions of law. *See Nestor v. Bruce Hardwood Flooring, L.P.*, 206 W. Va. 453, 456, 525 S.E.2d 334, 337 (1999). Safe-Guard willingly concedes that the Circuit Court’s order contains findings of fact and conclusions of law. The problem with this essential component of the Court’s order deals with the fact that the Court did not address any of the considerations announced by the OIC or contained in related to the factors to be considered in the

## CONCLUSION

WHEREFORE, Petitioner Safe-Guard Products International, LLC prays as follows:

- a. That the Petition for Writ of Prohibition be accepted for filing;
- b. That this Court issue a rule directing the Respondents to show cause, if any they can, as to why a Writ of Prohibition should not be awarded;
- c. That the case be stayed until resolution of the issues raised in this Petition;
- d. That the Court award a Writ of Prohibition against the Respondents, instructing the circuit court to direct entry of an Order finding that the Addendum does not constitute “insurance”; and
- e. That the Court award such other and further relief as the Court may deem proper.

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determination of whether a product is insurance. *See infra*. Because the order fails to address any of the considerations announced by the OIC and West Virginia Code of State Rules 106-11-6, it is in error.

The Court’s Order also contains other specific findings that were not ripe for resolution, thereby constituting error. The Court’s order found that there were genuine issues of material fact concerning statutory duties imposed by West Virginia Code section 33-11-4. *See* Order, at p. 12; ¶ 33 despite no pending motions on this issue. A finding that there were “issues of fact” is clear error as there were no pending motions related to this section of statute. *See Zaleski v. West Virginia Mut. Ins. Co.*, 224 W.Va. 544, 552, 687 S.E.2d 123, 131 (2009) (citations omitted). Similarly, the Court’s Order also addressed the potential for a finding of “actual malice” in the context of Hinkle’s bad faith claim, finding disputed issues of fact. *See*, Order, at p. 13; ¶ 36. Again, this issue was not briefed or otherwise before the Court and is not a properly before the Court. Another appealable error is that the Order also contained language indicating that Mr. Waugh, an employee of C&O motors, was an “agent” of C&O Motors and that the dealership was a party to the GAP Addendum through principles of contract and “agency.” *See* Order at p. 15; ¶¶ 8-9. To the extent that the Order can be construed as creating an agency relationship between Safe-Guard and C&O Motors and/or Paul Waugh, such a finding is in error as this issue was not before the Court. *See Zaleski, supra*.

The Court’s October 16, 2014 Order not only addressed the issue of whether the Addendum constituted “insurance” but also denied Santander’s motion for summary judgment on whether the terms of the GAP Agreement were clear and conspicuous. The Court’s Order found that Hinkle did apparently read the terms of the Addendum, but was unable to comprehend the undefined technical language contained in the definition of Unpaid Net Balance. *See Order*, at p. 4; ¶ 12. Later, in the conclusions of law section of the Order, the Court found that based on the evidence in the record, Hinkle *did not* read the terms of the Addendum. *See Order* at p. 10; ¶ 21. The Court then ruled that Hinkle’s failure to read the Addendum was harmless error as it pertained to Santander’s motion for summary judgment seeking judgment on Hinkle’s claims against it. *Id.* at p. 10; ¶ 22. While these findings were only directed to the motion for summary judgment filed by Santander, Safe-Guard had filed an almost identical motion for summary judgment based on the terms of the contract. For these reasons, the Order is also clearly erroneous.

Respectfully submitted the 3rd day of November, 2014.

**Defendant Below/Petitioner Herein,**

**SAFE-GUARD PRODUCTS  
INTERNATIONAL, LLC,**

**By Counsel:**

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**VERIFICATION**

STATE OF Georgia,

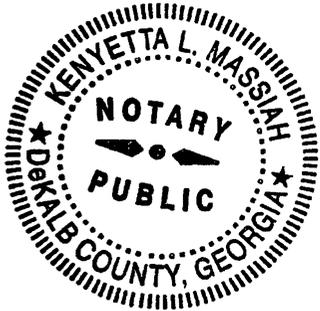
COUNTY OF DeKalb, TO WIT:

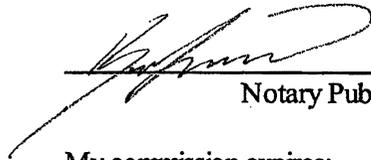
Damon Wiener, SVP and General Counsel for Safe-Guard Products International, LLC, being first duly sworn, says that he has read the foregoing **PETITION FOR WRIT OF PROHIBITION**, and that he knows the contents thereof; further, he says that the facts and allegations contained therein are true, except as to such that are made upon information and belief, and that as to such allegations, he believes them to be true.



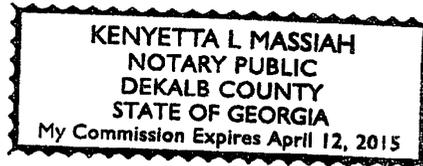
Taken, subscribed and sworn to before me, the undersigned notary public, this 3rd day of November, 2014.

*[affix notarial seal]*



  
\_\_\_\_\_  
Notary Public

My commission expires: \_\_\_\_\_



**CERTIFICATE OF SERVICE**

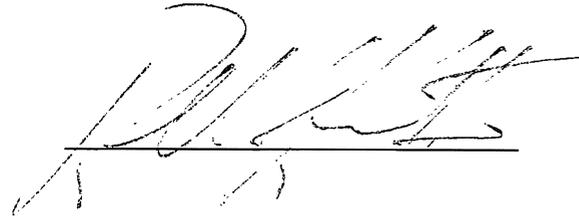
This is to certify that on the 3rd day of November, 2014, the undersigned counsel has contemporaneously herewith served the foregoing ***“PETITION FOR WRIT OF PROHIBITION”*** and ***“APPENDIX OF EXHIBITS”*** upon all persons whom a rule to show cause should be served, if granted, via overnight mail, as follows:

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***Respondent Herein***



A handwritten signature in black ink, appearing to read 'D. Konrad', is written over a horizontal line. The signature is stylized and somewhat cursive.