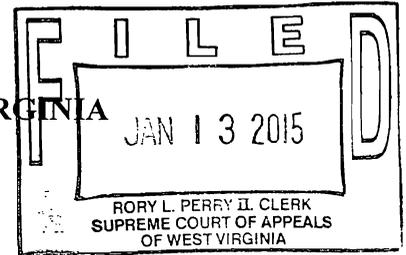


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-1059



**ERIE INSURANCE PROPERTY & CASUALTY COMPANY, and
WEST VIRGINIA INSURANCE COMMISSIONER,**

Respondents-Below, Petitioners

v.

VINCENT J. KING,

Petitioner-Below, Respondent.

**From the Circuit Court of Kanawha County, West Virginia
Civil Action No. 13-AA-95**

**BRIEF OF PETITIONER ERIE INSURANCE
PROPERTY & CASUALTY COMPANY**

**Jill Cranston Rice (WV State Bar No. 7421)
Andrew T. Kirkner (WV State Bar No. 12349)
DINSMORE & SHOHL LLP
215 Don Knotts Blvd., Suite 310
Morgantown, WV 26501
Telephone: 304-225-1430
Facsimile: 304-296-6116
E-mail: jill.rice@dinsmore.com**

**James D. Lamp (WV State Bar No. 2133)
Matthew J. Perry (WV State Bar No. 8589)
LAMP BARTRAM LEVY TRAUTWEIN &
PERRY, PLLC
720 Fourth Avenue
Huntington, WV 25701
Telephone: 304-523-5400
E-mail: jlamp@lbtplaw.com**

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES..... ii - iii

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 1

III. STATEMENT OF THE CASE 3

 A. Erie’s Rate Protection Endorsement (“RPE”)..... 3

 B. Procedural Background 4

 C. Insurance Commissioner’s Order 5

IV. SUMMARY OF ARGUMENT..... 8

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION 10

VI. ARGUMENT 11

 A. **The Circuit Court Ignored This Court’s Clear Directive That It Cannot Substitute Its Judgment for That of the Insurance Commissioner’s**..... 12

 B. **The Decision on Appeal Should Be Reversed Because It Ignored the Statutory Presumption That the Insurance Commissioner’s Approval of Erie’s RPE was Valid and Shifted the Burden of Proving its Validity to Erie** 16

 C. *The Decision on Appeal* Should be Reversed Because It Ignored and Misapplied Evidence in the Record and Relied on Evidence that Did Not Exist..... 19

 D. The Circuit Court’s Decision on Appeal Violates the West Virginia Constitution’s Separation of Powers Clause. 27

 E. The Circuit Court’s Misapplication of the Standard of Review Constitutes Reversible Error 30

 F. The Circuit Court’s *Decision on Appeal* Creates Ambiguity for Erie as to Whether it Can Use Products Approved by the Commissioner..... 36

VII. CONCLUSION..... 35

TABLE OF AUTHORITIES

Statutes & Legislation

W. Va. Code § 29A-5-4(g)3, 11, 16, 31

W. Va. Code § 33-6-92

W. Va. Code § 33-6-30(c).....1, 2, 14, 16, 18

W. Va. Code §33-20-3(b) (2006).....5, 26

W. Va. Code §33-20-4(d) (2005).....5

W. Va. Code §33-20-4(e) (2005).....6

W. Va. Code § 33-20-94,5

W. Va. Code § 33-30-6(c).....30

West Virginia Cases

Chesapeake and Potomac Telephone Company of West Virginia v. Public Service
Commission of West Virginia,

171 W. Va. 494, 300 S.E.2d 51 (1982).....33

Danielley v. City of Princeton,

113 W. Va. 252, 167 S.E. 620 (1933).....28

Frank's Shoe Store v. W. Va. Human Rights Commission,

179 W. Va. 53, 56, 365 S.E.2d 251 (1986).....30

Gino's Pizza of W. Hamlin, Inc.,

187 W. Va. 312, 418 S.E.2d 758 (1992).....31

Lightner v. Riley, et al.,

760 S.E.2d 142, 2014 W. Va. LEXIS 629 (2014)1, 14, 15, 18, 19

Muscatell v. Cline,

196 W. Va. 588, 474 S.E.2d 518 (1996).....11

Ruby v. Insurance Comm'n,

197 W. Va. 27, 475 S.E.2d 27 (1996).....31

State ex. rel. CitiFinancial v. Madden,

223 W. Va. 229, 672 S.E.2d 365 (2008).....1, 2, 12, 13, 14, 15, 18, 19, 28, 29

TABLE OF AUTHORITIES (CONT.)

Simpson v. W. Va. Office of the Ins. Comm'r,
223 W. Va. 495, 505, 678 S.E.2d 1, 11 (2009).....28

State ex rel. Barker v. Manchin,
167 W. Va. 155, 279 S.E.2d 622 (1981).....28

State v. Buchanan,
24 W. Va. 362, 1884 LEXIS 66 (1884).....28

State ex rel. State Bldg. Comm'n v. Bailey,
151 W. Va. 79, 89, 150 S.E.2d 449, 455 (1966).....28

State v. Huber,
129 W. Va. 198, 209, 40 S.E.2d 11, 18 (1946).....28

State ex rel. Affiliated Constr. Trades Found. v. Vieweg,
205 W. Va. 687, 702, 520 S.E.2d 854, 869 (1999).....29

Stewart v. W Va. Bd. of Exmrs. for Registered Prof. Nurses,
197 W.Va. 386, 475 S.E.2d 478 (1996).....11

W. Va. Employers' Mutual Ins. Co. d/b/a Brickstreet Mut. Ins. Co., et al. v. The Bunch Co.,
231 W. Va. 321, 745 S.E.2d 212 (2013).....1, 11, 13, 14, 15, 18, 24, 25, 26, 27, 30, 31

I. INTRODUCTION

Petitioner Erie Insurance Property and Casualty Company (“Erie”) seeks reversal of the Circuit Court of Kanawha *Decision on Appeal* which overturned the Insurance Commissioner’s administrative decision and retroactively disapproved Erie’s Rate Protection Endorsement, which the Commissioner had previously approved in 2010 in accordance with his statutory duties. Erie appeals this *Decision* because the Circuit Court failed to apply settled law and improperly injected itself into the regulation of insurance in violation of the West Virginia Legislature’s and this Court’s directives. It ignored, misapplied and perhaps even misunderstood the comprehensive rate filing and evidence in the Record, all demanding reversal.

II. ASSIGNMENTS OF ERROR

1. The Circuit Court improperly substituted its judgment for that of the Insurance Commissioner in reviewing the record *de novo* to determine whether the Commissioner should have withdrawn its 2010 approval of the Rate Protection Endorsement (RPE). In its *Decision on Appeal*, the Circuit Court summarily dismissed the relevance of three controlling cases of this Court, determining that they deal only with the sufficiency of the administrative process. See generally State ex. rel. CitiFinancial v. Madden, 223 W. Va. 229, 672 S.E.2d 365 (2008) (“CitiFinancial I”), West Virginia Employers’ Mutual Insurance Company v. The Bunch Company, 231 W. Va. 321, 745 S.E.2d 212 (2013) (“Bunch”) and Lightner v. Riley, et al., 760 S.E.2d 142, 2014 W. Va. LEXIS 629 (2014) (“CitiFinancial II”) (Collectively, “CitiFinancial Trilogy”). To the contrary, these cases very clearly set forth the deference to be afforded to the Insurance Commissioner’s decisions pursuant to W. Va. Code § 33-6-30(c), which the Circuit Court ignored here.

2. The Circuit Court erred by improperly reexamining the insurance policy form, the RPE, and corresponding rate that had been previously approved by the Commissioner in violation of W. Va. Code § 33-6-30(c). W. Va. Code § 33-6-30(c) provides that any policy and corresponding rate filing approved by the Insurance Commissioner is presumed to be in full compliance with the requirements of Chapter 33 of the West Virginia Code. In addition, this Court, in CitiFinancial I, held that “the burden for disproving the validity of such rates is placed on the entity who seeks to set the rates aside. . . . the presumption of statutory compliance for approved insurance rates set forth in West Virginia Code § 33-6-30(c) may only be rebutted in a proceeding before the Commissioner.” *Id.* at 239-240. In this case, the Circuit Court’s *Decision on Appeal* ignored this statutory presumption of validity and, instead, undertook a full review of the “statutory basis for mandated withdraw[al] of approval” under W. Va. Code § 33-6-9 which provides six separate criteria by which “[t]he *commissioner* shall disapprove any such form of policy application, rider, or endorsement or withdraw any previous approval thereof[.]” (Emphasis added). Thus, rather than presuming the validity of the RPE, the Circuit Court improperly conducted a *de novo* review of the underlying record and substituted its own judgment where the Legislature clearly intended the Insurance Commissioner to have exclusive authority.

3. The Circuit Court’s *Decision on Appeal* is clearly wrong because its Findings of Fact and Conclusions of Law are contrary to the evidence contained in the Record, misapply the Record, and fail to give adequate deference to the Commissioner’s conclusions and findings based on the same Record.

4. The Circuit Court’s *Decision on Appeal* violates the West Virginia State Constitution’s Separation of Powers clause. The Legislature has given the Insurance

Commissioner rate-making authority, and this Court has repeatedly recognized and upheld this authority. The Circuit Court, in reversing the Insurance Commissioner's Order, committed clear error by ignoring the deference to which the Insurance Commissioner is entitled.

5. The Circuit Court erred by misapplying the standard of review set forth in the West Virginia Administrative Procedures Act ("WVAPA"); specifically, W. Va. Code § 29A-5-4(g), by substituting its judgment for that of the Insurance Commissioner. West Virginia law is clear that courts must give deference to an administrative agency's findings, and the Circuit Court's failure to do so here constitutes reversible error

6. The Circuit Court's *Decision on Appeal* is clearly wrong and erroneous as a matter of law. It not only ignores West Virginia law, but is confusing, represents an obfuscation of the different roles of the Insurance Commissioner and the judiciary, and has the effect of destabilizing the regulation of insurance in West Virginia.

III. STATEMENT OF THE CASE

A. Erie's Rate Protection Endorsement ("RPE").

On or about February 2, 2010, Erie made a 398 page filing with the Insurance Commissioner that detailed a new product endorsement entitled "Rate Protection Endorsement". The filing contained letters of explanation, WV PPA Proposed Manual Rule Pages, WV Proposed Manual Rate Pages, Declarations Page, Filing Memorandum, Draft of Marketing Brochure, Draft of Agent Marketing Aid, Important Notice, and WV Filing Fee Form. The proposed effective date was June 1, 2010. The Offices of the Insurance Commissioner, Rates and Forms Division undertook an investigation and review of the filing, including sending several correspondences and objection letters which resulted in a number of amendments to the filings by Erie. Further, several filing notes were added. Additionally, a large number of

Supporting Documents were filed and reviewed, including a Rate Abstract P&C and Actuarial Memorandum.

On about April 15, 2010, the Commissioner approved the Erie filing, as amended, concerning the RPE, with an effective date of July 1, 2010. Importantly, the RPE as filed by Erie was an *optional* endorsement. (APP 1052, ¶¶ 3-6.)

B. Procedural Background.

Petitioner King first raised an issue with the RPE in a letter to his insurance agency, Garlow Insurance Agency (“Garlow”), dated October 12, 2012. He inquired about the application of the RPE to his policy and about the impact it had in reducing his overall premium. (APP 1015). In response, Erie provided information regarding Garlow’s offer to King to add the RPE and advised that, “because the rating plan associated with the Endorsement differs from Erie’s traditional rating plan, the price of a policy endorsed with Rate Protection may be higher, or lower, than it would be without the Endorsement[.]” Erie also stated:

The premium produced by the Rate Protection Endorsement is based upon a different rating methodology than our traditional rating plan. As noted above in some instances the total price for an Erie Auto Policy with the Rate Protection Endorsement is higher than without the Endorsement and sometimes, as in your case, it is lower.

(APP 1026-1027.) Nevertheless, Petitioner King remained unsatisfied and sent a letter directly to Cody Cook, Erie’s Vice President and Product Manager, Personal Lines Division, requesting a “hearing” pursuant to W. Va. Code § 33-20-9. In an unprecedented effort to cooperate with King, Erie made Mr. Cook available for a recorded deposition-like interview and provided the almost 400 pages of publicly-accessible documents related to Erie’s RPE rate filing.

Thereafter, King sent a letter to Erie, demanding certain actions by Erie, including that Erie educate agents (he volunteered to serve as instructor), and “redo” its rate filing for the RPE.¹ As a result, on February 6, 2013, Erie filed a *Petition for Declaratory Ruling* with the Commissioner to determine the proper application of W. Va. Code § 33-20-9 and King’s alleged status as a “person aggrieved” under the statute. (APP 1012-1034.)

Petitioner King, in turn, filed an administrative complaint against Erie titled *Petition for Hearing and Issuance of Subpoenas* (“*Petition for Hearing*”) on March 11, 2013 “to determine whether Erie “accurately represented the risk with respect to its [RPE] and corresponding Rate and Rule Manual pages, and whether the prior approvals thereof should now be withdrawn.” APP 0351 (footnotes omitted). Contemporaneous with the filing of his administrative complaint, King filed nearly 600 pages of documents, including a 198-page transcript of the deposition of Cody Cook (APP 0392-0590) and a 398 page “RPE HEARING EXHIBIT NOTEBOOK” (APP 0613-1011) in support of King’s position.

C. Insurance Commissioner’s Order.

On July 10, 2013, the Commissioner issued his order, *Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Petitioner* (“*Commissioner’s Order*”) on King’s Petition. In the 20-page order, the Commissioner detailed his findings of fact and conclusions of law, including the following:

1. Pursuant to W. Va. Code §33-20-3(b) (2006), rates may not be excessive, inadequate or unfairly discriminatory. *The Insurance Commissioner finds that Erie’s rate, form and/or product filings referenced herein this Order did not violate the referenced Code section and were approved for use accordingly.* Further, after undertaking a re-review of its prior approval continues to find the product to be in proper accordance with West Virginia law. Therefore, the Commissioner herein declines to take any further regulatory action against Erie for the allegations of Petitioner or due to the re-review of their filings.

¹ King also demanded free insurance from Erie for the remainder of his life.

2. Pursuant to W. Va. Code §33-20-4(d) (2005), [t]he commissioner shall review filings as soon as reasonably possible after they have been made in order to determine whether they meet the requirements of this article." *The Insurance Commissioner finds that the Offices of the Insurance Commissioner complied with the requirements of this Code section and subsequently approved the filings of Erie in the normal course of business for the agency.*

3. Pursuant to W. Va. Code §33-20-4(e) (2005), "...A filing shall be deemed to meet the requirements of this article unless disapproved by the commissioner within the waiting period. The Insurance Commissioner finds that *the filings of Erie referenced herein this Order and subject of the Petitioner's administrative complaint are deemed to meet the requirements of Chapter 33 of the West Virginia Code.*

4. Pursuant to W. Va. Code §33-6-30 (c) (2002), "[w]here any insurance policy form, including any endorsement thereto, has been approved by the commissioner, and the corresponding rate has been approved by the commissioner, there is a presumption that the policy forms and rate structure are in full compliance with the requirements of this chapter", *the Insurance Commissioner finds that the rates, forms and/or products were approved by the Insurance Commissioner and, therefore, presumed to be in compliance with Chapter 33 of the W. Va. Code.* Further, the Commissioner has been provided with no information that would in fact rebut such a presumption despite the voluminous filings and argument of Petitioner.

5. The Insurance Commissioner finds *there is no factual dispute concerning the filing and approval of the rates, forms and/or products of Erie as referenced herein this Order and the subject of the Petitioner's administrative complaint and as a matter of law the rate, form and/or product filings and Erie's use of the same should be upheld.*

6. The Petitioner does not argue that a deviation from the filing was applied to him but rather takes issue with the implementation of the product previously filed and approved by the Commissioner. Petitioner seeks to have his opinion substituted for that of the Insurance Commissioner and engage in discovery that wholly attempts to circumvent the authority and office of the Insurance Commissioner.

* * *

9. The Insurance Commissioner finds that *the rates charged by Erie were reasonable* in relation to the premium charged in that the benefits provided and the fact that the filings took into account the ramifications and usage of the optional endorsement known as the Rate Protection Endorsement and that

sufficient and adequate if not substantial benefits are provided to policyholders who have purchased this product and stay within the confines of the program. (APP 1058-1061) (emphasis added).

The Commissioner's Order also specifically addressed certain other allegations King ultimately raised in his *Petition for Appeal* to the Circuit Court:

15. The Insurance Commissioner finds and concludes that there are no violations of the West Virginia Code in regards to the Erie RPE filing and its implementation of the same to this policyholder, King.

16. The Insurance Commissioner finds and concludes that the filing does not contain or incorporate by reference any inconsistent, ambiguous or misleading clauses, or exceptions and conditions which deceptively affect the risk to be assumed in the general coverage of the contract.

17. The Insurance Commissioner finds and concludes that there are no other provisions of the filing that are misleading or were misleading in how it was implemented to this policyholder, King.

18. The Insurance Commissioner finds and concludes that the policies sold to King were not procured through deceptive advertising.

19. The Insurance Commissioner finds and concludes that the benefits of the RPE and the filing are reasonable in relation to the premium charged.

(APP 1065.)

King appealed the *Commissioner's Order* to the Circuit Court based on four assignments of error:

1. The Commissioner was statutorily required to withdraw prior approval of Erie's RPE; . . .
2. The Commissioner was clearly wrong with respect to certain Findings of Fact;
3. The Commissioner exceeded his authority in determining the "spirit and intent" of the Legislature and in interpreting statutes "in pari materia"; and
4. Portions of "Conclusion No. 7" are ad hominem and not a proper Conclusion of Law;

(APP 1081) (footnotes omitted). All of these allegations attack the Commissioner's review and approval of Erie's RPE and the handling of King's administrative Complaint. Importantly, King did *not* appeal the denial of his request for a hearing based on the Commissioner's finding that "a hearing would serve no useful purpose." (APP 1067.)

The Circuit Court heard oral argument on August 1, 2014 and adopted King's proposed order nearly verbatim on September 12, 2014 and entered its *Decision on Appeal*. Erie and the Commissioner seek a reversal of this *Decision on Appeal*.

IV. SUMMARY OF ARGUMENT

The Circuit Court's *Decision on Appeal* overturned the Insurance Commissioner's 20-page decision approving a 2010 product and rate filing and, in doing so, dismissed, in a mere footnote, this Court's trilogy of cases involving the very issue here: whether a circuit court can usurp the Insurance Commissioner's legislatively-assigned rate-making authority. It cannot, and the Circuit Court committed reversible error when it did because it ignored this Court's directive in the CitiFinancial Trilogy that it cannot substitute its judgment for the Insurance Commissioner's.

In addition, the *Decision on Appeal* should be reversed because it ignored the statutory presumption that the Insurance Commissioner's approval of Erie's RPE was valid, and the Circuit Court erroneously shifted the burden of proving *its validity* to Erie, rather than forcing King to show its *invalidity*. Our law is clear that administrative action must be afforded deference where there is substantial evidence to support the action. The Commissioner, in denying King's petition for a hearing and rejecting his request to withdraw Erie's RPE, conducted another thorough investigation of Erie's filing and relied on Erie's rate approval application, unverified submissions by King and the testimony of an Erie representative. The

Court, having all of this information available to it, including the benefit of the Commissioner's detailed order, nevertheless failed to defer to the Commissioner's approval and, in so doing, ignored the statutorily-mandated deference to which the Commissioner is entitled.

Still further, the *Decision on Appeal* should be reversed because it ignored and misapplied evidence in the record and, indeed, relied on evidence that did not exist. The Circuit Court flatly ignored the testimony of Erie Vice President Cody Cook that the RPE did not violate West Virginia's mandated age 55 discount, misinterpreted the language of Erie's RPE filing when it found that Erie's RPE was misleading, and interpreted the filing to mean that an insured's pre-RPE premium would not change as a result of an insured's election of the RPE in spite of the clear language contained in the filing that an insured's premium would not change *after* election of the RPE. The Circuit Court's determination that the benefit received was unreasonable in relation to the premium charged also ignores the fact that King's overall premium actually *decreased*.

The Circuit Court's *Decision on Appeal* also violates the West Virginia Constitution's Separation of Powers Clause. The Commissioner performed the role prescribed to him by the Legislature in reviewing and ultimately approving Erie's RPE. The Commissioner continued to perform the duties prescribed to him when Respondent King challenged the validity of his approval through an administrative appeal. The Circuit Court, however, by reexamining Erie's RPE instead of affording deference to the Commissioner's evidence-based determinations, has invaded the province of the Commissioner and, in turn, violated the West Virginia Separation of Powers Clause of the West Virginia Constitution.

In addition to the Circuit Court's failure to provide deference under the specific provisions of Chapter 33, the Circuit Court also failed to follow this Court's directives for

deference to administrative action under the WVAPA's standard of review. By ignoring the substantial evidence in the Record that was relied upon by the Commissioner and that was available to it in the administrative appeal, the Circuit Court failed to apply the correct standard of review required under the WVAPA.

Finally, the Circuit Court's *Decision on Appeal* creates ambiguity for Erie as to whether it can rely upon the Commissioner's approvals. Erie relied on the statutorily-mandated approval process to file, modify, and gain approval for its RPE. Since the Commissioner properly approved the RPE, Erie has relied on this approval, resulting in the endorsement of more than 53,000 West Virginia policies for policyholders who elected to lock in their premiums with the RPE option. If the Circuit Court is permitted to step in and invalidate this product and rates, four years and 53,000 policies later, Erie will be left wondering what authority the Insurance Commissioner actually has in approving its products and rates and whether Erie can rely on it.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Erie respectfully requests oral argument under Rule 19 of the West Virginia Rules of Appellate Procedure because this case involves assignments of error in the application of settled law, an unsustainable exercise of discretion where the law governing that discretion is settled, and insufficient – and contrary evidence - against the weight of the evidence in the record on appeal.

Additionally, Rule 21(e) provides that a “memorandum decision reversing the decision of a circuit court should be issued in limited circumstances.” This case, however, involves assignments of error in the application of well-settled law, and the Circuit Court ignored the established law in this area. As a result, a memorandum decision issued under Rule 21 is proper here.

VI. ARGUMENT

The Circuit Court's *Decision on Appeal* demands reversal because the Circuit Court intruded into insurance issues reserved exclusively for the West Virginia Insurance Commissioner pursuant to controlling West Virginia statutes and the decisions of this Court.

On appeal of an administrative decision from a circuit court, the standards contained in the West Virginia Administrative Procedures Act, W. Va. Code § 29A-5-4(g), control. "In cases where the circuit court has amended the result before the administrative agency, this Court reviews the final order of the circuit court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law *de novo*." Syl. Pt. 2, W. Va. Employers' Mutual Ins. Co. d/b/a Brickstreet Mut. Ins. Co., et al. v. The Bunch Co., 231 W. Va. 321; 745 S.E.2d 212 (citing Syl. Pt. 2, Muscattell v. Cline, 196 W.Va. 588, 474 S.E.2d 518 (1996)). A court shall reverse, vacate or modify the order or decision of the agency only if the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, decision or order are: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority or jurisdiction of the agency; (3) made upon unlawful procedures; (4) affected by other error of law; (5) clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. W. Va. Code § 29A-5-4(g) (2007). The "clearly wrong" and "arbitrary and capricious" standards of review are deferential ones which presume that an agency's actions are valid as long as the decision is supported by substantial evidence or a rational basis. Stewart v. W Va. Bd. of Exmrs. for Registered Prof. Nurses, 197 W.Va. 386, 475 S.E.2d 478 (1996). In the present case, the Circuit Court erred in reversing the administrative decision of the Insurance Commissioner by

substituting its judgment for the Insurance Commissioner's, ignoring the statutory presumption of validity afforded the Commissioner's 2010 approval of the RPE, failing to defer to the findings of fact made by the Commissioner, misconstruing the stipulated facts, and ignoring well-settled law in this area. Reversal is proper and necessary.

A. The Circuit Court Ignored This Court's Clear Directive That It Cannot Substitute Its Judgment for That of the Insurance Commissioner's.

This Court has been very clear in establishing the role of a circuit court in cases such as this: a circuit court cannot invade the administrative arena and reexamine a previously-approved rate for reasonableness. See CitiFinancial I, 223 W. Va. at 237, 672 S.E.2d 365 (2008). Here, the Circuit Court afforded no deference to the Insurance Commissioner's previous approval of a product and subsequent administrative decision, "conducted its own research and analysis;" reversed the Commissioner's 20-page administrative decision, and overruled the Commissioner's 2010 approval of Erie's filing, affecting 53,000 policyholders currently enjoying the benefits of the RPE. (APP. 1319-1331.) The Court's *Decision on Appeal* violates West Virginia law.

As a preliminary matter, the Legislature gave the Insurance Commissioner the authority to regulate the insurance industry and oversee its products and their corresponding rates:

Under the comprehensive system established by the Legislature for purposes of regulating the insurance industry *there is no question that the Commissioner is charged with overseeing the rates charged for various insurance products.* See W. Va. Code § 33-20-3 (listing factors pertinent to insurance rate making); W. Va. Code § 33-20-4 (requiring that insurers comply with filing obligations); see also W.Va. Code § 33-6-8 (requiring Commissioner's approval of insurance-related forms).

CitiFinancial I, 223 W. Va. At 238, 672 S.E.2d at 374 (emphasis added).

This Court first formally confirmed that issues of insurance ratemaking are preserved for the Insurance Commissioner in CitiFinancial I, a case challenging the reasonableness of a credit insurance rate approved by the Insurance Commissioner. In that case, the complainant Lightner

introduced evidence such as loss ratios and rates of return to disprove the reasonableness of the approved rate. The Court, granting a writ of prohibition to CitiFinancial to avoid the summary judgment order granted by the circuit court, determined that “due to their highly specialized nature, [the insurance issues] are typically reserved to the Commissioner's bailiwick.” See W.Va. Code §§ 33-20-3; 33-20-4, 33-6-30(b); CitiFinancial I, 223 W. Va. at 237, 672 S.E.2d at 373.

Justice McHugh elaborated:

It stands to reason that if a circuit court is allowed to invade this administrative arena and reexamine the issue of whether a given insurance rate is reasonable or excessive, the judiciary will necessarily be substituting its determinations as to permissible insurance rates for those previously determined by the Commissioner and supplanting its opinion in matters expressly delegated to the Commissioner's expertise and jurisdiction. A further peril that cannot be overlooked is that judicial intervention in the rate making area would open the door to conflicting decisions amongst the various circuits regarding what constitutes an unreasonable or excessive charge for credit insurance. In this manner then, the uniformity of regulation that the Legislature has established by delegating all matters involving rate making and rate filings to the Commissioner is certain to be infringed if circuit courts or jurors are permitted to second guess the reasonableness of rates previously approved by the Commissioner.

Id.

Then, in 2013, this Court evaluated whether the Circuit Court of Kanawha County properly overruled the Insurance Commissioner's administrative decision affirming a prior rate approval. In Bunch, the Bunch Company alleged that BrickStreet's premium should not have included the expense of an agent commission. Initially, the Circuit Court of Cabell County, coincidentally through Judge Cummings, determined that BrickStreet could not charge the premium, despite the Commissioner's previous approval of the rate. That order was vacated, however, following this Court's 2008 CitiFinancial I decision, in light of this Court's “clear disapproval of ‘judicial intrusion into issues of insurance rates setting.’” Bunch, 231 W. Va. at 327, 745 S.E.2d at 218 (citing CitiFinancial I, 223 W. Va. at 236, 672 S.E.2d at 372).

Thereafter, the Bunch Company filed a complaint with the Insurance Commissioner, and the Commissioner issued its ruling, concluding, in part, that “the rates charged by BrickStreet were reasonable in relation to the benefits provided[.]” Bunch, 231 W. Va. at 325, 745 S.E.2d at 216. The Bunch Company appealed to the Circuit Court which reversed and vacated the Insurance Commissioner’s decision, finding that “the Commissioner erred by allowing BrickStreet to charge Bunch a commission when no correlative expense had been incurred; and the Commissioner erred in finding that the subject insurance rates were reasonable.” Id. at 217, 745 S.E.2d at 326.

This Court reversed the Circuit Court’s decision for several reasons. Important, here, is the Bunch Court’s statement that:

Proceeding to the ultimate issue of whether the insurance rates at issue were reasonable, the petitioners and the amicus curiae strenuously maintain that the trial court ignored this Court’s holdings in CitiFinancial and improperly injected itself into a rate making matter expressly delegated to the Commission. *We agree.* The Legislature, in no uncertain terms, has reposed the authority for rate making matters in the Commission. *See W. Va. Code § 33-6-30(c).* As discussed above at length, the amendments to the insurance statutes enacted in the aftermath of *Broadnax* left no question that rate making was not a matter intended for the courts.

Id. at 222, 331.

Most recently, in CitiFinancial II, Mr. Lightner sought withdrawal of approval of an insurer’s filing. Like here, following receipt of the administrative complaint, the Commissioner undertook an investigation and analysis of not only Mr. Lightner’s allegations but all of the insurer’s filings. The Commissioner undertook an exhaustive investigation and review and ultimately issued an order, concluding

(1) that Triton did comply with *W.Va. Code § 33-20-3* (2006) in its filings and that Triton's rate filings did not violate *W.Va. Code § 33-20-3*; (2) that there "is no factual dispute as concerning the filing and approval of the rates and forms of Triton Insurance Company" and that the rates charged by Triton were reasonable

in relation to the benefits provided; and (3) that a hearing upon the administrative complaint would serve no useful purpose and, therefore, the request for a hearing was denied.

CitiFinancial II, 760 S.E.2d at 147, 2014 W. Va. LEXIS 629. Lightner appealed to the Circuit Court of Kanawha County, seeking a hearing, discovery, and, among other things, arguing that the Commissioner erroneously found that the insurer's rates were not excessive and reasonable in relation to the benefits provided. Id. The Circuit Court agreed with the Commissioner and affirmed his administrative decision.

Mr. Lightner then appealed to this Court, primarily arguing that he should have been given a hearing. This Court rejected that argument, affirming the Circuit Court's decision, opining that "[w]hile this Court recognized in Bunch that there are instances involving an alleged deviation from approved rate filings where a factual dispute exists requiring an administrative hearing to be held, this case did not present any factual disputes warranting a hearing in this case." Id. at 152, 30.

Here, King has not appealed the Commissioner's denial of a hearing, and not only did he *not* appeal the decision denying a hearing to the Circuit Court, he advised the Circuit Court at oral argument that he did not want the case remanded. (APP 1389-1390.) King took this position despite this Court's clear mandate that any challenge to a rate or insurance product such as Erie's RPE must be made before the Insurance Commissioner.

Despite this Court's consistent interpretation of the rate-making statutes, the Circuit Court dismissed these three controlling cases – the CitiFinancial Trilogy – in a mere footnote:

In resisting the instant appeal, the Commissioner relies on the trilogy of decisions in [the CitiFinancial Trilogy]. None of them address the issue here. In Citi and Burch [sic], the insured failed to exhaust administrative remedies, specifically requesting issuance of subpoenas so as to provide additional evidence, but both hearing and subpoenas were denied, and no request by the Commissioner had been refused. This is an appeal of right, pursuant to both

W. Va. Code 29A-5-4(a) and 33-2-14, and thus does not intrude on the Commissioner's authority which, in this case, has already been fully exhausted. (APP 1330.)

Clearly, West Virginia law is clear, and the Circuit Court got it wrong. Reversal of the *Decision on Appeal* is proper in order to ensure consistency in our laws.

B. The Decision on Appeal Should Be Reversed Because It Ignored the Statutory Presumption That the Insurance Commissioner's Approval of Erie's RPE was Valid and Shifted the Burden of Proving its Validity to Erie.

By substituting its judgment for the Insurance Commissioner's and reviewing the administrative record *de novo* to determine whether it satisfied the requirements of Chapter 33, the Circuit Court ignored the statutory presumption that the Commissioner's 2010 approval of the RPE was valid. W. Va. Code § 33-6-30(c) states: "Where any insurance policy form, including any endorsement thereto, has been approved by the commissioner, and the corresponding rate has been approved by the commissioner, there is a presumption that the policy forms and rate structure are in full compliance with the requirements of this chapter."

This statute could not be clearer. Indeed, in order to avoid any dispute over the purpose of the presumption and related statutory provisions about the Insurance Commissioner's approval authority, the Legislature set forth detailed legislative findings when it amended W. Va. Code § 33-6-30(b) in 2002. The Legislature informed, in pertinent part:

(1) That consumers and insurers both benefit from the *legislative mandate that the Insurance Commissioner approve the forms used and the rates charged by insurance companies in this state;*

(4) *That the provisions of this chapter were enacted with the intent of requiring the filing of all rates and forms with the Insurance Commissioner to enable the Insurance Commissioner to review and regulate rates and forms in a fair and consistent manner;*

(5) That the provisions of this chapter do not provide and were not intended to provide the basis for monetary damages in the form of premium

refunds or partial premium refunds when the form used and the rates charged by the insurance company have been approved by the Insurance Commissioner;

(6) That actions seeking premium refunds or partial premium refunds have a severe and negative impact upon insurers operating in this state by imposing unexpected liabilities when insurers have relied upon the Insurance Commissioner's approval of the forms used and the rates charged insureds; and

(7) That it is in the best interest of the citizens of this state to ensure a stable insurance market.

(c) Nothing in this chapter may be construed as requiring specific line item premium discounts or rate adjustments corresponding to any exclusion, condition, definition, term or limitation in any policy of insurance, including policies incorporating statutorily mandated benefits or optional benefits which as a matter of law must be offered. *Where any insurance policy form, including any endorsement thereto, has been approved by the commissioner, and the corresponding rate has been approved by the commissioner, there is a presumption that the policy forms and rate structure are in full compliance with the requirements of this chapter.* It is the intent of the Legislature that the amendments in this section enacted during the regular session of two thousand two are: (1) A clarification of existing law as previously enacted by the Legislature, including, but not limited to, the provisions of subsection (k), section thirty-one [§ 33-6-31] of this article; and, (2) specifically intended to clarify the law and correct a misinterpretation and misapplication of the law that was expressed in the holding of the Supreme Court of Appeals of West Virginia in the case of *Mitchell v. Broadnax*, 208 W. Va. 36, 537 S.E.2d 882 (W. Va. 2000). These amendments are a clarification of the existing law as previously enacted by this Legislature.

W. Va. Code § 33-6-30(b) (emphasis added).

Moreover, the presumption in favor of statutory compliance that King and Judge Cummings so eagerly dismiss can only be rebutted in a proceeding before the Insurance Commissioner, which King has not appealed. Specifically, in his administrative appeal to the Circuit Court, King did *not* appeal the Commissioner's finding that a hearing would serve no useful purpose. (APP 1068-1134). Then, during the oral argument before the Circuit Court, King

again informed Judge Cummings that he was not requesting a remand of the case to the Insurance Commissioner for a hearing. (APP 1389-1390.)²

This is important because this Court announced in its CitiFinancial case – and reiterated in Bunch and more recently in CitiFinancial II – that the courts are not the proper forum for a party to challenge the presumption of statutory compliance for an approved insurance rate. Specifically, this Court has held:

[t]he inclusion of the presumption within the insurance statutes and as part of legislation specifically enacted to prevent judicial reexamination of approved insurance rates suggests just the opposite [that Mr. Lightner should be able to challenge the rate before the circuit court]. Consequently, *we are of the opinion that the presumption of statutory compliance for approved insurance rates set forth in West Virginia Code § 33-6-30(c) may only be rebutted in a proceeding before the Commissioner.*

CitiFinancial, 223 W. Va. at 239-40, 672 S.E.2d at 375-76 (emphasis added).

Thus, when the Legislature amended § 33-6-30(b) in 2002, it did so, according to the CitiFinancial I decision “expressly . . . to curb what the Legislature perceived as judicial intrusion into issues of insurance rate setting.” See W.Va. Code § 33-6-30(b). CitiFinancial I, 223 W. Va. at 236, 672 S.E.2d at 372.

Nevertheless, the Circuit Court’s *Decision on Appeal* included ten separate Findings of Fact, with subparts, that are contrary to the specific findings set forth in the *Commissioner’s Order*, such as:

1. The RPE Violates Chapter 33;
2. The RPE contains misleading clauses;
3. The title of the RPE is misleading;
4. Erie is soliciting the RPE using deceptive marketing;

² A refusal to appeal his denial of a hearing is fatal to King’s assertions now because he did not file a verified complaint or affidavit. In other words, the *Decision on Appeal* is based on “argument,” not evidence.

5. The benefits of the RPE are unreasonable in relation to the premium charged;
6. The RPE is not in the public interest; and
7. Erie's filing was misleading.

(APP 1319-1331.) The Court's findings simply refute the Commissioner's, and the Commissioner, with his staff and their collective expertise, opted to rely on other, competing information in reaching his conclusion. See, e.g., Commissioner's Order (APP 1324). The Circuit Court here did not defer to the presumption or even reference it. Instead, ignoring it altogether, it substituted its judgment for the Insurance Commissioner's and retroactively disapproved the 2010 approval of the RPE.

This is precisely the situation the Legislature intended to avoid by incorporating the statutory presumption into its 2002 amendments. As this Court has recognized, "These issues, due to their highly specialized nature, are typically reserved to the Commissioner's bailiwick. See W.Va. Code §§ 33-20-3; 33-20-4, 33-6-30(b). CitiFinancial, 223 W. Va. at 237, 672 S.E.2d at 372. Reversal of the *Decision on Appeal* is appropriate for this reason alone.

C. The *Decision on Appeal* Should be Reversed Because It Ignored and Misapplied Evidence in the Record and Relied on Evidence that Did Not Exist.

In addition to the Circuit Court's intrusion into the Insurance Commissioner's legislative authority, the Circuit Court's *Decision on Appeal* is replete with factual errors unsupported by the extensive Record from the administrative proceeding below. Although this Court in CitiFinancial II recognized that there may be "rate filings where a factual dispute exists requiring an administrative hearing to be held", this case does not present any factual disputes justifying a wholesale reversal of an administrative agency decision. CitiFinancial II, 760 S.E.2d at 152, 2014 W. Va. LEXIS 629.

The Circuit Court misinterpreted the Record provided to it when it held that “[t]he RPE violates Chapter 33[.]” (APP 1321.) (footnote omitted). In support of this finding, and citing to specific deposition transcript pages 551-553 (APP 0551-0553), the Circuit Court stated, “[a]ccording to the testimony of Cody Cook, Erie V.P., RPE trumps any discount including the mandated Age 55 provisions of W. Va. Code 33-20-18.”

The statute and Record, however, simply do not support this finding, underscoring clear error in the Circuit Court’s *Decision on Appeal*. First, the Circuit Court’s Conclusion of Law No. 12 that Erie’s RPE violates W. Va. Code § 33-20-18 is clearly wrong. This statute requires that a motor vehicle insurance policy filed with the Insurance Commissioner “shall *provide* for an appropriate reduction in premium charges as to such coverages when the principal operator or spouse on the covered vehicle is an insured who is fifty-five years of age or older.” This does not mean that the insured is required to accept the discount or that it “trumps” all other discounts offered or made available to the insured.

Mr. Cook attempted to explain this to King during this deposition, informing that Erie customers have *the option* to lock in their premiums in lieu of the traditional rating method, which considers other decreases or increases that may impact policyholders’ premiums:

(APP 0553-0554.)

Q. [KING] All right. So back to the original question; yes, it will cause me to lose that discount unless I take off the rate protection endorsement?

A. [COOK] Again, lose the discount is something you're defining differently than what I am. Your premium will not go down at renewal if you've locked in the premium optionally. You will have the opportunity, if you choose, at age 55 to go back to the traditional rating.

Q. Right. Would that be true of any other discount that I might ask you about? Same exact procedure?

A. Yes. Or surcharge, just to be complete.

(APP 0553-0554.) In other words, Mr. Cook testified that the Age 55 discount was provided to Erie's customers, and they could choose to *opt out* of the discount by *opting into* the RPE. W. Va. Code § 33-20-18 does not prohibit the insured from choosing the premium stability offered by Erie's RPE, which could be a more attractive discount, in lieu of the age 55 discount, particularly since RPE prevents the imposition of a surcharge for accidents or violations an insured may incur. The RPE is *not* a discount that "trumps" others, nor a discount that violates Chapter 33, as the Commissioner and his staff determined.

The Circuit Court also misapplied the record below when it determined that the language of the RPE "contained misleading clauses[.]" (APP 1321.) The Circuit Court based this finding on his conclusion that the policyholders would experience an immediate change in premium. Specifically, the Circuit Court stated:

The RPE contains misleading clauses" [because] "the RPE states that "Your policy premium will remain the same unless one or more of the changes listed in paragraphs 1. or 2. Below occur: ... (Record at page 625).³ The Record reflects that the RPE actually results in an immediate change in premium regardless of changes that may also be triggered by any of the subsequent events listed."

(APP 1321.)

Again, however, the testimony cited by the Circuit Court does not support its whole-cloth finding that the RPE contains misleading clauses:

Q. [KING]. I want to focus on the changes that took place when I substituted vehicles in 2012 and see if you're in a position to agree with me that that resulted, and I'll go ahead and add the word exclusively, from the rate protection endorsement.

A. [COOK]. You had a premium change associated both with the exposure change that you made, the vehicle, and the addition of RPE or rate lock.

³ (APP 0625.)

Q. Okay. I think you're answering there were two factors.

A. Correct, there were two factors in your premium change.

(APP 0404).⁴

The Circuit Court's reliance on this exchange is misplaced. The Circuit Court appears to infer that the language contained in the RPE "Your policy premium will remain the same unless..." means that the insured's pre-RPE premium would be preserved through the addition of the RPE. This is simply not the case. After the RPE is added to an individual's policy, the individual's premium is re-calculated; at that point, the new, RPE-based premium would be locked in, pursuant to the terms of the RPE. Erie specifically told King that his premium could be impacted by the addition of the RPE. (APP 1016). Further, Mr. Cook explained the impact in the language cited by the Circuit Court in its *Decision on Appeal* and Erie submitted documents to the Commissioner when it initially filed for approval of the RPE in 2010 that were then made part of the Record for the Circuit Court, that clearly show the impact of the RPE. (APP 0196-0200). Indeed, the Commissioner's Order recognized, and the Circuit Court ignored entirely the Commissioner's finding that the "Important Notice Regarding your Rate Protection Endorsement" which was filed with the Commissioner and is provided to all customers who opt for RPE, including King, explained how RPE works. (APP. 1054-1055.)

Not only does the cited testimony fail to support the Circuit Court's finding that the RPE contained misleading clauses, but, more importantly, the testimony is *contrary* to the Circuit Court's basis on which it relied in making this finding.⁵ In other words, the premium adjustment

⁴ Respondent King then goes on to discuss a letter sent from Erie to the Respondent King in which Erie, again, listed two factors for the change in the King's premium. Mr. Cook's testimony relating to the letter is consistent with the testimony herein. (APP 0404.)

⁵ The Circuit Court also relied, curiously, on pages 485-487 of Mr. Cook's transcript (APP 0485-0487), which relates only to Mr. Cook's attempt to explain how the RPE compares to traditional rating over time.

and Mr. Cook's testimony on the factors that contributed to the adjustment are consistent with the plain language of the RPE. Thus, the RPE does *not* contain misleading clauses. The Circuit Court's misapplication – or perhaps misunderstanding – of the testimony and the operation of the RPE underscores the reason the Legislature gave the Insurance Commissioner the exclusive authority to approve product and rate filings because the Circuit Court's finding is clearly wrong.

Still further, the Circuit Court again ignored significant portions of the record when it held that the Commissioner should have withdrawn its 2010 approval of Erie's RPE because

Q. Let me read it again. If I add RPE, but then let's say within a couple of years, I have an event triggering change. Is the new rate, by that I mean subsequent to the change, the same as it would have been if I had stayed with traditional rating, meaning I never had RPE to begin with, or higher?

A. The term higher makes this question more complicated to answer. Let's take the word higher out for a second. So the traditional price - we'll try going this direction; you can tell me if this doesn't make sense. But let's take rate protect out of the conversation just for a moment. Traditional pricing, we use a 12-month policy, so in effect we used filed rates for an effective date for 12 months, and we have the opportunity to, in that time frame, make a rate change, and you saw some negatives, we've also filed some positives. And so at the end of that 12 months when you get your renewal, in just the traditional rating, we've had the opportunity to at least consider making a rate change in that time frame. As we discussed, between 2010 and 2012, until '11 of '12, we didn't make any rate changes so your rate essentially would stay the same, barring other policy changes, which I don't think you're referring to. So in the traditional rating it's every 12 months. I'll tell you that the vast majority of our competitors do this on a six-month basis, so they have the opportunity to change their rates every six months. And that, again, is through the filing process and whatnot.

So your specific question was in the traditional between those two years would my rate change? Yes, it's possible and probably likely that your rates would have changed over those two years. So, no, you would not have the same rate. *And then I think you added the complexity of rate protection. So if you got rate protection, let's say in 2013, and in 2015 you had a qualifying change, one of those three. We reconsider your rate protection premium based on whatever information you have at that time. And we go through the entire algorithm again. The traditional price, it is un-impacted. It's just the way it would have been had rate protection not been incorporated.* Now, you added is it higher. It could be higher or lower or the same. It could be any of the three, and it just depends on rate changes, components like driver age. So certainly over two years you age two years and that could either be a positive or a negative for your premium, depending on how old you are. You could have had accidents or violations, you could have changed your cars, you could have changed your limits, your deductibles, the coverages you have. So I hope you appreciate the complexity in the question that you asked me.

This testimony cited by the Circuit Court for the proposition that there would be an immediate premium change does not support this conclusion. In fact, Mr. Cook clearly testified that, while the premium charged under the RPE may be higher or lower than the traditional rate in the posited hypothetical, the premium would be dependent on the presence, if any, of a "qualifying change." Again, the Circuit Court's reliance on this testimony is clearly erroneous and should be overturned.

“[t]he benefits provided by the RPE are unreasonable in relation to the premium charged.” (APP 1322.) In support of this conclusion, the Circuit Court stated that King “pointed out that RPE resulted in a 40% increase in his personal liability rate” and “[t]he Record also indicates that, overall, RPE has resulted in a net gain to ERIE (Record at pages 454-457).” (APP 1322.) The Circuit Court’s conclusion and its purported support in the Record are flawed in that they do not consider the administrative record before the Commissioner and give it its due deference.

First, as it relates to Petitioner King, there is no dispute that King benefitted from the optional RPE; his policy premium decreased:⁶

Q. . . . And with respect to the change in vehicles, how did that impact me?

A. Your overall premium went down as a result of rate protection and the addition of the vehicle.

Q. With respect to the addition of the vehicle, how did that impact me?

A. Well, the two changes are intertwined, so the result of both changes --- the result of adding rate protection and changing the car caused your premium to go down. Because they're inter-related, I cannot separate the impact of one or the other.

(APP 0407.)

Second, in Bunch, this Court confirmed that ratemaking is prospective; therefore, when Erie filed the RPE for approval in 2010, the Commissioner based its decision on the 398-page documentation, which included experience data and projections that Erie had available to it then.

By design, insurance rate setting involves the prospective use of proposed rates which are calculated based on cost projections derived from past experience combined with a reasonable expectation of future losses and expenses.

Syl. Pt. 5, Bunch, 231 W. Va. 321, 745 S.E.2d 212 (2013).

⁶ In fact, aside from his dispute with his agent about the initial application of the RPE to his policy which is the subject of another civil action, it is not entirely clear how King has been aggrieved.

In the Bunch case, the Circuit Court overruled the Commissioner's approval of a charge by Brickstreet for an agent commission because, in the Circuit Court's view, it was not an expense that had been incurred. In overruling the Circuit Court in that case, this Court stated:

In reasoning that an insurance premium may only include charges for expenses that have actually been incurred, the trial court demonstrated *a crucial misunderstanding of the rate setting process*.

Bunch, 231 W. Va. at 329, 745 S.E.2d at 220 (emphasis added).

Finally, the Circuit Court's conclusion that the RPE was a "profit center" for Erie in other states and, therefore, not "rate neutral" as Erie initially represented in its filing also ignores competing, compelling evidence contained in the Record. (APP 1323.). Not only did Mr. Cook repeatedly inform King that the data Erie had collected from other states to date was not yet statistically valid because the RPE was relatively new and Erie had insufficient experience at that time⁷ but also that the benefits of the RPE to Erie were not to raise revenue but, rather, to retain customers, price more accurately, and create a buzz in the market and among agents. (APP 0460-0461.)

In fact, Mr. Cook testified that he expected that, over time, the RPE would lose revenue:

Q. As a matter of fact, Erie represented to the Commissioner that this would be revenue neutral; didn't it?

A. Yeah, that would be our expectation going in. Because again, going back to the 50/50 discussion, we typically price these types of things not to get more or less revenue, though as I said before, there is some theoretical belief that maybe you might lose some revenue, on average, with winner's curse.⁸

(APP 0459.)

⁷ (APP 0444-0460.)

⁸ "The expectation, when you roll out new pricing, is that something we call winner's curse, the belief that you're going to win where the price goes down and net where the price goes up." (APP 0455.)

Revenue, aside, however, the Circuit Court's equating rates to revenue is inexplicable. They are not the same. The Court's *Decision on Appeal* misinterpreted "revenue" for "rate" in reaching its conclusion and further relied on statistically uncertain *revenue* information from other states and ignored additional testimony suggesting revenue *loss*.

In addition to this determinative factual issue, when King requested the Commissioner to withdraw approval of Erie's RPE and the Commissioner undertook another investigation of Erie's filing, the Commissioner declined to do so, concluding that:

Pursuant to W. Va. Code § 33-20-3(b), rates may not be excessive, inadequate or unfairly discriminatory. The Insurance Commissioner finds that Erie's rate, form and/or product filings referenced herein this Order did not violate the referenced Code section and were approved for use accordingly. Further, after undertaken a re-review of its prior approval continues to find the product to be in proper accordance with West Virginia law. Therefore, the Commissioner herein declines to take any further regulatory action against Erie for the allegations of Petitioner [King] or due to the re-review of their filings.

(APP 1058.) The Commissioner's affirmation of its approval should be given deference. As this Court opined in 2013, and equally applicable here:

the trial court encroached upon a matter that has been expressly delegated to the executive branch of our state government. . . . In doing so, the trial court neglected to regard this Court's admonition in CitiFinancial that "the uniformity of regulation that the Legislature has established by delegating all matters involving rate making and rate filings to the Commissioner is certain to be infringed if circuit courts or jurors are permitted to second guess the reasonableness of rates previously approved by the Commissioner.

Bunch, 231 W. Va. at 332, 745 S.E.2d at 223 (citing CitiFinancial, 223 W. Va. at 237, 672 S.E.2d at 373).

D. The Circuit Court's *Decision on Appeal* Violates the West Virginia Constitution's Separation of Powers Clause.

Because the Circuit Court ignores the deference to which the Insurance Commission is entitled under West Virginia law, including this Court's holdings in the CitiFinancial Trilogy, the Circuit Court's *Decision on Appeal* violates the West Virginia Constitution's Separation of Power Clause.

W. Va. Const. Art. V, § 1 states:

The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature.

Specifically, the Legislature has given the Insurance Commissioner rate-making authority, and this Court has consistently upheld this grant of authority and recognized that the Insurance Commissioner should be given deference in the rate-making process. In Bunch, this Court stated:

We find it noteworthy that Judge Kaufman, during the hearing on this matter, was quick to recognize two fundamental concerns presented by this case: *encroachment on the regulatory rate making process and separation of powers*. Notwithstanding the trial court's appreciation of these issues, it proceeded to breach established precepts pertaining to both of those juridical areas. Specifically failing to heed this Court's recognition in State ex rel. Crist v. Cline, 219 W.Va. 202, 632 S.E.2d 358 (2006), "that we . . . give deference to [the Insurance Commissioner's] interpretation, so long as it is consistent with the plain meaning of the governing statute," the trial court substituted its judgment for that of the Commissioner on a matter that clearly fell within the rate making area of the Commissioner's expertise. Id. at 211, 632 S.E.2d at 367. As we recognized in Appalachian Power Co. v. State Tax Dep't, 195 W.Va. 573, 466 S.E.2d 424 (1995), "[a]n inquiring court--even a court empowered to conduct *de novo* review--must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion."

Bunch, 231 W. Va. at 331-332, 745 S.E.2d at 222-223 (emphasis added).

This Court has held time and again that the separation of powers doctrine is to ensure that the three branches of government are distinct unto themselves, and that they, exclusively, exercise the rights and responsibilities reserved unto them. Simpson v. W. Va. Office of the Ins. Comm'r, 223 W. Va. 495, 505, 678 S.E.2d 1, 11 (2009). The Court has construed the separation of powers clause as “not merely a suggestion[, but] part of the fundamental law of our State and, as such, it must be strictly construed and closely followed.” Syl. pt. 1, State ex rel. Barker v. Manchin, 167 W. Va. 155, 279 S.E.2d 622 (1981). Accord Syl. pt. 1, State v. Buchanan, 24 W. Va. 362, 1884 LEXIS 66 (1884) (“The legislative, executive and judicial departments of the government must be kept separate and distinct, and each in its legitimate sphere must be protected.”). See also State ex rel. State Bldg. Comm'n v. Bailey, 151 W. Va. 79, 89, 150 S.E.2d 449, 455 (1966) (“The legislative, executive and judicial powers, under the Constitution, are each in its own sphere of duty, independent of and exclusive of the other[.]” (quoting Danielley v. City of Princeton, 113 W. Va. 252, 255, 167 S.E. 620, 622 (1933))); Bailey, 151 W. Va. at 88, 150 S.E.2d at 454-55 (“The separation of these powers; the independence of the one from the other; the requirement that one department shall not exercise or encroach upon the powers of the other two, is fundamental in our system of Government, State and Federal. Each acts, and is intended to act, as a check upon the others, and thus a balanced system is maintained.” (quoting State v. Huber, 129 W. Va. 198, 209, 40 S.E.2d 11, 18 (1946))).

The Court’s holdings were reiterated in the context of administrative agency determinations in CitiFinancial I, when it reasoned that allowing a circuit court to invade the administrative arena and reexamine insurance rate determinations made by the Commissioner is the equivalent of permitting the judiciary to supplant and substitute the Commissioner’s opinion in matters expressly and exclusively delegated to the Commissioner’s expertise and jurisdiction.

CitiFinancial I, 223 W. Va. at 237, 672 S.E.2d at 373. This Court warned against this type of judicial intervention based on the potential for conflicting decisions amongst various circuits. Id. This Court has firmly established that the uniformity of regulation instituted by the Legislature is most certainly to be infringed if circuit courts or jurors are permitted to question the Commissioner's determinations that are well within its properly delegated authority. Id.

It has been observed that the Separation of Powers Clause is not self-executing, and, standing alone, the doctrine has no force or effect. The Clause is "given life by each branch of government working exclusively within its constitutional domain and not encroaching upon the legitimate powers of any other branch of government. This is the essence and longevity of the doctrine." State ex rel. Affiliated Constr. Trades Found. v. Vieweg, 205 W. Va. 687, 702, 520 S.E.2d 854, 869 (1999) (Davis, J., concurring). As made clear, a primary purpose of the separation of powers doctrine is to prevent judicial intervention into the administrative arenas created by the legislative branch, and to preserve the authority given to such administrative agencies through the legislature's necessary and proper delegation of powers.

It is clear from the Record that the Commissioner performed his statutory duties and approved Erie's rate, form and product filings, which are the subject of this case. It is also clear that upon receipt of King's administrative complaint, the Commissioner further complied with the guidance this Court further provided through the CitiFinancial Trilogy: he sent a letter advising of his intentions, he conducted a thorough investigation, and ultimately issued an order outlining his detailed findings of fact and conclusions of law and the basis for these findings and conclusions. (APP 1047-1067.)

Similarly, there is no factual dispute regarding the filing and approval of Erie's rates, forms and products, and King does not argue that any deviation from the filing was applied to

him, nor does he contest the denial of a hearing, effectively affirming that the record on appeal is complete. King also did not seek a remand to the Office of the Insurance Commissioner, the proper forum for challenging the Commissioner's approval of the RPE. Syl pt. 3, Bunch, 231 W. Va. 321, 745 S.E.2d 212.

Clearly, the Legislature did not authorize the Circuit Court to invade the jurisdiction of the Insurance Commissioner and conduct a reexamination of Erie's RPE here. This is wholly improper under the Insurance Code, the decisions of this court, and the West Virginia Separation of Powers Clause of our State Constitution.

E. The Circuit Court's Misapplication of the Standard of Review Constitutes Reversible Error.

In addition to the errors outlined above, the Circuit Court committed reversible error when it misapplied the standard of review set out in the WVAPA and failed to defer to the Commissioner's findings despite substantial evidence to support them. In failing to provide the appropriate deference to the Commissioner's ruling, the Circuit Court ignored the plain language of the WVAPA and clear judicial precedent of this Court.

While the Insurance Commissioner's decisions are not infallible, a Circuit Court's review of those decisions is subject to the administrative deference required by W. Va. Code § 33-30-6(c), discussed, *supra*, as well as the well-settled standard that a Circuit Court's review of an agency's findings of fact must be "extremely limited" in scope. Frank's Shoe Store v. W. Va. Human Rights Commission, 179 W. Va. 53, 56, 365 S.E.2d 251, 254 (1986). In fact, this Court has held that:

[a] reviewing court must evaluate the record of the agency's proceeding to determine whether there is evidence on the record as a whole to support the agency's decision. The evaluation is conducted pursuant to the administrative body's findings of fact, regardless of whether the court would have reached a different conclusion on the same set of facts.

Ruby v. Insurance Comm'n, 197 W. Va. 27, 32, 475 S.E.2d 27, 32 (1996).

It is well settled that, in reviewing agency action, the reviewing court must “evaluate the record of the agency's proceeding to determine whether there is evidence on the record as a whole to support the agency's decision.” Gino's Pizza of W. Hamlin, Inc., 187 W. Va. 312, 317, 418 S.E.2d 758, 763 (1992). Further, the Circuit Court's review must be “conducted pursuant to the administrative body's findings of fact, regardless of whether the court would have reached a different conclusion on the same set of facts.” Id.

Recently, in Bunch, 231 W. Va. 321, 745 S.E.2d 212 (2013), this Court again articulated the WVAPA standard for reviewing actions by an administrative officer, specifically in the context of the Commissioner:

On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4[(g)] and reviews questions of law presented de novo; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.

Bunch, 231 W. Va. at 326, 745 S.E.2d at 217.

Here, the Circuit Court failed to apply this deferential standard. One example of the Circuit Court's failure to afford deference is its holding that the RPE premium charged by Erie was unreasonable compared to the benefit provided. The Circuit Court determined that the evidence before the Circuit Court, and also before the Commissioner, was that King's liability premium had increased 40% after the RPE had been added to his policy and, consequently, “[t]he court has not found any cost-benefit analysis or any other entry in the Record to support the Commissioner's finding that the benefits provided by RPE are reasonable in relation to the increased liability premium charged.” (APP 1322.) In contrast, however, there was extensive testimony on the Record that the RPE provided increased certainty of a locked-in premium over

time. (APP 0192, 0432-0433, 0581.) Evidence in the Record ignored by the Circuit Court but considered by the Insurance Commissioner showed that King's overall premium actually decreased as a result of the RPE combined with the addition of a newer vehicle to his policy and that Erie's 2010 rate filing projected a 0% rate impact. (APP 0023, 0498.) While the Circuit Court may not agree with the Commissioner's ultimate conclusion, the testimony contained in the record clearly provides substantial evidence supporting the Commissioner's findings that the premium was reasonable and, as such, deference was required.

The Circuit Court also failed to give deference to the Commissioner as required by the WVAPA when it determined that Erie's RPE was misleading. In its *Decision on Appeal*, the Circuit Court stated:

the only evidence before the Commission [sic] during administrative review, and now before this Court on appeal is that the RPE had been a profit center in each of the states in which it has previously been implemented and the same has been true, thus far, in the State of West Virginia.

(APP 1323.)

Here, the Circuit Court confused Cody Cook's testimony. Mr. Cook did not testify that the RPE had been a "profit center"⁹ for Erie. In fact, Mr. Cook did not testify that the RPE had made money for Erie in any of the states in which it had been implemented. Instead, Mr. Cook actually testified that Erie anticipated breaking even or possibly even losing money on the RPE. (APP 0459.) Even the testimony cited by the Respondent in his *Petition for Hearing and Issuance of Subpoenas* does not support the contention that the RPE was a "profit center." In short, there is significant evidence in the Record to support the Commissioner's finding that the RPE filing was and not "misleading."

⁹ The term "profit center" – still undefined by both the Circuit Court and Respondent – first appears in the Respondent's *Petition for Hearing and Issuance of Subpoenas*, which was included in the record provided to the Circuit Court. (APP 0352.)

In its *Decision on Appeal*, the Circuit Court cited Chesapeake and Potomac Telephone Company of West Virginia v. Public Service Commission of West Virginia, 171 W. Va. 494, 300 S.E.2d 51 (1982) for the premise that administrative findings will be overturned where there is no substantial evidence to support them. (APP 1327.) While the principles articulated in Chesapeake are applicable generally, they do not apply here because there was substantial evidence to support the Commissioner's findings. While the Circuit Court is entitled, and even required, to overturn administrative actions where there is no substantial evidence to support them, it is not entitled to ignore the evidence in the record below.

The Insurance Commissioner has been designated by the Legislature to approve insurers' rate and form filings, and the Commissioner has expertise with respect to the issues presented in this case. Instead of deferring to the Insurance Commissioner, as the WVAPA requires so long as the Commissioner's decision is supported by evidence in the underlying record, the Circuit Court failed to provide proper deference to the Commissioner's findings. The Circuit Court's action is contrary to West Virginia law and should be reversed.

F. The Circuit Court's Decision on Appeal Creates Ambiguity for Erie as to Whether it Can Use Products Approved by the Commissioner.

In its *Decision on Appeal*, the Circuit Court held:

the Order appealed from is hereby REVERSED and continued approval of the RPE is OVERRULED. The Court leaves to the discretion of the Commissioner an orderly process by which policies currently subject to RPE are otherwise renewed and converted to traditional rating also previously approved. [Footnote omitted.] Alternatively, nothing herein precludes Erie from again seeking approval, with proper fiscal disclosure, deletion of the misleading clauses and title, neutral rating, proper consumer advertising and agent training, all as the Commissioner in full compliance with West Virginia law might allow, on a strictly voluntary basis by the consumer.

(APP 1319-1931.)

All told, the reversal of the Commissioner's prior approval of a 2010 endorsement and corresponding rate in these circumstances is clearly wrong because it ignores West Virginia law as more fully set forth above. Additionally, the relief ordered creates ambiguity in the regulation of the insurance market in the State of West Virginia and for insurers like Erie.

Should the Circuit Court's *Decision on Appeal* be undisturbed by this Court, Erie's business in West Virginia will be significantly affected. In developing and seeking approval for the RPE's use in West Virginia, Erie relied on the statutorily-mandated approval of the Insurance Commissioner. In fact, Erie revised its proposed filing, at the request of the Commissioner's office, over the course of several months. If the Circuit Court can simply step in and – four years later – overturn the properly-approved RPE, Erie will be forced to revise each of the 53,000 policies with the RPE currently in effect in West Virginia.

More problematic is the uncertainty created by the *Decision on Appeal* that any rate or product can be retroactively disapproved by a Court, *after* it has been approved *and affirmed* again in an administrative action by the regulator charged with overseeing insurance issues. As this Court has acknowledged, ratemaking represents a “highly specialized” process that the Legislature “expressly delegated to the Commissioner's expertise and jurisdiction.” CitiFinancial, 223 W. Va. at 237, 672 S.E.2d at 373. Erie relies on the Commissioner's expertise and uniform authority to set rates and create new products for West Virginia consumers as a fundamental part of its business operations in this State and to provide innovative and more attractive products for West Virginia consumers. This Court has repeatedly upheld this statutory scheme, which the Circuit Court here disregarded in clear violation of West Virginia law here.

V. CONCLUSION

The Circuit Court's intrusion into the province of the Insurance Commissioner should not be permitted by this Court. The Circuit Court's *Decision on Appeal* ignored settled law as to the role of the Insurance Commissioner, ignored the evidence provided to it via the Record below, and failed to apply this Court's clearly-articulated standard of review. In short, the Circuit Court would have its judgment inserted for that of the Commissioner based on its application of an improper standard, incomplete and misinterpreted evidence and a lesser degree of expertise. This is exactly what the Legislature intended to avoid in assigning the Commissioner the role of regulating insurance products and rates.

Based on the foregoing, Petitioner Erie Insurance Property & Casualty Company respectfully requests this Court Reverse the Circuit Court's *Decision on Appeal*.

**ERIE INSURANCE PROPERTY & CASUALTY
COMPANY**

BY DINSMORE & SHOHL, LLP



**Jill Cranston Rice (WV State Bar No. 7421)
Andrew T. Kirkner (WV State Bar No. 12349)
215 Don Knotts Blvd., Suite 300
Morgantown, WV 26501
Telephone: (304) 357-0900
Facsimile: (304) 357-0919
E-mail: jill.rice@dinsmore.com
E-mail: andrew.kirkner@dinsmore.com**

and

James D. Lamp (WV State Bar No. 2133)
Matthew J. Perry (WV State Bar No. 8589)
LAMP BARTRAM LEVY TRAUTWEIN &
PERRY, PLLC
720 Fourth Avenue
Huntington, WV 25701
Telephone: 304-523-5400
E-mail: jlamp@lbtplaw.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-1059

ERIE INSURANCE PROPERTY & CASUALTY COMPANY, and
WEST VIRGINIA INSURANCE COMMISSIONER,

Respondents-Below, Petitioners

v.

VINCENT J. KING,

Petitioner-Below, Respondent.

From the Circuit Court of Kanawha County, West Virginia
Civil Action No. 13-AA-95

CERTIFICATE OF SERVICE

I, Jill C. Rice, hereby certify that on this 13th day of January, 2014, I have served a true and exact copy of the **BRIEF OF PETITIONER ERIE INSURANCE PROPERTY & CASUALTY COMPANY** upon all parties to this matter, by depositing a true copy of the same in the U.S. Mail, postage prepaid, properly addressed to the following:

Vincent J. King
99 Presidio Pointe
Cross Lanes, WV 25313
vjking@suddenlink.net
Pro Se

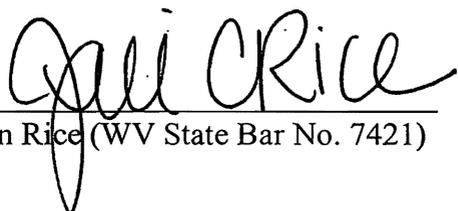
Andrew R. Pauley
General Counsel, Director – Legal Division
1124 Smith Street
Charleston, WV 25305-0540
Andrew.Pauley@wvinsurance.gov
Counsel for West Virginia Insurance Commissioner

Scott L. Summers
Summers Law Office, PLLC
P.O. Box 6337
Charleston, WV 25362
scott@summerswvlaw.com
Counsel for Garlow Insurance Agency, Incorporated

James D. Lamp / Matthew J. Perry
Lamp Bartram Levy Trautwein & Perry, PLLC
720 Fourth Avenue
Huntington, WV 25701
jlamp@lbtplaw.com
Counsel for Erie Insurance Property & Casualty Company

Jeff Wakefield
Flaherty, Sensabaugh & Bonasso, PLLC
200 Capitol Street
Charleston, WV 25338
Counsel for West Virginia Insurance Federation

Laurie C. Barbe
Steptoe & Johnson PLLC
P.O. Box 1616
Morgantown, WV 26507-1616
*Counsel for Property Casualty Insurers Association of America
and American Insurance Association*



Jill Cranston Rice (WV State Bar No. 7421)