

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**January 1998 Term**

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**No. 24447**

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**STATE OF WEST VIRGINIA BY AND THROUGH  
DARRELL V. McGRAW, JR., ATTORNEY GENERAL,  
Plaintiff Below, Appellee**

**v.**

**IMPERIAL MARKETING, ET AL., AND  
SUAREZ CORPORATION INDUSTRIES,  
Defendants Below**

**SUAREZ CORPORATION INDUSTRIES,  
Defendant Below, Appellant**

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**Appeal from the Circuit Court of Kanawha County  
Honorable Herman G. Canady, Jr., Judge  
Civil Action No. 94-C-243**

**AFFIRMED, IN PART, REVERSED, IN PART,  
AND REMANDED WITH DIRECTIONS**

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**Submitted: January 20, 1998  
Filed: June 25, 1998**

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**The Opinion of the Court was delivered PER CURIAM.**  
**JUSTICE McCUSKEY, deeming himself disqualified, did not participate**  
**in the decision in this case.**  
**JUDGE FOX, sitting by temporary assignment.**  
**JUSTICE STARCHER concurs, and reserves the right to file**  
**a concurring opinion.**

## **SYLLABUS BY THE COURT**

1. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus point 3, Aetna Casualty and Surety Co. v. Federal Insurance Co., 148 W.Va. 160, 133 S.E.2d 770 (1963).

2. "The West Virginia Prizes and Gifts Act, W.Va. Code 46A-6D-1 to -10 (1992) was designed by the West Virginia Legislature to assist in protecting West Virginia citizens from being victimized by misleading and deceptive practices when a seller is attempting to market a product using a prize or gift as an inducement." Syllabus point 3, State By and Through Darrell V. McGraw, Jr., Attorney General v. Imperial Marketing, 196 W.Va. 346, 472 S.E.2d 792, cert. denied, 65 U.S.L.W. 3340 (1996).

3. "An opponent of a summary judgment motion requesting a continuance for further discovery need not follow the exact letter of Rule 56(f) of the West Virginia Rules of Civil Procedure in order to obtain it. When a departure from the rule occurs, it should be made in written form and in a timely manner.

The statement must be made, if not by affidavit, in some authoritative manner by the party under penalty of perjury or by written representations of counsel. At a minimum, the party making an informal Rule 56(f) motion must satisfy four requirements. It should (1) articulate some plausible basis for the party's belief that specified "discoverable" material facts likely exist which have not yet become accessible to the party; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier." Syllabus point 1, Powderidge Unit Owners Association v. Highland Properties, LTD, 196 W.Va. 692, 474 S.E.2d 872 (1996).

4. "Under the West Virginia Prizes and Gifts Act, W.Va. Code, 46A-6D-1 to -10 (1992), once the circuit court makes a finding that deceptive practices are used to affect a consumer's decision to purchase a product, then the circuit court is authorized, within the bounds of reason, to infer that the deception will constitute a material factor in a consumer's decision to purchase the product."

Syllabus point 7, State By and Through Darrell V. McGraw, Jr., Attorney General v. Imperial Marketing, 196 W.Va. 346, 472 S.E.2d 792, cert. denied, 65 U.S.L.W. 3340 (1996).

5. "Although our standard of review for summary judgment remains de novo, a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed." Syllabus point 3, Fayette County National Bank v. Lilly, 199 W.Va. 349, 484 S.E.2d 232 (1997).

**Per Curiam:<sup>1</sup>**

**This action is before this Court upon an appeal from the final order of the Circuit Court of Kanawha County, West Virginia, entered on April 25, 1997. Pursuant to that order, the circuit court granted summary judgment in favor of the appellee, the State of West Virginia by and through Attorney General Darrell V. McGraw, and against the appellant, Suarez Corporation Industries. Concluding that various direct mail marketing solicitations sent by Suarez to West Virginia consumers violated the West Virginia Consumer Credit and Protection Act and, particularly, the Prizes and Gifts Act (contained within the Consumer Credit and Protection Act), the circuit court ordered (1) that Suarez be permanently enjoined from committing such violations, (2) that a \$500,000 civil penalty be assessed in the event Suarez fails to abide by the injunction order and (3) that Suarez engage in a consumer refund program under the supervision of a special commissioner.**

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<sup>1</sup>We point out that a per curiam opinion is not legal precedent. See Lieving v. Hadley, 188 W. Va. 197, 201 n.4, 423 S.E.2d 600, 604 n.4. (1992).

This Court has before it the petition for appeal, all matters of record and the briefs and argument of counsel.<sup>2</sup> It should be noted that an earlier, temporary injunction in this matter was upheld by this Court in State By and Through Darrell V. McGraw, Jr., Attorney General, v. Imperial Marketing, 196 W.Va. 346, 472 S.E.2d 792, cert. denied, 65 U.S.L.W. 3340 (1996). Upon a careful review of the record and for the reasons expressed herein, we now affirm the permanent injunction. However, this Court reverses the final order with regard to the \$500,000 civil penalty. Furthermore, we direct the circuit court to enter an order modifying the consumer refund program.

## I. PROCEDURAL HISTORY

Suarez Corporation Industries, located in Canton, Ohio, and its affiliated enterprises are in the business of selling consumer goods, such as simulated jewelry, through the use of direct mail marketing solicitations. Many solicitations were sent by Suarez to West Virginia residents prior to the institution of this action in 1994. The litigation surrounding the solicitations has been tempestuous to say the least and has resulted in the amassing of hundreds of pages

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<sup>2</sup>An amicus curiae brief has been received by this Court from the American Association of Retired Persons. In addition, an amicus curiae brief has

of pleadings, exhibits and transcripts. The limited record currently before this Court, as designated by the parties, is quite voluminous.

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been received from the North Central West Virginia Legal Aid Society.



Specifically, the Attorney General instituted this action in the Circuit Court of Kanawha County against numerous defendants, including Suarez, alleging that the solicitation activities of the defendants constituted multiple transgressions of the West Virginia Consumer Credit and Protection Act and, particularly, the Prizes and Gifts Act contained therein. W.Va. Code, 46A-1-101 [1974], et seq.; W.Va. Code, 46A-6D-1 [1992], et seq.<sup>3</sup> As indicated in Imperial Marketing, supra, the mailings of Suarez were selected by the Attorney General as representative of the solicitations in question of all of the defendants. Ultimately, the litigation focused upon three specific marketing efforts of Suarez involving several thousand West Virginia consumers. The three solicitations, discussed below, included (1) the awarding to consumers of a 1-carat cubic zirconia diamond simulant and the related sale of a mounting for the stone, (2) the awarding of a

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<sup>3</sup>The action instituted by the Attorney General primarily sought injunctive relief against the defendants to restrain them from violating the Consumer Credit and Protection Act and the Prizes and Gifts Act. As W.Va. Code, 46A-7-108 [1974], provides: "The attorney general may bring a civil action to restrain a person from violating this chapter and for other appropriate relief." In addition, however, the Attorney General sought (1) civil penalties, (2) restitution on behalf of West Virginia consumers, (3) damages on behalf of West Virginia consumers, including punitive damages, (4) litigation costs and (5) attorney fees. Moreover, the Attorney General alleged: "The relevant time period for the causes of action alleged in this Complaint is from at least four years prior to the filing of this Complaint, and includes the present and future [.]" As W.Va. Code, 46A-7-111(2) [1974], for example, states in part: "No civil penalty pursuant to this subsection may be imposed for violations of this chapter occurring more than four

**cash prize to consumers and the related sale of a five-piece clutch purse ensemble and (3) the sale to consumers of a pair of crystal candle holders and a related bonus gift of a crystal heart-shaped dish.**

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**years before the action is brought."**

On November 3, 1994, the circuit court awarded the Attorney General a temporary injunction restraining Suarez from violating the West Virginia Consumer Credit and Protection Act and the Prizes and Gifts Act.<sup>4</sup> In particular, the circuit court enjoined Suarez from, inter alia, soliciting consumers in West Virginia with an offer "which denominates an item as a prize, gift, award, premium, or similar term that implies the item is free whether stated or represented in any way, when the intended recipient is required to spend any sum of money to make meaningful use of it." In March 1996, this Court, in Imperial Marketing, upheld the temporary injunction.

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<sup>4</sup>The authority of the Attorney General to seek temporary relief in the context of consumer protection is found in W.Va. Code, 46A-7-110 [1974], which states: "With respect to an action brought to enjoin violations of this chapter or unconscionable agreements or fraudulent or unconscionable conduct, the attorney general may apply to the court for appropriate temporary relief against a respondent, pending final determination of the proceedings."

The facts relating to the three solicitations in question are more specifically set forth in the Imperial Marketing opinion. With regard to the first solicitation, potential consumers were notified by Suarez that they had been awarded a free 1-carat cubic zirconia diamond simulant. The consumers were also told, however, that the stone had already been mounted in a necklace or ring which could be purchased for \$19. If consumers desired the stone without purchasing the mounting, consumers were required to follow a convoluted claim procedure.<sup>5</sup> With regard to the second solicitation, consumers were notified that

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<sup>5</sup>Exhibit no. 3, submitted to the circuit court by Suarez, included the following instructions for claiming the diamond simulant without the \$19 mounting:

If you are not ordering: to only claim your unmounted CZ Diamond Simulant prize from the Finalist Drawing and confirm your entry in the Winners and Final Drawing, affix the Security Insurance Shipping Label from the Winners Certification Claim Form over your name and address on the Official Prize Claim Notice. Write in "PRJ78A" below the label to insure the proper prize is shipped to you. Completely fill out the Official Prizewinners Release Form (Form 201) and sign it where indicated. (Grace period: an additional 23 days is allotted for receipt of prize claims and/or mounting selections.) Mail your completed Official Prizewinners Release in a plain white #10 envelope (Do not use the enclosed return envelope.) to: Sweepstakes Claims Processing Center . . .  
. . . Improperly completed entries will be disqualified.

As this Court observed in Imperial Marketing, this cumbersome

they had been awarded a cash prize of "as much as \$1,000." The consumers were also told, however, that the prize had been placed in a five-piece clutch purse ensemble which could be purchased for \$12, plus \$2 for special packaging and insurance. The solicitation indicated that "priority handling" would be afforded to consumers purchasing the purse ensemble. If consumers desired the cash prize without purchasing the purse ensemble, consumers were required to follow a claim procedure similar to that concerning the diamond simulant.<sup>6</sup> The third solicitation involved an offer to sell to consumers a pair of crystal candle holders for \$19. As a

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process was in contrast to the simplified method of purchasing a mounted stone. 196 W.Va. at 353 n. 11, 472 S.E.2d at 799 n. 11.

<sup>6</sup>The record contains the following instructions for claiming the cash prize without purchasing the five-piece clutch purse ensemble:

If not ordering and to claim your cash prize only, cut out and affix the prize confirmation code located on the front [of] the Declaration of Cash Prize form to a 3-1/2 x 5-1/2 inch index card with your name, address and phone number and insert all into your own #10 white envelope. Failure to follow these instructions will cause forfeiture of your cash prize. Mail to Bulk-Sort Center . . . to claim your cash prize. Do not use the enclosed envelope that is for ordering only, or your cash prize and status as an eligible finalist will be waived. Since we will be required to remove your check from the purse if not ordering, we are required to give priority handling to those who accept the purse.

The record indicates that in almost no circumstances did the cash prize exceed a nominal amount.

bonus for the purchase, consumers were told that they would receive, as a gift, a crystal heart-shaped dish "worth over \$15." Enclosed with the solicitation was a check for a nominal amount to be returned by the consumer to Suarez to help cover the cost of shipping and handling with regard to the dish. Problematic, as to this third solicitation, was the ambiguity surrounding both the value of the bonus gift and the nature of the enclosed check.

In considering those solicitations, and in affirming the circuit court's award of a temporary injunction, this Court, in Imperial Marketing, observed that the evidentiary standard for such relief in consumer protection cases is rather minimal. Focusing upon the Prizes and Gifts Act, this Court, in Imperial Marketing, stated that, in seeking temporary relief, "the Attorney General need not prove the respondent has in fact violated the [Prizes and Gifts Act], but only needs to make a minimal evidentiary showing of good reason to believe that the essential elements of a violation of the Act are in view." 196 W.Va. at 352, 472 S.E.2d at 798. Suarez appealed this Court's decision in Imperial Marketing to the United States Supreme Court. That Court, however, denied certiorari in November 1996.

In the meantime, the Attorney General moved for summary judgment against Suarez. In the motion, the Attorney General indicated that a permanent injunction was warranted because the "undisputed conduct" of Suarez, as demonstrated by the solicitations, constituted violations of West Virginia law.<sup>7</sup> In response, Suarez alleged that, inasmuch as discovery in the action was "not complete," the motion of the Attorney General for summary judgment was premature. In addition, Suarez responded by filing a number of affidavits of its officers describing Suarez's business practices concerning its direct mail marketing efforts and denying that any violations of West Virginia law occurred. Moreover, Suarez asserted that various dissatisfied consumers brought to the attention of the circuit court by the Attorney General had simply "misinterpreted the plain meaning of promotions they received."

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<sup>7</sup>As the parties suggest, the motion filed by the Attorney General may more accurately be described as a motion for partial summary judgment. Specifically, the final order of April 25, 1997, granting the motion concerned the award of a permanent injunction, the \$500,000 civil penalty and the consumer refund program. The order did not resolve questions concerning consumer damages (including punitive damages), litigation costs and attorney fees. See n. 3, supra. We observe, nevertheless, that the order of April 25, 1997, is appealable to this Court because it "approximates a final order in its nature and effect." Syl. pt. 2, Durm v. Heck's, Inc., 184 W.Va. 562, 401 S.E.2d 908 (1991).

On December 13, 1996, the circuit court conducted a hearing upon the motion for summary judgment. Subsequently, on April 25, 1997, the circuit court entered the final order permanently enjoining Suarez from violating the West Virginia Consumer Credit and Protection Act and the Prizes and Gifts Act. In particular, the circuit court reaffirmed its previous findings concerning Suarez's solicitations (with regard to the temporary injunction) and concluded that "the only reasonable inference" that could be drawn from Suarez's practices was that deception constituted a material factor in consumer decisions to purchase the company's offers. As the final order stated, the evidence established that the solicitations "were actually misleading by virtue of material misrepresentations made, and that they exceed acceptable standards and practices allowing a certain degree of puffing in respect to sales transactions."<sup>8</sup>

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<sup>8</sup>The final order stated that Suarez and its affiliated enterprises were permanently enjoined from the following:

A. Soliciting consumers in West Virginia with an offer which denominates an item as a prize, gift, award, premium, or similar term that implies the item is free, whether stated or represented in any way, when the intended recipient is required to spend any sum of money to make meaningful use of it.

B. Representing to consumers in West Virginia that the prize, gifts, award, premium, or similarly denominated item or any good or service offered to consumers has a



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value in excess of the fair market value.

C. Representing to consumers that the consumer has specific odds or chances of winning a prize, contest, sweepstakes or similar promotion unless the specific odds or chance of winning has been numerically determined and can be substantiated prior to transmittal of the solicitation in accordance with the West Virginia Consumer Credit and Protection Act.

D. Sending to potential customers in West Virginia solicitations which use language such as "You have won," "Declaration of Cash Prize," "You are entitled . . . ,", "Certified Winner," and making representations to solicited persons in West Virginia of having won a prize, gift or other item of value, unless the solicited person is in fact given the prize, gift or item of value, without obligation, and unless all of the conditions of the West Virginia Consumer Credit and Protection Act, W.Va. Code, 46A-6D-3 are met.

E. Sending solicitations to persons in West Virginia which use official sounding language and seals such as: "Judges Seal," "Office of the Treasurer," "Claim Processing Division," that may lead a reasonable person to believe that he or she has won something of value; or sending solicitations that represent that the recipient has been specially selected, when in fact the solicitation is part of a mass mailing.

F. The defendant shall not send material to persons in West Virginia which includes writing which simulates a check, or resembles a check or invoice, in violation of the West Virginia Consumer Credit and Protection Act.

G. The defendant shall not solicit by sending to persons in West Virginia material referencing fake jewelry ratings or prize appraisals, bogus jewelers or agents who

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are holding prizes for the benefit of solicited customers in West Virginia.

H. The defendant is enjoined from conducting any business in the State of West Virginia that is in violation of [the] West Virginia Consumer Credit and Protection Act. W.Va. Code, 46A-6D-3 et seq.

I. The defendant is enjoined from conducting any business in the State of West Virginia that is in violation of [the] West Virginia Prizes and Gifts Act, W.Va. Code, 46A-6D-1, et seq [.]

As reflected in the final order, in addition to the award of a permanent injunction, the circuit court assessed a \$500,000 civil penalty against Suarez payable in the event Suarez were to fail to abide by the injunction order. See n. 8, supra. Moreover, as more specifically described below, the circuit court directed Suarez to engage in a consumer refund program under the supervision of a special commissioner.

This appeal followed.

## II. STANDARDS OF REVIEW

In Imperial Marketing, the issue before this Court was whether the circuit court had justification to conclude that the Attorney General had made the "minimal evidentiary showing" necessary for a temporary injunction. As we indicated in that decision, a temporary injunction could be awarded upon "reasonable cause." 196 W.Va. at 352, 472 S.E.2d at 798. Since then, however, a permanent injunction has been awarded by the circuit court by way of summary judgment. Thus, in contrast to the "reasonable cause" standard, Rule 56 of the West Virginia Rules of Civil Procedure states that summary judgment is warranted where the record demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See generally, Lugar & Silverstein, West Virginia Rules of Civil Procedure, p. 426-42 (Michie 1960).<sup>9</sup>

Our standards of review concerning summary judgment are well settled. As this Court stated in syllabus point 3 of Aetna Casualty and Surety Co.

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<sup>9</sup>It should be noted that, where appropriate, injunctive relief may be awarded by summary judgment. Arch Mineral Corporation v. Babbitt, 104 F.3d 660 (4th Cir. 1997); IOTA XI Chapter of Sigma Chi Fraternity v. George Mason University, 993 F.2d 386 (4th Cir. 1993).

v. Federal Insurance Co., 148 W.Va. 160, 133 S.E.2d 770 (1963): "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." See also, syl. pt. 1, Burdette v. Columbia Gas Transmission Corporation, 198 W.Va. 356, 480 S.E.2d 565 (1996); syl. pt. 2, Rose v. Oneida Coal Co., 195 W.Va. 726, 466 S.E.2d 794 (1995); Payne v. Weston, 195 W.Va. 502, 506, 466 S.E.2d 161, 165 (1995); syl. pt. 2, Graham v. Graham, 195 W.Va. 343, 465 S.E.2d 614 (1995). Moreover, we note that, upon appeal, the entry of a summary judgment is reviewed by this Court de novo. Syl. pt. 1, Koffler v. City of Huntington, 196 W.Va. 202, 469 S.E.2d 645 (1996); syl. pt. 1, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994).

In Weaver v. Ritchie, 197 W.Va. 690, 693, 478 S.E.2d 363, 366 (1996), this Court set forth the following a priori standard of review with regard to permanent injunctions: "In reviewing challenges to the findings and conclusions of the trial court, we apply a two-pronged deferential standard of review with the final order and ultimate disposition (granting of the permanent injunction) reviewed under an abuse of discretion standard, and the underlying factual findings under a clearly erroneous standard." See also, syl. pt. 1, G Corp, Inc. v. Mackjo, Inc., 195 W.Va. 752, 466 S.E.2d 820 (1995). Here, as the final order

indicates, the circuit court found as a matter of fact and law that the solicitations mailed by Suarez to West Virginia consumers violated the West Virginia Consumer Credit and Protection Act and the Prizes and Gifts Act. We review that order pursuant to the above standards.

### **III. THE PERMANENT INJUNCTION**

The West Virginia Consumer Credit and Protection Act is found in chapter 46A of the West Virginia Code. That Act includes the Prizes and Gifts Act found in W.Va. Code, 46A-6D-1 [1992], et seq. The award of the permanent injunction in this action was based upon the conclusion of the circuit court that Suarez's solicitations violated the provisions of the Consumer Credit and Protection Act, generally, and the Prizes and Gifts Act, specifically. With regard to the latter Act, this Court observed in syllabus point 3 of Imperial Marketing: "The West Virginia Prizes and Gifts Act, W.Va. Code 46A-6D-1 to -10 (1992) was designed by the West Virginia Legislature to assist in protecting West Virginia citizens from being victimized by misleading and deceptive practices when a seller is attempting to market a product using a prize or gift as an inducement."

The principal sections of the Prizes and Gifts Act involved in this action are W.Va. Code, 46A-6D-3 [1992], concerning the representation of having won a prize or gift, and W.Va. Code, 46A-6D-4 [1992], concerning the representation of eligibility to receive a prize or gift. As W.Va. Code, 46A-6D-3(a) [1992], concerning having won a prize or gift, provides in part:

[A] person may not, in connection with the sale or lease or solicitation for the sale or lease of goods, property or service, represent that another person has won anything of value or is the winner of a contest, unless all of the following conditions are met:

(1) The recipient of the prize, gift or item of value is given the prize, gift or item of value without obligation; and

(2) The prize, gift or item of value is delivered to the recipient at no expense to him or her, within ten days of the representation.

Moreover, as W.Va. Code, 46A-6D-4(a) [1992], concerning eligibility to receive a prize or gift, provides:

A person may not represent that another person is eligible or has a chance to win or to receive a prize, gift or item of value without clearly and conspicuously disclosing on whose behalf the contest or promotion is conducted, as well as all material conditions which a participant must satisfy. In an oral solicitation all material conditions shall be disclosed prior to requesting the consumer to enter into the sale or lease. Additionally, in any written material covered by this section, each of the following shall be clearly and prominently disclosed:

(1) Immediately adjacent to the first identification of the prize, gift or item of value to which it relates; or

(2) In a separate section entitled "Consumer Disclosure" which title shall be printed in no less than ten-point bold-face type and which section shall contain only a description of the prize, gift or item of value and the disclosures outlined in paragraphs (i), (ii) and (iii) of this subdivision:

- (i) The true retail value of each item or prize;
- (2) The actual number of each item, gift or prize to be awarded; and
- (3) The odds of receiving each item, gift or prize.

As indicated above, the permanent injunction herein was awarded by way of summary judgment. Suarez contends that, because discovery in this action was incomplete, the circuit court acted precipitously in concluding that the solicitations violated the Prizes and Gifts Act. Thus, Suarez asserts that the circuit court committed error in not granting its request, made pursuant to Rule 56(f) of the West Virginia Rules of Civil Procedure, for further discovery.<sup>10</sup>

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<sup>10</sup>Rule 56(f) provides:

Should it appear from the affidavits of a party opposing the motion [for summary judgment] that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

As syllabus point 3 of Williams v. Precision Coil, Inc., 194 W.Va. 52, 459



Moreover, Suarez asserts that the circuit court committed error in not concluding that the evidence of various officers of Suarez and consumers created a question of fact concerning whether the solicitations violated West Virginia law. Thus, according to Suarez, the circuit court committed error in granting the summary judgment. As discussed below, however, the assertions of Suarez in that regard are without merit.

As to Rule 56(f), this Court, in syllabus point 1 of Powderidge Unit Owners Association v. Highland Properties, LTD, 196 W.Va. 692, 474 S.E.2d 872 (1996), held as follows:

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S.E.2d 329 (1995), states:

If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the non-moving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

An opponent of a summary judgment motion requesting a continuance for further discovery need not follow the exact letter of Rule 56(f) of the West Virginia Rules of Civil Procedure in order to obtain it. When a departure from the rule occurs, it should be made in written form and in a timely manner. The statement must be made, if not by affidavit, in some authoritative manner by the party under penalty of perjury or by written representations of counsel. At a minimum, the party making an informal Rule 56(f) motion must satisfy four requirements. It should (1) articulate some plausible basis for the party's belief that specified "discoverable" material facts likely exist which have not yet become accessible to the party; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier.

(emphasis added)

Here, with regard to discovery, the record indicates that, prior to the entry of summary judgment, the Attorney General permitted Suarez to extensively examine and copy the State's files concerning the solicitations. Moreover, the individuals Suarez asserts it should have been allowed to depose prior to the entry of that judgment consisted largely of West Virginia consumers who testified and were cross-examined about the solicitations during the temporary injunction stage of the litigation. Thus, as the State asserts concerning those consumers, "the

substance of their potential testimony [was] already known" by Suarez before the summary judgment was entered.<sup>11</sup>

In addition, the affidavits of corporate officers submitted by Suarez in response to the motion for summary judgment indicated that, pursuant to Suarez's marketing strategy, the solicitations sent to West Virginia consumers offering a free gift always provided the following alternatives: "[E]ither the recipient may request the free gift, without obligation, or, alternatively, the recipient may pay a fee for an enhanced product." In that regard, we note that the affidavits simply emphasized the language actually employed in the solicitations, rather than extrinsic evidence.

More importantly, the discovery issue and the affidavits filed by Suarez notwithstanding, this Court is of the opinion, as we suggested in Imperial Marketing, that, in the circumstances of this action, the question of whether Suarez violated this State's consumer protection law, and, particularly, the

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<sup>11</sup>The individuals sought to be deposed by Suarez included, inter alia, Janice Estep, Minnie Johnson, Woodrow Nieman, William Knighton and Eleanor Jones. Those individuals were West Virginia consumers who testified at various hearings before the circuit court prior to the final award of temporary injunctive relief.

provisions of the Prizes and Gifts Act set forth above, depends upon the language of the solicitations themselves and not upon extrinsic evidence. Here, the circuit court properly determined that violations occurred, and the circuit court acted within its discretion in awarding the permanent injunction.

Although ostensibly requiring no purchase or obligation, the solicitations under consideration, while suggesting a certain mutability on the surface, possess a persistent deceptive quality beneath. As stated above, with regard to the first solicitation, West Virginia consumers were notified by Suarez that they had been awarded a free 1-carat cubic zirconia diamond simulant. The consumers were also told, however, that the stone had already been mounted in a necklace or ring which could be purchased for \$19. If consumers desired the stone without purchasing the mounting, consumers were required to follow a convoluted claim procedure. See n. 5, supra. Thus, the violation of W.Va. Code, 46A-6D-3(a) [1992], i.e., that the recipient of a prize or gift must be given the prize or gift "without obligation" and that it be delivered to the recipient "at no expense," is evidenced by the following language of the solicitation:

[T]his office can only award the 1-carat Lindenwold CZ Diamond, not the mounting. If you do not select a mounting, it may take up to 60 days to ship your prize. So, in order to patch up this confusion we are able to

make this special arrangement for you: (this offer cannot be transferred):

1. First you need to look through the enclosed Showroom Selections and choose the beautiful mounting you like best.

2. Since the 1-carat Lindenwold CZ Diamond is already mounted it will cost the jeweler too much to remove the CZ Jewel. Therefore, they have agreed to allow you to select any showroom mounting and ship it to you. All they ask is that you cover the standard \$19 Transfer Deposit.

Similarly, with regard to the second solicitation, consumers were notified that they had been awarded a cash prize of "as much as \$1,000." The consumers were also told, however, that the prize had been placed in a five-piece clutch purse ensemble which could be purchased for \$12, plus \$2 for special packaging and insurance. The solicitation indicated that "priority handling" would be afforded to consumers purchasing the purse ensemble. If consumers desired the cash prize without purchasing the purse ensemble, consumers were required to follow a claim procedure similar to that concerning the diamond simulant. See n. 6, supra. Thus, the violation of W.Va. Code, 46A-6D-3(a) [1992], i.e., that the recipient of a prize or gift must be given the prize or gift "without obligation" and that it be delivered to the recipient "at no expense," is evidenced by the following language of the clutch purse solicitation:

As a guaranteed cash prize winner, the 5 piece Givone Clutch Purse Ensemble holding your check will be transferred to you when you cover the sponsor's special publicity discount fee of just \$12, plus \$2 for special packaging and insurance. \* \* \* Remember, since the checks will already be in the purses, we are required by the sponsor's rules to give priority handling to those who are able to accept entitlement to their purse by submitting the minimum fee.

Finally, as stated above, the third solicitation involved an offer to sell to consumers a pair of crystal candle holders for \$19. As a bonus for the purchase, consumers were told that they would receive, as a gift, a crystal heart-shaped dish "worth over \$15." Enclosed with the solicitation was a check for a nominal amount to be returned by the consumer to Suarez to help cover the cost of shipping and handling with regard to the dish. The consumer's eligibility to receive the heart-shaped dish as a bonus gift therefore brings into play the above provisions of W.Va. Code, 46A-6D-4(a) [1992], which require disclosure of "[t]he true retail value of each item or prize [.]" The statement in the solicitation that the dish was "worth over \$15" did not comply with that statutory admonition.<sup>12</sup> Moreover,

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<sup>12</sup>Manifestly, the required disclosure of W.Va. Code, 46A-6D-4(a) [1992], constitutes a recognition by the West Virginia Legislature that consumers may be influenced in their purchase of the underlying product by the value of the bonus gift. As this Court observed in Imperial Marketing with regard to the heart-shaped dish, consumers were not provided "a clear and meaningful

whether the enclosed check for the nominal amount was a negotiable instrument or simply a simulated check was rendered ambiguous by the fact that the check was attached to an "Entitlement Form" which stated: "Do not detach [the check] - Return with order for free crystal heart box." See, W.Va. Code, 46A-6D-6(a) [1992], which provides that, in connection with a consumer transaction, no person may issue any writing which simulates or resembles a check, unless the writing clearly and conspicuously discloses "its true value and purpose."

During the course of this litigation, both the Attorney General and Suarez elicited the testimony of various consumers before the circuit court concerning the solicitations. Whereas the witnesses for the State indicated that the true import of the solicitations was difficult to grasp and that they had experienced a certain degree of bureaucratic hubris in their communications with Suarez, the witnesses called by Suarez suggested that the solicitations were quite clear and that their dealings with Suarez were satisfactory. The futility of that type of extrinsic evidence in cases of this nature, however, is evidenced by the fact that, during a one year period only, more than 17,000 West Virginia consumers received solicitations from Suarez or its affiliated enterprises. Rather, under the

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representation as to the true retail value of the bonus." 196 W.Va. at 356 n. 29, 472 S.E.2d at 802 n. 29.

circumstances of this action, and in view of the solicitations described above, this Court is of the opinion that the testimony of the consumers failed to establish a genuine issue of material fact within the meaning of Rule 56. As the final order of April 25, 1997, stated: "It is irrelevant, however, that there are some West Virginia consumers who are satisfied with their merchandise. The issue is: whether defendant, in its solicitation efforts in West Virginia . . . engaged in conduct which is calculated to or likely to, deceive and misrepresent the offer, and thereby violate [West Virginia law]." Indeed, in awarding the permanent injunction, the circuit court concluded that "the only reasonable inference" that could be drawn from Suarez's practices was that deception constituted a material factor in consumer decisions to purchase the company's offers. As the opinion in Imperial Marketing observes: "It is clear from this record that [Suarez's] solicitations induce a consumer to purchase a product not necessarily with direct misrepresentations about a product, but with other misleading and deceptive practices which affect the consumer's decision to buy." 196 W.Va. at 357, 472 S.E.2d at 803. Thus, as syllabus point 7 of Imperial Marketing holds:

Under the West Virginia Prizes and Gifts Act, W.Va. Code, 46A-6D-1 to -10 (1992), once the circuit court makes a finding that deceptive practices are used to affect a consumer's decision to purchase a product, then the circuit court is authorized, within the bounds of reason, to infer that the deception will constitute a



material factor in a consumer's decision to purchase the product.

Accordingly, upon all of the above, this Court holds that pursuant to the West Virginia Consumer Credit and Protection Act, W.Va. Code, 46A-1-101 [1974], et seq., and the Prizes and Gifts Act included therein, W.Va. Code, 46A-6D-1 [1992], et seq., the validity of direct mail marketing solicitations to West Virginia consumers must be resolved upon a case by case basis; however, where the language of such a solicitation is, on its face, misleading, deceptive and calculated to unfairly induce consumers to purchase a product, then such solicitation is in contravention of those statutes as a matter of law, and a circuit court is authorized to determine, without resort to extrinsic evidence, that the West Virginia Consumer Credit and Protection Act and the Prizes and Gifts Act have been violated, and a circuit court is further authorized to award injunctive relief in order to restrain such misconduct.

Here, the nature of the solicitations in question and the determination by the circuit court that deception was "the only reasonable inference" arising therefrom lead this Court to the inexorable conclusion that summary judgment

was proper.<sup>13</sup> See Imperial Marketing, 196 W.Va. at 358, 472 S.E.2d at 804, citing Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 105 S.Ct. 2265, 85

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<sup>13</sup> Suarez asserts that, pursuant to the provisions of W.Va. Code, 46A-6D-4(d) [1992], and W.Va. Code, 46A-6D-10 [1992], it is exempt from the Prizes and Gifts Act. It should be noted, however, that by their express terms, neither of those provisions applies to W.Va. Code, 46A-6D-3 [1992], which requires that the recipient of a prize or gift must be given the prize or gift "without obligation" and that it be delivered to the recipient "at no expense." As the exemption found in W.Va. Code, 46A-6D-4(d) [1992], states:

The provisions of this section do not apply where to be eligible:

(1) Participants are asked only to complete and mail, or deposit at a local retail commercial establishment, an entry blank obtainable locally or by mail, or to call in their entry toll free by telephoning or other free or local calling option; or

(2) Participants are never required to listen to a sales presentation and never requested or required to pay any sum of money for any merchandise, service or item of value.

As stated, that exemption does not apply to W.Va. Code, 46A-6D-3 [1992], and would, therefore, not affect the discussion herein concerning the cubic zirconia diamond simulant or the clutch purse ensemble. Moreover, the heart-shaped dish, although implicating W.Va. Code, 46A-6D-4 [1992], simply concerns the disclosure of "the true retail value" thereof, which was found lacking by the circuit court. The assertion that W.Va. Code, 46A-6D-4(d) [1992], exempts Suarez from the Prizes and Gifts Act is, under the circumstances of this action, unconvincing.

Furthermore, the exemption found in W.Va. Code, 46A-6D-10 [1992], is clearly limited in its application. That section provides:

The provisions of sections four through seven of this

L.Ed.2d 652 (1985), to the effect that "where the possibility of deception is self-evident, extrinsic evidence is not necessary for a finding that materials are misleading." See also, Double Eagle Lubricants v. Federal Trade Commission, 360 F.2d 268, 270 (10th Cir. 1965), indicating that evidence of actual deception is not necessary "where the exhibits themselves sufficiently demonstrate their capacity to deceive."

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article do not apply to the sale or purchase, or solicitation or representation in connection therewith, of goods from a catalog or of books, recordings, videocassettes, periodicals and similar goods through a membership group or club which is regulated by the federal trade commission trade regulation rule concerning use of negative option plans by sellers in commerce or through a contractual plan or arrangement such as a continuity plan, subscription arrangement or a single sale or purchase series arrangement under which the seller ships goods to a consumer who has consented in advance to receive such goods and the recipient of such goods is given the opportunity, after examination of the goods, to receive a full refund of charges for the goods, or unused portion thereof, upon return of the goods, or unused portion thereof, undamaged.

As reflected in the final order, the circuit court concluded that W.Va. Code, 46A-6D-10 [1992], did not exempt Suarez in this action. As in the case of the previous exemption, the provisions of W.Va. Code, 46A-6D-10 [1992], to not apply to W.Va. Code, 46A-6D-3 [1992]. In any event, the W.Va. Code, 46A-6D-10 [1992], exemption is not relevant to this action.

Therefore, upon all of the above, the circuit court's award of the permanent injunction was "protected by the parameters of sound discretion." Parker v. Knowlton Construction Company, 158 W.Va. 314, 329, 210 S.E.2d 918, 927 (1975).<sup>14</sup>

#### IV. REMAINING ISSUES

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<sup>14</sup>As stated in the brief filed by Suarez: "The West Virginia Prizes and Gifts Act does not prohibit the sale of products through direct mail marketing and promotion. Nor does it prohibit the use of sweepstakes or contests as part of the promotion of a product." That statement is consistent with this Court's opinion in Imperial Marketing which acknowledges: "There is nothing within the four corners of the temporary injunction which prevents [Suarez] from engaging in mail solicitation in a manner which does not violate the Act." 196 W.Va. at 364, 472 S.E.2d at 810.

Nevertheless, although this opinion focuses solely upon three solicitations, i.e., those relating to the cubic zirconia diamond simulant, the clutch purse ensemble and the crystal candle holders, a number of additional solicitations mailed by Suarez to West Virginia consumers were brought into question before the circuit court. Those additional solicitations, upon the limited record before this Court, remain somewhat undefined, and this Court is not in a position to "expiscate or 'fish out' from the record the details and circumstances" surrounding those solicitations. See, Maxey v. Maxey, 195 W.Va. 158, 159, 464 S.E.2d 800, 801 (1995). However, to the extent that those solicitations are substantially similar to the three solicitations discussed herein, Suarez engages in them at its peril.

As indicated above, the final order of April 25, 1997, enumerated a number of findings and conclusions with regard to the award of the permanent injunction. Those findings and conclusions were certainly sufficient for the circuit court to have based its determination upon that Suarez engaged in a course of repeated and willful violations pursuant to W.Va. Code, 46A-7-111(2) [1974]. However, the statute, upon such findings, provides for a civil penalty of no more than \$5,000.<sup>15</sup>

The reference to the penalty in the final order stated in its entirety: "A civil penalty of \$500,000 pursuant to W.Va. Code, 46A-1-101, et seq. and W.Va. Code, 46A-6D-1, et seq. shall be imposed, and shall be suspended upon compliance with [the] terms of paragraphs A through I." Paragraphs A through I of the final order listed the actions from which Suarez and its affiliated enterprises were permanently enjoined. See n. 8, supra. Although, as stated, payment of the

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<sup>15</sup>W.Va. Code, 46A-7-111(2) [1974], states in part:

The attorney general may bring a civil action against a creditor or other person to recover a civil penalty for willfully violating this chapter, and if the court finds that the defendant has engaged in a course of repeated and willful violations of this chapter, it may assess a civil penalty of no more than five thousand dollars.

penalty was contingent upon Suarez's failure to abide by the permanent injunction order, nothing in the final order indicated by what manner the \$500,000 amount was determined.

Consequently, the silence of the final order (and indeed of the record before us) with respect to how the amount of \$500,000 was determined, particularly in light of the statutory limitation of \$5,000, precludes any meaningful review of the penalty by this Court. In other words, the absence of any reasoning with respect to how the Court arrived at the \$500,000 amount necessarily renders that amount arbitrary. Syl. pt. 4, Poole v. Berkeley County Planning Commission, 200 W.Va. 74, 488 S.E.2d 349 (1997); syl. pt. 2, Farm Family Mutual Insurance Company v. Bobo, 199 W.Va. 598, 486 S.E.2d 582 (1997); syl. pt. 3, Fayette County National Bank v. Lilly, 199 W.Va. 349, 484 S.E.2d 232 (1997). Therefore, the \$500,000 civil penalty against Suarez must be set aside.

The Attorney General argues persuasively that a maximum penalty of \$5,000 in an action such as this one serves as very little deterrent to repeated violations of the West Virginia Consumer Credit and Protection Act and the Prizes and Gifts Act. While this Court must agree with that contention, we recognize that the amount of the civil penalty under W.Va. Code, 46A-7-111(2) [1974] is more

appropriately a matter to be addressed by the Legislature. As indicated above, under the circumstances of this action, we simply set the penalty aside.<sup>16</sup>

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<sup>16</sup>As indicated above, the penalty attempted to be imposed herein was suspended, pending compliance by Suarez with the terms of the permanent injunction. Thus, under the terms of the final order, Suarez would have to pay nothing so long as it obeyed the permanent injunction. The amount imposed, therefore, is somewhat in the nature of a "performance bond," rather than a penalty in its strictest sense. As the brief filed by the Attorney General stated: "[The penalty] is more akin to a requirement that [Suarez] post a performance bond." See, by analogy, Campbell v. Point Pleasant & Ohio River R.R., 23 W.Va. 448 (1884); 10A M.J. Injunctions §109 [1990]; 43A C.J.S. Injunctions §238(c) [1978], indicating that courts may substitute a defendant's bond of indemnity for an injunction. Here, however, the performance bond issue is not before this Court and is more appropriately subject to consideration by the circuit court upon the remand of this action.

In addition, we are not unmindful of the decisions of this Court concerning prospective monetary sanctions in Vincent v. Preiser, 175 W.Va. 797, 338 S.E.2d 398 (1985), and State ex rel. UMWA International Union v. Maynard, 176 W.Va. 131, 342 S.E.2d 96 (1985). Those cases, however, are not dispositive of the penalty issue herein concerning the West Virginia Consumer Credit and Protection Act and the Prizes and Gifts Act because, under the circumstances of this action, (1) a specific penalty statute relating to consumer protection, i.e., W.Va. Code, 46A-7-111(2) [1974], is relied upon, and (2) that statute expressly states that the penalty set forth therein is civil, whereas in Vincent and in UMWA International Union, this Court considered there to be criminal or quasi-criminal aspects of the sanctions. See, State ex rel. Robinson v. Michael, 166 W.Va. 660, 276 S.E.2d 812 (1981). See also, State Farm Mutual Automobile Insurance Company v. Stephens, 188 W.Va. 622, 425 S.E.2d 577 (1992), stating that "courts have recognized that the imposition of a per diem fine is an appropriate sanction for civil contempt of a discovery order when the purpose of the monetary sanction is remedial rather than punitive." 188 W.Va. at 631, 425 S.E.2d at 586.

Finally, the final order entered by the circuit court directed Suarez to engage in a consumer refund program under the supervision of a special commissioner. As the final order stated:

The Suarez Corporation shall offer refunds to consumers identified in the list within 30 days of the signing of this decree which shall inform consumers of the availability of the refunds and shall identify the amount spent by the consumer and shall identify the product purchased by the consumer.

- a. The defendant shall not condition the refund on a return of the product.
- b. Defendant shall send the consumer a check for the full amount of the refund within 30 days of receipt of the request for the refund.

Defendants shall bear all costs of the program herein, including mailing, printing and administration.

This Court shall appoint a proper and discreet attorney at law to serve as Special Commissioner to certify the entire process.

In September 1997, the special commissioner filed a report with the circuit court indicating that he had met with counsel for the parties and that certain notices to consumers concerning refunds and time-frames for the payment thereof were recommended. A review of the report remains pending in the circuit court.

According to Suarez, the refund program is unfair because it allows West Virginia consumers to request and obtain refunds without having to return the product purchased. In that regard, Suarez relies upon the provisions of W.Va.



Code, 46A-7-111 [1974], which authorizes refunds to consumers for "excess charges." The Attorney General, on the other hand, relies upon W.Va. Code, 46A-7-108 [1974], which states: "The attorney general may bring a civil action to restrain a person from violating this chapter and for other appropriate relief." (emphasis added)

Upon a careful review of this matter, this Court is of the opinion that the assertion of unfairness by Suarez is without merit. Rather, we find compelling the reasoning of the Attorney General that the use of the phrase "other appropriate relief" in W.Va. Code, 46A-7-108 [1974], "indicates that the legislature meant the full array of equitable relief to be available in suits brought by the Attorney General." That principle is particularly persuasive where, as demonstrated by the record in this action, the value of the products remains ambiguous. The assertion of Suarez is further deprived of significance by the distinction that W.Va. Code, 46A-7-111(1) [1974], is primarily concerned with the excessive charging of consumers for products, whereas the Prizes and Gifts Act, W.Va. Code, 46A-6D-1 [1992], et seq, so central to this action, concerns the protection of consumers from "misleading and deceptive practices when a seller is attempting to market a product using a prize or gift as an inducement." Syl. pt. 3, Imperial Marketing, supra.

On a final note, the refund program set forth in the order of April 25, 1997, states that Suarez shall offer refunds to consumers "identified in the list." Presumably, as indicated by the special commissioner, the list referred to is the list generated pursuant to the September 1, 1994, order of the circuit court. The final order, however, is unclear in that respect and, upon remand of this action, should be modified to more particularly identify those West Virginia consumers entitled to request a refund.

Upon all of the above, the final order of the Circuit Court of Kanawha County, entered on April 25, 1997, is affirmed with regard to the award of the permanent injunction. The refund program set forth in the final order is also affirmed, subject to the modification described above. The final order is reversed, however, as to the \$500,000 civil penalty, and the penalty is hereby set aside. Accordingly, this action is remanded to the circuit court for further proceedings.

**Affirmed, in part, reversed, in part,  
and remanded with directions.**