

No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

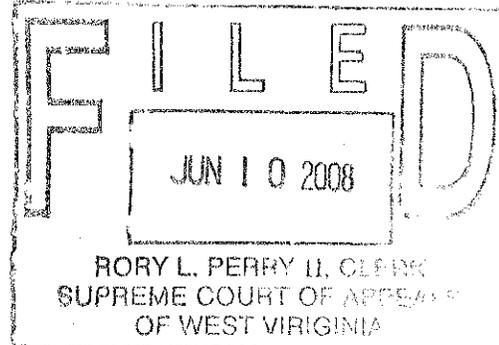
**STATE OF WEST VIRGINIA EX REL.
CITIFINANCIAL, INC.,**

Petitioner,

vs.

**THE HONORABLE JOHN T. MADDEN,
Judge of the Circuit Court of Marshall County,
and PAUL W. LIGHTNER,**

Respondents.



**FROM THE CIRCUIT COURT OF MARSHALL COUNTY
Civil Action No. 02-C-273**

VERIFIED PETITION FOR A WRIT OF PROHIBITION

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.
CITIFINANCIAL, INC.,

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CASE NO. _____

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and PAUL W. LIGHTNER,

Respondents.

VERIFIED PETITION FOR A WRIT OF PROHIBITION

Petitioner CitiFinancial, Inc. ("CitiFinancial"), respectfully petitions this Court for a Writ of Prohibition. In support of the petition, Petitioner states as follows:

This is an original action under *W. Va. Code* § 53-1-1 alleging that respondent, the Honorable John T. Madden, has abused his court's legitimate powers by denying CitiFinancial's motion for partial summary judgment dismissing all claims in the underlying action based on allegedly excessive and unreasonable charges for credit insurance or, in the alternative, that he acted in excess of his jurisdiction by denying CitiFinancial's motion to stay such claims, pursuant to the doctrine of primary jurisdiction, until the Commissioner of Insurance determines whether any of the charges for credit insurance in question are excessive or unreasonable.

The defendant and counterclaim plaintiff in the underlying action, Paul W. Lightner, contends that he paid excessive and unreasonable charges for credit insurance in connection with two small loans he obtained from CitiFinancial, allegedly in violation of the West Virginia Consumer Credit and Protection Act ("WVCCA"), *West Virginia Code* § 46A-3-109(a)(4). Lightner sued the wrong defendant under the wrong statute, and he is litigating the alleged unreasonableness of the charges in the wrong forum. The credit insurance charges of two

licensed insurance companies, American Health and Life Insurance Company ("American Health") and Triton Insurance Company ("Triton"), that Lightner paid were filed with and approved by the Commissioner of Insurance ("Commissioner"). The charges CitiFinancial collected are no more than the rates approved by the Commissioner, and *W. Va. Code* §§ 46A-3-109(a)(2) and (b)(3) give it a safe harbor to collect these approved charges. If Lightner has any claim against any person for the alleged excessiveness of the insurance charges, it would lie only against the insurers, whom he has not sued. The WVCCPA affords no remedy against CitiFinancial, the regulated consumer lender, for the alleged overcharges of third party insurers.

Even if there were such a remedy, moreover, both the Insurance Code, *W. Va. Code* §§ 33-20-5 and the WVCCPA, *W. Va. Code* § 46A-3-109(a)(4) and (b)(3), give the Commissioner exclusive authority to determine whether any charge for credit insurance is excessive and unreasonable. The doctrine of primary jurisdiction therefore requires that any claim that charges paid by Lightner were unreasonable be determined by the Commissioner before any further proceedings to provide a remedy under the WVCCPA.

CitiFinancial therefore moved for partial summary judgment (i) dismissing all of Lightner's claims against it arising from the alleged unreasonableness of credit insurance charges because of the safe harbor provided by *W. Va. Code* 46A-3-109(a)(2) and (b)(4), or (ii) in the alternative, staying all further proceedings on those claims under the doctrine of primary jurisdiction until the Commissioner determined whether any charge for credit insurance was unreasonable. The Honorable John T. Madden denied CitiFinancial's motion by Order dated May 5, 2008. A copy of the Order is attached under Tab A.

The writ of prohibition should issue because the trial court clearly exceeded its legitimate powers in requiring CitiFinancial to proceed to trial in this class action on those claims

for which the safe harbor provides it a defense as a matter of law, and, in the alternative, because the trial court lacks jurisdiction to determine whether any charge for credit insurance was unreasonable or excessive.

A. KIND OF PROCEEDING

CitiFinancial commenced the underlying action, *CitiFinancial, Inc. v. Lightner*, Civil Action No. 02-C-273, in the Circuit Court for Marshall County in November 2002 to collect a \$6,500 loan from Lightner that he borrowed in May 2002 and defaulted on. Lightner purchased no credit insurance in connection with this loan. In January 2004 Lightner filed an Amended Counterclaim which alleged, among other claims, that CitiFinancial violated the West Virginia Consumer Credit Protection Act ("WVCCPA"), W.Va. Code. § 46A-3-109, by charging unreasonable amounts for credit insurance that Lightner had purchased in connection with two other loans he obtained in 2001 and paid off. In October 2006, Lightner filed a Second Amended Counterclaim which asserted his claims against CitiFinancial, including the claims relating to allegedly unreasonable charges for credit insurance, on behalf of a putative class of borrowers over a 14 year period. Second Amended Counterclaim ¶¶ 1, 9. The insurance companies who provide the credit insurance, who received the charges paid by Lightner, and whose rates are being attacked as unreasonable, are not joined as parties.

On November 22, 2006, CitiFinancial removed this action to the United States District Court for the Northern District of West Virginia under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2), and Lightner moved to remand in December 2006. On March 29, 2007, Lightner filed a Motion for Class Certification with the District Court. The District Court remanded on June 6, 2007. CitiFinancial's petition to the United States Court of Appeals for the Fourth Circuit to review the remand was denied on February 28, 2008.

On June 7, 2007, one day after the Order of Remand, Lightner filed a Motion for Class Certification in the Circuit Court of Marshall County, West Virginia. On June 14, 2007, the Marshall County Circuit Court entered an order requiring CitiFinancial to respond to Lightner's Motion for Class Certification by July 13, 2007. On June 14, 2007, CitiFinancial filed a Petition to Appeal the Order of Remand pursuant to CAFA, 28 U.S.C. § 1453(c)(1). On June 15, 2007, CitiFinancial filed a Motion for a Stay of the Order of Remand with the District Court pursuant to Fed. R. Civ. P. 62. On June 27, 2007, CitiFinancial sought a stay of the Marshall County Circuit Court proceedings. On August 24, 2007, the Marshall County Circuit Court entered an Order and Opinion, drafted by Lightner's counsel, denying CitiFinancial's Motion to Stay the state court action pending the appeal to the United States Court of Appeals for the Fourth Circuit and setting a briefing schedule on Lightner's Motion for Class Certification.

On or about October 8, 2007, Lightner served an Amended Motion for Class Certification. On November 1, 2007, CitiFinancial filed its opposition to Lightner's Amended Motion for Class Certification. In addition, on November 1, 2007, CitiFinancial filed its Motion for Dismissal, for a Stay, and for Partial Summary Judgment. On December 17, 2007, Lightner served his reply in support of his Amended Motion for Class Certification. On January 11, 2008, CitiFinancial served an Amended Motion for Dismissal, for a Stay, and for Partial Summary Judgment. On January 22, 2008, CitiFinancial moved to defer consideration of the class certification motion until after the determination of its motion for summary judgment. On February 1, 2008, CitiFinancial filed a motion for leave to file a Sur-Reply in further opposition to Lightner's Motion for Class Certification, which was granted on February 13, 2008. Also on February 1, 2008, CitiFinancial asked the Court to set a briefing schedule on the summary

judgment motion for a response and a reply by CitiFinancial so the matter could be properly briefed before the argument. The Court took no action on that request.

Lightner's Amended Motion for Class Certification, CitiFinancial's Amended Motion for Dismissal, for a Stay, and for Partial Summary Judgment, and its motion to defer determination of the class certification motion until after the determination of the summary judgment motion were scheduled for argument on February 13, 2008. On the afternoon of February 11, 2008, less than 48 hours before the February 13, 2008 hearing, Lightner served his opposition to CitiFinancial's motions.

On February 13, 2008, the Honorable John T. Madden heard oral argument on all motions. At the beginning of February 13, 2008 hearing, CitiFinancial again requested permission to submit a Reply to Lightner's opposition to its Motion for Dismissal, for a Stay, and for Partial Summary Judgment, this time to be submitted after argument. Immediately following argument and without stating any reasons on the record, the Court denied CitiFinancial's motion to determine the summary judgment motion before ruling on class certification. The Court then immediately denied CitiFinancial's motion for partial summary judgment, overruled CitiFinancial's motion for dismissal and CitiFinancial's motion to stay; and denied as moot CitiFinancial's request to file a post-argument reply brief in response to Lightner's opposition served less than 48 hours before the time set for the hearing.¹ Judge Madden made no findings of fact or conclusions of law in support of his rulings, and he directed Lightner to submit a proposed form of order reflecting his rulings.

On February 29, 2008, instead of submitting an order reflecting Judge Madden's ruling on CitiFinancial's Amended Motion for Dismissal, for a Stay, and for Partial Summary

¹ Judge Madden also directed the parties to submit by March 28, 2008 findings of fact and conclusions of law on Lightner's Amended Motion for Class Certification.

Judgment, as requested by the trial court, Lightner submitted an eleven page opinion entitled "Order," containing findings of fact and conclusions of law. On March 3, 2008, CitiFinancial objected to Lightner's opinion and Order because Judge Madden never made such findings or conclusions. Instead, CitiFinancial submitted a simple form of Order reflecting Judge Madden's actual rulings. CitiFinancial Form of Order.

On May 5, 2008, Judge Madden entered Lightner's 11 page Order that is an essentially verbatim copy of the draft opinion submitted by Lightner. Order. On the same day, Judge Madden served a letter in response to CitiFinancial's objections that Lightner was supplying reasoning for the Court in Lightner's opinion and Order that were never expressed by the Court. Judge Madden explained that he requested the preparation of the Order without specifying the format, but expected the Order "to be drafted as Lightner's counsel provided." Judge Madden further stated that Lightner's reasoning was consistent with his thoughts -- although not previously expressed -- before denying CitiFinancial's motion. May 5, 2008 Letter from Judge Madden.

This petition followed.

B. STATEMENT OF THE FACTS OF THE CASE

CitiFinancial is a regulated consumer lender. It is not an insurer, and it does not sell credit insurance. Instead, employees of CitiFinancial are licensed to sell insurance on behalf of credit insurers that are in turn licensed by the Commissioner of Insurance to underwrite credit insurance in West Virginia. Westling Aff. ¶ 5. Credit insurance is written under a master policy that CitiFinancial obtains from the insurer. Westling Aff. ¶ 6. Individual borrowers like Lightner purchase coverage from the insurer and receive a certificate of insurance. Westling Aff.

¶ 6. The coverage is optional.² The borrower is not required to purchase insurance, and whether the borrower buys insurance has no bearing on the decision to extend the loan. Westling Aff. ¶¶ 6, 7. The purpose of the credit insurance policies at issue is to assure repayment of the debt in the event of the death, or involuntary unemployment of the debtor, or the loss of the property securing the loan, thereby protecting the debtor or his estate against claims for repayment in the insured circumstances.

Two insurance companies, American Health and Triton, provided Lightner with the credit insurance involved in his 2001 loans. Westling Aff. As required by W. Va. Code §§ 33-3-1, 33-6-8 and 9, and 33-20-4 and 5, American Health and Triton are licensed by the Commissioner of Insurance. They file with the Commissioner the insurance forms used and the rates to be charged.³ American Health underwrote the credit life insurance Lightner purchased and filed with the Commissioner both the forms and premium rates for that insurance. Triton underwrote the involuntary unemployment insurance and credit property insurance Lightner purchased and filed with the Commissioner both the forms and premium rates for that insurance. It is undisputed that Lightner was charged the approved rate, and the approved form was used, for all of the credit insurance he purchased. Westling Aff. ¶¶ 9(n), 18-29; Fagg Aff. ¶¶ 12-13. The Commissioner's approval remains effective.

Lightner contends the charges by American Health and Triton are unreasonable, in violation of W. Va. Code. § 46-3-109(a)(4) and (b)(3), because the premiums are excessive in relation to the insurer's loss experience. Lightner's witness, a former Deputy Commissioner of

² For example, Lightner chose to purchase all four credit insurance products offered with his March 2001 loan, only three of four credit insurance products offered with his October 2001 loan, and none of the credit insurance offered with his May 2002 loan.

³ Both American Health and Triton are subsidiaries of the same corporate parent as CitiFinancial. During the putative class period, three completely unaffiliated credit insurers also provided credit insurance to CitiFinancial borrowers. Westling Aff. ¶ 11.

Insurance, sets out what he contends is the standard of reasonableness the Commissioner uses and asserts, on the basis of loss experience data filed with the Commissioner, that the charges of American Health and Triton for credit insurance are excessive under that standard. King Aff. ¶¶ 8-14. Because the putative class Lightner claims to represent covers all CitiFinancial borrowers over a period of 14 years, the King Affidavit attacks as unreasonable insurance charges for forms of credit insurance Lightner did not purchase covering a period of many years before and after 2001. During the class period, CitiFinancial made available to borrowers 18 different credit insurance products offered by five third party insurers. Westling Dec. 5, 2007 Dep. Tr. at 49:9-19.

As required by law, American Health and Triton file annually with the Commissioner documents that include a Credit Insurance Experience Exhibit for each of their insurance products. King Aff. This filing discloses both premiums earned and losses incurred during the year reported, and it computes the ratio of losses to premiums for each insurance product. *Id.* As a result, the Commissioner is fully informed of the factors on which Lightner bases his claim that the credit insurance charges he paid are unreasonable. Under *W. Va. Code* § 33-20-3(a) and (b), insurance rates are required to be reasonable with respect to past and prospective loss experience. Under *W. Va. Code* § 33-20-5(c), the Commissioner may at any time disapprove a previously filed rate on the ground that the filing does not comply with law, and under *W. Va. Code* § 33-20-5(d) any "person aggrieved" by a previously approved rate may demand a hearing from the Commissioner. At no time has the Commissioner ruled that any rate charged by American Health or Triton is excessive or unreasonable. At no time has Lightner challenged the rates he was charged before the Commissioner.

C. ASSIGNMENTS OF ERROR

The trial court acted beyond its legitimate powers in denying CitiFinancial's motion for summary judgment dismissing all of Lightner's claims based on the alleged excessive and unreasonable amount of credit insurance charges Lightner paid because the charges were charges of third party insurers that had been approved by the Commissioner of Insurance and *W. Va. Code* § 46A-3-109(a)(2) and (b)(3) provide a safe harbor for the collection of such approved charges.

In the alternative, the trial court acted in excess of its jurisdiction because the doctrine of primary jurisdiction, as expressly incorporated in the West Virginia Consumer Credit and Protection Act by *W. Va. Code* 46A-3-109(a)(4), required the trial court to stay all proceedings relating to allegedly excessive or unreasonable charges for credit insurance until the Commissioner determined whether the charges at issue are reasonable or not.

D. RELIEF PRAYED FOR

Petitioner respectfully petitions that this Court issue a Writ of Prohibition (i) directing that the trial court dismiss all claims against CitiFinancial arising out of the alleged excessive and unreasonable amount of charges for credit insurance or, in the alternative, (ii) directing that the trial court stay all claims relating to such charges for credit insurance until the Commissioner of Insurance determines whether any such charge was excessive or unreasonable.

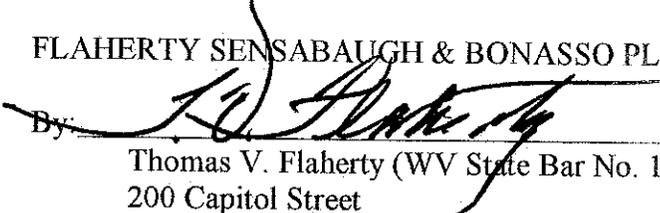
E. CONCLUSION

For the foregoing reasons, and for those stated in the accompanying Memorandum of Law in Support of the Petition, Petitioner respectfully prays that a rule to show cause issue.

Dated: June 10, 2008

Respectfully submitted,

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VERIFICATION

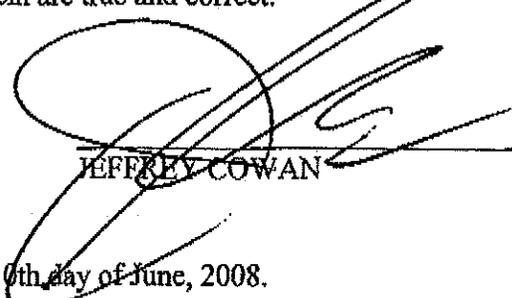
STATE OF MARYLAND,
COUNTY OF BALTIMORE, to-wit:

I, Jeffrey Cowan, being first duly sworn, depose and say:

1. That I am an Executive Vice President for CitiFinancial, Inc.;
2. That I am authorized by CitiFinancial, Inc. to make this declaration on its behalf;

and

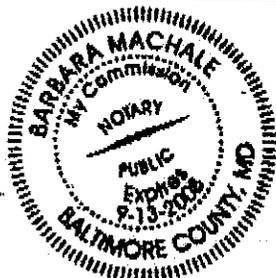
3. That the facts stated in the "Verified Petition for Writ of Prohibition" are within my personal knowledge and are true and correct; and that the facts stated therein that are not within my personal knowledge are, upon information and belief, true and correct, and I am informed and believe that the facts stated therein are true and correct.



JEFFREY COWAN

Subscribed and sworn before me this 10th day of June, 2008.

My commission expires 9-13-2008





Notary Public

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CERTIFICATE OF SERVICE

I, Angela Beblo, hereby certify that a true and exact copy of the foregoing **Verified Petition for a Writ of Prohibition** and accompanying **Appendix** were served via U.S. mail, postage prepaid, on the following persons on June 10, 2008:

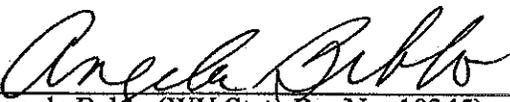
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