

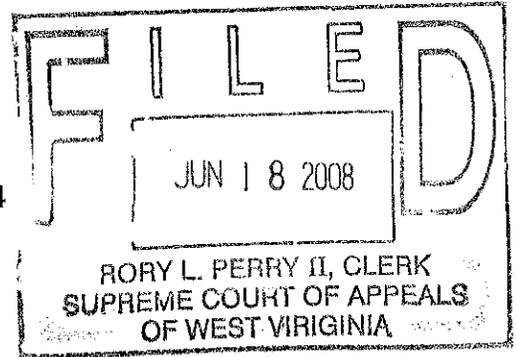
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner,

v.

CASE NO. 081254



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

Respondents.

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

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**RESPONSE OF DEFENDANT TO PETITION FOR WRIT OF PROHIBITION**

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The Court should deny CitiFinancial, Inc.'s petition for writ of prohibition because CitiFinancial cannot substantiate its claim to the relief it requests, because a writ would provide no efficiencies but would only add unnecessary delay, and because the Honorable John T. Madden properly denied CitiFinancial's underlying motion for partial summary judgment. Respondent Paul Lightner, the defendant below, respectfully submits that Judge Madden did not exceed his powers in denying the plaintiff's routine motion for partial summary judgment.

### **I. INTRODUCTION AND SUMMARY OF THE ARGUMENT**

This case is not as CitiFinancial represents it. Lightner did not "sue[ ] the wrong defendant under the wrong statute [or] in the wrong forum," as CitiFinancial contends.<sup>1</sup> Lightner is the defendant. CitiFinancial sued Lightner, seeking to collect on a debt.<sup>2</sup> Lightner raised several defenses to that suit, among them the illegality under the West Virginia Consumer Credit and Protection Act ("WVCCPA") of credit insurance charges that constituted a significant portion of the alleged debt. In addition to litigating his defenses to CitiFinancial's claim, Lightner also asserted it as a counterclaim. It is Lightner's counterclaim that CitiFinancial attacks in this petition. In short, CitiFinancial selected both the "forum" and the "defendant." Lightner chose only the statute, § 46A-3-109, which was created to protect consumers, like Lightner, from creditors, like CitiFinancial, in precisely these circumstances.

CitiFinancial further misdirects the Court by presenting its version of the facts as "undisputed" when, in reality, the facts were hotly contested below. For instance, CitiFinancial asserts that the insurance commissioner was "fully informed of the factors on which Lightner

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<sup>1</sup> CitiFinancial, Inc.'s Mem. of Law in Support of Verified Pet. for Writ of Prohibition ("Mem."), at 1.

<sup>2</sup> Order (May 5, 2008), at 1 (attached to Verified Pet. for Writ of Prohibition ("Pet.")).

bases his claim that the credit insurance charges he paid are unreasonable.”<sup>3</sup> Lightner presented contrary evidence.<sup>4</sup> Another example is CitiFinancial’s insistence that it did not “sell” the credit insurance at issue but that it nonetheless did “obtain” the insurance<sup>5</sup>—a truly peculiar position to advance. The trial court considered the record and concluded, under the summary judgment standard, that genuine issues of fact exists for trial.<sup>6</sup> Since, below, CitiFinancial did not contest Lightner’s summary judgment evidence, the trial court cannot be faulted for finding genuine issues of material fact prevented summary judgment. Even now, CitiFinancial fails to challenge the sufficiency of Lightner’s summary judgment evidence.

Finally, CitiFinancial’s legal argument is pure rhetoric. Without authority of any kind, CitiFinancial asserts that the WVCCPA creates an immunity for creditors and strips the courts of jurisdiction over insurance-related violations. The Act does no such thing. Indeed, the legislature created the WVCCPA to protect consumers like Lightner from creditors like CitiFinancial—not the other way around. The WVCCPA’s plain terms permit CitiFinancial to charge and collect credit insurance premiums but only if the charges are reasonable. See W. VA. CODE § 46A-3-109. And while the insurance commissioner must determine the reasonableness of the insurance rates in the first instance, *id.* § 46A-3-109(a)(4), the Insurance Code states quite plainly that such determinations create only a “presumption” of compliance, *id.* § 33-6-30(c), a presumption which the WVCCPA allows consumers to challenge in court. To reach the result that CitiFinancial seeks, the Court must not only require the insurance commissioner to initially

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<sup>3</sup> Pet., at 9.

<sup>4</sup> See Affidavit of Vincent J. King (Feb. 21, 2008) (“King Aff.”), ¶¶ 12-17 (attached in Petitioner’s Appendix (“P. Appx.”), at Tab 7).

<sup>5</sup> Pet., at 7, 9.

<sup>6</sup> See Order, at 6-7.

determine the reasonableness of insurance rates, it must also divert any challenges to that determination back to the insurance commissioner for a second go-round, and it must treat the insurance commissioner's decisions as conclusive and the statutory presumption arising therefrom as irrebuttable. The Act cannot bear such a strained interpretation, and it would run directly counter to the Honorable John T. Copenhaver Jr.'s ruling in an identical case, *Halstead v. Beneficial West Virginia, Inc.*, No 2:00-1027, (S.D.W. Va. Mar. 24, 2003) (slip op.) (attached in Petitioner's Addendum ("P. Add."), at Tab D).

In sum, there is no call for a writ of prohibition here. The trial court committed no error, let alone clear error. CitiFinancial's purpose in petitioning this Court is to introduce delay. And the interests of efficiency are best served by the availability of an appeal after trial. Indeed, regardless of the outcome of this petition, Lightner's class action counterclaim will proceed on behalf of tens of thousands of CitiFinancial customers from whom CitiFinancial took an illegal security interest in household goods. See W. VA. CODE § 46A-4-109 (prohibiting security interests in non-purchase-price household goods). The trial court denied summary judgment on this claim and certified it under Rule 23.<sup>7</sup> CitiFinancial has not challenged Judge Madden's class certification findings and conclusions in its petition; the Court should decline CitiFinancial's request to litigate this case in piecemeal fashion.

## II. FACTS

CitiFinancial's petition presents its own version of the facts rather than acknowledging application of the summary judgment standard. In this case, contrary to the impression CitiFinancial attempts to create, there are many factual disputes—several of them concerning the

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<sup>7</sup> See Order, at 10. See also Findings and Conclusions (May 12, 2008) ("Class Findings"), at 1, 13 (attached in Respondent's Appendix ("R. Appx."), at Tab A).

very issues CitiFinancial presented in its petition. The most significant differences between CitiFinancial's statement of the facts and the summary judgment record follow:

CitiFinancial's Purported Facts	Summary Judgment Record
<p>"The charges CitiFinancial collected are no more than the rates approved by the Commissioner." (Pet., at 3.)</p> <p>"The Commissioner's approval remains effective." (Pet., at 8.)</p>	<p>The insurance commissioner <u>disapproved</u> the credit property insurance that forms the subject matter of the underlying suit: "You are hereby advised that [credit property insurance] has been disapproved by the authority of the Insurance Commissioner."<sup>8</sup> Later, the commissioner repeated to the Citi insurer, "you must bring this program into compliance."<sup>9</sup></p>
<p>"Lightner purchased no credit insurance in connection with this loan." (Pet., at 4.)</p>	<p>Lightner bought each of credit insurance products at issue in this case in 2001.<sup>10</sup> Lightner, then, refinanced his prior loans into the loan CitiFinancial references.</p>
<p>CitiFinancial "is not an insurer and does not sell credit insurance. (Pet., at 7.)"<sup>11</sup></p>	<p>CitiFinancial employees sell the insurance. (Pet., at 7.) The insurers, Triton Insurance Co. and American Health and Life Insurance Co., are CitiFinancial's sister companies; all three entities are 100% owned by a single common parent. (Mem., at 7 n.4.)</p>

<sup>8</sup> Ltr. from Aaron Baughman, Office of West Virginia Ins. Comm'r, to Owana Cook, Triton Insurance Co. (Jul. 2, 2003) (attached in R. Appx., at Tab B).

<sup>9</sup> Ltr. from Aaron Baughman, Office of West Virginia Ins. Comm'r, to Beverly Childress, Triton Insurance Co. (Jul. 29, 2003) (attached in R. Appx., at Tab C).

<sup>10</sup> Findings and Conclusions, at 3, 4 (attached in R. Appx., at Tab A).

<sup>11</sup> Cf. Brief *Amicus Curiae* of the Am. Fin. Servs. Assoc. and the Consumer Credit Ins. Assoc. in Support of CitiFinancial, Inc.'s Pet. for a Writ of Prohibition ("Amicus Br."), at 7 ("58.6% of borrowers have indicated that they purchased credit insurance directly from a lender . . . . Credit insurance is typically offered by the lender that extends credit to the borrower and policy premiums become part of the loan principal, to be repaid to the lender." (emphasis added)).

CitiFinancial's Purported Facts	Summary Judgment Record
"[T]he Insurance Commissioner is fully informed of the factors on which Lightner bases his claim that the credit insurance charges he paid are unreasonable." (Pet., at 9.)	CitiFinancial and its sister company/insurer Triton concealed information from the insurance commissioner. <sup>12</sup>
CitiFinancial "has no control" over the credit insurance charges. (Mem., at 15.)	CitiFinancial's contracts with Citi insurance companies, Triton and American Health and Life, make <u>CitiFinancial responsible for compliance with state laws and regulations</u> and require it to indemnify the insurers for any liability resulting from noncompliance. <sup>13</sup>

CitiFinancial also omitted its previous trouble with credit insurance compliance. In 2001, the Federal Reserve initiated an enforcement action against CitiFinancial (and not the Citi insurers) concerning CitiFinancial's credit insurance practices among other issues.<sup>14</sup> That case resulted in the assessment of a \$70 million civil penalty in 2004.<sup>15</sup>

The amicus brief, jointly submitted by the American Financial Services Association and the Consumer Credit Insurance Association, likewise presents its own version of the facts without regard for the record before Judge Madden or the summary judgment standard. For instance, the industry groups boldly assert that credit insurance provides significant benefits to consumers.<sup>16</sup> But the groups ignore the record evidence showing loss ratios on the Citi credit

<sup>12</sup> King Aff., at ¶¶ 10-17 (describing concealed information).

<sup>13</sup> Insurance Marketing and Servs. Agreement Between CitiFinancial, Inc. and Triton Insurance Co. (Aug. 1, 2005), at §§ 7.01-02 (attached in R. Appx., at Tab D); Insurance Marketing and Servs. Agreement Between CitiFinancial, Inc. and American Health and Life Insurance Co. (Sept. 1, 2002), at §§ 7.01-02 (attached in R. Appx., at Tab E) (collectively, "Services Agreements").

<sup>14</sup> See Ltr. from Harry Goff, CitiFinancial President and CEO, to all U.S. CitiFinancial Branch Network Employees (May 27, 2004) (attached in R. Appx., at Tab F).

<sup>15</sup> See *id.*

<sup>16</sup> Amicus Br., at 5-7.

insurance at rates far below the typical 50% or 60% legal minimums and far below the 50-51% loss ratios the Citi insurers projected for the insurance commissioner.<sup>17</sup> The actual loss ratios demonstrate that the insurance is overpriced by roughly 200-400%. The amicus brief also posits, counterintuitively, that Lightner's challenge to the excessive Citi credit insurance charges, if successful, will result in higher premiums for West Virginia customers.<sup>18</sup> This self-serving prognostication has no basis in fact or reason. And it does not take into account the grossly excessive profits reaped by the unreasonable charges that CitiFinancial collected over the past many years (which continue today) at the expense of West Virginia's consumer borrowers.<sup>19</sup>

### III. ARGUMENT

This is no case for a writ of prohibition. The case cannot "be resolved independently of any disputed facts." Syl. pt. 1, *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979). Nor is there "a high probability [or even a possibility] that the trial will be completely reversed if the error is not corrected in advance." *Id.* Finally, there are no "substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate." *Id.* CitiFinancial cannot satisfy any of these writ-granting factors.

Disputed facts are central to the resolution of the legal issues presented by the petition. And resolution of those CitiFinancial raised in its motion for partial summary judgment can, at most, resolve only some of the claims at issue in the overall action—an inherent situation when challenging the disposition of a partial summary judgment motion. Moreover, CitiFinancial

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<sup>17</sup> King Aff., at ¶¶ 11-15.

<sup>18</sup> Amicus Br., at 16.

<sup>19</sup> The amicus brief also misunderstands the nature and circumstances of Lightner's action. The groups fault Lightner for "fil[ing] collateral litigation outside of the process set forth by statute." Amicus Br. at 9. The amici fail to realize that Lightner's claims are defensive in this action, which CitiFinancial initiated.

lacks any precedent to support the “errors” it fabricated; even if they truly were errors (they are not), CitiFinancial simply cannot show “clear-cut” error without any supporting legal authority.

Nevertheless, having misstated the summary judgment record and lacking legal authority, CitiFinancial demands that this Court revisit two of the four partial summary judgment issues presented to Judge Madden below. First, CitiFinancial asks this Court to create an immunity that protects creditors from suits by consumers—despite the fact that the legislature created the WVCCPA to protect consumers like Lightner from creditors like CitiFinancial. The very notion of this argument turns the purposes of the WVCCPA on its head. Further, there is no support, either in the text of the Act or in case law, for creditor immunity under the Act. Indeed, CitiFinancial’s contention that the WVCCPA permits it to charge and collect unreasonable insurance premiums with impunity would be more aptly termed a “creditor protection act”—an animal the legislature has not seen fit to create.

Second, CitiFinancial asks the Court to dismiss the case for lack of jurisdiction. CitiFinancial contends that the requirement that the insurance commissioner rule on the reasonableness of credit insurance rates in the first instance has the concurrent effect of permanently stripping the courts of jurisdiction for related violations of the WVCCPA while delegating exclusive jurisdiction to the insurance commissioner. This sweeping proposition lacks support both in the Act and in case law. Further, it is directly contrary to the Code, which states that insurance commission rate determinations only create a presumption of compliance with the law, a presumption that can be challenged in court under the WVCCPA.

As an alternative, CitiFinancial requests a stay under the doctrine of primary jurisdiction pending resolution of a CitiFinancial-invented administrative challenge to the credit insurance rates before the insurance commissioner. This imaginary proceeding is not an available practice

of the insurance commissioner.<sup>20</sup> Even if the proceeding were real, it would not provide any remedy to Lightner.<sup>21</sup> More to the point, the insurance commissioner has already ruled on the insurance rates at issue when it initially approved them based on the information presented.<sup>22</sup> There is no support in the WVCCPA or in case law for requiring the equivalent of a motion for reconsideration before the insurance commissioner.

None of CitiFinancial's arguments merit a writ. Judge Madden's ruling adhered to the plain language of the WVCCPA and applied record facts to the law. CitiFinancial's points of error fail on the merits and fall woefully short of *Hinkle*'s "clear-cut legal errors" standard.

**A. The WVCCPA Protects Injured Consumers from Predatory Creditors, Not Predatory Creditors from Injured Consumers.**

The WVCCPA gives West Virginia consumers a cause of action against creditors that collect excessive charges. *See* W. VA. CODE § 46A-5-101(1) ("If a creditor has violated the provisions of [chapter 46A] applying to collection of excess charges . . . the consumer has a cause of action to recover actual damages and . . . a penalty."). *See also* W. VA. CODE § 46A-5-101(4). For more than a decade CitiFinancial has contracted for, charged, and collected excessive and unreasonable premiums. CitiFinancial cannot and does not even contest this assertion. The insurance rates CitiFinancial contracts for, charges, and collects are easily more than double the typical maximum.<sup>23</sup>

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<sup>20</sup> King Aff., at ¶¶ 19-20 ("During my time at the Insurance Commission, I never witnessed or heard of an adjudicatory proceeding before the Insurance Commission involving credit insurance rates . . . [or] in which money damages, based on rate overcharges or statutory penalties, were awarded to a consumer.").

<sup>21</sup> *See* Order, at 9 (describing statutory limitations on the insurance commissioner's authority).

<sup>22</sup> Pet., at 3.

<sup>23</sup> *See* Order at 6-7; King Aff., at ¶¶ 12-15.

The court below concluded that Lightner had demonstrated the excessive charges sufficiently to satisfy the summary judgment standard, finding that the industry standard requires loss ratios of not less than 60% while the loss ratios in this case were, on average, 15.8% for credit unemployment insurance and 25.6% for credit property. CitiFinancial does not dispute this key finding. And it has never offered any evidence to the contrary. CitiFinancial concedes that it contracts for, charges, and collects these premiums but purports to read an immunity (which it calls a “safe harbor”) into the WVCCPA that condones the collection of unreasonable premiums by creditors. Neither the plain language of the WVCCPA nor any authority of any type supports this reading. There simply is no creditor immunity in the Act.

CitiFinancial creates its self-declared immunity only by ignoring § 46A-3-109(a)(4). Standing alone, that provision imposes a reasonableness requirement on credit insurance rates that would survive even CitiFinancial’s fabricated immunity in § 46A-3-109(b)(3). Confronted with a very similar challenge to credit insurance rates, Judge Copenhaver of the Southern District of West Virginia looked to § 46A-3-109(a)(4) and (b)(1) and held that both provisions require that charges for credit insurance must be reasonable. *Halstead*, No 2:00-1027, at 4-5. According to Judge Copenhaver, an expert in the consumer-finance arena, § 46A-3-109(a)(4) and (b)(1) are “the controlling provisions from the WVCCPA” for a credit insurance rate challenge—the identical situation that Judge Madden confronted below. *See id.* at 11-12.

The plain language of both subsections of § 46A-3-109 confirm Judge Copenhaver’s analysis. *See* W. VA. CODE § 46A-3-109(a)(4) (expressly allowing credit insurance sales on consumer loans only if “the charges are reasonable in relation to the benefits”); § 46A-3-109(b)(1) (permitting a creditor to charge or collect only “reasonable” charges). Because both sections demand that credit insurance charges—and therefore rates—must be reasonable as a

condition to authorizing a creditor to collect them, by definition, a creditor violates the Act by charging or collecting for insurance at unreasonable rates. Simply put, the court below followed Judge Copenhaver's reasoning in *Halstead* and the statute's plain language. CitiFinancial cannot show what *Hinkle* requires: "substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate."

CitiFinancial attempts to create error, claiming that Judge Madden erroneously ruled that CitiFinancial was not eligible for immunity because the court below found that CitiFinancial did not "obtain" the insurance.<sup>24</sup> Not only is CitiFinancial wrong factually,<sup>25</sup> its argument misses the point. As Judge Madden correctly determined, there is no "safe harbor" under the WVCCPA. The court below entertained and rejected CitiFinancial's construction of § 46A-3-109(b)(3), both on the facts and the law.<sup>26</sup> Nothing in the text of § 46A-3-109(b) provides to creditors a vehicle for contracting for and collecting unreasonable premiums. And to invent immunity for creditors to collect unreasonable rates would run counter to the WVCCPA's constant theme of reasonable rates. Section 46A-3-109(b) merely authorizes creditors to collect reasonable premiums.

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<sup>24</sup> See Mem., at 14 n.5.

<sup>25</sup> The summary judgment record does not establish that CitiFinancial "obtained" the insurance for Lightner. In fact, much of CitiFinancial's evidence, briefing, and argument below was aimed at persuading the court below that CitiFinancial has nothing to do with the sale or procurement of credit insurance. Moreover, CitiFinancial's reliance on the Affidavit of Cheryl Westling (Oct. 31, 2007), is disingenuous at best. (Mem., at 18.) Her testimony cannot support CitiFinancial's contention that it "obtained" Lightner's credit insurance by procuring the master policies under which it was sold.

In deposition, Westling testified: "I don't have any knowledge of the master policies. I have never seen them before. . . . I just know that there is a Master Policy. So I'm not really familiar with them." Deposition of Cheryl Westling (Dec. 5, 2007), at 65:7-17 (attached in R. Appx., at Tab G). The court below properly disregarded Ms. Westling's uninformed affidavit.

<sup>26</sup> See Order at 4-5 & n.4 (noting that § 46A-3-109(b)(3) requires that "charges for credit insurance must be reasonable").

Similarly, neither legislative intent nor any policy of the WVCCPA lends support to CitiFinancial's cause. Indeed, the policy argument CitiFinancial advances—the need to protect creditors—conflicts directly with the central purpose of the Act. It almost goes without saying that the WVCCPA is designed to protect West Virginia consumers from predatory creditors, not to protect creditors from the very cause of action that the Act creates.

For this same reason, the Court should disregard CitiFinancial's protestations about becoming "the guarantor of the reasonableness of a third party insurer's rates."<sup>27</sup> These insurance companies are captive Citi insurers, not unaffiliated, third parties.<sup>28</sup> And CitiFinancial, by contract, has agreed to assume the Citi insurers' "responsib[ility] for complying with all . . . state laws or regulations" that have "any application" to the credit insurance sold in connection with CitiFinancial loans.<sup>29</sup> CitiFinancial, moreover, expressly indemnifies the Citi insurers for any losses due to the failure to comply with such laws or regulations.<sup>30</sup> CitiFinancial cannot complain to this Court in good faith about being responsible for the Citi insurers' regulatory compliance when CitiFinancial voluntarily agreed to that very arrangement.

**B. The WVCCPA Provides a Cause of Action Against CitiFinancial in Court for the Unreasonable Credit Insurance Premiums.**

When "a creditor has violated the provisions of [the WVCCPA] applying to collection of excess charges," § 46A-5-101 provides a remedy in court: "[T]he consumer has a cause of action to recover actual damages and in addition a right in an action to recover from the person violating this chapter a penalty in an amount determined by the court. . . ." CitiFinancial

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<sup>27</sup> Mem., at 16.

<sup>28</sup> *Id.* at 7 n.4.

<sup>29</sup> Service Agreements, at §§ 7.01-02.

<sup>30</sup> *Id.*

contends that this remedy is unavailable to Lightner merely because § 46A-3-109 says that “the determination of whether the charges therefor are reasonable in relation to the benefits shall be determined by the insurance commissioner of this state.” CitiFinancial leaps from this provision directly to its ultimate conclusion: that the insurance commissioner’s determination is conclusive and its jurisdiction exclusive. Not only is a leap of this magnitude uncalled for (and well beyond *Hinkle*’s “clear-cut legal error” standard), it is also contradicted by the Insurance Code, which plainly states that the insurance commissioner’s approval of insurance rates is not conclusive but merely gives rise to a presumption of compliance. *See* W. VA. CODE § 33-6-30(c) (“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.”); *cf.* W. VA. R. EVID. 301 (“In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.”).

Applying these very same provisions of the Code, Judge Copenhaver, in *Halstead*, “read[ ] § 33-6-30(c) *in pari materia* with the insurance provisions of § 46A-3-109(a)(4)” and concluded that the insurance commissioner did not have exclusive jurisdiction. *Halstead*, No 2:00-1027, slip op. at 15; *see also id.* at 13 (“The circumstances under which this presumption [arising from insurance commissioner approval] may be overcome remain to be determined. The defendants’ motion to dismiss is not the appropriate vehicle for making that determination.”). As in *Halstead*, Judge Madden construed the interlocking provisions of § 33-6-30(c) and § 46A-3-

109 as establishing a two-step process: the insurance commissioner's initial approval results in a presumption of legal compliance, but consumers alleging a violation of the WVCCPA can rebut that presumption in court.

CitiFinancial does not seriously debate the reasoning Judge Madden or that of Judge Copenhaver. CitiFinancial merely declares, with enthusiasm and repetition, that the insurance commissioner has exclusive jurisdiction. But again the provision it cites, § 46A-3-109(a)(4), says nothing at all about either jurisdiction or exclusivity.<sup>31</sup>

The West Virginia legislature certainly knows how to delegate exclusive jurisdiction to the insurance commissioner; it just didn't do so here. For example, the legislature made the insurance commissioner's jurisdiction exclusive with regard to credit insurance rulemaking. See W. VA. CODE § 46A-3-109(c). In that provision (and in no others) the insurance commissioner's jurisdiction is expressly identified as exclusive. By contrast, the WVCCPA provision CitiFinancial relies on for its exclusivity argument say only that the insurance commissioner shall make a reasonableness determination; it does not mention exclusivity. *Id.* § 46A-3-109(a)(4). The WVCCPA contains no clear-cut adjudicatory jurisdiction-stripping provision.

**C. CitiFinancial Presents No Basis for Finding an Abuse of Discretion in the Trial Court's Primary Jurisdiction Ruling.**

The same reasons that undermine CitiFinancial's exclusive-jurisdiction argument also defeat its argument that primary jurisdiction lies with the insurance commissioner. This Court reviews a trial court's decision with respect to primary jurisdiction only for abuse of discretion

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<sup>31</sup> CitiFinancial also cites § 33-20-3(a)-(b) as demonstrating the exclusivity of the insurance commissioner's jurisdiction. (See Memo at 21.) But, like CitiFinancial's other proffered authorities, that section says nothing about either exclusivity or jurisdiction. That code provision merely states that rates may not be excessive and that due consideration should be given to certain factors in the process of ratemaking.

because the court below is in the best position to evaluate its resources, abilities, and the facts before it. *See State ex rel. Bell Atlantic-West Virginia v. Ranson*, 201 W. Va. 402, 411, 497 S.E.2d 755, 764 (1997). As Lightner established and the court below found, none of the factors that would result in primary jurisdiction apply under the facts and circumstances of this action. Aside from repeating the purpose of the doctrine, CitiFinancial made no effort to demonstrate to this Court how the facts of this case call for the application of primary jurisdiction. They do not. And CitiFinancial makes no attempt to refute the findings of the court below; it simply asks this Court to intercede and reverse this fact-laden, discretionary ruling without offering any basis for doing so. This is not enough to support a writ of prohibition.

Similarly baseless is CitiFinancial's suggestion that the insurance commissioner has a mechanism in place for dealing with this kind of dispute. The commissioner has no such proceeding for Lightner to employ.<sup>32</sup> Not only does the insurance commissioner lack procedures for awarding damages or refunds, it also lacks the power to affect existing policies. Under the Insurance Code, the commissioner cannot suspend a previously approved rate as to insurance policies issued at any time before disapproval:

Any person or organization aggrieved with respect to any filing which is in effect may demand a hearing thereon. If, after such hearing, the commissioner finds that the filing does not meet the requirements of this article, he shall issue an order specifying in what respects he finds that such filing fails to meet the requirements of this article, and stating when, within a reasonable period thereafter, such filing shall be deemed no longer effective. Said order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in said order.

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<sup>32</sup> *See King Aff.*, at ¶¶ 19-20 (“During my time at the Insurance Commission, I never witnessed or heard of an adjudicatory proceeding before the Insurance Commission involving credit insurance rates . . . [or] in which money damages, based on rate overcharges or statutory penalties, were awarded to a consumer.”).

W. VA. CODE § 33-20-5(d) (emphasis added). Thus, because Lightner’s policies were “issued prior to the expiration of the period [to be] set forth” in any order he might obtain under this rule, the Insurance Commissioner lacks the power to “affect” his policies, regardless of the ruling he might obtain there. *Cf. State ex. rel. Bd. of Educ. v. Casey*, 176 W. Va. 733, 735, 349 S.E.2d 436, 438 (1986) (stating that the doctrine of administrative remedies is inapplicable where resort to available procedures would be futile).

It is hardly surprising that CitiFinancial hopes to derail this case to a forum with an adjudicator who lacks both the mechanism and authority to address Lightner’s claims. But there is no basis in fact or law for granting CitiFinancial’s cynical wish. More importantly, there is no basis for this Court to find the kind of “clear-cut” error that *Hinkle* requires.<sup>33</sup>

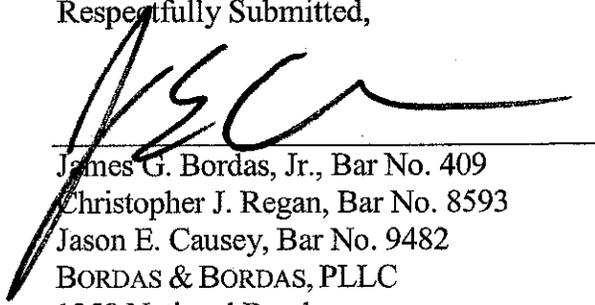
#### IV. CONCLUSION

CitiFinancial and its amicus ask the Court to turn the WVCCPA into a creditor protection act. They ask the Court to find “clear-cut legal errors” in Judge Madden’s refusal to do precisely that. And they ask to have the case referred to the insurance commissioner despite—or perhaps because of—the commissioner’s lack of ability and authority to adjudicate Lightner’s claims. This is not an appropriate case for a writ of prohibition. The Court should deny the petition.

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<sup>33</sup> It is telling that CitiFinancial did not plead primary jurisdiction among its defenses listed in its answer to Lightner’s counterclaims. Not until fifteen months after notice of Lightner’s class action counterclaims, and nearly four years after Lightner first asserted challenges to the credit insurance rates, did CitiFinancial raise the primary-jurisdiction defense—and, then, only in a motion. The defense still is not supported by a pleading. *Cf. Rowley v. American Airlines*, 875 F. Supp. 708, 713 (D. Or. 1995) (considering primary jurisdiction only after allowing defendant to amend answer to affirmatively plead it). In these circumstances, the court below could not abuse its discretion when it rejected CitiFinancial’s motion on the primary jurisdiction defense.

Respectfully Submitted,

A large, stylized handwritten signature in black ink, appearing to read 'JGB', is written over a horizontal line.

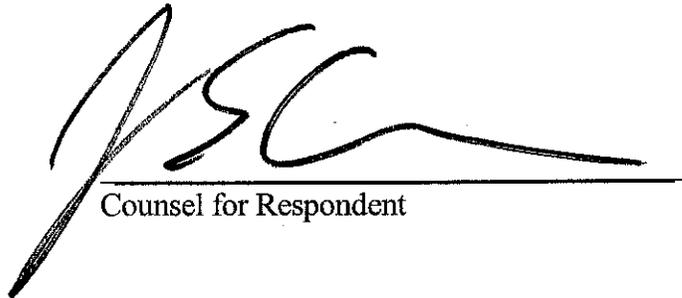
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**CERTIFICATE OF SERVICE**

Service of the foregoing **RESPONSE OF DEFENDANT TO PETITION FOR WRIT OF PROHIBITION** was had upon the defendant by via facsimile and by mailing a true copy thereof by U.S. Mail to the following this 18<sup>th</sup> day of June, 2008, as follows:

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Counsel for Respondent