

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
CITIFINANCIAL, INC.,

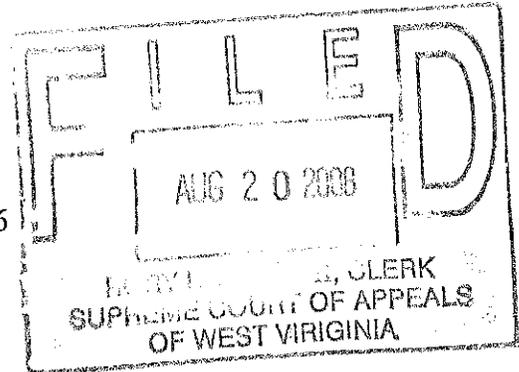
Petitioner,

v.

Case No. 34216

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

RESPONSE OF DEFENDANT TO RULE TO SHOW CAUSE
ON WRIT OF PROHIBITION

James G. Bordas Jr., Bar No. 409
Christopher J. Regan, Bar No. 8593
Jason E. Causey, Bar No. 9482
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, West Virginia 26003
Telephone 304.242.8410
Facsimile 304.242.3936
jbordas@bordaslaw.com
cregan@bordaslaw.com
jcausey@bordaslaw.com

Jonathan Bridges
Admitted *pro hac vice*
Daniel H. Charest
Admitted *pro hac vice*
SUSMAN GODFREY LLP
901 Main Street, Suite 5100
Dallas, Texas 75202
Telephone 214.754.1900
Facsimile 214.754.1933
jbridges@susmangodfrey.com
dcharest@susmangodfrey.com

Daniel F. Hedges
MOUNTAIN STATE JUSTICE, INC.
922 Quarrier Street, Suite 525
Charleston, West Virginia 25301
Telephone 304.344.3144
Facsimile 304.344.3145
dan@msjlaw.org

Attorneys for Defendant/Respondent
Paul W. Lightner

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I. SUMMARY OF THE ARGUMENT

The circuit court acted within its jurisdiction and legitimate power when it denied CitiFinancial, Inc.'s motion for partial summary and alternative motion to stay. CitiFinancial now seeks a writ of prohibition to prevent the circuit court from enforcing an order that does nothing more than allow this case to proceed to a determination of its merits. Since the Honorable John T. Madden did not err when he determined that Lightner should be allowed to attempt to prove his claim against CitiFinancial for charging and collecting excessive and unreasonable credit insurance premiums under the West Virginia Consumer Credit and Protection Act (the "WVCCPA"), this Court should refuse CitiFinancial's petition. Furthermore, because the circuit court committed no substantial, clear-cut error and contravened no legislative mandate warranting the extraordinary relief CitiFinancial seeks, the petition should also be refused. Additionally, the Court should refuse the petition because CitiFinancial's chief claim turns on the circuit court's fact finding. And, finally, the Court should refuse the petition with respect to primary jurisdiction because CitiFinancial failed to demonstrate abuse of discretion.

CitiFinancial's proposed writ would strip West Virginians of the protections the WVCCPA expressly provides and would misapply the balance the Legislature struck between insurance regulation and consumer protection. Further, it would force Lightner into a proceeding before the West Virginia Insurance Commissioner ("OIC"), despite the fact that the OIC is expressly forbidden by the West Virginia Code from granting Lightner any relief. No statutory language supports these results, nor are they the Legislature's natural or intended design. Judge Madden correctly rejected these arguments. And this Court should deny CitiFinancial's petition.

II. STANDARD FOR WRIT TO ISSUE

A writ of prohibition against a circuit court is a drastic and extraordinary remedy, afforded by this Court only in “really extraordinary causes.” *State ex rel. United States Fid. & Guar. Co. v. Canady*, 194 W. Va. 431, 436 (1995) (internal citations omitted). *See also State ex rel. Thrasher Eng’g, Inc. v. Fox*, 218 W. Va. 134, 138 (2005) (“writs of prohibition . . . provide a drastic remedy to be invoked only in extraordinary situations”). Where, as here, the petitioner contends that the circuit court exceeded its legitimate powers, the Court will grant relief “to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.” Syl. Pt. 1, *Hinkle v. Black*, 164 W. Va. 112 (1979). And, for the Court to award the extraordinary remedy of prohibition, the allegedly improper actions of the circuit court must constitute more than a simple abuse of discretion because “[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court.” Syl. Pt. 1, *State ex rel. Nelson v. Frye*, 221 W. Va. 391 (2007) (citing Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314 (1977)). Finally, as the petitioner, CitiFinancial bears the burden to demonstrate its right to the relief it requests. *See State ex rel. Rose L. v. Pancake*, 209 W. Va. 188, 191 (2001).

III. ARGUMENT

CitiFinancial and its amici have made none of the showings required to obtain the prohibition remedy. To the contrary, a review of Judge Madden’s order shows that he followed the statutory framework that the Legislature established, properly applied record evidence to that

statutory construct, and rendered factual findings that preclude the relief CitiFinancial seeks in this proceeding. Therefore, this Court should deny the petition.

A. Judge Madden Did Not Err When He Denied CitiFinancial's Motion for Summary Judgment and Alternative Motion to Stay.

CitiFinancial and its allies contend that Judge Madden, a jurist of unquestionable experience and standing, erred in his legal interpretation of the WVCCPA by permitting claims to lie against a creditor for collecting excessive charges in the form of unreasonable credit insurance premiums from a consumer. The proponents of prohibition—CitiFinancial and its amici, the American Financial Services Association, Consumer Credit Industry Association (collectively the “industry groups”), and the OIC—each fail to consider or apply this Court’s jurisprudence on issuing such writs. And, lacking a single case that is contrary to Judge Madden’s ruling, CitiFinancial and its amici fall well short of meeting their burden to show a clear-cut error or disregard of a legislative mandate.

CitiFinancial’s reading of the statute would effectively do away with an entire portion of the WVCCPA because it would eliminate all claims by consumers against the creditor for credit insurance premiums, no matter how unreasonable. That is, CitiFinancial seeks a grant of immunity for statutorily proscribed conduct. *See, e.g.,* W. VA. CODE § 46A-3-109 (limiting permissible charges to reasonable rates). And CitiFinancial would have the Court shunt this action to the OIC, where even the OIC concedes Lightner can obtain no relief. CitiFinancial presented these arguments to the circuit court in connection with its motion for summary judgment. Judge Madden correctly rejected them all.

Judge Madden’s order sets out legal reasoning and factual findings, properly made and applied, to permit Lightner to attempt to prove his cause of action against CitiFinancial for its excessive charges. And the order adheres to the statutory design established by the Legislature

and recognized by the Honorable John T. Copenhaver, Jr., in *Halstead v. Beneficial West Virginia, Inc.*, No 2:00-1027, slip op. at *4-5 (S.D.W. Va. Mar. 24, 2003), which completely rejected the theory advanced here by CitiFinancial and its amici.¹ Contrary to CitiFinancial's arguments, the WVCCPA does not create an immunity for creditors; it merely acknowledges a presumption of reasonableness when the OIC initially approves credit insurance rates. More importantly, the WVCCPA plainly and expressly gives consumers both a cause of action and a venue in the West Virginia courts under § 46A-5-101 by which to rebut any such presumption.

When considered under the standard of review for issuing writs of prohibition, the Court can easily deny the petition because the circuit court adhered to the established statutory mandate, correctly applied that law to the facts, and made fact findings that preclude the relief CitiFinancial seeks. Simply put, the Court should not grant this extraordinary relief because Judge Madden got it right: the WVCCPA gives consumer borrowers a cause of action against the creditor for charging unreasonable rates. *Cf. Halstead*, No 2:00-1027, slip op. at *14-15 (rejecting motion to dismiss an identical cause of action on an identical theory).

CitiFinancial and its amici also contend that the circuit court erred by not staying Lightner's case under the discretionary doctrine of primary jurisdiction. None of them bother to perform this Court's primary jurisdiction analysis; by contrast, Judge Madden performed the proper analysis, made factual determinations against primary jurisdiction, and exercised his discretion to not apply the doctrine. CitiFinancial and its friends attempt to bypass that inquiry by sheer rhetorical force, repeating the term "exclusive" more than two dozen times in their briefing, as if repetition alone could change the OIC's authority. Exclusivity, however, is their own creation, not the Legislature's. Nor is it even plausible to describe the OIC's authority as

¹ Judge Copenhaver's reasoning in *Halstead* is more fully described *infra* at part III.B.2.

exclusive, since it cannot grant relief for any past or existing policyholder. *See* W. VA. CODE § 33-20-5 (d) (providing that any rate-disapproval order by the OIC “shall not affect any contract or policy made or issued prior to the expiration of the period set forth in said order. In short, neither CitiFinancial nor its amici can show the Court a single source of positive law supporting their interpretation of the WVCCPA. Rhetoric notwithstanding, they have fallen well short of demonstrating “substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate.” Syl. Pt. 1, *Hinkle*, 164 W. Va. 112.

1. The WVCCPA Provides Lightner a Cause of Action Against CitiFinancial.

To protect the consumer from predatory lending practices, the WVCCPA limits the amount of money a regulated consumer lender may legally collect from a West Virginia consumer. *See generally* W. VA. CODE § 46A-4-107. The Legislature achieved this limitation by classifying all creditor charges as either a loan finance charge or an “additional charge” and restricting the amount a creditor could collect on both types of charges. *See* W. VA. CODE § 46A-4-107(1) (setting out the maximum loan finance charge); *id.* at § 46A-4-107(4) (providing that a regulated consumer lender may make “no additional charges” other than those additional charges identified in W. VA. CODE § 46A-3-109). Under the classification of an “additional charge,” the Act permits a creditor to collect “[c]harges for other benefits, including insurance, conferred on the consumer, if the benefits are of value to him or her and if the charges are reasonable in relation to the benefits.” W. VA. CODE § 46A-3-109(a)(4) (emphasis added). The code further defines a permissible “additional charge” in § 46A-3-109(b), which provides that the “creditor may take, obtain or provide reasonable insurance on the life and earning capacity of any consumer obligated on the consumer credit sale or consumer loan” and “reasonable insurance on any real or personal property offered as security.” W. VA. CODE § 46A-3-109(b) (emphasis added). Both of these provisions limit the permissible “additional charges” that a

creditor may collect under the WVCCPA to “reasonable” rates and charges. As a result, any charge that is not explicitly authorized by the WVCCPA falls under the “no additional charges” mandate in § 46A-4-107(4).

If the creditor collects excessive “additional charges” in the form of unreasonable insurance charges, that creditor violates the Act. And, when a creditor violates the Act, the WVCCPA provides the consumer a legal remedy in the circuit courts:

If a creditor has violated the provisions of [chapter 46A] applying to collection of excess charges . . . , illegal, fraudulent or unconscionable conduct . . . , security agreement on household goods for benefit of regulated consumer lender, . . . the 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 not less than one hundred dollars nor more than one thousand dollars.”

W. VA. CODE § 46A-5-101(1) (emphasis added). *See also* W. VA. CODE § 46A-5-101(4) (providing consumers with a cause of action to recover excess charges and penalties “[i]f a creditor has contracted for or received a charge in excess of that allowed by this chapter”). Under this statutory provision, any consumer that has paid excessive, unreasonable charges to a collecting creditor may sue the creditor in the circuit court, as provided.

The Legislature has established a system in which the insurance premium rate is deemed presumptively reasonable upon the OIC’s approval of the filing. *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.”). The statutory presumption of the rate’s reasonableness places the burden on the consumer to introduce evidence to rebut the presumption in order to advance the claim of unreasonable, excess charges under § 46A-5-101. *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.”). If the consumer can overcome this presumption and demonstrate that the charges were excessive and unreasonable, the circuit court should grant the relief provided in the WVCCPA’s § 46A-5-101.

Applied to the record facts, the result under this statutory paradigm is clear. CitiFinancial is a West Virginia regulated consumer lender. (Order, at 1.) Therefore, the amount it may legally charge consumers is limited by § 46A-4-107. CitiFinancial admitted to Judge Madden that it collected insurance premiums from Lightner. (See Order, at 2.) Under the WVCCPA, CitiFinancial was free to collect insurance premiums as an “additional charge” only if the charge was reasonable. See W. VA. CODE §§ 46A-3-109(a)(4) and (b). Because the charges it collected were unreasonable and, therefore, excessive, CitiFinancial violated the WVCCPA’s “no additional charges” mandate in § 46A-4-107(4), as delineated in § 46A-3-109, rendering it subject to suit under § 46A-5-101 for both damages and penalties “in an amount determined by the court.” W. VA. CODE §§ 46A-5-101(1) and (4) (emphasis added).

2. Lightner Presented Sufficient Record Evidence to Rebut the Reasonableness Presumption and Defeat CitiFinancial’s Motion for Summary Judgment.

The circuit court correctly recognized that, by virtue of their filing and approval, the rates were presumptively reasonable under the Code. (Order, at 2, 8 (citing W. VA. CODE § 33-6-30(c)).) Judge Madden continued to apply the Code as written and, having recognized the presumption, proceeded to determine whether Lightner had presented sufficient record evidence to rebut that presumption. The court below described the state of the record:

Lightner has supplied the Court with substantial summary judgment evidence—including affidavits, deposition testimony, and discovery materials—that go to the issue of the unreasonableness of the credit insurance premiums at issue. Included in those materials was evidence of industry standards requiring 60% loss ratios and evidence of loss ratios for the credit property insurance and credit unemployment insurance at issue averaging only 25.6% and 15.8% respectively.

(Order, at 6-7 (describing the record evidence it relied on to deny CitiFinancial’s motion for summary judgment).) Part of the summary judgment evidence was a demonstration of CitiFinancial’s history of unreasonable rates:

	Credit Property Loss Ratio	Credit Involuntary Unemployment Loss Ratio
1994	13.0%	10.0%
1995	18.0%	8.0%
1996	47.0%	2.0%
1997	21.0%	No data
1998	24.0%	31.0%
1999	19.0%	No data
2000	21.3%	21.4%
2001	35.0%	18.6%
2002	27.9%	27.3%
2003	29.3%	26.0%
2004	No data	11.0%
2005	No data	2.3%
2006	No data	15.6%
Average	25.6%	15.8%

(See App’x to Petition, Tab 7 (Affidavit Vincent J. King (“King Aff.”), at ¶ 13).)

The loss ratios were drawn from records that CitiFinancial produced in discovery. (See King Aff., at ¶¶ 4, 13.) And the expert testimony identified the industry standards based on the OIC’s regulation and available model acts. (See King Aff., at ¶¶ 9-11.) By contrast, CitiFinancial offered no evidence in support of the reasonableness of the rates. Nor did it challenge either the veracity of the loss ratios or the pedigree of the industry standards they fail to meet. Even now, no one—neither CitiFinancial nor the amici—has attempted to justify, defend, or explain these gross departures from industry norms. Moreover, the circuit court found

the loss ratio history was established as a fact finding, and Lightner is entitled to all inferences that can be reasonably drawn from the inexplicably high rates. (See Lightner's App'x, Tab A (Findings & Conclusions, entered May 12, 2008, at ¶ 12).)

According to the trial court, the record evidence showed that the credit insurance rates CitiFinancial charged were unreasonably high, with loss ratios that consistently fell far below the industry standard. (See Order, at 6.) And, based on the record evidence, Judge Madden ruled that Lightner had provided sufficient summary judgment evidence to rebut the presumption: "The Court finds this record evidence gives rise a fact question defeating summary judgment notwithstanding any presumption that may arise under § 33-6-30(c) due to the insurance commissioner's prior approval of the rates at issue." (Order, at 7.) The circuit court plainly recognized the presumption and, then, found that the record evidence rebutted the presumption. This is not error.

B. The Court Should Deny the Petition Because CitiFinancial Has Not Established Its Entitlement to a Writ of Prohibition.

As set out above, Judge Madden's reasoning and application of the law to the record evidence is without error. When the Court applies the stringent standard for issuing a writ of prohibition to CitiFinancial's arguments, the petition's denial necessarily follows. Specifically, the Court should deny CitiFinancial's petition because CitiFinancial wholly failed to establish the essential elements for prohibition: there are no "substantial, clear-cut, legal errors;" Judge Madden adhered to the clear statutory mandate; and, even assuming error, the error CitiFinancial asserts cannot "be resolved independently of any disputed facts." Syl. Pt. 1, *Hinkle*, 164 W. Va.

112.

1. CitiFinancial Cannot Show Substantial, Clear-Cut, Legal Errors Because the WVCCPA Does Not Permit CitiFinancial to Collect Unreasonable Rates.

Whether in § 46A-3-109(a) or (b)(1), the WVCCPA demands that charges for insurance must be reasonable. *See* W. VA. CODE § 46A-3-109(a)(4) (permitting “[c]harges for other benefits, including insurance, conferred on the consumer, if the benefits are of value to him or her and if the charges are reasonable in relation to the benefits”); W. VA. CODE § 46A-3-109(b) (providing that a “creditor may take, obtain or provide reasonable insurance on the life and earning capacity of any consumer obligated on the consumer credit sale or consumer loan” and “reasonable insurance on any real or personal property offered as security”). Disregarding these clear statutory mandates, CitiFinancial and the credit insurance industry have conjured up a never-before-heard-of immunity doctrine that would protect creditors—the very group the Legislature regulated under the WVCCPA—whenever the creditors collect unreasonable credit insurance premiums. In addition to the complete lack of supporting authority, this invented immunity also conflicts with both the language and purpose of the Act.

According to CitiFinancial, “[a]s long as the creditor charges no more than the amount approved by the Commissioner, subsection [§ 46A-3-109](b)(3) provides [CitiFinancial] with a safe harbor.” (Mem., at 14.) By “safe harbor,” however, CitiFinancial means complete immunity. CitiFinancial’s entire immunity theory depends on reading § 46A-3-109(b)(3) to permit what all of the other parts of § 46A-3-109 forbid. But that reading cannot stand because the WVCCPA expressly limits permissible charges to only “reasonable” charges—even under § 46A-3-109(b).

By its own force, § 46A-3-109(a)(4) demands that “[c]harges for . . . insurance” must be “reasonable in relation to the benefits.” W. VA. CODE § 46A-3-109(a)(4) (emphasis added). That alone, as Judge Madden ruled, is enough to require that all insurance charges must be

reasonable. (Order, at 4, n.4 (applying § 46A-3-109(a)(4) to find a reasonableness standard for insurance charges.) Even if that were not enough, throughout § 46A-3-109 the Code similarly demands reasonableness in charges. *See, e.g.*, W. VA. CODE § 46A-3-109(a)(5) (permitting “[r]easonable costs”); W. VA. CODE § 46A-3-109(b) (twice limiting the insurance that a creditor may “take, obtain or provide” to “reasonable insurance”); W. VA. CODE § 46A-3-109(b)(1) (requiring a “reasonable relation” between the insurance and the risk of loss and further demanding that the insurance be “reasonable in relation” to the insured item). Moreover, the provision CitiFinancial relies on for its purported immunity actually invokes the reasonableness standard by reference: when § 46A-3-109(b)(3) discusses “the insurance,” the word “the” refers to the insurance identified in § 46A-3-109(b), which in turn demands reasonableness. *See* W. VA. CODE § 46A-3-109(b).²

Finally, CitiFinancial asserts a new argument. It contends that the WVCCPA provisions that create a cause of action do not apply to it. (*See* Mem., at 16.) First, CitiFinancial suggests that § 46A-5-101(1) does not apply because the provision only applies if a creditor has violated the WVCCPA. (Mem., at 16.) CitiFinancial’s argument relies on circular logic because the premise of CitiFinancial’s argument—that it did not violate the Act—assumes the answer. If and when Lightner proves that CitiFinancial collected unreasonable rates in violation of the WVCCPA, Lightner can recover under § 46A-5-101(1) (creating a cause of action for violations of the Act against “the person violating this chapter”).

² The word “the” is used for specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article “a.” If the provision did not specify “the” insurance, CitiFinancial’s argument would improve because the provision might apply to all insurance, whether identified as reasonable or not. When the Legislature employed “the,” it restricted the application of the provision to the insurance—the reasonable insurance—it had previously introduced in § 46A-3-109(b).

Last, in an argument it failed to present to the circuit court, CitiFinancial attempts to create another escape hatch, contending that the enforcement provisions of the WVCCPA do not apply to it on the facts. (*See Mem.*, at 16.) Relying on circular logic, CitiFinancial contends that § 46A-5-101(1) does not apply because, in its opinion, it has not violated the WVCCPA. (*Mem.*, at 16.) The argument assumes away CitiFinancial's liability and is no basis for excluding the application of § 46A-5-101(1) (creating a cause of action for violations of the Act against "the person violating this chapter").

With similarly-flawed logic, CitiFinancial next argues that it is not subject to § 46A-5-101(3) because it suggests that it is not "the person who made the excess charge." (*Mem.*, at 16.) Whether CitiFinancial "made" the charges is a fact issue that CitiFinancial failed to present to the circuit court and as to which CitiFinancial failed to submit any proof. The Court should reject CitiFinancial's argument because the fact question was not raised below and because CitiFinancial did make the charges. (*See generally* Order, at 5 n.5 ("As a matter of record, the premiums upon which this action is founded stem from the credit insurance policy that Lightner purchased.").)

But CitiFinancial's assertion that it is not subject to the WVCCPA's remedial provisions because it collected but did not make the unreasonable charges fails completely. The Legislature expressly created a cause of action to be adjudicated in court on behalf of the consumer against a creditor who merely "collects" excessive charges:

If a creditor has contracted for or received a charge in excess of that allowed by this chapter, the consumer may, in addition to recovering such excess charge, also recover from the creditor or the person liable in an action a penalty in an amount determined by the court not less than one hundred dollars nor more than one thousand dollars.

W. VA. CODE § 46A-5-101(4) (emphasis added). CitiFinancial should have read the entire section. By its own admission, CitiFinancial collects the charges. (Mem., at 16.) And, as demonstrated in the table above, the history of unreasonable charges was established for the purposes of summary judgment. Therefore, the WVCCPA creates a cause of action for Lightner to sue CitiFinancial in court under the facts CitiFinancial concedes.

In short, no matter which portion of the Code CitiFinancial looks to, it cannot escape the reasonableness standard imposed under the WVCCPA. Nor can CitiFinancial avoid the unmistakable conclusion that the WVCCPA creates a cause of action in court for this very situation. CitiFinancial fails in its attempt to invent immunities from misapplied phrases it finds in the Code. These provisions fit within the broader legislative mandate and should not be taken out of context. When CitiFinancial draws on one clause of one subpart from a larger provision in an effort to contravene the larger provision's clear purpose, it runs afoul of this Court's dictates on statutory interpretation because "relevant statutes [must] be 'read *in pari materia* and any ambiguous provisions in the statutes should be interpreted in such a manner as to avoid conflict and give effect to all of the provisions of the related sections of the statutes.'" *Richards v. Harman*, 217 W. Va. 206, 210 (2005) (emphasis added) (citing Syl. Pt. 1, *Carolina Lumber Co. v. Cunningham*, 156 W. Va. 272 (1972)). *See also Halstead*, No 2:00-1027, slip op. at 15 ("read[ing] § 33-6-30(c) *in pari materia* with the insurance provisions of § 46A-3-109(a)(4)). The WVCCPA, in §§ 46A-3-109(a)(4) and (b), demands reasonableness and renders CitiFinancial liable to suit for the collection of unreasonable charges. Moreover, CitiFinancial's constrictive reading of the WVCCPA to avoid responsibility runs directly opposite to this Court's repeated admonitions that the Act should be read and applied broadly. *See Thomas v. Firestone Tire & Rubber Co.*, 164 W. Va. 763, 770 (1980) (WVCCPA must be interpreted in

light of its “broad remedial purposes”); *Dunlap v. Friedman’s, Inc.*, 213 W. Va. 394, 399 (2003) (construing the Act “liberally to protect all consumers from unfair, illegal, or deceptive action”).

Judge Madden’s reading correctly identified that CitiFinancial was permitted to collect only reasonable rates under the WVCCPA. And Judge Madden also properly applied the Act to CitiFinancial. The Court should not issue a writ of prohibition in this case because the circuit court committed no error, let alone a substantial, clear-cut, legal error. Syl. Pt. 1, *Hinkle*, 164 W. Va. 112.

2. The Circuit Court’s Reasoning Adheres to the Clear Statutory Mandate of Both the WVCCPA and Insurance Code.

The interplay between the WVCCPA and the Insurance Code results in a two-step process for reasonableness determinations. Judge Madden followed the clear statutory mandates of both the WVCCPA and the Insurance Code by reading them together and giving each full effect. First, Judge Madden gave effect to § 33-6-30(c) when he recognized that an insurance rate is presumed to be reasonable upon approval by the OIC. But, then, he gave effect to § 46A-5-101 when he recognized that an aggrieved consumer can rebut that presumption in the circuit courts. As Judge Madden noted, “[t]he Act permits no contrary reading” because this process takes the statutes as written and honors the intent of the Legislature.

CitiFinancial is ~~not the first~~ creditor to contend it was immune from suit under the WVCCPA for charging approved rates. Nor was this the first time a court has rejected CitiFinancial’s reading of the statutory construct. In *Halstead*, No 2:00-1027, slip op. at *4-5, the U.S. District Court for the Southern District of West Virginia considered these same statutory provisions in connection with a similar challenge to credit insurance rates under the WVCCPA. As in this case, the consumers challenged the reasonableness of insurance charges and demonstrated the excessiveness of the charges by reference to excessively low loss ratios. *Id.* at

*2-3. And, as here, the creditor claimed that the OIC, not the courts, should determine whether the rates violated § 46A-5-101. *Id.* at *4.

In *Halstead*, Judge Copenhaver assessed the interplay between § 33-6-30(c) and § 46A-5-101 and followed the same statutory mandate as Judge Madden did in this case: “read[ing] Chapter 33 on insurance, including § 33-6-30(c) *in pari materia* with the insurance provisions of § 46A-3-109(a)(4) and (b)(1) of the WVCCPA,” Judge Copenhaver rejected the creditor’s argument that the filed rate was “unassailable through judicial proceedings” and, instead, permitted the action to remain in court. *Id.* at *14-15. Notably, Judge Copenhaver’s reasoning, like that of Judge Madden, turned on the interplay between the rebuttable nature of the Insurance Code’s presumption and the WVCCPA’s express grant of a cause of action. Both experienced jurists identified the same statutory mandate and gave full effect to the statutes.

Despite its current litigation position—framing the issue as an unfair cause of action against an unwary lender—CitiFinancial’s actual relationship with the insurance companies shows that it knows that the WVCCPA places the burden on the lender to ensure the reasonableness of the credit insurance rates. CitiFinancial and the two insurance companies that underwrite the credit insurance at issue are all wholly owned by the same corporate parent. (Mem., at 7 n.4.) And, in contracts between CitiFinancial and the insurers, the sister companies have placed the obligation of regulatory compliance squarely with CitiFinancial: “The Lender [i.e., CitiFinancial] is responsible for complying with all federal and state laws or regulations having any implication to the Program [wherein the insurers permit CitiFinancial to sell insurance to the consumer borrowers] or the marketing thereof to Customers.” (Lightner’s App’x, Tab D (Insurance Marketing & Servs. Agreement (between CitiFinancial and Triton Ins. Co.), at ¶ 7.02 (emphasis added)); Lightner’s App’x, Tab E (Insurance Marketing & Servs.

Agreement (between CitiFinancial and American Health & Life Ins. Co.), at ¶ 7.02).) Directly contrary to CitiFinancial's pleas to the Court, these agreements expressly provide that CitiFinancial is liable for its failure to adhere to West Virginia's statutory design:

CitiFinancial will indemnify, defend, save and hold the Insurer[s] . . . harmless from any and all claims, [etc.] . . . which the Insurer[s] . . . may sustain or incur, by reason of the Lender's breach of its obligations under this Agreement or by reason of the Lender's failure to comply with applicable state, federal, case or common law. . . .

(Lightner's App'x, Tab D (Insurance Marketing & Servs. Agreement (between CitiFinancial and Triton Ins. Co.), at ¶ 7.02); Lightner's App'x, Tab E (Insurance Marketing & Servs. Agreement (between CitiFinancial and American Health & Life Ins. Co.), at ¶ 7.02).) Under these agreements, CitiFinancial mirrors the West Virginia legislature's design. It is in a far better position than the insured to demand that the insurance companies rates are reasonable. And, because it agreed to ensure regulatory compliance, its cries of unfairness in the statutory design ring hollow.

Disagreeing with both Judge Madden and Judge Copenhaver and acting contrary to its contractual obligation to ensure regulatory compliance, CitiFinancial contends that the Legislature intended to permit CitiFinancial to charge unreasonable rates while denying the consumer recourse to the courts. Aside from lacking support in the text of the provision, as demonstrated above, CitiFinancial's interpretation contravenes the statutory mandate in both the Insurance Code and the WVCCPA. CitiFinancial would ignore the WVCCPA's express grant of a cause of action in court under § 46A-5-101. And its reading depends on grafting the word "exclusive" onto the OIC's jurisdiction, which § 33-6-30(c)'s mere presumption of reasonableness cannot support. Despite fervent repetition in the briefing, the Legislature did not grant exclusive jurisdiction to the OIC on this issue. And no recorded cases of any kind support

CitiFinancial's claim. The Court should not issue a writ of prohibition in this case because the circuit court did not contravene a clear statutory mandate. Syl. Pt. 1, *Hinkle*, 164 W. Va. 112.

3. The Court Cannot Resolve CitiFinancial's Purported Legal Error Independently of Disputed Facts.

CitiFinancial's chief contention is that it enjoys immunity under W. VA. CODE § 46A-3-109(b)(3). (*See Mem.*, at 13-14.) The provision's text is plain: the immunity CitiFinancial envisions applies only to "[t]he premium or identifiable charge for the insurance required or obtained by a creditor." W. VA. CODE § 46A-3-109(b)(3) (emphasis added). CitiFinancial does not contend that it requires consumers to purchase the types of credit insurance at issue here. Instead, it suggests to the Court that the provision applies because CitiFinancial, not Lightner, obtained the insurance in question. (*Mem.*, at 18.) But the circuit court expressly found, based on the evidence before it, that CitiFinancial neither obtained nor required the insurance: "The record shows that, as a matter of fact, CitiFinancial did not require or obtain the insurance in question." (*Order*, at 5 (emphasis added).) Therefore, even if CitiFinancial's "immunity" provision did operate to immunize the creditor, it does not apply on the facts in the record.

CitiFinancial candidly concedes that the circuit court's determination constitutes a finding of fact. (*Mem.*, at 18 (citing *Order*, at 5).) In response, CitiFinancial simply says that Judge Madden got it wrong. But CitiFinancial's mere contention that the circuit court erred on a disputed fact is, of itself, cause to deny the writ because this Court has repeatedly stated that it will engage in the prohibition process only when the asserted legal error "may be resolved independently of any disputed facts." Syl. pt. 1, *Hinkle*, 164 W. Va. 112. The Court need go no further to deny CitiFinancial's petition.

But for the sake of completeness, the Court could further reject CitiFinancial's argument because CitiFinancial cannot support its claim that Judge Madden erred in his factual

determination. The only record evidence CitiFinancial offers is the Affidavit of Cheryl Westling. (See Mem., at 18 (citing Affidavit of Cheryl Westling (“Westling Aff.”), at ¶ 6.) Ms. Westling did state in her affidavit that “the lender purchases the master or group policy.” (Westling Aff., at ¶ 6.) But in deposition, Ms. Westling conceded that she lacked any competent basis for testifying about the master policies:

Q. [I]n the 20 years that you worked with CitiFinancial, have you ever attended any meetings having to do with the rates to be charged for credit insurance products or the master policies with CitiFinancial?

A. No.

Q. Have you ever been tasked with having to review these master policies or the rates?

A. I believe this is the first time I have ever seen this.

...

Q. Do you have any other personal knowledge about either rates or credit master policies for credit insurance?

A. No, I don't.

Lightner's Supp. App'x, Tab H (Deposition of Cheryl Westling, dated Dec. 5, 2007 (“Westling Dep.”), at 192:14-23, 193:22-194:1).

The Westling Affidavit is not enough to reverse the circuit court's factual determination under any standard of appellate review for a factual finding. The trial court was in the position to learn that Ms. Westling's affidavit had been largely undermined after her deposition. And CitiFinancial's reliance on the discredited affidavit demonstrates why fact issues like this form an improper subject to challenge on petition for writ of prohibition. This Court need not delve into the fact-finder's role because it can deny the petition based on mere existence of a fact issue.

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

1. The Code Affords a Presumption, Not Exclusive Jurisdiction to the OIC.

As an alternative argument, CitiFinancial requested that the circuit court stay proceedings under the doctrine of primary jurisdiction. Judge Madden considered the record evidence and exercised his discretion to reject CitiFinancial's alternative motion: "Based on the facts of this action (and the similar circumstances for the putative class), the Court will not exercise its discretion under the doctrine of primary jurisdiction." (Order, at 9.) This Court should similarly deny CitiFinancial's petition with respect to the doctrine of primary jurisdiction because neither CitiFinancial nor the amici evaluate the issues under the analysis set out by this Court, which calls for an exercise of the trial court's discretion and fact determinations. And the arguments in favor of "exclusive" jurisdiction for the OIC fail because they are not supported by the relevant statutes: the Legislature knows how to confer exclusive jurisdiction but did not do so here.

This Court reviews a trial court's decision with respect to primary jurisdiction for abuse of discretion 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 (1997). Here the circuit court applied its judgment and record evidence to the analysis set out by this Court in *Ranson* to deny CitiFinancial's motion to stay. The circuit court's analysis of the facts and circumstances of this action led it to conclude that it should not exercise its discretion to apply the doctrine of primary jurisdiction:

None of the factors that might call for the application of primary jurisdiction apply under the facts and circumstances of this action. *See State ex rel. Bell Atlantic-West Virginia v. Ranson*, 201 W. Va. 402, 410-11, 497 S.E.2d 755, 763-64 (1997). First, the claims at issue here "are clearly within the usual province of circuit courts." *Id.* at 410. Second, the Court has considered the claims at issue and does not feel, on the facts presented and challenged, that the agency's experience is required. Indeed, the agency has provided

sufficient guidance by withdrawing its approval of the credit property rate at issue and promulgating the 60% loss-ratio regulation of C.S.R. § 114-61-6.2. Third, the nature of the action Lightner is seeking and the requirement that insurance rates be uniform assuage any concerns the Court might have about inconsistent rulings. And, fourth, neither a prior application nor any effective mechanism exists for bringing such claims before the insurance commissioner.

(Order, at 9.)

CitiFinancial makes no attempt to refute the circuit court's fact-laden findings or to demonstrate any abuse of discretion. Nor could it; the reasoning and analysis are sound. The Court should deny the petition because CitiFinancial, joined by its amici, asks this Court to intercede and reverse this fact-based, ruling without meeting its burden to show that Judge Madden abused his discretion. That alone is reason enough to deny the petition.

CitiFinancial and the amici declare that the Legislature intended to grant exclusive jurisdiction to the OIC. Setting aside CitiFinancial's failure to demonstrate the circuit court's abuse of discretion, the arguments in favor of exclusive jurisdiction still fail because CitiFinancial and the amici have demonstrated no "substantial, clear-cut, legal errors" nor a "clear statutory . . . mandate" contravened by the challenged order. Syl. pt. 1, *Hinkle*, 164 W. Va. 112. CitiFinancial and the OIC repeat, with enthusiasm, that the insurance commissioner has "exclusive" jurisdiction over the approval of insurance rates. But none of the Insurance Code provisions they cite grant exclusive jurisdiction:

- W. VA. CODE § 33-2-3(a) (cited by the OIC) provides that the OIC "shall enforce the provisions of this chapter." There is no exclusionary language.
- W. VA. CODE § 33-1-10(e) (cited by the OIC) provides a definition for credit insurance. Neither jurisdiction nor exclusivity is mentioned.
- W. VA. CODE § 33-20-3(a) and (b) (cited by both CitiFinancial and the OIC) sets out the criteria for ratemaking. Neither jurisdiction nor exclusivity is mentioned.

- W. VA. CODE § 33-6-8 (cited by the OIC) sets out the procedure for filing insurance forms. There is no exclusionary language.

Lightner does not and has not contested that the OIC has jurisdiction to approve initially both rates and forms. The Insurance Code is clear in its grant of authority. *See* W. VA. CODE § 33-20-3(a) and (b) (rates); W. VA. CODE § 33-6-8 (forms). But the Insurance Code is similarly clear that the OIC's determination results only in a presumption of reasonableness. W. VA. CODE § 33-6-30(c).

The Legislature certainly knows how to delegate exclusive jurisdiction to the insurance commissioner; it just did not do so here. For example, the Legislature made the insurance commissioner's jurisdiction exclusive with regard to credit insurance rulemaking:

The insurance commissioner of this state shall promulgate legislative rules . . . to implement the provisions of this article relating to insurance, and the authority of the insurance commissioner to promulgate the rules is exclusive.

W. VA. CODE § 46A-3-109(c) (emphasis added).

In that provision—and in no others—the Legislature identified the OIC as the exclusive authority by simply using the term “exclusive.” By contrast, the provision CitiFinancial relies on states only that the insurance commissioner shall make a reasonableness determination: it does not mention exclusivity.³ *See* W. VA. CODE § 46A-3-109(a)(4). And when read together with the presumption of reasonableness resulting from the OIC's initial approval, it follows that the proviso in § 46A-3-109(a)(4) refers to the OIC's initial determination, i.e., the approval of the rate.⁴ This reading harmonizes the conferral of a cause of action to the consumer and the

³ Naturally, the question is whether the jurisdiction of the circuit courts has been stripped. The circuit courts' original jurisdiction derives from the Constitution, W. VA. CONST. art. VIII, § 6, and the WVCCPA confers the cause of action, *see* W. VA. CODE § 46A-5-101.

⁴ Indeed, the OIC's brief correctly states its role with respect to credit insurance regulation: “[The WVCCPA] specifically recognized the role of the OIC in establishing premium rates for
(continued...)

establishment of a presumption. Both Judge Madden and Judge Copenhaver read the statutes in this manner. (See Order, at 8 (“This is the interpretation given to these provisions by Judge Copenhaver in *Halstead*, No 2:00-1027, slip op. at 15 (“read[ing] § 33-6-30(c) *in pari materia* with the insurance provisions of § 46A-3-109(a)(4)” and concluding that the insurance commissioner did not have exclusive jurisdiction.”).) The arguments by CitiFinancial and the amici offer absolutely no contrary authority.

Moreover, § 46A-3-109(a)(4)’s proviso was never intended to limit the jurisdiction of the courts; it was intended to confirm that the OIC, as opposed to the commissioner of banking, would approve credit insurance rates.⁵ The legislative history of the WVCCPA, which was compiled by counsel for Lightner (who also observed and participated in the Act’s development), shows the true reason and meaning of the proviso. The original draft act was created by the banking commissioner’s office, and it assigned authority to that office liberally. When the draft reached the Senate Judiciary Committee for consideration of the bill in 1974, then insurance commissioner Samuel H. Weese (who served in Governor Arch A. Moore’s administration), appeared before the committee. Commissioner Weese insisted that the OIC, not the banking commissioner, should approve credit insurance rates. The change was made and is reflected in the current version of the Act.⁶ During the mark-up session, no one ever suggested that the

credit insurance and in developing rules to implement the provisions of the WVCCPA relating to credit insurance.” (OIC Mem., at 2.) The OIC’s initial reading is correct; it strays when it assumes, without statutory support that, because of its initial role, its jurisdiction is exclusive.

⁵ References to “the commissioner” in § 46A-3-109 and throughout the WVCCPA refer to the Commissioner of Banking and not the OIC. See W. VA. CODE § 46A-1-102(10) (defining “Commissioner”).

⁶ Compare W. VA. CODE § 46A-3-109(a)(4) (the “additional charges” provision), with Lightner’s Supp. App’x, Tab I (H.B. No. 718 (1971) (making no mention of the insurance commissioner in the then-existing draft version of the “additional charges” provision)), and Lightner’s Supp. App’x, Tab J (S.B. 152/H.B. 750 (1972) (same)).

private cause of action used to enforce every other provision in this bill was impaired. The banking commissioner is largely responsible for overseeing the WVCCPA; the Act's history explains the regulatory rivalry and brings the purpose of the proviso into sharp focus.

Neither the Insurance Code nor the WVCCPA contain a clear-cut, jurisdiction-stripping provision. The circuit court did not err by holding that the OIC did not have exclusive jurisdiction. The Court should deny the writ because CitiFinancial has failed to carry its burden.

2. The OIC Has No Remedy for Lightner, Notwithstanding CitiFinancial's Creativity.

In support of its motion at the trial court, CitiFinancial asked Judge Madden to send Lightner to the OIC on the reasonableness issues. At the hearing, Judge Madden questioned whether the OIC had procedures in place to address Lightner's situation. Judge Madden rejected CitiFinancial's "suggest[ion] that Lightner could avail himself of a hearing before the insurance commissioner as provided in § 33-20-5" because, as Judge Madden concluded, the OIC cannot provide Lightner relief:

But § 33-20-5's relevant provisions are neither retroactive nor even applicable to previously-issued policies. *See* W. VA. CODE § 33-20-5 (c) & (d). Lightner, if he proceeded in the manner suggested by CitiFinancial, could not benefit from any adjudication before the insurance commissioner: the Insurance Code expressly provides that any order resulting in disapproval "shall not affect any contract or policy made or issued prior to the expiration of the period set forth in said order." *Id.* § 33-20-5 (d).

(Order, at 9.) The same is equally true of every class member in this action. Even now the OIC identifies only § 33-20-5 (d) as the procedure it would follow. (*See* OIC Mem., at 5.) The circuit court correctly refused to shunt Lightner's case to the OIC.

After Judge Madden refused its first suggestion, CitiFinancial has returned with an amended procedure. Now, CitiFinancial suggests that Lightner should go to the OIC, get a ruling on the reasonableness, and, then, return to the court to seek damages (but not from

CitiFinancial). (See Mem., at 28.) Having invented another new procedure to govern itself (the fox's proposal for guarding the henhouse), CitiFinancial announces that Judge Madden's "conclusion that there is no process . . . is therefore incorrect." (Mem., at 28.) But just because CitiFinancial can conceive of a procedure (albeit after multiple iterations) does not mean there is a procedure in place for Lightner, much less that the hypothetical procedure is his exclusive remedy. And the fact that, between CitiFinancial, the industry groups, and the OIC, three different procedures are suggested only shows there is no established OIC procedure.

Historically, the OIC has not presided over adjudications of this nature. (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.")) The industry groups (who suggest a provision that is wholly inapplicable⁷) and CitiFinancial both miss the point: any OIC ruling cannot help Lightner because the OIC cannot suspend a previously approved rate from insurance policies issued any time before disapproval. The Insurance Code expressly limits the retrospective effect of the OIC's rate-disapproving orders. W. VA. CODE § 33-20-5 (d) ("Said order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in said order."). There is no reason for the circuit court to stay this case because there is no available procedure for Lightner to pursue and because any resulting determination could not affect him or any class members. Moreover, the OIC has already spoken with respect to the credit property insurance by expressly disapproving

⁷ The industry groups' reference to § 33-20-9(b) makes no sense because the provision is expressly designed to create an internal appeals system for persons aggrieved by the application of rating organization's rating system. W. VA. CODE § 33-20-9(b). The industry groups identify nothing in the record that would make this provision applicable.

the credit property insurance product in 2003.⁸ (See Lightner's App'x, Tab B (Ltr. from Aaron Baughman, OIC, to Owana Cook, Triton Insurance Co. (Jul. 2, 2003), at 1).)

The circuit court correctly rejected CitiFinancial's motion to stay Lightner's circuit court proceeding. Its ruling on primary jurisdiction is well within the circuit court's discretion and imbued with fact issues. And CitiFinancial and its amici have failed to demonstrate that the trial court's rejection of the imaginary proceeding was error.

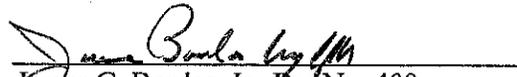
IV. CONCLUSION

CitiFinancial petitions the Court asking for a grant of immunity where the Legislature has created liability. It asks the Court to view the OIC's jurisdiction as exclusive when the Legislature limited the OIC's power by affording it only a presumption and conferring only the ability to grant prospective relief. CitiFinancial advances these unsupported, novel propositions and then asks the Court to find "substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate" based on the circuit court's fact-intensive ruling that rejected CitiFinancial's same arguments. CitiFinancial does not and cannot meet its burden under *Hinkle*, and, therefore, the Court should deny the petition. No writ of prohibition should issue.

Dated: August 20, 2008.

⁸ After the insurer attempted to withdraw its filing, the OIC ordered the insurer to bring the program into compliance, stating "you must bring this program into compliance." (Lightner's App'x, Tab C Ltr. from Aaron Baughman, OIC, to Owana Cook, Triton Insurance Co. (Jul. 29, 2003), at 1).)

Respectfully submitted,



James G. Bordas, Jr., Bar No. 409
Christopher J. Regan, Bar No. 8593
Jason E. Causey, Bar No. 9482
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, West Virginia 26003
Telephone 304.242.8410
Facsimile 304.242.3936
jbordas@bordaslaw.com
cregan@bordaslaw.com
jcausey@bordaslaw.com

Jonathan Bridges
Admitted *pro hac vice*
Daniel H. Charest
Admitted *pro hac vice*
SUSMAN GODFREY LLP
901 Main Street, Suite 5100
Dallas, Texas 75202
Telephone 214.754.1900
Facsimile 214.754.1933
jbridges@susmangodfrey.com
dcharest@susmangodfrey.com

Daniel F. Hedges
MOUNTAIN STATE JUSTICE, INC.
922 Quarrier Street, Suite 525
Charleston, West Virginia 25301
Telephone 304.344.3144
Facsimile 304.344.3145
dan@msjlaw.org

Attorneys for Respondent

CERTIFICATE OF SERVICE

Service of the foregoing **RESPONSE OF DEFENDANT TO RULE TO SHOW CAUSE ON 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 20th day of August, 2008, as follows:

Thomas V. Flaherty Esq.
Flaherty Sensabaugh & Bonasso
200 Capitol Street
PO Box 3843
Charleston, WV 25338-3843

Jeffrey J. Greenbaum, Esq.
James M. Hirschorn, Esq.
Charles J. Falletta, Esq.
Sills Cummis & Gross, PC
One Riverfront Plaza
Newark, NJ 07102

Debra Lee Hovatter, Esq.
Spilman Thomas & Battle
150 Clay Street, 2nd Floor
PO Box 615
Morgantown, WV 26507-0615

The Honorable John T. Madden
Circuit Court of Marshall County
Marshall County Courthouse
Moundsville, WV 26041



Counsel for Respondent