

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

No. \_\_\_\_\_

**STATE, EX REL. LLOYD'S, INC.,**

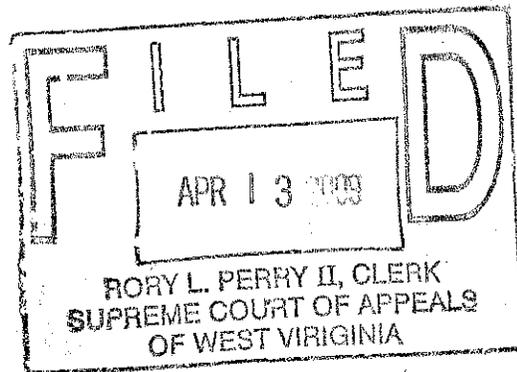
**Petitioner,**

v.

**Circuit Court of Braxton County  
Civil Action No.: 04-C-39**

**HONORABLE RICHARD A. FACEMIRE,  
JUDGE OF THE CIRCUIT COURT OF  
BRAXTON COUNTY,**

**Respondent.**



**Petition for Writ of Prohibition**

Kenneth E. Webb, Jr. (WVSB# 5560)  
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*Counsel for Petitioner*

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## **Petition For Writ Of Prohibition**

Pursuant to Article VIII, Section 2 of the Constitution of West Virginia and West Virginia Code §§ 51-1-3 and 53-1-1, Petitioner, Lloyd's Inc., requests a writ of prohibition, as a matter of right, preventing the Honorable Richard A. Facemire, Judge of the Circuit Court of Braxton County, West Virginia, from enforcing the March 27, 2009, Order granting defendants' an injunction enjoining Lloyd's Inc. from transferring, dissipating and/or wasting assets.

The Circuit Court of Braxton County, West Virginia has exceeded its statutory and constitutional powers by granting defendants' motion and entering the March 27, 2009, Order enjoining Lloyd's Inc. from transferring, dissipating and/or wasting assets. A rule to show cause should be issued in this matter because, *inter alia*, the Circuit Court awarded the injunction without citing any specific authority therefore, without any evidence of the likelihood of irreparable injury, without a hearing and without requiring any security. Therefore, a writ of prohibition must be granted as a matter of right under West Virginia Code § 53-1-1 and as a matter of justice.

### **Kind of Proceeding, Nature of the Rulings by the Circuit Court Below and Statement of Facts**

In the underlying proceeding, Charles R. Lloyd sued the petitioner for an amount allegedly due on a promissory note. That claim was tried in March of 2007. At the trial, petitioner attempted to introduce as a defense to the note claim that Charles R. Lloyd, acting as a bookkeeper for petitioner, misapplied approximately \$84,000.00 belonging to petitioner to a company that Charles R. Lloyd owns and controls – Lloyd Stave Co. Over petitioner's objection, Judge Facemire would not consider the offset issue and indicated that the offset would

have to be pursued in a separate action.<sup>1</sup> At the conclusion of the evidence in the case, Judge Facemire granted Charles Lloyd judgment as a matter of law on his note claim – amounting to \$132,000.00 plus interest. Charles Lloyd has since initiated execution activities on the judgment.

As part of the execution activities, Charles Lloyd filed a “Post-Judgment Motion to Enjoin Lloyd’s Inc. From Transferring, Dissipating and/or Wasting Assets. (Copy attached as Exhibit A.) In support of the motion, Charles Lloyd cites the Uniform Fraudulent Transfers Act codified at West Virginia Code § 40-1A-1 *et seq.* The motion then recites the history of the \$132,000.00 judgment and asserts that petitioner will engage in a fraudulent conveyance to prevent Charles Lloyd from recovering on his judgment. The motion was not verified and no affidavits were attached to support the fraudulent conveyance allegation.

By Order entered February 20, 2009, Judge Facemire directed that petitioner file a response to the Motion within 10 days and to request a hearing on the motion within 10 days. (Copy attached as Exhibit B.) By letter dated March 2, 2009, counsel for petitioner requested a hearing on the motion. (Copy attached hereto as Exhibit C.) Petitioner responded to the motion by Response dated March 6, 2009. (Copy attached as Exhibit D.) Charles Lloyd filed a Reply on March 19, 2009. (Copy attached as Exhibit E.) Again, the reply was not verified and no affidavits were attached to support the fraudulent conveyance allegation. No hearing was ever noticed or conducted on the motion. Thereafter, by Order entered March 27, 2009, the lower court granted Charles Lloyd’s Motion to Enjoin Lloyd’s Inc. From Transferring, Dissipating and/or Wasting Assets. (Copy attached as Exhibit F.) Importantly, the Order contains no factual

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<sup>1</sup> The offset issue was raised by petitioner in a separate action. Contrary to his position at the trial of the first action, Charles Lloyd moved to dismiss the action on the grounds that the offset issue should have been presented in the first action. The lower court agreed and dismissed the offset suit. The petitioner recently appealed the lower court’s dismissal of the offset suit to this Court.

findings related to any actual fraudulent conveyances or the likelihood of future fraudulent conveyances. Additionally, the Order does not require any bond.

### Standard of Review

Whenever a circuit court does not have jurisdiction or exceeds its legitimate powers, prohibition lies as a matter of right under West Virginia Code § 53-1-1:

The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.

West Virginia Code § 53-1-1 (2003). "A writ of prohibition lies only to restrain inferior courts from proceedings in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari." *Crawford v. Taylor*, 75 S.E.2d 370 (W. Va. 1953).

In *Hoover v. Berger*, this Court noted:

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction, but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

### **Points and Authorities**

A writ of prohibition is mandated because:

- I. **The Circuit Court Erred in Entering the Order of March 27, 2009, Enjoining Lloyd's Inc. From Transferring, Dissipating and/or Wasting Assets Without a Hearing.**
- II. **The Circuit Court Erred in Entering the Order of March 27, 2009, Enjoining Lloyd's Inc. From Transferring, Dissipating and/or Wasting Assets Upon No Factual Record.**
- III. **The Circuit Court Erred in Entering the Order of March 27, 2009, Enjoining Lloyd's Inc. From Transferring, Dissipating and/or Wasting Assets Without Requiring a Bond.**

### **Argument**

Generally speaking, Rule 65 of the West Virginia Rules of Civil Procedure governs injunctions in West Virginia. The rule expressly contemplates hearings (subsection b) whereat specific facts are presented which show that "immediate and irreparable injury, loss, or damage will result to the applicant." The rule also expressly requires security or bond (subsection c) before any injunction shall issue. Here none of the preconditions necessary for the issuance of a lawful injunction are present.

- I. **The Circuit Court Erred in Entering the Order of March 27, 2009, Enjoining Lloyd's Inc. From Transferring, Dissipating and/or Wasting Assets Without a Hearing.**

Hearings are generally required before an injunction may issue – unless it appears from some other form of evidence like affidavits that an injunction is needed before a hearing can be had. In cases where no showing of exigency is made, a hearing is required and any injunction issue without a hearing is null and void and in excess of the jurisdiction of the court.

*Powhatan Coal & Coke Co. v. Ritz*, 56 S.E. 889 (W.Va. 1906). In the instant case, there was no hearing on Charles Lloyd's motion for an injunction and the motion did not contain any evidentiary support for the allegations of a fraudulent conveyance. Accordingly, the issuance of the injunction was in error and in excess of the jurisdiction of the lower court.

**II. The Circuit Court Erred in Entering the Order of March 27, 2009, Enjoining Lloyd's Inc. From Transferring, Dissipating and/or Wasting Assets Upon No Factual Record.**

For an injunction to issue, there must be a factual record that supports awarding an injunction. In determining whether injunctive relief is appropriate, this Court has stated that a "balancing of hardship test" must be utilized. Application of the balancing of hardship test requires a factual record:

Under the balance of hardship test the district court must consider, in 'flexible interplay,' the following four factors . . . . (1) the likelihood of irreparable harm to the Plaintiff without injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the Plaintiff's likelihood of success on the merits; and (4) the public interest.

*Jefferson Co. Bd. Of Educ. v. Jefferson Co. Educ. Assoc., et al.*, 183 W. Va. 15, 393 S.E.2d 653, 662 (1990), quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1054 (4<sup>th</sup> Cir. 1985). See also, Note 8, *State ex rel. McGraw, Jr. v. Imperial Marketing, et al.*, 196 W. Va. 346, 472 S.E.2d 792, 798 (1996).

The lower court erred in issuing the injunction because there was no showing by Charles Lloyd on any of the four (4) factors that must be considered by the lower court. Accordingly, the issuance of the injunction was in error and in excess of the jurisdiction of the lower court.

**III. The Circuit Court Erred in Entering the Order of March 27, 2009, Enjoining Lloyd's Inc. From Transferring, Dissipating and/or Wasting Assets Without Requiring a Bond.**

No injunction may issue without the posting of a bond. West Virginia Code § 53-5-9. This Court has determined that it is error to award an injunction without requiring the plaintiff to post a bond. *Conley v. Brewer*, 102 S.E. 607 (W.Va. 1920).

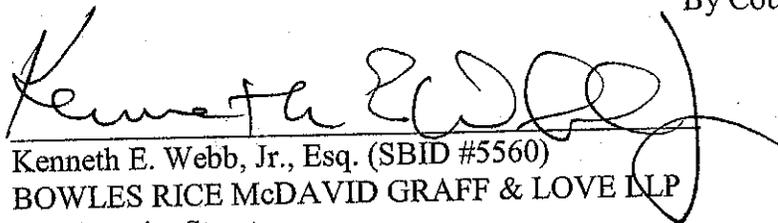
Here there is no bond mentioned in the Order of March 27, 2009. Accordingly, the issuance of the injunction was in error and in excess of the jurisdiction of the lower court.

**Relief Requested**

For the foregoing reasons set forth herein, petitioner respectfully requests that this Court grant its petition and issue a writ of prohibition ordering the Honorable Richard A. Facemire not to enforce his Order of March 27, 2009 Enjoining Lloyd's Inc. From Transferring, Dissipating and/or Wasting Assets.

LLOYD'S INC.,

By Counsel,



Kenneth E. Webb, Jr., Esq. (SBID #5560)

BOWLES RICE McDAVID GRAFF & LOVE LLP

600 Quarrier Street

Post Office Box 1386

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

No. \_\_\_\_\_

**STATE, EX REL. LLOYD'S, INC.,**

**Petitioner,**

v.

**Circuit Court of Braxton County  
Civil Action No.: 04-C-39**

**HONORABLE RICHARD A. FACEMIRE,  
JUDGE OF THE CIRCUIT COURT OF  
BRAXTON COUNTY,**

**Respondent.**

**Memorandum of Names and Addresses**

Pursuant to West Virginia Rule of Appellate Procedure 14(a), petitioner submits the following memorandum of names and addresses of persons upon whom the rule to show cause, if granted, should be served:

**Petitioner:** Lloyd's, Inc.

**Counsel:** Kenneth E. Webb, Jr., Esq.  
BOWLES RICE McDAVID GRAFF & LOVE LLP  
600 Quarrier Street  
Post Office Box 1386  
Charleston, West Virginia 25325-1386

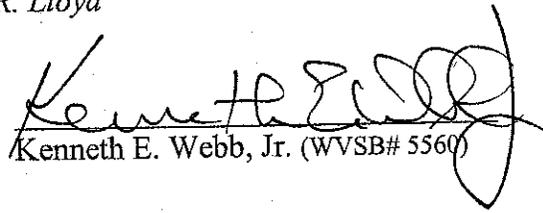
**Respondents:** The Honorable Richard A. Facemire, Judge  
Braxton County Circuit Court  
Braxton County Courthouse  
300 Main Street  
Sutton, West Virginia 26601

Attorney General Darrell V. McGraw, Jr.  
Capitol Complex, Building 1, Room E26  
Charleston, West Virginia 25305

Charles R. Lloyd, II

**Counsel:**

Erin K. King, Esquire  
Farmer Cline & Campbell, PLLC  
Post Office Box 3842  
Charleston, West Virginia 25338  
*Counsel for Charles R. Lloyd*

  
Kenneth E. Webb, Jr. (WVSB# 5560)

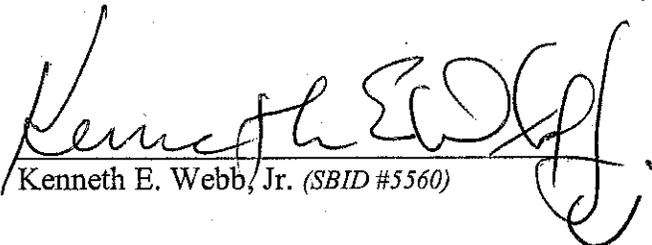
# Certificate of Service

I, Kenneth E. Webb, Jr., do hereby certify that a true and correct copy of the *Petition for a Writ of Prohibition* and *Memorandum of Names and Addresses* was forwarded U.S. Mail upon counsel of record, addressed as indicated, on the **13th day of April, 2009**:

The Honorable Richard A. Facemire, Judge  
Braxton County Circuit Court  
Braxton County Courthouse  
300 Main Street  
Sutton, West Virginia 26601

Attorney General Darrell V. McGraw, Jr.  
Capitol Complex, Building 1, Room E26  
Charleston, West Virginia 25305

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Post Office Box 3842  
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*Counsel for Charles R. Lloyd*

  
Kenneth E. Webb, Jr. (SBID #5560)



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Kimberly A. Martin  
Francis M. Curnutte, III  
Shawn A. Taylor  
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February 13, 2009

Direct Email: [eeking@fcclaw.net](mailto:eeking@fcclaw.net)

**REPLY TO: CHARLESTON OFFICE**

RECEIVED FEB 16 2009

J.W. Morris, Clerk  
Braxton County Circuit Court  
300 Main Street  
Sutton, West Virginia 26601

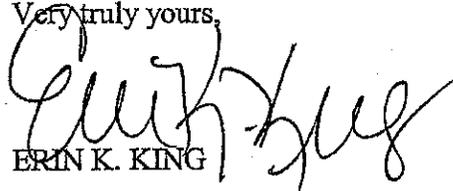
Re: *William G. Lloyd v. Charles R. Lloyd, et al.*  
Civil Action No. 04-C-39 (Cir. Ct. of Braxton Co., WV)

Dear Mr. Morris:

Enclosed for filing please find "CHARLES R. LLOYD'S POST-JUDGMENT MOTION TO ENJOIN LLOYD'S INC. FROM TRANSFERRING, DISSIPATING AND/OR WASTING ASSETS". A copy of this document has this day been served upon all counsel of record as reflected in the Certificate of Service.

Thank you for your assistance in this matter. If you have any questions, please contact me.

Very truly yours,

  
ERIN K. KING

EKK/sh

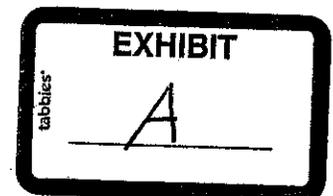
Enclosure

cc: Honorable Richard A. Facemire  
Steven L. Thomas, Esquire  
Kenneth E. Webb, Esquire

CHARLESTON: PO Box 3842 • Charleston, WV 25338  
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[farmerclinecampbell.com](http://farmerclinecampbell.com)



IN THE CIRCUIT COURT OF BRAXTON COUNTY, WEST VIRGINIA

WILLIAM G. LLOYD,

Plaintiff,

v.

CIVIL ACTION NO. 04-C-39  
Judge Richard A. Facemire

BRAXTON LUMBER CO., INC., a  
West Virginia corporation; and  
CHARLES R. LLOYD, an individual,  
and CHARLES R. LLOYD, II, an  
individual,

Defendants.

RECEIVED FEB 16 2009

BRAXTON LUMBER CO., INC., a  
West Virginia corporation; and  
CHARLES R. LLOYD, II, an individual,

Third Party Plaintiffs,

v.

LLOYDS, INC.,

Third Party Defendant.

**CHARLES R. LLOYD'S POST-JUDGMENT MOTION TO ENJOIN LLOYD'S INC.  
FROM TRANSFERRING, DISSIPATING AND/OR WASTING ASSETS**

COME NOW Charles R. Lloyd, by counsel, pursuant to the Uniform Fraudulent Transfers Act, W.Va. Code § 40-1A-1 et seq., and the "Judgment Order" attached as Exhibit A to this Motion, and hereby request that the Court enter an Order enjoining Third Party Defendant, Lloyd's Inc., from transferring, dissipating and/or wasting assets, and thereby, attempting to frustrate, hinder or defeat the plaintiffs' ability to collect upon the judgment obtained by them in this action. In further support of this Motion, Charles R. Lloyd states as follows:

1. This action came on for trial on March 27, 2007 before this Court and a jury, the Honorable Richard A. Facemire presiding.

2. On April 4, 2007, at the conclusion of the defendants/third-party plaintiffs' evidence, the parties orally moved for judgement as a matter of law pursuant to Rule 50 of the West Virginia Rules of Civil Procedure.

3. The Court, upon consideration of the motions, granted Charles R. Lloyd's motion for judgment as a matter of law against the Third Party Defendant, Lloyds, Inc. Pursuant to the Court's Judgment Order, entered March 5, 2008, Third Party Defendant Lloyds, Inc. was to pay the sum of One Hundred Thirty Two Thousand Dollars (\$132,000.00), together with pre-judgment interest at the rate of five percent (5%) per annum from January 1, 1999 to April 4, 2007, and post-judgment interest thereafter at the rate of nine and three quarters percent (9.75%) per annum to Charles R. Lloyd.

4. As of January 25, 2009, Third Party Defendant Lloyds, Inc. had failed to pay the Charles R. Lloyd any amount in satisfaction of the Judgment Order. As such, Charles R. Lloyd filed an Abstract of Judgment and a Writ of Execution on January 26, 2009.

5. Thus far, Lloyd's Inc. has refused to comply with the terms of the Judgment Order by failing to pay Charles R. Lloyd One Hundred Thirty Two Thousand Dollars (\$132, 000.00), plus interest as described above. Lloyd's Inc.'s failure and refusal to comply with the terms of the Judgment Order is consistent with its pattern and practice of conducting business;

6. Charles R. Lloyd has a valid judgment against Lloyd's Inc., and, thus, he is a "creditor" and Lloyd's Inc is a "debtor" pursuant to W.Va. Code §§ 40-1A-1 (c)(d)(e)(f);

7. Without the Court's assistance, Charles R. Lloyd has a good faith basis to believe that Lloyd's Inc. will transfer assets in such a manner as to constitute fraudulent transfers within the meaning of W.Va. Code § 40-1A-4 and W.Va. Code § 40-1A-5 and will thereby attempt to prevent Charles R. Lloyd from recovering upon the judgment obtained against Lloyds, Inc.

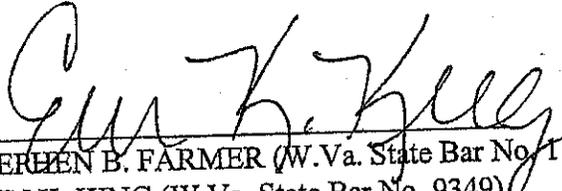
**WHEREFORE**, Charles R. Lloyd respectfully requests pursuant to the provisions of W.Va. Code § 40-1A-7 and the attached Judgment Order that this Court enter an Order:

- a. Enjoining Lloyd's Inc. from transferring, dissipating and/or wasting any assets without this Court's approval;
- b. Granting Charles R. Lloyd any and all other relief appropriate under the provisions of W.Va. Code § 40-1A-7; and
- c. Granting Charles R. Lloyd such other and further relief as the Court deems just and appropriate under the circumstances.

CHARLES R. LLOYD

Defendant,

By Counsel:

  
STERHEN B. FARMER (W.Va. State Bar No. 1165)  
ERIN K. KING (W.Va. State Bar No. 9349)  
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Charleston, West Virginia 25338  
(304) 346-5990

**EXHIBITS**

**ON**

**FILE IN THE**

**CLERK'S OFFICE**