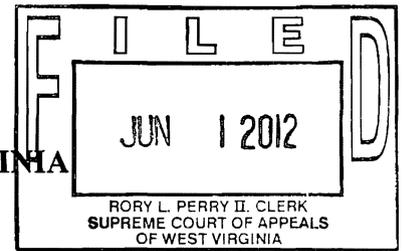


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 12-0150



AT CHARLESTON

BRIEF FILED
WITH MOTION

TRIBECA LENDING CORPORATION

Petitioner,

v.

From the 13th Judicial Circuit
(Circuit Court Kanawha County,
Civil Action No. 11-C-2010)
Judge Tod J. Kaufman, Presiding

JAMES E. MCCORMICK,

Respondent,

**BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER
AND ON BEHALF OF THE WEST VIRGINIA BANKERS
ASSOCIATION, INC. AND THE COMMUNITY BANKERS
OF WEST VIRGINIA, INC.**

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I. STATEMENT OF INTEREST

The West Virginia Bankers Association, Inc., (“WVBA”) and the Community Bankers of West Virginia, Inc., (“CBWV”) (collectively the “Associations”) each represent the interests of approximately eighty (80) federally-insured financial institutions in the State of West Virginia. The Associations are generally comprised of financial institutions headquartered within the State of West Virginia, and most of the Associations’ members’ business comes from West Virginia residents.

All the members of the WVBA and the CBWV engage in the business of making loans, transactions which sometimes require them to sell the collateral that secures a loan in a foreclosure sale. Clearly, matters pertaining to the applicable statute of limitations are of vital importance to the Associations. In particular, the two certified questions before the Court deal with matters critical to the operation of members of the respective Associations. Certainly these issues touch upon the ability to obtain and hold clear and marketable title in order to affect the transfer of collateral during a foreclosure. Both the WVBA and the CBWV believe that their perspectives will be of assistance to this Court in the resolution of both certified questions.¹

A. Issues of Interest to the *Amici*

The WVBA and the CBWV support all of the arguments made by the Petitioner to both of the certified questions presented to this Court. With respect to the first certified question, the Associations believe that West Virginia Code §38-1-4(a) controls the statute of limitations for challenges to foreclosures. As part of our commercial system, foreclosures are a

¹ All costs of filing this brief have been paid by the West Virginia Bankers Association and the Community Bankers of West Virginia, and no other party to this proceeding made a monetary contribution to fund the preparation or submission of this Brief *Amici Curiae*. Neither Respondents nor counsel for Respondents authored this brief.

legislatively approved method to ensure meaningful collateral exists with which to provide loans. Moreover, foreclosures provide a means by which to secure and ultimately transfer title. The procedural posture of the underlying case is significant to the extent that it is being used by Respondent to circumvent applicable statutory law. If the Court were to condone a much belated challenge to a foreclosure as suggested by the Respondent, then the ultimate transfer of good and marketable title lingers in perpetuity. Not only would that result stymie loan generation and commerce overall, more importantly, it would also have a negative impact on West Virginia consumers who as subsequent purchasers of homes would potentially face collateral attacks to their title years later. The Associations assert that the statute of limitations set forth clearly and unambiguously in West Virginia Code §38-1-4(a) controls the instant case and provides a clear and predictable means of transferring marketable title.

Regarding the second certified question, the WVBA and CBWV respectfully urge the Court to find that the statute of limitations contained within the West Virginia Consumer Credit and Protection Act (“WVCCPA”) begins one year after the “last scheduled payment,” which refers to the date the loan was accelerated. In a typical mortgage loan transaction, most issues relating to loan payments surface when there is a default. When a borrower fails to pay after notice and right to cure, the standard acceleration clause usually included in the note and the Deed of Trust permit the lender to require the borrower to make all remaining payments due under the note. This “last scheduled payment” is currently interpreted, and has always been interpreted, by the banking industry to be the date on which bank accelerates payment of the loan as permitted under the terms of the note and/or the Deed of Trust. To hold otherwise would severely hamper the ability of both a bank and a subsequent purchaser of the property to fully transfer good and marketable title.

B. Activities of a Lender in Connection with a Real Estate Loan and Subsequent Foreclosure

This Court's analysis with respect to the certified questions necessitates a fundamental understanding of the purchase of a home by a borrower and the borrower's interaction with the lending institution or bank. The lender first undertakes a credit underwriting process to determine the value of the collateral, and whether the borrower has or can obtain good and marketable title to the real estate. If the bank's underwriting standards are satisfied and it decides to make a loan, the bank will require the borrower to execute a Deed of Trust which conveys equitable title to a trustee. The Deed of Trust is a legal document through which the borrower retains legal title to the property, and in which the secured party, bank, or lender is a beneficiary, holding a beneficial right only to the proceeds of any sale. At the same time a Deed a Trust is executed, there is also a note which represents the loan agreement between the borrower and lender.

In the event the borrower defaults and the bank is forced to sell its collateral at a foreclosure sale, the trustee under the Deed of Trust acts as an agent for both the lender and the borrower pursuant to the terms of the Deed of Trust. The borrower, as the legal owner of the property, is contractually obligated under the Deed of Trust to permit a sale by the trustee, the borrower's agent. A foreclosure is a non-judicial process that provides a precise and predictable statutory procedure by which a bank transfers legal title to its collateral. In the industry, the foreclosure simply provides a process by which the lender can recoup the collateral used to secure the loan.

At the foreclosure sale, if no third party makes an acceptable bid on the property, the lender may bid on the property. The lender does not obtain legal title to the property unless

the lender bids upon and purchases the property at the foreclosure sale. Once this property is purchased by the lender, the lender then is free to appropriately sell or otherwise transfer the property in order to satisfy any outstanding payments under the loan. Of note, lenders are not in the business of holding real property but making loans. From an operational standpoint, it is critical, therefore, that any attacks on the foreclosure be done within a specific time period as prescribed by the statute. If there is no reasonable time limit, then lenders are placed in a precarious position with respect to their ability to assure a subsequent purchaser that they received and can transfer clear and marketable title.

The underlying case underscores that the remedies available to a borrower against a lender depend on whether the borrower is challenging the foreclosure process itself or the underlying note or instrument. The Associations believe borrowers have appropriate and effective remedies available to them in order to successfully challenge alleged wrongdoing by the lender relating to the underlying note and that those remedies have specific statutes of limitations. Similarly, challenges to a foreclosure process provide a remedy to the borrower if the lender fails to follow the requirements set forth in the foreclosure statute, but that remedy is subject to a specific statute of limitations of one year. Keeping these basic tenets in mind, the Court should be able to fully and fairly resolve the respective statute of limitations provisions in the applicable statutes at issue and affirm the answers to the two certified questions submitted by the circuit court.

II. SUMMARY OF ARGUMENT

West Virginia Code § 38-1-4a, provides a clear limitation on actions to set aside foreclosure sales:

[N]o action or proceeding to set aside a trustee's sale due to the failure to follow any notice, service, process or other procedural requirement relating to a sale of property under a trust deed shall be filed or commenced more than one year from the date of the sale.

The effect of this provision is quite simple: it prevents borrowers in default from making an untimely challenge to the legitimacy of a foreclosure sale. One of West Virginia's leading real estate scholars, Professor and Dean Emeritus John Fisher, II, recently observed that the Legislature likely enacted this provision to prevent a continuing cloud on title from defective foreclosure sales.

The various arguments of Respondent, James E. McCormick ("Respondent") in this case render meaningless the one year statute of limitations embodied in West Virginia Code § 38-1-4a. For instance, the Respondent asserts that the WVCCPA permits him to challenge the foreclosure within one year of the "final scheduled payment" under the mortgage, which he argues is some twenty-four (24) years from now. Additionally and alternatively, Respondent argues his claim to set aside the foreclosure is not subject to any limitations period, as it is a "counterclaim" to an unlawful detainer action.

For several reasons, we urge the Court to reject Respondent's positions. First, the Legislature has provided a clear limitation on actions to set aside foreclosure sales in § 38-1-4a. Borrowers should not be permitted to rely upon the WVCCPA and pursue setting aside a foreclosure as a remedy, so as to avoid this statutory bar. Moreover, in the event the borrower challenges the underlying note or instrument under the WVCCPA, then the date the lender accelerated the remaining debt is the only reasonable "final scheduled payment" date.

Further, §38-1-4a provides a specific one year limitation on claims that seek to set aside a foreclosure. Under basic canons of statutory construction, the general statute relied upon by the Respondent under the WVCCPA cannot trump this specific limitation period enacted by the Legislature in §38-1-4a. Finally, the underlying case arises out of an unlawful detainer action. An unlawful detainer is an *in rem* proceeding that is limited to wrongful possession of real property and not an action against the consumer. Therefore a counterclaim to this type of action cannot be used to extend the statute of limitations indefinitely.

Ultimately, the Associations strongly disagree with Respondent's position to the extent it ignores and undermines the intended effect of the statute of limitations. This case raises serious business and operational concerns for members of the Associations and important public policy concerns for the significant number of West Virginia homeowners who are subsequent purchasers of these properties.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Given the broad implications of this case for the banking industry in West Virginia, the Associations respectfully request an opportunity to be heard on the issues raised in this case. Under Revised Rules 30(f) and 20 of the West Virginia Rules of Appellate Procedure, an extraordinary reason exists to justify this request: a determination by this Court that foreclosure sales can be nullified in perpetuity is a legal question of fundamental public importance. Because the Associations represent the interests of approximately eighty (80) financial institutions in the State of West Virginia, and because an adverse decision in this case will certainly have a real and serious impact on banking practices statewide, the Associations request oral argument.

IV. ARGUMENT

A. To the extent a borrower seeks to set aside a foreclosure, that cause of action must be governed and limited by the one year statute of limitations embodied in West Virginia Code § 38-1-4a.

The Associations recognize the need to provide borrowers with a remedy to challenge a foreclosure. However, this remedy is not without limitations. Indeed, the West Virginia Legislature clearly and unequivocally limited such a challenge to a timeframe of one year:

[N]o action . . . to set aside a trustee's sale due to the failure to follow any notice, service, process or other procedural requirement relating to a sale of property under a trust deed shall be filed or commenced more than one year from the date of the sale.

W.Va. Code § 38-1-4a. This Court has long recognized the basic notion that “[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.” Syl. pt. 5, *State v. Gen. Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959). Under the express language of the statute, a challenge to a foreclosure must be done within one year.

A borrower should not be permitted to circumvent this specific time limitation by substantively challenging the underlying instrument. Foreclosures represent a procedure by which a lender may recoup the collateral and transfer marketable title to another. As such, challenges to foreclosures concern alleged procedural deficiencies and not substantive matters pertaining to the underlying note or instrument. While remedies are available to a borrower to challenge the note or instrument, the remedy to set aside foreclosure is not available after a year. The West Virginia Legislature could not be any more clear in this regard.

Moreover, the deleterious effect on marketable title of allowing foreclosure challenges beyond the one year limitation must be underscored. In a recent update to his ongoing examination of the scope of title examinations in West Virginia, Professor John Fisher, II, analyzed this Court's recent case law regarding foreclosures. Professor Fisher wrote, "It is fair to assume that the *Hafer* decision may have been part of the reason for the passage of West Virginia Code § 38-1-4a, entitled Statute of Limitation for Sales by Trustee, by the West Virginia legislature in 2006." John W. Fisher, II, *The Scope of Title Examinations in West Virginia Revisited*, 111 W. Va. L. Rev. 641, 689 (2009). In *Hafer v. Skinner*, 208 W. Va. 689, 542 S.E.2d 852 (2000), this Court set aside a foreclosure sale because the substitute trustee who sold the property failed to record the required notice of substitution prior to the sale. *Id.* For that reason, this Court ruled that "the trial court should have set aside the trustee's sale *as a nullity . . .*" *Id.* at 693, 865 (emphasis added). Without a time limit on actions to set aside a foreclosure, it would be possible to void a foreclosure sale well into the subsequent owner's possession, which is a needless cloud on title and the very concern the Legislature sought to address by enacting the 2006 statute of limitations.

By 1997, this Court had already noted that challenges to foreclosures should be subject to reasonable restrictions in order to preclude a chilling effect on the lending industry:

We believe that the very foundation of our trustee foreclosure laws would be unsettled were we to allow grantors to challenge the value of real property at a deficiency judgment proceeding. What has formerly been a relatively quick and inexpensive proceeding, would turn into protracted and expensive litigation. *The implications could negatively effect [sic] lending institutions from providing loans to its customers.*

Fayette County Nat. Bank v. Lilly, 199 W. Va. 349, 357, 484 S.E.2d 232, 240 (1997) (emphasis added). If this Court were willing to prevent the negative impact of allowing challenges to

property valuation in the foreclosure context, it must likewise remain mindful of the very real potential for needlessly clouding title to property decades into a subsequent purchaser's ownership. In sum, the one year statute of limitations puts individuals like Respondent on notice to file a timely claim, while assuring the lending industry that it will be able to recover and resell the collateral it took as security in issuing the loan. Not enforcing West Virginia Code § 38-1-4a will only cloud otherwise marketable title, hamper the resale of collateral, and ultimately chill the lending industry in West Virginia.

B. Borrowers cannot use the WVCCPA to circumvent current law and bring an action to set aside a foreclosure beyond the one year statute of limitations contained in West Virginia Code § 38-1-4a.

Despite claims to the contrary, Respondent seeks as a remedy to set aside the underlying foreclosure. First, Respondent's answer asserts that "the preceding foreclosure was wrongful and unlawful as more fully set forth in the Defendant's Affirmative Defenses and Counterclaim." [¶ 1, McCormick Answer (J.A. 38)]. Second, respondent states that he filed his counterclaim to "save his home from the Plaintiff's wrongful foreclosure" [¶ 1, McCormick Counterclaim (J.A. 40)]. Third, he also states that the "loan issued by Plaintiff . . . put him in jeopardy of losing his home." [¶ 17, McCormick Counterclaim (J.A. 42)]. Thus, Respondent's answer and counterclaim contain numerous references to a wrongful foreclosure and his desire to set it aside.

Borrowers should not be allowed to circumvent statutory and decisional law by couching a claim to set aside a foreclosure sale in terms of a WVCCPA violation. As previously noted, West Virginia Code § 38-1-4a mandates a one year statute of limitations on actions to set aside a foreclosure sale. The rationale behind such a limitation is clear - to avoid needless clouds on title beyond a one year timeframe, thereby allowing the free passage of marketable title to a

new owner and fostering a healthy and secure lending environment. Allowing any borrower in Respondent's position to void a foreclosure sale beyond this timeframe eviscerates these benefits and any others gained from the statute.

Certainly, other remedies are available to an aggrieved borrower but not the remedy to set aside a foreclosure after the expiration of the one year statute of limitations. Further, a borrower who challenges the underlying loan, and as a remedy seeks monetary damages and/or modification of the terms of the loan, cannot also seek as a remedy possession of the home years later. In other words, the remedy to set aside a foreclosure is separate and distinct from other remedies available under the WVCCPA and, therefore, follows a separate and distinct statute of limitations. The rationale is that the Legislature recognized that a subsequent purchaser who through a sale obtains title to a foreclosed home should not years later have title to his or her home jeopardized by the original borrower in a post foreclosure lawsuit. The public policy embodied in the statute of limitations is to ensure clear and marketable title to real estate after a definite and reasonable period of time has lapsed.

C. To avoid an unreasonable result under the WVCCPA, the Court must conclude that the "last scheduled payment" refers to the date an outstanding debt is accelerated.

This Court has consistently observed its duty "to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results." *State v. Kerns*, 183 W.Va. 130, 135, 394 S.E.2d 532, 537 (1990); *see also Taylor-Hurley v. Mingo County Bd. of Educ.*, 209 W. Va. 780, 787, 551 S.E.2d 702, 709 (2001). Here, the Respondent has offered an entirely "absurd" reading of the following WVCCPA text:

With respect to violations arising from other regulated consumer loans, no action pursuant to this subsection may be brought more

than *one year after the due date of the last scheduled payment* of the agreement pursuant to which the charge was paid.

West Virginia Code § 46A-5-101 (emphasis added). Based on this language and the underlying loan agreement, Respondent argues that defaulted borrowers should be able to file WVCCPA claims until one year after the due date of the “last scheduled payment” in a loan agreement, some 24 years into the future in Respondent’s case. This, he argues, is true despite a lender’s “acceleration” of debt, a mechanism whereby the loan agreement requires “the debtor to pay off the balance *sooner than the due date if some specified event occurs*, such as failure to pay an installment or to maintain insurance.” Black’s Law Dictionary (9th ed. 2009) (emphasis added). In effect, the “last scheduled payment” becomes the date the debt is accelerated under the parties’ agreement. Therefore, claims arising under the WVCCPA would be barred one year following the acceleration, and this is the *only* logical reading of that statute, as Judge Goodwin concluded:

Under the plaintiffs' reading, an action against a creditor could be brought as many as fifty years after a violation of the WVCCPA occurred—even if the plaintiff paid the entire balance of the loan on the first payment—provided that the loan's maturity date, and thus the “last scheduled payment,” was fifty years in the future. I sincerely doubt that the West Virginia legislature meant to allow plaintiffs a half-century in which to bring claims under the WVCCPA.

Delebreaux v. Bayview Loan Servicing, LLC, 770 F. Supp. 2d 813, 821 (S.D.W.Va. 2011). Holding contrary to the Southern District, this Court would sanction Respondent’s position that borrowers can later bring a claim to set aside a foreclosure into provisions of the WVCCPA and challenge a foreclosure sale years, even decades, down the road.

Nor should a borrower be able to extend this Court’s holding in *Dunlap v. Friedman’s, Inc.*, 213 W.Va. 394, 582 S.E.2d 841 (2003) to conclude that he or she can file an

action under the WVCCPA within one year of the due date of the final payment under a mortgage, where the lender previously accelerated the debt. First, the *Dunlap* Court considered a different factual and legal scenario. In *Dunlap*, the consumer agreement was “a retail installment sales contract requiring fifteen monthly payments beginning on January 1, 1998, and ending on February 25, 1999.” *Id.* at 395, 842. Because the Court reasoned that this type of agreement had not been clearly addressed by the statutes of limitations provisions in the WVCCPA, it found those provisions ambiguous as applied to that agreement. *Id.* at 398, 845. In light of the requirement to liberally construe the provisions of the WVCCPA, the Court held that “a consumer who is party to a closed-ended credit transaction, resulting from a sale as defined in West Virginia Code § 46A-6-102(d), may bring any necessary action within either the four-year period commencing with the date of the transaction or within one year of the due date of the last payment, whichever is later.” *Id.* at 399, 846.

The *Dunlap* decision did not involve a loan secured by real estate, and this Court was not asked to consider the concept of an accelerated debt under a mortgage, or the effect of acceleration on the “due date of the last payment.” Rather, the *Dunlap* Court addressed the ambiguity of the WVCCPA’s statutes of limitations as they applied to that specific consumer transaction. Significantly, the decision’s affirmation of the liberal construction of the WVCCPA’s statutes of limitations does not sanction the result requested in this case. To the contrary, borrowers like Respondent cannot argue that the final due date for payment under a mortgage could be 24 years into the future, where the lender already accelerated the debt and, thus, required full payment immediately. Such a construction of the WVCCPA would be in derogation of West Virginia law:

The West Virginia legislature clearly contemplated acceleration of loans as part of the regular course of business in consumer loan transactions. Thus, while the plaintiffs are correct that the WVCCPA ‘should be construed liberally as a remedial statute,’ *Dunlap v. Friedman's, Inc.*, 213 W.Va. 394, 582 S.E.2d 841, 846 (2003) (internal citations omitted), this does not mean that the court should penalize creditors who accelerate a loan in accordance with both the terms of a loan agreement and West Virginia law.

Delebreau, 770 F. Supp. 2d at 820-21.

D. A counterclaim to an unlawful detainer action cannot remove the statute of limitations applicable to challenges either to a foreclosure or the underlying note or instrument.

This Court should reject the position that a borrower can set aside a foreclosure years later by simply remaining in the home and asserting a counterclaim when the lender seeks possession. In order to avoid the statute of limitations under the foreclosure statute, a borrower could rely upon the following WVCCPA section: “Rights granted by this chapter may be asserted as a defense, setoff or counterclaim to an action against a consumer without regard to any limitation of actions.” West Virginia Code § 46A-5-102. This argument also fails for the reasons stated above, not the least of which is the serious potential for challenging otherwise marketable title decades into the future of a subsequent purchaser’s ownership.

First, as stated in Section IV(A) of this brief, the West Virginia Legislature mandated a specific limitation for a specific remedy: one year for setting aside a foreclosure sale. *See* West Virginia Code § 38-1-4a. Assuming *arguendo* that the WVCCPA could be a vehicle for challenging a foreclosure sale, none of its statutes of limitations would apply in light of the specific limitation embodied in West Virginia Code § 38-1-4a. Indeed, this Court held that “statutory construction requires that *a specific statute be given precedence over a general statute* relating to the same subject matter where the two cannot be reconciled.” Syl. pt. 1, *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 331, 325 S.E.2d 120, 120 (1984) (emphasis

added). Thus, the general provisions of the WVCCPA relating to consumer protection as a whole in West Virginia, including its statutes of limitations, do not trump the Legislature's specific limitation on a claim to set aside a foreclosure sale.

Of equal significance, an unlawful detainer cannot be “an action against a consumer” as contemplated by the WVCCPA. Rather, “unlawful detainer partakes of the nature of a proceeding *in rem*” *Rogers v. Jones*, 129 W. Va. 264, 266, 39 S.E.2d 919, 920 (1946). *See also Ray v. Hey*, 183 W.Va. 521, 396 S.E.2d 702 (1990) (observing that both ejectment and unlawful detainer actions take aim at possession and title to real property). Indeed, this Court observed that an “action of forcible entry and detainer is solely possessory in nature.” *Wiles v. Walker*, 88 W. Va. 147, 106 S.E. 423, 424 (1921). Therefore, when lending institutions file an unlawful detainer action, they are not pursuing an action against a consumer, but attempting to adjudicate the possession of property. In effect, an unlawful detainer is an *in rem* action in favor of property possession, not an action against a consumer pursuant to any loan transaction or other business relationship.

In fact, in *Chrysler Credit Corp. v. Copley*, 189 W. Va. 90, 428 S.E.2d 313 (1993), this Court allowed a consumer to assert various counterclaims under the WVCCPA without regard to any applicable statute of limitations. There, the consumer had been “sued for the balance due on a consumer transaction” *Id.* at 93, 316. In the case *sub judice*, however, Respondent has not been subjected to suit pursuant to the underlying loan agreement for any balance due, nor has he been sued as a “consumer;” rather, the existence under West Virginia law of a procedure for nonjudicial foreclosure obviates the need to file suit against defaulted borrowers. In other words, in *Chrysler Credit Corp.*, the counterclaiming defendant had been sued for money due pursuant to the transaction. That is plainly not the case where lending

institutions assert possession of property to which they already received title by virtue of the foreclosure procedures in an underlying loan.

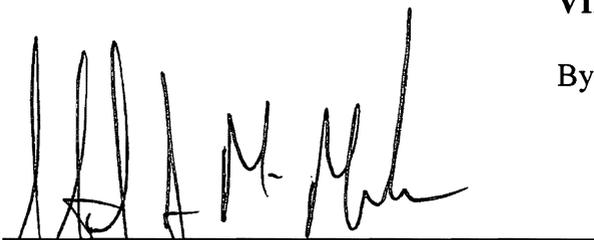
Finally, and from a common sense standpoint, if lending institutions need to exercise their rights to recover possession following a foreclosure sale, they will typically file an unlawful detainer action. If the Court does not uphold the circuit court's answers to the certified questions, a borrower in Respondent's shoes could wrongfully occupy the property following foreclosure, force an unlawful detainer action, and file any number of actions which would have otherwise been precluded by operation of the foreclosure statute's or WVCCPA's statutes of limitations. That simply cannot be the intended result.

V. CONCLUSION

The Associations respectfully urge this Court to reject the position of the Respondent and affirm the decision of the circuit court in regard to both certified questions.

**WEST VIRGINIA BANKERS ASSOCIATION
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
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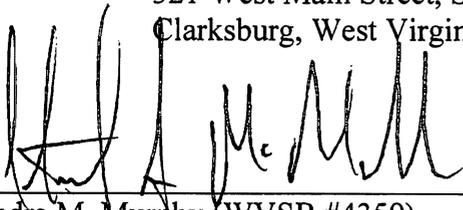
Respondent,

CERTIFICATE OF SERVICE

I, Stuart A. McMillan, hereby certify that on June 1, 2012, the foregoing **Brief Amicus Curiae in Support of Petitioner and on Behalf of The West Virginia Bankers Association, Inc., and The Community Bankers of West Virginia, Inc.** was served via facsimile and U.S. Mail on the following:

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