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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TRIBECA LENDING CORPORATION,

Plaintiff/Petitioner,

v.

APPEAL NO. 12-0150
(On appeal from the Circuit Court of Kanawha County Civil Action No. 11-C-2010 Hon. Tod J. Kaufman)

JAMES E. MCCORMICK,

Defendant/Respondent.

BRIEF OF RESPONDENT JAMES E. MCCORMICK ON NEW ARGUMENTS RAISED IN *AMICUS CURIAE* BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 2

ARGUMENT 3

A. **The Realities of Mortgage Lending and Non-Judicial Foreclosure in West Virginia** 3

B. **Section 38-1-4a of the West Virginia Code Does Not Govern All Actions to Contest Non-Judicial Foreclosures** 5

1. **Section 38-1-4a only governs challenges to foreclosures based on a procedural defect in the process** 5

2. **West Virginia courts have long recognized the right to challenge and set aside foreclosure sales on grounds independent of section 38-1-4a of the West Virginia Code** 7

3. **The remedy sought by Mr. McCormick in his Counterclaim—to set aside a wrongful foreclosure—is a remedy contemplated by the WVCCPA** 7

C. **West Virginia Law Allows Borrowers to Assert Counterclaims Challenging the Validity of the Underlying Mortgage Loan Agreement in Response to Unlawful Detainer Actions Brought By lenders, Servicers, or Holders** 9

1. **An unlawful detainer action is subject to affirmative defenses and/or counterclaims arising out of the loan origination** 10

2. **Mr. McCormick raised permissive affirmative defenses and counterclaims to the unlawful detainer action** 14

3. **It is fundamentally unfair for lenders to have a longer statute of limitations to pursue unlawful detainers against borrowers than borrrowers have to defend against the same** 16

CONCLUSION 17

TABLE OF AUTHORITIES

Ashland Oil, Inc. v. Donahue, 159 W. Va. 463, 223 S.E.2d 443 (1976) 14

Atkinson v. Washington & Jefferson College, 54 W. Va. 32, 46 S.E. 253 (1903) 7

Barr v. NCB Mgmt. Servs., Inc., 227 W. Va. 507, 711 S.E.2d 577 (2011) 12, 14

Bias v. Bias, 109 W. Va. 621, 155 S.E. 898 (1930) 15

Billingsly v. Stutler, 52 W. Va. 92, 43 S.E. 96 (1903) 9, 17

Chrysler Credit Corp. v. Copley, 189 W. Va. 90, 428 S.E.2d 313 (1993) 13, 17

Cline v. Bank of America, N.A., 823 F. Supp. 2d 387 (S.D.W. Va. 2011) 12

Corrothers v. Harris, 23 W. Va. 177 (1883) 7

Dishman v. Jarrell, 165 W. Va. 709, 271 S.E.2d 348 (1980) 14, 15

Dunn v. Rockwell, 225 W. Va. 43, 689 S.E.2d 255 (2009) 2, 6

Felsenheld v. Block Bros. Tobacco Co., 119 W. Va. 167, 192 S.E. 545 (1943) 6

Gideon v. Putnam Development Co., 121 W. Va. 46, 15 S.E.2d 399 (1939) 15

Hartman v. Evans, 38 W. Va. 669, 18 S.E. 810 (1893) 7

Highland v. Davis, 119 W. Va. 501, 195 S.E. 604 (1938) 15

Hodges v. Sasil Corp., 189 N.J. 210, 915 A.2d 1 (2007) 10

In re Machnic, 271 B.R. 789 (S.D.W. Va. 2008) 12

Jaroush v. Cook, 170 W. Va. 714, 296 S.E.2d 544 (1982) 14

Katz v. Aurora Loan Servicing, LLC, 11-CV-1806-IEG (POR), 2010 WL 78399
(S.D. Cal. Jan. 10, 2012) 10

Lucas v. Fairbanks Capital Corp., 217 W. Va. 479, 618 S.E.2d 488 (2005) 6, 7

Machir v. Sehon, 14 W. Va. 777 (1879) 7

Martin v. Cochran, 94 W. Va. 432, 119 S.E. 174 (1923) 9, 17

Moore v. Hamilton, 151 W. Va. 784, 155 S.E.2d 877 (1967) 7

Rodgers v. Rodgers, 184 W. Va. 82, 399 S.E.2d 664 6

Romea v. Heiberger & Assocs., 163 F.3d 111 (2d Cir. 1998) 10

Shapiro & Meinhold v. Zartman, 823 P.2d 120 (Colo. 1992) 10

State v. Abdella, 139 W. Va. 428, 82 S.E.2d 913 (1954) 6

State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770,
461 S.E.2d 516 (1995) 14

Teller v. McCoy, 162 W. Va. 367, 253 S.E.2d 114 (1978) 15

Thomas v. Firestone Tire and Rubber Co., 164 W. Va. 763, 266 S.E.2d 905 (1980) 12

Vangilder v. Hoffman, 22 W. Va. 1 (1883) 16

Villa v. Rodriquez, 79 U.S. 323 (1870) 16

Villers v. Wilson, 172 W. Va. 111, 304 S.E.2d 16 (1983) 7, 15, 16

Wiles v. Walker, 88 W. Va. 147, 106 S.E.2d 423 (1921) 13

Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373 (4th Cir. 2006) 10, 11, 12, 13

W. Va. Code § 38-1-4a . . . . . *in passim*

W. Va. Code § 46A-2-121(1)(a) 8

W. Va. Code § 46A-2-122(a) 11

W. Va. Code § 46A-2-122(c) 11

W. Va. Code § 46A-2-122(d) 12, 16

W. Va. Code § 46A-5-102 . . . . . *in passim*

W. Va. Code § 55-2-6 . . . . . 2, 6

W. Va. Code § 55-2-12 . . . . . 2, 6

W. Va. Code § 55-2-15 . . . . . 2, 6

W. Va. Code § 55-3-4 . . . . . 8, 17

SUMMARY OF ARGUMENT

The *Amicus Curiae* brief filed by the West Virginia Bankers Association, Inc., and the Community Banks of West Virginia, Inc., raises two arguments that were not raised below. First, *Amici* assert that all actions seeking to set aside a completed foreclosure in West Virginia may only be brought pursuant to section 38-1-4a of the West Virginia Code. (See *Amici* Br. 10.) Second, *Amici* argue that borrowers are precluded from asserting any counterclaims (whither pursuant to the West Virginia Consumer and Credit Protection Act ("WVCCPA")) to challenge the validity of the underlying mortgage loan agreement as a defense to an unlawful detainer action. (See id. 12.)

Amici argue that West Virginia borrowers' should lose their equitable and statutory rights to challenge the validity and enforceability of mortgage loan agreements once their homes have been sold at non-judicial foreclosure. *Amici* seek a patently unjust system in West Virginia where power of sale foreclosures—already occurring without any judicial involvement or oversight whatsoever—may never be challenged through unlawful detainers on the grounds that the underlying agreements were unenforceable and the foreclosures predicated thereon were thus improper, which for many West Virginians may be the last and only hope to save their homes.

First, as is clear from the plain language of the statute, section 38-1-4a of the West Virginia Code only governs and limits actions seeking to set aside foreclosures based upon procedural defects in the foreclosure process, such as improper notice. Section 38-1-4a has never applied to actions to set aside foreclosures based on other grounds. Moreover, West Virginia law has long recognized the right of West Virginia borrowers to assert actions to set aside foreclosures based on a variety of grounds independent of the grounds governed and limited by section 38-1-4a.

Further, *Amici* seek to trump every statute of limitations in the entire West Virginia Code by insisting that section 38-1-4a is the only applicable limitation to challenges to foreclosure. For

instance, taking *Amici*'s argument, borrowers could not bring claims to challenge the foreclosure sale for fraud (two year statute of limitations pursuant to section 55-2-12 of the West Virginia Code); or breach of contract (ten year statute of limitations pursuant to section 55-2-6); or could not apply the statute of limitations for minors (begins tolling at age 18 pursuant to section 55-2-15); and could not even seek equitable relief under the long-standing principles of laches (see, e.g., Syl. Pt. 2, Dunn v. Rockwell, 225 W. Va. 43, 689 S.E.2d 255 (2009)). Thus, the proposition that section 38-1-4a of the West Virginia Code applies to all challenges to set aside completed foreclosures is not supported by the plain language of the statute or West Virginia law.

Second, West Virginia borrowers clearly have the right to assert defenses when haled into court for the first time, especially where, as here, the original lender is pursuing the unlawful detainer in furtherance of its mortgage loan debt recovery. Moreover, where, as here, a lender's unlawful detainer action is predicated upon an improper foreclosure based on an allegedly unconscionable and unenforceable contract, a West Virginia borrower's right and ability to raise defenses and counterclaims must be preserved in the interest of justice and fundamental fairness. If borrowers are precluded from raising these defenses and counterclaims to lenders' unlawful detainer actions without the assistance of the waiver of limitations provision of section 46A-5-102 of the WVCCPA, then lenders would be free to assert indomitable actions by merely waiting one year after a foreclosure to initiate the actions and borrowers would lose all rights to access to the courts to resolve their claims. This would be, without a doubt, fundamentally unfair and offensive to principles of equity and to the remedial purpose of the WVCCPA, which this Court has always interpreted broadly to preserve the right and ability of West Virginia consumers to fight back against financial exploitation and abuse.

ARGUMENT

A. The Realities of Mortgage Lending and Non-Judicial Foreclosure in West Virginia.

Amici present an overview of the mortgage lending and subsequent foreclosure process in West Virginia from the banking industry's perspective. The overview ignores the reality many West Virginia homeowners face when both entering into loans and when being threatened with the loss of their most valuable asset: their homes. West Virginia is a special state that makes the dream of homeownership a reality for many poor and working class residents due to the historically reasonable cost of living and fair market values of West Virginia real estate. This also means that many West Virginia homeowners are undereducated and can be easy marks for unscrupulous lenders. Indeed, many low-income and/or undereducated borrowers, with no previous mortgage loan experience, are induced into unwise mortgage loans that contain terms that are unfair to them, but that are advantageous to mortgage brokers, lenders, servicers, and holders. West Virginia is certainly not immune to out-of-state mortgage lending schemes seeking to dispossess homeowners of their property through non-performing mortgage loans.

If a borrower defaults, he is often subject to mortgage loan servicing abuse, including demands for excessive late charges and illegal servicing fees, and harassing and unlawful debt collection practices. In many cases, borrowers in default are told by mortgage loan servicers that they qualify for a repayment plan or loan modification. These borrowers often wait well over a year and, in some cases, up to two years at the servicer's direction, only to be told they do not qualify for any assistance and foreclosure will occur or has already occurred. During this very long wait, borrowers are further instructed to make no payments toward their mortgage loans. However, while borrowers are being considered by alternative payment plans by the servicers' loss mitigation department, the same servicers' debt collection department is pursuing foreclosure. Sometimes

payment plans are offered before foreclosure halting the sale. In other cases, payment plans may be offered after the foreclosure has occurred. And, in too many cases to count, after borrowers have been instructed to wait and not make any payments toward their loan for up to two years, servicers fail to offer any assistance whatsoever, leaving borrowers in the lurch with no ability to bring their loans current and avoid foreclosure. During this time, based on servicers' representations that help is forthcoming, borrowers typically do not take any other measures to avoid foreclosure, reasonably so.

In the event of foreclosure in West Virginia, there is no judicial involvement or oversight. Instead, under West Virginia's foreclosure procedure, a foreclosure trustee simply announces the sale and then sells the home in a public auction. Thus, there is no legal proceeding to which borrowers may raise defense or challenges to a foreclosure proceeding. Creditors seeking foreclosure as a means to possess the collateral to satisfy any outstanding indebtedness need not demonstrate that they have standing, that the debt is valid, that the borrower is in default, that they have complied with the contract or other procedures, or even that the underlying agreement is enforceable and not the product of fraud or other illegal conduct. It is no secret that non-judicial foreclosure statutes operate as a boon to mortgage lenders. Under this procedure, borrowers may never have the ability to challenge a foreclosure predicated on an illegal contract if they cannot raise defenses and counterclaims to post-foreclosure actions by lenders.

As *Amici* point out, properties are generally not purchased by third parties at foreclosure sales. Rather, the lender, servicer, or loan holder purchases the property at foreclosure and continues its pursuit of any debts owed by the homeowner through eviction, resale, and deficiency. This outcome at foreclosure sales is so routine as to be considered a business practice. In other words, lenders, servicers, and loan holders are, in fact, in the business of purchasing homes at foreclosure

in furtherance of debt recovery.

Even after the sale, lenders, servicers, or holders often continue to reassure borrowers that a payment plan or other option to reinstate the loan may be possible. Many borrowers do not realize that the lender actually intends to take possession of the property until after the lender serves them with an unlawful detainer action. It is only at this point that the borrower—especially an undereducated, unsophisticated borrower—may seek legal assistance. And it is only at this point that the borrower may find it necessary to assert his legal claims.

In light of the realities faced by thousands of West Virginia homeowners, this Court's tradition in keeping with West Virginia law and the remedial purpose of the WVCCPA must hold steady. This Court must preserve the unquestionable right and ability of West Virginia homeowners to challenge foreclosures, the underlying mortgage loan agreements, and the lenders' conduct therein.

B. Section 38-1-4a of the West Virginia Code Does Not Govern All Actions to Contest Non-Judicial Foreclosures.

Amici assert that any and all actions to set aside a completed foreclosure must brought pursuant to section 38-1-4a of the West Virginia Code. This proposition is belied by both the plain language of the statute and long-standing West Virginia law, which recognizes challenges to completed foreclosures on grounds independent from section 38-1-4a of the West Virginia Code.

1. Section 38-1-4a only governs challenges to foreclosures based on a procedural defect in the process.

Section 38-1-4a governs only actions seeking to set aside foreclosures based on any procedural defects in the foreclosure process. This is clear from the plain language of the statute:

> [No] 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 the sale of property under a trust deed shall be filed or commenced more than one year from the date of sale.

W. Va. Code § 38-1-4a (emphasis added).

Amici ask this Court to read restrictions and limitations on the rights of West Virginia borrowers into the statute that are clearly not enumerated therein and to ignore the wide variety of applicable statutes of limitations in the West Virginia Code. However, this Court has steadfastly declined invitations to incorporate restrictions into statutory provisions where they are not plainly stated or intended. "In the absence of such a requirement being imposed by the legislature, we may neither create nor enforce one. '[C]ourts cannot read into a statute that which is not within the intent of the Legislature, manifest from the statute itself.'" Lucas v. Fairbanks Capital Corp., 217 W. Va. 479, 489, 618 S.E.2d 488, 498 (2005) (quoting State v. Abdella, 139 W. Va. 428, 448, 82 S.E.2d 913, 924 (1954)).

The assertion of *Amici*, that section 38-1-4a governs and limits all actions challenging foreclosures is further contradicted by the various applicable statutes of limitations in the West Virginia Code. For example, a borrower seeking to challenge a foreclosure based on the fraudulent conduct of the lender or servicer has two years within which to bring an action and is not limited by section 38-1-4a. See W. Va. Code § 55-2-12. Other applicable statutes of limitations apply permitting claims after one year, including section 55-2-6, which permits contract claims within ten years; and section 55-2-15, which provides that applicable statutes of limitation begin to toll once an affected minor reaches the age of eighteen. See W. Va. Code §§ 55-2-6 and -2-15. Finally, under West Virginia law, no statute of limitations applies to equitable claims for relief. See Syl. Pt. 2, Dunn, 225 W. Va. 43, 689 S.E.2d 255; see also Syl. Pt. 3, Rodgers v. Rodgers, 184 W. Va. 82, 399 S.E.2d 664 (1990) ("Statutes of limitations are not applicable in equity to subjects of exclusively equitable cognizance.") (quoting Syl. Pt. 3, Felsenheld v. Bloch Bros. Tobacco Co., 119 W. Va. 167, 192 S.E. 545 (1937)). Simply, the plain language of section 38-1-4a of the West Virginia Code and

the application of myriad other statutes of limitation to foreclosure challenges demonstrate clearly that Mr. McCormick's claim is neither governed nor limited by section 38-1-4a. Because he does not assert procedural defects in the foreclosure and raises, instead, defenses and counterclaims of a more substantive nature, the statute has no application here.

2. West Virginia courts have long recognized the right to challenge and set aside foreclosure sales on grounds independent of section 38-1-4a of the West Virginia Code.

Amici's assertion that all actions seeking to set aside a foreclosure are governed by section 38-1-4a of the West Virginia Code is further undermined by this Court's long history of recognizing causes of action seeking to set aside foreclosures on a variety of grounds other than procedural defects in the foreclosure process. For example, in Villers v. Wilson, this Court acknowledged that a borrower may seek to enjoin or set aside a foreclosure sale by asserting a counterclaim challenging the underlying loan transaction. See 172 W. Va. 111, 114, 304 S.E.2d 16, 18 (1983). This Court further acknowledged that a creditor's conduct in performance of the underlying agreement may affect title to the property. Id. In Moore v. Hamilton, this Court acknowledged that actions to set aside a foreclosure may be asserted where the home was sold for a grossly inadequate price. See 151 W. Va. 784, 792, 155 S.E.2d 877, 882 (1967); see also Corrothers v. Harris, 23 W. Va. 177, 182 (1883); Syl. Pt. 12, Atkinson v. Washington & Jefferson College, 54 W. Va. 32, 46 S.E. 253 (1903).

This Court has been reliably sensitive to and protective of the "unquestionable right" of a borrower to challenge the propriety of a foreclosure sale whether on strictly procedural grounds pursuant to section 38-1-4a or on a variety of substantive grounds pursuant to common law and other statutory provisions. See Lucas, 217 W. Va. at 488 (quoting Hartman v. Evans, 38 W. Va. 669, 679, 18 S.E. 810, 814 (1893)); see also Machir v.Sehon, 14 W. Va. 777, 783 (1879).

3. The remedy sought by Mr. McCormick in his Counterclaim—to set aside a wrongful foreclosure—is a remedy contemplated by the WVCCPA.

Finally, contrary to the assertion of *Amici*, the remedy Mr. McCormick seeks is clearly contemplated in the statutory provisions under which he brings his claims. Section 46A-2-121(1)(a) of the WVCCPA provides that "if a court as a matter of law finds [that] [t]he agreement or transaction to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct, the court may refuse to enforce the agreement, ..." W. Va. Code § 46A-2-121(1)(a). Obviously, if the court finds the loan was unconscionable and, thus, unenforceable, any foreclosure predicated thereupon would necessarily be void as improper, and Plaintiff/Petitioner would not have acquired title upon which it seeks possession in the pending unlawful detainer action.

Amici assert that if section 38-1-4a—plain language notwithstanding—does not operate as a time limit on all actions to set aside foreclosure, "it would be possible to void a foreclosure sale well into the subsequent owner's possession." (See *Amici* Br. 11.) This alarmist, red herring argument ignores the realities of the non-judicial foreclosure process (discussed *supra* Part A.), as well as the application of section 46A-5-102 of the WVCCPA.

The limitations exception in section 46A-5-102 of the West Virginia Code applies only to defenses, requests for setoff, or counterclaims. See W. Va. Code § 46A-5-102. Contrary to *Amici*'s assertion, borrowers would not be able to raise challenges to foreclosure actions eternally. Instead, these challenges may only be raised by borrowers in response to an action brought against them to which they could assert a viable counterclaim under the WVCCPA. A party asserting unlawful detainer—in this case, the original lender—must bring the action within three years of the commencement of the defendant's so-called unlawful detention. See W. Va. Code § 55-3-4; see also Syl. Pt. 3, Billingsly v. Stutler, 52 W. Va. 92, 43 S.E. 96 (1903) (unlawful detainer cannot be

maintained where plaintiff does not show that his right of action accrued within three years from commencement of the action); Martin v. Cochran, 94 W. Va. 432, 119 S.E. 174 (1923) ("The commencing of the action within three years from the time of the unlawful entry or detainer is an essential element of the right to sue, ..."). Notably, Plaintiff/Petitioner failed to bring the present unlawful detainer within that period of limitations. The present unlawful detainer action was filed on June 2, 2011, and the foreclosure of the subject property occurred well over three years earlier on December 18, 2007. (See Resp.'s Br. 3.) In addition, the homeowner could only avail himself to the limitations exception in section 46A-5-102 if he had a claim against the party initiating the unlawful detainer. This is because the WVCCPA does not run against a bona fide third party purchaser.

Accordingly, a borrower seeking to challenge the enforceability of an underlying mortgage loan and the propriety of a subsequent foreclosure predicated thereon as a WVCCPA defense or counterclaim to an unlawful detainer action would only have, at most, as long as the lender has to commence an unlawful detainer: not more than three years after any foreclosure (unless some other cause of action's statute of limitations applied). (See discussion *infra* Part C.3.) Thus, borrowers asserting section 46A-5-102 of the WVCCPA may not use the statute of limitations in an affirmative action in perpetuity as *Amici* warn. See W. Va. Code § 46A-5-102 ("may be asserted as a defense, setoff or counterclaim . . . .").

C. West Virginia Law Allows Borrowers to Assert Counterclaims Challenging the Validity of the Underlying Mortgage Loan Agreement in Response to Unlawful Detainer Actions Brought By Lenders, Servicers, or Holders.

Amici argue with no support that West Virginia borrowers should not be permitted to bring WVCCPA counterclaims to unlawful detainer actions. *Amici* assert, principally, that allowing West Virginia borrowers to assert WVCCPA counterclaims in response to unlawful detainer actions would

"challeng[e] otherwise marketable title decades into the future of a subsequent purchaser's ownership." (See *Amici* Br. 16.) *Amici* also argue that unlawful detainers are not "'action[s] against consumers' as contemplated by the WVCCPA." (See id. 17.) For the reasons that follow, the assertions and arguments of *Amici* are without support, contravene the remedial purpose of the WVCCPA, and offend principles of equity and fundamental fairness.

1. An unlawful detainer action is subject to affirmative defenses and/or counterclaims arising out of the loan origination.

Amici principally argue that an unlawful detainer action cannot be an action against a consumer covered by the WCCPA, because it is an *in rem* action seeking only to dispossess a borrower of his home. (See id.) In contrast to *Amici*'s assertion, these two concepts are not mutually exclusive. Instead, while unlawful detainers are undisputedly *in rem* actions, they are often also consumer debt collection actions, including when (as here) they are used to collect a debt from a consumer by gaining possession of a property to satisfy the consumer's debt. See, e.g., Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373, 376 (4th Cir. 2006) (holding that *in rem* foreclosure proceedings qualify as debt collection under the Fair Debt Collection Practices Act); Romea v. Heiberger & Assocs., 163 F.3d 111, 116 (2d Cir. 1998) (holding that a post-foreclosure eviction notice qualifies as debt collection activity); Hodges v. Sasil Corp., 189 N.J. 210, 228, 915 A.2d 1, 11 (2007) (holding that an unlawful detainer action qualifies as debt collection); Shapiro & Meinhold v. Zartman, 823 P.2d 120, 124 (Colo. 1992) ("[A] foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt."); Katz v. Aurora Loan Services, LLC, 11-CV-1806-IEG (POR), 2012 WL 78399, at *3-*4 (S.D. Cal. Jan. 10, 2012) (holding that a non-judicial foreclosure and an unlawful detainer qualify as debt collection).

This is precisely the case here. Plaintiff/Petitioner is the original lender of the underlying

mortgage loan and currently possesses the right to collect the underlying mortgage loan debt, which as of yet has not been satisfied, discharged, cancelled, or otherwise. The preceding foreclosure at which the subject property was "purchased" by the original lender did not operate to satisfy the underlying mortgage debt. See Wilson, 443 F.3d at 376 ("'debt' remained a 'debt' even after foreclosure proceedings commenced.") Instead, the debt will not be satisfied until the eviction is complete and Plaintiff/Petitioner collects by selling the home, and thereafter, seeking any deficiency. Thus, in this instance (and indeed most), an action for possession in pursuit of debt recovery is an action to which a consumer must have the right to assert WVCCPA counterclaims and to rely on the remedial "assertion of rights" provision in section 46A-5-102 of the WVCCPA.

Section 46A-5-102 applies in "an action against a consumer . . . ." W. Va. Code § 46A-5-102. The only qualification on the application of section 46A-5-102 is that the action be against a consumer. That qualification is met here. "Consumer" is defined by the WVCCPA as "any natural person obligated or allegedly obligated to pay any debt." W. Va. Code § 46A-2-122(a). At the time of the unlawful detainer action brought by Plaintiff/Petitioner original lender, Mr. McCormick was still allegedly obligated to the underlying mortgage loan debt.

The specific facts and posture of this case further demonstrate that Mr. McCormick has the right to assert WVCCPA counterclaims and rely on the waiver of limitations in section 46A-5-102. For example, Plaintiff/Petitioner's action for possession of the subject property can be easily characterized as a means to collect on Mr. McCormick's alleged mortgage loan debt. "Debt collection" is defined by the WVCCPA as "any action, conduct or practice . . . in the collection of claims owed or due or allegedly owed or due by a consumer." W. Va. Code § 46A-2-122(c); see also, Syl. Pt. 2, Thomas v. Firestone Tire and Rubber Co., 164 W. Va. 763, 266 S.E.2d 905 (1980) ("The word 'any,' when used in a statute, should be construed to mean any.") Plaintiff/Petitioner

is allegedly owed any remaining balance of the mortgage loan debt at issue and possession of the property would allow Plaintiff/Petitioner to recover the outstanding claim through both a sale to a third party purchase and thereafter a deficiency action, if necessary.

In addition, Plaintiff/Petitioner seeks to recover the debt it claims is owed by Mr. McCormick through this action and, thus, meets the definition of "debt collector" under the WVCCPA. See W. Va. Code § 46A-2-122(d) ("debt collector" is "any person or organization engaging directly or indirectly in debt collection.") (emphasis added); see also Barr v. NCB Mgmt. Servs., Inc., 227 W. Va. 507, 509, 711 S.E.2d 577, 579 (2011); Cline v. Bank of America, N.A., 823 F. Supp. 2d 387, 398 (S.D.W. Va. 2011); In re Machnic, 271 B.R. 789, 792 (S.D.W. Va. 2008) (holding credit card issuer was acting as a "debt collection" by filing adversary proceeding to except credit card debt from bankruptcy discharge); Wilson, 443 F.3d at 376 (concluding that foreclosure attorneys/substitute trustees' actions surrounding a foreclosure proceeding were attempts to collect a debt under the FDCPA). Thus, this Court may easily conclude that this is not just any action against a consumer, but that it is, indeed, a debt collection action by a debt collector.

Contrary to this settled law, *Amici* assert that West Virginia's non-judicial foreclosure process eradicates any potential liability under the WVCCPA, because, as *Amici* argue, activities to secure possession of the collateral do not qualify as debt collection. This Court and the United States Fourth Circuit Court of Appeals have rejected this argument for numerous reasons, not he least of which is that it would lead to absurd results. Under *Amici*'s reasoning, a borrower could protect himself from illegal activity under the WVCCPA in relation to action taken on an unsecured debt, but he could not do so to protect his most valuable asset—his home. As the Fourth Circuit has recognized:

> Defendants' argument, if accepted, would created an enormous loophole in the Act immunizing any debt from coverage if that debt happened to be secured by a real property interest and foreclosure proceedings were used to collect the debt. We see no reason to make an exception to the Act when the debt collector uses foreclosure instead of other methods. *See Piper*, 396 F.3d at 236 ("We agree with the District Court that if a collector were able to avoid liability under the [Act] simply by choosing to proceed in rem rather than in personam, it would undermine the purpose of the [Act].") (internal quotation marks ommitted).

Wilson, 443 F.3d at 376.

Of course, unlawful detainers in other contexts may be "solely possessory in nature" with no debt collection-related purpose. See Wiles v. Walker, 88 W. Va. 147, 106 S.E.2d 423 (1921) (possession action was based on prior conveyances and possible adverse possession, not on the enforcement of an underlying secured debt). Assuming, *arguendo*, that the original lender had not purchased the property at foreclosure and instead the property was sold to a third party, Mr. McCormick would not have the right to assert WVCCPA counterclaims in defense of an unlawful detainer action brought by that third party because that third party, presumably, was not involved or exposed to any liability for the conduct in the underlying mortgage loan transaction and was not seeking possession as a means to collect on a debt.[1] In such a scenario, a borrower might only have a right to assert WVCCPA claims pursuant to section 46A-5-102 without regard to any statute of limitations in response to a separate deficiency action brought by the lender or holder. See, e.g., Chrysler Credit Corp. v. Copley, 189 W. Va. 90, 428 S.E.2d 313 (1993). However, the borrower would not have the ability to assert WVCCPA counterclaims against a bona fide third party purchaser if that purchaser was to bring a timely unlawful detainer action.

In the present action, there has been no third party purchaser and the lender is still seeking

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[1] This is not to say that a borrower is not precluded from asserting timely affirmative claims against a lender in a separate action, or even through a third party complaint in response to the unlawful detainer. However, this scenario is not at issue in this case.

to recover the mortgage loan indebtedness through the eviction action. As a result, Mr. McCormick's counterclaims to the unlawful detainer are appropriate and timely. This application of the WVCCPA is in keeping with the remedial purpose of the WVCCPA. See, e.g., Barr, 227 W. Va. at 513, 711 S.E.2d at 583 ("'Where an act is clearly remedial in nature, we must construe the statute liberally so as to furnish and accomplish all the purposes intended'") (quoting State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 777, 461 S.E.2d 516, 523 (1995)).

The parade of horribles *Amici* warn us about—"the serious potential for challenging otherwise marketable title decades into the future of a subsequent purchaser's ownership"—will not come about by allowing borrowers to challenge the enforceability of the underlying mortgage agreement in defense to a timely unlawful detainer action brought by the original lender or holder of the loan in furtherance of its debt recovery efforts.

2. Mr. McCormick raised permissive affirmative defenses and counterclaims to the unlawful detainer action.

Amici's assertion that Mr. McCormick is precluded from raising defenses such as unconscionability to an unlawful detainer action is further undermined by long standing West Virignia law to the contrary. Indeed, West Virginia has long recognized a wide variety of defenses to unlawful detainer actions, including the defense of unconscionability of the underlying agreement. See, e.g., Ashland Oil, Inc. v. Donahue, 159 W. Va. 463, 476, 223 S.E.2d 443, 441 (1976) (concluding that defense of unconscionability of underlying agreement was a sufficient defense to an unlawful detainer action); see also Jaroush v. Cook, 170 W. Va. 714, 715-16, 296 S.E.2d 544, 545-56 (1982) (concluding that defendant in possessory action has a right to challenge plaintiff's right to possession where there are claims of illegality in the underlying transaction and that if defendant proves illegality, he may defeat an unlawful detainer action); Dishman v. Jarrell, 165 W.

Va. 709, 712, 271 S.E.2d 348, 350 (1980) (acknowledging West Virginia has long recognized defenses to unlawful detainers); Teller v. McCoy, 162 W. Va. 367, 387-88, 253 S.E.2d 114, 126-27 (1978) (allowing breach of implied warranty as a defense to unlawful detainer reasoning that landlord's unlawful conduct is directly related to issue of possession).

Here, divorcing the underlying contract from the unlawful detainer would improperly eliminate the defense of unclean hands. Mr. McCormick asserts, *inter alia*, the affirmative defense of unclean hands (see Answer and Countercl., Third Defense, App. 39), resulting from Plaintiff/Petitioner's unlawful conduct in originating the underlying mortgage loan, thereby leading to improper foreclosure and unlawful detainer. See Syl. Pt. 1, Gideon v. Putnam Development Co., 121 W. Va. 46, 1 S.E.2d 399 (1939) ("A Court of equity will not grant affirmative relief to a [party] guilty of inequitable conduct directly concerning the subject in controversy.").

Mr. McCormick's unclean hands defense is properly raised here and must be heard. The unlawful detainer is predicated on an improper foreclosure arising out of an illegal loan agreement. See Syl. Pt. 5, Highland v. Davis, 119 W. Va. 501, 195 S.E. 604 (1938) ("'In equity the bar of the unclean hands rule is raised only because of conduct connected with the particular transaction from which relief is sought.'") (citing Bias v. Bias, 109 W. Va. 621, 155 S.E. 898 (1930)); but cf. Villers, 172 W. Va. at 115, 304 S.E.2d at 20 ("the sale of property by a trustee under a trust deed will not be enjoined where the sole ground relied upon for the issuance of the injunction is that the grantor of the trust deed has an unliquidated claim against the creditor whose debt is secured by that trust deed for damages **arising out of a transaction unrelated to the trust deed agreement**.") (emphasis added). If the foreclosure preceding the unlawful detainer action was improper because it arose out of an illegal loan contract, then Plaintiff/Petitioner did not acquire title to the subject property justifying possession and, thus, Mr. McCormick's defenses and counterclaims are justly and properly

asserted.

Well-settled West Virginia law supports Mr. McCormick's right to have his defenses and claims regarding the Plaintiff/Petitioner's unlawful conduct in originating the subject mortgage loan heard on their merits. See Vangilder v. Hoffman, 22 W. Va. 1, 34 (1883) (quoting Villa v. Rodriguez, 79 U.S. 323, 339 (1870) ("If there is vice in the transaction, the law while it will secure to the mortgagee his debt with interest, will compel him to give back that which he has taken with unclean hands. Public policy, sound morals and the protection due to those whose property is thus involved require, that such should be the law.")). *Amici*'s arguments to the contrary find no support in West Virginia law and should be rejected.

3. It is fundamentally unfair for lenders to have a longer statute of limitations to pursue unlawful detainers against borrowers than borrrowers have to defend against the same.

Amici insist that West Virginia borrowers should not be permitted to assert counterclaims against the lenders or holders of their mortgage loans in response to unlawful detainers because, as *Amici* assert, the application of section 46A-5-102 of the WVCCPA would interfere with swift and easy title transfers and could subject bona fide purchasers to challenges on the title decades after purchase. This simply does not follow.

First, section 46A-5-102 of the WVCCPA, as discussed above, could only apply to waive limitations for defenses or counterclaims to in a case like the present one where the original lender, servicer, or holder is the plaintiff and seeks possession to further recover the existing mortgage loan debt. WVCCPA provisions cannot be asserted against individuals or organizations who are not acting directly or indirectly to collect a debt. See W. Va. Code § 46A-2-122(d). Thus, a bona fide third party purchaser pursuing an unlawful detainer would not be subject to any WVCCPA defenses or counterclaims, including the waiver of limitations provision in section 46A-5-102, because that

third party purchaser would not be acting in furtherance of debt recovery.

Second, section 46A-5-102 of the WVCCPA does not allow consumers to assert WVCCPA claims indefinitely. Rather, this section works merely to level the playing field for borrowers facing actions brought by lenders and loan holders. A lender has three years within which to bring an unlawful detainer action against a borrower. See W. Va. Code § 55-3-4; see also Syl. Pt. 3, Billingsly, 52 W. Va. 92, 43 S.E.96; Martin, 94 W. Va. 432, 119 S.E. 174. Thus, limiting a borrower's right to bring WVCCPA defenses and/or counterclaims to a one year statute of limitations in response to a lender's action is fundamentally unfair. Section 46A-5-102 of the WVCCPA can only extend the statute of limitations to as long as a lender has to bring an action, not indefinitely as *Amici* suggest. This Court in Chrysler Credit Corp. appreciated the effect this section has of leveling the playing field for West Virginia consumers in actions brought by lenders, explaining "this waiver of the statute of limitations . . . is one of the unique features of the CCPA." 189 W. Va. at 93, 428 S.E.2d at 316.

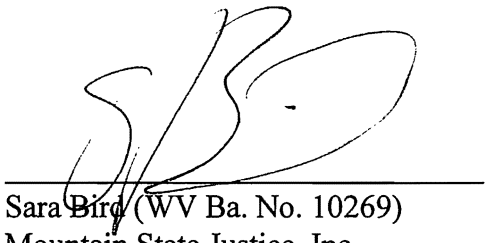
If this Court were to conclude that section 46A-5-102 of the WVCCPA did not apply in this context, it would allow lenders to simply wait more than one year after the foreclosure to initiate indomitable unlawful detainer actions against borrowers. A conclusion of this nature would work to deprive hundreds of West Virginia borrowers of their equitable and statutory rights and permit wide-spread abuse on the part of mortgage lenders and loan holders.

CONCLUSION

For all the reasons articulated above, this Court must preserve the right of West Virginia borrowers to assert legal and equitable defenses and counterclaims to unlawful detainers pursued by lenders where the propriety of the foreclosure and underlying mortgage loan agreement are called into question. If the Court were to accept the unsupported arguments of Plaintiff/Petitioner and

Amici, it would foreclose a long-relied upon avenue of relief for hundreds of West Virginia consumers. This outcome would turn the remedial purpose of the WVCCPA on its head, shift the balance of power in favor of banks even more, and create an environment of abuse by mortgage lenders on distressed West Virginia homeowners.

Respectfully Submitted,
Respondent/Defendant,
James E. McCormick,
By Counsel.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TRIBECA LENDING CORPORATION,

Plaintiff/Petitioner,

v.

APPEAL NO. 12-0150
(On appeal from the Circuit Court of Kanawha County Civil Action No. 11-C-2010 Hon. Tod J. Kaufman)

JAMES E. MCCORMICK,

Defendant/Respondent..

CERTIFICATION OF SERVICE

I, Bren J. Pomponio, counsel for Respondent, do hereby certify that I have served a true and exact copy of the forgoing **Brief of Respondent James E. McCormick On New Issues Raised in *Amicus Curiae* Brief** upon counsel of record as listed below by U.S. Mail, postage prepaid, addressed as follows:

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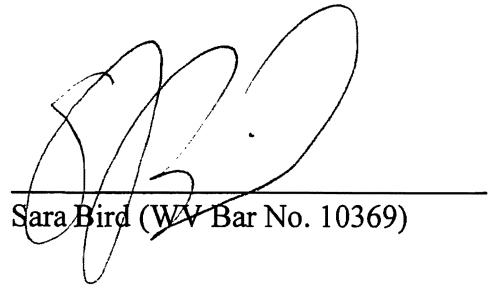
This the 17th day of July, 2012.



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