



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**

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## ASSIGNMENTS OF ERROR

Pursuant to Rule 17(a)(5) of the West Virginia Rules of Appellate Procedure, Mr. McCormick sets forth the following assignments of error arising from the circuit court's answers to the certified questions:

- A. The circuit court erred by ignoring the applicability of section 46A-5-102 of the West Virginia Consumer Credit and Protection Act (WVCCPA) in answering the certified questions.**
- B. The circuit court erred in answering the first certified question in the affirmative by incorrectly applying section 38-1-4a of the West Virginia Code to Mr. McCormick's Counterclaim.**
- C. The circuit court erred in answering the second certified question by incorrectly applying section 46A-5-101(1) of the WVCCPA to Mr. McCormick's Counterclaim.**

## STATEMENT OF THE CASE

Mr. McCormick offers the following statement of the case as necessary to correct inaccuracies and omissions in the statement of the case provided by Petitioner. See W. Va. R. App. Proc. 10(d).

Mr. McCormick resides in St. Albans with his young son in the home that is the subject of the underlying action. (See Answer and Countercl., App. 41 at ¶ 2(c).) Mr. McCormick suffers from a traumatic brain injury as a result being injured while serving in active duty in the United States military. (See Def.'s Resp. to Pl.'s Mot. to Dismiss, App. 59.) Mr. McCormick is an unsophisticated consumer with little understanding of financial matters. (See Answer and Countercl., App. 41 at ¶ 2(b).)

In or around September of 2005, Mr. McCormick was solicited by Plaintiff/Petitioner Tribeca Lending Corporation to refinance his mortgage. (Id. at ¶ 6.) Petitioner represented to Mr. McCormick that he would be getting a fixed rate loan with an interest rate not to exceed eight percent (8%). (Id. at ¶ 7.) Petitioner did not provide Mr. McCormick with any disclosures of the loan's terms prior to or at the closing of the mortgage loan at issue in the underlying case. (Id. at ¶ 9.) Contrary to what was represented prior to closing, Petitioner closed a loan for Mr. McCormick that contained an exploding adjustable rate mortgage with a high initial interest rate. (App. 42 at ¶ 18(a).) The loan also provided for an initial loan balance in excess of the true market value of the property and a high monthly payment that put Mr. McCormick up against his ability to pay. (App. 42 at ¶¶ 15, 17, 18(c); 43 at ¶¶ 22, 23, 29-32.) Petitioner ushered Mr. McCormick through a hurried closing during which Mr. McCormick was not provided with any opportunity to understand the documents or the material terms of the mortgage loan presented, nor was Mr. McCormick provided any opportunity to ask questions regarding the same. (App. 41 at ¶ 10.)

Because the loan provided for a monthly payment amount that exceeded Mr. McCormick's ability to pay, he was not able to maintain payments and ultimately, on or about December 18, 2007, Petitioner foreclosed on Mr. McCormick's home. (See Def.'s Resp. to Pl.'s Mot. to Dismiss, App. 60.)

Thereafter, on or about January 25, 2008, Petitioner filed its first unlawful detainer action against Mr. McCormick in Kanawha County Magistrate Court. (Id.) Mr. McCormick removed the action to the Circuit Court of Kanawha County and on February 7, 2008, filed an Answer and Counterclaim raising affirmative defenses and alleging unconscionable mortgage loan contract, fraud, fraudulent appraisal, and unlawful debt collection. (Id.) This action was styled *Tribeca Lending Corp., and Franklin Credit Management Corporation v. James E. McCormick*, Civil Action No. 08-C-283 (Cir. Ct. of Kan. Co.). (Id.) On or about September 25, 2009, Petitioner's first unlawful detainer action was dismissed by the circuit court pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure. (See Dismissal Order, App. 01.)

Well over three years after filing its first unlawful detainer action, Petitioner filed a second unlawful detainer action against Mr. McCormick in Kanawha County Magistrate Court on or about June 2, 2011. (See App. 02-35.) Mr. McCormick removed Petitioner's second unlawful detainer action to the Circuit Court of Kanawha County (see Not. of Removal, App. 36-37), and filed a counterclaim on July 25, 2011, raising the same affirmative defenses and counterclaims as those originally brought in February of 2008 to the first unlawful detainer action. (See Answer and Countercl., App. 38-47.) Specifically, Mr. McCormick's Counterclaim lodges the following claims: Count I for unconscionable contract in violation of the WVCCPA; Count II for fraud; Count III for fraudulent appraisal; and Count IV for unlawful debt collection in violation of the WVCCPA. (Id.)

On or about August 17, 2011, Petitioner filed a motion to dismiss Mr. McCormick's

counterclaim arguing that because Mr. McCormick reasserted his counterclaim to Petitioner's second unlawful detainer action three and one half years after Petitioner foreclosed on his home, all of his counterclaims are time-barred by the one-year statute of limitations provisions found in sections 38-1-4a and 46A-5-101(1) of the West Virginia Code. (See Pl.'s Mot. to Dismiss, App. 48-49.)

On or about September 20, 2011, Mr. McCormick filed his response to Petitioner's motion to dismiss arguing that neither of these limitations provisions applied to his counterclaims. (See Def.'s Resp. to Pl.'s Mot. to Dismiss, App. 59-68.) Specifically, Mr. McCormick argued that section 38-1-4a of the West Virginia Code has no application whatsoever to his counterclaims because he did not bring an action pursuant to 38-1-4a challenging the "notice, service, or process or other procedural requirement relating to a sale of property under a trust deed . . ." W. Va. Code § 38-1-4a. (App. 63, fn. 2.) Mr. McCormick also argued that no limitations provisions applied whatsoever to his counterclaims for unconscionable contract and unlawful debt collection brought pursuant to the WVCCPA because section 46A-5-102 of the WVCCPA provides that "[r]ights 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." W. Va. Code § 46A-5-102. (App. 64-65.) Finally, Mr. McCormick argued that even if the WVCCPA statute of limitations provision applied to his counterclaim, his claims would not be time barred because the plain language of the provision allows claims pursuant to the WVCCPA to be brought within one year after the due date of the last scheduled payment, which, as applied to the mortgage loan at issue, had not yet occurred at the time of the filing of the counterclaim. (Id.)

On September 27, 2011, the circuit court heard arguments of the parties and directed the parties to submit an agreed order and certification of questions concerning the application of any statute of limitations to Mr. McCormick's counterclaims. However, without seeking approval from

Mr. McCormick pursuant to Rule 24.01(b) of the West Virginia Trial Court Rules, Petitioner submitted a proposed Order and Certification of Questions, which the circuit court entered on or about November 10, 2011. (See Order Nov. 10, 2011, App. 77-83.) Upon receipt of the entered order and pursuant to Rule 24.01(d) of the West Virginia Trial Court Rules, Mr. McCormick notified Petitioner of his objections to the order and conferred with Petitioner's counsel in an attempt to resolve Mr. McCormick's objections. (See Letter to Judge Kaufman and Proposed Order, App. 91-100.) Mr. McCormick's attempt to resolve his objections was unsuccessful and, pursuant to Rule 24.01(d), he submitted a competing proposed Order and Certification of Questions to the circuit court. (Id.)

Notwithstanding Mr. McCormick's objections and competing proposed order, on February 6, 2012, the Circuit court transmitted Petitioner's proposed order and certification of questions to this Court and, thus, Mr. McCormick asserts assignments of error arising from the circuit court's order and answers to the certified questions.

### SUMMARY OF ARGUMENT

The most significant factor in addressing the appropriateness of the circuit court's Order and Certification of Questions is that Mr. McCormick's WVCCPA claims have been asserted in a counterclaim to Petitioner's unlawful detainer action. This is important because section 46A-5-102 of the WVCCPA states plainly that "[r]ights 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.**" W. Va. Code § 46A-5-102 (emphasis added). Both Petitioner and the circuit court wholly ignored the rightful application of this provision to Mr. McCormick's counterclaim.

Rather, Petitioner argues that Mr. McCormick's counterclaim is time barred under either section 38-1-4a of the West Virginia Code or section 46A-5-101(1) of the WVCCPA, both of which

provide for a one-year statute of limitations, but which provide for differing start dates. Section 38-1-4a, which concerns challenges to a foreclosure sale for “failure to follow any notice, service, process or other procedural requirement relating to the sale of a property under a trust deed,” provides that any challenges thereunder must be brought within one year of the date of foreclosure sale. W. Va. Code § 38-1-4a. Because Mr. McCormick makes no challenge to the foreclosure sale pursuant to this provision, its statute of limitations provisions simply does not apply.

Petitioner also argues—still ignoring section 46A-5-102's exception to limitations for counterclaims—that this case rests upon the interpretation of the phrase, “last scheduled payment” in the WVCCPA statute of limitations provision, which permits consumers to bring claims pursuant to the WVCCPA for, among other things, unconscionable conduct and unlawful debt collection up to “one year after the due date of the last scheduled payment.” W. Va. Code § 46A-5-101(1). Principally, Petitioner asserts, despite the statute’s plain language to the contrary, that the WVCCPA statute of limitations began the year Petitioner accelerated Mr. McCormick’s loan in 2007. Because, as Petitioner argues, Mr. McCormick asserted his WVCCPA claims in his most recent counterclaim to Petitioner’s second unlawful detainer action in 2011, his claims were brought beyond the one-year statute of limitations and are, thus, time-barred.

Even if (hypothetically speaking) section 46A-5-102 of the WVCCPA did not apply as an exception for counterclaims to any statute of limitations provision, Mr. McCormick’s WVCCPA claims would still not be time-barred under section 46A-5-101(1) because, giving effect to the plain language of the statutory provision, the due date for the last scheduled payment of Mr. McCormick’s closed-end mortgage loan has not passed.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Mr. McCormick does not believe oral argument is necessary as this Court has definitively

held that section 46A-5-102 of the WVCCPA operates as an exception to any applicable statute of limitations when WVCCPA claims are pursued as a defense, setoff or counterclaim. See Chrysler Credit Corp. v. Copley, 189 W. Va. 90, 93, 428 S.E.2d 313, 316 (1993). Nevertheless, if the Court determines oral argument is appropriate, Mr. McCormick urges the Court to place the questions on the Rule 20 argument docket, as the questions present an opportunity for the Court to clarify certain aspects of the WVCCPA that have not previously been definitively addressed. See W. Va. R. App. Proc. 20. If the questions are set for oral argument, Mr. McCormick requests the right to present such argument and specifically preserves the right to do so consistent with the Rules of Appellate Procedure.

## ARGUMENT

### A. Standard of Review

Mr. McCormick asserts that the circuit court erred by failing to apply the proper exception for counterclaims brought pursuant to the WVCCPA to any applicable statute of limitations in answering the certified questions. “The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*.” Syl. Pt. 1, Gallapoo v. Wal-Mart Stores, Inc., 197 W. Va. 172, 475 S.E.2d 172 (1996) (citing Simon v. G.D. Searle & Co., 816 F.2d 397, 400 (8th Cir. 1987)).

Additionally, Mr. McCormick asserts that the circuit court erred in its application of the statute of limitations provisions set forth in sections 38-1-4a and 46A-5-101(1) of the West Virginia Code in answering the certified questions. Because the issues before the Court involve the application and interpretation of statutory provisions, this Court should apply a *de novo* standard of review. See Syl. Pt. 1, Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995).

**B. Section 46A-5-102 of the WVCCPA Applies to Mr. McCormick's Counterclaim as an Exception to Any Applicable Statute of Limitations**

Petitioner asserts that Mr. McCormick's WVCCPA claims for unconscionable contract (Count I) and unlawful debt collection (Count IV) lodged in his counterclaim to Petitioner's unlawful detainer action are barred by statute of limitations provisions found in sections 38-1-4a and 46A-5-101(1) of the West Virginia Code.<sup>1</sup> However, no statute of limitations applies to Mr. McCormick's WVCCPA claims because the WVCCPA provides for an exception to any limitations when the claims are asserted through a counterclaim. See W. Va. Code § 46A-5-102. Section 46A-5-102 of the WVCCPA provides that "[r]ights granted by this chapter [46A] may be asserted as a defense, setoff or counterclaim to an action against a consumer without regard to any limitation of actions." Id.

Rather than argue that this exception somehow does not apply to Mr. McCormick's claims, Petitioner ignores the provision altogether. Nevertheless, there can be no doubt that this exception applies to Mr. McCormick's claims. Indeed, this Court has definitively held that section 46A-5-102 of the WVCCPA operates as an exception to any limitation that would otherwise act as a bar to claims brought pursuant to the WVCCPA in a counterclaim. See Chrysler Credit Corp., 189 W. Va. at 93, 428 S.E.2d at 316 (noting that "this waiver of the statute of limitations . . . is one of the unique

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<sup>1</sup> It should be noted that nowhere in the pleadings below or in Petitioner's opening brief does Petitioner assert that Mr. McCormick's equitable claims for fraud (Count II) and fraudulent appraisal (Count III) are barred by any statute of limitations. Under West Virginia law, no statute of limitations applies to equitable claims for relief. See Syl. Pt. 2, Dunn v. Rockwell, 225 W. Va. 43, 689 S.E.2d 255 (2009) (equitable causes of action not governed by any statute of limitation); 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. Block Bros. Tobacco Co., 119 W. Va. 167, 192 S.E. 545 (1937)); see also Laurie v. Thomas, 170 W. Va. 276, 279, 294 S.E.2d 78, 81 (1982) ("Where a suit based on fraud is not seeking damages but seeks to rescind a writing or impose a trust or other equitable relief, it is not a common law action for fraud but is equitable in nature . . .").

features of the CCPA.”).

This Court has held that exceptions to statutes of limitations must be strictly construed and given their effect. See Syl. Pt. 3, Perdue v. Hess, 199 W. Va. 299, 484 S.E.2d 182 (1997) (“Exceptions in statutes of limitations are strictly construed . . .”) (quoting Syl. Pt. 3, Hoge v. Blair, 105 W. Va. 29, 141 S.E. 44 (1929)); see also Johnson v. Nedeff, 192 W. Va. 260, 263, 452 S.E.2d 63, 66 (1994) (“[S]tatutes of limitations . . . cannot be avoided unless the party seeking to do so brings himself strictly within some exception.”). Accordingly, the statute of limitations exception for counterclaims found in section 46A-5-102 of the WVCCPA must apply to Mr. McCormick’s WVCCPA claims (Counts I and IV). The circuit court’s failure to apply the waiver of limitations to Mr. McCormick’s counterclaims brought pursuant to the WVCCPA is clear error of law.

Given the proper application of the limitations exception to counterclaims in section 46A-5-102 of the WVCCPA, this Court need not answer the certified questions presented or address any questions of the interpretation and application of sections 38-1-4a and 46A-5-101(1) to Mr. McCormick’s counterclaim. Rather, this Court should reformulate the certified questions presented pursuant to the Uniform Certification of Questions of Law Act in section 51-1A-1, *et seq.* and section 58-5-2 of the West Virginia Code. See Syl. Pt. 3, Kincaid v. Magnum, 189 W. Va. 404, 432 S.E.2d 74 (1993). This Court should simply consider whether section 46A-5-102 of the WVCCPA applies to Mr. McCormick’s WVCCPA claims in his counterclaim to Petitioner’s unlawful detainer action, thereby operating as an exception to any applicable statute of limitations and answer the question in the affirmative.

**C. Section 38-1-4a of the West Virginia Code Has No Application Whatsoever to Mr. McCormick’s Claims**

Ignoring the application of section 46A-5-102 of the WVCCPA, Petitioner asserts that

section 38-1-4a applies to Mr. McCormick's counterclaims because he has challenged the propriety of the foreclosure sale. (See Pet'r's Br. at 4-5.) To be sure, Mr. McCormick challenges the propriety of the foreclosure sale, but does not do so on the grounds that the notice, service, or process relating to the sale itself was improper. See W. Va. Code § 38-1-4a. Rather, Mr. McCormick challenges more broadly the enforceability of the underlying mortgage agreement through his claims for unconscionable contract, fraud, and fraudulent appraisal. (See Answer and Countercl., App. 38-47.) Nevertheless, Petitioner seems to argue that section 38-1-4a applies to any and all challenges to foreclosure sales. Contrary to Petitioner's unsupported argument, this is clearly not the case.

Section 38-1-4a of the West Virginia Code applies only to challenges to foreclosure sales alleging "failure to follow any notice, service, process or other procedural requirement relating to a sale of property under a trust deed . . ." W. Va. Code § 38-1-4a. The statute further provides that any action making such a challenge must be filed not later than one year from the foreclosure sale date. Id.

Simply, Mr. McCormick does not assert that Petitioner failed to provide proper notice relating to the sale nor is he required to make such an assertion in order to challenge the propriety of the foreclosure sale. This Court has recognized that certain types of challenges to a foreclosure sale may, and in some cases must, be made through myriad statutory, equitable, or common law mechanisms other than section 38-1-4a. For example, this Court has noted:

Our trustee sale statutes do not address the issue of setting aside a foreclosure sale. But, our cases have applied common law principles of equity to permit an action to set aside a foreclosure sale. See Syl. Pt. 2, Corrothers v. Harris, 23 W. Va. 177 (1883) ("A sale under a trust-deed will not be set aside unless for weighty reason."); Syl. Pt. 12, Atkinson v. Washington and Jefferson College, 54 W. Va. 32, 46 S.E.253 (1903) (In part: "Such sale will not be set aside, on the ground of inadequacy of price . . . [where] the evidence as to the value of the land does not clearly show that the price for which it sold

is so inadequate as to shock the conscience[,]”); Syl. Pt. 2, Emery’s Motor Coach Lines v. Mellon National Bank & Trust Co. of Pittsburgh, 136 W. Va. 735, 68 S.E.2d 370 (1951) (“Under a deed of trust appointing three trustees and providing that any two of such trustees may act, it is necessary that two of such trustees be personally present at any sale and supervise the same. A sale by one trustee in such instance will be set aside.”). Our cases have also held that a grantor may seek injunctive relief to prevent a real property foreclosure sale from occurring. See Villers v. Wilson, 172 W. Va. at 115, 304 S.E.20 (where it is was said that “there are instances when an injunction may lie; for example, when the proper amount due on the debt is in dispute.”), citing Wood v. West Virginia Mortgage & Discount Corporation, 99 W. Va. 117, 127 S.E. 917 (1925).

Fayette County Nat’l Bank v. Lilly, 199 W. Va. 349, 357, n.19, 484 S.E.2d 232, 240, n.19 (1997).

Indeed, it has long been held that a borrower has an unquestionable right to challenge the propriety of a foreclosure sale where, for whatever reason, a fair and proper sale is not possible or, again for whatever reason, there remains uncertainty regarding the amount owed. See Lucas v. Fairbanks Capital Corp., 217 W. Va. 479, 487, 618 S.E.2d 488, 496 (2005) (citing Syl. Pt. 8, Hartman v. Evans, 38 W. Va. 669, 18 S.E. 810 (1893)).

Because Mr. McCormick did not assert claims challenging the propriety of the foreclosure sale pursuant to section 38-1-4a, its statute of limitations provision has no application whatsoever to his counterclaim. The circuit court erred by applying the statute to Mr. McCormick’s counterclaim when it answered affirmatively that Mr. McCormick’s counterclaims were barred by the statute of limitations provision in section 38-1-4a. Because this provision has no application to Mr. McCormick’s counterclaim, the question should be reformulated to ask whether section 38-1-4a is applicable to Mr. McCormick’s counterclaim and should be answered by this Court in the negative.

**D. Even if the Statute of Limitations Provision in Section 46A-5-101(1) Applied to Mr. McCormick's Counterclaims, His Claims are Not Time-Barred**

Mr. McCormick maintains that his WVCCPA counterclaims are saved from any statute of limitations by virtue of the limitations exception in section 46A-5-102 of the WVCCPA. Nevertheless, even if this Court were to find that the limitations exception of 46A-5-102 did not apply to Mr. McCormick's claims, the claims would still not be time-barred under 46A-5-101(1) of the WVCCPA.

Section 46A-5-101(1) of the WVCCPA provides plainly, "[w]ith respect to violations arising from . . . 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." W. Va. Code § 46A-5-101(1). Petitioner asserts, despite the plain language of this provision, that the statute of limitations for claims brought pursuant to the WVCCPA begins to run when a mortgage loan is accelerated. Petitioner argues that because it accelerated Mr. McCormick's mortgage loan in 2007, Mr. McCormick's WVCCPA claims are time-barred because he did not assert them until 2011 when he brought his counterclaim to Petitioner's unlawful detainer action. (See Pet'r's Br. at 7.)

Petitioner asserts that the pre-foreclosure "acceleration" of Mr. McCormick's loan is equivalent to the "last scheduled payment of agreement" and the Circuit court adopted Petitioner's interpretation in applying the provision to Mr. McCormick's claims when it agreed that his WVCCPA claims are time-barred. In support of its assertion, Petitioner relies solely on one federal district court ruling that grossly misinterpreted the WVCCPA statute of limitations provision. (See Pet'r's Br. at 5-6 (citing Delebreaux v. Bayview Loan Servicing, LLC, 770 F. Supp. 2d 813 (S.D.W.

Va. 2011)).<sup>2</sup> The federal district court’s gross misinterpretation of section 46A-5-101(1) of the WVCCPA disregards the intent of the West Virginia Legislature and the plain language of the statute and fundamentally weakens the protections provided to West Virginia consumers by the WVCCPA.

Likewise, Petitioner’s interpretation, that the “last scheduled payment of the agreement” is equivalent to “acceleration,” conflicts with the legislative intent and the plain language of section 46A-5-101(1) of the WVCCPA. The interpretation, if allowed to stand, would result in inconsistent and absurd results and manifest injustice for West Virginia consumers in direct contravention to the remedial purpose of the WVCCPA.

**1. The interpretation of Petitioner adopted by the circuit court conflicts with Legislative intent and the plain language of the WVCCPA statute of limitations.**

First, “in matters involving statutory construction, legislative intent is the dominant consideration.” U.S. Life Credit Corp. v. Wilson, 171 W. Va. 538, 541, 301 S.E.2d 169, 172 (1982); see also In re Clifford K., 217 W. Va. 625, 633, 619 S.E.2d 138, 146 (2005) (“The cardinal rule of statutory interpretation is to first identify the legislative intent expressed in the promulgation at issue.”); Dunlap v. Friedman’s, Inc., 213 W. Va. 394, 401, 582 S.E.2d 841, 849 (2003) (Davis, J., dissenting) (“the ‘legislative policy in enacting . . . statutes [of limitations] is now recognized as controlling, . . . .’”) (quoting Johnson v. Nedeff, 192 W. Va. 260, 263, 452 S.E.2d 63, 66 (1994); Syl. Pt. 1, Smith v. State Workmen’s Compensation Com’r, 159 W. Va. 108, 219 S.E.2d 361 (1975) (“The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.”). Here, the intent of the Legislature in enacting the WVCCPA statute of limitations

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<sup>2</sup> It should be noted by the Court that this ruling and unprecedented interpretation of section 46A-5-101(1) of the WVCCPA is currently on appeal in the United States Court of Appeals for the Fourth Circuit. See Delebreaux et al. v. Bayview Loan Servicing, LLC, Record No. 11-1139 (U.S. Court of Appeals for the Fourth Circuit.)

is clear and rules out Petitioner's interpretation.

In enacting the WVCCPA in 1974, the West Virginia Legislature adopted many of the rights, remedies, and protections in the Uniform Consumer Credit Code (UCCC) first drafted in 1968 and revised in 1974. See Cardi, The West Virginia Consumer Credit and Protection Act, 77 W. Va. L. Rev. 401, 408-12, 414 (“In assembling the WVCCPA, the Legislature borrowed heavily from the UCCC, . . .”). The original version of the UCCC drafted in 1968 contained the following statute of limitations language: “one year after the due date of the last scheduled payment of the agreement.” See, e.g., IC 24-4.5-5-202 (1968) (Indiana adopted the 1968 version of the UCCC). However, in 1974, the UCCC statute of limitations was revised to provide that “no action pursuant to this subsection may be brought more than one year after the scheduled or accelerated maturity of the debt.” Unif. Consumer Credit Code § 5.201(1) (1974) (emphasis added).

The drafters of the revised UCCC in 1974 provided for two separate and distinct markers for calculating the statute of limitations: scheduled maturity and accelerated maturity. Id. Clearly, the drafters of the revised UCCC intended for there to be different meanings to the words “scheduled” and “accelerated”; otherwise, one of the terms would be rendered superfluous. See Syl. Pt. 2, State v. Snodgrass, 207 W. Va. 631, 535 S.E.2d 475 (2000) (“Each word of a statute should be given some effect and a statute must be construed in accordance with the import of its language. Undefined words and terms used in a legislative enactment will be given their common, ordinary and accepted meaning.”) (quoting Syl. Pt. 6, State ex rel. Cohen v. Manchin, 175 W. Va. 525, 336 S.E.2d 171 (1984)).

In 1974 when it enacted the WVCCPA, the West Virginia Legislature opted to incorporate the 1968 UCCC language and rejected the revised UCCC statute of limitations language, thereby rejecting the “accelerated maturity” debt as a marker for when the statute of limitations begins to run.

See W. Va. Code § 46A-5-101(1). Nothing could be more illustrative of the intent of the West Virginia Legislature than its deliberate selection of specific language providing for one and only one marker for when the statute of limitations begins to run, “the due date of the last scheduled payment of the agreement.” W. Va. Code § 46A-5-101(1). By rejecting the revised UCCC language, the West Virginia Legislature did not intend for the language “last scheduled payment of the agreement” to be synonymous with the term “acceleration.” Any such interpretation conflicts with and denies the effect of the Legislature’s intent in adopting and enacting the WVCCPA statute of limitations provision.

Second, the Court must give effect to the plain language of the WVCCPA statute of limitations deliberately chosen by the West Virginia Legislature. See Syl. Pt. 2, Snodgrass, 207 W. Va. 631, 535 S.E.2d 475. “Scheduled” is defined as “appoint[ed], assign[ed], or designate[d] for a fixed time.” Merriam-Webster Dictionary (2012), available at <http://merriam-webster.com/dictionary/scheduled> (accessed on May 15, 2012). For mortgage loans like the one at issue below, the schedule of payments is set up at the time of the making of the contract. Here, the mortgage loan was scheduled for 360 monthly payments to begin in 2005 with a scheduled maturity date in 2035. (See Answer and Countercl., App. 41 at ¶ 8(a).)

Moreover, the term “scheduled payments” is used with a precise meaning throughout the WVCCPA. See, e.g., W. Va. Code § 46A-2-105 (where the phrase “scheduled payments” clearly refers to a listing of dates on which installments are to be made and the amount due on those dates.) Indeed, the phrase “scheduled payment” is uniformly used in statutes and by courts across the country to describe the payments scheduled by the note, with the last such payment occurring at the date of maturity. See, e.g., Cal. Civ. Code. §§ 1799.5, 1799.8; Haw. Rev. Stat. § 37D-3; Mo. Rev. Stat. § 427.125; Notarnicola v. Lafayette Farms, Inc., 288 A.D.2d 198, 199 (N.Y. App. Div. 2001)

(finding that the language “date of last scheduled payment” in a statute of limitations that distinguishes between date of acceleration and date of last scheduled means maturity date of the loan); Diaz v. Rosario & Family Laundry, Inc., No. 09-23598-CIV, 2010 WL 4814659 (S.D. Fla. Oct. 22, 2010) (same); Byrd v. Crosstate Mortgage & Invs., Inc., No. LW-3263-4, 1994 WL 1031124, at \*2 (Va. Cir. Ct. Apr. 6, 1994) (last scheduled payment understood as maturity date of the note).

Finally, Petitioner’s interpretation, which was adopted by the circuit court in answering the second certified question, conflicts with this Court’s clear instructions for interpreting the WVCCPA broadly to ensure its remedial purpose to protect West Virginia consumers is given effect. This Court recently reiterated these instructions in Barr v. NCB Mgmt. Servs., Inc., which cited a long line of cases for the proposition that:

“[t]he purpose of the CCPA is to protect consumers from unfair, illegal, and deceptive acts or practices by providing an avenue of relief for consumers who would otherwise have difficulty proving their case under a more traditional cause of action. . . . [I]t must be our primary objective to give meaning and effect to this legislative purpose. Where an act is clearly remedial in nature, we must construe the statute liberally so as to furnish and accomplish all the purposes intended.”

227 W. Va. 507, 513, 711 S.E.2d 577, 583 (2011) (quoting State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 777, 461 S.E.2d 516, 523 (1995)) (additional citations omitted).

The Petitioner’s and the circuit court’s interpretation, that the WVCCPA statute of limitations begins to run on “[t]he date the applicable Loan was accelerated and all amounts became due,” stands in direct conflict with the Legislative intent and plain language of the WVCCPA statute of limitations and is a clearly incorrect interpretation of the law.

**2. Injustice to West Virginia borrowers and absurd results follow from the interpretation of Petitioner and the circuit court.**

The Legislature's intent in crafting the remedial statute of limitations provision is undermined by Petitioner's interpretation adopted by the circuit court, and absurd results follow from this interpretation. Interpreting the WVCCPA statute of limitations language, "due date of the last scheduled payment of the agreement" to mean the same as "acceleration of the loan" promotes injustice in direct contravention of the remedial purpose of the WVCCPA.

Significantly, "acceleration" is a default remedy that is exercised unilaterally by the lender and in many cases more than once in the lifetime of a loan. Take for example a scenario in which a borrower defaults and the lender exercises its default remedy of acceleration. Even though the lender has accelerated the mortgage loan, the borrower still has the contractual and legal right to reinstate her mortgage loan. If the borrower reinstates her mortgage loan, she may then resume the regularly scheduled payments under the loan agreement. However, if Petitioner's interpretation were permitted to stand, she would be precluded from bringing claims for WVCCPA violations occurring more than one year after the date of the acceleration of her loan and the lender could violate the law or continue to enforce an illegal loan with impunity. This example clearly demonstrates that for all practical purposes "acceleration" is simply not the "last scheduled payment of the loan."

Petitioner's interpretation also leads to absurd and unjust results by handing the lender ultimate control over the statute of limitations, creating perverse incentives for the creditor to act deceptively and improperly. Under Petitioner's interpretation adopted by the circuit court in answering the second certified question, a creditor benefits if it improperly accelerates a loan even if a borrower is not in default, or is only in default due to misapplication of payments or assessment of illegal fees, in order to start the running of the statute of limitations. Just as in the scenario above,

the lender could allow the borrower to reinstate or otherwise resume regularly scheduled payments for the life of the loan and should the borrower file suit under the WVCCPA after making payments for several more years, the lender could accurately assert that the claims were barred because more than one year had passed since acceleration. Such an interpretation clearly flies in the face of the remedial purpose of the WVCCPA.

Furthermore, applied to the facts of this case, injustice and absurd results ensue. Most significantly, Petitioner's interpretation ignores the application of the limitations exception for counterclaims found in section 46A-5-102 of the WVCCPA. Even if section 46A-5-102 were not applied, Petitioner's interpretation of the WVCCPA statute of limitations prohibits Mr. McCormick from asserting defenses and counterclaims to the civil action against him. Petitioner is suing Mr. McCormick to evict him and his son from their home. Mr. McCormick asserts that Petitioner's unlawful detainer action is predicated on a rightful and proper foreclosure. Accordingly, Mr. McCormick challenges the propriety of the foreclosure because the underlying mortgage loan agreement was enforceable. (See Answer and Countercl., App. 38-47.)

Importantly, in response to Petitioner's original unlawful detainer action, Mr. McCormick first asserted his defenses and counterclaims in February of 2008, well within one year of Petitioner's acceleration of the mortgage loan. (See Def.'s Resp. to Pl.'s Mot. to Dismiss, App. 60.) Although Mr. McCormick raised defenses and counterclaims and engaged in discovery in the original proceeding, due to Petitioner's failure to prosecute the original unlawful detainer action, the circuit court dismissed the entire case on September 25, 2009. (See Dismissal Order of Cir. Ct. Action 08-C-283, App. 01.) Petitioner then waited two years to file the present unlawful detainer action pending below. In response, Mr. McCormick effectively reasserted his original defenses and counterclaims. Petitioner argues absurdly that Mr. McCormick may not challenge its unlawful

detainer action because Mr. McCormick is out of time to raise his defenses and counterclaims when it was Petitioner who did not initiate the action pending below until well over three years had passed since it foreclosed on Mr. McCormick's home.

If Petitioner's interpretation is permitted to stand, then creditors would simply need to wait more than one year after acceleration to file actions against consumers in order to ensure that their suits are immune to meaningful defenses and challenges. In this scenario, creditors again have complete control over the application of the statute of limitations and could pave the way clear for indomitable unlawful detainer actions by simply waiting one year and a day after acceleration or foreclosure to file. This result is not just absurd, it is also patently unjust.

The circuit court erred in adopting Petitioner's interpretation of the WVCCPA statute of limitations that "acceleration" is the same as "the due date of the last scheduled payment of the agreement." The interpretation flies in the face of Legislative intent and the plain language of the provision and results in manifest injustice in contravention to the remedial purpose of the WVCCPA by inviting inconsistent and absurd results. This Court should reject this interpretation and reformulate the second certified question presented to simply ask whether the WVCCPA statute of limitations applies to Mr. McCormick's WVCCPA counterclaims given the limitations exception in section 46A-5-102 and answer in the negative.

### CONCLUSION

For all the reasons articulated above, this Court should either reformulate the questions presented as suggested or answer the questions presented in the negative.

**Respectfully Submitted,  
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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** upon counsel of record as listed below, via facsimile at (304) 414-0202, and by U.S. Mail, postage prepaid, addressed as follows:

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This the 21<sup>st</sup> day of May, 2012.

  
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