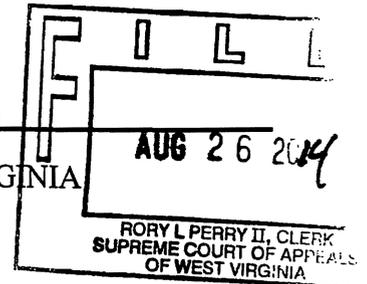

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

No. 14-0637



JAMES R. FLEET, JAMILLA FLEET and JAMES LAMPLEY,
Defendants Below,

Petitioners

v.

WEBBER SPRINGS OWNERS ASSOCIATION, INC.,
Plaintiff Below,

Respondent

PROPOSED AMICUS BRIEF OF THE WEST VIRGINIA
ASSOCIATION FOR JUSTICE IN SUPPORT OF PETITIONERS,
JAMES R. FLEET, JAMILLA FLEET AND JAMES LAMPLEY

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AMICUS CURIAE, WEST VIRGINIA
ASSOCIATION FOR JUSTICE

I.

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*, WEST VIRGINIA ASSOCIATION FOR JUSTICE

This *amicus* brief is submitted on behalf of the West Virginia Association for Justice [“WVAJ”] in support of the Petitioners, James R. Fleet, Jamilla Fleet and James Lampley.

The issues raised in this appeal have significant implications for West Virginia consumers. Among other things, these issues include the scope of the unfair debt collection provisions of the West Virginia Consumer Credit Protection Act, W.Va. Code 46A-1-101 *et seq.*, [“WVCCPA”] and the right under W.Va. Code 46A-5-102 to assert any defenses, setoffs or counterclaims regardless of any statute of limitations. The circuit court’s rulings in this case would severely undercut the WVCCPA and place many common, everyday forms of consumer debt outside the scope of its protection. To insure that the WVCCPA provides the fullest possible protection consistent with its remedial purposes, the circuit court’s judgment must be reversed.

The WVAJ is a private, non-profit organization consisting of attorneys licensed in the State of West Virginia who represent, among other clients, citizens of the State of West Virginia harmed by the wrongful conduct of others. The Membership of WVAJ is particularly interested in protecting ordinary West Virginians and securing for them the rights enshrined in the State Constitution, the West Virginia Code and the decisions of this Court. It has filed *amicus* briefs on more occasions than could conveniently be counted and its briefs have been acknowledged as helpful to this Court on multiple occasions.

No party to this appeal has authored or paid for any part of this brief.

II.

ARGUMENT

- A. The Circuit Court erred in finding that the WVCCPA would not apply because Defendants never entered into a “consumer credit sale.” Whether or not true, a “consumer credit sale” is not necessary to trigger the unfair debt collection provisions of the Act.**

In its summary judgment order, the circuit court applied the definition of “consumer” found in W.Va. Code 46A-1-102(12). This definition is specifically tied to consumer credit sales, loans, or leases: “Consumer means a natural person who incurs debt pursuant to a consumer credit sale or a consumer loan, or debt or other obligations pursuant to a consumer lease.” *Id.* The circuit court concluded that because the Respondent, Webber Springs Owners Association, Inc., did not engage in any type of credit transaction, the Petitioners “never entered into a consumer credit sale such that the application of the WVCCPA would apply.” 4/24/14 ORDER, AT 5, ¶ 4.

Unfortunately, the circuit court applied the wrong definition—an error which, if affirmed, would have devastating consequences in West Virginia’s fight against unfair debt collection.

The provisions governing unfair debt collection are codified in W.Va. Code 46A-2-122 through -29a. For purposes of these code sections, the Legislature crafted a much broader and all-encompassing definition of “consumer.” Under this definition, found in W.Va. Code 46A-2-122(a), a consumer includes “any natural person obligated or allegedly obligated to pay any debt.” This definition is explicitly and specifically applicable to debt collection provisions in the the WVCCPA. W.Va. Code 46A-2-122 (“For the purposes of this section and sections one hundred twenty-three, one hundred twenty-four, one hundred twenty-five, one hundred twenty-six, one hundred twenty-seven, one hundred twenty-eight, one hundred twenty-nine, and one hundred twenty-nine-a of this article, the following terms shall have the following meanings. . . .”). Importantly, then, when applied to unfair debt collection practices, the definition of “consumer” is

not tied to any consumer credit sales, leases or loans, which require the debt to either be payable in installments or subject to a sales finance charge. *See*, W.Va. Code 46A-1-102 (13 – 15). Instead, it is broadly written to cover “any debt.”

This is consistent with federal debt collection law, which utilizes similar standards to West Virginia law. Under federal law as codified in the Fair Debt Collection Practices Act [“FDCPA”], the “term ‘consumer’ means any natural person obligated or allegedly obligated to pay any debt.” 15 U.S.C.A. § 1692a(3). “The term ‘debt’ means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.” §1692a(5).¹

The argument that a debt must involve a credit agreement, or the deferral of a payment, to be covered by the FDCPA has been soundly rejected by the federal appellate courts.² This same reasoning has been applied to hold that the FDCPA applies to debts for assessments by homeowner associations and condominium fees.³ Because the debt collection provisions of the WVCCPA

¹ The requirement that the obligation or alleged obligation arise out of a transaction that is “primarily for personal, family or household purposes” is incorporated into select provisions of West Virginia’s unfair debt collection laws through the term “claim.” *See*, W.Va. Code 46A-2-122(b).

² The issue was first decided in *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F3d 1322 (7th Cir. 1997). Thereafter, the court’s reasoning in *Bass* has become generally accepted throughout the federal system. *See e.g.*, *Federal Trade Comm’n v. Check Investors, Inc.*, 502 F.3d 159 (3^d Cir. 2007); *Duffy v. Landberg*, 133 F.3d 1120 (8th Cir. 1998); *Snow v. Jesse L. Riddle, P.C.*, 143 F.3d 1350 (10th Cir. 1998); *Charles v. Lundgren & Assocs., P.C.*, 119 F.3d 739 (9th Cir. 1997); *Brown v. Budget Rent-A-Car Sys., Inc.*, 119 F.3d 922, 924 (11th Cir. 1997).

³ *See e.g.*, *Ladick v. Van Gemert*, 146 F.3d 1205 (10th Cir. 1998)(Assessment owed to a condominium association was a “debt” as defined); *Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477 (7th Cir. 1997)(Condominium assessments for common expenses for family homes were debts covered by the FDCPA); *Williams v. Edelman*, 408 F. Supp. 2d 1261 (S.D. Fla.

mirror federal law, the scope of protection should be interpreted consistently with this impressive line of federal cases. *Cf.* W.Va. Code 46A-6-101(1) (declaring that Courts interpreting deceptive practices provisions of WVCCPA be “guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters”).

The circuit court’s error has important ramifications because applying a *narrower* definition of “consumer” necessarily means a *narrower* scope of protection. Indeed, the circuit court’s interpretation would exclude large swaths of ordinary debt. For example, any consumer debt that was incurred through the purchase of goods or services where the payment obligation is not deferred would fall outside of the WVCCPA’s protection. This would have the effect of denying protection for many commonplace transactions, including most retail purchases, medical bills, dishonored checks, insurance bills, home improvement bills and auto repair bills, to name just a few.

It is, of course, well settled that the WVCCPA is a remedial act that must be liberally construed in favor of the consumer. *E.g., Vanderbilt Mortgage & Finance, Inc., v. Cole*, 230 W.Va. 505, 740 S.E.2d 562 (2013); *Barr v. NCB Management Services, Inc.*, 227 W.Va. 507, 711 S.E.2d 577, 583 (2011); *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229, 511 S.E.2d

2006)(Condominium assessments constituted “debts” under the FDCPA); *Dikun v. Streich*, 369 F. Supp. 2d 781 (E.D. Va. 2005)(Property owners’ association assessments for a consumer’s residence were held to be debts as defined by the FDCPA); *Fuller v. Becker & Poliakoff, P.A.*, 192 F.Supp. 2d 1361 (M.D. Fla. 2002)(Delinquent maintenance assessments under a property owners’ association contract were debts covered by the FDCPA); *Taylor v. Mount Oak Manor Homeowners Ass’n, Inc.*, 11 F.Supp. 2d 753 (D. Md. 1998)(Obligation to pay homeowners association maintenance fees was a “debt” as defined); *Thies v. Law Offices of William A. Wyman*, 969 F. Supp. 604 (S.D. Cal. 1997)(Homeowner association fees for maintenance and improvement of common areas within a housing development were a debt primarily for personal, family, and household purposes covered by the FDCPA).

854 (1998). By applying the narrower definition of “consumer” from W.Va. Code 46A-1-102(12), the circuit court not only violated the plain statutory language, but also violated this important rule of statutory construction. It is the view of amicus that the language in question is clear and that WVCCPA’s debt collection provisions apply to “any debt.” But even assuming, arguendo, that there was ambiguity in the text, this familiar rule of construction would require it to be resolved in favor of the consumer.

Similarly, the Circuit Court’s interpretation violates the established rule of statutory construction requiring that conflicts between specific and general provisions be resolved by applying the specific provision:

If, however, the two statutes cannot be reconciled, the language of the more specific promulgation prevails. “The general rule of 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, 325 S.E.2d 120 (1984). *Accord Tillis v. Wright*, 217 W.Va. 722, 728, 619 S.E.2d 235, 241 (2005) (“[S]pecific statutory language generally takes precedence over more general statutory provisions.”); *Bowers v. Wurzburg*, 205 W.Va. 450, 462, 519 S.E.2d 148, 160 (1999) (“Typically, when two statutes govern a particular scenario, one being specific and one being general, the specific provision prevails.” (citations omitted)); *Daily Gazette Co., Inc. v. Caryl*, 181 W.Va. 42, 45, 380 S.E.2d 209, 212 (1989) (“The rules of statutory construction require that a specific statute will control over a general statute when an unreconcilable conflict arises between the terms of the statutes.” (citations omitted)).

Zimmerer v. Romano, 223 W.Va. 769, 784, 679 S.E.2d 601, 616 (2009). Here, W. Va. Code 46A-2-122(a), contains an explicit definition specifically applicable to the debt collection provisions at issue in this case. Under *Zimmerer* (and the cases cited therein) the specific definition in section 122(a) governs over the generally applicable definition found in W.Va. Code 46A-1-102(12).

B. Counterclaims to collection actions that are based on violations of the unfair debt collection provisions of the Act are not subject to any statute of limitations under §46A-5-102 (“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.*”)

The circuit court also erred in concluding that the Petitioner’s counterclaim was time barred.

This issue is governed by the express language of W.Va. Code 46A-5-102, which provides: “rights granted by this chapter may be asserted as a defense, set off or counterclaim to any action against a consumer without regard to any limitation of actions.”

In *Chrysler Credit Corp. v. Copley*, 189 W.Va. 90, 428 S.E.2d 313 (1993), this Court incorporated the same principle into a syllabus point: “Where a consumer is sued for the balance due on a consumer transaction, any asserted defense, set off, or counterclaim available under the Consumer Credit Protection Act, W.Va. Code 46A-2-101 *et seq.*, may be asserted without regard to any limitation of actions under W.Va. Code, 46A-5-102 (1974).”

Thus, by virtue of both the express mandate of W.Va. Code 46A-5-102 and the *Copley* syllabus, a counterclaim by a consumer arising out of a consumer transaction *is not* subject to any statute of limitations.

In an attempt to avoid this settled law, the circuit court relied on *Tribeca Lending Corp. v. McCormick*, 231 W.Va. 455, 745 S.E.2d 493 (2013). In doing so, however, the circuit court seriously misapplied *Tribeca*.

The plaintiff in *Tribeca* was the holder of a mortgage who proceeded through foreclosure and obtained a deed to the mortgaged property. The plaintiff then filed an unlawful detainer claim against the defendant seeking possession of the property. The defendant counterclaimed, raising a multitude of consumer claims.

Contrary to what the circuit court says, *Tribeca* did not in any way “limit” the scope of W.Va. Code 46A-5-102 or *Copley*. Instead, *Tribeca* held that the plaintiff was not pursuing any kind of relief involving the underlying debt but, instead, was simply seeking possession of the property:

Tribeca is not pursuing any claims against Mr. McCormick on any consumer loan, Tribeca is pursuing its unlawful detainer action against Mr. McCormick because it alleges that he is wrongfully possessing land owned by Tribeca. It did not sue for any balance due on the 2005 loan or any loan deficiency from the 2007 trust deed sale. The unlawful detainer action was simply an action to recover possession of property Tribeca owned that was allegedly wrongfully possessed by another.

Tribeca concluded: “On this record, Mr. McCormick is not being sued by Tribeca as a ‘consumer’ under the West Virginia Consumer Credit and Protection Act.” 231 W.Va. at 463, 745 S.E.2d at 501.

Properly understood, then, *Tribeca* simply holds that for W.Va. Code 46A-5-102 to apply the initial claim must be one in which the defendant is sued to collect a debt. Here, of course, there is no doubt that the Respondent was attempting to collect a debt. Indeed, the Respondent brought this case for the express purpose of recovering the underlying debt, i.e., a property assessment. Because the Petitioners are “consumers” and are pursuing “claims” within the meaning of W.V. Code §46A-2-122, they are entitled to all of the protections afforded by the WVCCPA.⁴ This includes asserting any rights conferred under the WVCCPA by means of defense, set off or counterclaim without regard to any applicable statute of limitations.

⁴ In *Tribeca*, plaintiffs were pursuing a claim for unconscionable loan agreement under W.V. Code §46A-2-121, which applies the more narrow definition of “consumer” and its scope is expressly limited to consumer credit sales, consumer leases and consumer loans.

CONCLUSION

WHEREFORE, the Court's amicus respectfully asks that the Court take notice of the views of the members of the West Virginia Association for Justice, and those they represent, as set forth herein, in deciding this weighty matter.

**JAMES R. FLEET, JAMILLA FLEET,
and JAMES LAMPLEY, Petitioners**

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CERTIFICATE OF SERVICE

Service of the foregoing **PROPOSED AMICUS BRIEF OF THE WEST VIRGINIA ASSOCIATION FOR JUSTICE IN SUPPORT OF PETITIONERS, JAMES R. FLEET, JAMILLA FLEET AND JAMES LAMPLEY** was had upon the Respondent herein via e-mail and by mailing a true and correct copy thereof, by regular United States Mail, postage prepaid, this 26th day of August, 2014, to the following:

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**JAMES R. FLEET, JAMILLA FLEET,
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