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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 35709

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LINDA BARR,

Plaintiff

v.

NCB MANAGEMENT SERVICES, INC.,
and HSBC BANK NEVADA, N.A.,

Defendants.

BRIEF OF THE WEST VIRGINIA ATTORNEY GENERAL AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF

STATE OF WEST VIRGINIA ex rel.
DARRELL V. McGRAW, JR.
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I.
INTRODUCTION

Unfair and Deceptive Acts and Practices, or UDAP statutes, provide the basic protections for the millions of transactions that consumers in the United States enter into each year. Although UDAP statutes vary widely from state to state, their basic premise is that unfair or deceptive tactics in the marketplace are unlawful.

"Before the adoption of state UDAP statutes in the 1970s and 1980s, neither consumers nor state agencies had effective tools against fraud and abuse in the consumer marketplace." CAROLYN L. CARTER, NATIONAL CONSUMER LAW CENTER, CONSUMER PROTECTION IN THE STATES, A 50 STATE REPORT ON UNFAIR OR DECEPTIVE ACTS AND PRACTICES STATUES (FEB. 2009), p. 5. In most states, there was no state agency with a mandate to root out consumer fraud and abuse, much less tools to pursue fraud artists." Id.

Consumers had even fewer tools at their disposal. A consumer who was defrauded often found the fine print in the contract immunized the seller or creditor. A consumer's only recourse was to file a lawsuit alleging common law fraud, which required him to prove that the misrepresentation or omission was material and that he justifiably relied upon it. These requirements are significant impediments to fraud claims, particularly in class actions. Id. Even in cases where a consumer actually filed a private cause of action and won, very few states had statutes that allowed the consumer to recover attorney fees. As a result, even if a consumer won his case, he was rarely made whole.

"UDAP statutes were passed in recognition of these deficiencies." Id. at 6. Today, all fifty states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands have enacted at least one

statute aimed at preventing consumer deception and abuse in the marketplace. NATIONAL CONSUMER LAW CENTER, *Unfair and Deceptive Acts and Practices* § 1.1 (2001 5th ed. & Supp. 2003). Many of these statutes, including West Virginia's, are patterned after the language found in Section 5(a)(1) of the Federal Trade Commission (FTC) Act which prohibits "unfair or deceptive acts or practices."

UDAP statutes are particularly important because, while the FTC Act is often viewed as sharply limiting the doctrine of *caveat emptor*, it limits enforcement to actions brought by the Commission and does not provide for state enforcement actions or lawsuits brought by consumers. In contrast, UDAP statutes "all go beyond the FTC Act by giving a state agency the authority to enforce these prohibitions, and all but one also provide remedies that consumers who have been cheated can invoke." CONSUMER PROTECTION IN THE STATES at p. 6.[1]

A key element in a strong and effective UDAP statute is the consumer's right to bring a lawsuit on his own behalf. Why is this right so essential to effective enforcement of UDAP statutes – – because limited state consumer protection enforcement budgets are not able to police the marketplace fully. "Fundamentally, there are so many businesses, transactions and practices, and the day-to-day economic activity of the country is so immense, that public enforcement cannot do the job no matter how well-funded. The market can never be policed adequately from above. Consumers must be able to protect themselves – – and that ability is crucial for a well-functioning marketplace." Id. at 18. Enforcement of a regulatory statute through individual actions serves a deterrent effect, curbing impermissible conduct by unscrupulous businesses.

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[1]In July, 2009,the Iowa Legislature passed the Private Right of Action for Consumer Frauds Act, Iowa Code 714h, becoming the last state to give consumers a private cause of action.

The right of consumers to file private causes of action is vital in West Virginia. The Attorney General's mandate is to enforce the WVCCPA and is not, as many consumers believe, to represent them individually. Although it is true that the Consumer Protection Division often seeks restitution when it files a lawsuit against a business for violating the WVCCPA, its ability to effectively stamp out illegal conduct is severely limited because of its scarce resources. The Consumer Protection Division is staffed with only six attorneys. These six attorneys must sift through over 10,000 written complaints the Division receives each year and decide which ones merit further scrutiny by a lawyer. In other words, the Division has to pick and choose its battles. Hence, the consumer's right to bring a private cause of action under the Act is an integral component of its enforcement.

When it enacted the WVCCPA, the Legislature recognized how important it was for consumers to have a private cause of action, so they explicitly provided for this right.

The question before this Court, "[w]hether a consumer has a private cause of action against a non-creditor debt collector pursuant to the West Virginia consumer Credit and Protection Act, W. Va. Code § 46A-2-122, *et seq.*," can easily be resolved by applying the age old rules of statutory construction -- all of which lead to one inevitable conclusion -- YES. The Legislature made its intention crystal clear with the words they chose in providing this right. To find otherwise would impair "the consumers' ability to stop practices before they cause widespread consumer harm.

II.

STATEMENT OF FACTS

The Attorney General's office adopts and incorporates the factual statement in plaintiff Barr's brief.

III.
ARGUMENT

A. West Virginia Code § 46A-5-101(1) must be interpreted according to its plain terms.

Although the courts must ascertain what a law is and determine its application to particular facts in the decision of cases, *see, e.g.*, State v. C.H. Musselman Co., 59 S.E.2d 472 (W. Va. 1950), courts may not usurp the Legislature's power by rewriting a statute. Sowa v. Huffman, 443 S.E.2d 262 (W. Va. 1994); Soto v. Hope Natural Gas Co., 95 S.E.2d 769 (W. Va. 1956); State v. Epperly, 65 S.E.2d 488 (W. Va. 1951). *See generally*, 17 M.J. § 34, 378 (1994).

> [I]t is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten, or given a construction of which its words are not susceptible, or which is repugnant to its terms which may not be disregarded. State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars, 107 S.E.2d 353, 358 (1959).

Sowa, 443 S.E.2d at 268. *See* Thomas v. Morris, Syl. pt. 4, ____ S.E.2d ____, 2009 WL 4059067 (W. Va.) (unambiguous, clear statute given full force and effect by courts); Rhodes v. Workers' Compensation Div., 543 S.E.2d 289 (W.Va. 2001) (unambiguous statute not open to interpretation). Most often, the words of the statute are sufficient to determine the purpose of the legislation. In such cases, courts merely enforce the statute under its plain terms and do not resort to the rules of statutory construction.

Only where a statute is ambiguous or where its plain meaning would lead to an absurd or futile result, clearly at odds with the purpose of the enactment, should courts undertake an inquiry into intent beyond the mere text. State ex rel. Simpkins v. Harvey, 305 S.E.2d 268 (W. Va. 1983). "In the absence of any specific indication to the contrary, words used in a statute will be given their

common, ordinary, and accepted meanings." Syl. pt. 1, Thomas v. Firestone Tire & Rubber Co., 226 S.E.2d 905 (W. Va. 1980), *quoting* Syl. pt. 1, Tug Valley Recovery Ctr. v. Mingo County Comm'n, 261 S.E.2d 165 (W. Va. 1979).

1. Words in a statute will be given their common, ordinary, and accepted meanings.

In Thomas v. Firestone, this Court was asked to consider whether a debt collector as defined by W. Va. Code § 46A-2-122 included a creditor attempting to collect his own debts. The respondent in Firestone argued that the statute only regulated the practice of professional debt collectors.

The Court began its analysis by looking to the words used in the definition of "debt collector," which provides that the term means "any person or organization engaging directly or indirectly in debt collection." W. Va. Code § 46A-2-122(d) (emphasis added).[2] This Court held that the statute applied to both the original creditor and professional debt collectors. In reaching this conclusion, the Court first determined the plain meaning of the word "any" in the context of the statute. After looking up the definition of "any" in THE OXFORD ENGLISH DICTIONARY, among others, this Court was "led to the unavoidable conclusion that the word 'any,' when used in a statute, should be construed to mean, in a word, any." Id. at 909. This Court went on to explain:

> The 1974 enactment of Chapter 46A of the West Virginia Code represents recognition by the legislature of abuses in consumer credit

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[2]West Virginia Code § 46A-2-122(d) provides in its entirety:

> "Debt collector" means any person or organization engaging directly or indirectly in debt collection. The term includes any person or organization who sells or offers to sell forms which are, or are represented to be, a collection system, device or scheme, and are intended or calculated to be used to collect claims.

> transaction practices. In the face of the use of the word "any," it would be improper for this Court to limit the application of the statute to the activities of professional collection agencies. That would be a usurpation of the legislative function. The statute was designed to protect consumers against unscrupulous collection practices, by whomever perpetrated. In light of the broad remedial purposes of this legislative act, all who engage in debt collection are alike subject to its prohibitions. It would be incongruous to suggest that a creditor could evade the requirements of the statute by collecting his own debt in unconscionable fashion while another would be held to account if it enlisted the service of a professional collector to pursue the same course of action. Such a strained interpretation would conflict with common sense.

Id. at 909. *See also*, Fenton Art Glass Company v. W. Va. Office of the Ins. Comm'n, 664 S.E.2d 761 (W. Va. 2008); Zirkle v. Elkins Road Pub. Serv. Dist., 655 S.E.2d 155 (W. Va. 2007); Williams v. W. Va. Dep't. of Motor Vehicles, 419 S.E.2d 474 (W. Va. 1992).

2. Under the plain meaning of W. Va. Code § 46A-5-101(1), a consumer may bring a private cause of action "to recover from the person violating [the WVCCPA]."

The same rule of statutory construction applies to W. Va. Code § 46A-5-101(1) because it is part of the WVCCPA. Clendenin Lumber & Supply Co., Inc. v. Carpenter, 305 S.E.2d 332, 337 (W. Va. 1983).

West Virginia Code § 46A-5-101(1) provides, in pertinent part:

> If a creditor has violated the provisions of this chapter applying to . . . any prohibited debt collection practice . . . the consumer has a cause of action to recover actual damages and in addition a right in an action to recover from the *person* violating this chapter . . . .

(Emphasis added.) The defendant, NCB Management, argues this statute means that a consumer can *only* bring an action against the creditor. The plain meaning of the statute shows that NCB is wrong.

West Virginia Code § 46A-2-122(d) defines a "debt collector" to mean "any person, or organization engaging directly or indirectly in debt collection." The term "person" includes "a

natural person or an individual, and an organization." W. Va. Code § 46A-1-102(31).

It is "presumed that the legislators who drafted and passed [the WVCCPA] were familiar with existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof. . . ." Syl. pt. 5, McDavid v. U.S., 584 S.E.2d 226 (W. Va. 2003). Debt collection is explicitly included in the WVCCPA. Moreover, by enacting W. Va. Code § 46A-5-101(1), the Legislature gave consumers a private cause of action against "creditors" and "persons" who violate the WVCCPA.

Considering the plain meaning of these terms, it is apparent the Legislature intended consumers to have a private cause of action against *any person* violating the Act, not just creditors. Had the Legislature intended to limit consumers' rights in such a manner, it would have said so.

B. If this Court finds W. Va. Code § 46A-5-101(1) ambiguous, the statute must be interpreted using the rules of statutory construction.

If this Court finds W. Va. Code § 46A-5-101(1) to be ambiguous, the rules of statutory construction require that it look to the intent of the Legislature. *See*, Ewing v. Bd. of Educ., 503 S.E.2d 541 (W. Va. 1998); W. Va. Div. Envtl. Protection v. Kingwood Coal Co., 490 S.E.2d 823 (W. Va. 1997); Anderson v. State Workers Compensation Comm'r, 327 S.E.2d 385 (W. Va. 1985). A statute is ambiguous if it is "susceptib[le to] . . . two or more meanings and uncertainty [exists] as to which was intended." HN Corp. v. Cypress Kanawha Corp., 465 S.E.2d 391, 396 (W. Va. 1995). Moreover, "a statute that is ambiguous must be construed before it can be applied." Syl. pt. 1, Farley v. Buckalew, 414 S.E.2d 454 (W. Va. 1992). In construing a statute, the court is presented with a purely legal question. Banker v. Banker, 474 S.E.2d 465, 473 (W. Va. 1996) *quoting* Syl. pt. 1, W. Va. Human Rights Comm'n v. Garretson,

468 S.E.2d 733 (W. Va. 1996).

In any event, a statute is a positive action of the Legislature, and it must have some meaning. The courts may not simply ignore a statute on account of imperfect draftsmanship.

1. An ambiguous statute must be construed consistently with the intent of the Legislature.

The legislative purposes of the WVCCPA are stated in W. Va. Code § 46A-6-101(a), which provides, in its entirety:

> The legislature hereby declares that the purpose of this article is to complement the body of federal law governing unfair competition and unfair, deceptive and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the legislature that, in construing this article, the courts be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters. *To this end, this article shall be liberally construed so that its beneficial purposes may be served.*

W. Va. Code § 46A-6-101(a) (emphasis added). The Legislature's intent to protect consumers from fraud and abuse is well-documented by the legislative history of the WVCCPA. Specifically, the WVCCPA has been amended on numerous occasions and with each amendment the Legislature provided consumers with additional protections.

For example, in 1998, the Circuit Court of Kanawha County ordered a defendant to pay a $500,000 civil penalty. On appeal, the defendant argued that the maximum civil penalty that could be imposed under W. Va. Code § 46A-7-111 was $5,000.00. This Court set aside the civil penalty, holding that the absence of any reasoning to support the amount of the civil penalty rendered it arbitrary. State ex rel. McGraw v. Imperial Marketing, 506 S.E.2d 799, 810 (W. Va. 1998). Although this Court agreed with the Attorney General's contention that a maximum civil penalty of $5,000 served very little deterrent purpose and the Legislature's intent was that there be a $5,000

civil penalty for each violation; the maximum amount of civil penalty was "more appropriately a matter to be addressed by the Legislature." Id. at 811.

Justice Starcher, in his concurrence, suggested that the Legislature clarify this issue by inserting the words "for each violation of this chapter" into the statute. Id. at 815. In 1999, the Legislature amended W. Va. Code § 46A-7-111 in accordance with Justice Starcher's suggestion.

Between 1984 and 2007, the Legislature amended the WVCCPA by adding twelve (12) new articles, Articles 6A through 6L, and with each amendment expanded consumers' rights.[3] Historically, this Court has recognized the remedial nature of the WVCCPA. Today, the Attorney General urges the Court to liberally construe W. Va. Code § 46A-5-101(1) to benefit and protect West Virginians who file a cause of action alleging violations of the WVCCPA.

2. The Court has consistently construed the WVCCPA liberally and to benefit and protect consumers.

This Court has consistently held that "the purpose of the [WV]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*." State ex rel. McGraw v. Telecheck Services, Inc., 582 S.E.2d 885, 895 (W. Va. 2003), *quoting* State ex rel. McGraw v. Scott Runyon Pontiac-Buick, 461 S.E.2d 516, 523 (W. Va. 1995) (emphasis added). *See also*, Clendenin Lumber & Supply Co. v. Carpenter, 305 S.E.2d 332, 337 (W. Va.

[3]The Legislature has enacted the following additional articles, each covering a separate area: Article 6A - Consumer Protection - New Motor Vehicle Warranties (1984); Article 6B - Consumer Protection - Automotive Crash Parts (1988); Article 6C - Credit Services Organizations (1991); Article 6D - Prizes and Gifts (1992); Article 6E - Consumer Protection - Assistive Devices (1998); Article 6F - Telemarketing (1998); Article 6G - Electronic Mail Protection Act (1999); Article 6H - Transfers of Rights to Receive Future Payments (1999); Article 6I - Consumer Protections in Electronic Transactions (2001); Article 6J - Protection of Consumers from Price Gouging and Unfair Pricing During and Shortly After a State Of Emergency (2002); Article 6K - Good Funds Settlement Act (2004); and Article 6L - Theft of Consumer Identity Protection (2007).

1983), *quoting* Harless v. First Nat'l Bank of Fairmont, 246 S.E.2d 270 (W. Va. 1978). Moreover, W. Va. Code § 46A-5-101(1) must be liberally construed to effect its purpose because it is a remedial statute. State Farm Mutual Auto Ins. Co. v. Norman, 446 S.E.2d 720 (W. Va. 1994); Martin v. Smith, 438 S.E.2d 318 (1993); Plymale v. Adkins, 429 S.E.2d 246 (W. Va. 1993); Fowler v. Lewis, Adm'r, 14 S.E. 447 (W. Va. 1892).

In Telecheck, the defendants argued that the State had alleged and failed to prove a "pattern or practice" of violations of the WVCCPA, and thus, could not obtain a temporary injunction. While the Circuit Court of Kanawha County was misled by the defendants' narrow and fictitious version of the standard for obtaining temporary injunctive relief under the WVCCPA, this Court was not.

> Although the phrase "pattern or practice" permeates the circuit court's order, that phrase does *not* appear in the WVCCPA, nor does our research show that it is commonly used in the area of consumer protection or trade regulation law.

Telecheck, 582 S.E.2d at 895 (emphasis in original). This Court easily discerned that

> [I]nsofar as we can determine from the voluminous record, the Attorney General did not use the phrase "pattern or practice" in his pleadings or arguments, and Telecheck has not cited us to any such instance. To the contrary, the record shows that it was Telecheck that asserted - as essentially the core of its defense to the Attorney General's request for preliminary injunctive relief - the argument that the Attorney General had to prove a "pattern or practice." *In ruling on the Attorney General's request for a preliminary injunction, then, the circuit court used a standard that was introduced and advocated for by Telecheck.*

Id. at 896 (emphasis added.).

Based upon the legislative purpose of the WVCCPA and the remedial nature of the statute, this Court clarified that the standard for obtaining a temporary injunction under W. Va. Code § 46A-7-110 does not require a showing of a pattern or practice of violations. Id. at 897. Rather,

proving a violation of W. Va. Code § 46A-6-104 may be done by proving a single illegal act, without necessarily proving an illegal practice. Id. at 896, n. 18. *See* State ex rel. McGraw v. Imperial Marketing, 506 S.E.2d 799 (W. Va. 1996) (Standard for relief under W. Va. Code § 46A-7-110 substantially lower than ordinary standard of proof for preliminary injunction).

Similarly, in State ex rel. McGraw v. Imperial Marketing, 506 S.E.2d 799 (W. Va. 1998), this Court broadly interpreted the remedies available to the Attorney General. In that case, the defendant argued that the Attorney General had no authority to obtain restitution for consumers because such relief did not constitute excess charges under W. Va. Code § 46A-7-111. This Court rejected that argument, holding that the Legislature's use of the phrase "other appropriate relief" in W. Va. Code § 46A-7-108 indicated that the Legislature meant the full array of equitable relief to be available in suits brought by the Attorney General. Id. at 811-812. Thus, awarding a consumer restitution was not unfair, even if the consumer was not required to return the goods they purchased.

The same standard was used by this Court when it rejected the argument that only consumers can bring claims against an assignee of a consumer contract under W. Va. Code § 46A-2-102. State ex rel. McGraw v. Scott Runyon Pontiac-Buick, 462 S.E.2d 516 (W. Va. 1996). In Scott Runyon, this Court held that the Attorney General had authority to bring these claims on behalf of consumers because of his authority to seek refund of excess charges under W. Va. Code § 46A-7-111. The Court also interpreted the term "excess charges," which is not defined in the WVCCPA, broadly to include the charges that were illegal, as well as those which exceeded lawful amounts.

Historically, this Court has construed the WVCCPA liberally and to benefit consumers. This Court should continue that tradition and hold that consumer has a private cause of action against a debt collector.

3. This Court must give the Attorney General's interpretation of the statute that he enforces "great weight" unless clearly erroneous.

In syllabus point 7 of Evans v. Hutchinson, 214 S.E.2d 453 (W. Va. 1975), this Court articulated yet another longstanding rule of statutory construction.

> Where a statute is of doubtful meaning, the contemporaneous construction placed thereon by the officers of government charged with its execution is entitled to great weight, and will not be disregarded or overthrown unless it is clear that such construction is erroneous.

Thus, if this Court finds that W. Va. Code § 46A-5-101(1) is ambiguous, it should look to the interpretation given the statute by the Attorney General, the constitutional officer charged with enforcing it, and his interpretation should be given "great weight unless clearly erroneous." McJunkin Corp. v. W. Va. Dep't of Tax & Revenue, 457 S.E.2d 123 (W. Va. 1995) *See generally*, W. Va. Dep't of Health v. Blankenship, 431 S.E.2d 681 (W. Va. 1993); Hardy County Bd. of Educ. v. W. Va. Div. of Labor, 445 S.E.2d 192 (W. Va. 1994); Smith v. Bd. of Educ., 452 S.E.2d 412 (W. Va. 1994).. Otherwise, "a staggering administrative burden would fall to the entire court system if administrative bodies operating as delegates of the Executive Department were forbidden to make interpretations of statutes which they are charged by law with administering." Evans, 214 S.E.2d at 462. The Evans court also held an agency's interpretation "ought not to be disregarded without cogent reason." Id., *quoting* State ex rel. Daily Gazette Co. v. County Court, 70 S.E.2d 260 (W. Va. 1952) (emphasis added). Indeed, such interpretations "may even be determinative when questions are very close." State ex rel. Thompson v. Morton, 84 S.E.2d 791, 800 (W. Va. 1954).

The Legislature authorized the Attorney General to bring legal actions in his own name to enforce the provisions of the WVCCPA. *See e.g.* W. Va. Code § 46A-7-108. Among other things, the Attorney General may seek relief regarding alleged "unfair methods of competition and unfair

or deceptive acts or practice," a term which is defined in W. Va. Code § 46A-6-102. The Attorney General, through his Consumer Protection Division, may also " counsel persons and groups of their rights and duties under this chapter," W. Va. Code § 46A-7-102(b), including the rights of consumers to bring actions arising from alleged UDAPS, as provided for in W. Va. Code § 46A-5-101(1).

It is the opinion of the Attorney General that W. Va. Code § 46A-5-101(1) clearly and unequivocally gives a consumer the right to a private cause of action against any "person," including debt collectors, violating the WVCPPA.

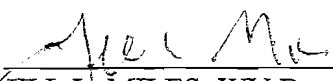
IV
CONCLUSION

The Attorney General respectfully and unequivocally joins in the plaintiff's request that this Court find that consumers' absolutely do have a right to a private cause of action against debt collectors under W. Va. Code § 46A-5-101(1).

Respectfully submitted,

STATE OF WEST VIRGINIA ex rel.
DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

By Counsel



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No. 35709

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LINDA BARR,

Plaintiff/Respondent

v.

NCB MANAGEMENT SERVICES, INC.,
and HSBC BANK NEVADA, N.A.,

Defendants/Petitioners.

CERTIFICATE OF SERVICE

I, Jill L. Miles, Deputy Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing **PROPOSED AMICUS BRIEF OF THE WEST VIRGINIA ATTORNEY GENERAL IN SUPPORT OF PLAINTIFF/RESPONDENT** was served upon all counsel of record by placing a copy thereof in the regular course of the United States mail, postage prepaid this 11th day of January, 2011, addressed as follows:

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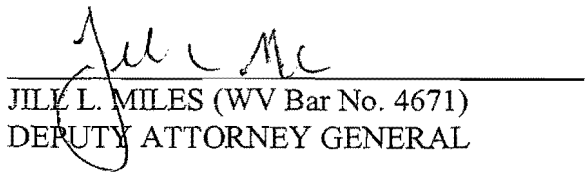

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