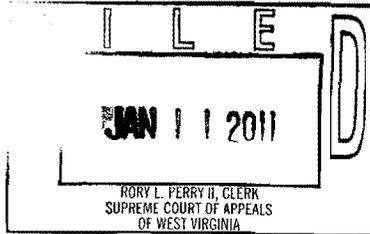


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LINDA BARR,

Plaintiff,

v.



Case No. 35709
On Certified Question
from the United States District Court
for the Northern District of West Virginia
Honorable John P. Bailey
Civil Action No. 3:10-CV-60

NCB Management Services, Inc., and
HSBC Bank Nevada, N.A.,

Defendants.

BRIEF OF AMICUS CURIAE MOUNTAIN STATE JUSTICE, INC.

Respectfully submitted,
Bren J. Pomponio (WV BAR ID No. 7774)
Mountain State Justice, Inc.
1031 Quarrier Street, Suite 200
Charleston, WV 25301
(304)344-3144
(304)344-3145 (fax)

I. TABLE OF CONTENTS

Table of Authorities	3
Certified Questions Presented	4
Argument	4 - 12
Conclusion	12

II. TABLE OF AUTHORITIES

Cases

<u>Thomas v. Firestone Tire & Rubber</u> , 164 W. Va. 763, 769, 266 S.E.2d 905, 909 (1980)	5
<u>Warden v. PHH Mortgage Corp.</u> , No. 3:10-CV-00075 (N.D.W. Va.)	5
<u>Stover v. Fingerhut Direct Marketing, Inc.</u> , No. 5:09-cv-00152, <u>available in</u> 2010 WL 1507182, at *3 (S.D.W.Va. Mar. 19, 2010)	12
<u>Scott v. Wells Fargo Home Mortg. Inc.</u> , 326 F. Supp. 2d 709, 717 (E.D. Va. 2003) (citing <u>Perry v. Stewart Title Co.</u> , 756 F.2d 1197 (5th Cir.1985))	12

Statutes

W. Va. Code § 46A-2-122	4, 5
W. Va. Code § 46A-5- 101	4, 5, 12
W. Va. Code § 46A-2-115	8, 9
W. Va. Code § 46A-2-127(c)	9
W. Va. Code § 46A-2-127(g)	9
W. Va. Code § 46A-2-128 ©)	9
W. Va. Code § 46A-2-128(e)	9
15 U.S.C. § 1692	12

Other

Keith Wofford & David Burkhalter, <i>Predatory Lending and Home Equity Securitizations</i> , Moody's Investors Service at 1-3 (April 28, 2000)	5
--	---

III. CERTIFIED QUESTION PRESENTED

The question certified by the Northern District of West Virginia to this Court is as follows:

Whether 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.

IV. ARGUMENT

A. Introduction.

Because of the coincidence of high home ownership and low income and lack of sophistication, West Virginia was a fertile ground for predatory lending. Since the economic downturn and subprime lending crash, the amicus, Mountain State Justice, Inc, (“MSJ”) a non-profit public interest law firm, currently has nearly 400 current cases it serves out of its two offices statewide involving the potential loss of our clients’ homes to foreclosure. The vast majority of these cases include claims against loan servicers – the entity that collects payments on the mortgage on behalf of the note holder – alleging violations of the West Virginia Consumer Credit and Protection Act (“WVCCPA”). MSJ has sought leave to file this *amicus* brief so that this Court would be aware of the substantial harm that would befall West Virginians who are fighting to save their homes from abusive loan servicers. MSJ urges that this Court answer the certified question in the affirmative.

B. **Exempting Loan Servicers From the enforcement Provision of the WVCCPA Would Eliminate the Only Remedy West Virginia Borrowers Have to Save Their Homes From Against Abusive Loan Servicers.**

The certified question presented concerns whether the enforcement provision of the WVCCPA, W. Va. Code § 46A-5-101, applies to professional debt collectors. As the Plaintiff accurately explains in her brief, this Court has recognized for over thirty years that both creditors and

professional debt collectors are subject to the act. See Thomas v. Firestone Tire & Rubber, 164 W. Va. 763, 769, 266 S.E.2d 905, 909 (1980) (“The Court holds that the plain meaning of W. Va. Code § 46A-2-122 requires that the provisions of article 2 of Chapter 46A regulating improper debt collection practices in consumer credit sales must be applied alike to all who engage in debt collection, be they professional debt collectors or creditors collecting their own debts.”). The question however has an even broader implication. If the Court were to interpret section 46A-5-101 to restrict a consumers remedy for violations of the act only to creditors, mortgage loan servicers would also claim they are not subject to the act because they collect payments on the loan on behalf of another entity. In fact, loan servicers have begun to make such arguments in support of dismissal in cases around the state. See, e.g., Warden v. PHH Mortgage Corp., No. 3:10-CV-00075 (N.D.W. Va.) (Defendant’s Motion for Judgment on the Pleadings). Restricting the application of section 46A-5-101 as the debt collector in this case suggests would leave the door open for loan servicers to abusive West Virginia borrowers and seek the wrongful foreclosure on their homes without providing borrowers with any cause of action to save their homes.

1. Loan Servicing and the Modern Mortgage Market.

Asset securitization enabled subprime lending to expand exponentially over the last decade. See Keith Wofford & David Burkhalter, *Predatory Lending and Home Equity Securitizations*, Moody’s Investors Service at 1-3 (April 28, 2000). The asset securitization model has generated billions on Wall Street, largely on the backs of low income consumers. The model resulted in the subprime crash in 2008 and spurred a economic recession in this country.

Securitization is similar to issuing a corporate bond, except that the lender does not promise to repay principal and interest to the investor, but rather promises to use the consumers’ loan

payments to repay investors. It works like this: An entity driving the system, known as the master lender, enters into a series of agreements through which groups of mortgage loans are brokered, originated and funded pursuant to underwriting guidelines laid out by the master lender. Once the loans are funded, they are transferred into a trust created by the master lender. The trust issues securities which are sold to investors. The trust in turn uses the funds from investors to buy more mortgage loans from a front end lender, who either originates the loans through a broker, or who underwrites the origination of loans. Finally, the consumers' loan payments are used to repay the investors who purchased the securities. The right and duty to collect payments from the borrower, is severed from the principal of the loans and sold to another entity or retained by the lender.

The rights and obligations of the master lender, the trust, the originating lender and the servicer, are typically spelled out in a lengthy contract called a "pooling and servicing agreement" or "PSI." These pooling and servicing agreements set forth who is going to service the loans for the trust and who services servicing fees for the various services. The servicer's income is derived totally from the various fees for servicing the loan at various stages.

It is commonplace for consumers to deal exclusively with a loan servicer, who are responsible for accepting payments from the borrowers, dunning borrowers when they are in default, and conducting all consumer service and collection activities, including foreclosure.

2. Statewide Class Action Settlements Prohibiting Abusive Loan Servicing Practices.

MSJ has represented West Virginia consumers in a various statewide class actions, which have resulted in class relief prohibiting servicers from engaging in abusive loan servicing. All of these important class settlements were made possible only through private enforcement of the

WVCCPA. Below is an example of the practices and results of some of these case.

a. Fairbanks Capital Corp.

Fairbanks Capital Cop. ("Fairbanks), was possibly the most notorious loan servicer in the mortgage lending industry. From approximately 2002 to 2004, Fairbanks was one of the largest subprime loan servicers in the country. Ultimately Fairbanks became the subject of investigations around the country, from the federal government to state Attorneys General, to local investigative news organizations, to Wall Street rating agencies. Fairbanks at one time pursued foreclosure of approximately 750 West Virginia homes out of approximately 2000 plus loans being serviced. This astounding number – thirty to forty percent of its West Virginia portfolio – was pursued through a pattern and practice of violating West Virginia law by (1) charging West Virginia borrowers illegal charges; (2) refusing to credit payments to borrowers accounts to create a false appearance that the borrower is in default; (3) charging borrowers attorneys fees, despite the fact that this practice is specifically prohibited by statute; (4) threatening foreclosure of private residences unless the borrower pays the illegal charges and attorneys fees; and (5) ultimately foreclosing on West Virginia homeowners when payments could have been made without taking the borrowers home.

Fairbanks began this pattern against individual West Virginians by acquiring the ownership of or servicing rights to home-secured loans on property in which the consumers have an equity position. In the first month, Fairbanks received and deposited the consumer's payments, but did not post them promptly or added an impermissible fee. Once the impermissible fee was posted, even if it is disputed by the consumer, the loan would be "in default" under Fairbanks' practices. In the second month or a subsequent month, Fairbanks received and deposited the mortgagor's payment, but then (1) posted it as a partial payment because of the late fees, or (2) did not post it at all; instead

the payment is held in a “suspense account.”

Fairbanks, over the ensuing months added impermissible fees, such as attorneys fees or “property preservation fees,” illegal under West Virginia law.

Next, Fairbanks put the foreclosure wheels in motion. The company contacted the consumer and claimed that hundreds or thousands (usually \$2,000 to \$4,000) must be paid immediately or the consumer’s home will be sold. Many victims paid the extortionate charges to save their homes, but the fraudulent pattern simply began again in the next payment cycle. During the period of the pre-foreclosure dispute, Fairbanks illegally added anywhere from hundreds to a couple thousand dollars to the actual amount due, amounts never contemplated by the original loan documents and which are illegal under state law.

Regardless of how much money the victimized consumer sends to Fairbanks, the outcome was almost always the same. Fairbanks cashed the checks and then made new and additional demands under threat of foreclosure. Well into the fraud in some cases, Fairbanks mailed a “forbearance agreement” to the victimized consumer. That document offers to allow the consumer to “pay late fees and other fees” under an “extended payment plan.” Included in the “plan” is a paragraph that absolves Fairbanks of any and all claims that the consumer may have “now or in the future.” Many unsophisticated homeowners – under duress and desperate to save the homes that they, their children, or even their elderly parents reside in – sign the adhesive document. Often, within days Fairbanks declares the “forbearance agreement” to be in default, even though it is not.

MSJ filed a statewide class action against Fairbanks (the first in the country). The Complaint alleged that Fairbanks violated several provisions of the WVCCPA:

– W. Va. Code § 46A-2-115 (prohibition against assessment of illegal default fees

and requiring that payments be applied against amounts due).

– W. Va. Code §§ 46A-2-127(g) (prohibiting “[a]ny representation that an existing obligation of the consumer may be increased by the addition of attorney’s fees, investigation fees, service fees or any other fees or charges when in fact such fees or charges may not legally be added to the existing obligation”).

– W. Va. Code § 46A-2-128(c) (declaring as unconscionable “[t]he collection or the attempt to collect from the consumer all or any part of the debt collector’s fee or charge for services rendered”).

The case was ultimately settled. The settlement provided for the moratorium of foreclosures statewide, appointment of a monitor to review accounts to ensure accounts were serviced consistent with West Virginia law, and monetary reimbursement for the consumers. (See Ex. A.) the settlement – and indeed the civil action itself – would not have been possible if the enforcement provision of the WVCCPA were limited only to creditors. Were there no application of the WVCCPA to Fairbanks, thousands of West Virginians would have faced potential foreclosure with little to no was to save their homes.

b. EMC Mortgage Corp.

EMC Mortgage Cop. (“EMC”) had a similar reputation of loan servicing abuse. EMC would similarly take over borrowers accounts and then consider them in default. EMC would then proceed to add hundreds to thousands of dollars to the borrowers accounts and demand payment of these illegal sums under the threat of foreclosure.

A class action was filed in the Circuit Court of Lincoln County, West Virginia. The Complaint alleged again various provisions of the WVCCPA. See W. Va. Code § 46A-2-115 (prohibiting the assessment of default fees and requiring the application of payments against amounts due); 46A-2-127(c) (prohibiting misrepresenting amounts due); 46A-2-128(e) (prohibiting the

assessment of any portion of the debt collectors fee). Again a settlement was reached. Pursuant to the settlement, EMC agreed, among other things, to cease assessment of bogus fees, apply payments against amounts due, and provide borrowers with adequate statements of their accounts. (See Ex. B.)

c. ABN –AMRO Mortgage Group.

ABN-AMRO Mortgage Group (“ABN-AMRO”) was a Dutch bank that serviced loans in West Virginia for many years. The servicer was proceeding with unnecessary and wrongful foreclosure on hundreds of West Virginians when MSJ filed a class action. The Complaint against alleged violations of the WVCCPA and a class wide settlement was reached. ABN-AMRO agreed to apply borrowers payments against amounts due, cease assessing the illegal default fees, and provide consumer understandable account records. (See Ex. C.)

d. Homecoming Financial Network, Inc.

Homecomings Financial Network, Inc. (“Homecomings”) was also the Defendant in a class action suit alleging loan servicing abuses. Homecomings agreed to a settlement on similar terms to Fairbanks, EMC, and ABN-AMRO. (See Ex. D.)

Enforcement of the WVCCPA led to statewide moratoriums in each of these cases, as well as in others. Thousands of West Virginia homeowners would have faced loss of their family home were it not for the protections of the WVCCPA against abusive debt collection practices.

2. Individual Allegations of Loan Servicer Abuse.

Since the mortgage crisis and resulting economic crash, MSJ has seen a significant increase in the number of individual cases seeking to protect homeowners from foreclosure at the hands of abusive loan servicers. Consider the following scenario.

A West Virginia family is struggling with their mortgage either because their mortgage was a product of predatory lending and more than they can afford or possibly due to a loss in income. The homeowner contacts her or his loan servicer to seek assistance and an affordable monthly payment. The loan servicer, pursuant to the federal Making Homes Affordable Program, agrees to consider the borrower for a loan modification. The servicer first directs the borrower to not make any payments while their modification is being considered.

Next the servicer delays the application for months, repeatedly directing the borrower not to make payments and assuring the borrower that there will be no foreclosure while the loan modification is processed. After several months one of two things happens: (1) the servicer proceeds to foreclose on the borrower; or (2) the servicer places the borrower into a temporary trial loan modification. In the latter scenario, at the conclusion of the trial modification, the servicer informs the borrower that her or his application for a permanent modification is denied. The borrower then scrambles to cure their arrearage and asks the servicer what is owed on the loan to prevent foreclosure. The servicer provides a figure to the borrower, which the borrower submits timely. The servicer nonetheless proceeds to foreclose.

MSJ currently has hundreds of cases that fit the above fact pattern. Servicers routinely return payments to borrowers thereby increasing the amount of their arrearage and preventing them from curing; misrepresent to borrowers the status of their loan; misrepresent the amount they need to pay to avoid foreclosure; and foreclose after specifically misrepresenting to the borrower that no foreclosure will occur. (See, e.g., Ex. E.) The only recourse for hundreds of borrowers facing losing their homes who seek legal assistance from MSJ is private enforcement of the WVCCPA.

3. If the WVCCPA Were Not Enforceable Against Loan Servicers, Servicers Would Be Free From Any Regulation Regarding Their Abusive Loan Servicing In West Virginia.

The Defendant may argue that WVCCPA was designed to supplement the Federal Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 et. seq., and because the FDCPA provides for a cause of action against non-creditor debt collectors, the legislature consciously decided to limit the CCPA to only creditors. However, the WVCCPA was enacted three years prior to the enactment of the FDCPA, see Stover v. Fingerhut Direct Marketing, Inc., No. 5:09-cv-00152, available in 2010 WL 1507182, at *3 (S.D.W.Va. Mar. 19, 2010), and the legislature therefore could not have intended to supplement a statute that was not even in existence at the time. More importantly, mortgage servicers are specifically exempt from the FDCPA. See, e.g., Scott v. Wells Fargo Home Mortg. Inc., 326 F. Supp. 2d 709, 717 (E.D. Va. 2003) (citing Perry v. Stewart Title Co., 756 F.2d 1197 (5th Cir.1985)). Accordingly, if the court were to restrict the application of the enforcement provisions of the WVCCPA consistent with the Defendant's argument in this case, loan servicers would not be subject to any debt collection regulation for their abusive loan servicing practices.

V. CONCLUSION

The amicus, MSJ, adopts and endorses the legal arguments as they have been stated by the Plaintiff in her brief. It is clear from a plain reading of the statute, the WVCCPA is enforceable against any person, not just "creditors," as urged by the Defendant. See W. Va. Code § 46A-5-101. A contrary construction would leave thousands of West Virginia homeowners without any ability to save their home from abusive mortgage loan servicing practices. MSJ therefore urges that this Court answer the certified question in the affirmative .

**Respectfully Submitted,
MOUNTAIN STATE JUSTICE, INC.**

Bren J. Pomponio

Bren J. Pomponio (State Bar ID # 7774)

Mountain State Justice, Inc.

922 Quarrier Street, Suite 525

Charleston, WV 23501

(304) 344-3144

(304) 344-3145 (fax)

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE