

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

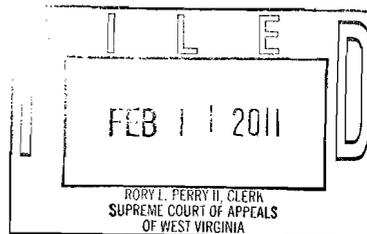
LINDA BARR,

Plaintiff,

v.

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

Defendants.



Case No. 35709

DEFENDANT NCB MANAGEMENT SERVICES, INC.'S BRIEF
On Certified Question from the United States District Court
for the Northern District of West Virginia
The Honorable Chief Judge John P. Bailey
Civil Action No. 3:10-cv-60

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I. CERTIFIED ISSUE PRESENTED

The Northern District of West Virginia certified the following issue to this Court:

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.*

II. STATEMENT OF THE CASE

Plaintiff, Linda Barr, correctly admits “this Court need not address the facts in answering the certified question of law[.]”¹ In shortest summary, however, this case relates to a debt plaintiff owes to HSBC Bank Nevada, N.A. (“HSBC”). In 2010, HSBC placed plaintiff’s account with NCB Management Services, Inc. (“NCB”) for collection.

On June 14, 2010, plaintiff filed a complaint in the United States District Court for the Northern District of West Virginia against HSBC and NCB.² Plaintiff asserts two claims. First, plaintiff alleges HSBC and NCB violated the West Virginia Consumer Credit and Protection Act (“WVCCPA”), W. Va. Code § 46A-2-122, *et seq.*, through their alleged improper collection actions. Based upon this allegation, plaintiff alleges she has a private cause of action against both HSBC and NCB for the alleged WVCCPA violations under § 46A-5-101(1).

Second, plaintiff avers defendants’ alleged improper collection actions constitute the tort of intentional infliction of emotional distress. Plaintiff seeks actual, statutory, and punitive damages for her claims.³

On August 6, 2010, NCB filed a Motion to Dismiss plaintiff’s WVCCPA claim, arguing there is no private cause of action against non-creditor debt collectors under § 46A-5-101(1). On September 20, 2010, Chief Judge John P. Bailey certified to this Court

¹ Pl. Brief at p. 3.

² Plaintiff filed an amended complaint to correctly identify the HSBC defendant as “HSBC Bank Nevada, N.A.,” which was previously mistakenly identified as “HSBC Bank USA, N.A.”

³ In the “Facts” section of her brief, plaintiff makes inflammatory and conclusory statements. *See* Pl. Brief at p. 4. She also includes allegations not in her complaint. *Id.* Plaintiff’s alleged “factual” summary should be disregarded.

whether a consumer has a private cause of action against a non-creditor debt collector pursuant to the WVCCPA. Chief Judge Bailey also stayed the case pending a decision on the certified issue. On October 27, 2010, this Court accepted the certified issue.

On January 12, 2011, plaintiff filed her brief, arguing the certified issue should be answered in the affirmative. Amici curiae briefs in support of plaintiff's position have been submitted by: (1) AARP, the National Association of Consumer Advocates, and the National Consumer Law Center; (2) Mountain State Justice, Inc.; and, (3) West Virginia Attorney General.

III. SUMMARY OF ARGUMENT

The remedy provision in W. Va. Code § 46A-5-101(1) provides:

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 a penalty in an amount determined by the court not less than one hundred dollars nor more than one thousand dollars.

W. Va. Code, § 46A-5-101(1) (emphasis added).

Applying the plain language rule, this remedy provision only applies to *creditors*. Several rules of statutory construction also establish this fact. For example, “[u]nder the familiar rule of *ejusdem generis* the general or inclusive phrase must be deemed to apply to things of the class or group specifically denominated and enumerated.” *Greene Line Terminal Co. v. Martin*, 10 S.E.2d 901, 906 (W. Va. 1940). “Under this rule of construction, general words do *not* amplify particular terms preceding them, *but are themselves restricted and explained by the particular terms.*” *Parkins v. Londeree*, 146 W.Va. 1051, 1062, 124 S.E.2d 471, 477 (W. Va. 1962) (emphasis added). Applying the rule of *ejusdem generis*, the general language (*i.e.*, “the person violating this chapter”) must be read to only apply to the person falling within the preceding class specifically denominated (*i.e.*, “creditor”). In other words, the phrase “the person violating this chapter” simply refers back to the violating “creditor.”

Further, the remedy provision is only triggered “[i]f a *creditor* has violated the provisions of [Chapter 46A.]” W. Va. Code, § 46A-5-101(1) (emphasis added). The remedy provision is wholly inapplicable *unless this condition is satisfied*.

Notwithstanding this fact, plaintiff has *not* presented any reasonable or factually supported argument as to how the remedy provision was triggered by the actions of NCB, a non-creditor debt collector.

A review of other subsections in § 46A-5-101 also confirms the remedy provision only applies to creditors. For example, the defenses in § 46A-5-101(7)-(8) are only available to creditors. Considering this fact, the remedy provision can reasonably be interpreted as only applying to creditors.

Finally, the sources of the WVCCPA and similar state consumer codes establish the remedy provision only applies to creditors. In fact, courts in Maine, Oklahoma, and Kansas have all interpreted the remedy provisions in their respective state codes as only applying to creditors. When faced with *the identical issue before this Court*, the Maine court rejected the plaintiff's interpretation of the remedy provision and ruled:

If [plaintiff's] interpretation is correct, then non-creditors being sued under the Act are not entitled to assert any of the defenses listed in section 5-201, including that the actions taken were "unintentional and the result of a bona fide error." "Statutory language should be construed to avoid absurd, illogical or inconsistent results." Interpreting section 5-201 to allow a consumer to sue non-creditors leads to such an absurd, illogical and inconsistent result. Specifically, non-creditors sued for violations of the Act will be precluded from asserting all of the statutory defenses that a creditor could assert from the same alleged violations.

Kueter v. Chrysler Financial Corp., 2000 WL 33675724, *4 (Me. Super. 2000) (citations omitted).

The Court should answer the certified question in the negative. A consumer does *not* have a private cause of action per § 46A-5-101(1) against a non-creditor debt collector for violations of § 46A-2-122, *et seq.*

IV. ARGUMENT

“A de novo standard is applied by this Court in addressing the legal issues presented by a certified question from a federal district or appellate court.” Syl. pt. 1, *Camden-Clark Memorial Hosp. Ass’n v. St. Paul Fire and Marine Ins. Co.*, 224 W.Va. 228, 228, 682 S.E.2d 566, 567 (W. Va. 2009); *see also* Syl. pt. 1, *Bower v. Westinghouse Elec. Corp.*, 206 W.Va. 133, 135, 522 S.E.2d 424, 426 (W. Va. 1999) (“This Court undertakes plenary review of legal issues presented by certified question from a federal district or appellate court.”).

A. The Remedy Provision in W. Va. Code § 46A-5-101(1) Only Applies to Creditors

It is settled that “courts must read the relevant law according to its unvarnished meaning, without any judicial embroidery.” *West Virginia Health Care Cost Review Authority v. Boone Memorial Hosp.*, 196 W.Va. 326, 336, 472 S.E.2d 411, 421 (W. Va. 1996); Syl. pt. 4, *State v. Ray*, 221 W.Va. 364, 366, 655 S.E.2d 110, 112 (W. Va. 2007) (same). “Plain language should be afforded its plain meaning.” *Crockett v. Andrews*, 153 W.Va. 714, 719, 172 S.E.2d 384, 387 (W. Va. 1970). And “the words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use.” Syl. pt. 4, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W.Va. 137, 137, 107 S.E.2d 353, 354 (W. Va. 1959).

The remedy provision in § 46A-5-101(1) provides:

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 a penalty in an amount determined

by the court not less than one hundred dollars nor more than one thousand dollars.

W. Va. Code, § 46A-5-101(1) (emphasis added).

Applying the plain language rule, this remedy provision only applies to *creditors*. This Court recently suggested the limited applicability of this provision by noting the above-quoted language “does in fact purport to place a penalty directly upon ‘creditors’ who have violated certain provisions of chapter 46A.” *Harper v. Jackson Hewitt, Inc.*, 2010 WL 4723380, *__ (W. Va. 2010). The Court had previously ruled on several occasions that the “express language” in § 46A-5-101(1) “imposed civil liability on creditors.” Syl. pt. 1, *Orlando v. Finance One of West Virginia, Inc.*, 179 W.Va. 447, 448, 369 S.E.2d 882, 883 (W. Va. 1988); Syl. pt. 3, *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229, 231, 511 S.E.2d 854, 856 (W. Va. 1998) (gathering authorities) (same); *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 556, 567 S.E.2d 265, 272 (W. Va. 2002) (“[B]y the express language of W. Va. Code, 46A-5-101(1), [the Legislature] created a cause of action for consumers and imposed civil liability on creditors[.]”); *Dunlap v. Friedman’s, Inc.*, 213 W.Va. 394, 396, 582 S.E.2d 841, 843 n. 4 (W. Va. 2003) (same).

In addition to the plain language in § 46A-5-101(1), several rules of statutory construction also establish the disputed remedy provision only applies to *creditors* and the phrase “the person violating this chapter” merely relates back to the violating “creditor.” “It is a fundamental principle of statutory construction that the meaning of a word cannot be determined in isolation, but it must be drawn from the context in which it

is used. Often, the meaning of a word that appears ambiguous if viewed in isolation will become clear when the word is analyzed in light of the term that surrounds it.” *West Virginia Health Care Cost Review Authority*, 196 W.Va. at 338, 472 S.E.2d at 423 (citations, quotation marks, and brackets omitted). Further, it is well settled, “[i]n the construction of statutes, where general words follow the enumeration of particular classes of persons or things, the general words, under the rule of construction known as *ejusdem generis*, will be construed as applicable only to persons or things of the same general nature or class as those enumerated, unless an intention to the contrary is clearly shown.” Syl. pt. 4, *Ohio Cellular RSA Ltd. Partnership v. Board of Public Works of State of W.Va.*, 198 W.Va. 416, 417, 481 S.E.2d 722, 723 (W. Va. 1996); *see also* Syl. pt. 2, *Vector Co. v. Board of Zoning Appeals of City of Martinsburg*, 155 W.Va. 362, 362, 184 S.E.2d 301, 301-302 (W. Va. 1971); *Greene Line Terminal*, 10 S.E.2d at 906 (“Under the familiar rule of *ejusdem generis* the general or inclusive phrase must be deemed to apply to things of the class or group specifically denominated and enumerated.”). This rule of statutory construction “is based on the obvious reason that if the legislature had intended the general words to be used in their unrestricted sense, they would have made no mention of the particular classes. Under this rule of construction, general words do *not* amplify particular terms preceding them, *but are themselves restricted and explained by the particular terms.*” *Parkins*, 146 W.Va. at 1061-1062, 124 S.E.2d at 477 (quotation marks and citations omitted) (emphasis added).

Ignoring the specific reference to “creditor” in the remedy provision, plaintiff

focuses on the general language “the person violating this chapter.”⁴ Plaintiff errors in this regard.⁵ The rules of statutory construction require the general language to be read in proper context; the general language *cannot* be read in isolation, as plaintiff would like. Applying the rule of *ejusdem generis*, the general language (*i.e.*, “the person violating this chapter”) must be read to only apply to the person falling within the preceding class specifically denominated (*i.e.*, “creditor”). In other words, the phrase “the person violating this chapter” simply refers back to the violating “creditor.”⁶

Application of the rule of *ejusdem generis* gives proper meaning and effect to all the words in the disputed remedy provision. Contrary to plaintiff’s argument, the phrase “the person violating this chapter” is *not* read-out of the statute, but instead given its proper contextual meaning.⁷ As explained below, it is plaintiff’s interpretation of the disputed remedy provision (not NCB’s interpretation) that requires the Court to rewrite the statute. The Court, therefore, should answer the certified question in the negative. Simply put, a consumer does *not* have a private cause of action per § 46A-5-101(1) against a non-creditor debt collector for violations of § 46A-2-122, *et seq.*

⁴ See Pl. Brief at pp. 5-8.

⁵ Plaintiff also errors by focusing on the WVCCPA’s definition of “person” in § 46A-5-102(31). See Pl. Brief at p. 6. The meaning of the word “person” is not the issue. The issue before the Court is: What did the Legislature mean when it used the general phrase “the person violating this chapter” following the use of the specific term “creditor”? The answer to this question is ascertained by applying settled rules of statutory construction.

⁶ Plaintiff mistakenly argues: “If the Legislature had intended to restrict Section 5-101 to original creditors, then it would not have used the phrase ‘person’ *in addition* to ‘creditor’ to indicate the party from whom a consumer could recover. Rather, it would have *only* used the term ‘creditor,’ which it did not do.” Pl. Brief at p. 6. Plaintiff’s argument is contrary to the rule of *ejusdem generis*, which presumes the general language (“the person violating this chapter”) is restricted to the specific language (“a creditor”). See, *e.g.*, *Parkins*, 146 W.Va. at 1061-1062, 124 S.E.2d at 477.

⁷ See Pl. Brief at p. 7.

B. The Remedy Provision in W. Va. Code § 46A-5-101(1) Is Not Triggered by the Actions of a Non-Creditor Debt Collector Such As NCB

Perhaps most importantly, the remedy provision in § 46A-5-101(1) contains a conditional statement. The remedy provision is only triggered “[i]f a *creditor* has violated the provisions of [Chapter 46A.]” W. Va. Code, § 46A-5-101(1) (emphasis added). The remedy provision is wholly inapplicable *unless this condition is satisfied*. In the words of this Court, “Section 101(1), *by its terms*, creates a cause of action for actual damages and a civil penalty *when a creditor violates any of the provisions of the Act enumerated therein.*” *U.S. Life Credit Corp. v. Wilson*, 171 W.Va. 538, 541, 301 S.E.2d 169, 172 (W. Va. 1982) (emphasis added); *see also Jones v. Sears Roebuck and Co.*, 2008 WL 4844717, *6 n. 15 (4th Cir. 2008) (“Section 46A-5-101(1) provides that a debtor who can show that *his or her creditor violated Chapter 46A* ‘has a cause of action to recover’”) (emphasis added). As the statutory language unambiguously confirms, only the actions of a *creditor* trigger the remedy provision. The remedy provision is *not* triggered by the actions of a non-creditor debt collector such as NCB.

1. Debt Collectors Such As NCB Are Not Creditors

Realizing the remedy provision is not triggered unless she can prove “a creditor has violated the provisions of [Chapter 46A],” plaintiff attempts to argue NCB is in fact a “creditor.”⁸ Plaintiff’s argument fails for three reasons.

First, plaintiff admits HSBC is her creditor and avers the debt she owes relates to

⁸ Pl. Brief at pp. 8-9.

“a loan obtained from Defendant HSBC[.]”⁹

Second, when answering a certified question, this Court “will assume that the findings of fact by the certifying court are correct.” *Barefield v. DPIC Companies, Inc.*, 215 W.Va. 544, 550, 600 S.E.2d 256, 262 (W. Va. 2004); *see also Mutafis v. Erie Ins. Exch.*, 174 W.Va. 660, 663, 328 S.E.2d 675, 678 (W. Va. 1985). In certifying the question presented here, Chief Judge Bailey concluded NCB is *not* a creditor. As plaintiff concedes, “the certified question rests on [this] assumption[.]”¹⁰ Therefore, in answering the certified question, this Court must assume NCB is not a “creditor,” but instead a “non-creditor debt collector.” *See Barefield*, 215 W.Va. at 550, 600 S.E.2d at 262; *Mutafis*, 174 W.Va. at 663, 328 S.E.2d at 678.

Third, “in the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.” *Shepherdstown Observer, Inc. v. Maghan*, 700 S.E.2d 805, 809 (W. Va. 2010). The term “creditor” is not defined in § 46A-5-101.¹¹ However, the WVCCPA defines the term “credit” as “the privilege granted by a *creditor* to a debtor to defer payment of debt or to incur debt and defer its payment.” W. Va. Code, § 46A-1-102(17) (emphasis added). As commonly understood, a “creditor” is the person to whom the debt or financial obligation

⁹ Pl. Brief at p. 4.

¹⁰ Pl. Brief at p. 8.

¹¹ W. Va. Code, § 46A-3-109a(5) defines “creditor” as “an institution, the deposits of which are insured by the federal deposit insurance agency, the national credit union share insurance fund, or a subsidiary of such an institution, or a subsidiary of a holding company owning such an institution[.]” However, § 46A-3-109a(5) specifically states this definition is “for purposes of this section only[.]”

is ultimately owed or due. *See* Black's Law Dictionary 368 (6th ed. 1990). As one federal court has observed:

[T]he term "creditor" is by no means some strange visitor from the legal lexicon. The phrase enjoys everyday usage and has a plain, unambiguous meaning in ordinary parlance. Webster's Dictionary (2d ed. 1983), which is typical in this respect, defines a creditor as "one to whom a sum of money . . . is due."

In re Hoffman, 65 B.R. 985, 992 (D. R.I. 1986). This common meaning of the term "creditor" also comports with the definition in the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq.*, the primary federal legislation regulating non-creditor debt collectors such as NCB.¹²

It is clear the WVCCPA incorporates the plain meaning of the term "creditor." And the Court has recognized this fact. *See Thomas v. Firestone Tire and Rubber Co.*, 164 W.Va. 763, 769, 266 S.E.2d 905, 909 (W. Va. 1980) (distinguishing between "professional debt collectors" and "creditors collecting their own debts"). To be sure, there is a stark difference between a creditor and third-party debt collector hired by the creditor. A third-party debt collector (such as NCB) collecting a debt on behalf of another is *not* the person to whom the debt or financial obligation is ultimately owed or due; therefore, a third-party debt collector is *not* a "creditor." As to plaintiff, it cannot be reasonably disputed that HSBC (not NCB) is her "creditor."

Plaintiff has *not* presented any reasonable or factually supported argument as to how the disputed remedy provision was triggered by NCB's actions. For this reason

¹² *See* 15 U.S.C. § 1692a(4) ("The term 'creditor' means any person who offers or extends credit creating a debt or to whom a debt is owed[.]").

alone, the Court should answer the certified question in the negative.¹³

C. Other Subsections in W. Va. Code § 46A-5-101 Establish the Remedy Provision in Subsection (1) Only Applies to Creditors

A review of other subsections in § 46A-5-101 confirms the disputed remedy provision only applies to creditors. For example, subsections (7) and (8) contain the following defenses:

(7) A *creditor* has no liability for a penalty under subsection (1) or subsection (4) of this section if within fifteen days after discovering an error, and prior to the institution of an action under this section or the receipt of written notice of the error, the *creditor* notifies the person concerned of the error and corrects the error. If the violation consists of a prohibited agreement, giving the consumer a corrected copy of the writing containing the error is sufficient notification and correction. If the violation consists of an excess charge, correction shall be made by an adjustment or refund.

(8) If the *creditor* establishes by a preponderance of evidence that a violation is unintentional or the result of a bona fide error of fact notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation or error, no liability is imposed under subsections (1), (2) and (4) of this section, and the validity of the transaction is not affected.

W. Va. Code, § 46A-5-101(7)-(8) (emphasis added).

As the above language indicates, the defenses are only available to “creditors.”

The statute does not provide a defense for any “person violating this chapter.”

Considering this fact, the disputed remedy provision can reasonably be interpreted as

¹³ Amici curiae for AARP, *et al.*, appear to suggest an alternative theory for triggering § 46A-5-101(1). See Amici Curiae for AARP, *et al.*, Brief at p. 6. While less than clear, the amici curiae appear to contend the disputed remedy provision was triggered through NCB’s actions as an “agent” for the creditor HSBC. *Id.* However, there has *not* been any factual finding regarding NCB’s status as an “agent.” See, e.g., *Harper*, 2010 WL 4723380 at *__ (“[T]he question of whether an agency relationship exists is generally fact dependent[.]”); *Burless v. West Virginia University Hospitals, Inc.*, 215 W.Va. 765, 771, 601 S.E.2d 85, 91 (W. Va. 2004) (same). There is no basis, therefore, to conclude the disputed remedy provision was triggered by NCB’s actions as an “agent.” The amici curiae’s “trigger argument” should be disregarded.

only applying to creditors. As Chief Judge Bailey succinctly stated:

The Court finds it unlikely that the Legislature would provide a defense exclusively to a creditor. Thus, it is equally unlikely that the Legislature's language in subsection (1), i.e., "the person violating this chapter," provides a private cause of action against a non-creditor debt collector.¹⁴

Not surprisingly, plaintiff does not even attempt to address this issue in her brief.

Two other subsections in § 46A-5-101 are revealing. In subsections (2) and (3), the Legislature granted the consumer a remedy against an assignee who directly undertakes collection of an account. *See* W. Va. Code, § 46A-5-101(2)-(3). These subsections prove the Legislature understands how to create a remedy against certain types of debt collectors. The absence of any similar language in subsection (1) establishes the Legislature did *not* intend for the disputed remedy provision in subsection (1) to apply to non-creditor debt collectors. *See, e.g., State ex rel. Riffle v. Ranson*, 195 W.Va. 121, 128, 464 S.E.2d 763, 770 (W. Va. 1995) ("If the Legislature explicitly limits application of a doctrine or rule to one specific factual situation and omits to apply the doctrine to any other situation, courts should assume the omission was intentional; courts should infer the Legislature intended the limited rule would not apply to any other situation.").

Further, the "willful violations" provision in § 46A-5-105 also establishes the disputed remedy provision in § 46A-5-101(1) only applies to creditors. Section 46A-5-105 provides, "[i]f a *creditor* has willfully violated the provisions of this chapter applying to . . . any prohibited debt collection practice, in addition to the remedy provided in [§ 46-

¹⁴ J. Bailey Certification Order, at p. 6.

A-5-101], *the court may cancel the debt* when the debt is not secured by a security interest.” W. Va. Code, § 46A-5-105 (emphasis added). This provision does not apply (nor could it apply) to non-creditor debt collectors because such entities do not own the debt. The limited application of the “willful violations” provision indicates the Legislature intended to provide a remedy against only “creditors” for prohibited debt collection practices.

D. The Sources of the West Virginia Consumer Credit and Protection Act and Similar State Consumer Codes Establish the Remedy Provision in W. Va. Code § 46A-5-101(1) Only Applies to Creditors

1. The Sources of the West Virginia Consumer Credit and Protection Act

“In 1974, the West Virginia Legislature passed a comprehensive consumer protection bill known as the West Virginia Consumer Credit and Protection Act, W. Va. Code, 46A-1-101, *et seq.*, which sought to modernize and clarify the law regarding consumer sales and credit transactions.” *Clendenin Lumber and Supply Co., Inc. v. Carpenter*, 172 W.Va. 375, 379, 305 S.E.2d 332, 336 (W. Va. 1983); *see also* Vincent P. Cardi, *The West Virginia Consumer Credit and Protection Act*, 77 W. Va. L.R. 401 (1975). “The legislative history of the Act makes it clear that the purpose of creating the Act was because so many consumers failed to accomplish any results at common law against *creditors*.” *Casillas v. Tuscarora Land Co.*, 186 W.Va. 391, 394, 412 S.E.2d 792, 795 (W. Va. 1991) (emphasis added). As this Court has often noted, the WVCCPA “is a hybrid of the Uniform Consumer Credit Code and the National Consumer Act and some sections from then-existing West Virginia law.” *Clendenin Lumber and Supply Co., Inc.*, 172 W.Va. at 379, 305 S.E.2d at 336 n. 4; *see also White v. Wyeth*, 2010 WL

5140048, * __ (W. Va. 2010); *State ex rel. McGraw v. Bear, Stearns & Co., Inc.*, 217 W.Va. 573, 577, 618 S.E.2d 582, 586 (W. Va. 2005).

Although the WVCCPA contains parts of both the Uniform Consumer Credit Code (“UCCC”) and the National Consumer Act (“NCA”), the disputed remedy provision is drawn almost exclusively from the 1974 version of the UCCC.¹⁵ Plaintiff concedes this point.¹⁶ This fact is significant because the UCCC primarily regulates *creditors*. One of the stated purposes of the UCCC is “to protect consumers against unfair practices by some *suppliers of consumer credit*, having due regard for the interests of legitimate and scrupulous *creditors*[.]” Unif. Consumer Credit Code § 1.102(2)(d) (emphasis added).

The UCCC remedy provision provides:

(1) *If a creditor* has violated any provision of this Act applying to . . . , the consumer has a [claim for relief] [cause of action] to recover actual damages and also a right in an action other than a class action, to recover from the person violating this Act a penalty in an amount determined by the court not less than \$100 nor more than \$1,000.

Unif. Consumer Credit Code § 5.201(1) (emphasis added). Comment 1 to this provision states “this section sets forth a right of action in the consumer in the event of violation by

¹⁵ The UCCC was originally drafted in 1968 and amended in 1974.

¹⁶ Plaintiff admits “the Legislature modeled the remedies section of the CCPA on the UCCC’s private remedies provision.” Pl. Brief at p. 14. Chief Judge Bailey concluded the disputed remedy provision “is almost exclusively derived from sections 5.302-04 of the [NCA.]” J. Bailey Certification Order, at p. 8. This conclusion is incorrect. It is true that Professor Cardi cited the NCA sections in the appendix of his law review article, but a review of the cited provisions proves the disputed remedy provision is modeled on the UCCC remedy provision. Even if the disputed remedy provision is derived in part from the NCA sections, however, as Judge Bailey noted, the language used in the disputed remedy provision proves “the Legislature intentionally made reference to creditors.” *Id.* The disputed remedy’s specific reference to creditors, which is *not* contained in the NCA sections, cannot be ignored and supports the conclusion that the disputed remedy provision only applies to creditors.

the *creditor* of each section of this Act that does not include its own provision for infraction[.]” *Id.* at ct. 1 (emphasis added).

The disputed remedy provision is nearly identical to the UCCC remedy provision.

Again, the disputed remedy provision provides:

If a creditor has violated the provisions of this chapter applying to . . . , 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 a penalty in an amount determined by the court not less than one hundred dollars nor more than one thousand dollars.

W. Va. Code, § 46A-5-101(1) (emphasis added).

“The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.” Syl. pt. 1, *Smith v. State Workmen’s Compensation Com’r*, 159 W.Va. 108, 108, 219 S.E.2d 361, 362 (W. Va. 1975). “Laws are presumed to be passed with deliberation[.]” *Mohr v. County Court of Cabell County*, 145 W.Va. 377, 400, 115 S.E.2d 806, 818 (W. Va. 1960). “Courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *State v. Richards*, 206 W.Va. 573, 577, 526 S.E.2d 539, 543 (W. Va. 1999) (quotation marks and brackets omitted). And when the Legislature passes a statute based upon a federal or model statute, the state statute can presumably be interpreted in conformity with the federal or model statute. *See, e.g., Davis Memorial Hosp. v. West Virginia State Tax Com’r*, 222 W.Va. 677, 687, 671 S.E.2d 682, 692 (W. Va. 2008).

Considering the similarity between the disputed remedy provision and the UCCC provision, it is reasonable to presume the Legislature intended for the disputed remedy provision to be interpreted in the same manner as the UCCC provision. The UCCC

provision only applies to *creditors*; therefore, the disputed remedy provision likewise only applies to *creditors*. In summary, by referencing “creditor,” the Legislature expressed its intent to limit the remedy provision to only creditors. This conclusion is buttressed by Professor Cardi’s summary of the disputed remedy provision in his often cited law review article: “A consumer may recover actual damages and a civil penalty in the amount of one hundred dollars to one thousand dollars from a *creditor* who violates the Act’s provisions relating to . . . prohibited debt collection practices[.]” Cardi, 77 W. Va. L.R. at 422-423 (emphasis added). Nowhere in Professor Cardi’s article is there any indication that the disputed remedy provision may be applied to non-creditor debt collectors. *Id.*

2. Similar State Consumer Codes

A review of other state consumer credit codes also establishes West Virginia elected to provide a limited remedy only against creditors. For example, the remedy provision in Maine’s consumer credit code is modeled on the 1974 version of the UCCC. Maine’s remedy provision provides:

If a creditor has violated the provisions of this Act applying to . . . illegal, fraudulent or unconscionable conduct in an attempted collection of debts, section 5-116, any aggrieved consumer has a right to recover actual damages from a person violating this Act, or in lieu thereof any consumer named as a plaintiff in the complaint as originally filed has a right to recover from a person violating this Act an amount determined by the court not less than \$250 nor more than \$1,000.

9-A Me. Rev. Stat. § 5-201(1) (emphasis added).

In *Kueter*, a Maine appellate court faced *the identical issue before this Court*. The *Kueter* court noted “the issue is whether claims under the Consumer Credit Code can be

asserted against entities which are not creditors.” *Kueter*, 2000 WL 33675724 at *3. The plaintiff in *Kueter* alleged the defendant American Auto Transport & Recovery (“American Auto”) violated the substantive debt collection provisions in the Maine consumer credit code, which generally apply to “a person.”¹⁷ *Id.* at *1-3. Based upon that allegation, the plaintiff argued she could assert a remedy against American Auto under the above-quoted Maine remedy provision. *Id.* at *3. Plaintiff contended the general language “a person violating this Act” in the remedy provision established she could assert a remedy against a non-creditor debt collector such as American Auto. *Id.* The court disagreed based upon all of the points presented by NCB hereinabove and granted American Auto’s summary judgment motion. *Id.* at *4-7. The court explained:

[Section 5-116] lists a number of activities that “a person” shall not take “[i]n attempting to collect an alleged debt arising from a consumer credit sale.” As already noted, the Legislature made a distinction between person and creditor when it enacted the Consumer Credit Code, as evidenced by the fact that they provided separate definitions for each of those terms. Section 5-116 specifically uses the word person, as opposed to creditor. Thus, the plain language of section 5-116 would seem to prohibit both creditors and non-creditors from taking the actions listed therein in collecting a debt arising from a consumer credit sale.

However, section 5-116 does not give consumers the right to seek damages for alleged violations of the Act. Rather, section 5-201, gives consumers that right. Located in Article V, Part 2, entitled “Consumers’ Remedies,” that section states that “[i]f a creditor has violated the provisions of this Act applying to . . . illegal, fraudulent or unconscionable conduct in an attempted collection of debts, section 5-116, any aggrieved consumer has a right to recover actual damages from a person violating this Act” [Plaintiff] interprets this section’s later use of the word “person” as evidence that she is entitled to recover damages from non-creditors, such as American Auto, when a creditor has also violated the Act.

¹⁷ See 9-A Me. Rev. Stat. § 5-116(1) (“In attempting to collect an alleged debt arising from a consumer credit sale, consumer lease or consumer loan, a person shall not . . .”).

The introductory clause, “[i]f a creditor has violated the provisions of this Act,” modifies or qualifies the later clause allowing a consumer to recover damages “from a person violating this Act.” In other words, this court interprets the legislative language to mean that the two phrases should be read together and thus read, they seem to be referring to the same person—the person violating the Act, which the first clause identifies as the creditor. Further support for this interpretation seems to come from section 5-201(7), (8), (10). Each of these subsections discusses defenses that can be raised by a “creditor” in an action for damages brought by a consumer. If [plaintiff’s] interpretation is correct, then non-creditors being sued under the Act are not entitled to assert any of the defenses listed in section 5-201, including that the actions taken were “unintentional and the result of a bona fide error.” “Statutory language should be construed to avoid absurd, illogical or inconsistent results.” Interpreting section 5-201 to allow a consumer to sue non-creditors leads to such an absurd, illogical and inconsistent result. Specifically, non-creditors sued for violations of the Act will be precluded from asserting all of the statutory defenses that a creditor could assert from the same alleged violations.

Id. at *4 (citations omitted).

The remedy provision in Oklahoma’s consumer credit code also provides some helpful guidance. Oklahoma’s remedy provision is modeled on the 1968 version of the UCCC and states:

If a creditor has violated the provisions of this act . . . , the debtor . . . has a right to recover from the person violating this act or from an assignee of that person’s rights who undertakes direct collection of payments or enforcement of rights arising from the debt a penalty in an amount determined by the court not in excess of three times the amount of the credit service charge or loan finance charge.

14A Okl. St. § 5-202(1) (emphasis added).

In *Jennings v. Globe Life & Acc. Ins. Co. of Oklahoma*, 922 P.2d 622 (Okl. 1996), the Oklahoma Supreme Court interpreted Oklahoma’s remedy provision. Like here, the plaintiff in *Jennings* argued the general language “the person violating this act” established the remedy provision applies to more than just creditors. *Id.* at 626. The

court disagreed and ruled the remedy provision only applies to creditors. *Id.* at 628. The court held the general language “the person violating this act” simply refers back to the violating creditor. *Id.* The court explained:

Subsections (1) and (2) govern *specific violations* of the UCCC by the *creditor*. . . . The provisions note that the debtor has a right to recover from “the person violating the act” or any assignee of *that person’s* right to collect payments from the debtor. There is no question that “the person violating the act” refers to the *creditor*. Likewise, the assignee refers to one who has been assigned the creditor’s rights.

Id. (emphasis in original). In rendering its decision, the *Jennings* court also noted the limited applicability of the defense to the actions of a “creditor” “further shows” the remedy provision only applies to the actions of a “creditor.” *Id.* at 627.

The remedy provision in Kansas’ consumer credit code is modeled on the 1974 version of the UCCC and states:

If a creditor has violated the provisions of this act . . . , the consumer has a cause of action to recover actual damages and in addition a right in an action other than a class action to recover from *the person violating such provisions of this act* a penalty in an amount determined by the court not less than \$100 nor more than \$1,000.

Kan. Stat. § 16a-5-201(1) (emphasis added).

In *Independent Financial, Inc. v. Wanna*, 186 P.3d 196 (Kan. App. 2008), a Kansas appellate court indicated all of the subsections in the Kansas remedy provision, including subsection (1), only applies to creditors. The court held: “Read in context, . . . it is clear [the remedy provision] applies only to consumers’ remedies for violations by *creditors*.” *Id.* at 199 (emphasis added).

As *Kueter*, *Jennings*, and *Independent Financial* confirm, § 46A-5-101(1)’s

general language “the person violating this chapter” simply refers back to the violating “creditor.” These cases establish the disputed remedy provision only applies to creditors. If the Legislature had intended to create a remedy against more than just creditors, then it simply would have granted a remedy against “any person,” *as the Iowa legislature did*.

Like the West Virginia remedy provision, the remedy provision in Iowa’s consumer credit code is modeled on the UCCC. However, Iowa’s remedy provision does *not* contain any reference or limitation to the “creditor”; instead, the provision applies to “the person” violating the statute.¹⁸ And the defense provision in the Iowa statute is available to “the person” accused of violating the statute, not just the “creditor” as in the West Virginia statute.¹⁹ All of these distinctions indicate the West Virginia Legislature acted purposefully with the intent to grant a remedy in § 46A-5-101(1) against only creditors.

In response, plaintiff provides a list of states she claims grant a remedy against third-party debt collectors.²⁰ However, the laws in these states are substantially different than the WVCCPA and are based upon stand-alone acts aimed directly at debt collectors, which clearly contain a private remedy provision. *See, e.g.,* Colo. Rev. Stat. § 12-14-101,

¹⁸ The Iowa statute provides:

The consumer . . . has a cause of action to recover actual damages and in addition a right in an action other than a class action to recover from the person violating this chapter a penalty in an amount determined by the court, but not less than one hundred dollars nor more than one thousand dollars, if a person has violated the provisions of this chapter relating to . . . [p]rohibitions against unfair debt collection practices under section 537.7103.

Iowa Code § 537.5201(1)(y).

¹⁹ Iowa Code § 537.5201(7).

²⁰ *See* Pl. Brief at p. 17.

et seq., and Fla. Stat. § 559.55, *et seq.*

Moreover, contrary to plaintiff's argument, interpreting the disputed remedy provision to only apply to creditors would *not* be "incongruent" or "anomalous."²¹ Indeed, such an interpretation would simply place West Virginia in the majority of states (approximately 30), which do *not* have a statute providing for a cause of action against third-party debt collectors! As explained below, existing law provides more than adequate protection to West Virginia consumers, so the Court need not rewrite the disputed remedy provision as plaintiff argues.

E. Plaintiff's Interpretation of W. Va. Code § 46A-5-101(1) Improperly Requires the Court to Rewrite the Statute

This Court has often repeated that it "cannot rewrite [a] statute so as to provide relief[.]" *VanKirk v. Young*, 180 W.Va. 18, 20, 375 S.E.2d 196, 198 (W. Va. 1988); *see also Associated Press v. Canterbury*, 224 W.Va. 708, 726, 688 S.E.2d 317, 335 (W. Va. 2009); *McVey v. Pritt*, 218 W.Va. 537, 540, 625 S.E.2d 299, 302 (W. Va. 2005); *State ex rel. Orlofske v. City of Wheeling*, 212 W.Va. 538, 547, 575 S.E.2d 148, 157 (W. Va. 2002). The Court has explained:

In the construction of statutes, it is the legislative intent manifested in the statute that is important and such intent must be determined primarily from the language of the statute. It is the duty of the courts to give a statute the interpretation called for by its language when this can reasonably be done; and the general rule is that no intent may be imputed to the legislature other than that supported by the face of the statute itself. The courts may not speculate as to the probable intent of the legislature apart from the words employed. A statute is to be taken, construed and applied in the form in which it is enacted. It is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be

²¹ *See* Pl. Brief at p. 17.

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.

General Daniel Morgan Post No. 548, 144 W.Va. at 144-145, 107 S.E.2d at 358 (citations omitted).

In the face of these bedrock principles of statutory construction, plaintiff asks this Court to rewrite the disputed remedy provision. This the Court cannot do. Most notably, the disputed remedy provision does *not* even mention “debt collector,” or any similar reference, yet plaintiff argues such words should be read into the provision. But “[c]ourts are not free to read into the language what is not there[.]” *State ex rel. Frazier v. Meadows*, 193 W.Va. 20, 24, 454 S.E.2d 65, 69 (W. Va. 1994).

Similarly, plaintiff improperly asks this Court to ignore § 46A-5-101(1)’s reference to “creditor.” But courts may not “eliminate through judicial interpretation words that were purposely included [in a statute.]” *Banker v. Banker*, 196 W.Va. 535, 547, 474 S.E.2d 465, 477 (W. Va. 1996).

It is true that the WVCCPA is a remedial statute, which should be liberally construed. *See State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 777, 461 S.E.2d 516, 523 (W. Va. 1995). However, a liberal construction of the statute does not grant the Court unbridled discretion and power to rewrite the statute. *See, e.g., Bear, Stearns & Co., Inc.*, 217 W.Va. 573, 618 S.E.2d 582 (refusing to expand the scope of the WVCCPA to apply to the providing of investment advice). “[T]he liberality rule must be tempered by reasonableness, and must not be used as justification for improper legislating by the Court.” *Repass v. Workers’ Compensation Div.*, 212

W.Va. 86, 112, 569 S.E.2d 162, 188 (W. Va. 2002) (Davis, C.J., dissenting). This is true no matter how compelling the argument may be for expanding the statute. *See, e.g., VanKirk*, 180 W.Va. at 20, 375 S.E.2d at 198 (“While it is unfortunate that the legislature did not foresee the situation now before us, we cannot rewrite the statute[.]”). As this Court has noted, judges are “not plenipotentiaries in the realm of statutory interpretation.” *City of Wheeling*, 212 W.Va. at 546, 575 S.E.2d at 156. “[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations[.]” *Lewis v. Canaan Valley Resorts, Inc.*, 185 W.Va. 684, 692, 408 S.E.2d 634, 642 (W. Va. 1991). “Once the Legislature indicates its preference by the enactment of a statute, the Court’s role is limited. [Its] duty is to interpret the statute, not to expand or enlarge upon it.” *Ranson*, 195 W.Va. at 126, 464 S.E.2d at 768.

These rules respect the separation of powers and properly defer matters of policy to the Legislature. *See, e.g., McVey*, 218 W.Va. at 540, 625 S.E.2d at 302 (“That, however, is a policy matter within the province of the Legislation and it is for the Legislature, not this Court, to decide.”); *Kasserman and Bowman, PLLC v. Cline*, 223 W.Va. 414, 421, 675 S.E.2d 890, 897 (W. Va. 2009) (“We believe the foregoing policy arguments are more appropriately directed to the Legislature.”). The Court should reject plaintiff’s request to rewrite the disputed remedy provision.

Plaintiff’s three remaining arguments are equally unavailing. First, limiting application of the disputed remedy provision to only creditors would *not* create an

“absurd result.”²² Plaintiff assumes she has some “right” to a remedy under § 46A-5-101(1) simply because the WVCCPA imposes certain restrictions on debt collectors.²³ However, the principle that “where there is a right, there is a remedy” arose out of the lack of any remedy for the violation of *constitutional rights*. Constitutional rights are *not* at issue in this case. Even if such rights were implicated, however, modern courts have recognized that this principle of law is not universally true. As this Court has noted, “[d]espite the celebrated dictum in *Marbury v. Madison*, in the law of modern constitutional remedies, not every right comes equipped with a guarantee of individual remediation for every violation of that right.” *Gribben v. Kirk*, 195 W.Va. 488, 497, 466 S.E.2d 147, 156 n. 18 (W. Va. 1995) (citation omitted).

Further, there are many statutes which impose substantive restrictions on certain persons for the benefit of the public, but do *not* contain any corresponding remedy against those persons violating the substantive restrictions. In fact, in 2008, the Legislature enacted Article 2A of the WVCCPA, entitled “Breach of Security of Consumer Information,” designated at § 46A-2A-101, *et seq.* See 2008 W. Va. Laws Ch. 37. This new Article imposes obligations on certain persons to provide notice of data security breaches. See W. Va. Code, § 46A-2A-102. However, the Legislature did *not* grant consumers a private cause of action against persons failing to provide the required notice; instead, the substantive provisions of Article 2A are exclusively enforced by the Attorney General, or the primary regulator of the violating financial institution. See W.

²² Pl. Brief at p. 18.

²³ See Pl. Brief at p. 11.

Va. Code, § 46A-2A-104; *Stover v. Fingerhut Direct Marketing, Inc.*, 2010 WL 1050426, *7 (S.D. W. Va. 2010) (“Section 46A-2A-104 deals with breaches of computerized personal data, and allows for suits only by the Attorney General, or by the primary regulator of a violating financial institution.”). Limiting the application of the disputed remedy provision to only creditors is certainly no more “absurd” than the Legislature providing *no remedy* against persons violating § 46A-2A-102.

Second, limiting application of the disputed remedy provision to only creditors will *not* “create a special class of debt collectors which would have carte blanche to threaten and harass West Virginia consumers.”²⁴ Regardless of the Court’s decision on the certified question, non-creditor debt collectors will continue to be bound by all federal and state laws. Failure to follow these laws will continue to subject non-creditor debt collectors to prosecution by the Attorney General (like data breach violations under § 46A-2A-104) for injunctions, penalties, and loss of license.²⁵ Further, the Court’s decision here will *not* affect other remedies West Virginia consumers currently have against non-creditor debt collectors. For example, West Virginia consumers will

²⁴ See Pl. Brief at p. 11.

²⁵ See, e.g., W. Va. Code, § 46A-7-101, *et seq.* (vesting authority in Attorney General and establishing Division of Consumer Protection); W. Va. Code, § 46A-7-108 (“The attorney general may bring a civil action to restrain a person from violating [Chapter 46A] and for other appropriate relief.”); W. Va. Code, § 46A-7-109(1)(c) (“The attorney general may bring a civil action to restrain a creditor or a person acting in his behalf from engaging in a course of . . . (c) [f]raudulent or unconscionable conduct in the collection of debts arising from consumer credit sales, consumer leases or consumer loans.”); W. Va. Code, § 46A-7-111(2) (“The attorney general may bring a civil action against a creditor or other person to recover a civil penalty for willfully violating [Chapter 46A], and if the court finds that the defendant has engaged in a course of repeated and willful violations of this chapter, it may assess a civil penalty of no more than five thousand dollars for each violation of this chapter. No civil penalty pursuant to this subsection may be imposed for violations of this chapter occurring more than four years before the action is brought.”).

continue to have a remedy against non-creditor debt collectors pursuant to the FDCPA and common law when applicable. Indeed, this Court's ruling will not dispose of plaintiff's claim against NCB for intentional infliction of emotional distress.

Finally, plaintiff argues NCB cannot offer an explanation why the Legislature would pass the WVCCPA, which contains substantive limitations on debt collection, but only provide a remedy in § 46A-5-101(1) against creditors.²⁶ The explanation is the Legislature's primary concern in enacting the WVCCPA was to regulate creditors, not third party debt collectors. Despite plaintiff's argument regarding the alleged "regulatory focus" at the time of the enactment of the WVCCPA, this Court has repeatedly noted the WVCCPA was passed to "modernize and clarify the law regarding consumer sales and credit transactions." *Clendenin Lumber and Supply Co.*, 172 W.Va. at 379, 305 S.E.2d at 336. As the above analysis shows, the Legislature's intent is easily discerned here by looking at the words of the statute, which speak for themselves and prove the *primary concern in enacting the disputed remedy provision was to regulate creditors.*²⁷ And, as this Court has observed, "[s]hould reason and experience dictate a change in [the] statute, it is up to our legislature to draft and pass appropriate modifications." *State v. Evans*, 170 W.Va. 3, 5, 287 S.E.2d 922, 924 (W. Va. 1982).

²⁶ See Pl. Brief at p. 17.

²⁷ Plaintiff devotes several pages in her brief to describing the purported "regulatory backdrop to the enactment of the CCPA." See Pl. Brief at pp. 15-17. While "colorful," plaintiff's description is not based upon any relevant legislative history, record, or discussion. Instead, plaintiff's "backdrop summary" is a self-serving narration based upon *law review articles* "cherry-picked" and parsed by plaintiff. Plaintiff's summary is unhelpful at best and misleading at worst. Regardless of what plaintiff perceives to have been the regulatory focus nationally, the Legislature's primary concern in enacting the WVCCPA was to regulate creditors, not third party debt collectors. Plaintiff's far flung alleged evidence of legislative intent proves nothing to the contrary.

F. If the Court Accepts Plaintiff's Interpretation of the Remedy Provision in W. Va. Code § 46A-5-101(1), the New Interpretation Should Not Be Applied Retroactively

“[J]udicial decisions ordinarily operate retroactively. [However,] [t]he courts of this country long have recognized exceptions to the rule of retroactivity[.]” *Ashland Oil, Inc. v. Rose*, 177 W.Va. 20, 23, 350 S.E.2d 531, 534 (W. Va. 1986). This Court recently set forth the applicable test:

In determining whether to extend full retroactivity to a new principle of law established in a civil case that *does not overrule* any prior precedent, . . . the following factors will be considered. First, we will determine whether the new principle of law was an issue of first impression whose resolution was clearly foreshadowed. Second, we must determine whether or not the purpose and effect of the new rule will be enhanced or retarded by applying the rule retroactively. Finally, we will determine whether full retroactivity of the new rule would produce substantial inequitable results.

Syl. pt. 9, *Caperton v. A.T. Massey Coal Co., Inc.*, 690 S.E.2d 322, 327 (W. Va. 2009) (emphasis in original); *see also Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 347, 256 S.E.2d 879, 888 (W. Va. 1979) (setting forth similar test for retroactivity when new interpretation overrules prior precedent).

Based upon the *Caperton* test, if the Court accepts plaintiff's interpretation of the disputed remedy provision, the Court should limit the new interpretation to prospective application. The Court should *not* apply the new interpretation retroactively. First, no court has specifically ruled whether § 46A-5-101(1) applies to non-creditor debt collectors, so the issue before the Court is one of “first impression.” Further, the new interpretation has *not* been “clearly foreshadowed.”

Second, if the Court only applied the new interpretation prospectively, the purpose and effect of the new interpretation would *not* be “retarded.” Prospectively, consumers

would have a remedy under the disputed provision, thereby achieving the purported purpose and effect of the new interpretation. It is true that prospective application of the new interpretation would mean plaintiff has no remedy. However, this result cannot be determinative or controlling because prospective application of a new interpretation always means the new rule will not apply to the existing litigation. *See, e.g., Kearney v. Salomon Smith Barney, Inc.*, 39 Cal.4th 95, 128, 137 P.3d 914, 937 (Cal. 2006) (ruling new interpretation of monitoring/recording statute will only apply prospectively because of unsettled state of law, resulting in plaintiff having no remedy for damages).

Finally, full retroactivity of the new interpretation would produce substantial inequitable results. The ultimate effect would be to ascribe a *new penalty to historical conduct*. Such application of the law raises due process concerns and should be avoided. Further, the severity of the statutory penalty (currently at approximately \$4,300/*per violation* when adjusted for inflation under § 46A-5-106) weighs in favor of limited application of the new interpretation. The equities also support prospective application only. Considering a federal judge as experienced and knowledgeable as Chief Judge Bailey could not discern the current state of law, it is unreasonable to expect NCB to know. To now create a new penalty, which no one anticipated, and apply that new penalty to historical conduct is indeed inequitable and unfair. If the Court accepts plaintiff's interpretation of the disputed remedy provision, the new interpretation should *not* be applied retroactively.

V. CONCLUSION

Based upon the foregoing reasons, the Court should answer the certified question in the negative. A consumer does *not* have a private cause of action per § 46A-5-101(1) against a non-creditor debt collector for violations of § 46A-2-122, *et seq.*

Respectfully Submitted,



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CERTIFICATE OF SERVICE

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