

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LINDA BARR,

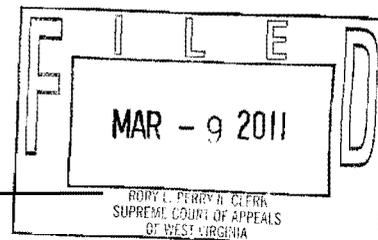
Plaintiff,

v.

Case No. 35709

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

Defendants.



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**REPLY BRIEF OF PLAINTIFF**

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

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**Certified Question Presented**

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

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.*

## REPLY BRIEF OF THE PLAINTIFF

This Court should answer the certified question in the affirmative and hold that a consumer does have a private cause of action under section 5-101(1) of the West Virginia Consumer Credit and Protection Act (“CCPA”) against all debt collectors including entities like NCB who receive an assignment of the debt for purposes of collection. To do otherwise would expose consumers in this State to abusive debt collection tactics ranging from the false threat of criminal prosecution, to harassing and repeated telephone calls, to falsely impersonating lawyers, to threats of violence. Thirty years ago, this Court in *Thomas v. Firestone*, 164 W.Va. 763, 767-768, 266 S.E.2d 905, 908 (1980), declared unequivocally that West Virginia’s illegal debt-collection laws apply to professional debt-collectors such as NCB. NCB now asks the Court to remove by judicial fiat the remedy the West Virginia Legislature provided for violating these provisions. NCB’s strained interpretation of the remedial provisions of the CCPA is plainly inappropriate.

### Summary of Argument

Section 5-101(1) of the CCPA grants all consumers a broad cause of action to recover “from the *person violating this chapter*” which includes debt collectors such as NCB. W.Va. Code § 46A-5-101(1). (Emphasis added.) This Court should reject NCB’s assertion of the doctrine of *ejusdem generis* in this case as it is contrary to this decisions of this Court in *Dunlap v. Friedman's, Inc.*, 213 W.Va. 394, 399, 582 S.E.2d 841, 846 (W.Va. 2003), and *Harper v. Jackson Hewitt, Inc.*, \_\_\_ S.E.2d \_\_\_, 2010 WL 4723380, \*10 (W.Va. 2010) where the Court refused to limit general language under the CCPA based on *ejusdem generis*- type arguments and instead applied the liberal construction rule applicable in CCPA cases.

Moreover, even if the CCPA’s remedies are limited to creditors, the term “creditor” must be construed by this Court as it is not defined in the CCPA. Under accepted definitions, the term

“creditor” is defined as someone to whom money is owed. NCB’s attempt to limit the definition to the person whom originally extended the debt or who had ultimate ownership of the debt fails as it is inconsistent with the Court’s rule of liberal construction of the CCPA and is inconsistent with this Court’s refusal to imply exceptions to the CCPA not expressly included by the Legislature. *Thomas v. Firestone Tire and Rubber Co.*, 164 W.Va. 763, 767-768, 266 S.E.2d 905, 908 (1980); *Harper, supra*.

NCB’s argument that the Uniform Consumer Credit Code (“UCCC”) focuses on first-party creditors to the exclusion of third-party debt collectors ignores both the explicit adoption in the CCPA of the robust debt collection restrictions in the National Consumer Act (“NCA”) which, unlike the rejected UCCC provisions, apply to all debt collectors including third-party collectors, and the inclusion of a private right of action for “any prohibited debt collection practice.” W.Va. Code § 46A-5-101(1).

NCB completely ignores the regulatory background in which the CCPA was adopted – a background where the third-party collectors were thought to be the problem rather than the first-party creditors that NCB argues are the focus of the CCPA. It is inconceivable that the 1974 Legislature meant to enact a statute that would provide more rights for consumers to sue banks and other original creditors than professional debt collectors and others who collect for the original creditors who were thought at the time to be the problem. This Court has traditionally looked at the regulatory background to discern the Legislature’s intent in adopting the CCPA. *White v. Wyeth*, \_\_\_ W.Va. \_\_\_, 2010 WL 5140048, \*9 (2010); *State ex rel. McGraw v. Bear, Stearns & Co., Inc.*, 217 W.Va. 573, 578-79, 618 S.E.2d 582, 587-88 (2005) (relying on regulatory backdrop to determine scope of the CCPA).

The cases cited by NCB from other jurisdictions are all distinguishable in that they involve different statutory schemes which contain specific restrictive definitions of creditors

evidencing an intent to limit the remedy not present in the CCPA. In addition, NCB's argument that the Court should not usurp the Legislature is not applicable in this case. While liberal construction of a remedial statute does not amount to a usurpation of legislative power, a strict construction that eliminates remedies historically understood is such a usurpation.

Finally, affirmation by this Court that consumers have a cause of action against any and all debt collectors for violations of the CCPA does not amount to an improper retroactive application of a new rule of law as this Court has never limited interpretation of the remedial provisions of the CCPA prospectively, and the requirements for an exception to the general rule of retroactive application are not met here.

## Argument

- A. **The CCPA provides consumers a cause of action against *all* debt collectors, regardless of whether they are collecting their own debts or debts initially originated by others.**
1. **The plain terms of West Virginia Code § 46A-5-101(1), which refer to a “person” in addition to “creditor,” demonstrates that the Act provides a cause of action and remedy against all professional debt-collectors.**

Section 5-101(1) of the CCPA grants all consumers a broad cause of action to recover “from the *person violating this chapter.*” W.Va. Code § 46A-5-101(1) (emphasis added). NCB argues that this broad provision is limited by the phrase “if a creditor has violated the provisions of this chapter” appearing earlier in this sub-section. NCB’s interpretation is, however, contrary to this Court’s historically broad interpretation of this very provision.

In making this argument, NCB seeks to apply the doctrine of *ejusdem generis*. In Syllabus point 4 of *Ohio Cellular RSA, Ltd. Partnership v. Board of Public Works*, 198 W.Va. 416, 481 S.E.2d 722 (1996), this Court explained the rule:

“In 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.***” Point 2, Syllabus, *Parkins v. Londeree, Mayor*, 146 W.Va. 1051[, 124 S.E.2d 471 (1962) ].” Syl. pt. 2, *The Vector Co., Inc. v. Board of Zoning Appeals of the City of Martinsburg*, 155 W.Va. 362, 184 S.E.2d 301 (1971).

(Emphasis added). For the reasons that follow, the doctrine is not applicable here.

First, this Court has historically refused to apply *ejusdem generis* when interpreting the provisions of section 5-101(1) of the CCPA, favoring instead the doctrine of liberal construction. In *Dunlap v. Friedman's, Inc.*, this Court interpreted section 5-101(1) liberally using the remedial purpose rule and rejected the application of *ejusdem generis* advocated by the dissent.

See 213 W.Va. at 403, 582 S.E.2d at 850 (Davis, dissenting) (arguing majority interpretation violated the rule of *ejusdem generis*).

Similarly, while not citing the *ejusdem generis* rule, this Court recently rejected an attempt to limit the general four-year statute of limitations contained in section 5-101(1) to claims against creditors. In *Harper v. Jackson Hewitt, Inc.*, the Court held the general language imposing a four-year statute of limitations applies to all claims for violations under the CCPA. The *Harper* Court rejected the argument that the specific reference to “creditors” in section 5-101 limits the general provisions of section which applied “more broadly” and were “not limited specifically to creditors.” *Id.* 2010 WL 4723380 at \*10 Thus, the *Harper* Court implicitly rejected the doctrine of *ejusdem generis* and reaffirmed the applicability of the doctrine of liberal construction to the CCPA, explicitly holding that exclusions from the broad provisions of the Act need be expressly stated. *Id.* at \*8.

Second, as the above quotation from *Ohio Cellular, supra*, makes clear, the *ejusdem generis* rule is not applicable when an intention to the contrary is clearly shown. In this case the inclusion of the broad debt collection restrictions in article 2 of the CCPA taken from the NCA and the rejection of the weak UCCC provisions evidence a clear contrary intent. As noted in Plaintiff’s Initial Brief, pp. 13, the robust debt collection restrictions contained in the NCA were promulgated, in part, because of the criticism that the UCCC did not provide a private right of action to consumers. Thus, use of the NCA debt collection restrictions and the addition of the phrase “any prohibited debt collection practice” into the right of action establish a clear intent to create a right of action against “any person violating the chapter.” W.Va. Code § 46A-5-101(1).

Finally, this result is consistent with the substantive statutory language at issue. Like section 5-101(1), the debt collection provisions apply broadly to include conduct by *any* person collecting a debt. *Thomas* 164 W.Va. at 763, 767-768, 266 S.E.2d at 908.

Thus, the plain terms of West Virginia Code § 46A-5-101(1), which refer to a “person” in addition to “creditor,” demonstrate that the Act provides a cause of action and remedy against all professional debt-collectors.

**2. A person collecting the debt of another is a creditor within the meaning of the CCPA.**

Even if the CCPA’s remedies are limited to creditors, the term “creditor” must be construed by this Court as it is not defined in the CCPA. As set forth in Plaintiff’s Initial Brief, pp. 8-9, the term creditor is commonly defined as someone to whom money is owed. NCB does not contest this definition. *See* NCB Brief at p. 12 (creditor defined as “one to whom a sum of money . . . is due”) (citations omitted)). Instead, it attempts to limit the definition to the person the debt is ultimately owed; that is, the originator or owner of the debt, not the debt collector. *Id.* at 11-12. This argument fails.

As an initial matter, NCB incorrectly assumes that Plaintiff is requesting that this Court decide the factual issue of whether NCB is a creditor. The Plaintiff is not making that request. In this certified question proceeding, the Plaintiff is requesting that this Court make clear the definition of the term “creditor” for the purposes Article 5 of the CCPA. It is well-established that this Court has the power to reform a certified question to fully address the applicable law:

This Court has the authority to reformulate certified questions if necessary. *See, e.g., Charleston Area Med. Ctr., Inc. v. Parke-Davis*, 217 W.Va. 15, 24 n. 12, 614 S.E.2d 15, 24 n. 12 (2005). Reformulating the certified questions may be particularly appropriate where “a certified question is framed so that this Court is not able to fully address the law which is involved in the question.” *Barefield v. DPIC Cos.*, 215 W.Va. 544, 550, 600 S.E.2d 256, 262 (2004)(quoting Syl. Pt. 3, *Kincaid v. Mangum*, 189 W.Va. 404, 432 S.E.2d 74 (1993)).

*Harper*, 2010 WL 4723380 at \* 4. For the reasons that follow, it is clear that, for the purposes of Article 5 of the CCPA, the term “creditor” includes any person to whom payment is due whether originally or by assignment.

Curiously, NCB relies on *Thomas* in support of its argument that the term “creditor” is limited to the entity that originated the debt. Contrary to NCB’s contentions, *Thomas* did not distinguish between professional debt collectors and creditors collecting their own debts. Indeed, the Court in *Thomas* refused to create a distinction between the two groups, holding that the CCPA’s broad remedial purpose required rejection of any distinction. *Thomas*, 164 W.Va. at 767-768, 266 S.E.2d at 908.

Moreover, nothing in the Fair Debt Collection Practices Act (“FDCPA”) supports NCB’s attempts to limit the definition. The definition of creditor in the FDCPA supports Plaintiff’s argument here. Under the FDCPA, creditor is defined as “any person who offers or extends credit creating a debt or to whom a debt is owed, *but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.*” 15 U.S.C. § 1692a(4) (emphasis added). In enacting the FDCPA, Congress expressly created a specific exclusion for transfers or assignments for collection because, absent that exclusion, the term creditor is commonly understood to include any person who has the right to demand payment of the debt including entities like NCB who receive an assignment of the debt for purposes of collection.

Moreover, it is clear that debt collectors like NCB are entities to whom the debt payment is due. Agencies like NCB are typically assigned the debts by others for the purposes of collection. Legrady, Paul, “Creditors Exercising Options For Receivables Management,” 107 *Business Credit* 8, 62–63 (2005-09). Under typical assignment agreements, consumers pay the third-party agency and the agency then transfers the sums back to the originator less a percentage retained as a contingent fee. *Id.*; see also American Lawyers Quarterly, “Debt Collection in the United States,” <http://www.alqlist.com/internationalguide.html> (accessed March 5, 2011).

While the factual record specific to NCB can be developed below once this Court interprets the law, Plaintiff's request is that this Court define "creditor" under the Act to broadly apply to all entities collecting money from consumers on debts.

Interpreting the term "creditor" to include any person who has the right to demand payment of the debt, including entities who receive an assignment of the debt for purposes of collection, is consistent with the rules of statutory interpretation historically applied to the CCPA by this Court. First, it is consistent with the Court's rule of liberal construction of the CCPA. *See* Plaintiff's Initial Brief at pp. 8-9. In addition, it is consistent with this Court's refusal to imply exceptions to the CCPA not expressly included by the Legislature. *Harper, supra*, p\*8; *Thomas*, 164 W.Va. at 767-768, 266 S.E.2d at 908; *cf infra*, p. 13-14 (noting other states which, unlike West Virginia, have adopted UCCC and expressly included narrow definitions of term creditor).

Finally, this interpretation is consistent with the other provisions of the CCPA. If the term creditor includes any person who has the right to demand payment of the debt, including entities who receive an assignment of the debt for purposes of collection, the creditor will be permitted to utilize the defenses contained in W.Va. Code § 46A-5-101(7)-(8).

Similarly, this interpretation is consistent with W.Va. Code § 46A-5-105, which allows the Court to void the debt in the face of a willful violation. First, NCB offers no reason why willful violation by an agent or assignee of the owner of the debt should not result in the debt being cancelled. Second, there is nothing strange about a remedy that is not available for every violation. Even under NCB's interpretation, the remedy of debt cancellation would not be available if the violation occurred after the debt was paid or if the illegal collection efforts were undertaken, as they often are, against someone who never owed the debt.

Finally, this interpretation is also consistent with W.Va. Code § 46A-5-101(2)-(3). Under these provisions, a person who pays on a loan made by an unauthorized lender or pays an excess charge can recover those payments from the lender violating the CCPA. *Id.* The provisions, however, also allow the consumer to recover all the illegal payments made from anyone assigned the loan or directly collecting the payments regardless of whether the entity was responsible for the violation or received the illegal proceeds. *Id.* These provisions are in contrast to the penalty provisions of subsection 1 which only applies to the “person violating” the CCPA. W.Va. Code § 46A-5-101(1). Subsections 2-3 expand the liability to successors and in essence make them vicariously liable for illegal payments collected by their predecessors. W.Va. Code § 46A-5-101(2)-(3). Thus, while a successor is liable for payments collected by a predecessor under subsections 2-3, it is not subject to the imposition of a penalty under subsection 1. This expansion of liability to an assignee for a refund is further evidence of the intent to provide broad remedial remedies. This expansion of remedies, however, is not inconsistent with imposing penalties on all creditors who actually violate the Act, including those creditors who have the right to demand payment of the debt such as those who receive an assignment of the debt for purposes of collection.

**B. The historical background of the CCPA establishes that the West Virginia Legislature intended to provide a private right of action for consumer claims of collection abuse against creditors and professional debt collectors.**

**1. Analysis of the model acts used to craft the CCPA demonstrates that the Legislature intended to regulate ALL debt collectors.**

With respect to the model acts that form the CCPA, NCB does not dispute the history set forth by the Plaintiff. Instead, it argues that the use of the UCCC by the West Virginia Legislature is evidence of an intent to focus on creditors. This argument completely ignores the rejection of the UCCC debt collection remedies during the period when these remedies were under criticism, in part, because they did not provide consumers with a private right of action.

*See* Plaintiff's Initial Brief at pp. 14-15. The adoption of many of the provisions of the UCCC shows that the regulation of creditors was a concern of the Legislature. However, the replacement of the UCCC debt collection restrictions with the expansive NCA provisions (which apply to all debt collectors) is clear evidence of a legislative concern with all debt collectors and evidence of an intent to provide an expansive private right of action for claims against all debt collectors.

It is true that the CCPA used the UCCC remedy provision. It did not, however, adopt the provision wholesale. Instead, it expressly included prohibited debt collection practices in the remedy section. W.Va. Code § 46A-5-101(1). It is understandable that the UCCC remedy provision was used because of the substantive UCCC credit regulation provisions contained in article 2 of the CCPA applying to creditors originating the debt. By expressly adding prohibited debt collection practices (which themselves expressly apply to any debt collector) in the remedy section, the Legislature was clearly expressing its intent to create a cause of action for violation against all debt collectors.

**2. The regulatory backdrop to the enactment of the CCPA and other consumer protection statutes provides further evidence that the Legislature intended to regulate all debt collectors, but more especially professional debt collectors like NCB.**

In her initial brief, Plaintiff set forth the historical backdrop to the enactment of the CCPA. NCB's response to this comprehensive historical recitation is to, in a conclusory fashion, argue that the history is selective. NCB offers no contrary evidence to the many scholars who emphasized that the major concern at the time was third-party collectors who had no business or community relationship with the consumers that would serve as a deterrent to abusive conduct. *See* Plaintiff's Initial Brief at pp. 15-17.

Given the concerns of the time, it is inconceivable that the Legislature intended to add substantive restrictions on all collectors (including third party collectors) and then only provide a

private right of action against first-party collectors who were not thought of as a problem. In interpreting the CCPA, this Court has consistently used the regulatory backdrop in determining the intent of the Legislature. *See, e.g., White* 2010 WL 5140048 at \*9 (relying on legal scholar's interpretation of regulatory backdrop to determine scope of the CCPA); *State ex rel. McGraw v. Bear, Stearns & Co., Inc.*, 217 W.Va. 573, 578-79, 618 S.E.2d 582, 587-88 (2005) (relying on regulatory backdrop to determine scope of the CCPA). As the amicus briefs filed in this case confirm, no one in this State ever imagined that the CCPA could be interpreted in the manner suggested by the defendant. Indeed, the only time the issue of third-party collector verses first-party collector has been raised in this Court was twenty years ago when a creditor sought (unsuccessfully) to limit the Act to collectors. *Thomas, supra*. It is striking that it occurred to no one to even point out in *Thomas* the potential argument raised here.

Finally, the cases cited by NCB from other jurisdictions are all distinguishable in that they involve different statutory schemes. *Kueter v. Chrysler Financial Corp.*, No.CV-98-202, 2000 WL 33675724 (Me.Super.Ct. 2000), contrary to Defendant's suggestion, is an unpublished trial court opinion interpreting Maine's consumer protection statute. Unlike West Virginia, Maine did not adopt the broad regulations governing any debt collectors based on the NCA as adopted in West Virginia. *Compare* 9-A M.R.S.A. § 5-201(1) (1997), with NCA §§ 7.201 – 7.209, and W.Va. Code §§ 46A-2-122 – 2-129; *see also* Plaintiffs' Initial Brief at pp. 12-13 (discussing legislative history). In addition, the Maine Legislature, unlike West Virginia, specifically added a restrictive definition of the term "creditor" that severely limited the application of its Act and the scope of the remedy section,<sup>1</sup> both of which evidence an intent to limit the consumer remedies of the Maine Act to claims against a defined class of persons.

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<sup>1</sup>See 9-A M.R.S.A. § 1-301(17) ("Creditor" means a person who both: A. Regularly extends credit in consumer credit transactions; and B. Is the person to whom the debt arising

The statutory language in *Jennings v. Globe Life & Acc. Ins. Co. of Oklahoma*, 922 P.2d 622, 626-27 (Okla. 1996), is also different from the West Virginia Act. Oklahoma, unlike West Virginia, has adopted the pure UCCC remedies section rather than the hybrid UCCC/NCA language adopted in West Virginia. Compare 14A O.S.1991 § 5-202, with UCCC § 5.201. *Jennings* refused to expand the UCCC remedy section to cover claims against insurers. However, unlike the pure UCCC remedy provision applicable in *Jennings*, the West Virginia Legislature expanded the UCCC remedy provision to include the broad debt collection restrictions from the NCA – thus evidencing an intent to create a broader remedy than that set forth in the UCCC.

Finally, the Kansas statute at issue in *Independent Financial, Inc. v. Wanna*, 39 Kan.App.2d 733, 738, 186 P.3d 196, 199 (Kan.App.Ct. 2008), also contained a specific, limited definition of creditor,<sup>2</sup> again evidencing an intent to limit the consumer remedies of the Act to claims against a defined and limited class of persons that did not include third-party collectors. Similarly, like the Oklahoma provisions, the Kansas remedy statute is a pure adoption of the UCCC. See K.S.A. § 16a-5-201; UCCC § 5.201; cf. W.Va. Code § 46A-5-101.

**C. While liberal construction of a remedial statute does not amount to a usurpation of legislative power, a strict construction that eliminates remedies historically understood is such a usurpation.**

The Plaintiff does not dispute NCB's contention that this Court should not function as a legislature. This basic rule of separation of powers, however, functions both ways. This Court

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from the consumer credit transactions is initially payable on the face of the evidence of indebtedness . . . .”).

<sup>2</sup> See K.S.A. 16a-1-301 (“‘Creditor’ means a person who regularly extends credit in a consumer credit transaction which is payable by a written agreement in more than four installments or for which the payment of a finance charge is or may be required and is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by written agreement. . . .”).

long ago held with respect to the very restrictions on debt collection at issue in this case that “it would be improper for this Court to limit the application of the statute . . . . *That would be a usurpation of the legislative function.*” *Thomas*, 164 W.Va. at 769, 266 S.E.2d at 909 (emphasis added).

This rule applies more so in the context of a remedial statute to be construed liberally. *Id.* Liberal construction of an ambiguous provision is not usurpation of the Legislature. This Court has consistently recognized that the CCPA is a remedial statute which must be liberally construed to accomplish that purpose. *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 777, 461 S.E.2d 516, 523 (1995); *Dunlap*, 213 W. Va. at 399, 582 S.E.2d at 846; *Harper* 2010 WL 4723380. As noted above, the existence of the remedy against third-parties who collect debts has been assumed by the Court and those who litigate these cases for decades. Under these circumstances, it is the limiting of the remedy through a strict construction of the CCPA that would amount to “a usurpation of the legislative function.” *Thomas, supra.*

**D. Affirmation by this Court that consumers have a cause of action against any and all debt collectors for violations of the CCPA does not amount to an improper retroactive application.**

NCB’s final argument is that this Court should apply any holding that consumers have a private right of action against any and all debt collectors prospectively only. The premise of the argument, that this would be some new and surprising holding, is false.

This Court has never limited the application of the CCPA to prospective cases. For example, the last time this Court held that the CCPA applied to all debt collectors, it did not limit

its holding prospectively. *Thomas, supra*. Similarly, when this Court rejected the argument that the four-year statute of limitations contained in W.Va. Code § 46A-5-101(1) was limited to claims against creditors and found that the credit services organization restrictions in article 6C of the CCPA applied to a tax preparer who assisted consumers in obtaining refund anticipation loans, it did not limit its holdings to prospective claims. *See Harper v. Jackson Hewitt, supra*.

As NCB recognizes, “judicial decisions ordinarily operate retroactively.” *Ashland Oil, Inc. v. Rose*, 177 W.Va. 20, 23, 350 S.E.2d 531, 534 (1986). In arguing for retroactivity, NCB applies the test set forth in syl. pt. 9, *Caperton v. A.T. Massey Coal Co., Inc.* 225 W.Va. 128, 133, 690 S.E.2d 322, 327 (2009).

The first *Caperton* factor is whether the new principle of law was an issue of first impression whose resolution was clearly foreshadowed. In this case, while the exact issue has never been addressed by this Court, as early as *Thomas*, this Court has broadly construed the debt collection restrictions in the CCPA as applying to all debt collectors. The *Thomas* opinion and the historical and regulatory background noted in Plaintiff’s Initial Brief establish that the result that the Plaintiff has a claim under the CCPA against NCB was clearly established.

The second *Caperton* factor addresses whether or not the purpose and effect of the new rule will be enhanced or retarded by applying the rule retroactively. As noted above, one major purpose of the CCPA is remedial. Obviously, denying the Plaintiff recovery is inconsistent with the statute’s remedial purpose. In addition, the private right of action exists to encourage private enforcement of the law. If a rule is established that when a defendant litigates and loses an issue involving the application of the CCPA that has never been decided by this Court, the plaintiff litigating the claim still loses, and there will be no incentive for a plaintiff to litigate these cases except in the few cases where there is binding precedent establishing the claim. Such a result is clearly contrary to the purposes of the CCPA’s private enforcement scheme.

The final *Caperton* factor involves whether full retroactivity of the new rule would produce substantial inequitable results. NCB argues that it would be inequitable to subject it to the penalty provisions of W.Va. Code § 46A-5-101(1) because it would ascribe a supposed new penalty to historical conduct. Assuming for the sake of this factor that this result would be some kind of surprise to NCB, the argument still fails.

As an initial matter, NCB does not and cannot argue that the conduct is legal. The violations pled in the Complaint, if proven, clearly violate the CCPA's debt collection restrictions in article 2. Its argument is that it would be unfair to impose a new surprise penalty.

One implication of this argument is that NCB never would have violated the law if it knew it might be subject to the statutory penalties. Of course, this implicit admission is one of the reasons that the private right of action and the penalties exist – to deter illegal conduct.

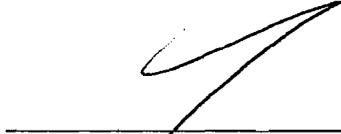
Moreover, even under NCB's interpretation of the law, the Attorney General can bring an action to recover even larger civil penalties of up to \$5,000 per violation. *See* NCB Brief at 27, n.25 (citing W.Va. Code § 46A-7-111(2)). Given that it is admittedly subject to a larger penalty in an action by the Attorney General, it is not inequitable for NCB to be subject to a penalty in an action by a consumer. Another implicit assumption of this argument by NCB is that an Attorney General action is unlikely given the office's caseload. *See, e.g.,* Brief of Amicus West Virginia Attorney General at pp. 12-13. Of course, that is why the Legislature created the private right of action in the first place.

### **Conclusion**

For the reasons discussed above and in Plaintiff's Initial Brief, this Court should answer the certified question in the affirmative and hold that a consumer does have a private cause of action under the CCPA against all debt collectors, including any person who has the right to

demand payment of the debt and such entities who receive an assignment of the debt for purposes of collection.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the foregoing **PLAINTIFF'S REPLY BRIEF** was served upon defendants, via USPS, postage prepaid, this the 9<sup>th</sup> day of March, 2011, at the following addresses:

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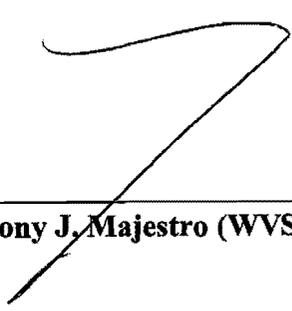
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