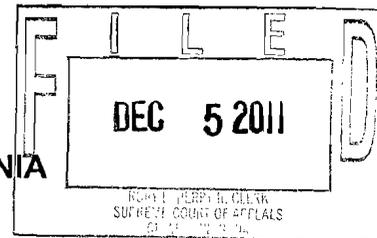


NO.: 11-1644
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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

Petitioner,

v.

Misc. Action No.: 11-MISC-206
(before the Circuit Court of
Kanawha County)

THE HONORABLE CHARLES E. KING, JR.,
JUDGE, Circuit Court of Kanawha
County; FAST AUTO LOANS, INC., a
Virginia Corporation; COMMUNITY
LOANS OF AMERICA, INC., a Georgia
Corporation; and ROBERT I. REICH,
President and Chief Executive Officer
of Fast Auto Loans, Inc. and Community
Loans of America, Inc.,

Respondents.

PETITION FOR WRIT OF PROHIBITION

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I. QUESTIONS PRESENTED

1. Whether a Virginia lender who makes loans to West Virginia residents secured by titles to their motor vehicles that engages in "debt collection" practices that allegedly violate the West Virginia Consumer Credit and Protection Act ("WVCCPA"), W. Va. Code § 46A-1-1, et seq., (i.e., harassing consumers by telephone, disclosing debts to family members, friends, references, employers; contacting third parties) has engaged in sufficient minimum contacts for due process purposes to submit itself to the investigative and regulatory jurisdiction of the Attorney General of West Virginia?
2. Whether a Virginia lender that files liens with the West Virginia Division of Motor Vehicles against the titles of vehicles owned by West Virginia residents to secure its loans has engaged in sufficient minimum contacts for due process purposes such as to submit itself to the investigative and regulatory jurisdiction of the Attorney General of West Virginia?
3. Whether a Virginia lender that makes loans to West Virginia residents secured by titles to their motor vehicles who physically enters West Virginia to seize motor vehicles when consumers default has engaged in sufficient minimum contacts for due process purposes to submit itself to the investigative and regulatory jurisdiction of the Attorney General of West Virginia?
4. Whether the WVCCPA, specifically W. Va. Code §46A-7-104, authorizes the Attorney General to issue an investigative subpoena requiring production of documents from an out-of-state lender that has made loans to West Virginia residents and engaged in allegedly unlawful debt collection activities when the lender's records are located out of state?
5. Whether a circuit court in West Virginia has jurisdiction to enforce an investigative subpoena issued by the Attorney General pursuant to W. Va. Code §46A-7-104 for the records of a lender that engaged in allegedly unlawful debt collection activities here when the company or its records are located out of state?

II. STATEMENT OF THE CASE

At the time the subject subpoena enforcement proceeding was initiated, First Auto Loans, Inc. ("FAL") operated 41 locations in Virginia from which it made "title loans" to residents of Virginia and other states, including West Virginia. Appendix 116. FAL's branch offices in Winchester and Wytheville, Virginia, are in close proximity to the West Virginia border. Community Loans of America, Inc. ("CLA") of Atlanta, Georgia, is the parent company of FAL. Robert I. Reich is the president and chief executive officer of FAL

and CLA. Unless otherwise noted, "FAL" hereinafter shall refer collectively to Respondents Fast Auto Loans, Inc., Community Loans of America, Inc., and Robert I. Reich.

According to a class action lawsuit filed recently by a soldier based at Ford Benning, Georgia, CLA operates more than 900 title loan offices under its umbrella in 22 states. See Russ Bynum, "*Ga. Soldier Claims He Was Predatory Lending Victim*," Atlanta Journal-Constitution, November 22, 2011, <http://www.ajc.com/news/nation-world/ga-solider-claims-he-1237646.html>. A copy of the article is attached hereto as Exhibit A and incorporated by reference herein.

The term "title loan" means a loan secured by a non-purchase money security interest in a motor vehicle. The complaints filed with the Attorney General of West Virginia indicate that FAL's loans charged interest with annual percentage rates of 300%. See complaint of Mable Williams of Bluefield. Appendix 54, 57.

Beginning in 2003 and continuing up until about June 1, 2010, FAL also engaged in the business of making "payday loans" at the same physical locations where FAL currently makes title loans. Appendix 108. "Payday loans" are short-term loans or cash advances, typically for a period of approximately 14 days, based upon or secured by a present or post-dated check or by an agreement authorizing debits of amounts owed from the consumer's checking account. Upon information and belief, FAL's payday loans also charged interest with annual percentage rates of 300%.

Payday loans and title loans have never been legal in West Virginia. If the loans in West Virginia had been entered into in West Virginia, the interest rates would have been capped at 18% APR. See Order, West Virginia Lending and Credit Rate Board, effective

December 1, 1999 and still in effect today, attached hereto as Exhibit B and incorporated by reference herein.

The Attorney General opened an investigation of FAL after receiving at least three complaints from or involving West Virginia consumers who had obtained title loans from FAL. See complaints attached to affidavit of Angela White, paralegal. Appendix 47-72.

The complaints alleged that FAL engaged in the following unlawful collection practices:

- (a) repeated telephone calls to consumers at their homes, places of employment, or at other unusual times or places known to be inconvenient, with intent to annoy, abuse, oppress or threaten them or the person at the called number, in violation of W.Va. Code § 46A-2-125(d) and W.Va. Code § 46A-6-104;
- (b) disclosing information relating to their alleged indebtedness to the consumer's employer or agent before a judgment has been rendered other than to proper legal action, process, or proceeding in violation of W.Va. Code § 46A-2-126(a) and W.Va. Code § 46A-6-104;
- (c) disclosing, publicizing, or communicating information relating to the consumer's alleged indebtedness to relatives, family members, references or other persons not residing with the consumer, in violation of W.Va. Code § 46A-2-126(c) and W.Va. Code § 46A-6-104; and
- (d) making threats and accusations, directly or by implication, that consumers have engaged in fraud or other conduct which, if true, would tend to disgrace or subject them to ridicule or contempt of society, in violation of W.Va. Code § 46A-2-124(b) and W.Va. Code § 46A-6-104.

See Appendix 47-72.

Upon the basis of these complaints, including the written responses of FAL and interviews with the consumers, the Attorney General opened a formal investigation of FAL and its parent company, CLA, and issued an investigative subpoena ("Subpoena") on March 2, 2011 as authorized by W.Va. Code § 46A-7-104(1) directing them to produce

documents about their debt collecting activities in West Virginia to the Attorney General on or before March 21, 2011. Appendix 117.

On April 5, 2011, FAL responded to the Subpoena by producing the affidavit of Terry E. Fields, chief financial officer for FAL, who acknowledged receiving the Subpoena. Fields alleged that FAL does not do business in West Virginia, does not have any offices or employees in West Virginia, and stated "I believe that any and all payments collected by Fast Auto occurred outside of West Virginia." Appendix 128. Accordingly, FAL refused to comply with the Subpoena, which led to the filing of this Petition with the Circuit Court of Kanawha County on April 25, 2011. Appendix 106.

A Show Cause Order was issued by the Honorable Respondent Charles E. King, Jr., on April 28, 2011, affording FAL an opportunity to show cause why the Subpoena should not be enforced at a hearing on June 8, 2011. Appendix 104. On May 25, 2011, FAL filed Respondents' Opposition to Petition to Enforce Investigative Subpoena. Appendix 74. On May 27, 2011, the State filed its Memorandum of Law in Support of State's Petition to Enforce Investigative Subpoena. Appendix 34.

The court held a hearing on June 8, 2011, at which time it considered the arguments of counsel, and the pleadings and exhibits of record, at the conclusion of which the court instructed the parties to file proposed findings of fact and conclusions of law for the court's consideration. The court did not make any ruling from the bench at the hearing. On August 15, 2011, Respondent Judge King entered the Memorandum Opinion & Order that had been submitted by FAL. Appendix 2. A comparison of FAL's Proposed Memorandum Opinion & Order and the one entered by the court indicates that Respondent Judge King

signed FAL's Proposed Memorandum Opinion & Order verbatim without changing a single word. Appendix 27.

III. SUMMARY OF ARGUMENT

In 1974 the West Virginia Legislature enacted the WVCCPA to prohibit a broad range of unfair or deceptive acts or practices in consumer sales and credit transactions, and empowered the Attorney General to enforce these provisions, W.Va. Code § 46A-7-102. The Legislature specifically proscribed a long list of debt collection practices that it found as a matter of law to be threatening, coercive, oppressive, abusive, fraudulent, deceptive, misleading, unfair or unconscionable. These practices are found in the WVCCPA, W.Va. Code § 46A-2-122 through W.Va. Code § 46A-2-129a.

Although the list of prohibited debt collection practices largely mirrors those practices enumerated in the federal Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 et seq., the reach of the WVCCPA is greater than the FDCPA because it covers all debt collection activities, including a creditor [like FAL] collecting its own debt, while the FDCPA only applies to collection agencies. See Thomas v. Firestone Tire & Rubber Co., 266 S.E.2d 905 (W.Va. 1980). Although the Legislature has directed that the West Virginia courts be guided by the interpretations given by the federal courts to the various federal statutes dealing with the same or similar matters, W.Va. Code § 46A-6-101(1), this case involves the exercise of the Attorney General's statutory obligation to investigate and regulate violations of the WVCCPA, not the FDCPA.

In accordance with this obligation, the Attorney General opened a formal investigation of FAL and issued the Subpoena requiring FAL to produce the records of its debt collection activities in West Virginia as authorized by W. Va. Code § 46A-2-104(1).

The latter provision authorizes the Attorney General to issue an investigative subpoena when he “has probable cause to believe that a person has engaged in an act which is subject to action by the Attorney General,” W.Va. Code § 46A-7-104(1). The statute further provides that the Attorney General “may...make an investigation to determine if the act has been committed and, to the extent necessary for this purpose,...may subpoena witnesses, compel their attendance, adduce evidence and require the production of any matter which is relevant to the investigation”.....(emphasis added).

The Legislature contemplated that it may be necessary for the Attorney General to subpoena records located out of state in order to fulfill its obligation and provided a procedure for doing so:

If the person’s records are located out this State, the person at his option may either make them available to the attorney general at a convenient location within this State or pay the reasonable and necessary expenses for the attorney general or his representative to examine them at the place where they are maintained. The attorney general may designate representatives, including comparable officials, of the states in which the records are located, to inspect them on his behalf.

See W.Va. Code W.Va. Code § 46A-7-104(2) (emphasis added).

When a person fails without lawful excuse to obey a subpoena issued by the Attorney General, the Attorney General may apply to the circuit court for an order compelling compliance. See W.Va. Code § 46A-7-104(3). In this case, the Attorney General’s Subpoena was duly served upon FAL in accordance with the applicable long-arm statutes, receipt of which was acknowledged by FAL. See Affidavit of Terry E. Fields, Appendix 94. After FAL failed to comply without lawful excuse, the Attorney General filed the subject subpoena enforcement proceeding.

In the trial court's Memorandum Opinion & Order denying the Attorney General's Petition, it is evident that Respondent Judge King adopted the fundamentally flawed position that was advocated by FAL in the proceedings below. FAL repeatedly argued that it did not engage in any business in West Virginia, and that the Attorney General's subpoena may only be enforced in Georgia in accordance with the procedure established by the law and civil rules of Georgia. If that was the case, neither the Attorney General of West Virginia nor any other state would be able to conduct a meaningful investigation, or any investigation at all, when companies violate consumer protection laws within their states. While the State asserts that FAL did engage in business in West Virginia, the question before this Court is whether FAL engaged in "activities," i.e., alleged unlawful debt collection activities, that make it subject to the Attorney General's investigative authority.

In this case, West Virginia consumers were enticed to travel to Virginia to get loans from FAL with interest rates that would be usurious here. In order to obtain a loan, they were required to produce a clear title to a motor vehicle registered in West Virginia as security for the loan. FAL then filed a lien against each title with the West Virginia Division of Motor Vehicles ("DMV"). If consumers became delinquent on their accounts, FAL engaged in a wide range of debt collection practices in West Virginia to coerce payment of the debts. When consumers defaulted on their accounts, FAL or its agents physically traveled to West Virginia to seize the vehicles that secured the loans.

The WVCCPA defines "debt collection" as "any action, conduct or practice of soliciting phones for collection or in the collection of claims owed or due or alleged to be owed or due by a consumer." See W.Va. Code § 46A-2-122(c). There can be no serious

dispute that FAL engaged in “debt collection” in West Virginia, an activity that the Legislature has placed under the regulatory jurisdiction of the Attorney General.

It is evident that FAL and the court failed to understand that the making of telephone calls is the fundamental, if not most important, tool employed by any debt collector. During the hearing, Respondent Judge King repeatedly asked the undersigned counsel to explain what conduct or activities FAL engaged in in West Virginia that would afford the Attorney General jurisdiction to investigate and regulate this conduct, and the court jurisdiction to enforce the Subpoena. Each time the undersigned counsel explained that FAL made repeated, abusive, harassing telephone calls into West Virginia to consumers, family members, friends, persons listed as references on loan application, and to their employers and others at their places of employment.

Although such conduct violates the WVCCPA, the court repeatedly asked what else did FAL do and questioned whether debt collection calls, even unlawful ones, constitute engaging in activity in West Virginia such as would authorize the issuance of the Attorney General’s subpoena and enforcement of the Subpoena by the court. In fact, during the hearing Respondent King made at least 13 references to or comments questioning whether unlawful debt collection calls into West Virginia afford the Attorney General a basis to issue the Subpoena or jurisdiction to the court to enforce the Subpoena. See generally, Transcript of June 8, 2011 hearing on Petition. Appendix 139-153.

Respondent Judge King’s inability to understand or refusal to acknowledge the significance of FAL’s debt collection activities in West Virginia for jurisdictional purposes is best illustrated by the following excerpts from exchanges between the court and the undersigned counsel:

[After the undersigned counsel explained the alleged unlawful debt collection communications, including harassing, abusive telephone calls, and other conduct as reported by aggrieved consumer complainants, Appendix 139-142.]

THE COURT: So making phone calls into the State of West Virginia from Virginia, right? Sending a representative up here from the State of Virginia to repossess an automobile, right? That is activity that you -- let's say, it's prohibited, let's say. It's illegal?

MR. GOOGEL: The activity that is prohibited -- They are not prohibited from making calls or sending letters. They're prohibited from engaging in abusive, harassing, oppressive debt collection conduct.

THE COURT: I understand. Is it the phone calls that are abusive and unlawful in your judgment, Mr. Googel?

MR. GOOGEL: Judge, the law prohibits continuous or repeated phone calls that are made with the intent to abuse or harass. The law also prohibits phone calls made to persons other than the one that owes the debt. You heard Mr. Barnette make reference to a reference that was called. A debt collector does not have the right to call your references when you default on a loan. In fact, the only time a debt collector can ever call somebody other than you --

THE COURT: Okay. I understand all that. Are you saying that that gives me jurisdiction to do what you want me to do?

MR. GOOGEL: Absolutely, Judge. They came into West Virginia and engaged in these activities.

THE COURT: They made phone calls.

MR. GOOGEL: They made phone calls.

THE COURT: ... Is that the activity that Mr. Barnette's clients are engaging in that you -- in the State of West Virginia, making phone calls from Virginia into West Virginia, that are contrary to legal debt collection practices?

MR. GOOGEL: Yes. They're making abusive phone calls.

THE COURT: Okay. That's all that you're contending, right?

MR. GOOGEL: Judge, we're seeking to discover more. This is an investigative process. We don't know --

THE COURT: Well, but, Mr. Googel, that's your complaint to this point against his clients, right?

MR. GOOGEL: That they are engaging in unlawful debt collection activity in West Virginia.

THE COURT: By making phone calls from Virginia into West Virginia.

MR. GOOGEL: And other activities.

* * * *

THE COURT: ... Are you saying that making phone calls, whether they're legal or illegal, in West Virginia and sending people up here to repossess a car is in effect conducting business in West Virginia sufficient to give --

* * * *

THE COURT: ... Let me start over. And please, answer my question. Facts. What are you basing jurisdiction on to require these out of state companies to give you these records? What have -- What activities have they engaged in? What conduct?

MR. GOOGEL: Judge, I believe I have answered it the best I can.

THE COURT: Answer again, please, so that I am sure of what your contentions are.

* * * *

MR. GOOGEL: What gives jurisdiction, Judge, is that this company engaged in debt collection activities within the State of West Virginia as defined by our law, as defined by our Consumer Act, as defined by our Long Arm Statute, as defined by all of our principles of law. And they don't want to be subject to the jurisdiction of our state.

THE COURT: You're arguing. I don't want to hear that. Now, I understand. I understand that. Now, what conduct? What did they do? Describe the nature of the conduct of these debt collection practices that you are so offended by. What did they do?

MR. GOOGEL: Well, they made repeated and continuous telephone calls to consumers at their homes.

THE COURT: What else?

MR. GOOGEL: To their friends. To their family members. To their places of employment. They disclosed the alleged indebtedness to third parties in all of those instances of contacts with third parties. They also disclosed the indebtedness. As I already explained, they are not allowed to ever call third parties except in the limited exception of obtaining location information. They knew where all of these people were.

THE COURT: All right. Time out. So they made phone calls into West Virginia from Virginia. That's the sum and total of it, right?

MR. GOOGEL: A special type of phone call. A debt collection phone call. A state and federal debt collection law that the states have the jurisdiction to enforce their debt collection laws.

THE COURT: Debt collection phone calls. That's a fair characterization, isn't it?

MR. GOOGEL: That's fair.

THE COURT: They made debt collection phone calls from Virginia into West Virginia?

MR. GOOGEL: They made unlawful debt collection phone calls.

THE COURT: Well, that remains to be seen, Mr. Googel. That's your allegation.

MR. GOOGEL: Right. And we're still in the investigative stage, Judge.

THE COURT: I have heard all of that. Now, what else did they engage in in West Virginia that gives jurisdiction to this court to do what you want, besides the phone calls?

* * * *

MR. GOOGEL: As part of debt collection, and under state and federal law, the act of repossessing the car constitutes debt collection. When consumers have defaulted, they came into West Virginia and seized the motor vehicles.

THE COURT: They repossessed vehicles. And they sent representatives in from Virginia to West Virginia to snatch the car, right?

MR. GOOGEL: That's correct.

THE COURT: What else?

MR. GOOGEL: Well, I'm not sure what else, Judge. That is what prompted us to open the investigation.

See generally Appendix 142-153.

As indicated by Respondent Judge King's questions and comments at the hearing, it was not surprising that he failed to find any jurisdictional basis for the Attorney General to issue the Subpoena or for the court to enforce the Subpoena. This finding totally defeats the Legislature's purpose in enacting the WVCCPA and authorizing the Attorney General to enforce it. It also runs contrary to the jurisdictional principles established by the United States Supreme Court in International Shoe Co. v. State of Washington, 326 U.S. 310 (1945), which is the law of the land in West Virginia and all other states. In International Shoe, the Court established the principle that a state may take jurisdiction over a nonresident defendant that has "certain minimum contacts with [the forum state] such that the maintenance of the suit [in the case, the Subpoena] does not offend traditional notions of fair play and substantial justice." 326 U.S. at 316. The principles of International Shoe Co. are discussed in more detail infra at 17-21.

In the case at bar, FAL did more than engage in certain minimum contacts in West Virginia. FAL engaged in debt collection conduct that violates the WVCCPA, which the Legislature authorized the Attorney General to investigate and take enforcement action when necessary. As explained above, the WVCCPA not only authorizes the Attorney General to "require the production of any matter which is relevant to the investigation" but also established a specific procedure that applies when the investigative subpoena seeks records located outside the state. See W.Va. Code § 46A-7-104(1), (2), respectively.

In this case, the Attorney General's Subpoena merely requires the production of documents that can be sent by first-class mail or transmitted electronically, as is most commonly done in response to the Attorney General's subpoenas. The Subpoena does not require FAL or any of its agents to physically appear in West Virginia. As discussed further herein below, there is no question that the Attorney General is authorized by the WVCCPA to subpoena records that may be located out of state. Moreover, the activities of FAL as alleged by the complainants clearly constitute sufficient contacts within the state to authorize issuance of the Subpoena and enforcement by this Court.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State represents that oral argument is necessary pursuant to the criteria contained in Rule 18(a) of the Rules of Appellate Procedure for the Supreme Court of Appeals of West Virginia because the parties have not agreed to waive oral argument; the petition is not frivolous; and the dispositive issues have not previously been authoritatively decided by this Court. The State further represents pursuant to Rule 20(a) of this Court's Rules of Appellate Procedure that this case involves an issue of fundamental public importance in that it goes to the heart of the Attorney General's power to investigate and regulate abusive debt collection practices within West Virginia as granted by the Legislature and, therefore, additional time may be needed for the oral argument.

V. ARGUMENT

- A. THE WEST VIRGINIA LEGISLATURE HAS AUTHORIZED THE ATTORNEY GENERAL TO INVESTIGATE AND REGULATE UNLAWFUL DEBT COLLECTION PRACTICES THAT OCCUR WITHIN THE STATE EVEN WHEN THE DEBT COLLECTOR AND ITS RECORDS ARE LOCATED OUTSIDE OF THE STATE.**

The WVCCPA authorizes the Attorney General to investigate when he has probable cause to believe that a person has engaged in an act which is subject to action by the Attorney General. Specifically, W. Va. Code § 46a-7-104(1) provides as follows:

§46A-7-104. Investigatory powers.

(1) If the attorney general has probable cause to believe that a person has engaged in an act which is subject to action by the attorney general, he may, and shall upon request of the commissioner, make an investigation to determine if the act has been committed and, to the extent necessary for this purpose, may administer oaths or affirmations, and, upon his own motion or upon request of any party, may subpoena witnesses, compel their attendance, adduce evidence, and require the production of any matter which is relevant to the investigation, including the existence, description, nature, custody, condition and location of any books, records, documents or other tangible things and the identity and location of persons having knowledge of relevant facts, or any other matter reasonably calculated to lead to the discovery of admissible evidence.

(Emphasis added.) The Legislature also contemplated that the Attorney General would need to subpoena records located outside of West Virginia in order to fulfill his obligations to investigate and enforce consumer protection laws and authorized the Attorney General to do so. Specifically, W.Va. Code § 46A-7-104(2) provides:

If the person's records are located outside this state, the person at his option shall either make them available to the attorney general at a convenient location within this state or pay the reasonable and necessary expenses for the attorney general or his representative to examine them at the place where they are maintained. The attorney general may designate representatives, including comparable officials of the state in which the records are located, to inspect them on his behalf.

(Emphasis added.)

The record herein indicates that the Attorney General received formal complaints from at least three persons disclosing that FAL was engaging in debt collection or other unfair or deceptive acts or practices in West Virginia. Appendix 47-72. The Legislature specifically authorized the Attorney General to regulate debt collection activity in West

Virginia and proscribed certain debt collection and unfair or deceptive practices that would be deemed to violate the WVCCPA. These provisions are found generally in W. Va. Code § 46A-2-128 through W. Va. Code § 46A-2-129a, inclusively, W. Va. Code § 46A-6-102, and W. Va. Code § 46A-6-104.

The conduct alleged by the complainants, if true, discloses that FAL's debt collection actions violated several provisions found in the WVCCPA. Based upon the allegations in the complaints, the Attorney General had probable cause to believe that FAL was engaged in acts [debt collection] which are subject to action by the Attorney General. Therefore, the Attorney General was authorized to open an investigation and issue the Subpoena which is the subject of this subpoena enforcement proceeding.

The record herein reflects that the Attorney General's Subpoena was duly served upon the two foreign corporations and the nonresident individual in accordance with West Virginia's applicable long-arm statutes. See W.Va. Code § 31D-15-1510 (long-arm service on foreign corporations) and W.Va. Code § 56-3-33 (long-arm service on nonresident individuals). FAL does not dispute that the State's Subpoena was served in accordance with the applicable long-arm statutes. Rather, FAL asserts that the State would have been required to domesticate the Subpoena in Georgia and enforce the Subpoena in Georgia as provided by Georgia law and rules of civil procedure.

FAL also argued that the WVCCPA does not authorize the Attorney General to subpoena the records of a company located out of state even when the company has engaged in unlawful debt collection practices proscribed by the WVCCPA within West Virginia but instead must place itself at the mercy of the laws and courts of the home states of the alleged violator. As shown above, FAL's position that was adopted by the court is

clearly wrong; the WVCCPA does authorize the Attorney General to subpoena records located out of state and has provided a special procedure for doing so. Moreover, such a position contradicts the venue and jurisdictional principles developed by the federal courts over several decades in cases involving FDCPA and state debt collection claims. See discussion infra at 28-32.

B. THE ATTORNEY GENERAL'S AUTHORITY TO SUBPOENA RECORDS FROM A COMPANY THAT HAS ENGAGED IN ABUSIVE DEBT COLLECTION OR OTHER UNLAWFUL SALES AND CREDIT PRACTICES WITHIN WEST VIRGINIA IS LIMITED ONLY BY THE REQUIREMENT THAT THE COMPANY HAS CERTAIN MINIMUM CONTACTS WITH THE STATE SUCH THAT THE MAINTENANCE OF A SUIT, OR IN THIS CASE THE ISSUANCE OF A SUBPOENA, DOES NOT OFFEND TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE.

In the late 1800s it had been ruled that no state could exercise direct jurisdiction and authority over persons or property without its territory. See Pennoyer v. Ness, 95 U.S. 742 (1878). However, "changes in the technology and transportation and communication, and the tremendous growth of interstate business activity, lead to an 'inevitable relaxation of the strict limit on state jurisdiction' over nonresident individuals and corporations." See Silverman v. Berkson, 661 A.2d 1266, 1270 (N.J. 1995), citing Hanson v. Denckle, 257 U.S. 235, 260 (1915). Ultimately, the Court held that a state court's jurisdiction over nonresidents does not violate the Due Process Clause if the Defendant has "certain minimum contact with it such that the maintenance of the suit does not offend 'traditional notice of fair play and substantial justice.'" See International Shoe Co. v. Washington, 326 U.S. at 316. The New Jersey court in Silverman explained that the due process limitation upon a state's extraterritorial application of law and the due process analysis for

determining the limit of a state court's judicial jurisdiction are closely linked and that "essentially the same principle should be applied with reference to both situations." Silverman at 1270.

The court in Silverman considered a challenge to the extraterritoriality of a state agency's subpoena much like the challenge to the Attorney General's subpoena in this case. In Silverman, the appellant challenged the ability and power of the New Jersey Bureau of Securities ("Bureau") to subpoena a nonresident who has engaged in purposeful conduct expressly aimed at the New Jersey securities market and questioned whether the New Jersey court could, consistent with due process principles, enforce such a subpoena.

Unlike the present case, where the Legislature expressly authorized the Attorney General to subpoena records from a company located out of state, the appellant in Silverman contended that the Bureau was not so authorized and argued "if the Legislature had wished to bestow such extraordinary extraterritorially ability upon the Bureau, it could have done so in plain language." See Silverman, at 1268. However, the court noted "powers expressly granted to an administrative agency should be liberally construed so that the agency can fulfill the Legislature's purpose" (citation omitted), id.

In considering the question of the Bureau's authority to subpoena a nonresident party and the court's jurisdiction to enforce a subpoena, the court reasoned:

The concepts of 'jurisdiction to prescribe' ("the authority of a state to make its law applicable to persons or activities") and 'jurisdiction to adjudicate' ('the authority of a state to subject particular persons or things to its judicial process')(citation omitted) are closely linked. * * * * * The question in this case is not whether a state may compel attendance in the forum of any out-of-state witness, but rather whether it may require the attendance of one who has purposely availed himself of the privilege of entering regulated securities markets in the forum state.

See Silverman at 1272-1273 (emphasis added). The court ultimately held the Bureau's subpoena could be issued and enforced:

[W]e hold that it is reasonable to infer that the Legislature would, consistent with principles of due process, intend that the Bureau's administrative power to compel the attendance of witnesses be coextensive with the substantive mandate to investigate securities transactions 'within or outside of this State.' Consistent with principles of due process, that authority shall be limited to subpoenaing witnesses who have purposefully availed themselves of the privilege to enter the New Jersey securities market.

See Silverman at 1276 (emphasis added).

Unlike the Bureau in Silverman, the Attorney General did not seek to compel the attendance of FAL or its principals within West Virginia to present testimony. Rather, the Attorney General's Subpoena merely required that FAL produce certain documents specified in the Subpoena, which could have been accomplished by placing a hard copy of the subpoenaed documents in first class mail or by transmitting the documents electronically as is routinely done by other out-of-state parties whose records have been subpoenaed by the Attorney General. Again, as already noted above, the Legislature contemplated that the Attorney General would need to subpoena records from companies located out of state and provided the precise procedure for doing so. W. Va. § 46A-7-104(2).

In addition to Silverman, which at least one commentator has characterized as the leading case on the extraterritoriality of state agency's subpoenas¹ at least two other courts have more recently upheld the authority of state agencies to subpoena records from out of state companies that have allegedly violated their state laws and the jurisdiction of

¹See Galvin v. Jaffe, 2009 WL 884605 (Mass. Super.) at 6, citing Long, J., Blue Sky Law § 11:43 (November 2008).

courts to enforce such subpoenas. In Everdry Marketing and Management, Inc. v. Carter, 885 N.E.2d 6 (Ind. App., 2008), the court upheld the Indiana Attorney General's authority to issue a civil investigative demand (the same as the Attorney General's investigative subpoena) and the lower court's authority to enforce the subpoena.

In Everdry, the Indiana Attorney General subpoenaed the records of a franchiser located out of state in connection with an investigation of its franchisees located within Indiana. The Indiana court's rationale in upholding the Indiana Attorney General's authority to issue the subpoena and the court's jurisdiction to enforce it are applicable to the instant case involving FAL. As did the court in Silverman, the court in Everdry applied the minimum contacts analysis established by International Shoe:

EverDry engaged in significant interaction with its Indiana franchisees and their customers, including termination of Indiana franchises, active recruitment of a potential Indianapolis franchisee, personal contact with Indiana consumers having service issues, and collection of fees and royalties from its Indiana franchisees.

See Everdry at 12 (emphasis added). The court also noted: "[T]he Attorney General merely seeks to gather information that may prove helpful in making a determination about the viability of potential legal action," the same as the Attorney General seeks to do here concerning FAL. The court observed:

[T]he attorneys general of the several states certainly would have a shared interest in furthering the policy of protecting their citizens from malfeasance at the hands of nonresident businesses who have no office within the State in question.

Id at 14. The court also noted "other states provide their attorneys general with investigative powers substantially similar to those afforded our Attorney General." Id., n. 9.

The court in Galvin v. Jaffe, 2009 WL 884605 (Mass. Super.) relied extensively on Silverman in upholding the authority of the Secretary of the Commonwealth to issue a subpoena to a nonresident who was not the target of the state agency's investigation. Among other things, Jaffe argued that Massachusetts law lacked the procedure for service of a subpoena upon a nonresident. But the court noted:

[G]eneral principles of administrative law suggest that the Legislature intended the agency to have the authority necessary to fulfill its function to investigate, within and without the State...transactions involving [its] residents...[The] authority to issue a subpoena 'within and without' the state implies authority to serve it, even though the procedure for doing so is unspecified. The Court need not construct such a procedure in the circumstances of this case, where Jaffe clearly received actual notice of the subpoena, [and] had fair opportunity to object to the manner in which it was served....

See Galvin at 7, citing Silverman with approval. The court applied traditional due process standards to the jurisdictional issues, again citing Silverman:

The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties or relations. By requiring that individuals have fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign, the Due Process Clause gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this fair warning requirement is satisfied if the defendant has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or related to those activities.

See Galvin at 10 (emphasis added), citing Silverman generally and Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). Finally, the court noted: "A single contact satisfies that requirement [that the party can reasonably foresee that it will be haled into court in the

forum] if it creates a 'substantial connection' with the forum state" (citations omitted).

Galvin at 11 (emphasis added).

C. THE COURT IN ITS MEMORANDUM OPINION & ORDER HAS ERRONEOUSLY APPLIED THE PROCEDURE FOR SUBPOENAING WITNESSES FOR DEPOSITIONS IN PRIVATE CIVIL ACTIONS TO THE ISSUANCE OF A SUBPOENA BY A REGULATORY AGENCY AUTHORIZED BY STATUTE.

If the subpoena in question was issued to compel attendance of a nonresident to provide testimony at a deposition in West Virginia arising out of civil litigation between private parties, the arguments advocated by FAL and adopted by the trial court might be sound. But the issuance of a subpoena by the Attorney General as authorized by W.Va. Code § 46A-7-104(1) to investigate alleged violations of the WVCCPA is an entirely different matter. In fact, Respondent Judge King ignored the most recent decision of this Court in which it weighed the authority of the Attorney General to subpoena records from out of state defendants.

Although the focus in State of West Virginia v. Bloom was different from the instant case, the underlying principle that the Court relied upon is applicable to this case. The specific issue in State of West Virginia v. Bloom was whether Kanawha Circuit Judge Bloom properly applied Rule 21 of the West Virginia Rules of Civil Procedure in severing the Attorney General's claims against eight Internet payday lenders all joined as respondents in a single subpoena enforcement proceeding. In ruling that Judge Bloom had erred, the Court held: "because the rules of civil procedure are not applicable to subpoena enforcement proceedings at the investigative stage, this Court is of the opinion that Rule 21 should not have been applied to sever the claims against the payday lenders"

(emphasis added). See State of West Virginia v. Bloom, No. 35716 (W.Va. Supreme Court, Feb. 17, 2011) (memorandum decision) at 3. All of the respondents in State of West Virginia v. Bloom were out-of-state foreign corporations or nonresident individuals who engaged in payday loan transactions with West Virginia consumers over the Internet.

Although the question before the Court in that case was whether the respondents were properly severed under Rule 21, it is important to note that the Supreme Court had the entire record before it. If the Court had any concerns about the procedure employed to serve the subpoenas, or whether the Attorney General was empowered to subpoena records from companies located out of state, it would have so noted. After the Court remanded the case for further proceedings before Judge Bloom, the State's petition to enforce subpoena was granted against all parties except those who were dismissed for lack of service.

In the case at bar, Respondent Judge King disregarded the principles established by State of West Virginia v. Bloom. In denying the State's Petition, Respondent Judge King relied on two cases from other states where subpoenas were issued in an effort to compel attendance of out-of-state residents at depositions or court hearings under procedural rules. In the first case, Guthrie v. American Broadcasting Co., 733 F.2d 634 (4th Cir. 1984) the court explained: "The dispositive question on this appeal is whether a subpoena duces tecum issued by the District Court of Maryland for the deposition of a nonparty witness could properly be served outside the district of Maryland." 733 F.2d at 636. The court held that a subpoena to take a deposition of a nonparty witness under Rule 45(d) of the federal rules of civil procedure may only be served in the judicial district where

it is issued. *Id.* at 637. Thus, Guthrie was decided specifically on the federal rules of civil procedure and did not involve the statutory power of the Attorney General or any agency to subpoena the records of a company violating consumer protection law within West Virginia or the jurisdiction of a West Virginia court to enforce such a subpoena.

The second case, Ealy v. State, 306 S.E. 2d 275 (Ga. 1983), is not even remotely relevant to the case involving FAL. Ealy involved defense counsel's failure in a criminal case to utilize the procedure under Georgia law to secure the attendance of witnesses to back up the defendant's alibi defense at trial in Georgia. Ealy had nothing to do with the statutory power of a state agency to subpoena the records of an out-of-state company violating the law in its state or the court's jurisdiction to enforce such an order. The trial court clearly erred by relying upon Guthrie and Ealy in finding that a "forum state's subpoena power does not extend beyond its borders." See Memorandum Opinion & Order, ¶ 15, Appendix 5. Not only did the court conclude erroneously that the Attorney General's subpoena power was governed by rules of civil procedure, contrary to Bloom, but said it was governed by the law and rules of Georgia.

D. FAL ENGAGED IN MINIMUM CONTACTS IN WEST VIRGINIA FOR DUE PROCESS PURPOSES SUFFICIENT TO WARRANT ISSUANCE OF A SUBPOENA BY THE ATTORNEY GENERAL AND ENFORCEMENT OF THE SUBPOENA BY THE COURT.

As the undersigned counsel explained to the trial court, the Attorney General's case against FAL is in the investigative stage. Appendix 143-144. Nonetheless, after the undersigned counsel stated and restated the allegations of unlawful debt collection practices by FAL, Respondent Judge King still asked: "Now, what else did they engage in in West Virginia that gives jurisdiction to this Court to do what you want, besides the phone

calls?" Appendix 143-144. It is apparent that Respondent Judge King subjected the Attorney General to the incorrect standard of proving the case against FAL on the merits as a condition of enforcing the Subpoena, something the Attorney General certainly is not required to do at a summary enforcement proceeding such as this. As the undersigned counsel explained, "Judge, we are seeking to discover more. This is an investigative process." Appendix 143.

As was explained to the Court, the Attorney General opened its investigation of FAL after receiving a formal complaint from Mildred Morris of Martinsburg, West Virginia on September 9, 2010. Appendix 139. Further inquiries found that the Attorney General had received two previous complaints, all of which reported conduct by FAL which, if true, indicated FAL engaged in unlawful debt collection practices in West Virginia. Appendix 140.

Ms. Morris reported that FAL's representatives made repeated telephone calls to her and to her daughter, Whitney Morris; her sister, Reminda Morris; her friend, Debbie Pruden; her co-worker, Dana Auglliard; and her supervisor at work, Jennifer Hogge. In each instance, FAL left messages for Ms. Morris to contact FAL even though FAL had all of the contact information for Ms. Morris. Appendix 52. Each of these calls constituted unlawful contacts to third parties in violation of several provisions of the WVCCPA. By leaving messages for Ms. Morris to call "Fast Auto Loans," FAL also unlawfully disclosed that it was calling about a delinquent debt. Ultimately, Ms. Morris could not withstand FAL's repeated harassing phone calls and the embarrassment caused by the unlawful contacts to third parties. In the end, FAL came to Martinsburg and took her car. Appendix 53.

How many other Mildred Morrises in West Virginia were victimized by FAL? That is precisely what the Attorney General sought to learn by issuing the investigative Subpoena. After learning about the Attorney General's enforcement proceeding against FAL, Amy Biegelsen of the highly-regarded Center for Public Integrity visited Mildred Morris in Martinsburg to learn the rest of the story. In an online story published by the Center's iWatch News on July 15, 2011, Biegelsen went behind the scenes to report on the consequences of predatory title loans and unlawful debt collection practices on the unwary victims. She reports that Ms. Morris is a single mother of two in Martinsburg who discovered she was in urgent need of \$700 to reserve a dormitory room for her son, Jonathan, to attend the prestigious American Musical and Dramatic Academy. In order to borrow the \$700 from FAL, Ms. Morris pledged the only thing of value she owned, a 2002 Pontiac Sunfire. After repaying FAL more than \$1,000 and enduring many months of harassment, two men from FAL drove to her home in Martinsburg and took her Pontiac Sunfire. "I felt sick," Morris said. The complete story of Mildred Morris and the harm caused by FAL and other title lenders to consumers is attached hereto as Exhibit C and incorporated by reference herein. See Amy Biegelsen, *"Borrower Nightmares: \$700 Dormitory Fee Costs Family Its Car,"* Center for Public Integrity's iWatch News, July 15, 2011. The story is available online at <http://www.iwatchnews.org/2011/July 7/15>.

James E. Mack of Milton, West Virginia reported that he received many telephone calls from FAL because his daughter listed him as a reference for a loan she obtained from FAL. He reported "they would call us 2 - 3 times a week, some days they called 2 or 3 times a day." He also said, "they told us that they would take us off their call list a couple of times but we still received calls up until we told them we were going to contact the

Attorney General.” See complaint of James E. Mack, Appendix 70, 72. The repeated calls by FAL to Mr. Mack violated the WVCCPA.

In addition, Mabel Williams of Bluefield, West Virginia also filed a complaint against FAL. Appendix 54. When the undersigned counsel attempted to call Ms. Williams to get a better understanding of her complaint, he learned that Ms. Williams died in 2008. However, Claudette Marie Lotts of Princeton, West Virginia, who answered the telephone number on Ms. Williams’ complaint form, explained what happened. She said Mabel was an elderly person who lived on a fixed income and did not have a home telephone, so she allowed Ms. Williams to use her phone. She reported that FAL made repeated telephone calls to her about the FAL loan, sometimes calling 2 - 3 times per day every day until she finally made the payment. The harassment did not end until Ms. Williams, with the assistance of Ms. Lotts, filed a complaint with the Attorney General.

Significantly, Ms. Lotts also reported that FAL engaged in a referral fee program to solicit West Virginia consumers for its loans. Ms. Lott explained that from 1997 to 2009 she was employed as a receptionist, secretary and salesperson at 460 Auto Sales, a used car dealership owned by her brother, Teddy Adkins, in Bluefield, West Virginia. She says that on at least three occasions while working at 460 Auto Sales she was visited by customers who had applied for a loan at FAL’s Wytheville, Virginia branch. Each of the consumers were trying to pledge the vehicle they owned to borrow enough money to purchase a new vehicle. They explained that FAL would pay \$100 to 460 Auto Loans if it agreed to sell the consumers a vehicle. Having already seen how FAL harassed her friend Mabel Williams, Ms. Lotts declined to accept the offer. The circumstances of the complaint of Mabel Williams and FAL’s referral fee offer is set forth in the affidavit of

Claudette Marie Lotts, attached hereto as Exhibit D and incorporated by reference herein.²

As explained herein above the applicable standard for determining whether a subpoena issued by an administrative agency is authorized and whether a court has jurisdiction to enforce the subpoena is governed by the “minimum contacts” standard established by International Shoe Co., supra. More specifically, the question is whether the company that is the subject of the subpoena engaged in minimum contacts with the state such that the maintenance of the suit, or in this case an investigative subpoena, does not offend “traditional notions of fair play and substantial justice.” International Shoe Co. 326 U.S. at 316. Although Respondent Judge King did not agree, there is no question that FAL engaged in minimum contacts for due process purposes to subject itself to the investigative and regulatory authority of the Attorney General.

In determining whether a court may enforce such a subpoena, Silverman, supra, explained that a court may enforce a subpoena against out-of-state witnesses “who have purposely availed themselves with the privilege to enter the New Jersey securities market.” 661 A.2d at 1276. In this case, by making loans to West Virginia consumers secured by titles to motor vehicles registered in West Virginia, by engaging in [unlawful] debt collection activities in West Virginia when consumers become delinquent, and by physically entering West Virginia to seize vehicles secured by its loans when consumers defaulted, FAL has purposely availed itself of the privilege of doing business in the West Virginia marketplace.

²The undersigned counsel disclosed his discovery of FAL’s referral fee program to solicit West Virginia consumers to the court at the June 8, 2011 hearing. Appendix 155.

E. VENUE AND JURISDICTION OVER ALLEGED UNLAWFUL DEBT COLLECTION PRACTICES ARE IN THE STATE WHERE THE COMMUNICATION IS RECEIVED AND NOT THE STATE IN WHICH THE DEBT COLLECTOR AND ITS RECORDS ARE LOCATED.

Although the question of whether the Attorney General and the courts of West Virginia have jurisdiction over alleged unlawful debt collection practices has not previously been decided by this Court, the question has arisen repeatedly in federal courts since enactment of the FDCPA on September 20, 1977. In each instance, courts have held that venue and jurisdiction for cases alleging unlawful debt collection practices under the FDCPA or other states laws such as the WVCCPA is in the consumer's home state or the state where the communication was received, and not the state where the debt collector is located or the state from which the debt collection communication was sent. In reaching this consensus, the court viewed debt collection communications, both letters and telephone calls, as sufficient "minimum contacts" for jurisdictional purposes under the International Shoe analysis discussed herein above. The courts also based their findings on the principle that unlawful debt collection practices are "torts" for purposes of state long-arm statutes. A sampling of these cases is discussed herein below for illustrative purposes.

In Vlasak v. Rapid Collection Systems, Inc., 962 F.Supp. 1096 (N.D. IL 1997), the defendant Arizona collection agency ("Rapid") challenged personal jurisdiction in Illinois because it had no offices there, did not solicit or conduct business there and, in its five-year history, alleged it made "only two 'contacts' with Illinois in relation to its debt collection activities." Vlasak at 1097. In rejecting Rapid's position, the court in Vlasak explained

"Rapid clearly committed a 'tortious act' as defined by the long-arm statute." The court also explained that the phrase "tortious act" under Illinois' long-arm statute "is not limited to acts which create common law liability; instead, 'it encompasses any act that constitutes a breach of duty to another imposed by law'" (citations omitted). Vlasak at 1100. The court concluded "a violation of the FDCPA unquestionably constitutes a breach of a legal duty," noting that the FDCPA imposes a series of behavioral obligations on debt collectors, "and collectors who fail to comply with the provisions of the Act [FDCPA] may be liable for damages and attorneys fees." Id., citing Bailey v. Clegg, Brush & Assocs., Inc., No. 90 CV 2702, 1991 WL 143461 at 2 (N.D.Ga. 1991)(finding that alleged violations of the FDCPA "are analogous to the commission of a tortious act" under the Georgia long-arm statute.) Applying the International Shoe analysis, the court in Vlasak also noted "based on its [debt collection] phone calls and letters to Vlasak, Rapid had fair warning that it might be called before an Illinois court." Vlasak at 1101. The court explained "the main factor in the minimum contacts inquiry is not physical presence in the forum state but rather 'foreseeability'" Id., at 1102. Thus, "Rapid obviously had a very clear purpose in mind when it communicated with Vlasak in Illinois: to collect a debt on behalf of one of its clients." Id.

More recently, a California debt collection lawyer challenged personal jurisdiction in Ohio because "he has never been to Ohio and maintains no contacts with the state, business related or otherwise." Vlach v. Yapple, 670 F.Supp.2d 644, 646 (N.D. Oh. 2009). Therein, the consumer alleged that Yapple engaged in debt collection communications with her in Ohio that violated the FDCPA as well as the Ohio Consumer Sales Practices Act ("OCSPA"). Citing Vlasak and other cases, the court found that Yapple [who sent three

written communications that allegedly violated the FDCPA and the OCSPA] “should have reasonably expected that the recipient would have been injured in this state, given that the letter was addressed to an Ohio resident” (citations omitted). Vlach at 648.

The rulings of Vlasak and Vlach find their roots in many other cases involving venue and jurisdictional challenges in debt collection cases filed in consumer’s home states. See, i.e., Sluys v. Hand, 831 F.Supp. 321, 324 (S.D.N.Y. 1993)(suits over alleged unlawful debt collection communications will be brought where the consumer receives the communication; “[o]therwise, one could invoke the protection of distance and send violative letters with relative impunity, at least so far as less well-funded parties are concerned.”); Bates v. C & S Adjusters, Inc., 980 F.2d 865, 868 (2d Cir. 1992)(noting the harm does not occur until receipt of the collection notice, the court concluded that receipt of a collection notice “is a substantial part of the events giving rise to a claim under the Fair Debt Collection Practices Act.”); Murphy v. Allen County Claims & Adjustments, Inc., 550 F. Supp. 128, 132 (S.D. Oh. 1982)(venue and jurisdiction for a claim involving alleged unlawful debt collection communications are in the place where the telephone calls were received, and thus the place where the harm occurred, and not the place where the calls were initiated as alleged by a nonresident collection agency).

The jurisdictional principles enunciated by the foregoing cases were not limited to written communications; rather, they apply to telephone calls, repossessions, or other tortious conduct that allegedly violates the FDCPA or state debt collection laws. Many courts have held that a single contact, even a single telephone call made to collect an alleged debt, provides sufficient contact for due process purposes to invoke the jurisdiction of the court in the state where the communication was received. In Hyman v. Hill &

Associates, 2006 WL 328260 (N.D.Ill), the court found venue and jurisdiction proper for a nonresident debt collection agency that had made “more than one call to Illinois,” noting “a single telephone call or letter directed by a defendant debt collector to a plaintiff debtor’s home state may support venue in that state in an FDCPA action” citing several other cases discussed herein above, i.e. , Bates, Bailey, and Murphy, all supra. Hyman at 1. See also Brooks v. Holmes, Rich & Sigler, P.C., 1998 WL 704023 (N.D.Ill.)(courts have found venue to lie based on a single act directed by the nonresident collection agency to the consumer’s state of residence; when an individual receives allegedly unlawful calls or letters from a distant collection agency “it makes sense to permit the individual to file suit where he receives the communications”), Brooks at 2; Norton v. Local Loan, 251 N.W.2d 520 (Iowa 1977)(a single allegedly unlawful debt collection call from another state into Iowa constitutes “conduct in this state” for due process purposes; the maker of such a telephone call assumes the burdens of Iowa law), Norton at 2; Heritage House Restaurants v. Continental Funding Group, Inc., 906 F.2d 276, 281 n. 6 (7th Cir. 1990)(a single transaction which gives rise to the cause of action amounts to purposeful availment of the privilege of conducting activities within the forum state; physical presence of a nonresident defendant when the transaction is not necessary to obtain jurisdiction); Paradise v. Robinson and Hoover, 883 F.Supp. 521, 526 (D.Nev. 1995)(in a challenge to jurisdiction over an alleged unlawful debt collection communication the court noted “it is well-settled that a single contact with the forum state, not involving the physical presence of the defendant, can be a sufficient basis upon which to establish jurisdiction over the defendant”). The court in Paradise explained the important distinction between telephone calls and letters made for other purposes and alleged unlawful debt collection communications:

This is not a case where the communication involved is merely a means of conducting some other primary business within the forum. Here, the Robinson Defendants' 'communications in the forum state...are the precise subject matter of this action pursuant to the FDCPA.'

Paradise at 526 (citations omitted)(emphasis added).

While most of the foregoing cases involve alleged unlawful debt collection communications by letters or telephone calls, courts have also found that alleged unlawful repossessions, or the act of the repossession itself, are sufficient to invoke jurisdiction in the place where the repossession takes place as opposed to the state where the creditor or debt collector is located. For example, the court in Stupar v. Bank of Westmont, 352 N.E.2d 29, 33 (Ill.App. 1976) found that a single allegedly unlawful repossession in Arizona conferred jurisdiction over the consumer's complaint in an Arizona court. "The defendant's actions here.. were 'voluntary, purposeful, reasonably foreseeable and calculated to have effect in Arizona'" and thus constitute minimum contact for due process purposes. In Arterbury v. American Bank and Trust Company, 553 S.E.2d 943, 948-949 (Tex.Civ,App. 1977), the court noted that a single act of repossession, alleging tort liability, was sufficient to sustain jurisdiction in the Texas court; "the merits of the alleged cause of action are not at issue in the jurisdiction herein." Id. at 948. Finally, the United States Court of Appeals for the Fourth Circuit has found that lawyers seeking to foreclose on property are engaged in "debt collection" as defined by the FDCPA and therefore are subject to suit for alleged violations of the FDCPA. See Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373, 378-379 (4th Cir. 2006)("we hold that Defendants' foreclosure action was an attempt to collect a 'debt'"). The holding in Wilson has subsequently been followed by federal district courts in West Virginia and other states. See Muldrow v. EMC Mortgage Corporation, 657

F.Supp.2d 171,175 (D.C. 2009); Goodrow v. Friedman & MacFadyen, P.A., 788 F.Supp.2d 464, 469 (E.D.Va. 2011); and Wymer v. Huntington Bank Charleston, N.A., 2011 WL 5526314 (S.D.W.Va.) at 5-6.

In summary, federal and state courts have repeatedly held that debt collection communications or actions, including letters, telephone calls, and acts of repossession, constitute sufficient minimum contacts for due process purposes to invoke venue and jurisdiction in the state where the communication was received or the conduct occurred. Moreover, courts have held that even a single communication or act is sufficient to invoke jurisdiction for due process purposes. In the case involving FAL, the three formal complaints alone filed with the Attorney General disclosed that FAL engaged in dozens of unlawful debt collection communications and other regulated conduct. Thus, the position advocated by FAL and adopted by the court is clearly wrong and runs contrary to the universal findings of federal courts in considering jurisdiction over alleged unlawful debt collection conduct.

F. SO LONG AS A STATE AGENCY'S ASSERTION OF AUTHORITY IS NOT APOCRYPHAL, A PROCEDURALLY SOUND SUBPOENA MUST BE ENFORCED.

Since at least 1991, the West Virginia Supreme Court of Appeals has followed the strong public policy established by the U.S. Supreme Court that administrative agency subpoenas must be enforced almost without restriction. In West Virginia Human Rights Commission v. Moore, 411 S.E. 2d 702, 707 (W. VA. 1991), a subpoena enforcement proceeding, the Court noted:

The Federal cases that have addressed this issue [subpoena enforcement] make it clear that agencies that are vested with subpoena power must have latitude in pursuing investigations in furtherance of their objectives and

purposes.

The Court in Moore expressly adopted a three-part test previously articulated by the Ninth Circuit in Equal Employment Opportunity Commission v. Children's Hospital Medical Center, 719 F. 2d 1426 (9th Cir. 1983) "in determining whether a subpoena issued by the Human Rights Commission should be enforced":

(1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation.

Moore, 411 S.E. 2d at 777. The Court in Moore also noted, importantly, "It is inappropriate to interfere with an administrative investigation by exploring substantive defenses to a later adversarial proceeding" (emphasis added). Moore, Id. at 707, citing Johnson Corp. v. Perkins, 317 U.S. 501 (1943).

In State ex rel. Palumbo v. Graley's Body Shop, 425 S.E. 2d 177 (W. Va. 1992), the Court, in enforcing the Attorney General's subpoena in an antitrust investigation, clarified that "the investigatory power of the Attorney General... is best compared to the authority of an administrative agency to investigate prior to making any charges of a violation of the law." Id. at 182, n. 2, citing United States v. Morton Salt, 338 U.S. 632, 642 (1950). The Court in Graley then explained that the Attorney General's investigative powers are analogous to the Federal Trade Commission when investigating unlawful trade practices. In doing so, Graley adopted the principles of Morton Salt in defining the extent of the Attorney General's subpoena power:

The only power that is involved here is the power to get information from those who best can give it and are most interested in not doing so. Because judicial power is reluctant if not unable to summons evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and

exercise powers of original inquiry. It has the power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the [Investigative] Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there are probable violations of the law.

Graley, Id. at 182, quoting United States v. Morton Salt, 338 U.S. at 642 (emphasis added).

The Court's incorporation of the Morton Salt principles when defining a state agency's subpoena power was further solidified in State ex rel. Hoover v. Berger, 483 S.E. 2d 12 (W. Va. 1996), a case that examined whether to enforce a subpoena issued by the West Virginia Board of Medicine. Citing the seminal U.S. Supreme Court cases of United States v. Powell, 379 U.S. 48, 57-58 (1964), Morton Salt, supra, and Oklahoma Press Publishing Company v. Welling, 327 U.S. 186, 208 (1945), the Court held that a state administrative agency, "in order to obtain judicial backing" of a subpoena, must show:

(1) the subpoena is issued for a legislatively authorized purpose, (2) the information sought is relevant to the authorized purpose, (3) the information sought is not already within the agency's possession, (4) the information sought is adequately described, and (5) proper procedures have been employed in issuing the subpoena. If these requirements are satisfied, the subpoena is presumably valid and the burden shifts to those opposing the subpoena to demonstrate its invalidity. The party seeking to quash the subpoena must disprove through facts and evidence the presumed relevance and purpose of the subpoena.

Hoover, Id. at 18. Importantly, the Court also held "these standards... apply to subpoenas issued by other agencies." The Hoover Court's reliance upon such federal standards in subpoena enforcement is particularly appropriate because the Legislature has commanded that the courts, when construing the WVCCPA, "be guided by the interpretation given by

federal courts to the various federal statutes dealing with the same or similar matters.” W. Va. Code § 46A-6-101(1).

Notwithstanding the Hoover Court’s recitation of a specific formal standard for enforcement of a state agency’s subpoena, Justice Cleckley, writing for a unanimous Court, restated the applicable showing in a simpler manner for courts to follow:

Subpoena enforcement proceedings are designed to be summary in nature, and an agency’s investigations should not be bogged down by premature challenges to its regulatory jurisdiction. As long as the agency’s assertion of authority is not obviously apocryphal...a procedurally sound subpoena must be enforced. Similarly, the initial determination of what information is relevant for its investigation... is left to the administrative agency. To this extent, the circuit court has authority to enforce the subpoena unless the agency is obviously wrong...therefore,...judicial review is very restricted.

Hoover, Id at 19-20 (emphasis added).

The strong public policy enunciated by Hoover that favors judicial enforcement of subpoenas almost without restriction was reaffirmed most recently by the Court in State of West Virginia v. Bloom, *supra*. Inasmuch as the underlying subpoena enforcement action in Bloom arose from the State’s effort to enforce subpoenas issued by the Attorney General against out-of-state Internet payday lenders, the Court’s decision made it clear that the Hoover principles apply to enforcement of subpoenas issued by the Attorney General. Moreover, since the procedures employed in issuing the subpoenas in Bloom were the same as here, the Court in Bloom implicitly endorsed the soundness of the procedures employed by the Attorney General to issue the subpoena to FAL. The Court also implicitly upheld the Attorney General’s power to subpoena the records of foreign corporations who have conducted business in West Virginia even when their records are located out of state.

It is also important to note that FAL has only objected to the Subpoena on procedural grounds and has not objected to the content or substance of the Subpoena. There is simply no merit to FAL's contentions, adopted by Respondent Judge King, that the State failed to employ proper procedures in issuing the Subpoena. Accordingly, the trial court should have enforced the subpoena.

VI. CONCLUSION

For all the reasons set forth herein above, the State represents that Respondent Judge King has abused his discretion and erred as a matter of law by denying the State's Petition to Enforce Investigative Subpoena. Accordingly, the State prays that its Petition for Writ of Prohibition be granted, that Respondent Judge King's Memorandum Opinion & Order be reversed and vacated, and that a new Order be entered compelling Fast Auto Loans, Inc., its parent company, Community Loans of America, Inc., and their owner, Robert E. Reich, to comply in full with the investigative subpoena issued by the Attorney General on March 2, 2011.

Respectfully submitted,
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EXHIBITS

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