BRIEF FILED
WITH MOTION

FILED
JAN 31 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GREEN TREE SERVICING, LLC,

Defendant Below, Petitioner

v. **DOCKET NO. 12-1143**

AIMEE NEELEY FIGGATT,

Plaintiff Below, Respondent

PETITIONER GREEN TREE SERVICING LLC's AMENDED BRIEF

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I. ASSIGNMENTS OF ERROR

1. The Circuit Court erred in declaring the entire arbitration provision void based upon the fact that certain types of claims, not even asserted in this matter, could not be heard by the specified forum.

2. The Circuit Court committed clear error in finding that claims brought under the West Virginia Consumer Credit and Protection Act, W. Va. Code §§ 46A-1-101 *et seq.* ("WVCCPA"), as well as claims for intentional infliction of emotional distress, negligence, and common law invasion of privacy, were not within the scope of the arbitration provision in the parties' contract.

3. The Circuit Court erred by reading into the WVCCPA a prohibition against "skip tracing" except where a creditor can affirmatively prove that it had sufficient reason to believe that a debtor or its collateral were no longer within the jurisdiction.

4. The Circuit Court erred in interpreting section 46A-2-128(e) of the WVCCPA to prohibit "'any' communication with a debtor known to be represented by counsel[,]" regardless of that communication's purpose.

5. The Circuit Court erred in interpreting the WVCCPA to require that a creditor must prove a telephone call was "accidentally dialed" in order to avail itself of the defense against liability for "unintentional" violations that is provided by section 46A-5-101(8) of the WVCCPA.

6. The Circuit Court erred in interpreting the word "maintain" to require that a creditor prove that it followed-up or tweaked its established (and compliant) West Virginia policies and procedures.

II. STATEMENT OF THE CASE

A. Nature of the Case

1. Figgatt entered into a contract with Green Tree that contained an arbitration agreement.

On December 9, 2000, respondent Aimee Neeley Figgatt ("Figgatt"), under her former name of Aimee Adkins, signed a Note, Disclosure and Security Agreement and Agreement to Arbitrate ("Contract") for the purchase of a 1995 Belmont Home, model HT, serial number MSB951472SN20215. (A.R. 3.) Figgatt's ex-husband, Robert Adkins, also signed the Contract. (*Id.*) The account associated with the debt created by the Contract was in the name of Robert Adkins and Aimee Adkins ("Account"). (*Id.*) Figgatt did not dispute the validity of the Contract. (A.R. 3.) Subsequent to the parties' execution of the Contract, the selected forum, the American Arbitration Association ("AAA"), changed its rules such that a debt collector could not bring debt collection claims against a consumer without the latter's present-day consent. (A.R. 90.)

The Contract contained an arbitration agreement ("Arbitration Agreement"), which provided, in pertinent part, as follows:[1]

> **ARBITRATION OF DISPUTES:**
>
> **a. Arbitration.** You and I agree to arbitrate any and all (1) disputes, torts, counterclaims, or any other matter in question between you and I arising out of, in connection with, or in any way relating to this Agreement ("Claims") (including whether a Claim must be arbitrated) and (2) any Claims arising out of, in connection with, or relating to a transaction involving you and I and one or more third parties who have not signed this Agreement which a third party elects to arbitrate ("Third Party Claims"). However, neither you or I can require the other to arbitrate (1) any proceeding in which a lien holder may acquire or convey title to or possession of any property which is security under this Agreement, or (2) an application by or on behalf of me for relief under the federal bankruptcy laws or any other similar laws of general application for the relief of debtors. Enforcement of this exception to arbitration at any time will not waive

[1] The Contract provides that "'I,' 'me,' 'myself' or 'us' means all persons who sign this Agreement as borrower or co-borrower, jointly and severally, and 'you' or 'your' means the Lender indicated below." (A.R. 43.)

the right to arbitrate any other Claim or Third Party Claim, including those asserted as a counterclaim in a lawsuit under this exception to arbitration.

b. Rules. The arbitration shall be (1) binding, and (2) governed by (i) the Federal Arbitration Act (Title 9 of the United States Code); (ii) the Expedited Procedures of the Commercial Arbitration Rules of the American Arbitration Association (the "Arbitration Rules") in effect at the time arbitration is requested, and (iii) this Agreement. A copy of the Arbitration Rules, free of charge, may be obtained by calling (800) 778-7879. The arbitrator shall have all powers provided by the Arbitration Rules and this Agreement and shall apply the law, including but not limited to all statutes of limitation, which would otherwise apply in a judicial action to a Claim or a Third Party Claim.

The award of the arbitrator(s) shall be in writing and include a statement of reasons for the award. If the terms of this Agreement and the Arbitration Rules conflict, the terms of this Agreement shall control the extent of the conflict. The arbitration shall be conducted in the federal judicial district where my residence is located, or at any other place mutually acceptable to you and I. The arbitration hearing shall begin within forty-five (45) days of the demand for arbitration.

If I have the right to rescind this Agreement, rescinding it will not rescind this agreement to arbitrate.

You and I agree that the arbitration proceedings are confidential. The information disclosed in such proceedings cannot be used for any purpose in any other proceeding. This Agreement is the only agreement between you and I regarding arbitration, and takes the place of any prior agreements to arbitrate Claims. This Agreement may be modified only by a written agreement between you and I.

THE ARBITRATION WILL TAKE THE PLACE OF ANY COURT PROCEEDING, INCLUDING A TRIAL WITH A JUDGE OR A JUDGE AND JURY. THE ARBITRATOR MAY AWARD DAMAGES OR OTHER RELIEF ONLY TO YOU OR I.

(A.R. 47.)

2. Figgatt failed to pay pursuant to the Contract terms and Green Tree attempted to collect on the Account.

Figgatt fell behind on payments under the Contract and became consistently delinquent beginning in 2004. (A.R. 3.) Green Tree placed telephone calls to Figgatt attempting to collect on the Account between March 2007 and October 2010. Many went unanswered. (*See* A.R. 4.)

On December 16, 2009, Figgatt notified Green Tree that she was represented by counsel. (*Id.*) To avoid future direct communications with Figgatt, Green Tree's employee placed a note on the Account indicating Figgatt was represented. (A.R. 599.) Inadvertently, Green Tree's employee failed to take the additional step necessary to prevent calls from being made on the Account by the automatic dialer. (*Id.*) Five additional telephone calls were placed before a supervisor reviewed and properly coded Figgatt's Account on January 15, 2010, effectively stopping all calls on the Account. (A.R. 369.)

On February 1, 2010, servicing of the Account was transferred from Green Tree's Lexington, Kentucky office to Green Tree's Fredericksburg, Virginia office. (A.R. 414.) An error occurred during the transfer, resulting in one additional telephone call and a notice of default and right to cure letter being sent directly to Figgatt. (A.R. 415.) Shortly after April 30, 2010, the Regional Manager of Green Tree's Fredericksburg, Virginia office requested Green Tree's local foreclosure counsel to contact Figgatt's counsel to discuss the situation. (A.R. 418.)

Between May 13, 2010 and July 1, 2010, Green Tree's local foreclosure counsel placed several calls, and sent several e-mails and six letters to Figgatt's counsel to determine if Figgatt was, in fact, represented. (A.R. 397-407.) Green Tree went to great lengths to avoid directly contacting a represented individual. (A.R. 397.)

Green Tree ceased all collection attempts on the Account from May 13, 2010 until August 17, 2010, while attempting to determine whether Figgatt was represented. (A.R. 406-07, 424.) However, because Green Tree's records listed the Account under the name of Robert Adkins, Green Tree's inquiries referenced Robert Adkins, rather than "Aimee Adkins" or "Aimee Figgatt." (A.R. 398.) On August 17, 2010, having been unable to confirm

representation, Green Tree resumed contacting Figgatt directly about the Account. Green Tree placed four calls to Figgatt after this date. (A.R. 779-82.)

3. Figgatt sought to litigate claims related to the collection efforts on the Account.

On October 22, 2010, instead of filing for arbitration of her claims, Figgatt filed a Complaint in the Circuit Court of Raleigh County, West Virginia ("Circuit Court"), alleging four causes of action: (1) violations of the West Virginia Consumer Credit and Protection Act, W. Va. Code §§ 46A-1-101 *et seq.* ("WVCCPA"); (2) common law negligence, (3) intentional infliction of emotional distress, and (4) common law invasion of privacy. (A.R. 14-18.) Figgatt sought to recover actual damages, statutory damages, punitive damages, attorney fees, court costs and fees, and cancellation of the debt. (A.R. 18-19.) All of Figgatt's claims are based upon Green Tree's conduct in collecting on the Account.

On November 22, 2010, Green Tree moved to dismiss this proceeding and compel arbitration or, in the alternative, to stay this proceeding pending arbitration ("Motion to Compel Arbitration"). (A.R. 21-29.)

B. Circuit Court's Order Denying Arbitration

The Circuit Court denied Green Tree's Motion to Compel Arbitration on June 9, 2011, concluding that the Arbitration Agreement was unenforceable. In support of this conclusion, Circuit Court made only two findings of fact. (A.R. 230-31.)

First, the Circuit Court found that the American Arbitration Association ("AAA") was the sole arbitration forum provided for by the Arbitration Agreement, and that "while the AAA would accept and administer [Figgatt]'s claim for arbitration[,] it would not accept a separate claim by [Green Tree] for 'debt collection arbitration.'" (A.R. 230.) The Circuit Court did not consider that, when Figgatt entered into the Contract, the AAA was still allowing business to

initiate debt collection claims in arbitration. (A.R. 268.) Nonetheless, the Circuit Court refused to "throw a lifeline to the drafter of the agreement and rewrite the arbitration provisions to include alternate arbitration forums." (A.R. 230.)

Second, the Circuit Court construed the arbitration agreement narrowly, and concluded that the actions complained of in [Figgatt's] Complaint did not derive from or relate to the [Arbitration] Agreement between the parties. (A.R. 231.) The Circuit Court determined that the source of the duty allegedly breached by Green Tree determined whether Figgatt's claims fell within the ambit of the Arbitration Agreement. (*Id.*) The Circuit Court decided that, because the duty allegedly breached by Green Tree was not contractual, but rather statutorily imposed, Figgatt's claims "[did] not relate to or derive from the Arbitration Agreement." (*Id.*) Consequently, the Court found that "the arbitration provision by its own terms would be inapplicable to this dispute" (*Id.*)

C. The Circuit Court conducted a bench trial resulting in judgment against Green Tree.

A bench trial was held on July 24-25, 2012. (A.R. 281.) During trial, the Circuit Court heard evidence that Green Tree placed telephone calls to Figgatt both before and after she notified Green Tree that she was represented by counsel. (A.R. 5.) Green Tree presented evidence that some of the telephone calls were made for purposes other than to collect upon the Account. (*Id.*) Green Tree also presented evidence that, in an effort to obtain better contact information for Figgatt, it attempted to contact her friends and relatives when it was unable to contact her at her known telephone number (the practice of "skip tracing"). (A.R. 4.) The Circuit Court heard testimony explaining that telephone calls made after Figgatt advised she was represented were the result of errors made in coding the Account, despite the existence of policies and procedures designed to prevent such calls. (A.R. 599.) Green Tree asserted two

defenses: the "unintentional" defense and the bona fide error defense, both contained in section 5-101(8) of the WVCCPA. (A.R. 7.)

1. Findings of Fact

The Circuit Court found that the parties stipulated to the facts surrounding the execution of the Account. (A.R. 3.) The parties stipulated that Figgatt did not dispute the debt. (*Id.*) The Circuit Court found that Figgatt was almost continuously delinquent on the Account, but she made fairly regular payments on it. (A.R. 4.) It found that, even though Figgatt refused to take most telephone calls that Green Tree made to her, there was "no evidence that she was hiding from [Green Tree] or had taken the home and absconded." (*Id.*) Rather, it found that Figgatt did not want to talk to Green Tree. (*Id.*)

The Circuit Court found that the parties did not dispute that Green Tree made six hundred fifteen telephone calls to Figgatt between March 2007 and October 2010. (*Id.*) Green Tree also placed twenty calls to third parties during the same time. (*Id.*) The Circuit Court found that the telephone calls to third parties were made when Green Tree appeared to have a valid telephone number for Figgatt and was receiving payments from her, even though she was not answering telephone calls and her payments were untimely. (*Id.*) Green Tree presented evidence that the calls to third parties were for the purpose of obtaining additional contact information for Figgatt, but the Circuit Court found that they were made with the intent to place additional pressure on Figgatt to pay on the Account. (*Id.*)

The Circuit Court found that the parties did not dispute that Figgatt advised Green Tree she was represented by counsel on December 16, 2009 and provided Green Tree with her attorney's name and telephone number. (*Id.*) The Circuit Court found that, despite the fact that Figgatt notified Green Tree that she was represented, Green Tree's employee placed a telephone

call on the Account on December 18, 2009, at which time Figgatt made a second attorney notification. (A.R. 4-5.) The parties agreed that Green Tree attempted to place twenty-eight telephone calls after December 16, 2009. (A.R. 5.) The Circuit Court declined to determine the purpose of each call. (*Id.*)

The Circuit Court found that, in May 2010, Green Tree retained counsel and attempted to contact Figgatt's counsel eighteen times to determine if they represented Figgatt. (*Id.*) The Circuit Court found that each of the eighteen attempts referred to Robert Adkins, who was identified as the primary on the Account. (*Id.*) Confusion about the name of the individual in question led Figgatt's counsel to deny its representation of Robert Adkins and fail to confirm its representation of her. (*Id.*)

The Circuit Court found that Green Tree had in place policies and procedures specific to the collection of accounts in West Virginia. (*Id.*) Those policies and procedures complied with West Virginia law. (*Id.*) The Circuit Court found that evidence supported a conclusion that Green Tree violated West Virginia law and its own policies related to the collection of other debtors' accounts. (*Id.*)

2. Conclusions of Law

It is undisputed that Figgatt is a person who falls under the protection of the WVCCPA. (A.R. 6.) Green Tree is a debt collector, as defined by the WVCCPA, with respect to the Account. (*Id.*) The WVCCPA applied to Figgatt's debt collection claims against Green Tree. (*See id.*)

Figgatt alleged that Green Tree violated section 2-128(e) of the WVCCPA, which prohibits "any communication with a consumer whenever it appears that the consumer is represented by an attorney and the attorney's name and address are known, or could be easily

ascertained . . . ." W. Va. Code § 46A-2-128(e). Green Tree argued that 2-128(e) is qualified by the general language of section 2-128 of the WVCCPA, which provides that "[n]o debt collector shall use unfair or unconscionable means to collect or attempt to collect any claim." *Id.* § 2-128. The Circuit Court concluded that section 2-128(e) of the WVCCPA prohibited "'any' communication with a debtor known to be represented by counsel, regardless of the nature of that communication." (A.R. 6.) The Circuit Court concluded that twenty-eight calls placed by Green Tree after Figgatt advised it that she was represented by counsel and provided counsel's name and telephone number were violations of section 2-128(e) of the WVCCPA. (*Id.*)

Next, the Circuit Court concluded that a creditor only has a right to use "skip tracing" if a debtor "**has in fact** 'skipped,' disappeared, moved, relocated, or attempted to abscond with or conceal secured property." (*Id.* (emphasis added).) The Circuit Court determined that, in this case, the twenty telephone calls placed by Green Tree to third parties "were oppressive and abusive attempts to collect a debt . . . ." and therefore constituted violations of sections 2-125 and 2-128 of the WVCCPA. (*Id.*) Section 2-125 of the WVCCPA provides that "[n]o debt collector shall unreasonably oppress or abuse any person in connection with the collection of or attempt to collect any claim alleged to be due and owing by that person or another." W. Va. Code § 46A-2-125.

Figgatt claimed that the volume of the telephone calls placed by Green Tree between March 2007 and October 2010 constituted a violation of section 2-125(d) of the WVCCPA. (A.R. 7.) Section 2-125 of the WVCCPA prohibits "[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously . . . with the intent to annoy, abuse, oppress or threaten any person at the called number." W. Va. Code § 46A-2-125(d). The Circuit Court concluded that, although the volume of calls in this case might annoy a debtor, it

was not oppressive and did not constitute a violation of section 2-125(d) of the WVCCPA. (A.R. 7.)

Finally, the Circuit Court addressed Green Tree's "unintentional" and "bona fide error of fact notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation or error" defenses under section 5-101(8) of the WVCCPA. (*Id.*); W. Va. Code § 46A-5-101(8). The Circuit Court concluded, that because Green Tree's calls to Figgatt after December 16, 2009 were not "accidentally dialed," Green Tree could not use the "unintentional" defense. (A.R. 7.) The Circuit Court also concluded that, despite the existence of Green Tree collection policies and procedures specific to West Virginia, the bona fide error defense required evidence that Green Tree maintained and "follow[ed] up on those procedures." (*Id.*) The Circuit Court concluded that Green Tree had not "maintained" its policies and procedures. (*Id.*)

The Circuit Court concluded that Green Tree was liable in the maximum statutory amount for twenty-eight violations of section 2-128(e) of the WVCCPA and twenty violations of section 2-125. (A.R. 7-8.) The Circuit Court concluded that damages, even before statutory attorney's fees, would exceed the stipulated cap of $75,000.00 in this matter, so it entered a remittitur and awarded judgment against Green Tree in the amount of $75,000.00 (A.R. 8.)

The Circuit Court noted all of Green Tree's objections and exceptions to the findings of fact and conclusions of law. (A.R. 9.) Green Tree appeals the foregoing conclusions of law.

III. SUMMARY OF THE ARGUMENT

Figgatt's claims against Green Tree should never have resulted in a trial and judgment order. The Circuit Court erred by denying Green Tree's Motion to Compel Arbitration for two reasons. First, the Circuit Court held that the Arbitration Agreement was unenforceable because Green Tree could not initiate an arbitration claim with the AAA – even though Green Tree was

not attempting to initiate such a claim. Second, the Circuit Court concluded that Green Tree's duty not to violate the WVCCPA did not derive from or relate to the parties' contract and, therefore, those claims did not fall within the scope of the Arbitration Agreement.

Once the bench trial concluded, the Circuit Court committed error by making two holdings that impermissibly expanded the scope of the WVCCPA beyond its statutory language and the consumer protections contemplated by the Legislature and comparable consumer protection schemes.

Nowhere does the WVCCPA limit "skip-tracing" to only those circumstances in which a creditor knows, with certainty, that a consumer is not answering telephone calls because she has "absconded" with the collateral. Nonetheless, without citation, the Circuit Court found that skip-tracing, without such a "legitimate" purpose, was a violation of sections 2-125 and 2-128 of the WVCCPA.

Section 2-128 of the WVCCPA expressly provides that "[n]o debt collector shall use unfair or unconscionable means **to collect or attempt to collect any claim**." W. Va. Code § 46A-2-128. Subsections (a) through (e) are examples of "conduct deemed to violate this section . . . ." *Id.* § 2-128(e). Despite the clear language of the statute, the Circuit Court determined that "any" communication literally meant "any," despite the qualifications of section 2-128. The Circuit Court erred by dismissing the relationship between section 2-128's general provisions and subsection (e)'s language.

The Circuit Court also erred by making two holdings that improperly narrowed the availability of the defenses available to creditors under the WVCCPA. The unintentional defense under section 5-101(8) of the WVCCPA requires that the violation, rather than the act of dialing, must be unintentional. W. Va. Code § 46A-5-101(8). By holding that a telephone call

must be "accidentally dialed" in order to qualify for the "unintentional" defense (A.R. 7), the Circuit Court rendered the defense meaningless. The bona fide error defense requires that an error occur "notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation or error . . . ." W. Va. Code § 46A-5-101(8). By reading into section 5-101(8) a requirement that such procedures be updated or tweaked (*id.*), the Circuit Court added an additional requirement to the defense not contemplated by the Legislature.

The Circuit Court's holdings expand consumer protections while simultaneously narrowing defenses available to creditors. Such holdings are either contrary to settled law or extend beyond it, and in either event constitute reversible error.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Revised Rule 18(a) of the West Virginia Rules of Appellate Procedure, Credit Acceptance respectfully requests that this Court grant oral argument under Revised Rules 20(a)(1), (a)(2), and (a)(3). This case involves six issues of first impression that are either significant to enforcing arbitration and protecting consumer s in West Virginia: (1) whether debt collection claims are outside the scope of a broad arbitration agreement because the WVCCPA, rather than the parties' contract, imposes a duty to refrain from debt collection violations; (2) whether one party's inability to initiate arbitration in the selected arbitration forum in a hypothetical, unfiled claim renders an arbitration agreement unenforceable in light of 9 U.S.C. § 5; (3) whether a creditor may skip trace an unresponsive debtor without confirmation that the debtor has disappeared or absconded with collateral; (4) whether section 2-128(e)'s prohibition against communications with a represented consumer is limited to those made to collect or attempt to collect any claim; (5) whether the WVCCPA's unintentional defense is limited to only those instances in which the physical act resulting in a violation of the WVCCPA is accidental;

and (6) whether the WVCCPA's bona fide error defense imposes a maintenance requirement on creditors seeking to avail themselves of the defense. None of the criteria articulated in Revised Rule 18(a) that would obviate the need for oral argument is present, and oral argument, with a precedential decision, is appropriate under Revised Rule 20.

V. ARGUMENT

A. Standard of Review.

On appeal to this Court, "'review of whether [an] [arbitration] [a]greement represents a valid and enforceable contract is *de novo*.'" *Brown v. Genesis Healthcare Corp.*, 268 W. Va. 646, 724 S.E.2d 250, 267 n.12 (2011), *vacated sub nom. Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. __, 132 S. Ct. 1201, 182 L.Ed.2d 42 (2012) (quoting *State ex rel. Saylor v. Wilkes*, 216 W. Va. 766, 772, 613 S.E.2d 914, 920 (2005)). Likewise, "[i]nterpreting a statute . . . presents a purely legal question subject to *de novo* review." Syl. pt. 1, *Fountain Place Cinema 8, LLC v. Morris*, 227 W. Va. 249, 707 S.E.2d 859 (2011).

B. The Circuit Court erred by failing to enforce the parties' valid Arbitration Agreement.

Section 2 of the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* ("FAA"), provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, **save upon such grounds as exist at law or in equity for the revocation of any contract**." 9 U.S.C. § 2. It is "beyond dispute that the FAA was designed to promote arbitration." *AT&T Mobility, Inc. v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740, 1749, 179 L.Ed.2d 742 (2011). There is "'. . . an emphatic federal policy in favor of arbitral dispute resolution.'" *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. __, 132 S. Ct. 1201, 1203, 182 L.Ed.2d 42 (2012) (citing *KPMG LLP* v. *Cocchi*, 565 U. S. ___, 132 S. Ct. 23, 181 L.Ed.2d 323 (2011) *(per curiam)* (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 631 (1985)). This Court has repeatedly applied a

two-part threshold inquiry for circuit courts to apply when ruling on a motion to compel arbitration: "(i) whether a valid arbitration agreement exists between the parties; and (ii) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement." Syl. pt. 2 (in part), *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 251, 692 S.E.2d 293, 294 (2010). Without acknowledging the established law of this Court,[2] the Circuit Court found the Arbitration Agreement unenforceable and inapplicable to Figgatt's claims.

1. Where a selected arbitration forum becomes unavailable to a party, section 5 of the FAA provides a mechanism for substituting the arbitrator.

The Arbitration Agreement in the Contract provided for arbitration under the rules and procedures of the American Arbitration Association ("AAA"). Subsequent to executing the Contract, the AAA changed its rules so that a debt collector cannot initiate debt collection claims against a consumer in arbitration without the consumer's present-day consent. (A.R. 267-68.) Even though Green Tree was not attempting to initiate debt collection claims against Figgatt in arbitration, the Circuit Court concluded that, because it was unable to do so, the Arbitration Agreement was unenforceable. (A.R. 230.) Moreover, the Circuit Court refused to "throw a lifeline to the drafter of the agreement and rewrite the arbitration provisions to include alternate arbitration forums." (*Id.*)

Despite the Circuit Court's refusal to "include alternate arbitration forums," the FAA vests courts with the power to appoint an arbitrator upon either party's petition when a substitution is required. When an arbitration agreement provides a mechanism for the selection of an arbitrator but the mechanism cannot be implemented, "upon the application of either party

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[2] The law of this Court did not include *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250, (2011), *vacated sub nom. Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. __, 132 S. Ct. 1201, 182 L.Ed.2d 42 (2012), at the time the Circuit Court entered its June 9, 2011 Order.

to the controversy the court **shall** designate and appoint an arbitrator [. . .] who shall act under the . . . [A]greement with the same force and effect as if he or they had been specifically named therein . . . ." 9 U.S.C. § 5 (emphasis added). That the Circuit Court refused to appoint a substitute arbitrator (to the extent one was even necessary, which it was not) in lieu of invalidating the Arbitration Agreement constituted an error of law. *See* 9 U.S.C. § 5.

Relying on section 5 of the FAA, a majority of jurisdictions have consistently held that the unavailability of the chosen arbitration forum (or arbitrator) does not affect the enforceability of an arbitration agreement. *See, e.g., Reddam v. KPMG LLP*, 457 F.3d 1054, 1060 (9th Cir. 2006) (*abrogated on other grounds by Atl. Nat'l Trust LLC v. Hawley Ins. Co.*, 621 F.3d 931 (9th Cir. 2010) (internal citations omitted)); *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000) (rejecting the plaintiff's argument that the arbitration clause was void because the entity chosen to administer arbitration had dissolved where the choice of forum was not an integral part of the arbitration agreement, but was an "ancillary logistical concern"); *Estate of Eckstein ex rel. Luckey v. Life Care Cntrs. of Am., Inc.*, 623 F. Supp. 2d 1235 (E.D. Wash. 2009) ("[t]he fact that the AAA no longer hears these types of disputes does not render the Agreement invalid. Another arbitrator may easily be substituted."). *See also Rivera v. Am. Gen. Fin. Servs., Inc.*, 259 P.3d 803, 812-14 (N.M. 2009) (whether a named arbitrator "is integral to the parties' agreement to arbitrate is a matter of contract interpretation" and a court should consider whether the parties designated one or several arbitrators, whether the contractual language naming the arbitrator was mandatory or permissive, and whether the clause named the arbitrator "exclusively throughout."); *ITT Consumer Fin. Corp.*, 211 F.3d at 1222 (same).

In order to "ensure[] that private agreements to arbitrate are enforced according to their terms[,]" Syl. pt. 8, *Brown*, 228 W. Va. 646, 724 S.E.2d 250, a court may refuse to enforce an

otherwise valid agreement to arbitrate ***only*** when there is "evidence that the naming of the [arbitrator] was so central to the arbitration agreement that the unavailability of the arbitrator brought the agreement to an end." *Reddam*, 457 F.3d at 1060 (internal citations omitted) (emphasis added)). Absent such a compelling showing, courts should not "annihilate [an] arbitration agreement." *Id.*

The AAA was available and willing to accept arbitration of Figgatt's claims. (A.R. 230.) It was irrelevant that Green Tree, who was not pursuing claims against Figgatt – let alone seeking to arbitrate any such claims – could not initiate a specific type of claim against Figgatt in the AAA. An arbitrator could have been appointed pursuant to the plain language of section 5 of the FAA. *See ITT Consumer Fin.*, 211 F.3d at 1222.

Even under the prevailing interpretation of section 5 of the FAA – that it can be used to appoint a substitute arbitrator except where the arbitration forum is integral to the parties' agreement – the Arbitration Agreement would allow for a substitute arbitrator. Even though only one set of arbitration rules governed the parties' claims, the language in the Arbitration Agreement emphasized the parties' agreement to arbitrate generally and did not place importance on the selected rules to employ. The Arbitration Agreement did not name the AAA "exclusively throughout." *See Rivera*, 259 P.3d at 812-14. It only mentioned the AAA's rules once and provided a telephone number where a free copy of those rules could have been obtained. (A.R. 47.) The remainder of the Arbitration Agreement referred neutrally to "the arbitrator." (A.R. 46-47.) It expressly stated that "[i]f the terms of this Agreement and the Arbitration Rules conflict, the terms of this Agreement shall control the extent of the conflict." (A.R. 47.) Finally, the parties expressly agreed to modify the arbitration rules to provide that the "arbitrator [. . .] *shall* apply the law, including but not limited to all statutes of limitation, which would otherwise

apply in a judicial action to a Claim or a Third Party Claim." (*Id.*) (emphasis added). Such language ensured that the "substantive outcome of the resolution" was not affected by the arbitration forum selected. *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 129, 678 S.E.2d 435, 439 (2009).

Additionally, the AAA is not a specialized forum. It does not employ specialized rules that would affect the "substantive outcome of the resolution." *Id.* It does not exclusively administer claims between a business and a consumer or have a specific expertise that must be utilized to advance a public policy. (A.R. 95.)

Nothing suggested that the AAA was integral to the Arbitration Agreement. Moreover, the Circuit Court did not analyze whether the AAA was integral to the Arbitration Agreement, even though Green Tree urged it to use section 5 of the FAA to appoint a substitute arbitrator if it found the AAA "unavailable." The Circuit Court found the AAA was unavailable to Green Tree. (A.R. 230.) The Circuit Court should have relied on section 5 of the FAA to appoint a substitute arbitrator upon finding the AAA unavailable. Instead, it concluded the parties' Arbitration Agreement was unenforceable. The Circuit Court erred in refusing to enforce the Arbitration Agreement.

2. Figgatt's debt collection claims were within the scope of the Arbitration Agreement.

Upon determining that a valid arbitration agreement exists between the parties, a circuit court is then charged with determining "whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement." Syl. pt. 2, *TD Ameritrade*, 225 W. Va. at 251, 692 S.E.2d at 294.

In *Volt Info. Sciences, Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 475 (1989), the Supreme Court held that, "in applying general state-law principles of contract

interpretation to the interpretation of an arbitration agreement within the scope of the Act, . . . due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." This Court has arrived at the same conclusion as the United States Supreme Court: "[t]he [FAA] establishes that, as a matter of federal law, any doubts concerning the **scope** of arbitrable issues should be resolved **in favor of arbitration**." *State ex rel. Wells v. Matish*, 215 W. Va. 686, 694, 600 S.E.2d 583, 591 (2004) (per curiam) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)). Furthermore, in *State ex rel. City Holding Co. v. Kaufman*, 216 W. Va. 594, 598, 609 S.E.2d 855, 859 (2004) (per curiam), this Court unequivocally recognized that "[i]n determining whether the language of an agreement to arbitrate covers a particular controversy, the federal policy favoring arbitration of disputes requires that a court construe **liberally** the arbitration clauses to find that they cover disputes **reasonably contemplated** by the language **and to resolve doubts in favor of arbitration**." (emphasis added).

In this case, the arbitration agreement at issue applies to the following:

> all (1) disputes, torts, counterclaims, or any other matter in question between you and I arising out of, in connection with, or in any way relating to this Agreement ("Claims") (including whether a claim must be arbitrated) and (2) any Claims arising out of, in connection with, or relating to a transaction involving you and I and one or more third parties who have not signed this Agreement which a third party elects to arbitrate ("Third Party Claims").

(A.R. 46.)

Consistent with the federal policy favoring arbitration, broad clauses are afforded a presumption of arbitrability. *See Oldroyd v. Elmire Sav. Bank*, 134 F.3d 72, 76 (2d Cir. 1998) (clause making arbitrable "any dispute, controversy, or claim arising under or in connection with" a contract "is precisely the kind of broad arbitration clause that justifies a presumption of

arbitrability."). The terms "any," "arising out of," and "relating to" establish that the scope of the arbitration clause is broad. *See, e.g., Penzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1067 (5th Cir. 1998) ("arising out of," and "in connection with or relating to" "resolves any doubt that [the clause] is a 'broad' clause"); *Collins & Aikman Prods. Co. v. Bldg. Sys., Inc.*, 58 F.3d 16, 20 (2d Cir. 1995) (a clause "submitting to arbitration 'any claim or controversy arising out of or relating to the agreement,' is a paradigm of a broad clause") (citations omitted).

In this case, Figgatt's allegation that Green Tree engaged in unlawful debt collection practices would not exist *but for* the Contract. The Contract is the device that indebted Figgatt to Green Tree in the first place. (*Id.*) When faced with an identical argument on a similar Green Tree arbitration provision in another case, the United States District Court for the Southern District of West Virginia ("Southern District") held that the unlawful debt collection claims made pursuant to the WVCCPA fell within the scope of the Green Tree arbitration provision.[3] *Baker v. Green Tree Servicing LLC*, No. 5:09-cv-00332, 2010 WL 1404088, *3 (S.D.W. Va. Mar. 31, 2010). As the Southern District found, "[w]ithout the contract [Agreement], there would have been no collection calls . . . ." *Baker*, 2010 WL 1404088, at *3. Just as in *Baker*, Figgatt's claims arise from an alleged statutory tort by Green Tree.

Rejecting the connection between Figgatt's indebtedness as a result of the Contract and Green Tree's alleged violations in collecting on that indebtedness would unreasonably narrow the scope of an Arbitration Agreement that law, and governing federal policy, demand to be

[3] In *Baker*, the arbitration agreement at issue applied to "[a]ny controversy or claim between or among [the Plaintiff] and [Green Tree] or [their] assignees arising out of or relating to this Agreement or any agreements or instruments relating to or delivered in connection with this Agreement, **including any claim based on or arising from an alleged tort**." *Baker*, 2010 WL 1404088, at *1 (emphasis added).

construed broadly. The Circuit Court erred by concluding that Figgatt's claims were outside the scope of the Arbitration Agreement.

C. The Circuit Court erred by unjustifiably expanding consumer protections in West Virginia beyond those provided for in the WVCCPA.

The WVCCPA affords broad consumer protections. Yet, its breadth is limited by the text of its statutes and the Legislature's intent. In this case, the Circuit Court expanded the WVCCPA to afford consumers protections not contained therein and protections that extend beyond the letter of the law. In so doing, the Circuit Court erred.

1. West Virginia law does not limit the use of "skip-tracing" to only those instances in which a creditor knows that a debtor has actually "'skipped,' disappeared, moved, relocated, or attempted to abscond with or conceal secured property."

The Circuit Court found that Green Tree attempted to place 20 telephone calls to third parties during a period when Figgatt was not answering telephone calls from Green Tree (even though the telephone number appeared to be valid) and Figgatt was making untimely (though fairly regular) payments. (A.R. 4.) The calls to third parties, to confirm, correct, or obtain improved contact information, are known within the collection industry as "skip tracing." The Circuit Court concluded that a creditor only has a right to engage in "skip tracing" if an alleged debtor "**has in fact** 'skipped', disappeared, moved, relocated, or attempted to abscond with or conceal secured property." (A.R. 6 (emphasis added).)

By reaching this conclusion, the Circuit Court imposed a burden on Green Tree to prove that Figgatt had actually "skipped" when it placed calls to third parties to obtain better contact information. When Green Tree failed to meet that burden, the Circuit Court inferred that Green Tree could only have placed the calls to third parties with "the intent to increase the pressure on [Figgatt] to pay her loan." (*Id.*) Based upon that inference, the Circuit Court held that those

telephone calls constituted "oppressive and abusive attempts to collect a debt" in violation of section 2-125 of the WVCCPA, as well as "unfair or unconscionable means to collect a debt" in violation of section 2-128 of the WVCCPA. (A.R. 6.)

Nothing in the WVCCPA prohibits a debt collector from contacting third parties to confirm a debtor's telephone number or location information. The Federal Debt Collection Practices Act, 15 U.S.C. §§ 1692, *et seq.* ("FDCPA"), which is a federal corollary to the WVCCPA, expressly addresses this situation and permits communications with third parties to "confirm[] or correct[] location information." 15 U.S.C. § 1692b. It would be illogical for a debt collector to "confirm" location information for a debtor if the creditor knew that the debtor had disappeared or otherwise "absconded" with the collateral. It may also be necessary to correct information, even when a debtor has not skipped.

The uncontroverted evidence established that Figgatt was nonresponsive to Green Tree's calls. (A.R. 4.) Green Tree therefore had reason to question the accuracy of its contact information, as well as question whether there was a better way to reach Figgatt. Green Tree engaged in skip-tracing to confirm Figgatt's information and try to obtain a better way to reach her. (A.R. 4.) Under the FDCPA, Green Tree's actions were legitimate. No specific prohibition or restriction in the WVCCPA put Green Tree on notice that its conduct (permitted under the FDCPA) could violate the WVCCPA.

Without citation to any authority or other basis for its extension of existing law, the Circuit Court concluded Green Tree was prohibited from skip-tracing unless it could prove that it had "lost" Figgatt. (A.R. 6.) The Circuit Court found that Green Tree had not "lost" Figgatt because she made regular (albeit untimely) payments. (A.R. 4.) Because Green Tree could not prove that Figgatt was "lost," as opposed to simply unwilling to speak with Green Tree, the

Circuit Court concluded that skip-tracing violated sections 2-125 and 2-128 of the WVCCPA. (A.R. 6.)

By requiring that Green Tree have actual knowledge that Figgatt had disappeared or absconded with collateral, the Circuit Court imposed a new requirement on debt collectors. Requiring such actual knowledge would impose an enormous and crippling burden on debt collectors. That requirement is not contained in the WVCCPA. Such an expansion of the WVCCPA by a Circuit Court is improper. Because the Circuit Court's limitation on skip-tracing is not supported by West Virginia law and it directly contravenes federal law, it is in error.

2. When it appears that a consumer is represented by an attorney, section 2-128(e) of the WVCCPA prohibits any communications with that consumer that relate to the collection or attempt to collect a claim.

The Circuit Court found that Green Tree placed 28 telephone calls to Plaintiff after it knew she was represented by an attorney. (A.R. 6.) The Circuit Court found that it "need not" determine the purpose of each of the 28 telephone calls because the WVCCPA "prohibits 'any' communication with a debtor known to be represented by counsel, regardless of the nature of that communication." (*Id.*)

Section 2-128 of the WVCCPA provides that "[n]o debt collector shall use unfair or unconscionable means to **collect or attempt to collect any claim**." W. Va. Code § 46A-2-128 (emphasis added). A "claim" is defined by the WVCCPA as a debt. *Id.* § 2-122(b). The statute lists five examples of debt collection practices that are per se violations. *Stover v. Fingerhut Direct Marketing, Inc.*, 709 F. Supp. 2d 473, 479 (S.D.W. Va. 2009); *see id.* Subsection (e) prohibits "[a]ny communication" with a consumer known to be represented by an attorney. *Id.* § 46A-2-128(e).

It is well accepted that

> courts must carry out the will of the Legislature when plainly expressed. Get its intent when it has plainly expressed it, and obey it. In such case, where the words are plan and unquestionable in meaning, the question is not one of construction, but one of implicit obedience to the legislative power. It is a well-established rule of construction that it is not permitted to interpret what needs no construction.

Kelley & Moyers v. Bowman, 68 W. Va. 49, 69 S.E. 456, 457 (1910). Only where a statute is vague or ambiguous may a court construe it. Under the principle of *in pari materia*, "'[s]tatutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments.'" Syl. pt. 1, *Kimes v. Bechtold*, 176 W. Va. 182, 342 S.E.2d 147 (1986) (quoting Syl. pt. 3, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975)) (citations omitted).

Section 2-128 of the WVCCPA is unambiguous. It prohibits the use of unfair or unconscionable means in a particular context, namely "to collect or attempt to collect any claim." Each subsection relates back and is limited to that express purpose. *See, e.g., Moore v. Mortgagestar, Inc.*, __ F. Supp. 2d __, 2002 U.S. Dist. LEXIS 27457, *43-47 (S.D.W. Va. Dec. 18, 2002) (analyzing whether a communication was an attempt to collect a debt). The limitation in section 2-128 should be read as applying to 2-128(e) because it is possible to give meaning to the first sentence of section 2-128 while also giving meaning to subsection (e). *See* Syl. pt. 5, *Foster Found. v. Gainer*, 228 W. Va. 99, 717 S.E.2d 883 (citation omitted). To read subsection (e) otherwise would be to render the first sentence of section 2-128 either superfluous or meaningless.

Further, sections 2-122 through 2-129a of the WVCCPA are the debt collection provisions of the WVCCPA. The debt collection provisions of the WVCCPA should be read together. *See* Syl. pt. 1, *Kimes v. Bechtold*, 176 W. Va. 182, 342 S.E.2d 147 (1986) (quotation omitted). Sections 2-122 through 2-129a relate to collecting or attempting to collect a debt. In

context, section 2-128(e) of the WVCCPA prohibits communications made in an attempt to collect a debt. The Circuit Court erred by selectively reading section 2-128(e) of the WVCCPA out of context, which significantly and impermissibly broadened its scope.

D. The Circuit Court impermissibly narrowed the "unintentional" and bona fide error defenses available to debt collectors under section 5-101(8) of the WVCCPA.

West Virginia Code section 46A-5-101(8) provides creditors with two defenses to alleged violations of the WVCCPA. First, "[i]f the creditor establishes by a preponderance of the evidence that a violation is unintentional . . . no liability is imposed . . . ." ." W. Va. Code § 46A-5-101(8). Second, it provides a defense for violations that "resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." *Id.*

Green Tree asserted both defenses in response to Figgatt's claims under section 2-128(e) of the WVCCPA. Importantly, the FDCPA provides a similar defense in section 1692k(c), but combines the WVCCPA's two defenses into one: a creditor must establish that a violation "was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c). Nonetheless, federal treatment of the unintentional and bona fide error components of the FDCPA defense is instructive.

1. The "unintentional" defense does not require that the act underlying a violation be "accidental."

The Circuit Court found that the telephone calls in question "were placed intentionally, in that they were not accidentally dialed . . .[,]" and on that basis concluded that Green Tree was not entitled to the protection from liability offered by that defense. (A.R. 6.) In *Lewis v. ACB Business Servs., Inc.*, 135 F.3d 389 (6th Cir. 1998), the Sixth Circuit examined the "unintentional" component of the bona fide error defense under the FDCPA. The Sixth Circuit

concluded that "the debt collector must only show that the violation was unintentional, not that the communication itself was unintentional. To hold otherwise would effectively negate the bona fide error defense." *Lewis,* 135 F.3d at 402.

The Circuit Court's ruling has the same effect. According to the Circuit Court, Green Tree must show it accidentally dialed Figgatt's number, i.e., that the communication itself was unintentional. Surely the West Virginia Legislature intended to provide a meaningful defense in enacting this statute, rather than simply protect a debt collector in the unlikely event that a debtor's number was "accidentally" dialed. The Circuit Court's holding that the physical placement of the call itself must be unintentional for the "unintentional" defense to apply is reversible error.

2. A debt collector is not required to follow-up on otherwise compliant West Virginia debt collection policies and procedures in order to avail itself of the bona fide error defense under section 5-101(8) of the WVCCPA.

The Circuit Court found that Green Tree had "West Virginia specific policies and procedures pertaining to the collection of accounts in this State." (A.R. 5.) In addition, it concluded that "the policies and procedures in evidence in this matter comport with West Virginia law relating to debt collection." (*Id.*) However, the Circuit Court determined that West Virginia law requires "regular maintenance and follow up on those procedures." (A.R. 7.) The Circuit Court concluded that Green Tree failed to establish that it performed the required "maintenance" on the policies and procedures. (*Id.*)

West Virginia law does not define "maintenance" as it pertains to section 5-101(8) of the WVCCPA. Again, it is important to note that the FDCPA corollary is almost identical to the WVCCPA. *See supra*, Assignment of Error V. The Tenth Circuit has addressed the precise issue of what the "maintenance" of policies and procedures means in the context of the bona fide

error defense. In *Johnson v. Riddle*, 443 F.3d 723 (10th Cir. 2006), the court explained that the inquiry is whether the debt collector "actually employed or implemented" procedures designed to avoid errors. *Johnson*, 443 F.3d at 729. The Tenth Circuit did not find that the procedures must be tweaked and changed in order for a creditor to avail itself of the bona fide error defense, as the Circuit Court did in this instance. Nothing in the WVCCPA explicitly requires a creditor to do so, either. *Clements v. HSBC Auto Finance, Inc.*, No. 5:09-cv-00086, 2010 WL 4281697, *10 (S.D.W. Va. Oct. 19, 2010), is one of the few West Virginia cases, state or federal, to discuss the "maintenance" requirement of the bona fide error defenses. *Clements* explains that the relevant language refers to the "adaption of a creditor's debt collection procedures to avoid violating the requirements of the WVCCPA" as opposed to being adapted to avoid violations of the FDCPA instead. *Id.*

The Circuit Court concluded that Green Tree had done just that – adapted its debt collection policies and procedures to comply with West Virginia law. (A.R. 5.) Green Tree was not required to demonstrate that it followed-up or tweaked its already compliant policies and procedures. The Circuit Court erred by reading an additional requirement into the WVCCPA's bona fide error defense.

VI. CONCLUSION

This lawsuit should have been resolved before it ever reached the Circuit Court. The parties entered into a valid, binding Arbitration Agreement. Figgatt's claims should have been compelled to arbitration. Instead, the Circuit Court denied Green Tree's Motion to Compel Arbitration and in so doing committed two errors. During trial, it committed another four. The Circuit Court's holdings regarding arbitration, skip tracing, and section 2-128(e) of the WVCCPA either impermissibly ignore or expand settled law. The Circuit Court's holdings regarding the defenses

provided by section 5-101(8) of the WVCCPA impermissibly restrict the availability of the defenses to creditors. In all respects, the Circuit Court's holdings will have significant, lasting, and profound effects on the state of arbitration and consumer protection laws in West Virginia. Based on the foregoing, Green Tree respectfully requests that this Honorable Court:

1. reverse the decision of the Circuit Court; and
2. grant such other and further relief as this Court deems just and proper.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GREEN TREE SERVICING, LLC,

Defendant Below, Petitioner

v. **DOCKET NO. 12-1143**

AIMEE NEELEY FIGGATT,

Plaintiff Below, Respondent

CERTIFICATE OF SERVICE

I, Don C.A. Parker, hereby certify that service of the foregoing **Petitioner Green Tree Servicing LLC's Amended Brief** has been made via U.S. Mail, on this 31st day of January, 2013, addressed as follows:

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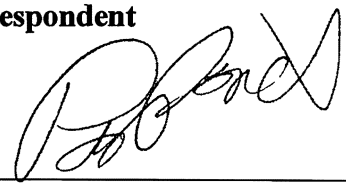

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