

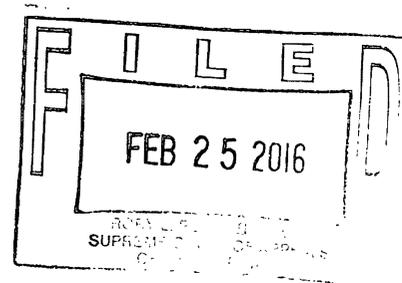
No. 15-0993

SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRAXTON LUMBER CO., INC.,
Plaintiff Below/Petitioner

v.

LLOYD'S, INC.,
Defendant Below/Respondent



On Appeal from the
Circuit Court of Braxton County, West Virginia
No. 07-C-121, The Honorable Richard A. Facemire

BRIEF ON BEHALF OF RESPONDENT, LLOYD'S, INC.

**Respondent Herein, LLOYD'S, INC.,
a West Virginia corporation, By Counsel:**

Debra Tedeschi Varner (WV State Bar #6501)

Counsel of Record

dtvarner@wvlawyers.com

Richard R. Marsh (WV State Bar #10877)

rrmarsh@wvlawyers.com

Michael P. Gruber (WV State Bar #12743)

mpgruber@wvlawyers.com

Empire Building - 400 West Main Street

P. O. Drawer 2040

Clarksburg, WV 26302-2040

Telephone: (304) 626-1100

Facsimile: (304) 623-3035

McNeer, Highland, McMunn and Varner, L.C.
Of Counsel

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STATEMENT OF THE CASE

Lloyd's Inc. (hereinafter, "Respondent") agrees with the majority of the facts alleged in Braxton Lumber Company, Inc.'s Brief in Support of Appeal; however, Respondent disagrees with some facts alleged and believes others require clarification.

On two separate occasions, December 26, 1990 and January 5, 1991, Chuck Lloyd gifted Greg Lloyd 160 shares of stock in Braxton Lumber Company, Inc. (hereinafter, "Petitioner"), leaving Greg Lloyd with an ownership of thirty-two percent of the company. R. 125-26.¹ At issue in this case is a promissory note (the "Note") on which Chuck Lloyd sought enforcement in an earlier action styled *William G. Lloyd, Plaintiff, v. Braxton Lumber Co., Inc., Defendant/Third-Party Plaintiff, Charles R. Lloyd, Defendant, and Charles R. Lloyd, II, Defendant/Third-Party Plaintiff v. Lloyd's Inc., Third-Party Defendant*, Circuit Court of Braxton County Civil Action No. 04-C-39 (the "First Action"). The assignment of the Note, as Petitioner states, was not endorsed and no new promissory notes were executed. Thus, after the assignment in question, Petitioner retained legal title to the Note, while Chuck Lloyd and Greg Lloyd received equitable title to 68% and 32% of the Note, respectively. R. 145-46. Further, Petitioner did not file a claim to enforce the Note in the First Action, although it admits in its Brief that it could have done so. Petitioner's Brief in Support of Appeal 13-14 (hereinafter, "Pet'r Br.").

In the First Action, regarding Chuck Lloyd's claim to enforce the Note, the Circuit Court of Braxton County ("Circuit Court") provided to the jury the verdict form prepared by Chuck Lloyd. R. 87-88. This form, which the jury used to present its verdict, did not present the jury with any theories under which it could find for Respondent; rather, the verdict form merely asked the jury to determine whether Chuck Lloyd could enforce the Note against Respondent. R. 120.

¹ Reference to the Appendix submitted is denoted with R followed by the applicable page numbers.

Additionally, the verdict form presented to the Circuit Court prepared by Respondent and Greg Lloyd did ask the jury to state on which issue it found for Respondent. Chuck Lloyd did not join in the request of that form and his own, more concise, form was used. R. 114-116. Further, in its denial of Chuck Lloyd's post-trial motions following the First Action, the Circuit Court found that sufficient evidence existed to show that the jury could have found for Respondent based on either the assignment or the enforceability of the Note itself.

SUMMARY OF THE ARGUMENT

The Court should uphold the Circuit Court's decision finding that Petitioner's claim is barred and Petitioner cannot enforce the Note against Respondent. Petitioner attempts to overcome three legal impediments on which the Circuit Court relied in its decision to find in Respondent's favor below: inapplicability of a tolling statute, *res judicata*, and collateral estoppel. Petitioner cannot meet its burden of proof as to any of theories and the Circuit Court was correct to deny Petitioner's attempt to enforce the Note against Respondent.

First, the Circuit Court was correct to deny Petitioner's claim because the tolling statute Petitioner relies upon to allow enforcement of the Note is inapplicable. The tolling statute Petitioner primarily relies upon tolls a statute of limitations during a pending claim when the cause of action to which the statute of limitation applies could be brought as a third-party complaint in that pending claim. However, this statute is inapplicable here because Petitioner could not procedurally have sought enforcement of the Note in the First Action. Petitioner's claim was not proper as a third-party action and, therefore, the tolling statute did not apply. This is because, in the First Action, had Petitioner brought a claim against Respondent to enforce the Note, such a claim would have had nothing at all to do with Petitioner's liability to Greg Lloyd.

Furthermore, Petitioner's second attempt at applying a tolling statute fails because it simply disregards clear, longstanding West Virginia law. In an attempt to get around its statutory bar, Petitioner requests that the Court apply foreign law to force Respondent's mere recognition of the existence of the Note as a clear, willing assumption of liability thereon. However, the evidence Petitioner supplies falls well short of the applicable West Virginia law, and its attempt to apply law from other jurisdictions creates perverse incentives within the court system and, therefore, bad public policy.

Second, the Circuit Court was correct to deny Petitioner's claim under the theory of *res judicata* because all the elements of the applicable test are met. To bar a claim based on *res judicata*, there must (1) be a final adjudication on the merits below, (2) be the same parties or parties in privity in both actions, and (3) the cause of action be one brought or that could have been brought in the original action. Petitioner relies on an incorrect assertion that the issue in the First Action focused solely on the validity of the assignment of the Note, while the issue in this action pertains to the enforceability of the Note itself. Even a cursory review of documents from the First Action establishes that this is not the case, as the jury below rendered a verdict regarding enforceability of the Note, not validity of its assignment. The first element is met because of this verdict, as well as the Circuit Court's denial of Petitioner's post-trial motions and this Court's denial of Petitioner's plea to appeal. The second element is met because, as West Virginia law establishes, Chuck Lloyd acted in the First Action as an agent of Petitioner attempting to enforce the Note. Additionally, the third element is met because Petitioner admits it could have brought the claim in the First Action, but failed to do so.²

² Petitioner clearly could have brought the claim as a permissive counterclaim.

Finally, the Circuit Court was correct to deny Petitioner’s claim under the theory of collateral estoppel because Petitioner had a full and fair opportunity to litigate its claim in the First Action. The test to bar a claim via collateral estoppel utilizes four elements, three of which are essentially identical to those in the *res judicata* test and, as already explained, are satisfied. The lone remaining element is also satisfied because Petitioner admitted that it could have litigated its claim on the Note in the First Action if not for its mistaken belief. The fact that Petitioner was wrong to think it could litigate the claim does not preempt applicability of collateral estoppel—Petitioner already had its opportunity to fully and fairly litigate its claim in the First Action, yet it simply did not do so. Petitioner cannot overcome any of the legal theories underlying the Circuit Court’s decision, and the Circuit Court was clearly correct to deny Petitioner’s claim to enforce the Note against Respondent.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent does not request oral argument in this appeal as it believes “the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.” W. Va. R. App. P. 18(a)(4).

ARGUMENT

I. Standard of Review.

This Court reviews a “circuit court’s grant of summary judgment *de novo* . . . and, therefore, [applies] the same standard as a circuit court, reviewing all facts and reasonable inferences in the light most favorable to the moving party.” *Powderidge Unit Owners Ass’n v. Highland Props.*, 196 W. Va. 692, 698, 474 S.E.2d 872, 878 (1996). The Court shall examine the pleadings and discovery to determine if there is no genuine issue of disputed fact. *Id.* After determining that there are no issues of fact in dispute, the Court must determine if the movant has demonstrated that

the movant is entitled to judgment as a matter of law. *Id.* Although the review is *de novo*, this Court will not consider evidence or arguments that were not presented to the Circuit Court and the review is limited to the record of the Circuit Court. *Id.* at 700, 474 S.E.2d at 880. Furthermore, “appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*.” Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995).³

II. The Circuit Court’s conclusion that Petitioner’s claim is barred by the statute of limitations was correct because neither West Virginia Code §§ 55-2-21 nor 55-2-8 tolled the applicable statute of limitation.

As part of its assignments of error, Petitioner asserts that the Circuit Court erred in finding that the applicable statute of limitations barred Petitioner’s claim. To attempt to establish this error, Petitioner relies upon its assertion that the applicable statute of limitation was tolled pursuant to West Virginia Code §§ 55-2-21 and/or 55-2-8. Petitioner must rely upon tolling because, otherwise, its claim is clearly time-barred. Petitioner admits in its Brief that the Note is a negotiable instrument under West Virginia Code § 46-3-104 and that the applicable statute of limitation is set forth in West Virginia Code § 46-3-118(a). West Virginia Code § 46-3-118(a) provides for a six-year statute of limitation on negotiable instruments. Finally, in its Brief, Petitioner readily admits that its claim is time-barred unless it can fall within a tolling provision: “[T]he Note was due and payable on or before January 1, 1999. Accordingly a cause of action to enforce the Note had to be brought no later than January 1, 2005, pursuant to W.Va. Code § 46-3-118(a), unless the limitations period was arrested by a tolling doctrine.” Pet’r Br. 13. Admittedly, no such action was brought within this time period and, therefore, Petitioner’s claim

³ Standards of review for a circuit court’s granting of a motion for summary judgment and a motion to dismiss are provided because the Circuit Court below entered two, nearly identical orders granting both of Respondent’s such motions. *See* R. 243, 263.

is time-barred unless a tolling period applies. As the Petitioner cannot establish that any tolling period applies, the Circuit Court was correct in its conclusion that Petitioner's claims were time-barred.

- A. **Petitioner's claim is barred by the statute of limitations because Petitioner could not have brought the claim as a third-party complaint in the First Action and, therefore, the tolling statute under West Virginia Code § 55-2-21 is inapplicable.**

Petitioner's argument regarding West Virginia Code § 55-2-21 rests upon two grounds. First, that the statute tolled the applicable statute of limitation. Second, that there was a rebuttable presumption that the Note had been properly assigned to Chuck Lloyd. Neither of those assertions are correct.

- i. **West Virginia Code § 55-2-21 did not toll the applicable statute of limitation because Petitioner did not have a third-party claim against Respondent.**

To shoehorn its claims into a tolling provision, Petitioner asserts that West Virginia Code § 55-2-21 tolled the six-year statute of limitation. Pet'r Br. 15. West Virginia Code § 55-2-21 does provide for tolling of the statute of limitations in certain situations when a third-party claim is involved:

After a civil action is commenced, the running of any statute of limitation shall be tolled for, and only for, the pendency of that civil action as to any claim which has been or may be asserted therein by counterclaim, whether compulsory or permissive, cross-claim or **third-party complaint**: Provided, that if any such permissive counterclaim would be barred but for the provisions of this section, such permissive counterclaim may be asserted only in the action tolling the statute of limitations under this section. This section shall be deemed to toll the running of any statute of limitation with respect to any claim for which the statute of limitation has not expired on the effective date of this section, but only for so long as the action tolling the statute of limitations is pending.

W. Va. Code § 55-2-21 (emphasis added). For Petitioner to prevail on its argument, it needed to have had a third-party complaint against Respondent that was tolled. Any such claim would not have been a cross-claim and, to the extent that it was a permissive counterclaim,⁴ such claim is no longer valid because it was not brought in the First Action. Thus, only the third-party complaint remains.

Petitioner admits that it could not have brought a third-party complaint in the First Action: “Braxton Lumber could not have asserted a claim on the Note as a third party claim against Lloyd's in the First Action based on the presumption that the Note was owned by Chuck and Greg by virtue of the Assignment.” Pet’r Br. 13-14; *see infra* pp. 23-24. It is unclear how West Virginia Code § 55-2-21 tolls the statute of limitation if Petitioner could not have brought a third-party complaint in the first place. Petitioner never explains how a claim that does not exist can be tolled.⁵ And that leads into the second problem with Petitioner’s argument: procedurally, Petitioner could not have brought a third-party complaint.

The issue with Petitioner’s assertion is that, procedurally, **Petitioner did not have a third-party complaint against Respondent in the First Action**, though not for the reason Petitioner asserts. Third-party complaints cannot be used for any claim against a third-party. Instead, such complaints can only be utilized for those actions in which there is liability to the defendant for the defendant’s liability to the plaintiff. The West Virginia Rules of Civil Procedure clearly state that defendants can only utilize third-party complaints to pursue certain claims: a third-party complaint is only proper when the third-party defendant may be liable to the third-party plaintiff for all or part of the plaintiff’s claim against the third-party plaintiff. W. Va. R. Civ. P. 14(a). This Court has further analyzed and explained when exactly a third-party complaint may be used. “The

⁴ A permissive counterclaim is how Petitioner should have properly brought its claim in the First Action.

⁵ Of course, as explained *infra* in Section III(c), Petitioner always had the ability to bring the claim.

purpose of Rule 14(a) . . . is to eliminate circuitry of actions when the rights of all three parties center upon a common factual situation.” Syl. Pt. 1, *Bluefield Sash & Door Co. v. Corte Const. Co.*, 158 W. Va. 802, 216 S.E.2d 216 (1975) (emphasis added) *overruled on other grounds by Haynes v. City of Nitro*, 161 W. Va. 230, 240 S.E.2d 544 (1977). “Impleader under Rule 14(a) . . . is available only against persons who are or may be liable to a defendant for part or all of the plaintiff’s claim.” *Id.* at Syl. Pt. 2.

In addition to the Court’s prior case law regarding third-party complaints, other courts have held that the use of third-party complaints is not unlimited. “[A] third-party claim may be asserted only when the third party’s liability is in some way dependent on the outcome of the main claim and the third party’s liability is secondary or derivative. It is not sufficient that the third-party claim is a related claim.” *United States v. One 1977 Mercedes Benz*, 708 F.2d 444, 452 (9th Cir. 1983).⁶

Based upon a plain reading of Rule 14, it is clear that Petitioner could not have brought its claim for payment on the Note as a third-party complaint in the First Action. In the First Action, Greg Lloyd sued Charles Lloyd, Chuck Lloyd, and Petitioner as three individual defendants, alleging fraud and civil conspiracy against Charles Lloyd and Chuck Lloyd and waste, conversion, self-dealing, and insider lending against Petitioner. R. 112-14. In response to these actions, Chuck Lloyd filed a third-party complaint against Respondent to seek judgment as to sixty-eight percent of the Note in question, and Charles Lloyd filed both a counter-claim against Greg Lloyd and a third-party complaint against Respondent, seeking repayment on a separate note paid to

⁶ *United States v. One 1977 Mercedes Benz* relied upon Federal Rule of Civil Procedure 14. However, this Court historically “give[s] substantial weight to federal cases in determining the meaning and scope of our rules.” *Brooks v. Isinghood*, 213 W. Va. 675, 682, 584 S.E.2d 531, 538 (2003). In this situation, Federal Rule of Civil Procedure 14(a) is nearly identical to West Virginia Rule of Civil Procedure 14(a), further supporting the potential reliance on case law examining the federal rule.

Respondent and secured by Greg Lloyd. R. 116-17, 246. In the First Action, Petitioner did not file a third-party complaint against Respondent seeking collection on the Note.

Looking at these facts, it must be concluded that Petitioner could not have brought a third-party claim seeking payment on the Note during the First Action.⁷ In the First Action, Greg Lloyd sued Petitioner on counts of waste, conversion, self-dealing, and insider lending. R. 129. Therefore, the only proper third-party complaint Petitioner could have alleged would have been against an individual liable or potentially liable to Petitioner for part or all of Greg Lloyd's claims of waste, conversion, self-dealing, and insider lending. In other words, in the First Action, Petitioner could not have properly brought a third-party complaint against Respondent seeking payment on the Note because such an action would not have been served on an individual liable to Petitioner regarding Greg Lloyd's claims of waste, conversion, self-dealing, and insider lending. The claims of waste, conversion, self-dealing, and insider lending do not "center upon a common factual situation" with a claim seeking payment on the Note, as the two matters are completely unrelated. The liability of Respondent concerning the Note was in no way dependent on the outcome of Greg Lloyd's claims against Charles Lloyd, Chuck Lloyd, and Petitioner. In the First Action, had Petitioner filed a valid third-party claim, such a claim could only have been brought against a non-party liable to Petitioner for Petitioner's own liability to Greg Lloyd concerning the waste, conversion, self-dealing, and insider lending claims. The two causes of action—Greg Lloyd's waste, conversion, self-dealing, and insider lending claims and Petitioner's claim seeking payment—are completely unrelated; therefore, Petitioner could not have brought a third-party

⁷ It further appears that, based on the same analysis, neither Charles Lloyd nor Chuck Lloyd should have been permitted to bring their respective third-party claims in the First Action. However, they were in fact permitted to do so, their actions are completed, and the issue as to those claims is moot.

action in the First Action seeking payment on the Note and, consequently, the statute of limitation was not tolled under West Virginia Code § 55-2-21.

ii. Petitioner's assertion that there was a rebuttable presumption that legal title had passed to Greg Lloyd and Chuck Lloyd is incorrect and irrelevant.

As an additional ground supporting its tolling argument, Petitioner contends that there was a rebuttable presumption that legal title to the Note was held by Greg Lloyd and Chuck Lloyd. Pet'r Br. 14-15. Per Petitioner, absent that rebuttable presumption, Petitioner could and would have raised the third-party complaint against Respondent to enforce the Note in the First Action. *Id.* at 15.

Whether there is a rebuttable presumption is irrelevant because Petitioner does not explain why the presence of such a presumption would in any way toll the applicable statute of limitations. It appears that Petitioner raises a standing issue based upon its assertion that it could not have brought a third-party complaint because Greg Lloyd and Chuck Lloyd held equitable title to the Note and, therefore, the statute of limitation did not run against it. Petitioner provides no case law for this position.

Petitioner's standing argument does not bear weight when analyzed pursuant to the discovery rule. "[T]he discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action." Syl. Pt. 5, *Dunn v. Rockwell*, 225 W. Va. 43, 689 S.E.2d 255 (2009). One would presume that Petitioner knew or should have known about the Note and the lack of payment on such Note when the First Action was filed. Petitioner could have brought that suit before January 1, 2005, when it knew the statute of limitation ran. Pet'r Br. 8. To the extent that Petitioner believed that Greg Lloyd and Chuck Lloyd

held the claim, it could have pled in the alternative as allowed by the West Virginia Rules of Civil Procedure. *See* W. Va. R. Civ. P. 8(a). Instead, Petitioner, through one of its agents, Chuck Lloyd, sat back, failed to exercise its rights, and now claims that it did not have reason to believe that it had a claim.⁸

Petitioner's claim that there was a rebuttable presumption and thus its explanation as to why Petitioner did not bring suit against Respondent for collection of the Note in the First Action fails. Essentially, it appears that Petitioner did not bring its claim as a tactical decision or as a result of its own misapplication of law or fact. None of those reasons create any type of tolling of the statute of limitation. In hindsight, it is clear that Petitioner was in error in not bringing its action, but that does not alleviate it from the repercussions of such failure, i.e., the possibility that its claim is now time-barred.

To the extent that Petitioner is relying upon an argument that the existence of the rebuttable presumption and the rebutting of that presumption tolls the statute, such assertion is incorrect because there was no rebuttable presumption.⁹ Petitioner is correct that, generally, a corporate officer has authority to act on behalf of the corporation. Pet'r Br. 14. However, as with many general rules of law, there are exceptions to that general rule. If there is an exception to the rule, then there cannot be a rebuttable presumption.

West Virginia law is clear that the partial assignment of the Note to Chuck L. Lloyd did not deprive Petitioner of its right to bring a cause of action. "If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under this article and has only the rights of a partial assignee." W. Va. Code § 46-3-

⁸ At the same time, Petitioner admits it had legal title at that time. *See* Pet'r. Br. 15.

⁹ Respondent notes that if this is Petitioner's argument, Petitioner has provided no authority for any such tolling doctrine.

203(d). “The cause of action on an instrument cannot be split. Any indorsement which purports to convey to any party less than the entire amount of the instrument is not effective for negotiation.” *Id.*, official comment 5. An assignee of a non-negotiable instrument may bring in his own name, without designation as “assignee,” any claim that the original payee might have brought. W. Va. Code § 55-8-9.

Ultimately, although Petitioner’s legal contention may be correct that, generally, there is a rebuttable presumption that a corporate officer has the authority to bind a corporation regarding contracts and instruments, such rebuttable presumption never applied in this situation. Pet’r Br. 14; W. Va. Code § 46-3-203(d). Any such authority regarding corporate officers does not preempt other law, and thus does not create a rebuttable presumption that a legally invalid transfer is valid merely because a corporate officer carried out the transfer. Here, Petitioner attempted to divide and assign the Note to both Chuck Lloyd and Greg Lloyd. Under the West Virginia Code § 46-3-203(d), such a purported transfer of less than the entire instrument is not a valid transfer of a negotiable instrument. Therefore, in the case at hand, after the transfer, Petitioner still held full legal title to the Note, while Chuck Lloyd and Respondent held equitable title thereto, allowing them to bring any action on the Note that Petitioner may have brought. Put simply, under the relevant law, legal title to the Note never transferred from Petitioner, and Petitioner always had that claim.

Petitioner’s argument regarding rebuttable presumption makes even less sense when its *res judicata* argument is taken into consideration. Petitioner admits that, “pursuant to West Virginia Code § 46-3-203(d), Braxton Lumber’s cause of action on the Note could not be split.” Pet’r Br. 20. As Petitioner explains: “Here, there was no endorsement of the Note; rather, Braxton Lumber executed the Assignment, which was not affixed to the instrument itself. As the holder of the Note,

a negotiable instrument, only Braxton Lumber could bring a cause of action on the Note as a matter of law.” Pet’r Br. 21 (emphasis added). If Petitioner could only bring the cause of action on the Note as a matter of law, then why did it not do that timely? Petitioner appears to admit that it badly misread the applicable law and now asks that the Court excuse it from its mistake.

There probably was a rebuttable presumption that Chuck Lloyd, as president of Petitioner, had the authority to transfer legal title to the Note. Had Chuck Lloyd transferred the entirety of the Note to himself, then such transfer likely would have been proper. However, Chuck Lloyd’s attempt to split the Note was, by black letter law provided by the Uniform Commercial Code, legally insufficient. Petitioner never relinquished legal title to the Note and failed to bring an action to enforce the Note during the applicable statute of limitations.

Petitioner’s tolling argument ultimately fails for two reasons. First, even if there was a rebuttable presumption that Petitioner did not have standing to enforce the Note prior to the jury’s decision in the First Action, as Petitioner contends, Petitioner could not have brought a third-party action to toll the statute because its claim is not a third-party claim as defined by Rule 14. Second, Petitioner’s rebuttable presumption argument fails because Petitioner never relinquished legal title to the Note, had standing to enforce during the entirety of the statute of limitation, and never brought an enforcement action thereon. For those reasons, the Circuit Court was correct in concluding that Petitioner is time-barred from collecting on the Note.

B. Respondent did not acknowledge any debt related to the Note during the First Action and, therefore, there is no tolling or removal of the time-bar created under West Virginia Code § 46-3-118(a).

To avoid the repercussions of the statute of limitations, Petitioner relies upon a long-standing exception in the case of debt collection: acknowledgement of the debt. There are two problems with its argument. Under West Virginia law, there is no evidence sufficient to support

a finding that Respondent acknowledged the debt in such a manner as to restart the statute of limitations. Second, Petitioner's argument to extend West Virginia law in accordance with other jurisdictions violates public policy.

i. Petitioner cannot establish acknowledgment of the debt in such a manner as to restart the applicable statute of limitation.

Petitioner contends that there is a genuine issue of material fact as to whether the statute of limitation regarding the Note was tolled. West Virginia law does not support such a conclusion. As Petitioner states in its brief, a time-barred claim to enforce a debt may be lifted in West Virginia when "any person against whom the right shall have so accrued on an award, or on any such contract, shall by writing signed by him or his agent promise payment of money on such an award or contract." W. Va. Code § 55-2-8. Further, a written acknowledgment "from which a promise of payment may be implied" is considered an adequate promise of payment. *Id.* To remove a time-bar in this way:

an acknowledgment in writing, to operate as a new promise to remove the bar of the statute of limitations, must be a clear and definite acknowledgment of a precise sum, importing a willingness and liability to pay; it must be an acknowledgment from which a promise of payment may be implied unconditionally and such as to indicate an actual liability and a willingness to pay.

Preston Cty. Coke Co. v. Preston Cty. Light & Power Co., 146 W. Va. 231, 247, 119 S.E.2d 420, 430 (1961) citing *Stiles v. Laurel Fork Oil and Coal Company*, 47 W.Va. 838, 35 S.E. 986 (1900). "Mere entries by a party in his own book of accounts will not operate as an acknowledgment, to take a demand out of the statute of limitations." Syl. Pt. 5, *Stiles v. Laurel Fork Oil & Coal Co.*, 47 W. Va. 838, 35 S.E. 986 (1900). Finally, "the burden of removing the statutory bar rests upon the plaintiff." *Stansbury v. Stansbury's Adm'rs*, 20 W. Va. 23, 29 (1882).

The key in this analysis is the presence, express or implied, of a **new promise to pay**. An acknowledgement of the old promise to pay is not sufficient. Further, as the plaintiff in this case, Petitioner bears the burden of proof in attempting to remove the time-bar under West Virginia Code § 46-3-118(a). The “evidence” Petitioner puts forth regarding Respondent’s alleged acknowledgement of the debt plainly does not meet the requirements of West Virginia’s clear, longstanding law regarding the issue. An analysis of each item of the proffered evidence establishes these shortcomings.

First, Petitioner contends that Greg Lloyd, on behalf of Respondent, admitted during the First Action that (1) Petitioner provided labor and materials in helping set up Respondent’s business; (2) Greg Lloyd signed the Note; (3) Greg Lloyd was president of Respondent; and (4) as President, if the company borrowed money or signed a contract, that he would be the one to sign. Pet’r. Br. 17. None of these statements by Greg Lloyd on Respondent’s behalf meet the requirements of acknowledgement of a debt. In the statements, there is no promise to pay anything to Petitioner, no clear and definite acknowledgement of a precise sum showing a willingness and liability to pay, and in no way can one infer from the statements an unconditional promise to pay.

For the statute of limitation to not apply, the acknowledgment must be in a signed writing. *See* W. Va. Code § 55-2-8. Petitioner has provided no evidence that any of the facts identified *infra* were in writing. For that reason alone, such facts cannot support a holding that Respondent acknowledged the debt in such a manner as to alleviate the effects of the statute of limitation.

Second, in an attempt to get around the writing requirement, Petitioner claims that an accounting journal entry on Respondent’s books, admitted as evidence in the First Action, showing a \$600,000 debt to Petitioner qualifies as an acknowledgement. Pet’r Br. 23. However, “[m]ere entries by a party in his own book of accounts will not operate as an acknowledgment, to take a

demand out of the statute of limitations.” *Stiles*, 47 W. Va. at Syl. Pt. 5. Additionally, there is nothing that indicates that there was a promise to pay. Further, such books were prepared for Respondent’s own purposes; there is no evidence that Respondent transferred them to Petitioner outside of the litigation context or intended Petitioner to rely upon them. For those reasons, Petitioner’s second item of evidence put forth cannot operate as an acknowledgment of a debt.

Third, Petitioner contends that the report prepared by Respondent’s expert witness and admitted as evidence in the First Action operates of an acknowledgment of the debt. Pet’r. Br. 23. Petitioner claims that the report reflects the existence of the Note on December 31, 1997, showing a balance of \$566,400.00, and a note hand written by the expert, Robert Morris, that reads “Conclusion: Entries on Braxton & Lloyd’s Inc. probably correspond and are ok.” Pet’r. Br. 18. Again, these mere accounting entries cannot function as an acknowledgment capable of removing a claim from its time-barred status. Further, although the expert’s report may mention a debt, it in no way plainly shows a willingness and assumed liability on Respondent’s behalf to pay that debt. Moreover, it is highly questionable at best to assume that an expert witness would be Respondent’s “agent” with authority to acknowledge and assume a debt on Respondent’s behalf. Thus, Petitioner’s claim that the expert report operates as an acknowledgement of the debt is clearly wrong and should be disregarded.

Finally, Petitioner brings forth Greg Lloyd’s, on behalf of Respondent, response to a request for admission submitted by Chuck Lloyd in the First Action. Pet’r. Br. 23. The request asked Respondent to admit that Petitioner made a series of loans to Respondent beginning in 1996 and that, by August 1998, the books of both parties showed such a debt of \$600,000. *Id.* at 18. Greg Lloyd’s response, on Respondent’s behalf, read “admitted in so far as the fact that loans were made. Greg Lloyd, after reasonable investigation, does not possess knowledge or information

sufficient to admit or deny facts about the amount of any such loans.” *Id.* This response, as it states, merely reflects the fact that loans were made. The response does not acknowledge any debts, any definite sum, any willingness to pay, or any assumption of liability to pay by Respondent. Therefore, Petitioner’s assertion fails in its contention that the response is an acknowledgement of a debt on the Note.

Because Petitioner’s “evidence” so blatantly falls short of the requirements for acknowledgment of a debt under West Virginia law, Petitioner cites law from other jurisdictions. *Id.* at 16-17. Petitioner’s foreign case law, from Maryland and Connecticut, provides substantially lower standards as to what constitutes acknowledgment of a debt, which would be necessary to force the evidence brought by Petitioner into what might be an acknowledgment. *Id.* However, West Virginia has clear, confirmed, longstanding case law on the issue and law from other jurisdictions on the issue is not necessary or relevant. *See Preston Cty. Coke Co., 146 W. Va.* at 247, 119 S.E.2d at 430 *supra* p. 14; *W. Va. Code § 55-2-8 supra* p. 14. Additionally, adoption of Petitioner’s argument leads to bad public policy.

ii. Petitioner’s interpretation of acknowledgement of debts creates bad public policy because it encourages plaintiffs to delay filing of claims and defendants to lie.

Under the Petitioner’s interpretation of the law regarding acknowledgement of debts, it appears that literally any acknowledgment that a debt existed would restart the statute of limitations. Pet’r. Br. 17-18. This would include any acknowledgment that was given as part of litigation. This creates multiple problems, namely that it will encourage plaintiffs to delay filing of claims and for defendants to lie.

In its brief, Petitioner states, “The circuit court’s order, which permits Respondent to avoid its clear legal obligations based upon a statute of limitations defense perpetrates a grave

miscarriage of justice.” *Id.* at 19. Petitioner’s hyperbole aside, it ignores the fact that statutes of limitation specifically do create a form of injustice based upon a balancing of competing interests. On one hand, people are able to utilize the courts to remedy harms that befall them, whether through tort, breach of contract, or other claim, and, on the other hand, the public wants claims timely brought so as to avoid loss of evidence, such as documents and testimony. The Court has previously noted reasons for the statute of limitations:

Statutes of limitation are statutes of repose and the legislative purpose is to compel the exercise of a right of action within a reasonable time; such statutes represent a statement of public policy with regard to the privilege to litigate and are a valid and constitutional exercise of the legislative power.

Syl. Pt. 1, *Stevens v. Saunders*, 159 W. Va. 179, 220 S.E.2d 887 (1975), *superseded by statute as stated in Wright v. Myers*, 215 W. Va. 162, 597 S.E.2d 295 (2004).

Petitioner is trying to battle against the outcome created from long-standing balances of different concerns of justice. In every instance, the application of a statute of limitation creates a “grave miscarriage of justice.” If today, a motorist is killed in an automobile accident, and the motorist’s personal representative brings a civil action against the tortfeasor two years and one day later, the motorist’s heirs receive nothing. However, if the personal representative brings the civil action one day earlier, the motorist’s heirs could receive millions of dollars.¹⁰ That could be considered a grave miscarriage of justice, but public policy has weighed those concerns against the desire to have potential plaintiffs promptly bring their civil actions.¹¹

The same situation is present here. Petitioner failed to bring its action timely. Instead, it brought its action nearly three years after the statute of limitation ran. R. 1. Although in Petitioner’s

¹⁰ To quote the Temptations, “What a difference a day makes.”

¹¹ Alternatively, if the statute of limitation did not apply, the personal representative could bring suit years or decades later. In that case, evidence and witnesses’ memories would be lost, depriving the defendant of a meaningful defense.

mind there may be a grave miscarriage of justice, in the public policy realm, such injustice is counter-balanced by the injustice levied upon Respondent in defending such an untimely claim.

In addition to the historic balancing of competing interests in the development of statute of limitations, Petitioner's interpretation of the foreign cases should not be followed for other public policy reasons, namely sanctity of the courts. Under Petitioner's standard, almost any mention of the debt would cause the statute of limitation to begin to run anew. First, under Petitioner's argument, if a claim is brought seeking payment on a note after the statute of limitations has run, considering any mention or recognition of the debt by the defendant during the case to be an acknowledgment sufficient to lift the time-bar would render the purpose of a statute of limitation meaningless. A plaintiff could wait decades before seeking enforcement of a note on which the statute had run and then use the litigation to cause the defendant to agree that there was a loan many years back, lifting the time-bar.

This tactic is evidenced in this case. The majority of the evidence cited by Petitioner to establish the alleged acknowledgment of the debt was evidence generated as part of the litigation: Respondent's admissions that Petitioner provided labor and materials in setting up Respondent's business, that Greg Lloyd signed the Note, and that Greg Lloyd, as President of Respondent, would be the signatory if Respondent borrowed money or signed a contract came through trial testimony. R. 5, 26. Petitioner also relies upon responses to Requests for Admission in support of its claim. Pet'r. Br. 18.

Under Petitioner's view of acknowledgement, a creditor would not have to secure a written acknowledgment and promise to pay from the debtor to restart the statute of limitation. Rather, the creditor would simply have to file its complaint and then serve simple requests for admission on the debtor or notice the debtor's deposition. That is exactly what the Petitioner did here. A

simple “did you sign the promissory note?” could work. Here, Petitioner did not cite evidence that Respondent did not pay the Note, but rather that it acknowledged that the Note was made. Based upon that, which appears to be a true statement, Petitioner seeks to restart the statute of limitation.

This interpretation of acknowledgement encourages misuse of the court system. If a plaintiff can avoid the time-bar simply by having the defendant admit to signing the note, then the statute of limitation is meaningless because the signature and subsequent admission of the same would extend the statute. In fact, the complaint would cause that admission.

Giving the plaintiff such powers of course creates a corresponding incentive: the incentive to simply lie and deny the signing of the note. The court system and the public has a great incentive and desire to prevent parties and witnesses from lying. Petitioner’s argument will encourage blatant lying. For example, if plaintiff tries to enforce a time-barred note, the savvy defendant will know all he or she needs to do is deny signing it. This is true even if the note is presented to the defendant with the defendant’s notarized signature. The savvy defendant still lies because he or she knows there is nothing else the plaintiff can do: the action is time-barred so long as there is no acknowledgement.¹² In the alternative, if the defendant admits what everyone knows, i.e., that the defendant signed the note, then the defendant loses. It is unwise of the court system to setup such clear win-lose situations.

In summary, it is against public policy to allow a plaintiff to collect on a physical tort years after the statute of limitation had run; it is similarly undesirable to consider a tortfeasor’s acknowledgment of the act during a case brought years after the statute of limitation had run sufficient to lift the time-bar. Therefore, because Petitioner failed to meet its burden to show any acknowledgment of the debt by Respondent under West Virginia law, the foreign case law is

¹² The courts would still have recourse to pursue contempt or perjury charges, but even that creates another problem: using such charges to essentially create the threat of debtors’ prisons in debt collection.

irrelevant due to West Virginia's clear and longstanding law on the issue, and applying such law would be against public policy, there is no tolling or removal of the time-bar created under West Virginia Code § 46-3-118(a).

III. The Circuit Court was correct in finding that Petitioner's claim is barred by *res judicata* because the First Action was a final adjudication on the merits, the First Action contained the same parties as or persons in privity with the parties in the current action, and the cause of actions are identical in both the First Action and the current action.

Petitioner contends that the Circuit Court erred in finding that Petitioner's claim is barred by *res judicata* because the validity of Petitioner's assignment of the Note is not at issue here and Respondent conceded liability on the Note in the First Action. Pet'r. Br. 19. The test for *res judicata* consists of three elements:

before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.

Blake v. Charleston Area Med. Ctr., Inc., 201 W. Va. 469, 477, 498 S.E.2d 41, 49 (1997). Each element of the *Blake* test is met in this action because (1) there was a final adjudication on the merits in the First Action by a court with proper jurisdiction; (2) privity exists between Chuck Lloyd, plaintiff in the First Action, and Petitioner in this action; and (3) Petitioner's claim in this action could have been resolved, had it been presented, in the First Action.

- A. **The first *Blake* element is met because the Circuit Court in the First Action had proper jurisdiction and, after the jury’s final verdict, all post-trial motions and pleas for appeal were denied.**

Petitioner contends that there was no adjudication on the merits in the First Action by stating that the issue in the First Action “bears no relation to” the issue in this action and, therefore, the issue in the current action was not adjudicated. Pet’r. Br. 20.¹³ Petitioner claims that the sole issue in the First Action was the validity of the assignment of the Note, while the issue herein is Petitioner’s legal right to collect on the Note. *Id.* However, a simple review of the relevant documents shows that Petitioner’s assertion is plainly erroneous. Because Petitioner does not dispute that the Circuit Court had proper jurisdiction in the First Action, only the final adjudication on the merits is at issue in this case.

In the First Action, the verdict form the Circuit Court provided to the jury was the verdict form prepared by Chuck Lloyd. R. 87-88. Although Petitioner asserts that only the assignment of the Note was addressed in the First Action, the verdict form shows otherwise. The verdict form used in the First Action contains a very straight-forward question regarding Respondent’s liability as to the portion of the Note held by Chuck Lloyd: “Do you find by a preponderance of the evidence that Chuck Lloyd is entitled to judgment against Lloyd’s Inc. in the amount of \$408,000.00, plus prejudgment interest from September 1, 1997?” R. 120. This verdict form obviously did not request the jury to state on which issue it found in favor of Respondent in that action. *Id.* Therefore, the issue resolved by the jury in the First Action, and reflected on the verdict form, was simply Respondent’s liability on the Note.

¹³ Petitioner sets forth various statements, such as “the issue presented was the validity of the Assignment and Chuck’s legal right to collect 68% of the Note pursuant thereto.” Pet’r. Br. 20. The problem is that it does not cite to the record for any of these statements. In fact, Petitioner does not cite to any part of the record in its section on *res judicata* other than its citations regarding Respondent’s alleged acknowledgment of the Note.

Further, in its denial of Chuck Lloyd's post-trial motions following the First Action, the Circuit Court found that there was sufficient evidence to show that the jury could have concluded that Chuck Lloyd was unable to collect from Respondent either because the assignment was invalid or because Chuck Lloyd was estopped from enforcing the Note against Respondent. R. 132-33. Additionally, Chuck Lloyd's appeal of the First Action to this Court was denied on December 9, 2008. R. 252. Therefore, the final verdict of the jury in the First Action, the Circuit Court's denial of Chuck Lloyd's post-trial motions, and this Court's denial of Chuck Lloyd's plea for appeal show that the First Action reached a final adjudication on its merits by a court with proper jurisdiction and, consequently, that the first element of the *Blake* test is satisfied.

B. The second *Blake* element is met because privity exists between Chuck Lloyd, as holder of equitable title of the Note and plaintiff in the First Action, and Petitioner, as holder of legal title to the Note and Petitioner in this action.

Petitioner contends that no privity exists between Chuck Lloyd and Petitioner because, in the First Action, a rebuttable presumption existed preventing Petitioner from enforcing the Note against Respondent. Pet'r. Br. 21-22. As explained prior, a holder of equitable title to a note may bring a claim on that note in his own name. W. Va. Code § 55-8-9, *see also Thomas v. Linn*, 40 W. Va. 122, 20 S.E. 878 (1894). Although "an assignee of a note for a collection may sue on it, he acts, in doing so, as the assignor's agent." *Curl v. Ingram*, 121 W. Va. 763, 763, 6 S.E.2d 483, 483 (1939).

As explained above, Petitioner's assertion of a rebuttable presumption in this context is irrelevant. Petitioner never relinquished legal title to the Note, though its failed transfer of legal title thereto left Chuck Lloyd and Greg Lloyd each holding equitable title to sue on their respective portion of the Note. R. 289. As assignee of the Note holding equitable title, Chuck Lloyd brought his claim in the First Action to seek enforcement on the Note and, pursuant to West Virginia law,

he did so as an agent of Respondent. Therefore, because Chuck Lloyd sued Respondent in the First Action as an agent of Petitioner, privity exists between Chuck Lloyd and Petitioner. Consequently, the second element of the *Blake* test is satisfied.

- C. **The third *Blake* element is met because Petitioner admits that it could have brought its claim in this action during the First Action and, had the claim been brought, it could have been resolved in the First Action.**

Petitioner contends that, based on its incorrect assertion that a rebuttable presumption existed at the time, Petitioner could not have brought a claim to enforce the Note during the First Action. Pet'r. Br. 15. As to the cause of action element of the *Blake* test:

An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, **but as to every other matter which the parties might have litigated as incident thereto**, and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but **it is sufficient that the *status* of the suit was such that the parties might have had the matter disposed of on its merits.** An erroneous ruling of the court will not prevent the matter from being *res judicata*.

Syl. Pt. 1, *Sayre's Adm'r v. Harpold*, 33 W. Va. 553, 11 S.E. 16 (1890) (emphasis added). “[I]n assessing whether the claim at issue could have been litigated, ‘the essential question becomes whether the claims asserted by the [plaintiff] in the present and prior actions are closely enough related to justify the conclusion that the defendant should have foreseen the consequences in the present action of his failure to litigate his defenses in the prior action.’” *Matter of Townview Nursing Home*, 28 B.R. 431, 445 (Bankr.S.D.N.Y.1983) (quoting *United States v. Martin*, 395 F.Supp. 954, 959 (S.D.N.Y.1975)) (citation omitted); *Blake*, 201 W. Va. at 477, 498 S.E.2d at 49.

Although the analysis in Section II(A)(ii) above states that, legally, it would have been improper for Petitioner to bring a third-party claim during the First Action seeking enforcement on the Note, the facts surrounding the First Action clearly indicate that the Circuit Court would

have allowed Petitioner to bring a third-party claim, had Petitioner attempted to do so. This is clear because the Circuit Court allowed Chuck Lloyd to bring such a claim to enforce the Note and also allowed Charles Lloyd to bring a third-party claim enforcing a different note, showing that the Circuit Court found such enforcements to be within the “legitimate purview” of Greg Lloyd’s claims. R. 80-81.

Additionally, the Section II(A)(ii) analysis above applies only to a third-party claim brought by Petitioner. Petitioner could have brought a permissive counterclaim against Respondent. Pursuant to West Virginia Rule of Civil Procedure 13(h), Petitioner could have joined Respondent as a counterclaim defendant. Thus, it is obvious that a claim could have been disposed of on its merits in the First Action should Petitioner have brought it, regardless of what type of claim was brought.

Moreover, Petitioner even acknowledged that it could have asserted the claim in the First Action: “furthermore, Braxton Lumber would have asserted a claim to enforce the Note but for its reasonable belief that legal title to the Note was held by Chuck and Greg Lloyd.” Pet’r. Br. 15. As explained above, this mistaken belief is not reasonable because it did not actually, legally prevent Petitioner from bringing the claim in the First Action. Most importantly, this acknowledgment by Petitioner establishes that Petitioner “**should have foreseen** the consequences in the present action of [its] failure to litigate [its] defenses in the prior action.” *Townview Nursing Home*, 28 B.R. at 445. Petitioner, as holder of legal title to the Note, could have brought a claim for the entire Note on its own through a permissive counterclaim. Instead, Petitioner sat by as Chuck Lloyd, as an agent of Petitioner, unsuccessfully sought enforcement of the Note. Therefore, because Petitioner admittedly could have brought and resolved this claim in the First Action but

failed to do so, the third element of the *Blake* test is satisfied and Petitioner's claim herein is barred under the doctrine of *res judicata*.

IV. The Circuit Court was correct in finding that Petitioner's claim is barred by collateral estoppel because the issue in the previous action is identical to the issue here, the First Action was a final adjudication on the merits, the party against which collateral estoppel is invoked is the same or in privity with the party in the first action, and the party against which collateral estoppel is invoked had a full and fair opportunity to litigate the issue in the First Action.

Petitioner contends that the Circuit Court erred in its finding that Petitioner's claim is barred by collateral estoppel because, in addition to the reasons Petitioner provided for the elements of *res judicata*—which are substantially similar to three elements of collateral estoppel—Petitioner did not have a full and fair opportunity to litigate its claim in the First Action. Pet'r. Br.

25. Collateral estoppel will bar a claim when:

four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Syl. Pt. 1, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). The analysis above regarding *res judicata* shows that the first three elements of the *Miller* test are satisfied. First, the issue here is identical to the issue in the First Action—whether the Note is enforceable against Respondent. This is established by the verdict form used in the First Action and the Circuit Court's statement that there was sufficient evidence to show that jury in the First Action could have found for Respondent either because of a failed assignment or an unenforceable note. R. 87-88. Second, there was a final adjudication on the merits in the First Action, as the jury supplied a final verdict, the Circuit Court denied Chuck Lloyd's post-trial motions, and this Court denied Chuck Lloyd's plea for appeal. R. 252. Third, privity exists between Chuck Lloyd and Petitioner because, in the First Action, Chuck Lloyd sued Respondent as an agent of Petitioner, as Chuck Lloyd held only equitable title to the Note, while legal title thereto remained with Petitioner. R. 253.

Thus, only the final element of the *Miller* test need be discussed, and it is clear that Petitioner had a full and fair opportunity to litigate the issue in the First Action. As discussed above, Petitioner admitted that it could have asserted the claim in the First Action. Pet'r. Br. 15. Further, Petitioner's mistaken belief of a rebuttable presumption did not actually, legally prevent Petitioner from bringing the claim in the First Action. In fact, Petitioner was included in the First Action because its agent, Chuck Lloyd, litigated the issue of the Note. Petitioner had several options outlined above to join itself or Greg Lloyd to the First Action in order to seek enforcement on the entire Note, but Petitioner failed to do so. R. 253-4. Petitioner had a full and fair opportunity to litigate the issue here in the First Action, and Petitioner simply did not do so. Therefore, the fourth element of the *Miller* test—as well as the prior three—is satisfied, and the Circuit Court was correct to bar Petitioner's claim under the doctrine of collateral estoppel.

CONCLUSION

For the foregoing reasons, the Court should affirm the Circuit Court of Braxton County's granting of Respondent's motion for summary judgment and motion to dismiss.

Respectfully submitted the 24th day of February, 2016.

**Respondent Herein, LLOYD'S, INC.,
a West Virginia corporation, By Counsel:**



Debra Tedeschi Varner (WV State Bar #6501)

Counsel of Record

dtvarner@wvlawyers.com

Richard R. Marsh (WV State Bar #10877)

rrmarsh@wvlawyers.com

Michael P. Gruber (WV State Bar #12743)

mpgruber@wvlawyers.com

Empire Building - 400 West Main Street

P. O. Drawer 2040

Clarksburg, WV 26302-2040

Telephone: (304) 626-1100

Facsimile: (304) 623-3035

McNeer, Highland, McMunn and Varner, L.C.
Of Counsel

CERTIFICATE OF SERVICE

This is to certify that on the 24th day of February, 2016, the undersigned counsel served the foregoing "*BRIEF ON BEHALF OF RESPONDENT, LLOYD'S, INC.*" upon counsel of record by depositing a true copy in the United States Mail, postage prepaid, in an envelope addressed as follows:

Steven L. Thomas, Esquire
Kay Casto & Chaney PLLC
707 Virginia Street, East, Suite 1500
Charleston, WV 25327
*Counsel for Plaintiff Below/Petitioner,
Braxton Lumber Co., Inc.*

Michael P Gruber