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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Nos. 14-0791 and 14-0792

(Circuit Court of Kanawha County, Civil Action No. 11-C-829)

MORGAN DREXEN, INC.,

Defendant Below,
Petitioner,

v.

PATRICK MORRISEY,
ATTORNEY GENERAL,

Plaintiff Below,
Respondent.

And

LAWRENCE WILLIAMSON,

Defendant Below,
Petitioner,

v.

PATRICK MORRISEY,
ATTORNEY GENERAL

Plaintiff Below,
Respondent.

PETITIONERS' BRIEF

Bruce M. Jacobs (W. Va. State Bar No. 6333)
Alexander Macia (W. Va. State Bar No. 6077)
Dennise R. Smith (W. Va. State Bar No. 7228)
Nicholas P. Mooney II (W. Va. State Bar No. 7204)

Spilman Thomas & Battle, PLLC
300 Kanawha Blvd., East (ZIP 25301)
P.O. Box 273
Charleston, WV 25321-0273
(304) 340.3800 /(304) 340.3801 (*facsimile*)
amacia@spilmanlaw.com
bjacobs@spilmanlaw.com
dsmith@spilmanlaw.com
nmooney@spilmanlaw.com

Counsel for Petitioners Morgan Drexen, Inc. and Lawrence Williamson

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I. ASSIGNMENTS OF ERROR

1. The Circuit Court committed clear error when it found that Morgan Drexen has more than 245 customers in West Virginia.

2. The Circuit Court committed clear error by failing to distinguish the actions or inactions of Lawrence Williamson from those of the Williamson Law Firm, LLC.

3. The Circuit Court committed clear error by finding that Morgan Drexen, rather than licensed attorneys, reviewed documents and negotiated settlements and erroneously concluding that Morgan Drexen and Mr. Williamson violated W. Va. Code § 46A-6-104 by creating a likelihood of confusion or misunderstanding among consumers.

4. The Circuit Court committed clear error by finding that Rachelle McIntyre-Nicholson worked for Morgan Drexen.

5. The Circuit Court committed clear error by finding that Morgan Drexen engaged in telemarketing solicitations to consumers.

6. The Circuit Court committed clear error by finding that Mr. Williamson and Ms. McIntyre-Nicholson knew about Morgan Drexen airing television ads in West Virginia.

7. The Circuit Court erred in concluding that Morgan Drexen conducted business in West Virginia and that it violated W. Va. Code § 46A-6-104 by failing to maintain a business license and failing to disclose the same.

8. The Circuit Court erred in concluding that Morgan Drexen failed to clearly and conspicuously disclose to consumers that all fees must be paid before debt relief services begin, even though it made no finding of fact to support its conclusion and any such finding would have been untrue.

9. The Circuit Court erred by implicitly finding that W. Va. Code § 61-10-23

applied to the services offered by Morgan Drexen and subsequently concluding that Morgan Drexen violated that statute.

10. The Circuit Court alternatively erred by concluding that the attorneys utilizing Morgan Drexen's services did not qualify for the "licensed attorney" exception contained in W. Va. Code § 61-10-23.

11. The Circuit Court erred by finding that Morgan Drexen is a credit services organization under the Credit Services Organization Act ("CSOA"), W. Va. Code §§ 46A-6C-1 through 12, and that it violated the CSOA by purporting to improve credit history without qualifying that such improvements can only be made if a consumer's credit history is obsolete or inaccurate.

12. The Circuit Court erred by applying the Telemarketing Act, W. Va. Code § 46A-6F-101, *et seq.*, to the provision of legal services.

13. The Circuit Court erred by assuming, without any evidentiary basis for doing so, that "Morgan Drexen's violations of the Telemarketing Act resulted in two hundred and forty five (245) West Virginia consumers signing up for and paying into the Morgan Drexen debt settlement program."

14. The Circuit Court erred by concluding that Morgan Drexen violated the West Virginia Consumer Credit Protection Act ("WVCCPA"), W. Va. Code §§ 46A-1-101, *et seq.*, because its Attorney/Client Agreement was "not written in a clear and coherent manner" and is "not easily understood by consumers in violation of W. Va. Code § 46A-6-109."

15. The Circuit Court erred by concluding that "Morgan Drexen clearly and conspicuously disclosed to consumers the potential adverse credit consequences for participating in debt settlement[,]" but that it nonetheless violated W. Va. Code § 46A-1-102(11).

16. The Circuit Court erred by concluding that Morgan Drexen violated W. Va. Code § 46A-1-102(11), a definitional section of the WVCCPA (for the term "conspicuous").

17. Further, the Circuit Court erred by concluding that Mr. Williamson engaged in unfair methods of competition and unfair or deceptive acts or practices in violation of W. Va. Code § 46A-6-104.

II. STATEMENT OF THE CASE

A. Factual Background.

1. Defendant Morgan Drexen

Morgan Drexen provides paraprofessional and administrative services to law firms from its offices in Costa Mesa, California. (A. R. 1506-1507, 1509-1510, 1553). Simply put, Morgan Drexen contracts with law firms, not consumers. (A. R. 1507-1508). Morgan Drexen's sole income is received from the law firms it services. (A. R. 1508).

The Chief Financial Officer of Morgan Drexen, David Walker, explained the services Morgan Drexen provides:

> Mr. Walker: We specialize primarily within the legal field. We service attorneys to make their processes more efficient, and we service attorneys who primarily do bankruptcy, personal liability, mass tort, bankruptcy, debt settlement.
>
> Q: Q. Okay. What kind of services, automated services does Morgan Drexen provide in those areas, generally?
>
> Mr. Walker: Automated services?
>
> Q: Yes.
>
> Mr. Walker: Well, we do a lot of the, the kind of docketing -- serving as a docketing, a file clerk, receipt of mail and information like that from the clients. We answer client telephone calls, calendaring for the attorneys, all the paralegal and paraprofessional services for them.

Q: Okay. What kind of paraprofessional services? What does that mean?

Mr. Walker: It's all the, the things that they would typically ask a clerk or paralegal in their offices to do for them, or an office manager.

(A. R. 1506-1507).

Morgan Drexen also provides accounting and financial services for law firms, including arranging for routine electronic transfers to law firms' trust accounts. (A. R. 1508). It does so pursuant to an Agreement for Automated Electronic Funds Transfer whereby the law firm's client authorizes the law firm or Morgan Drexen on its behalf "to initiate ACH entries against" the law firm's client's bank account. (A. R. 1521, 1633). Those payments are not paid to Morgan Drexen, but rather are transferred into the law firm's trust accounts to be held in escrow for payment of various fees related to the law firm's services and, once sufficient funds have accumulated, for settlement of the client's debts, if applicable. (A. R. 1510).

Morgan Drexen does not itself retain such fees nor is it paid any compensation by the law firm's clients. Id. Rather, Morgan Drexen is paid for its services by the law firms with whom it contracts. (A. R. 1508). Morgan Drexen invoices the attorneys based upon the type of services provided to the law firms. Id. At no time does Morgan Drexen retain any fee from any consumer for any service of any kind, including debt pooling or debt settlement. (A. R. 1508).

2. Lawrence Williamson

Lawrence Williamson is an attorney licensed to practice law in Kansas and is a member of the Williamson Law Firm, LLC (the "Williamson Law Firm"). (A. R. 1493, 1499). The Williamson Law Firm provides legal services relating to personal injury, employment law and consumer protection, and engages the services of Morgan Drexen for back-office administrative and paraprofessional support. (A. R. 1493, 1499). Mr. Williamson's prior law firm, Shores,

Williamson & Ohaebosim, L.L.C. and Howard | Nassiri entered into a separate agreement, pursuant to which Mr. Williamson's law firm agreed to use the attorneys with whom Howard | Nassiri associated. (A.R. 1644 -1646). Howard | Nassiri agreed to provide Mr. Williamson's law firm with access to its network of local counsel for states in which the private attorney does not otherwise have a local counsel arrangement. (A.R. 1495, 1644-1645).

The Williamson Law Firm – not Lawrence Williamson, himself – had approximately 245 clients active in the debt settlement program in West Virginia. (A.R. 1496). The Agreement that each client signs (including those West Virginia clients who testified at trial -- Mary Linville and Brenda Martin), is clear about the means by which in-state legal services will be furnished:

> 4. UTILIZATION OF LOCAL COUNSEL *You authorize Attorneys with the discretion to select an attorney licensed in your jurisdiction ("local counsel") to assist Attorneys in providing services under this Agreement.* Attorneys' use of local counsel will not increase the fees and charges you agreed to pay under this Agreement. *If Attorneys needs to transfer your case from one local counsel to another, your consent to such transfer will be implied unless you object in writing within seven (7) days.* By signing this Agreement, you are consenting to Attorneys sharing part of the contingent fee or any other fee paid to Attorneys under this Agreement with local counsel.

(A. R. 1518 (emphasis added).)

The Williamson Law Firm's West Virginia clients are assigned to Rachel McIntyre-Nicholson, an attorney licensed to practice law in West Virginia, who serves as the firm's local counsel. (A. R. 1472, 1473, 1475, 1479). Ms. McIntyre-Nicholson contracted with Howard | Nassiri to serve as local counsel in the Howard | Nassiri network. (A. R. 1481, 1529-1531). She also separately contracted with Morgan Drexen to perform paralegal and legal administrative work for clients of her law firm. (A. R. 1479, 1482, 1552-1567).

3. <u>The Pre-Litigation Attorney/Client Agreement & Services Pursuant Thereto</u>

The Attorney/Client Agreement clearly and conspicuously establishes the parameters of the attorney/client relationship, the debt settlement services at issue, the law firm's potential use

of outside companies to assist it in performing the services at issue, the risks and possible tax consequences attendant to enrolling in the debt settlement program, the risk that creditors may file suit against firm clients for ceasing payments on their debts during participation in the program, and an explanation that no particular outcome can be guaranteed. (A. R. 1628-1631). The Attorney/Client Agreement also states that the scope of the specific representation includes only negotiation and settlement of debt, and that representation for other matters, including litigation or bankruptcy, would be subject to separate retainer agreement. (A. R. 1518, 1628).

Upon receipt of a signed Attorney/Client Agreement, letters are sent to creditors informing them that the client has retained legal counsel and that all further communications must be directed to the attorney. (A. R. 1518, 1628, 1532, 1635). Upon receiving notice of attorney representation, creditors are thereafter precluded under West Virginia and federal law from contacting the client directly and must, instead, address all communications to the client's counsel. W. Va. Code § 46A-2-128(e); 15 U.S.C. § 1592b. This communication constitutes a valuable service to shield clients from the potentially harassing collection communications.

4. Post-Litigation Attorney-Client Agreement

If the creditor files suit against the client, the client receives a separate "Limited Scope Representation." (A. R. 1590-1591, 1526.) "Limited Scope Representation" is "a relationship between an attorney and a person seeking legal services in which they have agreed that the scope of the legal services will be limited to specific tasks that the attorney will perform for the person." Id. The "Agreement and Authorization for Limited Scope Representation" restates this definition, and explains that under the agreement, attorneys will provide the client with "legal advice and/or suggested pleadings for any of your accounts that are in litigation," and then lists a number of "specific limited tasks" that the attorneys may perform and the prices therefor. Id. It

also conspicuously informs clients of the parameters of representation by stating with emphasis that "attorneys have not agreed to represent you by, for example, going to a hearing or trial with you, preparing your case for trial, or providing any legal assistance other than the limited legal advice and/or documents that are the subject of this agreement." Id. (emphasis added). The Limited Scope Representation Agreement states that "you understand and agree that Attorneys may utilize the services of outside companies or law firms to assist Attorneys in performing the services under this Agreement." Id.

B. Procedural History

On May 20, 2010, the Attorney General filed a Complaint and Petition for Preliminary and Permanent Injunction ("Complaint") against Morgan Drexen in the Circuit Court of Kanawha County, West Virginia, alleging violations of various provisions of the WVCCPA, the CSOA, and the West Virginia Telemarketing Act, W. Va. Code § 46A-6F-101, *et seq.*, and also alleges violations of other statutes which violations he further claims constitute unfair or deceptive acts or practices, namely W. Va. Code § 61-10-23 (prohibiting debt pooling); W. Va. Code § 11-12-3 (requiring certain entities to register with and pay fees to the West Virginia Tax Department); and the alleged unauthorized practice of law by attorney Lawrence Williamson.

The Attorney General named Mr. Williamson, individually, as a defendant and also sued the law firm of Howard | Nassiri, and its principals Vincent D. Howard and Damian J. Nassiri, all of whom oversaw and directed the actions of the paralegals and paraprofessionals employed by Morgan Drexen, and the local attorney, Rachel McIntyre-Nicholson. In the Fifth Cause of Action, the Attorney General alleges that Mr. Williamson personally violated the WVCCPA by receiving fees from his clients, while allegedly failing to provide any services to those individuals. The Sixth Cause of Action alleges that Mr. Williamson violated the WVCCPA by

engaging in the unauthorized practice of law in West Virginia. The Seventh Cause of Action asserts that Ms. McIntyre-Nicholson violated the WVCCPA by assisting Mr. Williamson in engaging in the unauthorized practice of law. The Eighth Cause of Action alleges that Morgan Drexen and Mr. Williamson violated the WVCCPA by failing to comply with the provisions of the CSOA. In the Tenth Cause of Action, the Attorney General alleges that Morgan Drexen and Mr. Williamson violated the WVCCPA by failing to comply with W. Va. Code § 61-10-23, West Virginia's debt pooling statute.

C. Trial Court Order Below

On September 7, 2011, the Circuit Court conducted a bench trial on all of the Attorney General's claims against all of the defendants[1] except for those allegations related to the unauthorized practice of law, which the Circuit Court determined should be addressed in a different forum. Nearly three years later, the Circuit Court entered its "Final Order" on July 15, 2014 ("Order"). The Order contained 135 numbered paragraphs styled as "Findings of Fact." It contained 20 numbered paragraphs styled as "Conclusions of Law." (A.R. 66-72).

The Circuit Court concluded that Morgan Drexen had violated the WVCCPA six times by engaging in unfair methods of competition or committing unfair or deceptive acts or practices with respect to each of the 245 West Virginia clients. (A. R. 71). Accordingly, it assessed a $7,350,000.00 penalty against Morgan Drexen. The Circuit Court further concluded that Morgan Drexen had twice violated West Virginia's Debt Pooling Statute, W. Va. Code § 61-10-23 and assessed a penalty of $500.00. Id. Finally, the Circuit Court concluded that Morgan Drexen had violated the CSOA with regard to each of the 245 West Virginians and assessed a fine of

[1] The Circuit Court found that the Attorney General failed to introduce any evidence supporting a claim against Mr. Ledda. (A. R. 70). Further, Defendants Vincent D. Howard and Damian J. Nassiri were similarly never served and no rulings were made against them.

$1,225,000.00. Id. Collectively, the Circuit Court ordered Morgan Drexen to pay $8,575,500.00 in penalties. (A. R. 72). It also permanently enjoined and restrained Morgan Drexen and all of its directors, managers, agents, and employees from conducting business, telemarketing, or providing debt relief in West Virginia.

With respect to the Attorney General's claims against Ms. McIntyre-Nicholson, the Circuit Court found that "the State failed to prove by a preponderance of the evidence that Ms. Nicholson misled consumers to believe they were receiving legal representation in violation of . . .W. Va. Code § 46A-6-104." (A.R. 68). Similarly, the Circuit Court found that claims against Howard | Nassiri for receiving fees from consumers without providing services in violation of W. Va. Code § 46A-6-104 were not substantiated. (A. R. 67).

However, the Court found that "Mr. Williamson creates the likelihood of confusion or of misunderstanding by representing to consumers that his law firm will provide services when it does not in violation of W. Va. § 46A-6-104," and further that Mr. Williamson "has deceived consumers by representing that his law firm will provide legal services to consumers in West Virginia when it does not." (A.R. 50). As such, the Circuit Court concluded that Mr. Williamson committed one violation of the WVCCPA by engaging in unfair methods of competition and unfair or deceptive acts or practices with regard to each of the 245 consumers in West Virginia. (A. R. 71). Citing W. Va. Code §§ 46A-6-104, 46A-6-102(7)(I), (L), (M), the Court concluded that "Defendant Mr. Williamson creates the likelihood of confusion or of misunderstanding by representing to consumers that his law firm will provide services when it does not, which, in terms of the West Virginia Code, amounts to advertising services with intent not to sell them as advertised and misrepresenting a material fact with the intent that others rely upon such

misrepresentation in connection with the sale or advertisement of service." (A.R. 68).[2] The Circuit Court assessed a $1,225,000.00 penalty against Mr. Williamson, and not the Law Firm, for one violation. (A.R. 71).

It is from this Order that Morgan Drexen and Mr. Williamson appeal and request that this Court reverse the Order, dismiss the Complaint, and enter judgment in their favor.

III. SUMMARY OF ARGUMENT

The Circuit Court's Order finding that Morgan Drexen violated the WVCCPA, the West Virginia's Debt Pooling Statute, the CSOA, and the Telemarketing Act are not supported by a clear reading of the statutes and undisputed facts. First, Morgan Drexen did not engage in any unfair methods of competition or commit any unfair or deceptive acts or practices, nor does it have 245 customers. The Williamson Law Firm and its local counsel, Rachelle McIntyre-Nicholson provided valuable and necessary legal services associated to their clients and Morgan Drexen provided paraprofessional and administrative services to those law firms.

There was no evidence that any individual was confused about how the program operated or the risks associated with it and the legal services they were provided by the law firms. Nor does the WVCCPA apply, as a whole, because the agreement between the lawyers and their clients does not involve an extension of credit. The unrefuted facts prove that Morgan Drexen provides services only to lawyers, receives no income from consumers, and that the risks involved in the debt settlement are fully disclosed to the law firms' clients.

Second, the debt pooling statute is inapplicable because the attorneys' settlement program at issue is not debt pooling. Even if it were, the fees assessed *by the attorneys* would be

[2] The Attorney General did not file a Notice of Appeal challenging the Circuit Court's finding as to Ms. McIntyre-Nicholson. Thus, the factual rulings and conclusions of law as to the causes of action alleged against her are the law of this case.

statutorily permissible because the service is provided by attorneys. Third, the CSOA does not apply to Morgan Drexen because it does not obtain extensions of credit for, nor claims to improve the credit scores of, clients for the law firms it services. Fourth, the Telemarketing Act does not apply as a matter of law since Morgan Drexen is not a "telemarketer" within the definition of the act.

Fifth, the Circuit Court's conclusion that Mr. Williamson committed one violation of WVCCPA by engaging in unfair methods of competition and unfair or deceptive acts or practices with regard to 245 consumers in West Virginia is incorrect as a matter of law and not supported by the substantial evidence. The Circuit Court's assessment of $1,225,000.00 in penalties against Mr. Williamson individually is based upon erroneous facts and the conflation of Mr. Williamson with the Williamson Law Firm, LLC. Mr. Williamson did not contract individually with the consumer-clients: rather, all attorney-client agreements were between the client and the Williamson Law Firm.

Furthermore, contrary to the Court's findings, the uncontroverted evidence at trial was that Mr. Williamson did, in fact, review settlement documents and provide other legal services for clients involved in the debt settlement program. Those settlements involving West Virginia clients as well as collection litigation involving those clients were referred to local counsel here in West Virginia. Additionally, other members of his firm participated in the negotiation of settlements.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Revised Rule 18(a) of the West Virginia Rules of Appellate Procedure, Morgan Drexen respectfully requests that this Court grant oral argument under Revised Rules 19(a)(1) and 19(a)(3). Rule 19(a)(1) provides for oral argument when cases involve

"assignments of error in the application of settled law . . . ." Rule 19(a)(3) provides for oral argument where cases claim "insufficient evidence or a result against the weight of the evidence . . . ." In this case, the assignments of error demonstrate reliance on findings of fact that are contrary to the weight of the evidence – or which are devoid of any evidence. Further, the Circuit Court makes several misapplications of law, based upon unsupported factual findings, and misinterprets established state law. For these reasons, oral argument is proper.

V. ARGUMENT

A. Standard of Review.

"A party to a civil action may appeal to [this Court] . . . from an order of any circuit court constituting a final judgment as to one or more but fewer than all claims . . . ." W. Va. Code § 58-5-1. The Order at issue in this case constitutes a final judgment on all claims and, as such, is appropriate for review. "Generally, findings of fact are reviewed for clear error . . . ." Syl. pt. 1, in part, State ex rel. Cooper v. Caperton, 196 W. Va. 208, 210, 470 S.E.2d 162, 164 (1996). "However, ostensible findings of fact, which entail the application of law or constitute legal judgments which transcend ordinary factual determinations, must be reviewed *de novo*. Id., in part. "'Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, [the Court] appl[ies] a *de novo* standard of review.'" State ex rel. McGraw v. Pawn Am., 205 W. Va. 431, 432, 518 S.E.2d 859, 860-61 (1998) (quoting Syl. pt. 1, Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995)). To the extent that this appeal presents questions of law and statutory interpretation, a *de novo* standard is appropriate on those issues.

B. The Assignment of Errors

1. The Circuit Court committed clear error when it found that Morgan Drexen has more than 245 customers in West Virginia.

The Circuit Court incorrectly imputed clients to Morgan Drexen in spite of undisputed testimony to the contrary. Specifically, the Circuit Court found that Morgan Drexen's Chief Financial Officer, David Walker, "testified that Morgan Drexen has 'more than 245 customers' in West Virginia." (A. R. 20). The Order cites "Walker Test., Trial Tr., 212:16-24, 213:1-9." Id.. This is flatly incorrect. The question actually posed to Mr. Walker at trial was "how many clients do these law firms have in West Virginia?" (A. R. 1507). That testimony is as follows:

> Q: Okay. So, now we're talking about the support provided for the law firms. In debt settlement only, sir, how many of these law -- ***how many clients do these law firms have in West Virginia?***
>
> A: I believe it's about 245.
>
> Q: Okay. And are they all with the law firms -- clients of law firms?
>
> A: ***They are all with clients of law firms except for two, I believe, which is with the bankruptcy trustee.***

Id. (emphasis added).

Mr. Walker explained that Morgan Drexen contracts with the law firms, not the clients, and that, to his knowledge, Morgan Drexen has never contracted with individuals directly. Id. Mr. Walker also testified that Morgan Drexen is paid for their services by the law firm with whom they contract for paraprofessional and administrative services, not clients. (A. R. 1508). In fact, Morgan Drexen invoices the law firms for services provided. Id.

Mr. Williamson, whose law firm utilizes Morgan Drexen for paraprofessional and administrative services, similarly testified that Morgan Drexen does not enter into any contracts with West Virginia consumers for debt settlement:

> Q: Do you -- does, does Morgan Drexen have any contracts with people in West Virginia?

A: Absolutely not. I mean, that, that was one of the, that was one of the principal factors that we discussed amongst the attorneys. These are our clients. If I decide right now that I don't want to utilize Morgan Drexen and I want to utilize another outsourcing outfit, I can do that. There's nothing preventing that.

(A. R. 1504).

There was no evidence to refute any of the above testimony. The importance of this finding is that the number of *law firm* clients was then used, by the Circuit Court, to calculate the $8,575,500.00 in penalties against Morgan Drexen. If the Circuit Court had correctly found that Morgan Drexen had no customers in West Virginia, then the Circuit Court could not have awarded an $8,575,500.00 judgment against the administrative support services company. Accordingly, this material finding of fact should be reversed.

2. The Circuit Court committed plain error by failing to distinguish the actions or inactions of Mr. Williamson with the actions or inactions of the Williamson Law Firm.

Paragraph 143 of the Court's Order found that Mr. Williamson created "the likelihood of confusion or of misunderstanding by representing to consumers that his law firm will provide services when it does not[.]" (A. R. 68). Specifically, the Circuit Court claims that defendant Mr. Williamson admitted that he "does not review 'all the documents,' nor does he negotiate with any creditors." (A. R. 14). The Circuit Court then concluded that "Mr. Williamson provides no services to West Virginia consumers," and that Morgan Drexen and Mr. Williamson made representations likely to mislead consumers in violation of the WVCCPA, as well as other claims. (A. R. 49, 67).

This factual finding is, however, not supported by the record and is based upon half-cited testimony and testimony taken out of context. Specifically, the Circuit Court omits Mr. Williamson's clarification "that the contracts are with my firm and not with me personally."

(A. R. 1497-1498). The Circuit Court also disregarded Mr. Williamson's testimony that another attorney in his firm has conducted negotiations with creditors. (A.R. 1497-1498). In short, rulings based upon a finding that Mr. Williamson, personally, did not provide each and every task relating to the client representation is unfounded since the representation and services in question were provided by the law firm, as a whole, and not Mr. Williamson as a solo practitioner, with no support staff, are erroneous.

Virtually every exhibit introduced at the trial of this matter documenting contacts with consumers bore the name of "Williamson Law Firm, LLC." (A. R. 1518-1521, 1525, 1532, 1626, 1628- 1631, 1635, 1641). Notably, on 26 separate occasions, the Circuit Court references contracts with, communications from, and actions involving the "Williamson Law Firm[.]" (A. R. 5, 6, 7, 8, 10, 11, 13 (2), 15 (2), 20, 23, 24 (2), 26, 35, 37, 39, 42 (2), 43, 47, 48, 49, 52, 64). None of the contracts are between Mr. Williamson, individually, and the clients; the Circuit Court's findings of fact acknowledge this. (See e.g. A. R. 7-8, 10, and 13). However, despite the fact that all contracts and communications were from the Williamson Law Firm, the Circuit Court chose to assess a $1,225,000.00 penalty against Mr. Williamson personally. (A. R. 69).

Absent in the Order is any explanation of the legal rationale or factual basis for a finding individual liability of Mr. Williamson versus liability of the Williamson Law Firm. This Court has explained that, "'The law presumes ... that corporations are separate from their shareholders.'" Syl. pt. 3 (in part), S. Elec. Supply Co. v. Raleigh Cnty. Nat'l Bank, 173 W.Va. 780, 320 S.E.2d 515 (1984)." Syl. pt. 1, Laya v. Erin Homes, Inc., 177 W.Va. 343, 352 S.E.2d 93 (1986). To "pierce the corporate veil" in order to hold the shareholder(s) actively participating in the operation of the business personally liable to the party who entered into the contract with the corporation, there is normally a two-prong test: (1) there must be such unity of interest and

ownership that the separate personalities of the corporation and of the individual shareholder(s) no longer exist (a disregard of formalities requirement) and (2) an inequitable result would occur if the acts are treated as those of the corporation alone (a fairness requirement). *See* Syl. pt. 3, Laya.

The Williamson Law Firm is a limited liability company. As noted by this Court in Kubican v. The Tavern, LLC, 232 W.Va. 268, 273, 752 S.E.2d 299, 304 (2013), "[i]n the LLC context, the purpose of piecing the corporate veil would be to hold members and/or managers of the LLC personally liable for the wrongful actions of the business." Here, the record shows that the Attorney General never presented any evidence to support piercing the corporate veil. The Circuit Court simply found Mr. Williamson liable. This is plain error.

"The 'plain error' doctrine grants appellate courts, in the interest of justice, the authority to notice error to which no objection has been made." State v. Miller, 194 W.Va. 3, 18, 459 S.E.2d 114, 129 (1995). "To satisfy the plain error standard, a court must find: (1) there was error in the trial court's determination; (2) the error was plain or obvious; and (3) the error affected "substantial rights" in that the error was prejudicial and not harmless. Miller, 194 W. Va. at 18, 459 S.E.2d at 129, citing United States v. Olano, 507 U.S. 725, 730–32, 113 S.Ct. 1770, 1776, 123 L .Ed. 2d 508, 518 (1993). If these criteria are met, this Court may, in its discretion, correct the plain error if it "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" Olano, 507 U.S. at 732, 736, 113 S.Ct. at 1776, 1779, 123 L.Ed.2d at 518, 521 (quoting United States v. Atkinson, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555, 557 (1936)).

Here, the criteria for plain error have been met. Not only was the error obvious, but it resulted in a $1,225,000.00 penalty against Mr. Williamson personally, rather than the

Williamson Law Firm, LLC, in whose name the contracts were made and alleged misleading communications were sent. As such, the Circuit Court's finding of individual liability against Mr. Williamson should be reversed.

3. The Circuit Court committed clear error by finding that Morgan Drexen, rather than licensed attorneys, reviewed documents and negotiated settlements and erroneously concluding that Morgan Drexen and Mr. Williamson violated W. Va. Code § 46A-6-104 by creating a likelihood of confusion or misunderstanding among consumers.

The Circuit Court's determination that Morgan Drexen reviewed documents and negotiated settlements rather than a licensed attorney is also contrary to the substantial evidence on record. This erroneous finding of fact was then used as a basis to support the Circuit Court's conclusion that Morgan Drexen and Mr. Williamson violated the WVCCPA by misleading consumers, which the Circuit Court in turn used to assess $7,350,000.00 in penalties against Morgan Drexen and $1,225,000 in penalties against the Mr. Williamson, individually.

First, as stated above, the Circuit Court incorrectly conflates Mr. Williamson's actions with those of his law firm. While Mr. Williamson admitted that he may not have personally negotiated with each of his client's creditors during pre-litigation debt settlement, another attorney in his firm *did undertake* such negotiations. (A. R. 1497-1498). Mr. Williamson testified that he also authorized Morgan Drexen to solicit offers from creditors, not negotiate with them, and that "it's up to me in Kansas and other local counsel to review those settlements, determine whether or not it's in the clients' best interests and to either approve, modify or reject those settlements." (A. R. 1498 and 1493).

There was no finding that Morgan Drexen negotiated the settlement of any claim that was the subject of a civil action or otherwise before a court or other tribunal, or that it solicited any offers from creditors' attorneys once the debt became the subject of a suit. In fact, the testimony

from Mr. Williamson that once the client is sued, he and his attorneys negotiate directly with the creditor's lawyers. (A. R. 1505). That Mr. Williamson did not *personally* review *every* document involved with any one client's case does not lead to the logical conclusion that he, therefore, misled the firm's clients. While Mr. Williamson does review client files in connection with his representation, he does not review any settlements involving West Virginia clients as Ms. Nicolson is the attorney licensed in West Virginia who reviews each settlement as to its legality under state law. (A. R. 1473-1474, 1498, 1501).

The Circuit Court selectively excerpted Ms. McIntyre-Nicholson's testimony to suggest that she served a *de minimus* function in settlement negotiation. (A. R. 17). This is contrary to the uncontroverted evidence at the hearing. Ms. McIntyre-Nicholson's testified that her role as local counsel was to "assist those [West Virginia] clients in preparation of documents and other limited scope services after the client signed the limited scope agreement," "to answer questions if the clients had any prior to entering into litigation," and "to review settlement offers and settlement proposals and approve those or reject them or make changes," which was one of her key functions. (A. R. 1473, 1474).

Ms. McIntyre-Nicholson expressly disputed that she had no active role in the debt settlement aspect of the program, stating "That's not accurate in every case, no, sir." (A. R. 1477). She explained that she reviews "many, many settlements on behalf of the client[,] but I have also contacted many creditors directly -- or counsel for the creditors in cases where I've been asked to do so by the client." (A. R. 1477). In fact, Ms. McIntyre-Nicholson's attorney fees for her pre-litigation services were based upon her review of these settlements. Ms. McIntyre-Nicholson is paid, by the Williamson Law Firm, a flat fee of $500 for up to 300 clients and $2.50 per client over that amount per month. (A. R. 1474). She is also paid $250

each month, by the Williamson Law Firm, for review of the first 50 settlements and $5.00 per settlement for anything over 50 settlements. (A. R. 1475).

Ms. McIntyre-Nicholson clarified that during the first year and half of her association with the Howard | Nassiri law firm, she did not have any direct contact with creditors for her clients that were in pre-litigation debt counseling; however, she began to do so around December 2010. Id. For those of her West Virginia clients who are sued by creditors, Ms. McIntyre-Nicholson takes a more active role in negotiating settlements with the creditors and works hard to resolve her clients' disputes during that process. (A. R. 1481).

In sum, the Circuit Court's finding that the attorneys provided no debt settlement services is simply unsupported by the record.

4. The Circuit Court committed clear error by finding that Rachelle McIntyre-Nicholson worked for Morgan Drexen.

This finding is also not supported by any evidence on record. The Circuit Court's Order claims that Ms. McIntyre-Nicholson initiated her work with Morgan Drexen after responding to a Craigslist advertisement that Morgan Drexen was hiring. (A. R. 14-15). This implies that Morgan Drexen hired Ms. McIntyre-Nicholson. In fact, Ms. McIntyre-Nicholson actually testified that she was "hired through Howard, through Howard | Nassiri, and I'm assigned to the Williamson Law Firm." (A. R. 1473). Ms. McIntyre-Nicholson unequivocally testified that she did not work for Morgan Drexen, rather "Morgan Drexen works for Williamson." Id. In fact, Ms. McIntyre-Nicholson did not even speak with anyone from Morgan Drexen until after she was hired to serve as local counsel for Mr. Williamson's West Virginia clients. Id.

5. The Circuit Court committed clear error by finding that Morgan Drexen engaged in telemarketing solicitations to consumers.

The Circuit Court's finding that Morgan Drexen engaged in telephone solicitation,

(A. R. 60), is contrary to the evidence presented at the hearing and the Telemarketing Act.

Morgan Drexen does not call potential clients, nor does it engage a third party or agent to do so. (A. R. 1508). Only where a lead provider furnishes a person's name might an individual be called. Id. Mr. Walker, Morgan Drexen's CFO, explained that, although he is aware of "generic ads" that discuss becoming debt free and using an attorney "to help settle debt with creditors" and relieve the onerous burden of creditor calls, specific attorneys are not mentioned in those advertisements. (A. R. 1511). No evidence shows that the law firm defendants were mentioned in any television advertisement.

Moreover, the Court erred by concluding that "from a plain reading of the statute, "telemarketing solicitation" includes outgoing calls and incoming calls that result from advertisements or notifications of any medium." (See A.R. 58.) Subsection (a)(1) of the Act prohibits unsolicited telephone calls *to* consumers, not calls *from* consumers to Morgan Drexen. Any calls to Morgan Drexen generated from generic advertising are beyond the scope of subsection (a)(1) of the Act. On the other hand, subsection (a)(2) of the Act requires a telemarketer's intent "to enter into an agreement with the consumer for the purchase of consumer goods or services . . . ." In this case, neither the lead provider nor Morgan Drexen ever intended to enter into any agreements with West Virginians, as Morgan Drexen exclusively serves law firms. Based on a plain reading of the Telemarketing Act, Morgan Drexen did not engage in any of the conduct prohibited therein. The Circuit Court's conclusion to the contrary is error.

6. The Circuit Court committed clear error by finding Mr. Williamson and Ms. McIntyre-Nicholson knew about Morgan Drexen airing television ads in West Virginia.

The Circuit Court found that "Mr. Williamson testified that he was aware that Morgan Drexen had television ads airing in West Virginia." (A. R. 14). This finding is contrary to the

actual testimony. What Mr. Williamson actually said was "I have some understanding of that, and I know that the ads are supposed to say that – excludes West Virginia, if any ad is running. It's supposed to exclude West Virginia." (A. R. 1499). The Circuit Court similarly misstates Ms. McIntyre-Nicholson's testimony. She had no knowledge regarding any advertisements in West Virginia other than what *counsel for Plaintiff* advised her. Her precise testimony on this subject is as follows:

> Q. Okay. Were you also aware that there were television ads being run in West Virginia at that time?
>
> A. You informed me of that.

(A. R. 1480).

The Circuit Court's finding that both Mr. Williamson and Ms. McIntyre-Nicholson were "aware that Morgan Drexen had television ads airing in West Virginia" was used to support its conclusion that Morgan Drexen engaged in telemarketing solicitation "by either calling consumers directly or through a third-party and by receiving calls as a result of advertisements from various media." (A.R. 59-60). Such a finding is flatly incorrect and should be reversed.

7. <u>The Circuit Court erred by concluding that Morgan Drexen conducted business in West Virginia and that Morgan Drexen violated W. Va. Code § 46A-6-104 by failing to maintain a business license and disclose the same.</u>

The Circuit Court found that Morgan Drexen's failure to disclose its lack of a business license violates § 46A-6-104 in that it causes "a likelihood of confusion and of misunderstanding as to certification by omitting the material fact that it is not licensed to do business in West Virginia." (A. R. 30). The Circuit Court's application of this revenue generating tax statute to the WVCCPA is unprecedented and unsupported by law or fact. The Circuit Court also failed to cite evidence or explain how this could result in a likelihood of confusion and misunderstanding among West Virginians, particularly when a business license is not even required.

Under W. Va. Code §11-12-3, "[n]o person shall, without a business registration certificate, engage in or prosecute, in the State of West Virginia, any business activity without first obtaining a business registration certificate from the Tax Commissioner of the State of West Virginia." That section also exempts from the registration requirement any person engaging in or prosecuting business activity in this state:

> (1) Who is not required by law to collect or withhold a tax administered under article 10 of this chapter; and
>
> (2) Who does not claim exemption from payment of taxes imposed by articles fifteen and fifteen-a of this chapter, shall be exempt from both registration and payment of the tax imposed by this article, if such person had gross income from business activity of four thousand dollars or less during that person's tax year for state income tax purposes immediately preceding the registration period for which a registration certificate is otherwise required by this article.

W.Va. Code § 11-12-2(c).

Morgan Drexen does not conduct business in West Virginia. (A. R. 1510). It does not have any gross income from business activity for any "tax year for state income tax purposes," since all of Morgan Drexen's income consists of fees paid to it by the law firms it services, none of which fees emanate from West Virginia. (See A. R. 1508). The services Morgan Drexen provides are performed in Costa Mesa, CA. (A. R. 1510). In sum, Morgan Drexen is exempt from registration with the Tax Department pursuant to W. Va. Code § 11-12-2. Accordingly, because Morgan Drexen is not required to have a business registration certificate with the Tax Department, no disclosure of this fact to potential clients of the law firm is necessary.

The Circuit Court concludes that "Morgan Drexen conducts business in West Virginia because it solicits clients in West Virginia and services 245 clients in West Virginia." (A. R. 28). As discussed above, this is not correct. Morgan Drexen's clients are law firms, not West Virginians. (A.R. 1507-1508). While those law firms have approximately 245 clients in

West Virginia, these clients have no contractual agreement with Morgan Drexen. (A. R. 1510).

Moreover, even if Morgan Drexen were required to register with the Tax Department, the Attorney General could not prosecute any failure to do so under the WVCCPA because the registration requirement is purely a revenue-generating provision and has no consumer protection aspect. W. Va. Code § 11-12-3 merely requires entities file with the Tax Department and pay money thereto.[3] This statute is revenue-generating and is completely void of any consumer protection aspects.

The failure to be licensed has never been found to be the basis for an unfair or deceptive act or practice claim, nor should it be. The existence of a business licenses conveys nothing more than the payment of taxes into the West Virginia Treasury. There is no warranty, guarantee or other promise made to any consumer by the receipt of one. Because the Circuit Court based its legal conclusion on erroneous facts, its conclusion that Morgan Drexen conducts business in West Virginia and all conclusions premised thereon, are in error.

8. The Circuit Court erred by concluding that Morgan Drexen failed to clearly and conspicuously disclose to consumers that all fees must be paid before debt relief services begin.

The Circuit Court's finding that Morgan Drexen fails to disclose that "it will provide no debt relief services to consumers including negotiating debt settlement until all of its fees have been paid" is predicated upon a material false assumption. Morgan Drexen does not provide debt relief services to debtors, and the fees at issue are not paid to Morgan Drexen. Morgan Drexen provides support paraprofessional and administrative services to the law firms and to the law firm's clients *upon engagement* and before the engagement fee is fully satisfied.

[3] W.Va. Code § 11-12-3 does require certain businesses to comply with other sections of the Code that provide consumer protection, but the Attorney General has not alleged that any of those apply to Morgan Drexen, nor would they.

(A.R. 1507-1508, 1509). While Morgan Drexen assists law firms by setting up client trust accounts and completing the paperwork necessary for funds to be deposited therein, such acts are the same type of accounting and administrative duties law office managers routinely perform. The funds are not retained by or paid to Morgan Drexen. (A. R. 1510).

Significantly, the Circuit Court *made no finding* that debt relief services did not begin until all fees were paid. In fact, the evidence indicates to the contrary. Mr. Walker testified that after the client signs the attorney/client agreement as a participant in the debt settlement program, letters go out to the client's creditors, advising them to cease collection efforts and interact solely with the attorney. (A. R. 1509; see e.g. A. R. 1532, 1635). This is a very real and valuable service the attorney provides as the consumer is now free from harassing and embarrassing phone calls from his or her creditors.

While debts are not immediately paid off, the accumulation of funds to settle the debts is a necessary and unavoidable circumstance. If these clients had sufficient funds to pay off the debts without this "banking" phase of the program, they would not need to be in the program at all. The fact that attorney fees and expenses are first paid is similar to routine attorney-client arrangements where payment of the attorney is required up front. Arguably in this case, the client is benefitted from this arrangement as the full amount is not required all at once, which would most assuredly prevent most indebted persons from ever being able to obtain the necessary relief.

This restrictive view of the nature of the services provided also disregards the legal strategy involved in reaching the goal which is to get out of debt and ideally for less money than one owes. As explained by Mr. Williamson, creditors do not negotiate the debt owed to them when the account is kept current and up-to-date. (A. R. 1501). Indeed, they benefit from the

account being paid at the minimum amounts as they earn interest upon the ever-growing balance. See id. It is only when such minimum payments are not made and the debtor becomes in arrears that the creditors consider settlement. See id.

In sum, the Circuit Court's conclusion that no services are rendered prior to the payment of fees is factually incorrect and disregards the nature of legal services being provided to the clients.

9. The Circuit Court erred by implicitly finding that W. Va. Code § 61-10-23 applied to the services offered by Morgan Drexen and subsequently concluding that it violated that statute.

The Circuit Court did not make any finding of fact that the services provided by Morgan Drexen constitute a "debt pool." Rather, it simply applied the West Virginia Debt Pooling statute, W. Va. Code § 61-10-23, without explaining how Morgan Drexen's activities fell within its purview and concluded that fees assessed to the law firm's clients exceeded the statutory maximum. However, neither Morgan Drexen's nor any of the named Defendants' services constitute debt pooling as defined by W. Va. § 61-10-23. As such, the Circuit Court's conclusion that Morgan Drexen violated the fee restriction provisions of that statute is also erroneous.

a. The Plain Language of West Virginia's Debt Pooling Statute Reveals No Application to Debt Settlement.

The West Virginia debt pooling statute provides in pertinent part:

> ***'Debt pooling'*** shall mean the rendering in any manner of advice or services of any and every kind in the establishment or operation of ***a plan*** pursuant to which a debtor would deposit or does deposit funds for the purpose of ***distributing*** such funds ***among*** his ***creditors***. ...

W. Va. Code § 61-10-23 (emphasis added.)

"When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts. The duty of the courts is not to construe but to apply the statute as written. State ex rel. Dep't of Unemployment Comp. v. Continental Cas. Co., 130 W. Va. 147, 156 (W. Va. 1947). The plain reading of W. Va. Code § 61-10-23 indicates that it does not apply to debt settlement. The Circuit Court has distorted the language of the statute from a "debt pooling" statute to a "money pooling" statute.

First, the statute requires a "plan;" that is, a preconceived layout or arrangement of the distribution of funds. In contrast, debt settlement is an adversarial process in which the debtor and his representative cannot plan, but must negotiate, and ultimately results in an agreement. (*See e.g.*, Nevada's debt settlement statute at R.S. § 676A.580(4)). Second, the statute requires a distribution "among" creditors, contemplating payment to multiple creditors. Indeed, the "distribution" of the funds to creditors means "to apportion; to divide among several." Black's Law Dictionary (9th ed. 2009). That is, each month the debtor's funds are dispersed to a group (or "pool") of creditors. In contrast, debt settlement involves the payment to one creditor at a time.

Debt pooling is akin to a Chapter 13 proceeding under the Bankruptcy Code wherein a trustee disburses limited resources "among" multiple creditors. Like the trustee, the debt pooler, historically, has worked with (if not on behalf of) creditors. In stark contrast, debt settlement is not viewed as collection agencies for creditors; rather, "to the contrary, debt settlement companies generally are creditors' adversaries." Carla Stone Witzel, "The New Uniform Debt-Management Services Act," 60 Consumer Fin. L.Q. Rep. 650, 653 (2006).

Because the subject, purpose, and nature of the attorneys' business operations, supported by Morgan Drexen, do not amount to "debt pooling" either by establishing "debt management

plans" or "distributing" funds among creditors pursuant to such plans, its activities fall outside the statutory language.

b. The Attorney General's Application of the Debt Pooling Statute to the Attorneys' Debt Settlement Practice Creates an Absurdity and Unreasonable Result.

Courts must avoid a construction of a statute that leads to absurd, inconsistent, unjust or unreasonable results. Charter Communs. Vi., v. Cmty. Antenna Serv., 211 W. Va. 71, 77, 561 S.E.2d 793, 799 (2002). The Attorney General and Circuit Court's application of the "debt pooling" statute to a "debt settlement" practice violates this cannon of statutory interpretation resulting in an absurdity.

The Attorney General recognizes that "Debt settlement is a ... strategy ... [where a] company ... attempts to negotiate lump sum settlements of the consumers' accounts for ***less than*** the balance owed." "2006 Annual Report, A Report on the Activities of the West Virginia Attorney General's Consumer Protection and Antitrust Divisions," at 33 (2006). For these negotiation services, the Attorney General claims W. Va. § 61-23-10 permits a company to charge a fee equal to only 2% of the money deposited in the account to be paid to the creditors. Thus, assume a $10,000 debt is owed to a creditor. If a company negotiates a 90% reduction in the debt, and $1,000 is paid to the creditor, according to the Attorney General, the company would be entitled to $20 (2% of $1,000). However, if the company performed poorly and could not negotiate any reduction in the debt (and thus $10,000 was paid to the creditor), the company would be entitled to $200 (10% of $10,000). The statutory limit on fees, if applied to debt settlement, would incentivize law firm retained for this purpose to negotiate against its client's interests. That is, the poorer the negotiated settlement, the greater the fee. Not only is this "absurd," but it creates a conflict of interest between clients and their attorneys. What of those cases in which hard negotiations yielded a complete write-off of the debt? The end result of such an interpretation means that the attorney is entitled to *no* compensation.

Such an interpretation results in an absurd, unreasonable and unjust result. The ramifications of the Circuit Court's interpretation will inevitably result in lawyers refusing to engage in debt settlement work, leaving consumers without legal representation or recourse other than to pay each debt off in full. This in no way benefits the consumer, which is the guiding purpose of the WVCCPA.

c. The Historical Context of the Debt Pooling Statute Invalidates Its Application to Debt Settlement.

Section 61-23-10 applies only to "debt pooling." Neither the term "debt settlement" nor its objective of achieving a reduction in principal on behalf of the debtor is mentioned in the statute. A general rule of statutory construction provides that where words in a statute are not defined, they "must be given their ordinary meaning." United States v. Granderson, 511 U.S. 39, 71 (1994). In determining the legislative purpose of the statute, the plain meaning of the statute's words is highlighted by their context and the contemporaneous legislative history. Edwards v. Aguillard, 482 U.S. 578, 595 (1987). It is also proper for a court to consider the historical context of the statute, and the specific sequence of events leading to its passage. Id.

The development of this practice area, in context of its history, demonstrates why the statute was not intended to apply to debt settlement. The Prefatory Note to the Uniform Debt-Management Services Act provides the most extensive discussion of the historical context. The consumer credit-counseling industry originated in the early twentieth century in the form of for-profit debt adjusters (also known as debt poolers, debt consolidators, debt managers or debt pro-raters). National Conference of Commissioners on Uniform State Laws, *Uniform Debt-Management Services Act* ("UDMSA"), Prefatory Note, 1 (2005). This early type of credit counseling consisted of securing agreements from all of the debtors' creditors. Id. If the creditors agreed, the debt adjuster would "pool" or "consolidate" all the debt, collect a monthly

payment from the consumer, and distribute appropriate portions to each of the creditors. Id. Due to abuses, many states outlawed the business; some opted for a regulatory approach. Id. It was during this era (1957), when West Virginia passed its original debt pooling statute. See W. Va. Code § 61-10-23 (1957).

Many states exempted not-for-profit organizations from these statutes, enabling nonprofits to render counseling services free of regulation. This led to the growth, starting in the 1950s, of the next generation of credit counseling. Id. The creditors supported the formation of credit-counseling agencies as a means of helping consumers in financial difficulty gain control of their finances and pay their debts. Id. "The objectives were ***full repayment of debt*** and the avoidance of bankruptcy." Id. (emphasis added). The counseling agencies provided financial education and enrolled debtors in debt-management plans. Id. Under these plans, the agencies would negotiate a payment plan for the pay-off of the entire principle. Id. The debtor made one monthly payment to the agency; the agency then disbursed a pro-rata amount, concurrently, to the participating creditors. Id.

West Virginia responded by amending § 61-10-23 statute in 1971 allowing debt pooling with a 2% cap on the permissible fees. 1970-1972 Op. Atty Gen. W. Va. 174. The nominal fee provision of 2% must be viewed in its entire context. "The creditors supported the counseling agencies by returning to them a percentage—often 15%-- of the payments they received...the creditor's 'fair share.'" UDMSA, at 1. With the "fair share," a debt pooler could earn as much as 17% of the entire debt.

However, as the economy weakened in the 1990's and the ensuing years, another generation of debt resolution began to emerge known as debt settlement. Whereas the objective of the earlier debt pooling generation was to enable consumers to repay their debts in full, "debt

settlement" does not have this objective at all. Instead of helping the consumer pay creditors in full, the objective is to persuade creditors to settle for less than the full amount of the consumer's debt, writing off the rest. A debtor's funds are accumulated and when those payments reach a target percentage of the debt owed to ***one*** of the creditors, the representative will endeavor to negotiate a settlement (on the consumer's behalf) for the amount in hand. Unlike "debt pooling," where debt is "pooled" and money is distributed among all creditors, debt settlement deals with each creditor, individually and sequentially. (A.R. 1505.)

Many states have recently reacted to the genesis of debt settlement by enacting statutory language acknowledging a difference between debt pooling and debt settlement. For instance, Nevada's statutes were amended in 2010 to recognize this difference in its fee provisions: "[i]f an individual assents to a ***plan*** which contemplates that creditors will reduce finance charges or fees for late payment, default or delinquency, the provider may charge a certain fee." N.R.S. § 676A.580(4)(a) (emphasis added); however, when "an individual assents to an ***agreement*** ("debt settlement") which contemplates that creditors will settle debts for less than the principal amount of the debt a different fee is charged." N.R.S. § 676A.580(4)(b).

Nevada's law is based on the Uniform Debt-Management Services Act which, in the aftermath of its adoption, is being enacted in a number of jurisdictions. Under the Nevada statutory scheme, the debt settlement provider may charge the consumer a contingency fee of 30% of the savings or a flat fee based upon the debt enrolled. The provider is not incentivized to perform poorly for its client, as would happen if the West Virginia debt pooling provisions were applied to debt settlement.

In 2010, the Federal Trade Commission responded to the debt settlement practice by permitting the provider to assess a fee equal to "a percentage of the amount saved as a result of

the renegotiation, settlement, reduction or alteration." 16 C.F.R. 310.4(a)(5)(i)(C)(2). Present history is replete with examples of legislative responses to the debt settlement practice,[4] however West Virginia's statutory scheme remains silent on the matter. Even after the emergence of practice of debt settlement, West Virginia did not enact any legislation to regulate it, nor amend its debt pooling statute in any fashion.

The Circuit Court should not be permitted to amend or enact such legislation by edits. "[I]t is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, . . . or rewritten[.]" Hill v. Stowers, 224 W. Va. 51, 60, 680 S.E.2d 66, 75 (2009). For that matter, "it is not for [courts] arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, [courts] are obliged not to add to statutes something the Legislature purposely omitted." Jones v. West Virginia State Bd. of Ed., 218 W. Va. 52, 57-58, 622 S.E.2d 289, 294-95 (2005).

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[4] By way of additional examples, in 2009, the state of Minnesota enacted the Debt Settlement Services Act ("DSSA"), which defined "debt settlement" to include "(1) offering to provide advice, or offering to act or acting as an intermediary between a debtor and one or more of the debtor's creditors, where *the primary purpose of the advice or action is to obtain a settlement for less than the full amount of debt*, whether in principal, interest, fees, or other charges, incurred primarily for personal, family, or household purposes including, but not limited to, offering debt negotiation, debt reduction, or debt relief services; or (2) advising, encouraging, assisting, or counseling a debtor to accumulate funds in an account for *future payment of a reduced amount of debt to one or more of the debtor's creditors*." *Minn. Stat. § 332.02* (emphasis added). Similarly, in August of 2010, the state of Illinois enacted the Debt Settlement Consumer Protection Act which applied specifically to debt settlement. Under the Illinois statute, "debt settlement" is defined to include "(1) offering to provide advice or service, or acting as an intermediary between or on behalf of a consumer and one or more of a consumer's creditors, *where the primary purpose of the advice, service, or action is to obtain a settlement, adjustment, or satisfaction of the consumer's unsecured debt to a creditor in an amount less than the full amount* of the principal amount of the debt or in an amount less than the current outstanding balance of the debt; or (2) offering to provide services related to or providing services advising, encouraging, assisting, or counseling a consumer to *accumulate funds for the primary purpose of proposing or obtaining or seeking to obtain a settlement, adjustment, or satisfaction of the consumer's unsecured debt to a creditor in an amount less than the full amount of the principal amount of the debt* or in an amount less than the current outstanding balance of the debt." 225 ILCS 429/10 (emphasis added). The Kentucky legislature amended its "debt adjusting" statute in 2006 to add the language "settlement" and "modification" to its statute. KRS § 380.010.

10. The Circuit Court alternatively erred by concluding that the attorneys utilizing Morgan Drexen's services did not qualify for the "licensed attorney" exception contained in W. Va. Code § 61-10-23.

Even if this Court finds that the Circuit Court did not err in finding that Petitioners' services constituted debt pooling, the Circuit Court erred when it concluded that the "licensed attorney" exception to the Debt Pooling Statute did not apply. Assuming *arguendo* that the law firms' debt settlement program did constitute debt pooling, the fees assessed would not be statutorily impermissible because the service is provided by attorneys. Licensed attorneys are "excepted" from the statute's limitation on fees. Specifically, W. Va. Code § 61-10-23 states the following:

> It shall further be unlawful for any person, except licensed attorneys, to make any charge for a debt pooling by way of fee, reimbursement of costs, or otherwise, in excess of an amount equal to two percent of the total amount of money actually deposited pursuant to a debt pooling[.]

Here, West Virginia participants in the debt settlement program are represented by licensed attorneys via the Williamson Law Firm and local counsel Ms. McIntrye-Nicholson, who is licensed to practice in West Virginia. The Circuit Court dismisses this exception based upon its erroneous finding that Mr. Williamson's law firm and Ms. McIntrye-Nicholson do not provide any services to West Virginia clients. (A. R. 25, 47).

Again, this is contrary to the uncontroverted testimony of Mr. Williamson and Ms. McIntyre-Nicholson. The fact that each of these lawyers, or members of their firm, utilize Morgan Drexen's paraprofessional and administrative services does not undermine the legitimacy of the legal services they provide. Indeed, the large majority of lawyers in this country use and rely upon support staff to assist them with routine paperwork, correspondence and discovery. Ms. McIntyre-Nicholson testified that Morgan Drexen staff support her legal services and act under her supervision. (A.R. 1482.) This is the traditional attorney use of non-attorney support sanctioned by Rule 5.3 of the West Virginia Rules of Professional Conduct.

The Circuit Court's opinion has effectively criminalized a critical component of the practice of law.

11. The Circuit Court erred by finding that Morgan Drexen is a credit services organization under the CSOA, W.Va. Code §§ 46A-6C-1 through 12, and that it violated the CSOA by purporting to improve credit history without qualifying that such improvements can only be made if a consumer's credit history is obsolete or inaccurate.

a. Morgan Drexen is not a credit services organization.

A credit services organization under the CSOA as "a person who, with respect to the extension of credit by others . . . provides, or represents that the person can or will provide, . . . any of the following services: (1) Improving a buyer's credit record, history, or rating; (2) Obtaining an extension of credit for a buyer" or providing advice or assistance with regard to either of those services. W. Va. Code § 46A-6C-102. Neither Morgan Drexen nor the Williamson Law Firm represents that it provides services that are designed to improve a buyer's credit record, history or rating. (A. R. 1502). Neither Morgan Drexen nor the Williamson Law Firm provides advice or assistance with regard to credit repair or improvement. Id.

In construing federal legislation similar to West Virginia's CSOA, courts have repeatedly determined that entities that simply advertise and provide debt settlement services similar to those here do not qualify as credit repair organizations. See e.g., Pavlov v. Debt Resolvers USA, Inc., 907 N.Y.S.2d 798 (N.Y. City Civ. Ct. 2010); and Plattner v. Edge Solutions, Inc., 422 F. Supp.2d 969 (N.D. Ill. 2006).

The historical background regarding the regulation of credit services organization also indicates the term is simply inapplicable to the conduct and services of Morgan Drexen. West Virginia and a number of other states, have legislation similar to the federal Credit Repair Organization Act ("CROA"), which was enacted in 1996 to address concerns raised by the potentially misleading practices of a growing number of companies advertising services to

improve consumers' credit ratings. See Am. Jur. Proof of Facts 3rd 205 Proof of Claims Involving Credit Repair Organization Act or Similar Enactment. The CROA's definition of a "credit repair organization" is functionally equivalent to the CSOA's definition of "credit services organization," encompassing "any person who . . . sell[s], provide[s], or perform[s], (or represent[s] that such person can or will sell, provide, or perform) any service . . . for the express or implied purpose of (i) improving any consumer's credit record, credit history, or credit rating" or provides advice or assistance with regard to any such activity or service. 15 U.S.C. § 1679a(3)(A).

Applying that definition to a company that offered a service aimed solely at resolving debts, a New York court found that, although the customer contracted with the business to assist him in resolving his credit card debt with the intent that paying off such obligations would have a positive effect on his credit rating, the business itself did not qualify as a credit repair organization, since it neither provided credit improvement services nor purported to do so. Pavlov, 907 N.Y.S.2d at 798. The court noted that the contract did not "represent that the resolution of claims [would] improve the claimant's credit rating" and informed the claimant that even if his accounts were settled, the creditor might still report in a derogatory manner to credit reporting agencies. Id. at 805. The debtor's subjective intention to improve his credit rating by participation in defendant's program could not overcome the plain language of the contract and the statute. Id. at 806.

In examining a debt settlement service similar to that here, the Illinois federal district court took a different approach, yet arrived at the same conclusion. It found that Congress had only been concerned with businesses whose main objective was credit repair, and that, since any improvement in credit rating was a "purely collateral consequence" of a debt settlement program,

CROA did not reach such programs. Plattner v. Edge Solutions, Inc., 422 F. Supp.2d at 675.

Inasmuch as the definition of "credit repair organization" is equivalent to the portion of West Virginia's definition of a "credit services organization" dealing with credit rating improvement, the reasoning of these courts is applicable here. Neither Morgan Drexen, nor the law firms it serves, provides or purports to provide any service to improve consumers' credit record, history, or rating. As discussed in subsection *b*, *infra*, prospective clients learn on multiple occasions that participation in the debt settlement program may adversely affect their credit rating.

Nor does Morgan Drexen obtain extensions of credit for the law firm clients. "Extension of credit" is the "right to defer payment of debt or to incur debt and defer its payment offered or granted primarily for personal, family, or household or agricultural purposes." W. Va. Code § 46A-6C-1(3). To determine the meaning of this term, the U.S. Supreme Court has noted that the definition of "credit" must first be examined. Am. Express Co. v. Koerner, 452 U.S. 233, 241, 101 S. Ct. 2281 (1981). In its examination of the definition of "credit" in the Truth in Lending Act identical to the one here (see W. Va. Code § 46A-1-102(17) ("'Credit' means the privilege granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment."), the Court noted that:

> In order for there to be an extension of consumer credit, there first must be an extension of 'credit.' The TILA's definition of 'credit' is contained in § 103(e), 15 U.S.C. § 1602(e): 'The term 'credit' means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.' Thus, a credit card company such as American Express extends credit to an individual or an organization **when it opens or renews an account**, as well as when the cardholder actually uses the credit card to **make purchases**. When the account is opened or renewed, the creditor has granted a right 'to incur debt and defer its payment"; when the card is used, the creditor has allowed the cardholder "to defer payment of debt.'

Am. Express, 452 U.S. at 241 (emphasis added). This explanation of credit extension illustrates

that neither Morgan Drexen nor the law firms it serves obtain such extensions of credit for consumers. The process of debt settlement does not involve opening a new account with a creditor, or renewing an existing one. Instead, it simply entails reducing the amount of money a debtor owes. Debts are not "deferred," they are diminished. A new account is not opened; an existing one is revised to reflect a decreased debt.

In sum, a finding that Morgan Drexen is a credit services organization is a condition precedent to any finding that it violated the CSOA. Because this finding was erroneous and not supported by the evidence, there should have been no finding of a violation of CSOA, as discussed below.

b. Morgan Drexen did not purport to improve credit without qualifying that it can be done only if a consumer's credit history is inaccurate or obsolete.

This finding is contrary to the overwhelming evidence. Specifically, Mr. Williamson testified that "***All our documents say that your credit will be adversely affected***," and that his clients are informed of this. Id. (emphasis added). The clients of the Williamson Law Firm are advised also verbally before they sign any agreement with the Williamson Law Firm that their credit may actually be *adversely affected* by participating in the program because monthly payments will not be paid to the creditors. (A.R. 1465, 1488). Evidence that clients are notified on multiple occasions that their credit score could be negatively affected was undisputed.

Morgan Drexen's paralegals and paraprofessionals are trained not to make any representations that the potential client's credit would be repaired. (A. R. 1511). According to Mr. Walker, Morgan Drexen's Chief Financial Officer, "That's not something that is offered by any of the attorneys that we service. Id. Under questioning by the Circuit Court, Mr. Williamson explains his firm's goal and purpose with respect to his debt settlement clients is

to "get them out of the cycle of debt," and to "add a layer of protection" between the client and the creditor who uses limited actions as a collections process to take advantage of the typical debtors' inability to pay for counsel. Id.

To support this conclusion, the Circuit Court points to an internal Morgan Drexen manual containing one a sentence in a question and answer script for intake staff:

> The Q & A portion of the script addresses credit ratings: "Q: Will this affect my credit? Response: Yes, it may adversely affect it, but you will have a chance to reestablish your credit ***once you complete the program.*** In addition, the only way to get out of debt is not to acquire anymore."

(A. R. 54 (emphasis added)).

The Circuit Court also relied upon a statement in the Training Manual that, "Once those debts are settled, your attorney will have your creditor issue a letter, showing the account has been paid off! The best thing is even the credit bureaus get a copy of this too. It shows that you did the right thing and amended your relationship with the creditor." (A. R. 54). While nothing in this script states or suggests that a consumer should be told his or her credit will improve or be repaired as a result of this program, and, in fact, they are told the opposite, the Circuit Court found that "this excerpt creates the likelihood that a consumer will believe that his or her credit will be repaired." (A. R. 56).

However, the Circuit Court's findings of fact controverts its own conclusion as the court acknowledged and credited testimony that the two consumer witnesses had been so advised and that they understood their credit ratings could be adversely affected. (A. R. 7, 8, 12, 58, 62). With regard to Plaintiff's Second Cause of Action, alleging a failure to disclose adverse consequences of the debt settlement program, the Circuit Court ruled *in favor of Defendants*, stating, "[t]he evidence shows that Ms. Linville and Ms. Martin were informed several times of the potential adverse consequences accompanying Morgan Drexen's debt relief program."

(A. R. 34). The Circuit Court ultimately ruled that "Morgan Drexen did not fail to disclose potential adverse credit consequences for participating in the debt settlement program and, consequently, did not violate W.Va. Code § 46A-6-101 or, more specifically, W. Va. Code § 46A-6-102(7)(M)." (A. R. 34). Also, the Circuit Court concluded "that a reasonable person ought to have noticed the clauses in the Disclosure Statement and the Unsecured Debt Negotiation/ Settlement Attorney/ Client Fee Agreement pertaining to potential adverse credit consequences for participating in the debt settlement program." (A. R. 34).

The Circuit Court's findings that Morgan Drexen is a credit services organization that purports to improve credit, is therefore logically inconsistent and incongruent with these findings. As the Circuit Court clearly found that clients were advised by the law firms their credit could actually suffer as a result of participating in the debt settlement program, the Circuit Court's conclusion that Morgan Drexen purported to improve credit without the necessary qualification must be vacated and reversed.

13. The Circuit Court erred by applying the Telemarketing Act, W. Va. Code § 46A-6F-101, et seq., to the provision of legal services.

Because Morgan Drexen's services are purchased solely by attorneys and not by the clients of those attorneys, the clients of attorneys have purchased no service that could qualify them as consumers under the WVCCPA. Further, the Attorney General cannot attempt to regulate the practice of law through the WVCCPA.

The Telemarketing Act only applies to "telemarketers" who are engaged in making "telemarketing solicitations." W. Va. Code §§ 46A-6F-112 and 113. In order for the act to apply, one of two things must occur. First, the telemarketer "makes an unsolicited telephone call to a consumer, attempting to sell consumer goods or services to the consumer, when the consumer has not previously expressed an interest to the telemarketer in purchasing, investing in,

or obtaining information regarding, the consumer goods or services offered by the telemarketer." W. Va. Code § 46A-6F-112(a)(1). Morgan Drexen does not make unsolicited telephone calls on behalf of the lawyers to obtain new clients for the law firms. (A. R. 1508). Because Morgan Drexen provides paralegal and administrative services to law firms, services for which it bills those law firms directly, it does not offer to sell any goods or services to consumers. Id. Rather, the only thing that is provided to clients is legal services by the lawyers.

Second, the Telemarketing Act may apply if the "telemarketer communicates with a consumer by any means and invites or directs the consumer to respond by any means to the telemarketer's communications, **and the telemarketer intends to enter into an agreement with the consumer** for the purchase of consumer goods or services at some point during the course of one or more subsequent telephone communications with the consumer." W. Va. Code § 46A-6F-112(a)(2). However, it is undisputed that the agreements in question are between the lawyers and their clients. (A. R. 1507). Morgan Drexen does not enter into contracts with consumers and, therefore, is not a telemarketer subject to the Act as a matter of law.[5]

Moreover, the WVCCPA is not designed to regulate the practice of law. Chevy Chase Bank v. McCamant, 204 W. Va. 295, 302, 512 S.E.2d 217, 224 (1998) (per curiam). "'The exclusive authority to define, regulate and control the practice of law in West Virginia is vested in the Supreme Court of Appeals.'" Id. Acting pursuant to this authority, the Supreme Court "has promulgated rules defining the practice of law, prescribed a code of ethics regulating the professional conduct of attorneys, and adopted procedures for disciplining violations thereof."

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[5] Indeed, the application provision of the WVCCPA contained in § 46A-1-104, expressly states that the provisions of the entire act, including Article 6F, only apply if a consumer, who is a resident of the State, is induced to enter into a consumer credit sale, a consumer loan, a revolving charge account or a consumer lease. W. Va. Code § 46A-1-104. By definition, consumer credit sales, loans, revolving charge accounts and leases require credit to be extended, and the obligation to be paid back in installments or subject to a finance charge. W. Va. Code §§ 46A-1-102(13), (14), (15) (17), (39) and (40).

Id. at 303, 225. The advertising of a lawyer's services is already regulated under the West Virginia Rules of Professional Conduct ("WVRPC"). Specifically, section seven of the WVRPC proscribes the content of attorney advertisements, how long an advertisement needs to be kept for, and what types of advertisements and/or solicitation are permitted.

Based on the evidence, Morgan Drexen is not a telemarketer and not engaged in telemarketing solicitation subject to Article 6F of the WVCCPA. As such, there can be no violation of W. Va. Code § 46A-6F-101, et seq. Moreover, legal services are exempt from the WVCCPA and are subject to regulation only by this Court.

14. The Circuit Court erred by assuming, without any evidentiary basis for doing so, that "Morgan Drexen's violations of the Telemarketing Act resulted in two hundred and forty five (245) West Virginia consumers signing up for and paying into the Morgan Drexen debt settlement program."

As discussed above, the Circuit Court erroneously found that Morgan Drexen had 245 customers in West Virginia. Morgan Drexen has no customers in this state, nor has it entered into any contract with any consumer for goods or services. Furthermore, there was no factual support for the claim that law firms who utilize Morgan Drexen's services obtained all 245 of their clients through Morgan Drexen's alleged telemarketing activity. Given these erroneous factual findings and false assumptions, the Circuit Court's finding that Morgan Drexen had 245 clients in the state of West Virginia must be reversed.

15. The Circuit Court erred by concluding that Morgan Drexen violated the WVCCPA because the Documents Sent to the Law Firm's Clients, such as Attorney/Client Agreement, was "not written in a clear and coherent manner" and is "not easily understood by consumers in violation of W. Va. Code § 46A-6-109."

The Eleventh Cause of Action claims that Morgan Drexen violated W.Va. Code§ 46A-6-109 by using contracts and other documents that "are not written in a clear and coherent manner and are not easily understood by consumers[.]" (A. R. 63-64). The Circuit Court ruled in favor

of the Attorney General, but did not elaborate what precisely was unclear, incoherent, or not easily understood about the documents it cited, namely the State's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 14, 16, 17, 18, and 19. (A. R. 64, 70). The Circuit Court merely stated that it was concluding as much "[b]ecause the letters do not clarify who is responsible for creating and sending the documents or which entity provides the services in the documents[.]" (A. R. 64).

Failure to identify who drafted a communication or mailed it does not make a document unclear or confusing, nor is this a violation of § 46A-6-109. Nor does § 46A-6-109 state or indicate that a failure to specify what person or entity is providing what precise service associated with the contract constitute a violation. Rather, § 46A-6-109 requires the use of plain language in consumer transactions. That code section is as follows:

> (a) Every written agreement entered into by a consumer . . ., for the purchase or lease of goods or services in consumer transactions, . . ., must: (1) Be written in a clear and coherent manner, using words with common and everyday meanings; (2) use type of an easily readable size and ink which adequately contrasts with the paper; and (3) be appropriately organized and captioned by its various sections to be easily understood.

There is no support in this statute for the Circuit Court's application of it to these facts. Notably, there is no testimony or evidence that anyone thought the documents at issue were confusing or unclear. In fact, the testimony at the hearing revealed that the consumer witnesses had a very thorough understanding of how the program worked, the risks involved and the potential outcomes. (A.R. 1460, 1466-1467, 1468, 1484, 1485, 1488-1492).

The only testimony regarding any confusion over the documents pertained to the Attorney/Client Agreement with the Williamson Law Firm, not Morgan Drexen. Both witnesses tendered by the Attorney General confessed to not having read it through completely. (A.R. 1460, 1484). However, Ms. Linville testified that she, nevertheless, "thought I had a general knowledge." (A. R. 1460 at 24:17-22). Ms. Martin was given the opportunity at trial to read

through the Attorney/Client Agreement, and she was unable to identify anything she found confusing or unclear. (A. R. 1489-1490).

Moreover, many of the documents at issue in the Circuit Court's Order are the Attorney/Client Retention Agreements and the written disclosures provided to the potential clients of the law firms. (See A. R. 62, 1518-1521, 1525-1526, 1620-1623, 1628-1631, 1634-1635). The Circuit Court's conclusion in this regard is essentially regulating the content of Attorney-Client Retention Agreements. However, the WVCCPA does not regulate relationships between lawyers and their clients. That authority, by constitutional mandate, is vested exclusively in this Court. The Circuit Court erred in applying the WVCCPA to documents evidencing an attorney-client relationship.

Regardless, even if the WVCCPA applied, which it does not, this Court (as the trier of fact) can assess on its own that the contracts between the lawyers and their clients are, indeed, clear and unambiguous. The Circuit Court's ruling that the contracts were misleading because they did not disclose precisely what tasks associated with the legal representation were being done by whom is facially unreasonable. Such a holding will lead far-reaching circumstances for virtually every lawyer in this state that relies on paralegals and administrative staff: seldom does a retainer agreement contain such specificity, nor would it be possible given the nature of legal services that involves defensive as well as offensive work for a client.

16. The Circuit Court erred by concluding that Morgan Drexen violated W. Va. Code § 46A-1-102(11), a definitional section of the WVCCPA (for the term "conspicuous").

Paragraph 138 of the Circuit Court's Order finds and concludes that "Morgan Drexen failed to clearly and conspicuously disclose to consumers that fees must be paid before debt relief services begin in violation of § 46A-1-102(11)." (A. R. 66). This holding is wrong factually and as a matter of law.

a. There is no cause of action for violation of § 46A-1-102(11).

The referenced code section contains no mandate or prohibition: it is the definition of "conspicuous" contained in the §46A-1-102, which is entitled "General definitions." That code section states as follows: "A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it." W.Va. Code § 46A-1-102(11). There can be no violation of a definition section of the Code.

b. The finding that Morgan Drexen failed to clearly and conspicuously disclose to consumers that fees must be paid before debt relief services begin is factually incorrect and inconsistent with the Court's Other Findings.

Notably, the Circuit Court concluded that Morgan Drexen "clearly and conspicuously disclosed to consumers the potential adverse credit consequences for participating in debt settlement." (A. R. 66). The Circuit Court further found that Morgan Drexen's Disclosure Statement "informs consumers creditors will be paid after the establishment fee or engagement fee is paid[.]" (A. R. 32). The Circuit Court based its conclusion that Morgan Drexen misled the law firm's clients solely on its claim that the disclosures "do not inform consumers that no services will be rendered until the entire engagement fee has been paid." Id. However, this finding is predicated upon a material false assumption and is not supported by the evidence.

c. Morgan Drexen does not charge consumers any fees: it provides paraprofessional and administrative services to law firms.

Morgan Drexen does not provide debt relief services to debtors, and the fees at issue are not paid to Morgan Drexen. Morgan Drexen provides support services to attorneys who perform legal services for their clients, and the fees in question go to the attorneys. (A. R. 1506-1507, 1508, 1501). Thus, the Court's determination premise that Morgan Drexen supplies debt relief services to the law firms' clients is incorrect and unsupported by the evidence.

d. Debt relief services are provided before all fees are paid.

The Court was also mistaken in finding that no services are provided until all fees are paid. It is not even possible to pay all fees up front in legal representation. For instance, attorney contingency fees represent a percentage of the settlements reached, and these would be impossible to pay initially. Also, the maintenance fees for the life of the program cannot be demanded up front, as they are assessed on a monthly basis. The only fee that must be paid up front is the lawyers' engagement fee, which is common in the legal profession.

Significant valuable services are rendered before the engagement fee is fully satisfied. Upon receipt of a signed Unsecured Debt Negotiation/Settlement Attorney/Client Fee Agreement (the "Attorney/Client Agreement"), letters are sent in the name of and on the lawyer's letterhead to creditors informing them that the client has retained legal counsel and that all further communications must be directed to the attorney. (A. R. 1509, 1518, 1620; see e.g. A. R. 1532, 1635). Under the WVCCPA and the FDCPA, the creditors are thereafter forbidden from any further contact with those clients to collect the debt. W. Va. Code § 46A-2-128(e); 15 U.S.C. § 1592b. This is not an inconsiderable service because it shields clients from the potential barrage of collection calls.

e. Clients are made aware the funds must accumulate before debts can be settled.

Furthermore, potential clients of the law firms are made fully aware on three separate occasions that settlements cannot be reached until their engagement and monthly maintenance fees have been paid. First, during the initial call, all potential clients are asked "[w]ere you made aware that your creditors will be contacted once you complete and return your welcome kit, yet settlements cannot be reached until sufficient funds have accumulated in your client trust account" and that the fees for the services to the lawyers include the engagement fee, the contingency fee arrangement and the monthly maintenance fee. (A. R. 46, 1466, 1491.) Each

person called by the Attorney General each responded affirmatively to this question. (A.R. 1465, 1491.)

Prior to entering into the Attorney/Client Agreement, the lawyers' potential clients also sign and initial each paragraph of a Disclosure Statement declaring, among other things, that they "understand that all monies received by the law firm will first be applied to pay the balance of my/our engagement and monthly maintenance fees" and that "[n]o monies will be applied to the escrow account or withdrawn for payment of other obligations until my/our establishment fee is paid in full." (A. R. 1524, 1588, 1634)

The Attorney/Client Agreement also provides that all monthly installments "will first be used to pay the fees described below in the section of this Agreement entitled "'Fees, Costs and Expenses.'" (A. R. 1519, 1620-1621, 1629). The Attorney/Client Agreement expressly provides that the "Attorneys earn the aforementioned fees immediately upon receipt of it" and that "after all fees are paid" the monthly payment received from the client would be used to accumulate a fund in an escrow account to settle the client's debts. Id. Every witness tendered by the Attorney General stated, in their initial telephone call regarding the engagement, stated they understood that debt settlement will not commence until sufficient funds have accumulated to satisfy the engagement fee and the monthly maintenance fees. (A. R. 1465, 1491). That Morgan Drexen's conduct was somehow misleading is simply not supported by the facts.

17. Mr. Williamson did not engage in unfair methods of competition and unfair or deceptive acts or practices in violation of W. Va. Code §46A-6-104.

W. Va. Code §46A-6-104 provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." The Circuit Court held that Mr. Williamson personally engaged in "unfair methods

of competition and unfair or deceptive acts or practices" as set forth in W.Va. Code 46A-6-102(7) (I), (L) and (M). Those code provisions state the following:

> (I) Advertising goods or services with intent not to sell them as advertised;
>
> (L) Engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding;
>
> (M) The act, use or employment by any person of any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any goods or services, whether or not any person has in fact been misled, deceived or damaged thereby;

a. There was no advertising of goods or services with intent not to sell them as advertised.

W. Va. Code § 46A-6-102 defines "advertisement" for purposes of the WVCCPA in the following manner:

> (1) "Advertisement" means the publication, dissemination or circulation of any matter, oral or written, including labeling, which tends to induce, directly or indirectly, any person to enter into any obligation, sign any contract or acquire any title or interest in any goods or services and includes every word device to disguise any form of business solicitation by using such terms as "renewal", "invoice", "bill", "statement" or "reminder" to create an impression of existing obligation when there is none or other language to mislead any person in relation to any sought-after commercial transaction.

Mr. Williamson never personally advertised. (A. R. 1499.) More importantly, the Circuit Court made no finding, nor was there any evidence, that Mr. Williamson personally advertised his services in West Virginia. Accordingly, there was no basis on which the Circuit Court could have found Mr. Williamson personally liable under W. Va. Code § 46A-6-104.

b. Mr. Williamson and his Firm's use of Morgan Drexen's services does not constitute fraud, or misrepresentation, or concealment.

The Court found Mr. Williamson liable because it concluded that Mr. Williamson, personally, "provides no services to West Virginia consumers." This finding is unsupported.

At the hearing, the documents sent to Ms. Martin and Ms. Linville under the heading of the Williamson Law Firm included: the "Unsecured Debt Negotiation/Settlement Attorney/Client Fee Agreement" (A.R 1518-1520, 1620-1623); Cover letter enclosing the "Limited Scope Representation;" (A.R. 1525); the "Agreement and Authorization for Limited Scope Representation." (A.R. 1526). The Circuit Court disregarded Mr. Williamson's testimony that the debt settlement program and the documentation involved in it was created and designed by him and the Howard | Nassiri attorneys. (A. R. 1503). The Circuit Court disregarded Mr. Williamson's testimony, even though there was no evidence to the contrary upon which the Court could support his conclusion of law.

Even assuming *arguendo* these documents were compiled from templates, the Circuit Court failed to explain how the manner and method of a document's' creation can be fraud, misrepresentation or concealment. The client is not entering into a contract for the purchase of any of these documents: rather, it is entering into a contract for debt settlement and legal services. It is most likely of no consequence to any potential client who drafted attorney/client agreements and cover letters. These documents are simply the precursor to the clients' receiving debt settlement and legal services. More importantly, the Circuit Court's finding of fact did not identify any statement contained in these documents that was false, deceiving, or fraudulent and made with the intent to cause the client to rely upon it.

The fact that the Mr. Williamson and his law firm utilized Morgan Drexen to provide routine documents used in debt settlement transactions does not lead to the conclusion that there was any fraud, misrepresentation or concealment. Many, if not most, attorneys who practice law before this Court rely on the support of paralegals, secretaries and support staff. Here, these paralegals happen to be located in California in Morgan Drexen's office, but the roles they play

and the tasks they are performing are the same as "in-house" paralegals. Indeed, in today's world of telecommuting, many law firms now have their paralegals and other support staff located in offices far away from the attorneys.

Similarly, the fact that neither Mr. Williamson nor his law firm have itemized every task associated with the debt settlement program and cross-referenced each task with the person who will be performing it is not some form of nefarious concealment. Indeed, such a task would be impossible to do early in the attorney/client relationship because an attorney cannot anticipate all of the issues and challenges that will arise with each client's case. If this Court affirms the Circuit Court's application of WVCCPA to the practice of law, then few lawyers would escape the reach of this statute.

Moreover, preventing debtor's counsel, such as Mr. Williamson and Ms. McIntyre-Nicholson, from utilizing the type of services Morgan Drexen provides puts them in a disadvantage in dealing with creditors who routinely automate their dealings with debtors in serious arrears. Nothing prohibits creditors from using collection law firms that consist of a few attorneys and an army of paralegals who actually handle all the day-to-day functions (such as processing paperwork, negotiating, preparing legal documents for a lawyer's signature), and may be paid for their productivity with bonuses. How, under the guise of consumer protection, is restricting the resources of attorneys representing individuals further the goal of consumer protection? It does not.

As Ms. McIntyre-Nicholson explained, the services Morgan Drexen provides are invaluable and allow her to provide this type of legal work to the public:

> A: The amount of paper that is produced in this debt resolution program is so profound, that I could not possibly service the client appropriately without the assistance that Morgan Drexen provides. They are essentially -- I rely

on them to do the work of a paralegal, which is what this contract says that they are going to do, and that's what they have done.

Q: Okay. Do they do anything else other than paralegal services?

A: They make phone calls on my behalf, they send out letters on my behalf, they contact clients and schedule appointments on my behalf, much the same that I would expect my legal assistant to do if I had one.

(A. R. 1482).

Ms. McIntyre-Nicholson and the Williamson Law Firm have taken advantage of Morgan Drexen's services, which are similar to those used by collection firms and which help "level the playing field" in dealing with sophisticated creditors and their attorneys in a way that a small law firm and its clients could never afford.

c. Mr. Williamson did not engage in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

The only other evidence cited in the Court's Order as support for a violation of W. Va. § 46A-6-104 is one letter that was sent by Morgan Drexen on behalf of the Williamson Law Firm to Mary and Ronnie Linville, which indicates that the Williamson Law Firm is "licensed to practice law in your jurisdiction." (A. R. 1524.) Admittedly, this statement is inaccurate. However, the letter is a computer-generated communication that was sent to the Linvilles in error. (A.R. 1502-1503). Mr. Williamson explained: "[T]his letter is just an example of the, of an error in the automated process. I mean, I make errors in court documents, I've had my assistants . . . make errors in dates, case numbers. Essentially we approve the, we approve the general letter that individuals at Morgan Drexen enter fields and then they—the fields are populated by the computer software program as it's filled out." Id. That is, Morgan Drexen's staff committed an error in completing the field of the form document inputting the Williamson Law Firm instead of the name McIntyre-Nicholson. Furthermore, at the time this

letter was sent, the Linvilles were already participating in the debt settlement program and had a contractual relationship with the Williamson Law Firm.

One mistakenly completed document by Morgan Drexen should not constitute Mr. Williamson's "engaging" in conduct that is false, misleading or otherwise creates a likelihood of confusion or misunderstanding, let alone justify a $1,225,000.00 penalty against Mr. Williamson personally. (A.R. 69). Furthermore, the document was not sent by Mr. Williamson personally, nor on his behalf personally. Rather, it was sent by Morgan Drexen on letterhead bearing the Williamson Law Firm, LLC. (A.R. 1525). As discussed above in Section B, this alone cannot support liability of Mr. Williamson, individually, as a member of that firm. The Court's finding in this regard should be reversed.

CONCLUSION

For the above reasons, Petitioners respectfully request that the Circuit Court Order be reversed, the penalties assessed against them both be vacated, and judgment entered in its favor, as well as such other and further relief as this Court deems just and proper.

MORGAN DREXEN, INC. and LAWRENCE WILLIAMSON,

By SPILMAN THOMAS & BATTLE, PLLC

Bruce M. Jacobs (W. Va. State Bar No. 6333)
Alexander Macia (W. Va. State Bar No. 6077)
Dennise R. Smith (W. Va. State Bar No. 7228)
Nicholas P. Mooney II (W. Va. State Bar No. 7204)
P.O. Box 273
Charleston, WV 25321-0273
304.340.3800 /304.340.3801 (*facsimile*)
amacia@spilmanlaw.com
bjacobs@spilmanlaw.com
dsmith@spilmanlaw.com
nmooney@spilmanlaw.com