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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Nos. 14-0791 and 14-0792

FILED
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Morgan Drexen, Inc.,
Defendant Below, Petitioner

v. No. 14-0791

Patrick Morrisey, Attorney General,
Plaintiff Below, Respondent

AND

Lawrence Williamson,
Defendant Below, Petitioner

v. No. 14-0792

Patrick Morrisey, Attorney General,
Plaintiff Below, Respondent

FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
CIVIL ACTION NO. 11-C-829

RESPONSE BRIEF OF THE STATE OF WEST VIRGINIA EX REL. PATRICK MORRISEY, ATTORNEY GENERAL

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INTRODUCTION

Petitioners seek to overturn a decision rendered by the Circuit Court of Kanawha County following a bench trial. The State of West Virginia, through its Attorney General (hereinafter "the State"), filed the underlying civil action alleging that, while operating a debt settlement business, Petitioners committed multiple violations of the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-1-101 *et seq.* ("WVCCPA"). Judgment was entered against Morgan Drexen and Lawrence W. Williamson ("Petitioners").[1] The Circuit Court determined that Petitioners engaged in unfair or deceptive conduct in violation of the WVCCPA as they misled consumers into wrongly believing they would receive debt settlement services from lawyers. The Circuit Court also determined that a number of additional violations had occurred. The assignments of error raised by Petitioners largely challenge the trial court's factual findings; however, they leave no definite and firm conviction that a mistake has been made. There being no basis for reversing the Circuit Court's decision, the underlying decision should be affirmed.

STATEMENT OF THE CASE

Debt settlement, a form of debt relief where, for a fee, the company attempts to negotiate and settle consumer debt for less than what is owing, is a high risk proposition fraught with abusive and deceptive practices. *See generally*, U.S. Government Accountability Office, DEBT SETTLEMENT FRAUDULENT, ABUSIVE AND DECEPTIVE PRACTICES POSE RISK TO CONSUMERS (April, 2010) GAO-10-593T, http://www.gao.gov/products/GAO-10-593T ("GAO Report"). Most states provide some exemption from consumer protection laws for lawyers performing debt relief services. However, Morgan Drexen, a for profit company, provided nearly all debt

[1] The Circuit Court held the State failed to prove its case against the remaining defendants.

settlement services for consumers in West Virginia while the lawyers involved with the program did very little, if anything. At the heart of the underlying matter was the State's position that Lawrence W. Williamson ("Williamson"), a Kansas-licensed attorney, was merely "renting" his bar license to Morgan Drexen to allow Morgan Drexen to avoid state regulation. Following a presentation of the evidence, the Circuit Court concurred, finding that: "The Court is of the opinion that the Defendants' operations amount to a ruse perpetrated by Morgan Drexen." Final Order, ¶ 71 (Appendix Record, p. 37) (hereinafter "A.R.__). The Court further found:

> [I]t is evident that Morgan Drexen hides behind attorneys who perform or complete little to no work, exert little to no control over Morgan Drexen, and play little to no role in Morgan Drexen's debt settlement negotiations.

Final Order, ¶ 82. A.R. 44.

As further background, the evidence adduced below reveals that Morgan Drexen began operating a nationwide debt settlement program in March 2007 from its offices in California.[2] A.R. 1497. In August 2007, Morgan Drexen began providing the same debt settlement services under the guise of providing paralegal support for attorneys. A.R. 1497. *See also* Petitioner's Brief, p. 3. Morgan Drexen entered into an arrangement with Williamson, California lawyers Vincent Howard and Damian Nassiri, and Eric Rosen, a Florida attorney.[3] A.R. 1493-94. The lawyers would purportedly provide legal services in connection with the debt settlement program. *See, e.g.* A.R. 1647-1659. The consumer contracts previously used by Morgan Drexen,

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[2] Morgan Drexen is primarily owned by Walter Ledda (more than 76%) who previously operated a different debt settlement company. The Federal Trade Commission sued Ledda and his company in *Federal Trade Commission v. National Consumer Council, Inc., et al.*, CV04-0474-CJC (C.D.Calif. 2005). Ledda paid the FTC $1,356,000 to settle the litigation. Morgan Drexen and Ledda also were sued by the federal Consumer Financial Protection Bureau with a bench trial commencing Feb. 10, 2015. *CFPB v. Morgan Drexen et al.*, SACV 13-001267 JLS (U.S. D.Ct., C.D. Calif.).

[3] Rosen was disciplined by the Florida Bar regarding his involvement with Morgan Drexen. *The Florida Bar v. Eric A. Rosen*, SC12-392 (Bar File No. 2011-51,326) (Fla. June 11, 2013).

A.R. 942, were modified to cover the new arrangement resulting in the contracts used with West Virginia consumers such as Mary Linville and Brenda Martin. A.R. 111 and 1628.

Morgan Drexen provided all meaningful services for the debt settlement program. *See* Affidavit of Rita Augusta, Chief Operating Officer. A.R. 825-831. Morgan Drexen advertised for clients and performed the customer intake via telephone. A.R. 1533-1551 (customer intake instructions). Petitioner created the debt settlement plan and transmitted contracts to consumers. A.R. 1514, 1517, 1624. Morgan Drexen sent form letters to creditors and collected payments from clients. A.R. 1460. The company managed the bank accounts of Williamson and others. A.R. 1500 (p. 187). Morgan Drexen negotiated with creditors and settled some debts of consumers. *See* A.R. 1522 (authorization to negotiate); A.R. 1463 (pp. 37-38). Petitioner made payments to creditors. Lawyers did not typically have any involvement with consumers in the debt settlement program. Rachelle McIntyre Nicholson, a West Virginia lawyer named by Respondent in the underlying case, admitted in her testimony, "I don't do any debt settlement." A.R. 692-697, 1477 (p. 95). Petitioner Williamson also admitted he did not review client documents or negotiate with creditors. A.R. 1497 (p. 175).

If clients were sued, Morgan Drexen offered a separate contract, entitled Limited Scope Representation, providing limited legal services for which clients had to pay money in addition to the debt settlement contract. A.R. 1462 (Linville testimony) and A.R. 1526 (Limited Scope Representation contract). The procedure described by Nicholson in her sworn statement indicated that she had "absolutely no contact with the client until a case enters litigation." A.R. 695, *see also* A.R. 1473 (p. 79). Nicholson provided legal services to help defend clients who were sued if they paid the additional fees. However, Nicholson provided the limited

representation at a fee schedule set by Morgan Drexen and contracted to pay HowardlNassiri[4] a 15% referral fee in connection with the services even though they did not have any clients in West Virginia. A.R. 1558-1559, A.R. 1529-1531. The evidence demonstrated that Nicholson did not assist consumer Mary Linville because Linville contracted with Morgan Drexen in March 2008 while Nicholson did not start with Morgan Drexen until August 2009. Instead, Linville received a letter and contract stating that Petitioner Williamson would be her lawyer. A.R. 1462 (p.34), A.R. 1525-1526. Notably, Williamson did not provide legal services. Williamson testified that the correspondence was a mistake, but Morgan Drexen did not have any local West Virginia lawyer under contract when Linville was sued. A.R. 1505-06 (pp. 207-208), A.R. 130-131. Consequently, Linville was misled by Petitioners that Williamson would be her lawyer. A.R. 1462-63 (pp. 34-36).[5]

Additionally, Morgan Drexen was providing debt settlement services to consumers prior to the underlying defendant lawyers' involvement.[6] Morgan Drexen's Chief Financial Officer, David Walker, conceded that when Morgan Drexen first commenced business it contracted directly with consumers. A.R. 1510 (pp. 225-226). Petitioner Williamson and underlying Defendants Howard and Nassiri did not affiliate with Morgan Drexen until August 2007. A.R.

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[4] HowardlNassiri, owned by the Defendant California attorneys below, Vince Howard and Damian Nassiri, recruited Nicholson into a "network" of attorneys to act as local counsel for themselves and purportedly, others such as Williamson, as part of Morgan Drexen's debt settlement program. A.R. 1644-46.

[5] Ms. Linville's authorization to withdraw money from her bank account was given to Morgan Drexen, not Williamson. A.R. 1522. Linville and Martin both testified they spoke with Morgan Drexen employees who provided information about the debt settlement program. *See, e.g.* A.R. 1456, 1483. After Ms. Linville was sued by one of her creditors, she quit the program. A.R.1461-62. Martin quit the program after several months because creditors did not stop calling and Morgan Drexen had not settled any debts. A.R. 1487.

[6] A copy of one of Morgan Drexen's debt settlement contracts before the defendant lawyers partnered with Morgan Drexen is at A.R. 942-944 ("Bradley contract"). *See also, In re Morgan Drexen, Inc.*, Decision and Order, Administrator, State of Wisconsin Dep't of Fin. Inst. Div. of Banking, 10-S-127 (April 25, 2013) (identifying 37 contracts prior to attorney involvement). A.R. 1189, 1192.

1497. Nevertheless, the evidence revealed that Morgan Drexen's operations remained much the same. In March 2008, Morgan Drexen sent consumer Mary Linville an instruction letter that had the following statement under Morgan Drexen's letterhead:

> The Morgan Drexen is an organization dedicated in helping the American consumer return to a Debt-Free Standard of Living. We have helped thousands of good people with a similar situation return to Financial Stability.

A.R. 1515. Consumer Brenda Martin received the same instruction sheet two years later. A.R. 1627. Notably, the foregoing description is directly contrary with what Morgan Drexen now claims to be, a "paraprofessional and administrative services" company servicing law firms. Petitioners' Brief, p. 3.

Morgan Drexen admitted in its Answer that it was not registered to do business in West Virginia. A.R. 379. Nevertheless, the trial court found that Morgan Drexen was doing business in West Virginia through a variety of activities such as soliciting customers through telemarketing and then servicing the accounts. A.R. 28 (¶ 44). As part of its business operations in West Virginia, Morgan Drexen also made electronic withdrawals from Linville's and Martin's bank accounts. *See e.g.*, A.R. 1461-62, 1523, and A.R. 1633. No one disputed Morgan Drexen was advertising in West Virginia; Morgan Drexen's CFO admitted it. A.R. 1511 (p.228).[7]

As noted previously, fundamental to the State's suit and the Circuit Court's decision is the fact that Petitioner Williamson and underlying Defendant Nicholson provided no meaningful services to Morgan Drexen's debt settlement customers. Both Morgan Drexen and Williamson misled consumers into believing Williamson would provide legal services when he did not. Williamson also admitted he did not review client documents or negotiate with creditors. A.R.

[7] Both Petitioner Williamson and Nicholson admitted they knew Morgan Drexen was airing television ads in West Virginia and that neither was listed as the responsible attorney. A.R. 1499-1500 (pp.183-184), A.R. 1480 (p.107). Copies of screen shots from some of Morgan Drexen's television ads can be seen at A.R. 243 252.

1497 (p.175).[8] Petitioner claimed an attorney in his office may have negotiated with creditors, but the attorney did not start to work for Williamson until March 2011. A.R. 1497-1498 (pp. 175-178). Moreover, Morgan Drexen's own documents state Morgan Drexen will negotiate consumers' debts. *See, e.g.* A.R. 1514-17, 1522. Based upon this evidence, the trial court found Williamson and Nicholson did not "contact and notify . . . creditors" or "advise . . . creditors" as advertised and promised in the debt settlement contracts. A.R. 25 (referencing A.R. 1518(¶ 2)). The trial court also found that Morgan Drexen promised lawyers would provide debt relief services when they do not. A.R. 25. These findings are correct and amply supported by the record.

Indeed, although Morgan Drexen maintains it is a paraprofessional support company for lawyers, it actually recruits lawyers to the program. Nicholson testified she first learned about Morgan Drexen through a want ad on Craig's List on the Internet. A.R. 1473 (pp. 76-77). Notably, however, Morgan Drexen maintains control of the client. The Confidential Contract entered into between Nicholson and Morgan Drexen is purportedly for Morgan Drexen to provide paralegal services to Nicholson, yet the agreement states:

> "POISON PILL" PROVISION – A ONE-TIME CHARGE: MD will charge MCINTYRE-NICHOLSON a one-time charge of $1,100.00 for each debtor under management in the event MCINTYRE-NICHLSON chooses to compete with MD and takes clients previously serviced by MD. This charge shall cover potential recovery of lost revenue... MCINTYRE-NICHOLSON agrees to forgo any challenge to the basis for the averaged charge, and waives the right to audit MD's books and records to verify the charge in connection with settlement of any particular debt."

[8] Underlying Defendant Nicholson also had little to do with the debt settlement program. In her sworn statement, Nicholson testified, "I don't do any debt settlement." A.R. 692-697. During her trial testimony, she admitted that prior to December 2010, about 1½ years after starting with Morgan Drexen, she did not have any contact with debt settlement consumers until they were sued by their creditors. A.R. 1473 (p. 79). At most, Nicholson proposed changes to settlement paperwork which she sent to Morgan Drexen. A.R. 1477(p. 95).

A.R. 1561 (¶ 4.C.). Morgan Drexen's Confidential Contracts with Nicholson and Williamson also provide that Morgan Drexen can assign the contract but the lawyers are prohibited from doing so without Morgan Drexen's approval. A.R. 1561-62(¶ 6 & 7.), A.R. 1655(¶ 7 & 8). Morgan Drexen dictates the maximum fees charged for services by the lawyers. A.R. 1558-59 (¶ G.)[9] Morgan Drexen also takes a security interest in all proceeds from consumer contracts. A.R. 1564 (¶ I.), A.R. 1656 (¶ I.). Additionally, Morgan Drexen provided Nicholson a form contract to be used with consumers, identical to the ones used with consumers Linville and Martin, letter templates, disclosure statements identical to the ones used with Linville and Martin, a script for customers to use when contacted by creditors and other forms that include statements of the law with regard to credit reporting, debt collection and defamation. A.R. 1569-1618. In this regard, Morgan Drexen could change the methods and procedures for servicing customers without the lawyers' approval. A.R. 1558 (¶ E.), A.R. 1653 (¶ E.).

The evidence shows that Morgan Drexen is a debt settlement company that contracted with lawyers to work with it to provide a shield from consumer protection laws. In fact, it is difficult to express the relationship better than the Circuit Court:

> [I]t is evident that Morgan Drexen hides behind attorneys who perform or complete little to no work, exert little to no control over Morgan Drexen, and play little to no role in Morgan Drexen's debt settlement negotiations.

A.R. 44. Another tribunal has reached the same conclusion. *See In re Morgan Drexen, Inc.*, Decision and Order, Administrator, State of Wisconsin Dep't of Fin. Inst. Div. of Banking, 10-S-127 (April 25, 2013) ("Courts and commentators alike have observed that Morgan Drexen

[9] Payments to Nicholson by Morgan Drexen prior to her direct contract with the company were made on a monthly basis under the following schedule: $500 per month for the first 300 clients plus $2.50 for each additional client. A.R. 1530. She also received an extra $250 per month for reviewing the first 50 settlements plus $5 per each settlement in excess of the first 50. A.R. 1530. After she contracted directly with Morgan Drexen, Nicholson's compensation changed to $500 per month for the first 300 clients plus $2 for each client over 300. A.R. 1558 (¶ F.).

is a 'prototypical debt settlement company' and but one of many who has employed an 'attorney model' in an effort to evade regulation."(Citations omitted.)) A.R. 1232-33[10]

Additionally, the record demonstrates that Morgan Drexen was operating as a telemarketer in violation of the WVCCPA. Ms. Linville testified that she had received several telephone calls from Morgan Drexen attempting to sell her debt settlement services. A.R. 1456-1457. She finally agreed and enrolled in the program. *Id.* Indeed, although initially denying it, Morgan Drexen's CFO admitted that Petitioner purchased leads from third party telemarketer companies. A.R. 1508 (p.218). Brenda Martin testified that she called Morgan Drexen's toll free telephone number after seeing one of its ads on television. A.R. 1483(p.117-118). She spoke directly to a Morgan Drexen employee. Morgan Drexen sent Linville and Martin contract documents and commenced servicing their accounts after closing the sales over the telephone. A.R. 1483-1484 (pp. 119-120). As Morgan Drexen admittedly was not registered to do business in West Virginia, A.R. 379, it was likewise not registered with the Department of Tax and Revenue as a telemarketer in West Virginia. A.R. 239 (Tax Department statement of non-registration). W. Va. Code § 46A-6F-301. Nor was Morgan Drexen registered with the West Virginia Secretary of State, A.R. 233, which is required of credit services organizations. W. Va. Code § 46A-6C-5.

Likewise, as a matter of law, Morgan Drexen is a Credit Services Organization. Morgan Drexen provides advice to consumers about improving their credit histories. Brenda Walker testified she was told by Morgan Drexen how her credit would be affected by Morgan Drexen's debt settlement program – negatively for about a year, and then it would improve. A.R. 1483

[10] A state trial court in Colorado found Morgan Drexen was merely a paraprofessional services company supporting lawyers, but the decision was made before any discovery commenced, before any trial, solely on the affidavits of the parties. *Moore et al. v. Suthers et al.*, 11CV7027 (Dist. Ct., Denver County, Colo. Sept. 2012). A.R. 1149.

(p. 119). Thus, Morgan Drexen led her to believe her credit would improve if she stayed in its program.

Morgan Drexen also had a training manual for its Legal Intake Specialists. A.R. 1533. In a Q & A section, a question is asked, "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 to not acquire any more." A.R. 1539. The training manual script continues to have a Specialist tell a consumer, "Once these 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 relationships with the creditor." A.R. 1543. Morgan Drexen was providing advice to consumers about improving their credit histories. It is without question that the record supports the decision of the trial court. A.R. 68 (¶ 145).

The Circuit Court determined that the WVCCPA had been violated due to the Petitioners' unfair or deceptive conduct; that Morgan Drexen violated West Virginia's Debt Pooling statute; that Morgan Drexen operated as a credit services organization; and that Morgan Drexen operated as a telemarketer. The court's findings are amply supported by the record and the decision should be affirmed.

SUMMARY OF ARGUMENT

Petitioners have alleged seventeen (17) assignments of error, primarily complaining the trial court's findings of fact were wrong. As set forth herein, the record amply supports the Circuit Court's determination.

The Circuit Court correctly found that Morgan Drexen and Williamson misled consumers into believing that lawyers would provide legal services when they did not, in violation of the WVCCPA. W. Va. Code § 46A-6-104 as defined by W. Va. Code §§ 46A-6-102(7)(B),(L) and (M). Morgan Drexen admitted it was not authorized to do business in West Virginia, yet did so, and failed to disclose its lack of licensure to consumers in violation of W. Va. Code § 46A-6-104 as defined by W. Va. Code §§ 46A-6-102(7)(B), (C), (L) and (M). Morgan Drexen similarly failed to disclose that no debt settlement services would start until after its fees were paid and further failed to disclose that lawyers would not perform those services as advertised. W. Va. Code § 46A-6-104 as defined by § 46A-6-102(7)(I) and (L). The court correctly found Morgan Drexen used documents that were not clear and coherent as to who created the documents and who was providing debt relief services. W. Va. Code § 46A-6-109.

Additionally, the evidence supported the trial court's determination that Morgan Drexen's debt settlement program was a "debt pooling" as defined by W. Va. Code § 61-10-23. Accordingly, under the debt pooling statute, the conclusion was properly made that Morgan Drexen could only collect 2% of the money deposited for payment to creditors yet it collected in excess of that amount in violation of the statute.

Similarly, the trial court properly determined that Morgan Drexen provided credit services to West Virginia consumers by leading consumers to believe that its debt settlement program would improve their credit records. W. Va. Code § 46A-6C-1 *et seq.* Morgan Drexen also engaged in telemarketing, collecting fees before its credit improvement efforts had concluded. W. Va. Code § 46A-6F-101 *et seq.*

The Circuit Court's findings were not clearly erroneous and the ultimate decision was well within the Court's discretion. Those findings and conclusions should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary as the facts and legal arguments are adequately presented and the decisional process will not be aided by oral argument. *See* W.Va. R. App. P. 18(a).

ARGUMENT

As stated previously, Petitioners have raised seventeen (17) assignments of error. This shotgun approach to an appeal is generally viewed with caution.

> Ingenious and diligent counsel have taken a shotgun approach to the validity [of the proceedings], asserting that reversible error occurred in [numerous] respects. So many points of error suggest that none are valid.

Elizabethtown Gas Co. v. Nat'l Labor Rel. Bd., 212 F.3d 257, 262 n.2 (4th Cir. 2000), *quoting U.S. v. Sawyers*, 423 F.2d 1335, 1338 (4th Cir. 1970). In the instant matter, the view espoused by the Fourth Circuit Court of Appeals is apt. In large part, Petitioners challenge what they believe to be a fundamental factual error committed by the trial court: that West Virginia consumers were clients of Morgan Drexen rather than Williamson. This one (1) finding is the basis for fourteen (14) of Petitioners' seventeen (17) assignments of error. However, the evidence adduced supportive of the trial court's findings and conclusions is substantial and in no way leaves a "firm and definite conviction" that a mistake has been made. The findings and conclusions should, therefore, be affirmed.

A. Standard of Review

The standard of review does not allow for the Petitioners to substitute their view of the facts for the trial court's. The findings of fact by the trial court – the factfinder in this matter:

> shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

In Interest of Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177, Syl. pt. 1 (1996). Furthermore, "An appellate court may not decide the credibility of witnesses or weigh evidence as that is the exclusive function and task of the trier of fact. . . . It is for the [factfinder] to decide which witnesses to believe or disbelieve. Once the [factfinder] has spoken, this Court may not review the credibility of the witnesses." *State v. Guthrie*, 194 W. Va. 657, 670, 461 S.E.2d 163, 176, n. 9 (1995)(citation omitted) ("[A]ppellate review is not a device for this Court to replace a jury's finding with our own conclusion.").[11] *State v. Bailey*, 151 W. Va. 796, 155 S.E.2d 850, Syl. pt.2 (1967) (the factfinder "is the sole judge as to the weight of the evidence and the credibility of the witnesses.").

The Circuit Court ruled that Petitioners were operating a ruse. A.R. 37 (¶71). Therefore, it is incumbent upon the court to look beyond the surface of what Petitioners claim to be doing. The witness testimony, in conjunction with the documents presented to the Circuit Court, make it

[11] "In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to de novo review." *Cavalry SPV I, LLC v. Morrisey*, 232 W. Va. 325, 331, 752 S.E.2d 356 , 362 (2013).

clear the Circuit Court reached the correct conclusion. This Court's admonition to look behind the mere form of a transaction to discern if unlawful usury conduct has occurred is instructive:

> The usury statute contemplates that a search for usury shall not stop at the mere form of the bargains and contracts relative to such loan, but that all shifts and devices intended to cover a usurious loan or forbearance shall be pushed aside, and the transaction shall be dealt with as usurious if it be such in fact. *Crim v. Post*, 41 W. Va. 397, 23 S.E. 613 (1895).

Carper v. Kanawha Banking & Trust Co., 157 W. Va. 477, 478, 207 S.E.2d 897, 901, Syl. pt. 4 (1974). *See also, Reese v. Melahn*, 53 Ill.2d 508, 513, 292 N.E.2d 375, 379 (1973) ("the substance of the transaction, and not the form, is to be regarded in the determination of the rights of the parties. . . . It is the nature of the enterprise undertaken that controls, not the form of the agreement.") (*quoting Ditis v. Ahlvin Constr. Co.*, 408 Ill. 416, 425, 97 N.E.2d 244, 249 (1951)); *Pielet v. Hiffman*, 407 Ill.App.3d 788, 798, 948 N.E.2d 87, 97 (1st Dist.2011); and *Central Prod. Credit Ass'n v. Hans*, 189 Ill.App.3d 889, 909, 545 N.E.2d 1063, 1077 (2d Dist.1989) ("Courts will disregard names and penetrate disguises to determine the substance of the act or transaction and will not be misled by devices and subterfuges."). *See also, State ex rel. Frieson v. Isner*, 168 W. Va. 758,775, 285 S.E.2d 641, 653 (1981) ("the assignment of a creditor's claim to a collection agency for purposes of enabling the agency to sue in its own name is a sham and a fraud perpetrated upon the court, a subterfuge which permits the collection agency to carry on the business of practicing law without being subject to the regulation and control of the courts.").

B. Assignments of Error

Assignment 1. Petitioners claim the trial court erred when it found Morgan Drexen had 245 customers in West Virginia. Even though the debt settlement contracts appear to be between Williamson and consumers, after examining the evidence, the trial court found the arrangements to be a ruse, and correctly found the customers were Morgan Drexen's, not Williamson's. The

facts supporting this determination were clear and admitted. The record adduced demonstrates that Williamson had very little to do with West Virginia consumers. Williamson admits that he did not review their documents, did not meet with them, and did not negotiate with their creditors. A.R. 1497 (p. 175), A.R. 836. Petitioner admitted that he did not even review the settlements negotiated by Morgan Drexen for West Virginia consumers. Rather, in Williamson's affidavit, he stated that any legal work that was to be done in West Virginia was handled by Nicholson. A.R. 1637.[12]

Williamson's contract with Morgan Drexen also emphasizes that Morgan Drexen is in control of the relationship. A.R. 1647.[13] For example, Morgan Drexen required Williamson to maintain errors and omissions liability insurance. A.R. 1649. Williamson was required to affirm he was licensed to practice law in Kansas and he would promptly report to Morgan Drexen any negative bar discipline or criminal convictions. A.R. 1650. Morgan Drexen can assign the contract at will while Williamson was required to obtain Morgan Drexen's consent before assigning the contract. A.R. 1655. Morgan Drexen also takes a security interest in all the money generated from the debt settlement program. A.R. 1656-57.

The record clearly demonstrates that Morgan Drexen maintained control of the debt settlement program since its inception. Petitioner was using the basic debt relief contract before Williamson's involvement. A.R. 942-944. It provided the advertising, customer intake, debt planning, correspondence, debt negotiating, and creditor payment, among other services. *See,*

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[12] Williamson admitted that he did not have a written contract with Nicholson and that he had never communicated with her in writing or orally before the State commenced its investigation in December 2010. A.R. 620 (¶ 106, admitting the allegations of the complaint). Instead, he relied on a contract with Howard|Nassiri to provide him with local counsel. A.R. 1637, 1644. The contract, referred to as a "clearinghouse" agreement, however, only provides for Howard|Nassiri to be Williamson's local counsel, not Nicholson. A.R. 1476 (p. 88); A.R. 1644-46.

[13] The contract is between Williamson and Morgan Drexen, not Williamson's law firm. A.R. 1647.

e.g., A.R. 825-831, 1460-63, 1480, 1499-500, 1514-17, 1522, 1523, 1533-1551, 1624, 1633. The Circuit Court made no error and the decision should be affirmed.

Assignment 2. Petitioners claim the court erred in holding Williamson responsible for his actions or the actions of his law firm, Williamson Law Firm, LLC. The trial court correctly found that Williamson was misleading consumers to believe that he would provide debt settlement services, which he admitted he did not provide. Moreover, the trial court correctly concluded that Williamson cannot hide his wrongdoing behind his limited liability company.

Petitioners rely on general corporation law to argue for Williamson's absolution for his misdeeds. Pet. Brief, pp. 15-16. However, this reliance is misplaced. For many years, lawyers were not permitted to practice law in a corporation. W. Va. Code § 30-2-5. In 1972, the West Virginia Legislature permitted lawyers to form legal corporations. W. Va. Code § 30-2-5a. Practicing in the corporate form, however, did not relieve lawyers of personal liability for their actions.

> This section does not modify the law as it relates to the relationship between a person furnishing legal services and his client, nor does it modify the law as it relates to liability arising out of such a professional service relationship. Except for permitting legal corporations, this section is not intended to modify any legal requirement or court rule relating to ethical standards of conduct required of persons providing legal service.

W. Va. Code § 30-2-5a(c). Simply stated, Petitioner cannot evade legal duties and ethical responsibilities by virtue of a corporate entity. *See In re Sinnott*, 176 Vt. 596, 600-601, 845 A.2d 373, 380-381 (2004) (lawyer providing debt settlement services found personally responsible to pay restitution even though he attempted to avoid personal liability through corporate structure); *Street v. Sugerman*, 202 So.2d 749, 751 (Fla. 1967) (attorneys permitted to incorporate to take advantage of tax and retirement benefits not to immunize themselves from personal liability);

First Bank & Trust Co. v. Zagoria, 250 Ga. 844, 846, 302 S.E.2d 674, 675-676 (1983) ("It is inappropriate for the lawyer to be able to play hide-and-seek in the shadows and folds of the corporate veil and thus escape the responsibilities of professionalism."). No piercing of the corporate veil is necessary. *See also* Michael T. Escue, Comment, Limiting Lawyer Liability in West Virginia, 99 W. Va. L. Rev. 837, 839 (liability protection from business debts such as bank loans, leases, equipment purchases, torts unrelated to the law practice, vicarious liability for wrongs committed by others in the firm).

This Court's Rules of Professional Conduct also allow attorneys to practice in a limited liability company but mandate that, "Nothing in this rule or the law or laws under which a lawyer or law firm is organized shall relieve a lawyer from personal liability for the act, errors, and omissions of such lawyer arising out of the performance of professional legal services." W. Va. R. Prof'l. Conduct 5.7(b). Williamson's name is printed near the signature line for both Linville's and Martin's contracts indicating he would be the responsible lawyer. A.R. 1521, 1623. Petitioner had to be the responsible lawyer if his "clearinghouse" agreement could have any effect. A.R. 1644-46. According to his testimony, Williamson was the only lawyer in his firm until March 2011. A.R. 1498 (pp. 177-78). Therefore, as the trial court ruled, Williamson cannot avoid liability for his role in this scheme. Petitioner not only caused the likelihood of confusion, he actually caused confusion. W. Va. Code § 46A-6-104 as defined by § 46A-6102(7)(I), (L)and (M).[14] Linville believed Williamson would provide legal services.

[14] Unfair or deceptive practices are defined to be, in part,

(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

A.R. 1462 (p.33) ("I thought I had all of these lawyers working for me."). The underlying decision should be affirmed.

Assignment 3. Petitioners claim error occurred when the Circuit Court found Morgan Drexen reviewed documents and negotiated settlements rather than the lawyers. It is without question, based upon the evidence presented, that the Circuit Court reached the correct conclusion. As discussed herein, the underlying Defendant and West Virginia attorney, Nicholson, admitted she had nothing to do with the debt settlement program until suit was filed against a consumer. A.R. 695. Petitioner Williamson admitted he did not review documents and did not negotiate settlements. A.R. 1497. Indeed, Williamson maintained that an attorney in his office did negotiate with creditors; however, the evidence revealed that said attorney did not start working for him until March 2011, three and one half years after Williamson started working with Morgan Drexen. A.R. 1497 (p. 177). In his affidavit, Williamson further admitted he did not communicate with West Virginia customers. A.R. 836. Similarly, Morgan Drexen's Chief Operating Officer, Rita Augusta, submitted an affidavit making it clear that Morgan Drexen provides all the meaningful debt settlement services. A.R. 827-828.

Petitioners try to divert attention to testimony about activities undertaken by Nicholson or Williamson after a consumer was sued. However, as noted herein, such representation required a separate contract – distinct from the debt settlement contract. Indeed, the separate Limited Scope Representation agreement required more fees to be paid. A.R. 1466 (p. 80), 1526. The trial court correctly focused on the debt settlement program, the subject of the litigation and the substance of this appeal. Perhaps the most telling evidence was Nicholson's sworn statement: "I don't do

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advertisement of any goods or services, whether or not any person has in fact been misled, deceived or damaged thereby;

W. Va. Code § 46A-6-102(7)(I), (L) and (M).

any debt settlement." A.R. 692-697. The trial court's findings are not clearly erroneous and the decision should be affirmed.

Assignment 4. In this assignment, Petitioners allege that the Circuit Court found underlying Defendant Nicholson worked for Morgan Drexen and that such finding was erroneous. Initially, such a finding was not made by the trial court. Nevertheless, the Circuit Court would have been correct to make such a finding. Nicholson testified she first learned about Morgan Drexen by responding to an ad she saw on Craig's List on the Internet. A.R. 1473 (pp. 76-77). When she did contract with Morgan Drexen to be an "enrollment lawyer," she signed a contract with a "Poison Pill" provision that required Nicholson to pay Morgan Drexen $1,100 for every client she took from Morgan Drexen. A.R. 1561. The trial court easily could have found that Nicholson was hired by Morgan Drexen based upon the evidence presented. It simply did not.

Assignment 5. Petitioners maintain that the Circuit Court erred when it found Morgan Drexen engaged in telemarketing. The evidence supporting this finding was substantial, however, and the trial court's decision should be affirmed.

Unchallenged by Petitioners, consumer Linville testified that she received automated telephone calls from Morgan Drexen, testimony the trial court found credible. *Compare*, A.R. 4 (¶2) with A.R. 21 (¶26). Another consumer, Martin, testified she saw a Morgan Drexen ad on television and called the toll free number to talk to a Morgan Drexen employee. A.R. 1483 (118). Again, this testimony was not challenged. However, the trial court did note the inconsistencies in the CFO's testimony on behalf of Morgan Drexen. A.R.19-21. Walker admitted that Morgan Drexen purchased leads from telemarketers. A.R. 21. The CFO also admitted that Morgan Drexen aired "generic ads" on television offering debt settlement services which encouraged

consumers to call Morgan Drexen's toll-free telephone numbers. A.R. 1511, 243-252. In light of the foregoing, Petitioners have left no "clear and definite conviction" that a mistake has been made as is necessary to surpass the standard of review.[15] *Public Citizen, Inc. v. First Nat'l Bank in Fairmont*, 198 W.Va. 329, 334, 480 S.E.2d 538, 543 (1996) (quotation omitted).

Assignment 6. Petitioners take the position that the trial court erred when it found attorneys Williamson and Nicholson knew Morgan Drexen was running ads on television in West Virginia. The evidence amply supported the Circuit Court's finding and is contrary to Petitioners' argument. The record reveals that the attorneys knew of the ads and, moreover, knew the ads did not identify them as responsible attorneys. A.R. 1499 (p. 183) (Williamson had "some understanding" of the advertising), A.R. 1480 (p. 107) (Q: Were you aware that the television ads that were being aired here in West Virginia did not list you as the responsible counsel? A: I suppose I was aware of that, because if it had listed me, someone would have called me to tell me they saw it.").[16] The decision of the trial court should be affirmed.

Assignment 7. Petitioners maintain that the trial court erroneously concluded that Morgan Drexen was doing business in West Virginia without a business license and failed to disclose that fact to consumers. Again, however, the factual and legal support for the trial court's findings and conclusions is substantial such that Petitioners cannot overcome the deferential standard of review.

The Circuit Court found that Morgan Drexen was perpetrating a "ruse" and attempting to hide behind the lawyers to conduct its debt settlement business. A.R. 37 (¶71), A.R. 44(¶ 82). Morgan Drexen admitted in its Answer that it was not registered to do business in West Virginia.

[15]Petitioners' argument is that the debt settlement program was attorney Williamson's rather than Morgan Drexen's. Even Petitioners concede that some of the television ads were generic, with no mention of specific attorneys. Pet. Brief p. 20. The trial court's findings are appropriate and should be affirmed.

[16] Morgan Drexen's CFO admitted generic television ads that did not identify specific attorneys were aired in West Virginia that promoted the debt settlement business. A.R. 1511 (pp. 228-29).

A.R. 379. Despite Morgan Drexen's blatant omission, the record reveals that Morgan Drexen advertised for customers in West Virginia and provided some debt settlement services to at least 245 West Virginia consumers. Petitioner reached into the West Virginia bank accounts of West Virginia consumers to collect its fees. As a matter of law, Morgan Drexen should have been registered to do business in West Virginia, but it failed to do so. W. Va. Code § 11-12-3 and § 46A-6-104; *See also*, *Cavalry SPV I, LLC v. State ex rel. Morrisey* , 232 W. Va. 325, 341, 752 S.E.2d 356, 372 (2013) (out-of-state business collecting debts in West Virginia was properly enjoined by trial court from collecting any debts acquired prior to becoming licensed in West Virginia.). Moreover, failing to disclose to consumers it was not licensed to do business in West Virginia is an unfair or deceptive act or practice in violation of the WVCCPA. W. Va. Code § 46A-6-104 as defined by § 46A-6-102(7)(B), (C), (L) and (M).[17] The omission also allows Morgan Drexen to gain an unfair advantage over competitors that comply with the law. The purpose of the WVCCPA, in part, is to "protect the public and foster fair and honest competition." W. Va. Code § 46A-6-101(1). The trial court's ruling is well-grounded factually and legally and should not be disturbed.

Assignment 8. According to Petitioners, the trial court erred when it concluded Morgan Drexen failed to clearly and conspicuously disclose that its fees must be paid in their entirety before debt relief services would begin. The trial court's determination is clearly supported by the evidence.

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[17] Unfair or deceptive practices are defined to be, in part,

> (B) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or <u>certification</u> of goods or services;
>
> (C) Causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with or <u>certification</u> by another;

W. Va. Code § 46A-6-102(7)(B) and (C) (emphasis added).

Morgan Drexen never disclosed that debt settlement services would not commence until after its fees were paid. Morgan Drexen claims to send letters to creditors shortly after a consumer enrolls, advising them of Williamson's representation; however, the record demonstrates that the letters that Morgan Drexen purportedly sent were ineffective since creditors continued to contact consumers Linville and Martin and filed suit against Linville. A.R. 1461, 1487. With regard to the trial court's specific findings that Morgan Drexen failed to disclose that debt settlement services would not commence until after all fees are paid, even a cursory review of the documentary evidence supports the decision. A.R. 31-31 (¶ 53-56). W. Va. Code § 46A-6-104 as defined by § 46A-6-102(7)(I) and (L). As both testimonial and documentary evidence supports the trial court's findings and conclusions, said determinations should be affirmed.

Assignment 9. Petitioners allege error with regard to the Circuit Court's conclusion that Morgan Drexen was providing debt pooling services. Again, however, the trial court made no mistake in concluding that Morgan Drexen's debt settlement program was a debt pooling and it charged more fees than permitted by law.

West Virginia's debt pooling statute provides in relevant 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. It shall be unlawful for any person to solicit in any manner a debt pooling. 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. . .

W. Va. Code § 61-10-23. (Emphasis added). The trial court properly concluded that Morgan Drexen was engaged in debt pooling under the clear meaning of the statute. The record reveals

that Morgan Drexen provided advice and services to West Virginia consumers in the establishment and operation of a plan to resolve their debts. *See*, A.R. 940, 1516-17, 1624. It is undisputed that the consumers deposited their money with Morgan Drexen for the purpose of distributing their funds among their creditors. *See generally*, A.R. 1628-1633. W. Va. Code § 61-10-23. It is further undisputed that Morgan Drexen created a plan that will settle consumers' debts with creditors and then paid creditors from consumer funds when settlements were reached. Brenda Martin's plan, for example, was to pay Morgan Drexen $360.00 a month for about 42 months, with an expected savings of $6,174.00 over what she owed. A.R. 1624.[18] As this Court has repeatedly instructed, "'[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.'" *State ex rel. Miller v. Stone,* 216 W.Va. 379, 383, 607 S.E.2d 485, 489 (2004) (*quoting* Syl. pt. 5, *State v. General Daniel Morgan Post No. 548, V.F. W.*, 144 W.Va. 137, 107 S.E.2d 353 (1959)).

Moreover, Morgan Drexen was engaged in unfair competition and unfair or deceptive acts or practices in violation of the WVCCPA when it charged and collected fees from consumers for services in excess of those allowed by law. W. Va. Code § 46A-6-104. There was no dispute that Morgan Drexen charged more than 2% of the money deposited with Morgan Drexen. A.R. 1503 (p.199) (admitting 6% of the total amount of debt or $900, whichever was greater). Petitioners did not dispute the trial court's calculations finding Morgan Drexen charged fees equal to or greater than 59% of the total payments to be made under Linville's and Martin's debt settlement plans.

[18] Morgan Drexen proposed several plans before Ms. Linville agreed on one. A.R. 1514, 1517.

In this regard, as a matter of law, violating a statute designed to protect the public interest is a violation of the West Virginia Consumer Credit and Protection Act. The Consumer Credit and Protection Act is designed to protect the public from acts such as those undertaken by the Petitioners. "[T]he purpose of this article is . . . to [regulate] unfair competition and unfair, deceptive and fraudulent acts or practices in order to protect the public and foster fair and honest competition." W. Va. Code § 46A-6-101(1). Many jurisdictions have held that a violation of a statute designed to protect the public also is a violation of the state's consumer protection statutes. *Cheshire Mortgage Services, Inc. v. Montes*, 223 Conn. 80, 106, 612 A.2d 1130, 1144 (1992) (violation of state statute and Truth in Lending Act constituted per se UDAP violation because, although no intent to deceive, such violations "offend[ed] public policy to the extent that it constitute[d] a breach of established concepts of fairness"); *Lemelledo v. Beneficial Management Corp. of America*, 289 N.J.Super 489, 674 A.2d 582 (1996) (violation of a statute or regulation is evidence of fraudulent and unconscionable conduct prohibited by the Consumer Fraud Act); *Winston Realty Co. v. G.H.G. Inc.*, 314 N.C. 90, 95, 331 S.E. 2d 677, 681 (1985) (violation of act "designed to protect the consuming public" constituted, "as a matter of law," an unfair or deceptive trade practice in violation of North Carolina's UDAP statute). *In re Scrimpsher*, 17 B.R. 999, 1015 (Bankr. N.D.N.Y. 1982) (violation of federal Fair Debt Collection Practices Act is a violation of state UDAP laws).

Petitioners attempt to distract and confuse the Court with hypotheticals, foreign law and model legislation enacted by other states. It has no bearing on the issues before this Court. The Circuit Court applied the law as written in accordance with the instructions of this Court. The evidence supported the court's factual findings. The decision of the trial court should be left undisturbed.

Assignment 10. Echoing Petitioners' attempt to shield itself from liability for its debt settlement practices by contracting with attorneys, Petitioners also try to rely upon the same scheme to avoid debt pooling liability. The Circuit Court properly declined application of the attorney exemption to the State's Debt Pooling statute. Specifically, as with other findings, the trial court found the attorney exemption in the debt pooling statute to be irrelevant since it found Morgan Drexen operated the program while the lawyers provided no meaningful services. A.R. 42 (¶ 82).

Regardless, as a matter of law, Petitioner Williamson would not benefit from the lawyer exemption as such an exemption traditionally requires state licensure. *Lexington Law Firm v. South Carolina Dep't of Cons. Affairs,* 382 S.C. 580, 677 S.E.2d 591 (S.C. 2009) (lawyer exemption only applies to South Carolina-licensed lawyers, not out of state lawyers). Not only was Williamson not admitted to practice in West Virginia, underlying Defendant Nicholson's West Virginia license cannot be relied upon on Williamson's behalf. There was no evidence that Nicholson was local counsel for Williamson. Both attorneys admit they never met, communicated or had a written contract prior to December 2010. A.R. 620, 1475 (p.87). The clearinghouse agreement does not legitimize their lack of a relationship. A.R. 854. Williamson never sought to be admitted *pro hac vice* in West Virginia in accordance with Rule 8 of the West Virginia Rules of Admission, nor did he comply with West Virginia State Bar Advisory Opinion 10-001 (requiring foreign lawyers to be admitted *pro hac vice* through a miscellaneous proceeding even if no court action was pending). A.R. 621 (admitting ¶ 11 of the Complaint). The trial court made no clearly erroneous finding and the decision should be affirmed.

Assignments 11 and 12. Using a two-step process, Petitioners allege the Circuit Court erred in finding Morgan Drexen is a credit services organization under the WVCCPA. As with the other alleged errors, the Circuit Court's finding is amply supported and not clearly erroneous.[19]

The Credit Services Organization statutes provide:

> (a) A credit services organization is a person who, with respect to the extension of credit by others and in return for the payment of money or other valuable consideration, 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
> (3) Providing advice or assistance to a buyer with regard to subdivision (1) or (2) of this subsection.

W. Va. Code § 46A-6C-2. The evidence presented to the trial court demonstrated that Morgan Drexen gives advice about consumers' credit ratings or scores thus satisfying the clear and unambiguous statutory definition. Brenda Martin testified she was told by a Morgan Drexen employee that her credit score would initially decline, and then improve after being in the program for about a year. A.R. 1483. This activity falls within the definition of "credit services." W. Va. Code §§ 46A-6C-2(a)(2), -(3).[20]

The trial court also found persuasive the script in Morgan Drexen's Legal Intake Specialist training manual which instructs employees to routinely advise consumers about their credit scores. A.R. 54-56 (referring to A.R. 1539). The record reflects that although consumers were advised their credit scores would be negatively affected, Morgan Drexen gave consumers the false hope their credit would improve if they stayed in the program. A.R. 1539, 1543. Martin

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[19] The court found that the State did not present any evidence that Morgan Drexen was not registered to be a credit services organization. Under the statute, Morgan Drexen is required to register with the W. Va. Secretary of State. W. Va. Code § 46A-6C-5(a). The State did submit a Certificate of Fact from the Secretary of State stating that Morgan Drexen was not registered. A.R. 233. The trial court may have overlooked the document.

[20] Credit services includes "Providing advice or assistance to a buyer with regard to [improving a consumer's credit score]." W. Va. Code §§ 46A-6C-2(a)(2), -(3).

was misled by Morgan Drexen in this way. A.R. 1483. Consumers were never told their credit scores would suffer for at least 7 years once they stopped paying their creditors. *See* GAO Report at pp. 9-10, 14 (bad debt remains on credit history for seven years).

Petitioners erroneously maintain on appeal that they satisfy qualifying language permitting the misleading representations. The WVCCPA prohibits representations regarding "'eras[ing] bad credit' or words to that effect unless the representation clearly discloses that this can be done only if the credit history is inaccurate or obsolete." W. Va. Code § 46A-6C-3(3). Rather than try to demonstrate the existence of this qualification, Petitioners merely deny that they provide credit services. Additionally, Petitioners' federal authority does not address the issue and must be disregarded.[21] Based upon the evidence before it, the evidence in the record before this Court, the Circuit Court found that consumers were misled to believe their credit scores would improve if they stayed in the program. A.R. 54 (¶113). *See* A.R. 1539, 1543. The decision is proper and should be upheld.

Assignment 13. Petitioners wrongly claim the Circuit Court erred when it found Morgan Drexen was a telemarketer.[22] The evidence supporting the trial court's decision is substantial, therefore, the decision should be affirmed.

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[21] Petitioner's cite *Pavlov v. Debt Resolvers USA, Inc.*, 28 Misc.3d 1061, 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) for support that Morgan Drexen does not provide credit services. After a trial, the *Pavlov* court found no evidence Debt Resolvers gave advice about credit repair. *Id.* at 805-806. In *Plattner*, the court found the evidence contradictory on a summary judgment motion. *Id.* at 975.

[22] The court found that the State did not present any evidence that Morgan Drexen was not registered to be a telemarketer. Under the statute, Morgan Drexen is required to register with the W.Va. Department of Tax and Revenue. W. Va. Code § 46A-6F-301. This is the same agency that registers companies to do business in the state. W. Va. Code § 11-12-3. The State did submit a certificate of confirmation from the Tax and Revenue department stating Morgan Drexen was not registered to do business in West Virginia. A.R. 239. The court may have overlooked the document. Morgan Drexen also admitted it was not registered to do business in West Virginia.

"Telemarketing solicitations" as defined by the WVCCPA, W. Va. Code § 46A-6F-112(a) are:

> any communication between a telemarketer and a prospective purchaser for the purpose of selling or attempting to sell the purchaser any consumer goods or services, if it is intended by the telemarketer that an agreement to purchase the consumer goods or services will be made after any of the following events occur:
> (1) The telemarketer makes an unsolicited telephone call to a consumer attempting to sell consumer goods or services . . . or
> (2) 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 time during the course of one or more subsequent telephone communications with the consumer.

Thus, the West Virginia's Telemarketing Act applies to both outbound calls made by the soliciting company and to inbound calls when consumers are responding to advertisements urging consumers to telephone the company. A.R. 58-59. As noted previously herein, "'[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.'" *State ex rel. Miller v. Stone,* 216 W.Va. 379, 383, 607 S.E.2d 485, 489 (2004) (quoting Syl. pt. 5, *State v. General Daniel Morgan Post No. 548, V.F. W.*, 144 W.Va. 137, 107 S.E.2d 353 (1959)).

Ms. Linville testified that Morgan Drexen telephoned her repeatedly in an attempt to sell her debt settlement services. A.R. 1456 (p. 10-11). Linville finally relented and enrolled in the program. *Id.* In this regard, Morgan Drexen's CFO admitted that at one time Morgan Drexen purchased leads generated by third party telemarketers. A.R. 1508 (pp. 217-218).

A "'telemarketer' means any person who initiates or receives telephone calls to or from a consumer in this state for the purposes of making a telemarketing solicitation. . ." W. Va. Code

§ 46A-6F-113(a). "A telemarketer may initiate or receive a communication that constitutes a telemarketing solicitation on his own behalf, through a salesperson, or through an automated dialing machine." W. Va. Code § 46A-6F-113(b). The foregoing evidence demonstrates that Linville was the recipient of an outbound telemarketing sales call by Morgan Drexen, or a third-party salesperson or through an automated dialing machine. A.R. 1456 (p. 10) ("And, and each time I listened to a little bit more. And then they asked me if I wanted to speak to a live person, to press '1,' and I did.").

Morgan Drexen also received in-bound calls from consumers who saw its television ads and called the advertised toll-free telephone number. Brenda Martin saw a Morgan Drexen television advertisement and responded to it by telephoning Morgan Drexen and enrolling in the debt settlement program. A.R. 1483 (pp. 117-118).

Simply stated, Morgan Drexen engages in telemarketing activities and accepts payment from consumers for goods or services offered for sale, prior to the completion of all credit services offered by Morgan Drexen, in violation of W. Va. Code § 46A-6F-501(2) and (8). The Telemarketing Act provides in pertinent part:

> It is an unfair or deceptive act or practice and a violation of this article for any seller or telemarketer to engage in the following conduct: . . . (2) To request or receive payment of any fee or consideration for goods or services represented to remove derogatory information from, or improve, a person's credit history, credit record, or credit rating until: . . . (B) The telemarketer has provided the person with documentation in the form of a consumer report from a consumer reporting agency demonstrating that the promised results have been achieved, such report having been issued more than six months after the results were achieved;. . .

W. Va. Code § 46A-6F-501(2). Because Petitioners advise consumers to stop paying their credit card debts in an attempt to settle their debts, the consumers' credit ratings will suffer for years to come. *See*, GAO Report, pp. 9-10, 14. Notably, Petitioners never attempted to show the trial

court that it had improved a consumer's credit history.[23] As this court is aware, a violation of the Telemarketing Act also is a violation of W. Va. Code § 46A-6-104. W. Va. Code § 46A-6F-501(8). The underlying decision was not clearly erroneous.

Assignment 14. Petitioners argue the Circuit Court erred when it found Morgan Drexen's telemarketing efforts resulted in it obtaining 245 customers. Again, this determination was not erroneous. Petitioners made no effort to show they obtained customers in any other manner than through telemarketing. All the testimony the trial court heard involved customer acquisition by telemarketing – either outbound or inbound calls. Morgan Drexen's CFO's testimony also confirmed that customers come to Morgan Drexen by telephone. A.R. 1508 (p. 219). The evidence supporting the trial court's decision is substantial and leaves no firm conviction that a mistake was made.

Assignment 15. It is inappropriately alleged that the Circuit Court erred when it concluded Morgan Drexen's documents were not clear and coherent. Morgan Drexen's documents unquestionably did not "clarify who is responsible for creating and sending the documents or which entity provides the services in the documents," and thus the documents were not "written in a clear and coherent manner and not easily understood by consumers." A.R. 64 (¶ 132). This is yet another violation of the WVCCPA. W. Va. Code § 46A-6-104 as defined by § 46A-6-102(7)(L). W. Va. Code § 46A-6-109.

Petitioners offer no legal authority for their contention, instead challenging the trial court's factual findings. Petitioners cannot overcome the substantial evidence and the deferential standard of review. For example, Linville testified that she had read over the debt settlement

[23] Petitioners raise the argument under this assignment of error that the WVCCPA does not regulate the practice of law. The Circuit Court made it clear it was not regulating the practice of law. As the trial court found the lawyers, Williamson and Nicholson, provided no meaningful services, there simply was no practice of law to regulate. A.R. 44 (¶ 82).

contract but did not understand what various provisions meant. A.R. 1459-1460. Linville did testify that she had a general knowledge of what Morgan Drexen was supposed to do, but not "specifics." A.R. 1460 (p. 24). The consumer did not know who Williamson was. Ms. Linville "thought it was Morgan Drexen's attorneys." A.R. 1460. The witness did not choose Williamson, "I thought it was just a group – like these people here, a group that worked with Morgan Drexen." A.R. 1460 (p. 24).

Ms. Martin also did not understand the debt settlement contract "100 percent." A.R. 1484 (p. 123). Like Linville, Martin did not know who Williamson was. Ms. Martin thought Williamson "was just a law firm for Morgan Drexen." A.R. 1484 (p. 123). Martin did not choose Williamson to be her lawyer. The testimony was conclusive; the documents given to consumers were not easily understood.

Assignment 16. Petitioners assert the trial court erred when it referred to a definitional section of the WVCCPA as the basis for finding Morgan Drexen failed to "clearly and conspicuously" disclose to consumers that all fees must be paid before debt relief services would start. As more fully set forth herein, Petitioners' assertion is not well-taken and the trial court's decision should not be disturbed.

Morgan Drexen fails to clearly and conspicuously disclose that no debt relief services will begin until its fees are paid. A.R. 31-32. Although the court found Morgan Drexen does disclose that creditors will not be paid until all of its fees were paid, this is different from failing to disclose no debt settlement services will begin until all the fees are paid. A.R. 32. The distinction is significant as consumers believe they should start experiencing relief from their creditors immediately after enrolling in Morgan Drexen's program. Both Linville and Martin testified that collection calls continued after they enrolled. A.R. 1461, 1487. Indeed, a suit was

filed against Linville. A.R. 1461. The only service Morgan Drexen claims to have started before all fees were paid involved the mailing of notice letters to creditors. Pet. Brief, p. 44. Whether or not that service was provided is irrelevant to the necessary disclosures, in addition to being ineffective given that calls continued and suits were initiated against consumers.

As a matter of law, the failure to disclose that no meaningful services would begin until after all Morgan Drexen's fees were paid is an unfair or deceptive act or practice in violation of the WVCCPA. W. Va. Code § 46A-6-104 as defined by W. Va. Code § 46A-6-102(7)(I) and (L). Morgan Drexen causes the likelihood of confusion by failing to sell its debt settlement services as advertised. Petitioners' arguments in opposition are as unpersuasive with regard to this assignment as they are elsewhere.

Petitioners also complain the Circuit Court referenced a definition for "conspicuous" in its conclusions of law as the basis for a cause of action. Although there is no separate cause of action based on the definition of "conspicuous" in the WVCCPA, W. Va. Code § 46A-1-101(11), failing to conspicuously disclose significant and relevant information is an unfair or deceptive act or practice. W. Va. Code § 46A-6-104. The trial court addresses this legal issue in its Final Order, clearly identifying the violations. A.R. 31-32 (¶ 53) (violations of W. Va. Code § 46A-6-104 as defined by W. Va. Code § 46A-6-102(7)(I) and (L)). Thus, Petitioners' argument lacks merit and is insufficient to disturb the trial court's ruling.

Assignment 17. As their final assignment of error, Petitioners allege that the trial court erred when it concluded Williamson engaged in unfair or deceptive acts or practices in violation of the WVCCPA. W. Va. Code § 46A-6-104. Again, however, the evidence supporting the trial court's decision is substantial.

Although the Attorney General does not regulate the practice of law, he does enforce the WVCCPA. W. Va. Code § 46A-1-101 *et seq.* Lawyers are not exempt from complying with the WVCCPA just as they are not exempt from complying with traffic laws, business registration laws, and criminal laws. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 793 (1975) ("In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act [antitrust laws] we intend no diminution of the authority of the State to regulate its professions.*");* *Karasavas v. Gargano*, 2014 WL 861029 (Mass. Super. 2014) (lawyer violated Mass. unfair or deceptive practices law by charging an excess fee, and threatening to not represent client unless the client paid more money). *Guenard v. Burke*, 387 Mass. 802, 809, 443 N.E.2d 892 (1982) (an attorney's reliance on a fee agreement that violated ethical rules "was, as a matter of law, an unfair or deceptive act or practice"); *see also Doucette v. Kwait*, 392 Mass. 915, 467 N.E.2d 1374 (1984) (affirming that a lawyer violated Massachusetts' unfair or deceptive practices act by collecting an additional fee from a client beyond that permitted by their contingent fee agreement).[24]

Notably, disciplinary action sometimes proceeds at the same time as Attorney General enforcement of consumer protection laws. For example, in Florida, the law firm of Hess Kennedy and its main partner, Laura Hess, were sued by the Florida Attorney General for consumer protection violations including misleading consumers into believing Hess Kennedy was practicing law while purporting to provide debt settlement services. *Office of the Attorney General v. Laura L. Hess et al.*, Case No. 08-007686(08) (Cir. Ct. 17th Jud. Cir., Broward

[24]To avoid being sued under North Carolina's consumer protection laws, Morgan Drexen, Howard|Nassiri and Eric Rosen entered into an Assurance of Discontinuance with the North Carolina Attorney General who alleged similar consumer protection violations as in the instant case. A.R. 954. Morgan Drexen and Howard|Nassiri paid money to former customers and wound down their business rather than complying with North Carolina's consumer protection laws. *Id.*

County, Florida 2008). A.R. 962-1010. In a parallel proceeding, Laura Hess was eventually disbarred by the Florida Supreme Court for five years. *Id.*

The Alabama Attorney General also brought an action against a lawyer operating a debt settlement business, misleading consumers into believing he was providing legal services. *State of Alabama v. Allegro Law, LLC et al.*, CV-09-125-F (Cir. Ct. Autauga County, Ala. 2009). A.R. 1011-1040. The lawyer, K. Anderson Nelms, was suspended from practice in a parallel proceeding. *Id.* Both Hess Kennedy and Allegro Law were placed under a receivership, wound down and closed.

Similarly, Legal Helpers Debt Resolution, a/k/a Macey, Aleman, Hyslip & Searns, a law firm headquartered in Chicago, was sued by the Illinois Attorney General for similar conduct as the Petitioners. *People of the State of Illinois v. Legal Helpers Debt Resolution, LLC*, No. 2011 CH 00286 (Cir. Ct. 7th Jud. Cir., Sangamon County, Ill. 2010). A.R. 1041-1090. In a parallel proceeding, the Illinois Department of Financial & Professional Regulation, Division of Financial Institutions, issued a Cease and Desist Order, preventing the law firm from engaging in any debt settlement. *In the Matter of Legal Helpers Debt Resolution, LLC a/k/a Macey Aleman Hyslip & Searns,* No. 10CC311, State of Illinois, Dep't of Fin. & Prof. Reg. Div. of Fin. Institutions (Aug. 8, 2011). A.R. 1041-1090. In yet a third proceeding, Illinois's lawyer disciplinary commission has recommended Aleman and Macey be suspended. *In the Matter of Macey & In the Matter of Aleman*, Case Nos. 6216468, 6238869 (Hearing Bd., Ill. Att'y Reg. & Disciplinary Comm'n Dec. 2014), http://www.iardc.org/rd_database/rulesdecisions.html (search Macey or Aleman).

In the instant matter, the trial court properly made findings and conclusions against Petitioner Williamson following a bench trial on the State's action. Although Petitioner

Williamson did not provide any meaningful services to West Virginia consumers, he did allow his name to be used on the debt settlement contract. A.R. 1518. A contract is an advertisement under the WVCCPA.

> "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.

W. Va. Code § 46A-6-102(a). A contract bearing Williamson's name can be misleading. In fact, Linville was misled. A.R. 1462 (p.33) ("I thought I had all of these lawyers working for me."). Williamson's name is used on numerous other documents as well. At one point, documents were sent to Linville stating he would be her local lawyer after she was sued. A.R. 1462 (p. 34-35), A.R. 1525-26.

As stated previously herein, Williamson takes the position that a mistake was made when a letter and Limited Scope Representation contract were mailed to Linville stating he would be her local lawyer. A.R. 1525-26. However, the evidence demonstrates that Morgan Drexen did not have any West Virginia lawyer available to serve as "local counsel" when Linville was sued in December 2008. Indeed, underlying Defendant Nicholson did not start until August 2009. A.R. 1472. Nicholson's predecessor likewise did not start until days after Linville was sued. A.R. 130-131. The evidence was conclusive; the correspondence was not in error.

Petitioners maintain that the trial court ignored Williamson's testimony that he helped design the debt settlement program and documents were created by him, in part. This Court has consistently maintained that the trier of fact, in this instance the trial court, is uniquely positioned

to assess the credibility of witnesses. *See, e.g., Webb v. West Virginia Bd of Medicine*, 212 W. Va. 149, 569 S.E.2d 225 (2002). Morgan Drexen's CFO David Walker admitted that when the company started the program, it contracted directly with consumers. A.R. 1510 (p. 226). Williamson himself, though seemingly evasive, eventually admitted that Morgan Drexen was doing debt settlement before he got involved. A.R. 1497 (pp. 172-173) (he was "vaguely aware of it"). Due regard must be afforded the Circuit Court as the court was uniquely positioned to determine that Williamson's testimony was not credible, particularly in light of the Bradley Contract, from June 2007, A.R. 942 and her plan letter, A.R. 940.[25]

In short, Williamson misled consumers to believe he would provide debt settlement services, yet admittedly he provided no services. A.R. 1497. The trial court appropriately found Williamson's conduct caused the likelihood of confusion and that he failed to disclose he would provide no services, all in violation of the WVCCPA. W. Va. Code § 46A-6-104 as defined by § 46A-6-102(7)(L) and (M). Petitioners have no support for their arguments. They cannot demonstrate that the trial court's findings were clearly erroneous.

Lawyers get no special pass from the WVCCPA. W. Va. Code § 46A-1-101 *et seq.* Their unfair and deceptive business practices are actionable by the Attorney General. This Court and the Office of Disciplinary Counsel deal with unethical conduct. The decision of the trial court must be left undisturbed.

[25] Bradley's sworn affidavit also describes Morgan Drexen's debt settlement program as it was in 2007 before Williamson's involvement. A.R. 931-938.

CONCLUSION

In light of all the foregoing, this Court must affirm the July 14, 2014 Final Order of the Circuit Court. Petitioners have failed to show the Circuit Court's factual findings were "clearly erroneous." They have failed to show any misapplication of the law. They have not met their burden and the underlying decision should be upheld.

Respectfully submitted,

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