No. 24447 -- State of West Virginia by and through Darrell V. McGraw, Jr., Attorney General v. Imperial Marketing, et al. and Suarez Corporation Industries

Starcher, J., concurring:

When the Attorney General's Office filed this lawsuit in September 1994, it compiled a list of 17,563 West Virginia consumers who were swayed by Suarez Corporation Industries' ("Suarez") fraudulent solicitations to spend $975,389.02 on trinkets. Now, 4 years later, the Attorney General is still embroiled in tedious litigation to compel Suarez to refund that money to those consumers.

The majority opinion cleanly decides the legal issues raised by Suarez in its continuing attempts to avoid responsibility for the misleading solicitations. I concur with the majority's reasoning, and write to expand upon the extensive factual and legal reasons that support the Court's opinion.

I.
A Permanent Injunction and Restitution were Warranted

The main issue raised by Suarez on appeal is that the circuit court improperly granted summary judgment, and basically improperly stopped Suarez from using misleading solicitations and required Suarez to repay West Virginia consumers. Suarez argues two grounds: first, it should have been allowed to conduct discovery far in excess of that already conducted (the record in this case currently fills two banker's boxes); and second, it should have been allowed to present testimony through witnesses who would say they were not mislead by any Suarez solicitations, and testimony through

loyal Suarez employees who would say no one intended to mislead anyone. Suarez basically argues that if a consumer who received a Suarez solicitation was misled, it was the consumer's fault.

These arguments carry no weight. First, no additional discovery was needed in this case. Each side was given ample opportunity to examine the evidence held by their opponent. Testimony was taken from numerous witnesses, and piles of documents were exchanged and examined. Suarez has not directed us to any undiscovered area where evidence exists suggesting that each of the 17,563 West Virginia consumers did not receive one or more of the dozens of solicitations in the record. Further, Suarez has failed to direct us to any unexamined evidence suggesting that the misleading nature of the dozens of different solicitations in the record was the result of some repeatedly-occurring printing error or other factor.[1] The Attorney

[1]The record suggests that Suarez mailed solicitations or letters under such names as National Publicity Sweepstakes; National Publicity Services; Board of Compensation and Property; Case, Waterman & Associates; Lindenwold Fine Jewelers; Lady Lindenwold; Devoorst (International Purveyors of Fine Diamonds and Gem Stones); Earnst & Alexander Holding Associates; Office of the Treasurer; Payables Desk, Department of Sweepstakes Administration; Redemption Center, Office of Cash Distribution; International Home Shopping; North American Travel Bureau; The Heard Academy; and U.S. Commemorative Fine Art Gallery. Suarez operates other subsidiaries not involved in this case: Unimax Computer Manufacturing; CompuClub Software; Pro Tour Sports Equipment Manufacturing; International TeleCommunications; The Hanford Press; Media Services; Campaign Services; and Associated Brokers Realty.

The Prizes and Gifts Act states that a person may not represent that another person is eligible to win a prize "without clearly and conspicuously disclosing on whose behalf the contest or promotion is conducted. . . ." *W.Va. Code*, 46A-6D-4(a) [1992]. While the names used in the Suarez solicitations may have been registered with the Ohio

General's office made all of its evidence available for Suarez to inspect; accordingly, no additional discovery was necessary.

Second, the Attorney General overwhelmingly proved that Suarez repeatedly used deceptive practices to affect consumers' decisions to buy his products, through the use of the many misleading solicitations mailed to West Virginia consumers. Summary judgment was proper because the Attorney General conclusively proved his case. Suarez never introduced evidence to dispute the fact that many of the 17,563 consumers were deceived by one or more of the solicitations. Instead, Suarez's defense was that because *some* consumers were not deceived and merely wanted to buy its products, the company should be allowed to put on evidence extrinsic to the printed solicitations through those satisfied consumers. Those consumers were expected to testify that they were able to read through the fine print in the solicitations, and Suarez contends it would also offer the testimony of employees who would say there was no intent by Suarez to mislead anyone. Basically, Suarez's argument appears to be that the trial court should have to sort through the 17,563 consumers one at a time to determine who was deceived and who was not.

As demonstrated in the majority opinion (as well as this Court's opinion in *State by and through McGraw v. Imperial Marketing*, 196 W.Va. 346, 472 S.E.2d 792 (1996)), the Court closely examined three of Suarez's solicitations to demonstrate how

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Secretary of State as fictitious names or trade names, that is *not* a clear and conspicuous disclosure to a West Virginia consumer that Suarez was behind the solicitations.

the solicitations violated the Consumer Protection Act and Prizes and Gifts Act. I write to make clear that the permanent injunction against Suarez and the award of relief to West Virginia consumers is warranted, not only because of these three solicitations, but also because of the dozens of other solicitations entered into the record by the Attorney General. Seventeen Suarez solicitations were attached to one pleading alone.

Simply put, each of these solicitations contains language clearly violating the Consumer Credit and Protection Act and the Prizes and Gifts Act. I was unable to count the number of times the phrases "Official Prize Claim Notice," "Winners Certification Claim Form," or "Cash Prize Release Document" were used. Each solicitation began by telling the consumer that he or she was a winner -- but buried in the fine print, or on another letter in the envelope, was the hint they really weren't a big winner after all. Therefore, many of the solicitations violate *W.Va. Code*, 46A-6D-3 [1992], which prohibits persons from making representations that someone has won a prize unless that prize is awarded to the consumer without obligation and delivered within 10 days of the representation.

Another problem with the solicitations in the record is that, while every solicitation carried the disclaimer "no purchase necessary," every solicitation also carried the suggestion the recipient was more likely to be a winner or would get their prize faster if they first bought some merchandise. *W.Va. Code*, 46A-6D-4(c) [1992] prohibits persons from making representations that as a condition of receiving a prize, the consumer must pay money or purchase, lease or rent goods or services.

Another example is a solicitation that tells the consumer that they have won a "4-Door Chevrolet Caprice, Model Year 1995 if your Vehicle Award Claim is confirmed as a winning claim" -- and attached is a note entitling the consumer to three "Bonus Awards" "worth up to $300."[2] As discussed in the majority opinion, the use of the vague language "worth up to" is a clear violation of the Consumer Credit and Protection Act. *See W.Va. Code*, 46A-6D-4(a)(2)(i) [1992] (written sweepstakes materials must contain "[t]he true retail value of each item or prize").

The record also contains a solicitation from the "tie-breaker supervisor" of the "Payables Desk, Department of Sweepstakes Administration" which tells the recipient that he or she is "tied" with other individuals to win a cash prize -- without telling the reader the odds of winning, that is, how many other people the reader was "tied" with. This solicitation was likely drafted by someone who full-well knew the language was misleading, but thought it could later be argued that it "technically" was within the bounds of every consumer protection statute in the country. On the contrary, because the solicitation is misleading on its face, and because it fails to state the odds the consumer has of winning the sweepstakes, it violates West Virginia's consumer protection laws. *See W.Va. Code*, 46A-6D-4(a)(2)(iii) [1992] (written sweepstakes materials must contain "[t]he odds of receiving each item, gift or prize").

[2]The three awards are: a 3-carat "pear-shaped Faux Diamond" (with a note pointing out that "mined Diamonds usually have imperfections . . . your Faux Diamond is internally perfect."); an electroplated gold ring on which to mount the fake diamond; and 40 "FREE Accent Faux Diamonds" to surround the pear-shaped imitation diamond.

As the majority opinion makes clear, whether Suarez or any other sweepstakes operator violated this State's consumer protection law by mailing a consumer a solicitation primarily depends upon the language of the solicitation itself and not upon extrinsic evidence. If the language of a solicitation is, on its face, misleading, deceptive and, to the eye of a reasonable beholder, calculated to unfairly induce customers to purchase a product, then the solicitation violates the Consumer Credit and Protection Act, *W.Va. Code*, 46A-1-101 to -8-102, and the Prizes and Gifts Act, *W.Va. Code*, 46A-6D-1 to 10. Because the many solicitations in the record are patently deceptive, misleading, and obviously calculated to unfairly induce West Virginia consumers to buy cheap merchandise at inflated prices, the circuit court was correct in granting summary judgment to the Attorney General, awarding injunctive relief against Suarez, and requiring Suarez to pay back every single consumer who lost money as a result of receiving one of Suarez's solicitations.

II.
The Civil Penalty

W.Va. Code, 46A-7-111(2) [1974][3] authorizes the Attorney General to bring a civil action against any person for each and every willful violation by that person of the Consumer Credit and Protection Act. If the circuit court finds the person has "engaged in a course of repeated and willful violations" of the Act, the court can assess a penalty of up to $5,000.00. The meaning of this statute is clear: for every individual violation of the Act, the Attorney General can bring a lawsuit and collect a civil penalty up to $5,000.00.

[3]*W.Va. Code*, 46A-7-111 (2) [1974] states:

> The attorney general may bring a civil action against a creditor or other person to recover a civil penalty for willfully violating this chapter, and if the court finds that the defendant has engaged in a course of repeated and willful violations of this chapter, it may assess a civil penalty of no more than five thousand dollars. No civil penalty pursuant to this subsection may be imposed for violations of this chapter occurring more than four years before the action is brought.

In this case, the Attorney General compiled a list of at least 17,563 violations[4] of the Act by Suarez. Rather than file 17,563 individual lawsuits, the Attorney General filed one. Applying the plain language of the statute, the court could have required Suarez to pay a civil penalty of up to $87,815,000.00. Suarez therefore "got off light" by only being assessed a $500,000.00 performance-bond penalty, a penalty that is suspended so long as Suarez follows the law in the future.

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[4]The number of individual violations of the Act may actually be higher. The record suggests that Suarez sent several different solicitations to some of the consumers identified by the Attorney General, and some of these consumers responded to those additional solicitations. Hence, 17,722 transactions occurred with 17,563 consumers.

An *amicus* brief filed by the American Association of Retired Persons suggests that it is common for fraudulent telephone and direct-mail marketers to repeatedly send solicitations to past victims, because "dishonest promoters know that consumers who have been tricked once are likely to be tricked again." Federal Trade Commission, *Reloading Scams: Double Trouble for Consumers* (May 1998). The Federal Trade Commission refers to this practice of retargeting consumers who have lost money as "reloading" or "double-scamming:"

> If you've taken the bait and lost money to a telemarketer, expect that the same or another telemarketer will try to hook you again. Consumers who have been victimized often are placed on what is known in the trade as "sucker lists" and then victimized again. . . . These lists, which are created, bought, and sold by some telemarketers, are invaluable because unscrupulous promoters know that consumers who have been tricked once are vulnerable to additional scams. These telemarketers hope that consumers believe that "this time" they will win the "grand prize." Most often, however, these consumers simply lose more money.

Federal Trade Commission, *Telemarketing: Reloading & Double-Scamming Frauds* (March 1994).

The problem with the circuit court's order in this case was not the amount of the penalty, but the lack of explanation as to how the penalty was determined. As we made clear in Syllabus Point 3 of *Fayette Co. National Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232 (1997)[5] a trial court must explain the factual and legal reasoning behind an order granting summary judgment. Because the circuit court failed to explain the basis for the suspended civil penalty against Suarez, we have reversed that portion of the summary judgment order and remanded the case for reconsideration and an explanation of the penalty.

When a trial court issues a summary judgment order imposing a civil penalty under *W.Va. Code*, 46A-7-111(2), the order becomes a public record defining the seriousness of the defendant's offense under the Consumer Credit and Protection Act and the Prizes and Gifts Act. The order must, of course, give the defendant notice of why it is being punished and how the punishment was determined. When a circuit court states specifically how and why a penalty is being imposed, then a defendant such as Suarez can understand how to correct its behavior in the future. More important, by reading the

[5]Syllabus Point 3 of *Fayette County Nat. Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232 (1997) states:

> Although our standard of review for summary judgment remains de novo, a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed.

order other sweepstakes solicitors will fully understand the level of penalties they may face if they imitate such reprehensible conduct in the future.

Suarez's argument before this Court is that *W.Va. Code*, 46A-7-111(2) only authorizes one, total civil penalty of $5,000.00 upon a finding that a sweepstakes solicitor has "engaged in a course of repeated" violations. Therefore, even though Suarez bilked West Virginia consumers out of $975,389.02 through repeated, willful conduct, it argues it should only have to pay one $5,000.00 fine. As the majority opinion suggests, there is a facial appeal to this argument because the statute says a circuit court may impose a "civil penalty of no more than five thousand dollars," and does not clearly say the court can assess a "civil penalty of no more than five thousand dollars *for each violation of this chapter*." The Legislature should act to clarify *W.Va. Code*, 46A-7-111(2) with the addition of the italicized text, so that this insulting argument does not rear its ugly head in the future.[6]

[6]The language of *W.Va. Code*, 46A-7-111(2) clearly assumes that a civil penalty may be imposed for each, individual violation of the Consumer Credit and Protection Act. Other jurisdictions considering this question have consistently held that a civil penalty may be imposed for each individual violation of a consumer protection statute. *See, e.g., State ex rel. Nixon v. Consumer Automotive Resources, Inc.*, 882 S.W.2d 717 (Mo.App. 1994) (consumer protection statute authorized civil penalty up to $1,000.00 per violation; court upheld $273,600.00 penalty for unlawful pyramid scheme involving 1,368 victims, holding penalties amounted to $200.00 per person); *State ex rel. Stenberg v. American Midlands, Inc.*, 509 N.W.2d 633 (Neb. 1994) (statute authorized $2,000.00 civil penalty per violation; court upheld penalty of $788,000.00 where 788 persons paid money to an advance fee loan scam); *People v. Dollar Rent-A-Car Systems, Inc.*, 211 Cal.App.3d 119 (1989) (each of the more than 500,000 misleading or deceptive car rental contracts could justify a separate penalty; therefore, the $100,000.00 penalty was "abundantly justified"); *State ex rel. Corbin v. United Energy Corp. of America*, 725 P.2d

752 (Ariz. 1986) (the state Consumer Fraud Act allowed court to impose a civil penalty of $55,000.00, or the statutory maximum of $5,000.00 for each of 11 consumers who were victims of fraud); *People v. Toomey*, 157 Cal.App.3d 1 (1984) (civil penalties for fraudulent telephone solicitations should be imposed "per victim;" because the defendant committed at least 150,000 violations of two statutes, court was justified in imposing $150,000.00 in civil penalties); *United States v. Readers' Digest Association, Inc.*, 662 F.2d 955 (3d Cir. 1981) (each individual mailing of a simulated check violated the Federal Trade Commission Act; while a civil penalty could be assessed of "not more than $10,000.00 for each violation," court upheld the imposition of $1,750,000.00 penalty for one bulk mailing of simulated checks to millions of consumers); *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 553 P.2d 423, 436 (Wash. 1976) (court held that under Washington Consumer Protection Act, a civil penalty could be assessed for every violation of the Act, and that there could be multiple violations for each victim. The court stated that "[e]ach cause of action required respondent to prove divergent facts to establish a violation. Therefore, we hold that each cause of action is a separate violation of the consumer protection act."); *People v. Bestline Products, Inc.* 61 Cal.App.3d 879 (1976) (court upheld a $1,000,000.00 civil penalty, or approximately $330.00 per violation in a pyramid promotional scheme where 3,000 consumers lost $9,000,000.00, stating that the number of violations of the statute was to be determined by the number of persons to whom misrepresentations were made).

I do not believe that Suarez has thought its argument through to its logical conclusion. Assuming Suarez's argument was correct, to avoid the argument in this case the Attorney General would have had to file 17,563 separate lawsuits to maintain an action for civil penalties for each violation. Since this one lawsuit has generated enough paperwork to fill two bankers boxes, 17,563 lawsuits would likely have a similar result -- thereby filling the courthouse with over 35,000 boxes of paper. Additionally, the Attorney General would, as in this one single case, be entitled to collect the attorneys' fees and costs incurred from the extra work necessary to the filing and prosecution of these extra lawsuits. This is to say nothing for the extra litigation costs that Suarez would have incurred, and would have added a considerable sum to the $87,815,000.00 fine that the circuit court could have imposed in the 17,563 lawsuits. I do not believe that the Legislature intended such a complicated or expensive result.

Suarez also contends on appeal that there was insufficient evidence to show "willful" violations of the Consumer Credit and Protection Act. "The term 'willful' ordinarily imports a knowing and intentional act, as distinguished from a negligent act." *Board of Education v. Chaddock*, 183 W.Va. 638, 640, 398 S.E.2d 120, 122 (1990) (*per curiam*). It seems self-evident that 17,563 violations of a statute alone could constitute willful conduct -- especially when those violations did not occur at one point in time, but were spread out and repeated over the course of at least a year, and occurred through the use of dozens of different solicitation letters. Moreover, there is a substantial amount of other evidence in the record to establish that Suarez's conduct was anything but accidental or negligent, and this evidence of intent can be summarized into three categories.

First, the founder and president of Suarez Corporation Industries is Benjamin D. Suarez. In *State by and through McGraw v. Imperial Marketing*, *supra*, we discussed Mr. Suarez's penchant for intentionally using deceptive marketing methods:

> In his book, *7 Steps to Freedom II: How to Escape the American Rat Race*, Mr. Suarez expresses a recurrent theme of assuring the sale of a product through a mail solicitation by baiting the sale with promises of prizes and rewards and warning the consumers that if they do not purchase a product and respond within a prescribed time period, they risk forfeiture of these prizes and rewards. In a self-fulfilling prophecy, Mr. Suarez, through his company, SCI, has made fear and confusion the catalysts to assure a completed sale of whatever product is being peddled.

196 W.Va. at 358-59, 472 S.E.2d at 804-805. Mr. Suarez's book[7] demonstrates that the

misleading statements contained in the multiple solicitations by his company to West Virginia consumers were no accident.

Second, a host of different state and federal agencies have prosecuted actions against the Suarez Corporation for its deceptive direct mailing practices. The record contains

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[7]Mr. Suarez has stated that "[i]t is hard to put a price on" his book, suggesting he "could easily demand thousands of dollars for this information." However, the book is currently sold by the Suarez Corporation for $32.00, and an accompanying computer software package costs $27.00.

Mr. Suarez's book has been the focus of other litigation. In February 1994, reporter Brock N. Meeks received an electronic solicitation through the Internet from EPS (the "Electric Postal Service") concerning a way to make easy cash and receive certain Internet services; all he need do is send his name and home address to EPS and details would be mailed to him.

Mr. Meeks never received the information from EPS. Instead, he received an "approved letter of requisition" in the mail to purchase Mr. Suarez's book and the associated software for $159.00. Mr. Meeks looked into EPS and discovered it was actually a subsidiary of Suarez Corporation Industries. He also learned of the many state and federal enforcement agencies that had brought actions against Suarez as a result of dubious direct mailing practices. Mr. Meeks ultimately wrote of these legal actions in an article for the March 8, 1994 edition of his Internet magazine *Cyberwire Dispatch*. In his article, Mr. Meeks accused Mr. Suarez of "attempting to pull off some kind of Internet P.T. Barnum routine" with EPS, stating he was "infamous for his questionable direct marketing scams" and "he has a mean streak."

In response to the article, Mr. Suarez sued Mr. Meeks for defamation. It appears that Mr. Suarez initially offered to settle if Mr. Meeks would apologize and say that the investigations by state and federal authorities were "sham investigations," and paying Mr. Suarez's legal fees (estimated to be $15,000.00). The case was finally settled with Mr. Meeks paying only $64.00 to cover Suarez's filing fees, and agreeing that before he publishes anything about Mr. Suarez or his company in the future, he will fax Mr. Suarez notice of the article 48 hours in advance.

numerous court orders, administrative cease and desist orders, and consent judgments finding Suarez violated statutes prohibiting unfair or deceptive acts or practices, false advertising, or violated statutes similar to the West Virginia Consumer Credit and Protection Act.[8] All of the enforcement actions predate the entry of summary judgment

[8]Examples of the many regulatory actions against Suarez, found in both the court and public record, include:

-- In 1978 the United States Food and Drug Administration and the Attorney General of Ohio prosecuted actions against Suarez for false labeling and advertising in selling "No-Hunger Bread," a diet-aid product Suarez also claimed could cure cancer. *United States v. No Hunger Bread distributed by American Health Foods*, No. C78-217 (U.S.D.C., N.D. Ohio); *William Brown, Attorney General of Ohio v. American Health Institute, Inc., et al.*, No. 78CV-04-1926 (Ct. of Com. Pleas, Franklin Co. Ohio).

-- In 1982 and 1983, Suarez operated a mail-order marketing scheme where consumers paid $80.00 to subscribe to Suarez's International Home Shopping; the consumer was then paid $17.00 for each new subscriber recruited by the consumer. The Attorney General of Ohio filed an action under the state's Consumer Sales and Pyramid Sales Acts. On April 15, 1985, Suarez entered into a consent decree agreeing to refund membership fees. *State of Ohio ex rel. Attorney General Celebrezze v. Suarez Corporation Industries*, No. 85CV-04-1841 (Ct. of Com. Pleas, Franklin Co. Ohio).

-- On November 19, 1985, the United States Postal Service filed a complaint against the "Department of Unclaimed Funds" division of Suarez's International Home Shopping. Suarez had mailed a solicitation to 1.9 million consumers suggesting the consumers were entitled to "unclaimed funds" lost in government accounts, and that for $19.00, Suarez would assist the consumer in recovering the unclaimed funds. Consumers who replied to the solicitation instead received a list of 50 state offices to write to.

On September 22, 1986, a postal judicial officer rendered a decision holding that with this solicitation Suarez was "engaged in a scheme to obtain money through the mail by means of false representations" in violation of 39 U.S.C. § 3005. *United States Postal Service v. International Home Shopping*, Complaint No. PS 22/155. Suarez appealed the judicial officer's ruling to the United States District Court for the Northern District of Ohio. The district court upheld the Postal Service ruling on May 29, 1987. *Suarez Corporation Industries v. United States Postal Service*, No. C87-358A (U.S.D.C, N.D. Ohio). These rulings were affirmed on appeal. 869 F.2d 1493, *cert. denied*, 493 U.S. 847, 110 S.Ct. 143, ___ L.Ed.2d ___ (1989).

-- The Attorney General of Indiana filed an action against Suarez for solicitations

similar to those at issue in this case in November 1990. Suarez agreed to stop using the challenged solicitations, and to pay civil penalties. *State of Indiana v. Suarez Corp. Industries*, Cause No. 49D019011CP1649 (Sup. Ct. of Marion Co., Indiana).

-- In February 1991, the New Jersey Bureau of Securities, Division of Consumer Affairs investigated newspaper ads by Suarez offering for sale a "Desert Storm" brooch and a savings bond. Because the ads failed to note the value of the bond or brooch, Suarez agreed to withdraw the ads and offer refunds to customers.

-- In September 1991, the Attorney General of Idaho conducted an investigation into Suarez's solicitation activities in that state. As a result of the investigation, Suarez agreed to discontinue a mail solicitation, pay civil penalties, and offer refunds to consumers. *In the matter of Attorney General Larry Echohawk's investigation into the business practices of Suarez Corporation Industries*, Case No. 94973 (Dist. Ct. of Ada Co., Idaho).

-- The Attorney General for the State of Washington commenced a consumer protection action against Suarez on December 23, 1991. That action was settled for $15,000.00, and dismissed on January 8, 1992 with the entry of a consent decree against Suarez. *State of Washington v. Suarez Corporation Industries*, No. 91-2-28185-8 (Sup. Ct. of King Co., Washington).

-- On August 28, 1992, the Washington Attorney General filed a second consumer protection action against Suarez to enforce the prior consent decree, and adding additional charges. The trial court granted summary judgment to the Attorney General on February 1, 1994, noting that Suarez made fraudulent claims and solicitations indistinguishable from those in this case, such as making an "award" of a free "CZ" diamond with the requirement that the consumer purchase the gold band on which the "free" cubic zirconium gem was mounted. Other solicitations indicated the recipient could be the winner of a prize, but never stated the odds of winning the prize.

The Washington superior court imposed a suspended penalty of $500,000.00, and required Suarez to offer unconditional refunds to consumers. *State of Washington v. Suarez Corporation Industries*, No. 92-2-19598-4 (Sup. Ct. of King Co., Washington).

-- The State of Connecticut brought an action similar to that filed in the State of Washington on June 22, 1994. *State of Connecticut v. Suarez Corporation Industries* (Sup. Ct., Dist. of Hartford/New Britain).

-- On October 4, 1994, the United States Postal Service filed the first of a series of complaints against Suarez alleging that Suarez's sweepstakes solicitations "contain[] the elements of prize, chance and consideration and constitutes a lottery or scheme for the distribution of money or property by chance through the mails within the meaning of 39 U.S.C. § 3005." The Postal Service contended that Suarez's

> [p]romotions lead consumers to believe that some important entity, such as an accounting office, law firm or bank, is personally contacting them regarding a significant cash prize

by the circuit court, and create an indisputable inference that each of the solicitations in the record was sent to 17,563 West Virginia consumers with a willful disregard for West Virginia law.

Lastly, the circuit court was, to a limited extent, justified in finding Suarez acted willfully because of the evidence in the record of Suarez's *ad hominem* attacks against the individuals who have investigated consumer complaints against Suarez. Suarez Corporation Industries and any other sweepstakes solicitor has every right to dispute a charge that it has violated a consumer protection statute. But when the

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> that they have won. . . . Consumers bombarded with these official-looking forms and documents declaring impressive prize winnings have little reason to suspect that the true purpose of the promotions is to sell them cheap merchandise at inflated prices.

In the Matter of the Complaint Against Suarez Corporation Industries and Benjamin Suarez, d.b.a. Dept. of Sweepstakes Administration, P.S. Docket No. FR 94-158.

The second postal complaint was filed on December 2, 1994, again alleging mail fraud violations by Suarez. *In the Matter of the Complaint against Suarez Corporation Industries and Benjamin Suarez, both d.b.a. Case, Waterman & Associates, Office of the Treasurer, Board of Currency Disbursement, Dept. Of Currency Disbursement,* P.S. Docket No. FR 94-222.

The United States Postal Service then went to federal court seeking an injunction against Suarez's style of sweepstakes promotion. A temporary restraining order was issued by the district court on December 9, 1994. *United States Postal Service v. Suarez Corporation Industries*, Case No. 1:94MC727 (U.S.D.C., N.D. Ohio).

On February 26, 1995, the Postal Service and Suarez reached a settlement agreement allowing the entry of a Postal Service Order pursuant to 39 U.S.C. § 3005(a)(3). In the settlement agreement, Suarez agreed to refrain from numerous deceptive practices, and agreed that it would no longer use certain solicitations questioned by the Postal Service. It appears that several of the solicitations disputed by the Postal Service, and withdrawn by Suarez, were among the solicitations distributed to West Virginia consumers.

litigation repeatedly expands beyond the bounds of the courtroom and into other courtrooms, and when witness and attorney intimidation becomes an element of litigation strategy, a circuit court must take careful measures to insure the integrity of the judicial system.[9]

[9]This Court has allowed circuit courts, pursuant to the *West Virginia Rules of Civil Procedure*, to take exceptional measures to preserve the integrity of the judicial system when litigants have engaged in a pattern of abusive and oppressive litigation. *See, e.g.*, *State ex rel. McMahon v. Hamilton*, 198 W.Va. 575, 482 S.E.2d 192 (1996) (petitioner filed numerous lawsuits "in a variety of state and federal courts against a various medley of defendants, among them, federal and circuit court judges, lawyers and clerks of court" claiming various constitutional violations; under *W.Va.R.Civ.P.* Rule 17(c), Court upheld requirement that petitioner submit to a psychiatric examination to determine whether petitioner could "comprehend the meaning and effect of the countless lawsuits she has instituted for more than a decade.").

For example, the record in the instant case indicates that in December 1991 and again in August 1992, the Attorney General for the State of Washington filed consumer protection lawsuits against Suarez for mailing fraudulent solicitations to Washington consumers. During the course of that litigation, Suarez "followed, harassed and threatened attorneys and investigators on the case."[10] At the conclusion of the Washington litigation in 1994, Suarez funded expensive election campaign ads attacking the Washington Attorney General.

[10]See Exhibit 3, filed with the trial court on August 29, 1994.

It appears from the record that Suarez has followed a similar course of conduct in this case. Shortly after the West Virginia Attorney General's Office filed this action in August 1994, an investigator hired by Suarez appeared at a court hearing to follow and videotape the State's witnesses and several deputy attorneys general. The Attorney General subsequently filed a motion to prevent Suarez from harassing and intimidating State witnesses. Suarez also paid for numerous campaign ads attacking Attorney General McGraw in the 1996 election, and supporting his opponent.[11] Furthermore, in the course of this consumer protection lawsuit, Suarez has filed a number of lawsuits against the Attorney General, mostly in federal court, relating to the prosecution of the instant case.[12]

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[11]*See State ex rel. McGraw v. West Virginia Ethics Comm'n*, 200 W.Va. 723, 490 S.E.2d 812 (1997) (Suarez political consultant attempted to run political advertisements against Attorney General on television stations. Attorney General notified stations of litigation against Suarez, and political consultant filed an ethics complaint alleging the Attorney General abused his office).

[12]*See, e.g., Suarez v. McGraw*, Case No. 97-CV-059 (Meigs Co. Ohio)(alleges violation of First Amendment rights); *Suarez v. McGraw*, Case No. 2:97-0038 (S.D.W.Va. 1997)(alleges violation of First Amendment rights); *Suarez v. McGraw*, Case No. 2:96-1950 (S.D.W.Va. 1996) (alleges violation of First Amendment rights; case has been dismissed); *Suarez Corporation Industries v. McGraw, et al.*, Case No. 2:95-0248 (S.D.W.Va. 1995) (complaint alleges various tortious actions during the course of this case; for a discussion, *see Suarez Corporation Industries v. McGraw*, 125 F.3d 222 (1997)); and *Better Government Bureau, Inc. v. McGraw*, Case No. 2:94-0952 (S.D.W.Va. 1994) (alleging the Attorney General violated Suarez's First Amendment rights by forming the "Better Government Bureau, Office of the Attorney General, State of West Virginia," thereby preventing Suarez's political "watchdog" group "Better Government Bureau" from incorporating in West Virginia. A jury verdict was returned for the Attorney General. For details, s*ee Better Government Bureau, Inc. v. McGraw*, 904 F.Supp. 540 (1995); 924 F.Supp. 724 (1996); 924 F.Supp. 729 (1996) and *In re*

The willful nature of Suarez's conduct is patently obvious from these three categories of actions, and the circuit court should consider this information in determining the need for or extent of a civil penalty under *W.Va. Code*, 46A-7-111(2). Whether the company should be punished, and the future deterrent effect of such punishment on Suarez and other sweepstakes solicitors is an issue to be considered by the circuit court on remand.[13]

III.
Conclusion

The circuit court correctly granted summary judgment to the Attorney General. The dozens of solicitations in the record from Suarez are, without question, all violative of the West Virginia Consumer Credit and Protection Act and the Prizes and Gifts Act. The fact that *some* consumers weren't mislead by the solicitations is irrelevant; the question is, could *a* reasonable, prudent consumer be mislead by the solicitation? Because the willfully misleading nature of the solicitations is apparent, there was no material issue remaining for trial.

Allen, 106 F.3d 1196 (1997), *rehearing en banc denied*, 119 F.3d 1129).

[13]Consumers injured under the Consumer Credit and Protection Act are entitled to pre-judgment and post-judgment interest of 10% per year. *W.Va. Code*, 56-6-31 [1981]. Hence, it appears from the record that Suarez is currently liable for over $600,000.00 in interest in addition to the principal amount of $975,389.02, as well as all fees and costs of litigation.

Therefore, whether a $500,000.00 "suspended penalty" is sufficient to secure Suarez's future good behavior is questionable.

To correct this situation, the circuit court was within its power to grant a permanent injunction against Suarez prohibiting the use of misleading solicitations, and requiring that all 17,563 consumers who received and responded to one or more of the dozens of solicitations be reimbursed and compensated for their losses. The circuit court was further within its power to impose a civil penalty up to $5,000.00 for each violation of our consumer protection laws; the court must, however, state its reasoning for the penalty in the record.

I therefore concur with the majority's opinion.