No. 30839 - James Dunlap and Stephanie Gibson, on behalf of themselves and all others similarly situated v. Friedman's, Inc., dba Friedman's Jewelers, A Delaware Corporation, American Bankers Insurance Company of Florida, Inc., American Bankers Life Assurance Company of Florida, Alan Hopkins, William Perry, Nancy Tanoukhi, Roy Batson, John Doe and Jane Doe

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OF WEST VIRGINIA

Davis, J., dissenting:

In this proceeding, the majority found that a consumer who is a party to a closed-end credit transaction may choose between two different statutes of limitation under the West Virginia Consumer Credit and Protection Act (hereinafter "WVCCPA"): "either the four-year period commencing with the date of the transaction or within one year of the due date of the last payment, which ever is later." Syl. pt. 6, Maj. Op. I respectfully dissent from this holding which applies two separate statutes of limitation to one single transaction as such a conclusion "elevates form over substance and defies common statutory construction." *Master Insulators of St. Louis v. International Ass'n of Heat & Frost Insulators*, 925 F.3d 1118, 1121 (8th Cir. 1991).

A. Open-end versus Closed-end Credit

Consumer credit is divided into two categories, open-end credit and closed-end credit. "Open-end credit involves a credit sale or loan, generally without a fixed term, under an arrangement which allows the consumer to borrow additional amounts as desired up to an established credit limit such as under a credit card or revolving loan. Repayment is normally made based on the current account balance." Anthony Rollo, *A Primer on Consumer Credit*

Insurance, 54 Consumer Fin. L.Q. Rep. 52, 52 (2000). On the other hand,

> [c]losed-end credit involves a credit or loan of a specific term where the borrower typically agrees to repay the debt in equal monthly payments over a set term, either in a cash and credit transaction where the debtor receives cash from a lender to buy consumer products by entering into the credit obligation (a loan), or in a retail installment sale transaction where the consumer receives a product by entering into the credit obligation directly with the seller (a credit sale).

Id. An analysis of W. Va. Code § 46A-5-101(1) (1996) (Repl. Vol. 1999) shows that it, too, contains the dichotomy between open-end and closed-end credit.

W. Va. Code § 46A-5-101(1) provides, in pertinent part:

> With respect to violations arising from consumer credit sales or consumer loans made pursuant to revolving charge accounts or revolving loan accounts, or from sales as defined in article six of this chapter, no action pursuant to this subsection may be brought more than four years after the violations occurred. With respect to violations arising from other consumer credit sales or consumer loans, no action pursuant to this subsection may be brought more than one year after the due date of the last scheduled payment of the agreement.

W. Va. Code § 46A-5-101(1) thus recognizes two kinds of credit transactions: (1) those involving revolving charge accounts, revolving loan accounts or from sales as defined in article six of the WVCCPA and (2) all other consumer credit sales or consumer loans. While W. Va. Code § 46A-5-101(1) does not use the specific term "open-end credit", "open-end credit" is understood to be synonymous with "revolving credit". *E.g.*, H.R. Rep. 90-1040 (1967), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1971 (recognizing that "open-end credit

plans" are more commonly known as "revolving charge accounts").[1]

Moreover, while the majority asserts that W. Va. Code § 46A-5-101(1) "does not specifically address the concept of closed-ended contracts; [and that] the Appellees only assume that the legislature's use of the term 'other contracts' embraced open-ended contracts[,]" Maj. Op. at 6, it does not explain what "other consumer credit sales or consumer loans" could mean besides closed-ended contracts. This common sense recognition that if the credit is not open-end, it must be closed-end, has antecedents in both state and federal consumer law. For example, the official Kansas comment accompanying its adoption of the UCCC's limitation provision[2] explains that the one-year limitation for "other consumer transactions" not covered by the two-year limitation for "open end credit" applies to closed-end credit. Kan. Stat. Ann. § 16a-5-201(1) (1995), at Kansas comment 2000 ("[S]ubsection (1) also provides for a relatively short statute of limitations: one year after the last installment is due under a closed end contract and two years after the violation occurs under open end credit."). Likewise, the federal regulations implementing Title I of the Federal Consumer Credit Protection Act explains that "*[c]losed-end credit* means consumer credit other than

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[1]Similarly, the definition of "open-end credit" under the 1974 Uniform Consumer Credit Code is almost identical to the WVCCPA's definitions of "revolving charge account" and "revolving loan account." *Compare* Uniform Consumer Credit Code (hereinafter "the UCCC") § 1.201(28), 7 U.L.A. 127 (2002) *with* W. Va. Code §§ 46A-1-102(39) & (40) (1996) (Repl. Vol. 1999).

[2]*See supra* n.1 discussing the similarities between the WVCCPA and the UCCC.

open-end credit as defined in this section." 12 C.F.R. § 226.2(10) (2003). Consequently, W. Va. Code § 46A-5-101(1) makes provision for two different types of transactions–open-end and closed-end. With this understanding, I now turn to an examination of whether W. Va. Code § 46A-5-101(1) is ambiguous.

B. Statutory Construction

A statute is ambiguous if it "can be read by reasonable persons to have different meanings . . . ." *Lawson v. County Comm'n of Mercer County*, 199 W. Va. 77, 81, 483 S.E.2d 77, 81 (1996) (per curiam). However, simply because "'"the parties disagree as to the meaning or the applicability of [a statutory] provision does not of itself render [the] provision ambiguous or of doubtful, uncertain or unsure meaning." *Habursky v. Recht*, 180 W. Va. 128, 132, 375 S.E.2d 760, 764 (1988) (internal quotations and citations omitted). A statute "is not ambiguous simply because different interpretations are conceivable." *State v. Keller*, 143 Wash. 2d 247, 276, 19 P.3d 1030, 1035 (2001) (footnote omitted), *cert. denied*, 534 U.S. 1130, 122 S. Ct. 1070, 151 L. Ed. 2d 972 (2002). Rather, a statute must be subjected to analysis under traditional rules of statutory construction to determine if a statute is ambiguous for "'[r]ules of interpretation are resorted to for the purpose of resolving an ambiguity . . . .'" *Habursky*, 180 W. Va. at 132, 375 S.E.2d at 764 (quoting *Crockett v. Andrews*, 153 W. Va. 714, 719, 172 S.E.2d 384, 387 (1970)). It is only after all other avenues of statutory analysis are exhausted that this Court should resort to liberally construing the statute. *Cf. United States v. Shabani*, 513 U.S. 10, 17, 115 S. Ct. 382, 386,

130 L. Ed. 2d 225, 231 (1994) (noting the rule that ambiguous statutes are to be read with lenity in favor of a defendant "applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute.") In contravention of these principles, though, the majority has found W. Va. Code § 46A-5-101(a) to be ambiguous, and has liberally interpreted it in favor of the appellants–a result at odds with a correct analysis of WVCCPA, as I shall now demonstrate.

A number of well-established canons of statutory construction should guide our review in this case–the rule against statutory absurdity, the rule of *ejusdem generis*, the rule against statutory nullity and the rule that statutes of limitation are to be liberally construed to effectuate their manifest objective. We explained the rule against statutory absurdity in *Charter Communications VI, PLLC v. Community Antenna Service, Inc.*, 211 W. Va. 71, 77, 561 S.E.2d 793, 799 (2002) (citations omitted), when we said, "a well established cannon of statutory construction counsels against . . . an irrational result [for] '[i]t is the "duty of this Court to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results."'" We explained the rule of *ejusdem generis* in Syllabus point 4 of *Ohio Cellular RSA, Ltd. Partnership v. Board of Public Works*, 198 W. Va. 416, 481 S.E.2d 722 (1996):

> "'In the construction of statutes, where general words follow the enumeration of particular classes of persons or things, the general words, under the rule of construction known as *ejusdem generis,* will be construed as applicable only to persons or things of the same general nature or class as those

> enumerated, unless an intention to the contrary is clearly shown.' Point 2, Syllabus, *Parkins v. Londeree, Mayor*, 146 W. Va. 1051[, 124 S.E.2d 471 (1962)]." Syl. pt. 2, *The Vector Co., Inc. v. Board of Zoning Appeals of the City of Martinsburg*, 155 W. Va. 362, 184 S.E.2d 301 (1971).

We also have explained that the rule against statutory nullity is "[a] cardinal rule of statutory construction . . . that significance and effect must, if possible, be given to every section, clause, word or part of the statute." Syl. pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999). Finally, we have observed that the

> legislative policy in enacting . . . statutes [of limitation] is now recognized as controlling and courts, fully acknowledging their effect, look with favor upon such statutes as a defense. . . . It is evident . . . that statutes of limitations are favored in the law and cannot be avoided unless the party seeking to do so brings himself strictly within some exception. It has been widely held that such exceptions "are strictly construed and are not enlarged by the courts upon considerations of apparent hardship."

Johnson v. Nedeff, 192 W. Va. 260, 263, 452 S.E.2d 63, 66 (1994) (citations omitted). Thus, "'[w]hile the courts will not strain either the facts or the law in aid of a statute of limitations, nevertheless it is established that such enactment will receive a liberal construction in furtherance of their [sic] manifest object, are [sic] entitled to the same respect as other statutes, and ought not to be explained away.'" *Id.*, 192 W. Va. at 263, 452 S.E.2d at 66 (citations omitted). *See also Wood v. Carpenter*, 101 U.S. 135, 139, 25 L. Ed. 807, 808 (1879) ("Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at

their foundation. They stimulate to activity and punish negligence."). Applying these well-established rules to W. Va. Code § 46A-5-101(1) shows the flaws in the majority's opinion.

Simply put, the majority's reading of W. Va. Code § 46A-5-101(1) leads to an absurd result. The majority holds in this case that a consumer who is a party to a closed-end credit transaction has two different statutes of limitation: "either the four-year period commencing with the date of the transaction or within one year of the due date of the last payment, which ever is later." Syl. pt. 6, Maj. Op. The majority opinion fails to draw the distinction set forth in the statute between open-end credit and closed-end credit, thus ignoring the statutory language. Further, not only does the majority make the four-year open-end credit limitation apply to closed-end transactions, it then compounds its error by also making the one-year limitation for closed-end credit apply as well. In essence, the majority has turned W. Va. Code § 46A-5-101(1) on its head by converting the limitations period of *no more* than four years for open-end transactions into one of *at least* four years for all transactions. This "particular construction of [W. Va. Code § 46A-5-101(1)] . . . result[s] in an absurdity, [so] some other reasonable construction, which will not produce such absurdity, [must] be made." Syl. pt. 7, in part, *State ex rel. Charles Town Gen. Hosp. v. Sanders*, 210 W. Va. 118, 556 S.E.2d 85 (2001) (internal quotations and citations omitted). Having so stated, I do agree with the majority on one point. W. Va. § 46A-5-101(1)'s invocation of "sales as defined in article six [of the West Virginia Consumer Credit Protection Act]" creates an ambiguity requiring judicial resolution. Unfortunately, the majority failed to properly apply our rules

of statutory construction.

"[S]ale[] as defined in article six [of the WVCCPA]" is "any sale, offer for sale or attempt to sell any goods for cash or credit or any services or offer for services for cash or credit." W. Va. Code § 46A-6-102(d) (1996) (Repl. Vol. 1999). W. Va. Code § 46A-5-102(d) does not define the credit used in the "sale" as either open-end or closed-end. However, W. Va. Code § 46A-5-101(1)'s invocation of "sale[] as defined in article six" is preceded in W. Va. Code § 46A-5-101(1) by the definition of open-end consumer financing. Consequently, the use of the term "credit" in the definition of "sale" in article six, section 102(d) of the WVCCPA must be understood as referring only to open-end credit transactions–a result compelled by *ejusdem generis* since the general term "credit" in article six is preceded by the more specific term "revolving," or open-end credit transactions.[3] This conclusion is reinforced by the realization that any other reading of W. Va. Code § 46A-5-101(1) nullifies the one-year limitation applicable to "other consumer credit sales or

[3]Furthermore, the reference to article six of the Consumer Credit Protection Act [titled "General Consumer Protection"] simply confirms that if an issue arises as to the quality of a good, as opposed to the terms of the consumer credit or consumer loan for the sale of the good, the Uniform Commercial Code's four-year statute of limitation applies. *See* W. Va. Code § 46-2-725(1) (1963) (Repl. Vol. 2001) ("An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued."). Such harmonization between W. Va. Code § 46A-5-101(1) and § 46-2-725(1), both of which relate to consumer protection, is justified because "a statute should be read to make it harmonize with other statutory enactments[.]" *Preston Mem. Hosp. v. Palmer*, ___ W. Va. ___, ___, 578 S.E.2d 383, 390 (2003) (per curiam) (Davis, J., concurring) (citing Syl. pt. 7, *Ewing v. Board of Educ. of Summers County*, 202 W. Va. 228, 503 S.E.2d 541 (1998)).

consumer loans[,]" because if any sale involving any type of credit triggers the four year statute of limitation, there would be no need for the one year limitation for "other consumer credit sales or consumer loans[]"–a reading foreclosed by the rule against statutory nullity requiring every portion of a statute be given effect. Thus, the one-year limitation under W. Va. Code § 46A-5-101(1) must apply to closed-end credit transactions such as those at issue in this case.

Consequently, application of the above rules to W. Va. Code § 46A-5-101(1)'s limitations provisions requires us to find that the Legislature's use of "sale as defined in article six," in the four-year limitation provisions was meant only to assure that the four-year limitation applies to any open-end contract, no matter the method used for establishing a "revolving" or open-end contract, or how the transaction is characterized, *i.e.*, as a "credit sale," "consumer loan" or any other type of arrangement. Thus, the majority's resort to a liberal interpretation of the limitations provision as a remedial statute in the appellants' favor is unwarranted. *See Bishop Trust Co. v. Burns*, 46 Haw. 375, 399-400, 381 P.2d 687, 701 (1963) (recognizing the rule that the tax statute must be construed in favor of the taxpayer "is only to be resorted to as an aid to construction when an ambiguity or doubt is apparent on the face of the statute, and then only after other possible extrinsic aids of construction available to resolve the ambiguity have been exhausted").

Finally, I believe the majority has erred by not affording W. Va. Code § 46A-5-101(1)

the same respect due other statutes and by not granting it a "liberal construction in furtherance of [its] manifest objective[,]" *Johnson*, 192 W. Va. at 263, 452 S.E.2d at 66 (citations omitted), of "encourag[ing] promptness in instituting actions; . . . suppress[ing] stale demands or fraudulent claims; and . . . avoid[ing] inconvenience which may result from delay in asserting rights or claims when it is practicable to assert them." *Morgan v. Grace Hosp., Inc.*, 149 W. Va. 783, 791, 144 S.E.2d 156, 161 (1965). The majority has denigrated the importance of W. Va. Code § 46A-5-101(1)'s limitations provisions and, in so doing, has ignored the plethora of "our decisions reflect[ing] our commitment to ensuring that such time limits are strictly followed." *Perdue v. Hess*, 199 W. Va. 299, 303, 484 S.E.2d 182, 186 (1997).

W. Va. Code § 46A-5-101(1) must receive a "liberal construction in furtherance of [its] manifest object" of establishing two different limitations periods for two different types of consumer credit or loans–a four-year limitation for any open-end consumer credit or open-end consumer loans and a one-year limitation for all other sales or loans, *i.e.*, closed-end consumer credit or closed-end consumer loans. Thus, contrary to the majority's *ipse dixit* conclusion conflating open-end and closed-end credit and finding that a closed-end consumer credit transaction has two applicable statutes of limitation under W. Va. Code § 46A-5-101(1), I find that the law compels the following recognition. If a consumer asserts a violation arising from "consumer credit sales or consumer loans made pursuant to revolving charge accounts or revolving loan accounts, or from sales as defined in article six of this

chapter," that is any transaction that involves open-end consumer credit or an open-end consumer loan, the applicable limitations period is four years. However, if a consumer asserts "violations arising from other consumer credit sales or consumer loans[,]" that is a closed-end consumer credit or a closed-end consumer loan, the applicable period of limitations is one year.[4]

Thus, I respectfully dissent. I am authorized to state that Justice Maynard joins me in this dissenting opinion.

[4]I am not unsympathetic to the appellants. However, "'the highest exercise of judicial duty is to subordinate one's personal pulls and one's private views to the law of which we are all guardians-those impersonal convictions that make a society a civilized community, and not the victims of personal rule.'" Hon. Tom C. Clark, *Mr. Justice Frankfurter: "A Heritage for All Who Love the Law,"* 51 A.B.A.J. 330, 332 (1965) (quoting Frankfurter, J.). Therefore, I remain steadfast to my commitment that "[w]hen litigants come before this Court, I will consistently apply the law regardless of personal desires[,]" *Patton v. Gatson*, 207 W. Va. 168, 174, 530 S.E.2d 167, 173 (1999) (Davis, J., concurring), because I realize that "[i]f we destroy the law's integrity in the pursuit of some goal, however worthy, we break down one of the necessary conditions of a decent society." H. Jefferson Powell, *Who's Afraid of Thomas Cromwell?*, 74 Chi-Kent L. Rev. 393, 407 (1999).