IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SPECIALIZED LOAN SERVICING LLC,

Defendant Below, Petitioner,

v. No. 20-1025

RONALD J. STOVER and
PATTI A. STOVER,

Plaintiffs Below, Respondents.

RESPONDENTS' BRIEF

Respondents,
RONALD J. STOVER and
PATTI A. STOVER,
By Counsel:

Sarah K. Brown (State Bar ID No. 10845)
Bren J. Pomponio (State Bar ID No. 7774)
Daniel F. Hedges (State Bar ID No. 1660)
Mountain State Justice, Inc.
1217 Quarrier Street
Charleston, WV 23501
Telephone: (304) 344-3144
Facsimile: (304) 344-3145
sarah@msjlaw.org
bren@msjlaw.org
dan@msjlaw.org

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I. ASSIGNMENT OF ERROR

Whether the circuit court properly granted judgment for Respondents when the undisputed evidence establishes that Petitioner Specialized Loan Servicing LLC ("SLS"), the servicer of Respondents Ronald and Patti Stover's mortgage loan, returned three payments made by the Stovers, rather than credit those amounts to payments due on their loan in violation of West Virginia Code section 46A-2-115(c), when Petitioner is unable to avail itself of the narrow exception permitting return of partial payments during a reinstatement period because the Stovers' loan does not meet the applicable definition of "consumer loan" set forth in West Virginia Code section 46A-2-115(b)?

II. STATEMENT OF THE CASE

Respondents Ronald and Patti Stover purchased a home at 3989 Clear Fork Road, Clear Fork, Raleigh County, West Virginia, in October 2000. (J.A. 154, 338.) Mr. and Mrs. Stover obtained a mortgage from PinnFund, USA, a California Corporation, for the purchase of the property. (J.A. 338.) Petitioner SLS is the servicer of the mortgage loan, and the current holder of the loan is The Bank of New York Mellon Trust Company, N.A. f/k/a The Bank of New York Trust Company, N.A., as successor to JPMorgan Chase Bank, N.A., as successor in interest to Bank One, National Association, as Trustee for Residential Asset Mortgage Products, Inc., Mortgage Asset-Backed Pass-Through Certificates Series 2001-RS1. (J.A. 99, 338.) It is undisputed that the loan originator was not a bank or savings and loan association, or an affiliate; the loan is not held by a federal home loan bank, the federal national mortgage association, the federal home loan mortgage corporation, the government national mortgage association, or the West Virginia housing development fund; and the loan is not insured or guaranteed by the farmers

home administration, the veteran's administration, or the department of housing and urban development. (J.A. 406.)

The Stovers later divorced, and in 2014, Patti Stover executed a quit claim deed transferring her interest in the home to Ronald Stover. (J.A. 155, 157-58, 338-39.) By early 2015, Mr. Stover was struggling to keep up with the mortgage payment and applied for payment assistance with Petitioner SLS. (J.A. 163-71, 339.) However, Petitioner SLS refused to consider his request without receiving certain income information from Patti Stover, despite that she had deeded her interest to Mr. Stover and that the applicable guidelines provide that a modification is available to Mr. Stover in those circumstances. (J.A. 181-90, 204, 341.) Rather than consider Mr. Stover's request for a loan modification that he was eligible for, Petitioner SLS initiated foreclosure proceedings. (J.A. 339, 382-85.)

In an effort to avoid foreclosure on the home where he and his new wife and young stepson live, Mr. Stover sent in a payment to Petitioner SLS. (J.A. 206.) Petitioner SLS returned the payment, forcing the Stovers to file suit to stop the foreclosure sale. (J.A. 205-06, 340.) During litigation, the Stovers again attempted to send in regular monthly payments, which Petitioner SLS returned without applying to their loan. (J.A. 207-10, 342.)

On competing motions for summary judgment, the circuit court held that Petitioner SLS violated West Virginia Code section 46A-2-115(c) in returning the Stovers' payments. (J.A. 469-473.) In applying the statute, Judge Burnside found that Petitioner SLS could not avail itself of the affirmative defense contained in that section because the Stovers' loan does not meet the narrow definition of consumer loan required for the reinstatement period defense. (Id.)

III. SUMMARY OF ARGUMENT

The West Virginia Consumer Credit and Protection Act ("WVCCPA" or the "Act") is a remedial statute enacted to protect consumers from unfair, illegal, and deceptive acts or practices. Among the Act's many protections is a requirement that all amounts paid to a creditor be credited upon receipt to payments due. See W. Va. Code § 46A-2-115(c). At issue in this case is the unfair and illegal practice of rejecting payments from consumers trying to save their home from foreclosure. It is undisputed that Petitioner Specialized Loan Servicing LLC ("SLS"), the servicer of Respondents Ronald and Patti Stover's mortgage loan, returned three payments made by the Stovers rather than credit those payments to the amount due on their loan. Although the WVCCPA provides a narrow affirmative defense permitting the return of certain partial payments during the reinstatement period, Petitioner SLS may not avail itself of that defense because the Stovers' loan does not meet the narrow definition of a "consumer loan" as required by the unambiguous language of the defense. Because the circuit court properly applied this remedial statute, this Court should affirm its order granting judgment in favor of Respondents.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary because the stipulated facts and narrow legal arguments at issue are fully presented in the briefs and the record on appeal. W. Va. R. App. P. 18(a)(4). Should the Court determine that oral argument would aid the Court in its decision-making process, Rule 19 argument is appropriate, given that this appeal presents a narrow question of law. W. Va. R. App. P. 19. In the event that Rule 19 argument is held, a memorandum decision is appropriate.

V. ARGUMENT

A. Standard of Review

This Court reviews the circuit court's entry of summary judgment *de novo*. See Syl. Pt. 1, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994). Summary judgment is proper when the moving party shows that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. See id. at 193, 758 (citing Rule 56 of the West Virginia Rules of Civil Procedure). The parties below stipulated to all relevant facts, leaving for determination a purely legal question. Therefore, the circuit court's determination of that legal issue is subject to *de novo* review by this Court. See Syl Pt. 1, Appalachian Power Co. v. State Tax Dep't of West Virginia, 195 W. Va. 573, 466 S.E.2d 424 (1995).

B. SLS Violated West Virginia Code Section 46A-2-115(c) by Returning Respondents' Payments

1. Section 46A-2-115(c) is clear and unambiguous in limiting the reinstatement period defense to certain consumer loans.

This Court reviews *de novo* questions of statutory interpretation. See, e.g., Meadows v. Wal-Mart Stores, Inc., 207 W. Va. 203, 212, 530 S.E.2d 676, 685 (1999). In deciding the meaning of a statute, this Court has explained that it "begins with the principle that judicial interpretation of a statute is warranted only if the statute is ambiguous. A statute which is clear and unambiguous should be applied by the courts and not construed or interpreted." Syl Pt. 3, Meadows, 207 W. Va. at 214, 530 S.E.2d at 687 (internal quotations and citations omitted). In considering whether a statute is unambiguous, and therefore does not require construction or interpretation, courts must consider the context of the dispute. See W. Va. Highlands Conservancy, Inc. v. Huffman, 588 F. Supp. 2d 678, 690 (N.D.W. Va. Jan. 14, 2009), aff'd 625 F.3d 159 (4th Cir. 2010) (citing Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)). "[C]ourts should consider 'the language itself, the

specific context in which that language is used, and the broader context of the statute as a whole. The 'inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent.'" Id. If a statute is ambiguous, and therefore requires judicial interpretation, "legislative intention is the controlling factor; and the intention of the legislature is ascertained from the provisions of the statute by the applications of sound and well established cannons of construction." Syl Pt. 2, Meadows, 207 W. Va. at 206, 530 S.E.2d at 679. One such canon is that "significance and effect must, if possible, be given to every section, clause, word or part of the statute." Id.

The plain language of West Virginia Code section 46A-2-115(c) unambiguously requires that a creditor credit all amounts received toward payments due on a consumer credit sale or consumer loan. "All amounts paid to a creditor arising out of any consumer credit sale or consumer loan shall be credited upon receipt against payments due." W. Va. Code § 46A-2-115(c) (2003) & (2016).[1] Federal and state courts in West Virginia have routinely upheld claims that creditors violate this section of the WVCCPA by refusing or returning payments without finding the statute ambiguous or in need of interpretation. See, e.g., Simpson v. Ocwen Loan Servicing, No. 2:19-cv-29, available at 2020 WL 1430470 (N.D.W. Va. March 23, 2020); Ballenger v. Nat'l City Mortg., Inc., No. 1:14-cv-81, available at 2015 WL 5062770, at *14-15 (N.D.W. Va. Aug. 26, 2015) (refusing summary judgment on a claim for a violation of the statute when the creditor instructed that it would not accept partial payments after notice of default issued); McNeely v. Wells Fargo Bank, N.A., No. 2:13-cv-25114, available at 2014 WL 7005598, *8 (S.D.W. Va. Dec. 10, 2014) ("[A]llegations . . . that a lender returned payments to a borrower

[1] The version of West Virginia Code section 46A-2-115 applicable when Petitioner SLS returned the Stovers' payment in 2015 was enacted in 2003. As discussed herein, the statute was amended in 2016, and the 2016 amendments apply to the payments Petitioner SLS returned to the Stovers in 2017.

would constitute a plausible claim under § 46A-2-115(c)."); Pannell v. Green Tree Servicing, LLC, Case No. 5:14-cv-14198, available at 2014 WL 3361984, at *7 (S.D.W. Va. July 8, 2014) (refusing to dismiss claim when creditor alleged returned payment after reinstatement period expired); Coleman v. JP Morgan Chase, N.A., No. 3:14-cv-0183, *available at* 2014 WL 1871726, *7 (S.D.W. Va. May 8, 2014) (refusing to dismiss claim despite creditor arguing it returned payment during reinstatement period); Petty v. Countrywide Home Loans, Inc., No. 3:12-cv-06677, available at 2013 WL 1837932, at *13 (S.D.W. Va. May 1, 2013) ("Plaintiffs' allegations that Defendant instructed them not to make payments and, if they did, their payments would be returned, is sufficient to state a plausible claim under West Virginia Code § 46A-2-115."); Patrick v. PHH Mortg. Corp., 937 F. Supp. 2d 773, 783 (N.D.W. Va. March 27, 2013); Ranson v. Bank of America, N.A., No. 3:12-cv-5616, available at 2013 WL 1077093, *9 (S.D.W. Va. March 14, 2013); Kesling v. Countrywide Home Loans, Inc., No. 2:09-cv-588, available at 2011 WL 227637, at *3 (S.D.W. Va. Jan. 24, 2011) (describing the subsection as requiring "a lender of a consumer loan to credit any full or partial payments received from the borrower"); Duvall v. Ocwen Loan Servicing, No. 18-C-312 (Cir. Ct. Berkeley Co., W. Va. Nov. 30, 2020); Flagstar Bank, FSB v. Leintu, No. 15-C-320 (Cir. Ct. Berkeley Co., W. Va. Sept. 26, 2016); Kerns v. Fidelity & Deposit Co. of Md., No. 12-C-739 (Cir. Ct. Berkeley Co., W. Va. July 15, 2013).[2] Petitioner SLS undisputedly violated this provision of state law when it refused the Stovers' payments made to it to save their home from foreclosure.

The affirmative defense of which Petitioner seeks to avail itself, permitting return of payments in certain limited circumstances, is also unambiguous and requires no judicial interpretation. See Coleman, 2014 WL 1871726, at *7 (holding that the two clauses following

[2] Respondents are simultaneously filing a motion for leave to file a supplemental appendix to provide the Court with these three unpublished circuit court opinions.

"provided" in the statute are considered defenses a creditor may raise). The first payment made by the Stovers and returned by Petitioner SLS was on June 4, 2015. (J.A. 205-06, 340.) In the version of the statute applicable in 2015, the affirmative defense provides that "partial amounts received during the reinstatement period set forth in subsection (b) of this section do not create an automatic duty to reinstate and may be returned by the creditor." W. Va. Code § 46A-2-115(c) (2003) (emphasis added).

Subsection (b) of section 46A-2-115 provides in its entirety:

> A consumer loan secured by real property: (1) Originated by a bank or savings and loan association, or an affiliate, and not solicited by an unaffiliated broker; (2) held by a federal home loan bank, the federal national mortgage association, the federal home loan mortgage corporation, the government national mortgage association, the West Virginia housing development fund; or (3) insured or guaranteed by the farmers home administration, the veteran's administration, department of housing and urban development, which includes in the loan agreement a reinstatement period beginning with the trustee notice of foreclosure and ending prior to foreclosure sale, may, in addition to those authorized by this chapter, permit the recovery of the following actual reasonable reinstatement period expenses paid or owed to third parties: (i) Publication costs paid to the publisher of the notice; (ii) appraisal fee when required by the circumstances or by a regulatory authority and only after the loan has been referred to a trustee for foreclosure; (iii) title check and lienholder notification fee not to exceed two hundred dollars, as adjusted from time to time by the increase in the consumer price index for all consumers published by the United States Department of Labor; and (iv) certified mailing costs.

W. Va. Code § 46A-2-115(b) (2003) (emphasis added).

The reinstatement period set forth in subsection (b), then, requires both that the loan be originated, held, or insured by the enumerated entities ***and*** also that the loan agreement include a reinstatement period running from the notice of trustee sale and ending prior to the trustee's foreclosure sale. See W. Va. Code § 46A-2-115(b) (2003). It is unambiguous that the 2015 exception permitting the return of payments during the reinstatement period applies only to loans originated by the enumerated entities, as Judge Burnside concluded in applying the statute to the Stovers' claim: "To qualify for the exception stated in subsection (b)(3), the Defendant

[Petitioner SLS] must satisfy both criteria: (1) that the loan is insured or guaranteed by one of the designated entities, and (2) that it contains in the loan agreement a reinstatement period." (J.A. 469.) Petitioner SLS does not dispute that the loan is not originated, held, insured, or guaranteed by one of the enumerated entities. Accordingly, this limited defense is not available to Petitioner SLS for returning the Stovers' house payment in 2015.

The West Virginia Legislature amended section 46A-2-115 during the 2016 legislative session, with the changes becoming effective on June 8, 2016. Therefore, the amended version applies to the second and third payments returned by Petitioner SLS on March 17, 2017, and April 24, 2017. (J.A. 342.) The primary directive of subsection (c) is unchanged in the amended version: "All amounts paid to a creditor arising out of any consumer credit sale or consumer loan shall be credited upon receipt against payments due." W. Va. Code § 46A-2-115(c) (2016). The language of the affirmative defense is slightly modified: "Provided, however, That partial amounts received during the period set forth in subdivision (3) subsection (b) of this section do not create an automatic duty to reinstate and may be returned by the creditor." Id. The 2016 amendments had additionally changed the structure of subsection (b), to specifically enumerate three subdivisions, and thus subsection (c) was simply revised to reference the period set forth in the newly enumerated applicable subdivision of the subsection (b).

The version of subsection (b) enacted in 2016 provides in its entirety:

(b) With respect to this subsection:

> (1) The phrase "consumer loan" shall mean a consumer loan secured by real property: (A) Originated by a bank or savings and loan association, or an affiliate, not solicited by an unaffiliated broker; (B) held by a federal home loan bank, the federal National Mortgage Association, the federal Home Loan Mortgage Corporation, the Government National Mortgage Association, the West Virginia Housing Development Fund; or (C) insured or guaranteed by the Farmers Home Administration, the Veteran's Administration or the

> Department of Housing and Urban Development.
>
> (2) Except as provided in subdivision (3) of this subsection, the agreements that evidence a consumer loan may permit the recovery of the following charges: (A) Costs of publication; (B) an appraisal fee; (C) all costs incidental to a title examination including professional fees, expenses incident to travel, and copies of real estate and tax records; (D) expenses incidental to notice made to lienholders and other parties and entities having an interest in the real property to be sold; (E) certified mailing costs; and (F) all fees and expenses incurred by a trustee incident to a pending trustee's sale of the real property securing the consumer loan.
>
> (3) For purposes of the charges expressly authorized by this subsection, no charge may be assessed and collected from a consumer unless: (A) Each charge is reasonable in its amount; (B) each charge is actually incurred by or on behalf of the holder of the consumer loan; (C) each charge is actually incurred after the last day allowed for cure of the consumer's default pursuant to section one hundred six, of this article and before the consumer reinstates the consumer loan or otherwise cures the default; (D) the holder of the consumer loan and the consumer have agreed to cancel any pending trustee's sale or other foreclosure on the real property securing the consumer loan; and (E) in the case of an appraisal fee, no appraisal fee has been charged to the consumer within the preceding six months.

W. Va. Code § 46A-2-115(b) (2016).

The affirmative defense set forth in the version of section 46A-2-115(c) applicable in 2017 permits return of partial amounts received "during the period set forth in subdivision (3) subsection (b)," which is defined as "after the last day allowed for cure of the consumer's default pursuant to section one hundred six, of this article and before the consumer reinstates **the consumer loan** or otherwise cures the default." W. Va. Code § 46A-2-115(b)(3) (2016) (emphasis added). Subsection (b) of the 2016 amendment contains its own definition of consumer loan applicable to the entire subsection, which includes the requirement that the loan be originated, held, or insured by particular entities. Therefore, because the defined time period itself includes the requirement that the loan be a consumer loan, and consumer loan is particularly and narrowly defined in this

subjection, it is unambiguous that the statutory defense created by section 46A-2-115(c) for returning payments is only available to creditors collecting on loans meeting that narrower definition. Indeed, this was the conclusion Judge Burnside reached in applying the statute to the Stovers' claim for the 2017 returned payments:

> The structure of the 2017 amendment to §46A-2-115 is similar to the pre-2017 version in that the 2017 version of subsection (c) states a general rule with specific exceptions and the reader is referred to subsection (b)(3) to understand the scope of the exception.
>
> Although subsection (b)(3) was restructured in 2017, the practical effect is equivalent to the version operative in 2015. The special definition of "consumer loan" in the 2017 version of subsection (b) limits the term "consumer loan" by reference to (A) origination, (B) the holder, and (C) the insurer or guarantor. If the loan does not fall within that specialized definition, none of subsection (b)(3) can apply to that loan.
>
> Subsection (c) does not have a specialized definition of "consumer loan" and so the general WVCPA definition of "consumer loan" would presumably apply to the issues governed by subsection (c). However, since subsection (b)(3) determines the scope of the exception we are bound by the definition of "consumer loan" specific to subsection (b). If the loan in question does not qualify as a "consumer loan" as defined in subsection (b)(1), this exception to the subsection (c) requirement to credit all payments does not apply.

(J.A. 472.) Therefore, Petitioner SLS violated the statute when it returned the Stovers' two payments made in 2017 to avoid foreclosure.

2. *The remedial purpose of the WVCCPA requires a narrow application of the affirmative defense.*

Consideration of the context of the statute confirms that the statutory provision is not ambiguous. See W. Va. Highlands Conservancy, Inc., 588 F. Supp. 2d at 690 (considering the language, the specific context in which the language is used, and the broader context of the statute as a whole is used to determine if the statutory language is unambiguous and the statutory scheme consistent). Binding legal authority instructs that the WVCCPA is to be broadly construed to protect West Virginia consumers and not narrowly interpreted for the benefit of wrongdoers. As

recently as November 2020, this Court interpreted the provisions of the Act and reaffirmed that "[s]tatutes which are remedial in their very nature should be liberally construed to effectuate their purpose." Syl. Pt. 7, West Virginia ex rel. 3M Company v. Hon. Jay Hoke & Patrick Morrisey, 244 W. Va. 299, 852 S.E.2d 799 (2020) (citing Syl. Pt. 6, Vest v. Cobb, 138 W. Va. 660, 76 S.E.2d 885 (1953)). This Court's recent decision is clear in upholding longstanding precedent that the Act should be interpreted so as to effectuate its purpose in protecting consumers.

To "effectuate" the purpose of the WVCCPA "is to protect consumers from unfair, illegal, and deceptive acts or practices by providing an avenue of relief for consumers who would otherwise have difficulty proving their case under a more traditional cause of action." Dunlap v. Friedman's, Inc., 213 W. Va. 394, 399, 582 S.E.2d 841, 846 (2003) (quoting State ex rel. McGraw v. Scott Runyan Pontiac–Buick, Inc., 194 W. Va. 770, 777, 461 S.E.2d 516, 523 (1995)). The 1974 enactment of the WVCCPA itself demonstrates the Legislature's long understanding of the obstacles an ordinary consumer must overcome to hold their creditors accountable through the myriad of traditional common law problems in this area and the deficiencies of earlier statutes providing consumer protection. By 1978, this Court, in ruling on that explicit purpose, opined that the Act "represents a comprehensive attempt on the part of the Legislature to extend protection to the consumers and persons who obtain credit in this State and who obviously constitute the vast majority of our adult citizens." Harless v. First Nat'l Bank in Fairmont, 162 W. Va. 116, 125, 246 S.E.2d 270, 275–76 (1978). Justice Miller reinforced in Harless that "[n]ot only did the Legislature regulate various consumer and credit practices, but it went further and established the right to civil action for damages on behalf of persons who have been subjected to practices that violate certain provisions of the Act." Id.

From those foregoing principles, this Court has repeatedly mandated that this "remedial

statute . . . be liberally construed to protect consumers from unfair, illegal, or deceptive acts." Syl. Pt. 6, Dunlap, 213 W. Va. 394, 582 S.E.2d 841; Vanderbilt Mortg. & Fin., Inc. v. Cole, 230 W. Va. 505, 740 S.E.2d 562 (2013); Quicken Loans v. Brown, 230 W. Va. 306, 331, 737 S.E.2d 640, 665 (2012), citing Harper v. Jackson Hewitt, Inc., 227 W. Va. 142, 151, 706 S.E.2d 63, 72 (2010); Barr v. NCB Management Services, Inc., 227 W. Va. 507, 513, 711 S.E.2d 577 (2011) ("In keeping with the remedial purposes of the WVCCPA, and the liberal construction we have historically afforded this Act.") These precepts have informed the development of the Act's interpretation by this Court for decades.

This Court has repeatedly interpreted the WVCCPA to effectuate the legislated purpose of protecting consumers in many varied circumstances to ensure broad application of the Act. See, e.g., Syl. Pt. 2, Fleet v. Webber Springs Owners Ass'n, 235 W. Va. 184, 185, 772 S.E.2d 369 (2015) (finding homeowners association assessments are "claims" for purposes of the Act's protections); Vanderbilt Mortg. & Fin., Inc., 230 W. Va. at 511, 740 S.E.2d at 568 (refusing to condition successful statutory claims on an award of actual damages); Syl. Pt. 6, Dunlap, 213 W. Va. 394, 582 S.E.2d 841 (resolving ambiguity regarding a statute of limitation to find that consumer may bring action within either the four-year period commencing with the date of the transaction or within one year of the due date of the last payment, whichever is later).

In the context of the clear history that the WVCCPA be construed broadly to protect consumers, it is unambiguous that the statutory requirement that all amounts paid to a creditor be credited against payments due contain only as a narrow an exception as possible. See W. Va. Highlands Conservancy, Inc., 588 F. Supp. 2d at 690. The most restrictive reading of the statutory defense permitting return of partial payments is the reading most consistent with the remedial purpose of the WVCCPA. Indeed, the narrowest reading of the defense provides the greatest

benefit to consumers by restricting the circumstances in which a creditor may return payments rather than credit to a consumer's account.

Importantly, the Legislature had good reason to limit the narrow affirmative defense set forth herein to only those consumer loans that are issued, held, or insured by certain types of financial entities. Loans originated by a bank, held by a government-backed entity like the federal National Mortgage Association (commonly referred to as Fannie Mae) or the federal Home Loan Mortgage Corporation (commonly referred to as Freddie Mac), or insured by an entity like the Veteran's Administration or the Department of Housing and Urban Development are more highly regulated than loans originated by a mortgage company or held by a private trust. These more highly-regulated consumer loans also offer additional protections to consumers. See, e.g., 12 U.S.C. § 1715u (requiring loss mitigation on FHA-insured loan); Fannie Mae Single-Family Servicing Guide, available at http://www.fanniemae.com/singlefamily/servicing (regulating originating and servicing of mortgage loans held by Fannie Mae); Freddie Mac Single-Family Seller/Servicing Guide, available at http://www.guide.freddiemac.com (regulating origination and servicing of mortgage loans held by Freddie Mac).

Consumers are harmed when a creditor rejects their payments, because it increases the arrearage consumers must pay to save their home from foreclosure and discourages consumers from reinstating the loan by making multiple payments to satisfy the total arrearage. Conversely, there is no harm to the creditor in accepting the payments as partial payments do not impose a duty to reinstate the loan if the full reinstatement is not received prior to the foreclosure sale. See W. Va. Code § 46A-2-115(c) (2003) & (2016). The Legislature surely balanced the harms to the consumer against any harm to the creditor when it narrowly drafting the limited defense to the general rule to apply only to certain creditors who are otherwise regulated by federal and state

agencies.

3. Canons of statutory construction mandate a limited scope of the affirmative defense.

Should the Court find the statute ambiguous, and therefore requiring judicial interpretation, the intent of the legislature is the controlling factor. See Syl Pt. 2, Meadows, 207 W. Va. at 214, 530 S.E. 2d at 687. "[T]he intention of the legislature is ascertained from the provisions of the statute by the applications of sound and well established cannons of construction." Id.

One such canon is that "significance and effect must, if possible, be given to every section, clause, word or part of the statute." Id. (citation and quotation omitted). If the Legislature had only intended to incorporate the narrow time-frame component of the reinstatement definition, it could have done so much more straightforwardly. The reference to subsection (b) could be omitted entirely, such that the affirmative defense in subsection (c) would read: "provided further that partial amounts received during the reinstatement period do not create an automatic duty to reinstate and may be returned by the creditor." Judge Burnside reached this conclusion in applying the statute:

> If the Legislature had intended that this exception to subsection (c) [pre 2017 amendments] was to be measured simply by reference to a cure period, it would have said so. It chose, rather, to identify this exception by reference to "the reinstatement period set forth in subsection (b)..." Inasmuch as the only reinstatement period found in all of subsection (b) is in (b)(3), the language chosen by the Legislature signals that all of subsection (b)(3) must be satisfied for this exception to operate.

(J.A. 470.) Indeed, the Legislature demonstrated that it knew it could use such a straightforward approach with its handling of the first affirmative defense in subsection (c). That proviso states: "provided, that amounts received and applied during a cure period will not result in a duty to provide a new notice of right to cure." Likewise, with regard to the affirmative defense at issue here, the Legislature could have simply stated "reinstatement period" or incorporated the

timeframe into the provision. Instead, the Legislature referenced the definition set forth in subsection (b).

This Court has also recognized the rule of statutory construction known as ejusdem generis, which dictates that, when general words follow a listing of specific classes of persons or things, the general words are construed as applying only to the listed classes or things of the same general nature. See Dunlap, 213 W. Va. at 401, 582 S.E.2d at 848 ("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." (internal citation and quotation omitted)). Petitioner SLS requests that this Court pluck the general words "reinstatement period beginning with the trustee notice of foreclosure and ending prior to foreclosure sale" and ignore the enumerated list of specific loans to which that general phrase applies from the version of the statute applicable in 2015. (Pet. Br. 12-16.)

In order to accomplish its purpose of evading liability for returning the Stover's payments, Petitioner SLS must employ a different tactic for the two payments it returned in 2017. In that instance, Petitioner asks this Court to ignore the phrase "consumer loan" in the definition of the reinstatement period. (Pet. Br. 12-16.) This Court, however, has emphasized that "significance and effect must, if possible, be given to every section, clause, word or part of the statute." Syl Pt. 3, Meadows, 207 W. Va. at 206, 530 S.E.2d at 679. By including the words "consumer loan" in the definition of the reinstatement period—"before the consumer reinstates the consumer loan or otherwise cures the default"—the Legislature indicated its intent for the reinstatement period to specifically apply to those consumer loans defined in that subsection. See W. Va. Code § 46A-2-

115(b)(3) (2016). Otherwise, the statute could read simply, "before the consumer reinstates or otherwise cures the default." Giving meaning to every word of West Virginia Code section 46A-2-115(b)(3) requires that courts limit the reinstatement period to the specific subset of defined consumer loans.

By using the broad and expansive words "any" and "all" in the primary directive of subsection (c), the Legislature signaled its intent that the requirement for creditors to accept payments made be applied broadly. See Syl. Pt. 2, Thomas v. Firestone Tire & Rubber Co., 164 W. Va. 763, 266 S.E.2d 905 (1980). This Court, in determining whether the WVCCPA applies to creditors collecting their own debts, looked at the statutory definition of debt collector and debt collection and held that the definition of "any action, conduct, or practice" and "any person or organization" was to be broadly construed. Id. at 767, 266 S.E.2d at 908. "The Court is led to the unavoidable conclusion that the word "any," when used in a statute, should be construed to mean, in a word, any." Id. at 769, 266 S.E.2d at 909; see also U. S. v. Ickes, 393 F.3d 501, 504 (4th Cir. 2005) ("The word 'any' is a term of great breadth. Read naturally, [it] has an expansive meaning.") (quotation and citation omitted). The primary directive of subsection (c)—requiring that "**all** amounts paid to a creditor arising out of **any** consumer credit sale or consumer loan shall be credited upon receipt against payments due" makes clear the legislative intent for the broad application of the provision, which is consistent with the oft-affirmed remedial nature of the Act. See W. Va. Code § 46A-2-115(c) (2003) & (2016). In that context, a narrow and restricted reading of the exception or defense is reflective of the legislative intent.

Petitioner SLS asserts that Judge Burnside's interpretation would produce an absurd result in that different definitions of "consumer loan" apply to different portions of subsection (c) of the statute; however, this is in fact a logical legislative decision consistent with the purposes of the

WVCCPA. (Pet. Br. 19-20.) Section 46A-2-115 begins with a general prohibition on the assessment of default fees, applicable to the general definition of "consumer loan" contained in section 46A-2-101. See W. Va. Code §46A-2-115(a) (2003) & (2016). The next subsection, section 46A-2-115(b), permits a narrower subset of consumer loans, as defined in that subsection, to assess additional default charges. See 46A-2-115(b) (2003) & (2016). As previously noted, limiting the types of loans to which subsection (b) applies reflected considered reasoning by the Legislature, given that the excluded loans are already heavily regulated. Finally, section 46A-2-115(c) sets forth a broad mandate that creditors of consumer loans, as generally defined in section 46A-2-102, must credit all payments received to payments due. See W. Va. Code § 46A-2-115(c) (2003) & (2016). It is a consistent policy decision for the Legislature to limit the exception to the broad mandate to the same narrower set of loans defined in subsection (b). The subset of consumer loans narrowly defined in subsection (b) are those more highly regulated by federal and state agencies. The legislative decision to allow those more highly regulated creditors to assess additional fees and return particular partial payments does not risk harm to consumers in the same way that permitting all creditors to return payments would. The drafting decision to have different definitions of consumer loan apply to the mandate and the exception contained in subsection (c) is not only not absurd, it is logical, a reflection of good public policy, and consistent with the statutory scheme and the broader purposes of the WVCCPA.

Petitioner SLS's attempt to restrict the important protection against unlawful and unfair conduct provided by section 46A-2-115(c) is entirely inconsistent with the remedial nature of the statute, the broad public policy the Legislature intended the statute to effectuate, and the binding law available to this Court.

VI. CONCLUSION

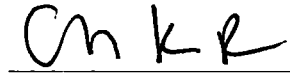
West Virginia Code section 46A-2-115(c) is a clear and unambiguous statute requiring creditors like Petitioner SLS to apply payments received to amounts due. Petitioner SLS clearly violated this statutory mandate in returning the Stovers payments on three occasions. Petitioner SLS is unable to avail itself of the narrow affirmative defense the Legislature provided to permit creditors of highly regulated state and federal loans to return certain partial payments as the Stovers' loan is undisputedly not originated, held, or guaranteed by an enumerated entity. Because application of the law, supported by the context of the remedial statute and canons of statutory construction, dictates that Petitioner SLS violated the applicable provision in returning the Stovers' payments, the judgment of the Circuit Court should be affirmed.

WHEREFORE, Respondents respectfully request the following relief:

(1) That this Court affirm the decision of the Circuit Court; and

(2) That this Court award Respondents the reasonable attorney fees and costs incurred on appeal.

Respondents,
RONALD J. STOVER and
PATTI A. STOVER,
By Counsel:



Sarah K. Brown (State Bar ID No. 10845)
Bren J. Pomponio (State Bar ID No. 7774)
Daniel F. Hedges (State Bar ID No. 1660)
Mountain State Justice, Inc.
1217 Quarrier Street
Charleston, WV 23501
Telephone: (304) 344-3144
Facsimile: (304) 344-3145
sarah@msjlaw.org
bren@msjlaw.org
dan@msjlaw.org

CERTIFICATE OF SERVICE

I, Sarah K. Brown, counsel for Respondents, do hereby certify that on this 10th day of May, 2021, I have served a true and exact copy of the foregoing ***Respondents' Brief*** upon the following, by depositing the same into the U.S. mail, first class, postage pre-paid:

Randall L. Saunders, Esq.
Ashley N. Barebo, Esq.
Jonah D. Samples, Esq.
Nelson Mullins Riley & Scarborough LLP
949 Third Avenue, Suite 200
Huntington, WV 25701
Counsel for Petitioner

Sarah K. Brown (State Bar ID No. 10845)