

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 32515

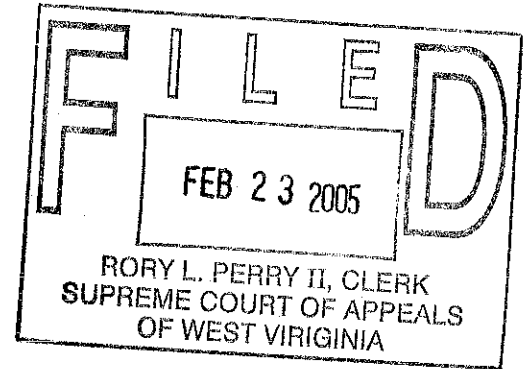
STATE OF WEST VIRGINIA, *ex rel.*
DARRELL V. MCGRAW, JR., ATTORNEY
GENERAL,

Plaintiff,

v.

BEAR, STEARNS & CO. INC., CITIGROUP
GLOBAL MARKETS INC. (f/k/a SALOMON
SMITH BARNEY, INC.), CREDIT SUISSE FIRST
BOSTON LLC, GOLDMAN, SACHS & CO.,
LEHMAN BROTHERS INC., MERRILL LYNCH,
J.P. MORGAN SECURITIES INC., MORGAN
STANLEY & CO., INC., UBS WARBURG LLC,
and U.S. BANCORP PIPER JAFFRAY INC.,

Defendants.



Upon Certified Question
From the Circuit Court of Marshall County
Honorable John T. Madden, Circuit Judge
Civil Action No. 03-C-133M

BRIEF OF PETITIONERS

BEAR STEARNS & CO., INC., CITIGROUP GLOBAL MARKETS, INC. (f/k/a SALOMON SMITH BARNEY, INC.), CREDIT SUISSE FIRST BOSTON LLC, GOLDMAN, SACHS & CO., LEHMAN BROTHERS INC., MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., J.P. MORGAN SECURITIES INC., MORGAN STANLEY & CO., INC., UBS SECURITIES LLC (f/k/a UBS WARBURG LLC) AND U.S. BANCORP PIPER JAFFRAY INC.

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KIND OF PROCEEDING AND NATURE OF RULING BELOW

This is a certified question proceeding under Rule 13 of the West Virginia Rules of Appellate Procedure. This Court has agreed to review the question of law certified by the Circuit Court of Marshall County, Madden, J., who held that the West Virginia Consumer Credit and Protection Act ("WVCCPA") applies to the Attorney General's Complaint.

STATEMENT OF THE CASE

The Global Research Settlement

In April 2003, Defendants and a comprehensive group of state and federal securities regulators agreed to the terms of a global settlement of charges relating to alleged conflicts of interest of Wall Street research analysts. The regulators included representatives of securities regulators from all fifty states, the District of Columbia and Puerto Rico, the Securities and Exchange Commission ("SEC"), NASD, Inc. ("NASD") and the New York Stock Exchange, Inc. ("NYSE"). This "Global Settlement" provided for, among other things, the imposition of wide-ranging injunctive relief and the payment by Defendants of approximately \$1.4 billion (in a combination of penalties, disgorgement to individual investors and funding for independent research and investor education). The Global Settlement represents the collective judgment of the nation's securities regulators that it is in the public interest to resolve nearly two years of investigations into alleged conflicts of interest of research analysts on the terms and conditions embodied in the settlement documents.

The West Virginia Auditor, to whom the West Virginia Legislature has delegated exclusive authority for securities enforcement matters, participated in this settlement process,

and ultimately joined the State of West Virginia in the Global Settlement, based on alleged violations of the West Virginia Uniform Securities Act (“WVUSA”).¹

The Attorney General’s Complaint

Before the Auditor was able to prepare and sign final settlement documents, the Attorney General of the State of West Virginia filed the Complaint in this matter, which “cuts and pastes” the allegations from each of the Defendant’s settlement documents and contends that the very same conduct that was the subject of the Global Settlement also amounts to “hundreds of thousands” of violations of the WVCCPA.² The Complaint seeks fines and penalties in addition to and apart from those included in the settlement proposed and ultimately agreed to by the Auditor, whose settlement efforts were jeopardized and delayed significantly in light of the Attorney General’s Complaint. The Auditor’s settlement efforts were not concluded until late 2003, long after the Defendants finalized settlements with and paid fines or other penalties to almost every other state.

The Attorney General’s Complaint alleges that each Defendant had an “investment banking component” that performed underwriting services in connection with securities offerings and a “stock and securities research analyst component” that issued reports, opinions and ratings regarding individual securities and that also allegedly solicited and marketed investment banking transactions. (Complaint ¶¶ 32-42.) The Complaint contends that a conflict of interest existed between these components and that the conflict caused Defendants to issue certain research

¹ While the Attorneys General of a handful of states participated in the Global Settlement (e.g., New York), in all such states the Attorney General is the state official charged with administering the state’s securities laws. In West Virginia, by contrast (as in the vast majority of states), the Attorney General does not have responsibility for enforcing the state securities laws – that responsibility is left to a separate and independent state official (in West Virginia, the Auditor).

² Because this certified question arises from Defendants’ challenge to the sufficiency of the Plaintiff’s pleading, for present purposes Defendants accept the allegations in the Complaint as true.

reports that failed to disclose, and/or were improperly affected by, those conflicts. (E.g., *id.* ¶¶ 52, 54.) Like the allegations that led to the Global Settlement, the Complaint also alleges that two Defendants engaged in inappropriate allocation of shares in initial public offerings, that two firms received payments for research and that four firms made payments for research.

In an apparent attempt to bring the alleged conduct within the language of the WVCCPA, the Complaint characterizes the Defendants' behavior as having occurred "in the conduct of trade and commerce, including the trade and commerce of buying and selling securities, including underwriting securities offerings." (Complaint ¶¶ 762-67.) The Complaint alleges that a WVCCPA violation occurred each time a Defendant acted improperly in connection with the underwriting, marketing, allocation and pricing of securities, or in the issuance or publication of research reports, ratings or opinions that were based on the conflict of interest between research and investment banking. (*Id.*) The Complaint contends that there are "believed to be hundreds of thousands of violations," each of which is punishable by a fine of \$5,000. (*Id.*, Introduction.)

Proceedings Below

In August 2003, Defendants moved to dismiss the Complaint under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure on the grounds that (a) the Complaint fails to allege conduct actionable under the WVCCPA, because that statute does not cover securities or securities-related services; and (b) in bringing this action, the Attorney General has exceeded his authority under the West Virginia Constitution and statutes.³

³ Where specifically cited, the briefs filed by the parties in the Circuit Court below are referenced here as follows: the Memorandum of Law in Support of Defendants' Motion to Dismiss is referred to as "Defs. MTD Br."; the State's Brief in Opposition to the Defendants' Motion to Dismiss is referred to as "Pl. Opp'n Br."; and the Reply Memorandum of Law in Further Support of Defendants' Motion to Dismiss is referred to as "Defs. Reply Br."

Defendants demonstrated that while the Complaint purports to seek relief based on the WVCCPA, that statute covers only “goods” and “services,” and the Complaint relates to items and conduct that do not fall within any reasonable definition of those terms as used in the WVCCPA. On the contrary, the Attorney General’s Complaint is based *entirely* on the allegations made in the Global Settlement, which relate *solely* to – and have meaning only in the context of – the buying and selling of the securities of public companies. Because neither securities nor securities-related conduct fall within the defined scope of the WVCCPA, allegations relating to securities and securities-related conduct cannot state a claim under the WVCCPA. That conduct is instead properly and comprehensively regulated by the West Virginia Auditor, who acts as the state’s Securities Commissioner under the WVUSA.

Defendants also demonstrated that the Attorney General has exceeded the well-defined scope of his Constitutional and statutory authority by bringing this suit, because the West Virginia legislature has determined that the West Virginia Auditor, not the Attorney General, is the state official with responsibility for securities regulation and enforcement. Thus, the Attorney General simply has no authority to pursue securities-related claims.

At a status conference on May 19, 2004, Judge Madden acknowledged that he was considering certifying the questions raised by Defendants’ motion, because he found himself to be “wrestling” with the motion, which presented “something new before” him. (May 19, 2004 Tr. at 4.) On July 23, 2004, Judge Madden denied Defendants’ motion to dismiss but certified the following question to this Court:

Question: Does the fact that a business entity has the buying and selling of securities as a component of its business exempt it from being prosecuted by the State of West Virginia through its Attorney General, under W. Va. Code §46A-7-101 et seq., where the State is seeking to impose civil penalties on the business entity

for allegedly committing unfair and deceptive acts in the conduct of commerce in violation of W. Va. Code §46A-6-101 *et seq.*, (General Consumer Protection)?

Judge Madden's proposed answer was "no."

Defendants then petitioned this Court to docket and decide the certification, and respectfully asked this Court to employ its power under West Va. Code §51-1A-4 to reformulate the certified question as follows:

Is it statutorily and constitutionally permissible for the Attorney General of West Virginia to bring an action under the West Virginia Consumer Credit and Protection Act based upon conduct related to securities transactions?

This Court then issued an order docketing the question for review, leading to the brief that Defendants file today.

ASSIGNMENT OF ERROR

The Circuit Court erred in concluding that the WVCCPA reaches the conduct alleged in the Attorney General's Complaint. That conduct relates exclusively to the purchase and sale of securities, and neither securities nor securities-related services fall within the ambit of the WVCCPA. The Defendants and the securities-related businesses in which they engage are extensively regulated through a comprehensive scheme of federal, state and self-regulatory organization rules and regulations. Accordingly, no regulatory purpose would be served by permitting this securities-related suit under the WVCCPA. Moreover, the evidence is overwhelming that the Legislature did not intend the WVCCPA to reach securities-related conduct.

Fundamentally, the plain language of the WVCCPA makes clear that securities and securities-related services fall outside the WVCCPA article upon which the Attorney General's

case is based, because neither fits within the definitions of “goods” or “services” as those terms were meant to be interpreted in that article. Multiple independent grounds confirm the accuracy of this interpretation. First, recent amendments to the WVCCPA conclusively establish that this is the right interpretation of the WVCCPA, because the Legislature has for the first time specifically *included* securities within certain articles of the WVCCPA, but has done so *only in articles that the Attorney General does not rely on here*. Moreover, the history and context of the WVCCPA’s original enactment in 1974 establish that the statute was not intended to reach securities-related activities. On the contrary, the Legislature sought to remedy abuses in the extension of credit to consumers and to address unfair trade practices related to such abuses. Indeed, within days of enacting the WVCCPA the legislature enacted the WVUSA; and it is the WVUSA, not the WVCCPA, that is the comprehensive statutory vehicle intended to govern securities-related conduct. As a result, permitting the Attorney General’s suit to proceed would contravene the Legislature’s intent, by creating an overlapping, incoherent and conflicting regulatory scheme.

Furthermore, as the Legislature and this Court have recognized, and as the Attorney General himself has conceded, the WVCCPA must be construed consistently with the federal statute after which it was modeled, the Federal Trade Commission Act, a statute that has never been deemed to reach securities or securities-related activity. And the overwhelming majority of courts to have considered the issue have concluded that consumer protection statutes like the WVCCPA are not intended to cover securities or securities-related conduct, and that such activity is comprehensively and properly regulated by securities laws and regulations. All of these reasons demonstrate that the WVCCPA was never intended to reach the conduct alleged in the Complaint.

Finally, a separate and independent basis for concluding that the WVCCPA does not apply to the conduct alleged in the Complaint is that the Complaint exceeds the Attorney General's authority under the West Virginia Constitution and statutes and invades the exclusive province of the Auditor, who is charged with enforcing the state's securities laws.

POINTS AND AUTHORITIES AND DISCUSSION OF THE LAW

I. This Court Should Reformulate The Certified Question, As Authorized Under West Virginia Code Section 51-1A-4

Defendants respectfully submit that the question certified by the Circuit Court misstates the premise of their challenge to the sufficiency of the Complaint, and, therefore, should be reformulated. This Court has the authority to reformulate the question certified by the Circuit Court. The West Virginia Code provides that “[t]he supreme court of appeals of West Virginia may reformulate a question certified to it.” W.Va. Code § 51-1A-4. Accordingly, as this Court has explained, “[w]hen a certified question is not framed so that this Court is able to fully address the law which is involved in the question, then this Court retains the power to reformulate questions certified to it.” Syllabus Point 3, Kincaid v. Mangum, 189 W.Va. 404 (1993). This Court often exercises this authority to reformulate questions that do not permit the court to address the legal issues implicated by the question. See, e.g., Martino v. Barnett, 215 W.Va. 123, 126 (2004); Zelenka v. City of Weirton, 208 W.Va. 243, 245 (2000).

As drafted, the question certified by the Circuit Court may not permit this Court “to fully address the law which is involved” because the question could be interpreted as asking only whether an organization would have blanket immunity from the WVCCPA so long as that organization had, “as a component of its business,” the buying and selling of securities. Here defendants are not arguing for blanket immunity; rather, Defendants argue that the WVCCPA

does not reach *the specific conduct alleged in the Complaint*, because *that conduct* relates exclusively to the buying and selling of securities (and is regulated by the Auditor under the WVUSA). For example, if, in addition to buying and selling securities, an entity also issued credit cards or sold cars, the fact that the entity was in the securities business would be irrelevant to whether it could be sued under the WVCCPA for conduct related to its lending practices or automobile sales. The real question is whether such an entity could be sued under the WVCCPA for *conduct that relates to* the buying and selling of securities, not merely whether the WVCCPA could ever be used against such an entity for any purpose simply because that entity has the buying and selling of securities as a component of its business. For these reasons, Defendants respectfully request that the Court reframe the question as follows:

Is it statutorily and constitutionally permissible for the Attorney General of West Virginia to bring an action under the West Virginia Consumer Credit and Protection Act based upon conduct related to securities transactions?

In framing the question in this manner, Defendants have attempted to present for resolution both of the principal legal propositions they seek to advance: first, that as a matter of statutory interpretation, the WVCCPA does not reach securities transactions or related conduct; and second, that as a constitutional and statutory matter, the Attorney General of West Virginia lacks authority to enforce the WVCCPA in such a way as would permit him to regulate securities transactions or related conduct (such transactions and conduct are properly regulated by the Auditor).

Even if the Circuit Court's question is not reformulated, however, the result in this case should be the same. The WVCCPA does not apply to the conduct alleged in the Attorney General's Complaint, not because the Defendants have the buying and selling of securities as a

component of their businesses, but because the conduct alleged in the Complaint relates exclusively to the buying and selling of securities, and that conduct is not governed by the WVCCPA.

II. The Complaint Fails As A Matter Of Law

A. Legal Standards

“The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*.” Syllabus Point 1, Gallapoo v. Wal-Mart Stores, Inc., 197 W.Va. 172 (1996). Defendants challenge the Complaint under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, which compels dismissal “where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Harrison v. Davis, 197 W. Va. 651, 656 (1996). As this Court has held, a plaintiff may not proceed “where the claim is not authorized by the laws of West Virginia.” State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 776 (1995) (citation and internal quotation marks omitted). In this regard, “[a] motion to dismiss under Rule 12(b)(6) enables a circuit court to weed out unfounded suits.” Id.

B. The WVCCPA Does Not Apply To The Conduct Alleged In The Complaint

The fundamental flaw with the Attorney General’s Complaint is that the only conduct it alleges *relates exclusively and inextricably to the buying and selling of securities*. (See, e.g., Compl. ¶¶ 762-71 (alleging “unfair or deceptive acts or practices” in connection with purchase or sale of securities, such as contact between research analysts and bankers, issuance of misleading research reports, allocation of shares in exchange for brokerage commissions or investment banking business, etc.)) As explained below, because the WVCCPA, by its terms, does not

cover such conduct – as that conduct is governed by a separate statutory scheme – the Complaint must be dismissed.

Recognizing the force of this argument, the Attorney General all but conceded in the Circuit Court that the WVCCPA does not apply to the buying and selling of securities. The Attorney General attempted to reframe the Complaint by contending that it instead targets services provided by Defendants and advertisements about those services. (See Pl. Opp'n Br. at 5, 9, 12; Defs. Reply Br. at 1-2, 7.) However, as explained below, the Attorney General's position conflicts with the express allegations of the Complaint and ignores the nature of the conduct and activities at issue. It thus cannot serve to bring the Complaint within the scope of the WVCCPA.

1. The Plain Meaning of the WVCCPA Demonstrates That Securities and Securities-Related Conduct Are Not Within Its Scope

The WVCCPA is codified as Chapter 46A of the West Virginia Code. Within Chapter 46A are a series of articles covering different subjects. The Attorney General brings this case under Article 6 of Chapter 46A, titled "General Consumer Protection." Section 104 of Article 6 ("Section 104") declares "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any *trade or commerce* . . . [to be] unlawful." W. Va. Code § 46A-6-104 (emphasis added). Section 102 of Article 6, in turn, defines "trade or commerce" as "the advertising, offering for sale, sale or distribution of any goods or services" *Id.* § 46A-6-102(e). Thus, in order to state a claim, the Complaint must allege that Defendants engaged in prohibited conduct in their "advertising, offering for sale, sale or distribution of any goods or services."

In the section of the Complaint articulating the cause of action (titled “Cause of Action Against all Named Defendants for Violations of West Virginia Consumer Credit and Protection Act”), the Attorney General alleges *exclusively* that the “trade or commerce” in which Defendants engaged when they supposedly violated the WVCCPA was “the trade and commerce of buying and selling securities, and underwriting securities” (Compl. ¶¶ 762-65.) Consistent with that allegation, all of the conduct alleged in the Complaint relates *exclusively* to Defendants’ activities with respect to the offering, recommendation, sale and/or distribution of securities. But because neither securities nor acts relating to the purchase and sale of securities fall within the WVCCPA’s definition of “goods” or “services,” conduct involving those topics does not constitute “trade” or “commerce” within the scope of the WVCCPA.

(a) Securities Are Not “Goods” Within the Meaning of the WVCCPA

Under the plain terms of the WVCCPA, and indeed as the Attorney General effectively conceded in the Circuit Court (see Pl. Opp’n Br. at 5), securities are not “goods.” Article 6 does not contain its own definition of “goods” or “services,” so one must look to the general definition provisions of the WVCCPA, which are contained in Article 1 of Chapter 46A (“Short Title, Definitions And General Provisions”). Under this general definition, “goods” are defined to “*exclude[]* money, chattel paper, documents of title and *instruments*.” W. Va. Code § 46A-1-102(21) (emphasis added). Under West Virginia law, it is well established that securities are a form of “instrument,” and thereby, not goods. Id. § 32-4-401(n) (defining “security,” in WVUSA, to mean, among other things, “any interest or *instrument* known as a ‘security’”) (emphasis added); id. § 60A-7-706(a) (describing distribution of proceeds from forfeited “moneys, securities or other negotiable instruments”); Yost v. Haun, 204 W. Va. 306, 309 (1998)

(construing “instrument” as defined in 1979 version of West Virginia U.C.C. to include stock certificates). Thus, by the Act’s own terms, securities are excluded from the reach of Article 6. Given the plain terms of the Act, it is hardly surprising that Defendants have been unable to locate a single case in which the WVCCPA has been applied to securities transactions; nor is it a surprise that the Attorney General all but conceded below that the WVCCPA does not apply to the purchase and sale of securities.

(b) Acts Relating to the Buying and Selling of Securities Are Not “Services” Within the Meaning of the WVCCPA

Nor does the Complaint allege “services” as that term is defined in Section 104 of the WVCCPA. The WVCCPA defines “services” narrowly to include three specific categories. In particular, W. Va. Code § 46A-1-102(47) provides that “services” includes:

- (a) Work, labor and other personal services; (b) privileges with respect to transportation, use of vehicles, hotel and restaurant accommodations, education, entertainment, recreation, physical culture, hospital accommodations, funerals, cemetery accommodations, and the like; and (c) insurance.

Neither securities themselves, nor any of the conduct alleged in the Complaint, fits within any of these categories. The Complaint alleges nothing relating to insurance, transportation, vehicles, hotels, restaurants or any of the other subjects identified in subsections (b) and (c). Nor, as explained below, can the Attorney General reasonably contend that the conduct in the Complaint constitutes “[w]ork, labor [or] other personal services” within the meaning of subsection (a), because the Complaint alleges wrongdoing exclusively in connection with the purchase and sale of securities, and securities are not covered under the WVCCPA.

When the Complaint was challenged, the Attorney General attempted to recast the allegations, contending below that this lawsuit is not about buying and selling “securities” at all,

but is instead about Defendants' advertising and provision of "services." (See Pl. Opp'n Br. at 9 (stating, for the first time, that the case is about "neither securities trading nor investment banking, but rather misrepresentations by the defendants as to the value and trustworthiness of their services."))⁴ But the Attorney General cannot simultaneously concede that the WVCCPA does not apply to the purchase and sale of securities, and then turn around and argue that the WVCCPA somehow applies to Defendants' "services," where *the inherent and exclusive purpose of those services is to facilitate the buying and selling of securities.*

Numerous courts have recognized that securities and securities-related services cannot be separated and so have refused to allow securities-related claims to be brought under a state consumer protection statute. For example, in the recent decision of Gray v. Seaboard Securities, Inc., 788 N.Y.S. 2d 471 (N.Y. App. Div. 2005), the New York Appellate Division affirmed the dismissal of plaintiffs' consumer protection claim against a full-service securities brokerage firm like Defendants here. The plaintiff, similar to Plaintiff here, asserted that the defendant induced him to open up a brokerage account by falsely representing that it would provide him with proprietary investment research, which it allegedly failed to provide. Though the plaintiff, also like Plaintiff here, contended that his claim related to "the service of providing investment advice and not to the purchase of securities themselves," the court rejected this argument because any research advice given by the brokerage firm was "clearly ancillary to the purchase of securities," and securities themselves are not covered under New York's consumer protection law. Id. at 472-73 (explaining also that New York's consumer protection law does not cover securities

⁴ In fact, the Complaint does not allege a single "advertisement" by any Defendants as to "trustworthiness." Indeed, it does not identify any "advertisements" at all. All that the Complaint alleges is that Defendants generally "held themselves out" to be "independent" and "objective" (Compl. ¶ 39), without alleging how these statements were made, when they were made, to whom they were made, or even specifically alleging that they were in any way false – or believed false – when made.

because “individuals do not generally purchase securities in the same manner as traditional consumer products” and because securities arena is highly regulated and it is therefore “questionable that the legislature intended to give securities investors an added measure of protection beyond that provided by securities acts”); see also Harrah v. J.C. Bradford & Co., No. 93-2458, 1994 U.S. App. LEXIS 27827, at *13 (4th Cir. Oct. 6, 1994) (unpublished) (holding that “securities-related activities” could not be deemed to be within the scope of the North Carolina Unfair and Deceptive Trade Practices Act, which did not otherwise apply to securities); Sterner v. Penn., 583 S.E.2d 670, 675 (N.C. Ct. App. 2003) (citing Harrah with approval for proposition that North Carolina consumer protection statute does not apply to securities-related services because it does not apply to securities); cf. City Check Cashing, Inc. v. Nat’l State Bank, 582 A.2d 809 (N.J. Super. Ct. App. Div. 1990) (holding New Jersey Consumer Fraud Act did not apply to purchasers of cash, and therefore also holding the Act also did not apply to “services [that] are merely incidental” to the underlying cash transactions).

At bottom, the consumers that the Attorney General is seeking to protect are investors who relied on allegedly false research reports in connection with the purchase or sale of securities. In other words, the Attorney General’s allegations as to Defendants’ “services” are nothing more than repackaged claims about securities transactions, and, as such, amount to securities regulation. Because the WVCCPA does not permit the Attorney General to regulate securities, the Complaint must be dismissed as a matter of law.

There is no credible argument that the Legislature intended the interpretation of “services” that the Attorney General urges on this Court. Indeed, for all of the reasons explained below, adoption of the Attorney General’s definition would run contrary to the structure and historical context of the WVCCPA, and create an overlapping and incoherent regulatory

landscape at odds with the Legislature's clear intent. The Legislature intended to follow established federal precedent by locating responsibility for securities-related conduct with a designated official, the Auditor, under a dedicated statute, the WVUSA — a statute that subjects Defendants to strict and pervasive regulation within the state of West Virginia.

2. Subsequent Legislation Confirms That Securities Are Not "Goods" or "Services" Within the Meaning of the WVCCPA.

Other definitions of "goods" and "services" in related sections of the West Virginia Code confirm that securities are not covered under Section 104 of Article 6. For example, a later-enacted article of the WVCCPA dealing exclusively with telemarketing ("Article 6F" or the "Telemarketing Article") explicitly defines "goods" and "services" to cover securities, *but only for the purpose of the Telemarketing Article*. See W. Va. Code § 46A-6F-104(2) (defining "[c]onsumer goods or services" to include "[a]ny property or service offered or sold for the purpose of providing profit or investment opportunity"); *id.* § 46A-6F-101 (setting forth definitions only "[f]or the purposes of this [telemarketing] article"). By contrast, Article 6 — the Article under which this case is brought — does not contain its own definition of "goods" and "services." Therefore, those terms used in Article 6 have the meaning set forth in the general definitions provisions of the Act, which, as noted above, do not include securities or securities-related services within their ambit. (See *supra* at 10-15.) The Telemarketing Article's expanded definition of "goods" and "services, which again applies only to the Telemarketing Article, would be totally redundant if the general definitions of "goods" and "services" in Article 1 — the only definitions applicable to this case — already covered securities transactions. Since courts must interpret statutes so as to give each provision meaning, *Cary v. Riss*, 189 W. Va. 608, 614 (1993), this recently enacted amendment to the WVCCPA establishes conclusively that Article 6,

Section 104, the provision under which the Attorney General has sued here, does not apply to securities or securities-related activities.

Furthermore, even in the Telemarketing Article, the Legislature was careful to carve out heavily regulated broker-dealers and investment advisers like Defendants. In particular, the Telemarketing Article expressly does *not* apply “to any licensed securities, commodities, or investment broker, dealer, or investment adviser” W. Va. Code § 46A-6F-202. Likewise, the Telemarketing Article does not apply to “any licensed associated person of a securities, commodities, or investment broker, dealer, or investment adviser . . . [who is] registered or licensed by the National Association of Securities Dealers or other self-regulatory organization” *Id.* § 46A-6F-203. These important exemptions exist only in the Telemarketing Article because the Telemarketing Article is the only one to include securities within the definition of “goods” and “services” and hence is the only article that could possibly apply to such entities in the first place.

The clear legislative intent to reach securities that is evinced by the language of the Telemarketing Article indicates that, when it chooses to do so, the West Virginia Legislature knows very well how to draft provisions that apply to securities. See also W. Va. Code § 46-2-105(1) (defining “goods,” in West Virginia Uniform Commercial Code (“UCC”), to mean, among other things, “investment securities” only for the purposes of article 8, which deals exclusively with securities). Since legislatures are presumed to be familiar with their earlier enactments when they pass subsequent legislation, Cary, 189 W. Va. at 614; Manchin v. Dunfee, 174 W. Va. 532, 535 (1984), the West Virginia Legislature must be credited with the knowledge of its definition of “goods” in section 46A-1-102(21). As such, the only reasonable explanation of why it would reformulate its definition of “goods” in the Telemarketing Article so as to

expressly reach securities is that the Legislature itself neither intended Article 6 to apply to securities, nor believed that it in fact did so.

3. The Historical Context of the WVCCPA's Enactment Confirms That it Does Not Apply to Securities or Securities-Related Transactions

The historical context surrounding the WVCCPA's enactment in 1974 and its legislative history also confirm that the Legislature never intended the Act to apply to securities transactions or securities-related services. As an initial matter, the timing of the respective enactments of the WVCCPA and the WVUSA confirms that the Legislature did not need or intend the WVCCPA to cover securities. Without any reference to securities, the Legislature enacted the WVCCPA as part of Chapter 12 on March 5, 1974. See Act of Mar. 5, 1974, ch. 12, 1974 W. Va. Acts 58. *Four days later*, on March 9, 1974, the Legislature passed Chapter 128, including the WVUSA, which is concerned exclusively with securities regulation. See Act of Mar. 9, 1974, ch. 128, 1974 W. Va. Acts 719. It is a well-established canon of statutory construction that where there is an earlier, generally applicable statute, and a later, more specific statute that contains inconsistent provisions, the later statute controls. Block v. N. Dak. ex rel. Bd. of Univ. & Sch. Lands, 461 U.S. 273, 285 (1983); see also Syllabus Point 2, Winkler v. W. Va. Sch. Bldg. Auth., 189 W. Va. 748 (1993). In a directly analogous situation, the Supreme Judicial Court of Massachusetts observed that "the Legislature was presumably aware of" the irreconcilable differences between the Massachusetts consumer protection statute and state securities law that it had enacted only days apart. Cabot Corp. v. Baddour, 477 N.E.2d 399, 402 (Mass. 1985). The Cabot court thus concluded that it was "unlikely that the Legislature intended to allow a defrauded purchaser of securities to claim remedies under [the consumer protection statute] which are neither in [the state securities law] or its federal counterpart" Id. Just as in Massachusetts, the West Virginia

Legislature perceived the important differences between the broad provisions of the WVCCPA and the narrowly drawn remedies of the WVUSA at the time it enacted them. (See infra at 20-25 (noting differences between WVCCPA and WVUSA).) The later enactment of the WVUSA provides proof that the Legislature intended securities to be regulated exclusively under that statute, and not to come within the reach of the WVCCPA.

The broader historical context of the WVCCPA further confirms this result. In a comprehensive law review article that this Court has found authoritative, see Morris v. Marshall, 172 W. Va. 405, 407 n.3 (1983), Professor Vincent Cardi explained that the WVCCPA arose from the consumer movement that gained force throughout the United States in the late 1960s. See Vincent Paul Cardi, West Virginia Consumer Credit and Protection Act, 77 W. Va. L. Rev. 401, 408-09, 411-13 (1975). The “unfair or deceptive acts or practices” with which that movement was then concerned focused primarily on abuses in the extension of consumer credit, including the use of excessive finance charges, cross-collateral clauses, and other oppressive lending and collection practices that were being used unfairly by creditors against consumers.⁵ See id. at 402-09; see also Nat’l Comm’n on Consumer Finance, Consumer Credit in the United States 23-43 (1972). These practices and others which the WVCCPA was designed to address simply bear no resemblance to the allegedly improper practices that the Attorney General seeks to regulate with this case – practices such as “inflated gross spreads which were in excess of competitive levels,” “allocat[ion] of shares of IPOs to a select group of persons in other firms,” or “act[s] in violation of the concept of the ‘Chinese Wall’ or separation of research and investment banking” (Compl. ¶ 771(a), (c), (i)). See Cardi, supra, at 413-15.

⁵ “Cross-collateral clauses” are provisions that may appear in installment contracts “allowing the seller, if the buyer defaults, to repossess not only the particular item sold but also every other item bought from the seller on which a balance remained due when the last purchase was made.” Black’s Law Dictionary 383 (7th ed. 1999).

Reference to the two model codes on which the WVCCPA was patterned further attests to the misguided nature of the Attorney General's case. As shown by Professor Cardi, the WVCCPA drew heavily from both the Uniform Consumer Credit Code ("UCCC") and the National Consumer Act ("NCA"). Cardi, supra, at 414. Tellingly, the UCCC focuses exclusively on practices involving the provision of credit, and does not even contain a provision similar to West Virginia Code § 46A-6-104 – the basis of the Attorney General's suit here – that prohibits unfair practices in the sale of goods or services. Comment, An Analysis of the Uniform Consumer Credit Code and the National Consumer Act, 12 B.C. Indus. & Com. L. Rev. 889, 911-14 (1971). Moreover, Section 3.201 of the NCA, on which West Virginia Code § 46A-6-104 was patterned, see Cardi, supra, at 414 & n.67, 523, is implicitly limited in scope, as the following official comment establishes:

By failing to provide protections to the consumer against unfair and deceptive trade practices, the draftsmen of the [UCCC] completely ignored the fact that these practices often accompany credit transactions. . . . Furthermore, since many credit transactions are in fact sales of goods, there is need to afford the consumer additional warranty protection.

Nat'l Consumer Act § 3.201, cmt. 1 (Nat'l Consumer L. Center 1970). The NCA thus makes clear that its prohibition on unfair trade practices is a necessary but secondary adjunct to its main purpose of regulating consumer credit transactions. The WVCCPA operates in the same fashion. Therefore, while Article 6, Section 104 may go somewhat beyond the mere regulation of consumer credit transactions, see W. Va. Code § 46A-1-103(3) (stating certain articles of chapter 46A apply to transactions "not necessarily involving consumer credit"), it clearly can have no application to the purchase or sale of securities or the provision of equity research coverage, which are worlds away from the specific practices to which the WVCCPA was targeted. See

Syllabus Point 3, Kings Daughters Housing Inc. v. Paige, 203 W. Va. 74, 74 (1998) (stating “fundamental” rule that statutory language “may be ascertained by reference to the meaning of other words or phrases with which it is associated” and “limited in its operation or effect where it may be gathered from the intent and purpose of the statute that it was designed to apply only to certain persons or things”).

4. Including Securities and Securities-Related Conduct Within the WVCCPA Would Lead to Overlapping and Conflicting Provisions of the WVCCPA and the WVUSA, Resulting in an Incoherent and Overlapping Regulatory Framework that the Legislature Never Intended

Yet another reason why this Court should hold that securities are not covered by the WVCCPA is that the legislature, through its enactment of the WVUSA, has already created a comprehensive securities regulation scheme. Allowing securities enforcement under the WVCCPA would therefore lead to overlapping, incoherent and conflicting regulation (as the filing of this case demonstrates).

(a) The Legislature Vested Securities Regulatory Authority in the Auditor and the WVUSA, and Did Not Intend Duplicative Regulation By the Attorney General Under the WVCCPA

The WVUSA clearly and comprehensively covers the conduct about which the Attorney General complains in this case. As the Attorney General alleges (Compl. ¶¶ 21-22), each of the Defendants is registered with the West Virginia Securities Commissioner, i.e., the Auditor, pursuant to West Virginia Code § 32-2-202. This registration subjects Defendants to the Auditor’s regulatory authority to “deny, suspend, otherwise condition or revoke” their registration “by order” if he finds that the Defendants engaged in “dishonest or unethical practices in the securities business.” Id. § 32-2-204(a), (a)(2)(G). As amended in 2002, such

practices are specifically defined with respect to broker-dealers to include prohibitions on the very conduct in which the Attorney General claims Defendants participated, including:

- Recommending to a customer the purchase, sale or exchange of any security without reasonable grounds to believe that the transaction or recommendation is suitable for the customer based upon reasonable inquiry concerning the customer's investment objectives, financial situation and needs and any other relevant information known by the broker-dealer and/or agent (id. § 32-2-204(b)(3));
- Charging unreasonable and inequitable fees for services performed, including services related to its securities business (id. § 32-2-204(b)(10));
- Engaging in a course of conduct constituting an egregious violation of the rules of a national securities association of which the broker-dealer is a member with respect to any customer, transaction, or business (id. § 32-2-204(b)(14));
- Effecting any transaction in, or inducing the purchase or sale of, any security by means of any manipulative, deceptive or fraudulent device, practice, plan, program, design or contrivance (id. § 32-2-204(b)(19));
- Using any advertising or sales presentation which is deceptive or misleading, such as the distribution of any nonfactual data, material or presentation based on conjecture, unfounded or unrealistic claims or assertions in any brochure, flyer or display by works, pictures, graphs or otherwise designed to supplement, detract from, supersede, or defeat the purpose or effect of any prospectus or disclosure (id. § 32-2-204(b)(22));
- Representing the availability of financial or investment capabilities when the representation does not accurately describe the nature of the services offered, the qualifications of the person offering the services and method of compensation for the services (id. § 32-2-204(b)(31));
- Engaging in any act or a course of conduct which resulted in the issuance by a securities agency or administrator of any state of an order to cease and desist the violation of the provisions of any state's securities laws or rules (or the equivalent of any such order) (id. § 32-2-204(b)(32)); and
- Engaging in any other act or practice which the commissioner determines to constitute dishonest or unethical practices in the securities business (id. § 32-2-204(b)(33)).

By amending the WVUSA to specify explicitly that it covers such conduct, the Legislature expressed its clear desire to have unfair and deceptive practices touching the purchase or sale of

securities regulated through the comprehensive framework of the WVUSA, rather than through the WVCCPA.

Notably, even without the clarification provided by the 2002 amendments, it cannot seriously be doubted that the WVUSA covered the conduct the Attorney General has identified in his Complaint. Indeed, the Auditor took that position in the settlements he reached with each of the Defendants in connection with the Global Settlement, asserting that the Defendants violated West Virginia Code § 32-2-204(a)(2)(G), a provision of the WVUSA, by engaging in the very conduct alleged in the Attorney General's Complaint here. With or without the recent amendments, it is indisputable that the WVUSA is the proper statute to address the conduct alleged in the Complaint.

Moreover, the WVUSA confers ample authority on the Securities Commissioner to punish the violations he finds. The Securities Commissioner may (i) deny, suspend, condition, or revoke any registration, see id. § 32-2-204(a); (ii) issue an order imposing an administrative assessment of up to \$10,000 for a single violation, or \$50,000 for multiple violations in a single proceeding or a series of related proceedings, id. § 32-4-407a;⁶ (iii) seek immediate injunctive relief to halt violations or enforce compliance with his orders, id. § 32-4-408; and (iv) refer a matter to the appropriate prosecuting attorney for criminal prosecution, id. § 32-4-409. These powers, which parallel and in some ways exceed those granted the Attorney General under the WVCCPA, demonstrate that if the WVCCPA *were* to apply to securities transactions and related services, it would not provide any greater deterrent to engaging in unfair and deceptive conduct touching securities than does the WVUSA alone.

⁶ In fact, the Defendants paid a total of \$4,125,000 to the Securities Commissioner in connection with the Global Settlement.

The overarching point to be drawn from the comprehensiveness of the WVUSA is that the securities business — including the actual purchase and sale of securities, the offering of services, and advertisements about such securities-related services — stands as one of the most heavily regulated businesses in this Country. Indeed, in West Virginia the securities laws already comprehensively address the very conduct that the Attorney General is seeking to regulate under the WVCCPA — conduct that was investigated, charged and settled on behalf of the people of the State of West Virginia by the state official vested with authority to carry out that task, the Auditor. Permitting the Attorney General to prosecute this suit would not serve any regulatory purpose, and would merely result in — at best — a regulatory framework that duplicates an existing regulatory system, and — at worst — a competing framework that conflicts with these preexisting regulatory regimes (as explained below).

(b) Because The WVCCPA and WVUSA Conflict in Material Respects, Permitting the Attorney General's Suit Would Create an Incoherent and Dissonant Regulatory Framework in West Virginia

The WVUSA and WVCCPA differ in material respects. For example, while the WVUSA affords defendants a due diligence defense, the WVCCPA apparently does not. Compare W. Va. Code § 32-4-410(a)(2), (b) (predicating liability under the WVUSA, in part, on defendant's failure to "sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission . . .") with State ex rel. McGraw v. Telecheck Servs. Inc., 213 W. Va. 438, 448-49 (2003) (implying that accidental violation of WVCCPA could give rise to liability in some circumstances). Furthermore, the Attorney General may bring an action for a civil penalty under the WVCCPA within four years of a violation of the statute. W. Va. Code § 46A-7-222(2). Application of the WVCCPA to securities thus would nullify the safe harbor to which defendants are entitled under the

WVUSA's shorter, three-year statute of repose for civil actions. See id. § 32-4-410(a)(2)(e). The Legislature could not have intended so contradictory and incoherent a result. See, e.g., UMWA by Trumka v. Kingdon, 174 W. Va. 330, 332 (1984) (recognizing as general standard of statutory construction that "a specific statute [is] to be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled").

Courts in many other jurisdictions have recognized that a variety of other differences between the relevant state securities laws and consumer protection laws, as well as the comprehensive regulatory framework under each, mean that regulation of securities under both schemes would result in incoherence. See, e.g., Smith v. Cooper/T. Smith Corp., 846 F.2d 325, 328-29 (5th Cir. 1988) (focusing on unintended overlapping enforcement of Louisiana consumer protection and securities regulators), aff'd in part on reh'g, 886 F.2d 755 (1989); Stephenson v. Paine Webber Jackson & Curtis, Inc., 839 F.2d 1095, 1100-01 (5th Cir. 1988) (noting that dual regulation would lead to inconsistency); Spinner Corp. v. Princeville Dev. Corp., 849 F.2d 388, 391 (9th Cir. 1988) (noting incoherence of dual regulation); Lindner v. Durham Hosiery Mills, Inc., 761 F.2d 162, 167-68 (4th Cir. 1985) (focusing on availability of treble damages under consumer protection law and unintended overlapping enforcement of consumer protection and securities regulators); Crowell v. Morgan Stanley Dean Witter Servs. Co., 87 F. Supp. 2d 1287, 1295 (S.D. Fla. 2000) (focusing on fact that securities field "is already heavily regulated by other state and federal laws"); Nichols v. Merrill Lynch, Pierce Fenner & Smith, 706 F. Supp. 1309, 1323, 1337 (M.D. Tenn. 1989) (focusing on availability of treble damages under consumer protection law); In re Catanella & E.F. Hutton & Co. Sec. Litig., 583 F. Supp. 1388, 1443 (E.D. Pa. 1984) (focusing on privity requirement in New Jersey state securities law); Russell v. Dean Witter Reynolds, Inc., 510 A.2d 972, 980-81 (Conn. 1986) (focusing on comprehensiveness of

regulatory scheme under both state securities laws and consumer protection laws); Skinner v. E.F. Hutton & Co., 333 S.E.2d 236, 241 (N.C. 1985) (approving Lindner analysis); Cabot Corp., 477 N.E.2d at 401-02 (focusing on comprehensiveness of both schemes); Taylor v. First Jersey Sec., Inc., 533 So.2d 1383, 1387-88 (La. Ct. App. 1988) (noting that dual regulation would be inconsistent with statutory scheme) (citation omitted).

Much of the reasoning in the above cited cases is remarkably relevant to the interpretation of the WVCCPA. For example, a particular concern for a number of courts was the fact that dual regulation “could subject those involved with securities transactions to overlapping supervision and enforcement by both the . . . Attorney General, who is charged with enforcing [the consumer protection act], and the . . . Secretary of State, who is charged with enforcing the . . . [state] Securities Act.” Lindner, 761 F.2d at 167-68. In West Virginia, the WVCCPA is administered by the Attorney General, while the WVUSA is enforced by the Auditor. The inconsistent, overlapping regulation that concerned the Lindner court is not only a specter looming over the WVCCPA, but in connection with the Global Settlement it became, in fact, all too real. The Legislature has assigned responsibility for securities regulation and enforcement to the Auditor, based on the Legislature’s judgment that it is the Auditor, with expertise and experience in such matters, who is best suited to protect the interests of the residents of West Virginia. The Attorney General thus should not now be permitted, in contravention of the Legislature’s plan, to use the WVCCPA to attempt to undo the intricate resolution of a securities matter that the Auditor has achieved through the Global Settlement.

Moreover, as noted above (supra at 17-18), the timing of the respective enactments of the WVCCPA and the WVUSA makes clear that the Legislature did not intend to create an

incoherent, dual regulatory scheme for securities; rather, it intended that securities be covered, exclusively, under the WVUSA.

5. The WVCCPA Does Not Apply to Securities Because It Tracks the FTCA, Which Has Never Been Held to Cover Securities.

Just like the consumer protection statutes of many other states, the WVCCPA does not apply to securities because it is patterned after the Federal Trade Commission Act (“FTCA”) — it is a so-called “baby FTCA” statute — and the FTCA has never been held to regulate securities. The WVCCPA’s connection to the FTCA is plain from both the face of the Act and the decisions of courts in West Virginia and elsewhere. The WVCCPA’s very first provision indicates that it was intended to complement federal law “in order to protect the public and foster fair and honest competition.” W. Va. Code § 46A-6-101(1). Subsequent provisions of the WVCCPA lend further support to this general intention to harmonize the WVCCPA with federal law. For example, Section 103 of Article 6, chapter 46A, authorizes the Attorney General to promulgate rules and regulations interpreting the WVCCPA. W. Va. Code § 46A-6-103. The WVCCPA requires these regulations to “conform as nearly as practicable with the rules, regulations and decisions of the federal trade commission and the federal courts in interpreting the provisions of the ‘Federal Trade Commission Act,’ as from time to time amended.” Id.

Likewise, the West Virginia courts have affirmed that federal court decisions interpreting the FTCA are a source of guidance for interpreting the WVCCPA. State ex rel. McGraw v. Imperial Mktg., 196 W. Va. 346, 357 (W. Va. 1996). The federal courts, too, at the urging of the West Virginia Attorney General, have recognized the WVCCPA’s dependence on the FTCA. Indeed, in F.T.C. v. Mylan Labs., 99 F. Supp. 2d 1 (D.D.C. 1999), the Attorney General of West Virginia argued successfully that the WVCCPA should be interpreted by reference to the FTCA.

See id. at 8-9 (reassessing ruling concerning availability of restitution under WVCCPA because of availability of restitution under FTCA). In Mylan Labs, the Attorney General submitted a brief acknowledging that the West Virginia Legislature has “directed [its] state courts to follow federal interpretations of the FTC Act in construing state law” and, as such, the Attorney General urged the federal district court hearing the case to “construe [the WVCCPA] in accordance with its interpretation of the FTC Act.” See Memorandum of Law in Support of Plaintiff States’ Motion to Reconsider at 7-8, 31, Connecticut v. Mylan Labs., Civ. No. 1:98-CV-3114 (D.D.C. brief filed Aug. 12, 1999) [hereinafter “Brief for Plaintiff States”] (attached as Exhibit 1 to Defendants’ Motion to Dismiss).

The consumer protection statutes of many other jurisdictions also track the FTCA. Federal and state courts in these jurisdictions have correctly placed great importance on the fact that the FTCA has never been applied to securities transactions, and therefore, have held that the relevant state consumer protection statute does not apply to securities. Spinner Corp., 849 F.2d at 391-93; Lindner, 761 F.2d at 166-67; Crowell, 87 F. Supp. 2d at 1294-95; Wyman v. Prime Disc. Sec., 819 F. Supp. 79, 86 (D. Me. 1993); Joyner v. Triple Check Fin. Serv., 782 F. Supp. 364, 368 (W.D. Tenn. 1991); Nichols, 706 F. Supp. at 1322-23, 1337-38; Russell, 510 A.2d at 977; Skinner, 333 S.E.2d at 241; Cabot Corp., 477 N.E.2d at 400-01 (1985); Taylor, 533 So.2d at 1387-88. Just like the consumer protection statutes in these other jurisdictions, the WVCCPA, as a “baby” FTCA, does not cover securities. The Attorney General himself implicitly accepted this conclusion, when, in his Mylan Labs brief, he acknowledged that the WVCCPA is “identical in all material respects” to the consumer protection statutes of Connecticut and Florida, Brief for Plaintiff States at 7, both of which have been held not to apply to securities because they track the FTCA, Crowell, 87 F. Supp. 2d at 1294-95; Russell, 510 A.2d at 977.

Indeed, the conclusion that the FTCA itself, as well as “baby” FTCAs such as the WVCCPA, cannot apply to securities transactions is required by the fact that Congress specifically considered, and then rejected, granting the Federal Trade Commission (“FTC”) authority to regulate securities. In the version of the Securities Exchange Act of 1934 (“Exchange Act”) initially passed by the House of Representatives, enforcement of the Exchange Act was entrusted to the FTC. See H.R. 9323, 73d Cong. § 3(15) (1934), reprinted in 10 J.S. Ellenberger & Ellen P. Mahar, Legislative History Of The Securities Act Of 1933 And Securities Exchange Act of 1934, item no. 31 (1973). In conference committee, however, the FTC was supplanted from its role as securities regulator in favor of the SEC. H.R. Conf. Rep. No. 73-1838, at 30 (1934), reprinted in 5 Ellenberger & Mahar, item no. 20. As explained by members of the Senate, the rationale for this decision was to ensure that “so delicate a mechanism as the modern stock exchange” would be regulated by a separate agency appointed “specifically for that purpose.” S. Rep. No. 73-792, at 5 (1934), reprinted in 5 Ellenberger & Mahar, item no. 17. These senators believed that the public would be better served by a body that possessed the unique knowledge and expertise to guarantee efficient and effective securities regulation. See 78 Cong. Rec. 8,162 (1934) (remarks of Sens. Fletcher, Barkley, & Glass), reprinted in 4 Ellenberger & Mahar, item no. 9.

If the FTC could regulate securities under the FTCA, a blunt instrument not designed for that purpose, it would undermine Congress’s clearly expressed intent to deprive the FTC of authority to regulate securities under the federal securities laws, which were constructed so as to comprehensively and appropriately regulate the “delicate mechanism” of the stock market. The same is true of those state acts modeled on the FTCA, especially where, as in West Virginia,

there exists a comprehensive state framework for the appropriate regulation of securities, such as the WVUSA. (See *supra* at 20-25.)

Because the WVCCPA is closely modeled on the FTCA, which has never been held to cover securities, this Court should join the other states in holding that the WVCCPA likewise does not reach securities and should dismiss the Complaint.

6. Analogous Consumer Protection Statutes in Other States Do Not Cover Securities.

Finally, it is worth noting that the overwhelming majority of states to have considered whether their consumer protection laws cover securities – either by express statutory provision or by judicial decision – exempt securities transactions and related conduct from the scope of their respective consumer protection statutes. West Virginia should follow this prodigious and persuasive authority.⁷

Securities transactions and related services, either in whole or in part, are not covered by the consumer protection statutes of the following twenty-five states: **Alabama**, see Ala. Code § 8-19-7 (1989 & Supp. 2002); **California**, see *Bowen v. Ziasun Technologies, Inc.*, 11 Cal. Rptr. 3d 522, 533 (2004); **Connecticut**, see *Russell*, 510 A.2d at 977-81; **Florida**, see *Rogers v. Cisco Sys., Inc.*, No. 3:03 CV 32, 2003 WL 21463643, at *8 (N.D. Fla. May 14, 2003); *Crowell*, 87 F. Supp. 2d at 1295; **Georgia**, see *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667, 674-75 (N.D. Ga. 1983); **Hawaii**, see *Spinner Corp.*, 849 F.2d at 389-93; **Indiana**, see Ind. Code Ann. § 24-5-0.5-2 (West 1995 & Supp. 2002); **Kansas**, see Kan. Stat. Ann. § 50-624(c) cmt. (1994); **Louisiana**, see *Smith v. Cooper/T. Smith Corp.*, 846 F.2d 325, 328-29 (5th Cir. 1988), *aff'd in*

⁷ It is telling that despite some differences in the precise scope of their consumer protection statutes, the vast majority of states to have considered the matter have chosen, in whole or in part, to regulate the specific conduct at issue in this case through their securities statutes, as opposed to their consumer protection statutes.

part on reh'g, 886 F.2d 755 (1989); Stephenson, 839 F.2d at 100-01; Taylor, 533 So.2d at 1387-88; **Maine**, see Wyman, 819 F. Supp. at 86; Lessard v. Allstate Ins. Co., No. CIV. A. CV-98-162, 2001 WL 1712653 (Me. Super. Ct. Mar. 12, 2001); **Michigan**, see Caproni v. Prudential Sec. Inc., 15 F.3d 614, 620-21 (6th Cir. 1994), overruled on other grounds by Rotella v. Wood, 528 U.S. 549 (2000); **New Hampshire**, see N.H. Rev. Stat. Ann § 358-A:3(I) (1995 & Supp. 2002); **New Jersey**, see In re Catanella, 583 F. Supp. at 1441-43; Stella v. Dean Witter Reynolds, Inc., 574 A.2d 468 (N.J. Super. Ct. App. Div. 1990); **New Mexico**, see Greene v. Horizon/CMS Healthcare Corp., Civ. No. 97-114, 1998 U.S. Dist. LEXIS 12254, at *26-28 (D.N.M. July 13, 1998); **New York**, see Morris v. Gilbert, 649 F. Supp. 1491, 1497 (E.D.N.Y. 1986); Smith v. Triad Mfg. Group, Inc., 681 N.Y.S.2d 710, 712 (N.Y. App. Div. 1998); **North Carolina**, see Lindner, 761 F.2d at 165-68; Skinner, 333 S.E.2d at 241; **Ohio**, see Ohio Rev. Code Ann. §§ 1345.02(A), 1345.01(A), 5725(B) (2002); **Oklahoma**, see Okla. Stat. Ann. tit. 15, § 754(2) (1993); **Pennsylvania**, see Algrant v. Evergreen Valley Nurseries Ltd. P'ship, 126 F.3d 178, 186-88 (3d Cir. 1997); **Rhode Island**, see State v. Piedmont Funding Corp., 382 A.2d 819 (R.I. 1978); **South Carolina**, see State ex rel. McLeod v. Loeb Rhodes, Hornblower & Co., 267 S.E.2d 539 (S.C. 1980), overruled in part by Ward v. Dick Dyer & Assocs., Inc., 403 S.E.2d 310 (S.C. 1991); **Tennessee**, Joyner, 782 F. Supp. at 367-68 (W.D. Tenn. 1991); Nichols, 706 F. Supp. at 1322-25; **Texas**, see Allais v. Donaldson, Lufkin & Jenrette, 532 F. Supp. 749, 752 (S.D. Tex. 1982); **Utah**, see Utah Code Ann. § 13-11-3(2) (2001); and **Virginia**, see Va. Code Ann. § 59.1-199 (1998).

By contrast, the consumer protection laws of only seven states apply to securities transactions or related services, and in each of these states, the respective consumer protection statutes are distinguishable from the WVCCPA. In four of these states – Iowa, Massachusetts,

Vermont, and Wisconsin – the consumer protection statutes, unlike the WVCCPA, contain express provisions making them applicable to securities. See Iowa Code § 714.16(1)(i) (2003); Mass. Gen. Laws ch. 93A, § 1(b) (1997); Vt. Stat. Ann. tit. 9, § 2451a(a),(b) (1993); Wis. Stat. § 100.18(1) (2004). In the remaining three states – Arizona, Illinois, and Minnesota – courts have held that the consumer protection statutes are applicable to securities, but based their decisions on circumstances or statutory features inapplicable to the WVCCPA. See State ex rel. Corbin v. Pickrell, 667 P.2d 1304 (Ariz. 1983) (en banc) (legislature amended statute shortly after earlier decision held that consumer protection act did not apply to securities, permitting inference that legislature had intended to overrule earlier decision); see also Endo v. Albertine, 812 F.Supp. 1479, 1495 (N.D.Ill. 1993) (finding securities to be covered on rationale that Illinois statute had been interpreted, unlike WVCCPA, to cover “intangibles”); Jensen v. Touche Ross & Co., 335 N.W.2d 720 (Minn. 1983) (finding that securities are covered only because Minnesota statute, unlike the WVCCPA, specifically covered “intangibles”).

Accordingly, for all of the reasons set out above, West Virginia should join the majority of its sister states and reject the Attorney General’s attempt to regulate securities through the WVCCPA.

III. The Complaint Should Be Dismissed Because It Exceeds the Attorney General’s Authority Under the West Virginia Constitution and Statutes

An additional, independent basis exists for answering the reformulated Certified Question in the negative: the Attorney General’s Complaint invades the Auditor’s exclusive authority to regulate securities. The Legislature has conferred the task of regulating securities upon the Auditor. The Attorney General thus is without any authority to seize this function for himself.

In West Virginia, the office of the Auditor, like that of the Attorney General, is constitutionally created. W. Va. Const., art. VII, § 1. Both the Auditor and the Attorney General are elected officials. Id. § 2. According to the West Virginia Supreme Court, these constitutional officers are “constitutional equals,” see State ex rel. McGraw v. Burton, 212 W. Va. 23, 40-41 (2002), and “each [has] a separate, distinct, and vital contribution to be made to the operation of the executive branch,” id. at 33.⁸

It is against this backdrop that the Legislature vested the Auditor, and not the Attorney General, with securities regulation and enforcement authority. According to the West Virginia Code, the State’s securities laws “shall be administered by the auditor of this state, and he or she is hereby designated, and shall be, the commissioner of securities of this state.” W. Va. Code § 32-4-406(a). As such, West Virginia’s securities laws (including its securities antifraud law, id. § 32-1-101) are enforced by the Auditor, and no one else.

While the Attorney General is charged with “perform[ing] such duties as may be prescribed by law,” W. Va. Const., art. VII, § 1, the Supreme Court of Appeals of West Virginia has repeatedly held that the Attorney General’s authority is limited to that conferred by the Constitution and by statute. Burton, 212 W. Va. at 30; State ex rel. Fahlgren Martin, Inc. v. McGraw, 190 W. Va. 306, 312 (1993); Manchin v. Browning, 170 W. Va. 779, 785 (1982) (McGraw, J.). Although the Constitution endows the Attorney General with the “core function” of being the state’s chief legal officer — that is, representing the state and state officials when they are parties to litigation, Syllabus Points 2-3, Burton, 212 W. Va. at 30 — the Attorney

⁸ The court went on to observe that “[u]nlike the federal government, where essentially the entire executive power is vested in one elected officer, the President of the United States, our State Constitution apportions executive power among several elected officers. These offices, each operating in some respects independently, must combine and cooperate (even if they have differing policy views and perspectives) to provide an efficient and effective executive branch of government.” Burton, 212 W. Va. at 33.

General's other powers derive only from the Legislature. Indeed, the Attorney General has no common law authority to undertake investigations or enforcement actions. See Fahlgren Martin, Inc., 190 W. Va. at 313. Where not authorized to do so by the Constitution or statute, the Attorney General is powerless to act. See id. at 312.

With the limited Article 6F exception (inapplicable here) of preventing deceptive acts or practices in the telemarketing of unregistered securities by persons who are not broker-dealers registered with the NASD,⁹ see W. Va. Code §§ 46A-6F-104, 46A-6F-202, 46A-6F-203, the Legislature has conferred no authority on the Attorney General to act in connection with securities. Rather, as noted above, authority with respect to securities rests entirely in the Auditor, who is the "constitutional equal" of the Attorney General.

While the Auditor is permitted to call upon the Attorney General for assistance in enforcing the WVUSA if he wishes it, see id., he is not obligated to do so and has not done so here. And if called upon to assist in this capacity, the Attorney General would be bound to represent the Auditor's position faithfully, and could not advocate his own view as to what is in the best interest of the state, even if he disagreed with the Auditor. Manchin, 170 W. Va. at 790 ("The Attorney General's role in this capacity is not to make public policy in his own right on behalf of the state.").

Neither the Constitution nor the Legislature has conferred any authority upon the Attorney General to interfere with a carefully crafted settlement relating to the administration of the WVUSA. "As disappointing as it might be to any Attorney General, . . . the powers of the Attorney General are strictly defined by Constitution and statute," and courts do "not have the

⁹ As previously noted, each of the Defendants in this action is a broker-dealer registered with—and thus, highly regulated by—the NASD, and as such, is not subject to the telemarketing provisions of the WVCCPA—the only provisions of the WVCCPA that pertain to securities. (See supra at 15-17.)

right to create powers, which, based upon constitutional and legislative history, were never intended.” Fahlgren Martin, Inc., 190 W. Va. at 313. Because the Attorney General is without authority under the Constitution or statute to enforce West Virginia’s securities laws, he has no power to interfere, by use of the WVCCPA, with the Auditor’s ability to enter into settlements like the one at issue here. This Court should refuse to condone the Attorney General’s attempts to claim for himself the responsibilities that the Legislature has conferred on another, constitutionally created, and democratically elected executive officer. See W. Va. Const., art. VII, § 2. Accordingly, for this reason as well, the Certified Question should be answered in the negative.

PRAYER FOR RELIEF

Defendants respectfully request that this Court:

1. exercise its power under West Va. Code Section 51-1A-4 to reformulate the question as follows:

Is it statutorily and constitutionally permissible for the Attorney General of West Virginia to bring an action under the West Virginia Consumer Credit and Protection Act based upon conduct related to securities transactions?


and

2. answer that question in the negative.

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BOSTON LLC, GOLDMAN, SACHS & CO.,
LEHMAN BROTHERS INC., MERRILL LYNCH,
J.P. MORGAN SECURITIES INC., MORGAN
STANLEY & CO., INC., UBS SECURITIES LLC
(f/k/a UBS WARBURG LLC), and U.S. BANCORP
PIPER JAFFRAY INC.,
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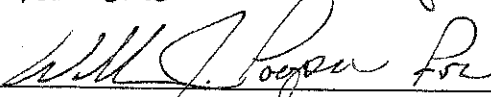
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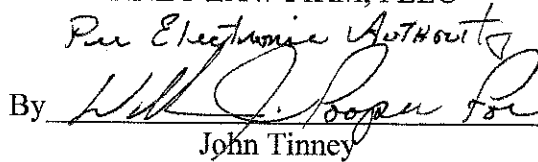
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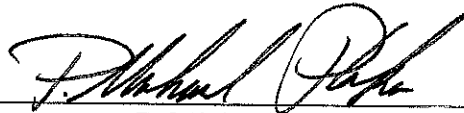
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CERTIFICATE OF SERVICE

I, William J. Cooper, do hereby certify that service of the foregoing *Brief of Petitioners* thereon, has been made upon the parties herein by mailing a true and exact copy of the same (except as noted below), in a properly stamped and addressed envelope, to the following counsel of record:

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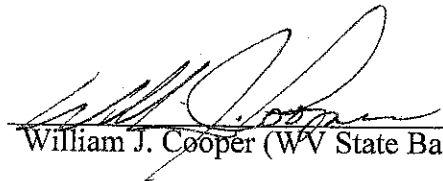
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