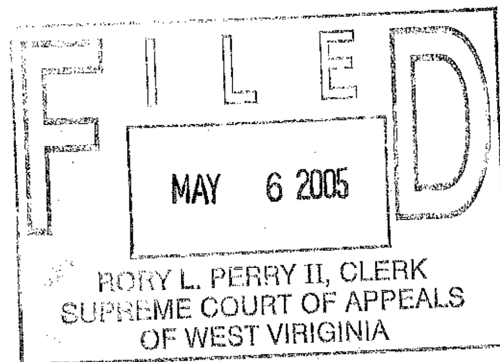
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 32515



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

Plaintiff-Appellee,

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-Appellants.

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

REPLY BRIEF OF APPELLANTS
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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INTRODUCTION

Far from rebutting the arguments presented by Appellants, the Brief of Appellee ("Appellee Br.") merely highlights the Attorney General's overbroad and insupportable interpretation of the West Virginia Consumer Credit and Protection Act (the "Consumer Act" or "Act"), and underscores the simple fact that, properly construed, the Consumer Act does not provide a backdoor basis for the Attorney General to regulate the securities-related conduct at issue in his Complaint.

To try and bring the conduct of Appellants within the scope of the Consumer Act, the Attorney General has advanced a novel interpretation of the Act that is so sweeping it would, under the guise of protecting consumers, make him the primary regulator of virtually all commerce within the State of West Virginia. The Attorney General asserts that he has this all-encompassing power notwithstanding that all securities-related conduct in this State is already comprehensively regulated by the West Virginia Auditor under the West Virginia Uniform Securities Act (the "Securities Act"). Indeed, the very conduct alleged in the Attorney General's Complaint was already the subject of a $1.4 billion global settlement with the Securities and Exchange Commission ("SEC"), self-regulatory organizations, and the securities regulators of the District of Columbia, Puerto Rico, and all fifty states, including the West Virginia Auditor. (Mem. Supp. Defs. Mot. Dismiss at 2-3; Appellants Br. at 1-2.)[1] Only in West Virginia, however, has this settlement been second-guessed, let alone by a State officer who is without authority to regulate securities.

[1] The Court may judicially notice the global settlement because it is a matter of common knowledge. See, e.g., W. Va. R. Evid. 201; State ex rel. County Comm'n v. King, 202 W. Va. 258, 269 n.5 (1998) (judicially noticing on prohibition proceeding matters that were disseminated to public).

The Attorney General tries to justify his unreasonable interpretation of the Consumer Act by attributing to the West Virginia Legislature a series of choices that are belied by the facts of this case and that inherently make no sense. He asserts, for example, that the Legislature gave no real securities enforcement powers to the Auditor under the Securities Act (Appellee Br. At 32-35), ignoring that it was the Auditor who was involved on behalf of the State of West Virginia in the global settlement of the claims that the Attorney General tries to resurrect in this action. The Attorney General concedes that the Legislature did not grant him authority to reach actual securities transactions under the Consumer Act. Indeed, he admits that in drafting the Act's very terms, the Legislature limited him to regulating *only* "trade or commerce" involving the advertisement, offer, sale, or distribution of "goods" or "services," and that the Legislature purposefully and expressly excluded "instruments" such as securities from its definition of these terms. (See, e.g., id. at 20, 37.) Nevertheless, the Attorney General nonsensically claims that the Legislature did give him unlimited authority to regulate securities-related *services*, even though these services are provided for the sole purpose of facilitating the very securities transactions with respect to which the Attorney General is powerless. The only "source" relied on by the Attorney General for this purported authority is the language of Article 6, Section 104 of Chapter 46A of the West Virginia Code. Yet that one-sentence provision makes no mention of securities, and comes in the middle of an act that is otherwise almost exclusively devoted to regulating traditional consumer transactions and the types of potential abuses associated with them.

The Attorney General's reading of Article 6, Section 104 far exceeds anything that the Legislature could have intended in enacting the Consumer Act. Under the Attorney General's interpretation, it is almost impossible to imagine anything not swept up by the Attorney General's consumer protection powers. No matter how divorced from the traditional concerns of

consumer protection, no matter how heavily regulated by another statutory regime, every conceivable subject matter not specifically exempted from the Act could be reached by the Attorney General based on tangential aspects that supposedly impact consumers in some amorphous way. Adopting this view, the Attorney General accuses Appellants of seeking to create an "implied exemption" from the scope of the Act. (Id. at 16-17.) But this is not what Appellants are doing at all.

The history of the Consumer Act, together with its structure and text, when taken as whole, establish that the Consumer Act does not apply to securities-related conduct *in the first place*, and so, requires no exemption. This interpretation is further supported by the decisions of courts interpreting consumer protection acts similar to the Consumer Act. In addition, the Federal Trade Commission Act – which itself has never been held to cover securities-related conduct, and which the courts of this state are directed to consult in interpreting the Consumer Act – also dictates the conclusion that the Legislature did not grant the Attorney General authority to regulate securities-related services. Finally, the Legislature's enactment of a robust Securities Act within days of the Consumer Act can leave no doubt that the Attorney General is without authority under the Act to reach the securities-related conduct he targets in his Complaint.

ARGUMENT

I. THE LEGISLATURE HAS IMPOSED REAL LIMITS ON THE SCOPE OF THE ATTORNEY GENERAL'S AUTHORITY

This Court must again enforce the limits that the Legislature has imposed on the Attorney General, since it is clear that the Attorney General seeks to assume the Auditor's role in regulating securities. In doing so, the Attorney General ignores this Court's holdings in three prior cases. First, in Manchin v. Browning, 170 W. Va. 779 (1982), this Court held that the

Attorney General has no common law powers to assert his preferred policies in spheres that the Legislature has committed to other executive officers, and that besides the role required of him by the Constitution, the Attorney General's powers are limited to those prescribed by the Legislature. Id. at 785. Next, in State ex rel. Fahlgren Martin, Inc. v. McGraw, 190 W. Va. 306 (1993), this Court held that where the Legislature has granted the Attorney General only limited powers, he cannot unilaterally expand those limited powers into the authority to conduct wide-reaching investigations into anything touching on the subject matter of the Legislature's grant. Id. at 313. Most recently, in State ex rel. McGraw v. Burton, 212 W. Va. 23 (2002), this Court rejected the Attorney General's sweeping claim for "complete and exclusive jurisdiction over all state legal matters . . . ." Id. at 38.

In this case, the Attorney General is seeking to circumvent these limitations on his power by interpreting the Consumer Act so broadly that it swallows the Auditor's legislatively conferred task of regulating securities. The Attorney General cannot point to anything that suggests the Legislature intended him to share this job with the Auditor. It is thus not enough, as the Attorney General argues, that the Auditor's role in regulating securities may not be one of the Auditor's core functions under the Constitution. (Appellee Br. at 42.) For without specific authorization from the Legislature, the Attorney General has no authority whatsoever to regulate buying and selling securities, including securities research.

II. THE ATTORNEY GENERAL'S INTERPRETATION OF THE CONSUMER ACT CONFLICTS WITH LEGISLATIVE INTENT

Contrary to the Attorney General's claims, this Court must consider the history, structure and language of the Consumer Act, all of which establish that the Act does not cover the conduct alleged in the Complaint. The Attorney General asserts that such consideration is foreclosed because the language of Article 6, Section 104 of the Act "unambiguous[ly]" gives him power to

regulate "any trade or commerce," including Appellants' securities research. (Appellee Br. at 16-17.) The Attorney General is incorrect. By focusing on one narrow phrase of the Act, the Attorney General has failed to interpret the Consumer Act as a whole, as he must. See Smith v. State Workmen's Comp. Comm'r, 159 W. Va. 108, 115 (1975) (holding that "'effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation'") (citation omitted); see also W. Va. Human Rights Comm'n v. Garretson, 196 W. Va. 118, 123 (1996) (same); 2A Norman J. Singer, Statutes & Statutory Construction, § 46:05, at 154 (6th ed. 2000) (stating that "it is not proper to confine interpretation to the one section to be construed"). In Smith, this Court held that "the Legislature's intent . . . cannot be ascertained by simply giving effect to ... one clause [of the West Virginia Code] . . . ." 159 W. Va. at 116; accord W. Va. Human Rights Comm'n, 196 W. Va. at 123 n.5. Similarly here, the Legislature's intent with respect to the Consumer Act cannot be divined by focusing exclusively on the phrase "any trade or commerce" in Article 6, Section 104.

A. THE HISTORY, STRUCTURE, AND TEXT OF SECTION 104 SHOW THAT THE LEGISLATURE NEVER INTENDED IT TO APPLY TO THE CONDUCT ALLEGED IN THE COMPLAINT

1. Historical Context

The Attorney General entirely failed to address two points raised by Appellants' Brief concerning the Consumer Act's historical context.

First, the Attorney General has not disputed that when the Legislature enacted the Consumer Act, it was focused primarily on addressing abuses in consumer lending, consumer credit transactions, and consumer credit sales – and *not at all* on regulating the buying or selling of securities, including securities research. The Consumer Act arose out of the consumer

movement of the late 1960s, which was largely concerned with abusive lending and debt-collection practices. (Appellants Br. at 18.) While one of the two model acts on which the Consumer Act was patterned contains a general consumer protection provision analogous to Article 6, Section 104, that model provision was only intended to ensure that sales involving consumer credit or accompanying consumer credit transactions did not go unregulated. (Id.) Here, the Attorney General does not suggest that securities research reports are related to or issued in connection with consumer credit transactions – or that they are in any way related to the types of transactions usually covered by the Consumer Act or the model acts on which it was based.

In light of this undisputed history, it is clear why the Legislature did not include sales of securities or securities research in the Act's "Exclusions" or "Exempted Transactions" sections, W. Va. Code §§ 46A-1-105, -6-105, a point the Attorney General stresses (see Appellee Br. at 17-18). It is not, as the Attorney General contends, because the Legislature wished to give the Attorney General authority to regulate buying or selling securities, including securities research, as part of his consumer protection powers (id. at 18); rather, it is because the Legislature neither designed nor intended the Consumer Act to cover such conduct in the first place. In contrast to the issuance of securities research, the transactions that *are* specifically mentioned in the Act's Exclusions section are either transactions that would otherwise have come within the Act's express terms, like "[t]he sale of insurance by an insurer," W. Va. Code § 46A-1-105(a)(2); see id. § 46A-1-102(47)(c) (defining "services" to include "insurance"); or they are exactly the sort of transactions in which traditional consumers engage or that involve or accompany consumer credit transactions, like transactions by "licensed pawnbrokers," id. § 46A-1-105(a)(4).

Moreover, the Legislature's decision not to include securities or securities-related services within the scope of the Consumer Act must be viewed as intentional. As conceded by the Attorney General, the Legislature enacted the Securities Act on March 9, 1974, only *four days* after enacting the Consumer Act. (Appellants Br. at 17.) Therefore, it is impossible that, at the time it enacted the Consumer Act, the Legislature could have been unaware that it had devised a different scheme for the comprehensive regulation of securities in the State of West Virginia. It is simply not credible under these circumstances to suggest that the Legislature intended the Attorney General to have broad authority under the Consumer Act to regulate the buying and selling of securities, including securities research, yet chose to make no mention of this authority in the text of the Act itself or in the Securities Act.

Unable to explain away the Act's historical context, the Attorney General does not address it at all. Instead, he insists he is proceeding here on a "recognized" legal theory under the Consumer Act. (Appellee Br. at 11.) However, this Court has *never* before permitted the Attorney General to bring a Consumer Act case related to securities research or any other goods or services that do not fall squarely within the Act's scope. Each of the cases relied on by the Attorney General involved conduct at the very core of what the Consumer Act was intended to regulate and not an extension of the Consumer Act into an entirely new area. See State ex rel. McGraw v. Telecheck Servs., Inc., 213 W. Va. 438, 441, 450 n.20 (2003) (allegedly unfair practices in the distribution of information about consumers' credit-worthiness and allegedly abusive debt-collection practices); State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 774-75 (1995) (consumer credit transactions in which defendants financed extended warranties that were sold to automobile buyers but never provided); Syl. Pt. 3, State ex rel. McGraw v. Imperial Mktg., 196 W. Va. 346 (1996) (direct marketing practices clearly

covered by Prizes and Gifts Act contained in Article 6D of the Consumer Act). Thus, none of these cases supports the Attorney General's attempt to radically expand the Consumer Act here.

2. Structural Context

The structure of the Consumer Act as a whole, and the place of Article 6, Section 104 within that structure, also demonstrate the overbreadth of the Attorney General's position. As noted above, the Consumer Act must be interpreted as a whole. (See supra at 5.) Moreover, under the statutory canon of *ejusdem generis*, "where general words follow the enumeration of particular classes of persons or things, the general words . . . 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." Syl. Pt. 4, Oh. Cellular RSA L.P. v. Bd. of Pub. Works, 198 W. Va. 416, 417, 423 (1996).

Mindful of these canons, it is impossible to read Article 6, Section 104 as broadly as the Attorney General wishes. Article 6, Section 104 is a one-sentence section appearing in an Act specifically focused on regulating potentially abusive practices that typically arise in the context of consumer transactions, especially consumer credit transactions. For example, Article 2 of the Act governs extensions of credit to consumers; Article 3 covers finance charges; and Article 4 covers licensing and other requirements for regulated consumer lenders. Even within Article 6, the specific provisions other than Section 104 apply to practices that potentially could be abused in typical consumer transactions. For example, Section 107 of Article 6 prohibits merchants of consumer goods from disclaiming or limiting their warranty obligations, or limiting their liability under those obligations. See W. Va. Code § 46A-6-107(1), (2). Similarly, Section 108 abolishes privity requirements for breach of warranty suits, id. § 46A-6-108(a); prohibits manufacturers from failing to honor warranties just because they were not registered, id. § 46A-6-108(b); and

gives merchants a cause of action against manufacturers for failing to honor their warranties, id. § 46A-6-108(c). Section 109 requires consumer agreements to be written in plain language and in a readable font. Id. § 46A-6-109(a). And Section 110 bans the solicitation or acceptance of postdated checks. Id. § 46A-6-110(1).

It is inescapable that all of the Act's provisions concern practices related to typical consumer credit transactions or sales of consumer goods or services, and not practices associated with the highly-specialized and heavily-regulated field of securities. Article 6, Section 104, simply may not be interpreted as a freestanding enactment untethered from the context provided by the rest of the Consumer Act. Therefore, under the statutory canons set forth above, the only sensible reading of the language of Article 6, Section 104, is that it, too, must refer to practices generally applicable to typical consumer transactions.

Nor can the Attorney General's interpretation be supported by the so-called savings clauses of the Consumer Act, W. Va. Code § 46A-7-113, and the Securities Act, id. § 32-4-410. (See Appellee Br. at 28-30.) The Consumer Act's savings clause only purports to preserve private civil remedies otherwise available to *consumers*,[2] not the Attorney General. See W. Va. Code § 46A-7-113 ("The grant of powers to the attorney general in this chapter does not affect remedies available to consumers under this chapter or under other principles of law or equity."). This savings clause therefore has absolutely no bearing on the issue of whether the Legislature intended the Attorney General to be able to regulate buying and selling securities, including

[2] "Consumers" are defined in various provisions of the Act. See, e.g., W. Va. Code. § 46A-1-102(12) ("'Consumer' means a natural person who incurs debt pursuant to a consumer credit sale or a consumer loan, or debt or other obligations pursuant to a consumer lease."); id. § 46A-6-102(b) ("'Consumer' means a natural person to whom a sale or lease is made in a consumer transaction . . . ."). Neither definition includes the Attorney General.

securities research, under the Consumer Act.[3] The Securities Act's savings clause similarly provides only that "the rights and remedies provided by this chapter are in addition to any other rights or remedies that may exist at law or in equity . . . ." W. Va. Code § 32-4-410(h). This language "simply preserv[es] a purchaser's right to pursue his common law remedies for fraud." Cabot Corp. v. Badour, 477 N.E.2d 399, 402 (Mass. 1985) (citing cases), superseded by statute, Mass. Gen. Laws ch. 93A, § 1(b). The Securities Act thus does not address the Attorney General's statutory authority to bring a Consumer Act case over conduct related to securities. Moreover, a savings clause, whatever its precise language, can only preserve rights that otherwise exist. However, the Consumer Act does not authorize the Attorney General to regulate securities, and the Securities Act's savings clause does not suggest otherwise.

3. Textual Context

The text of the Act itself further undermines the Attorney General's position. The Attorney General now concedes that securities are not "goods" or "services" under the Act, and, as such, their advertising, offering for sale, sale or distribution does not constitute "trade or commerce." (See Appellee Br. at 20, 37; W. Va. Code § 46A-6-102(e).) He nonetheless insists he can regulate the "service" of issuing research analyst reports. This "service," however, has no other purpose but to facilitate decisions about whether to buy or sell the securities of specific public companies – the very conduct which the Attorney General admits he has no authority to

[3] The Consumer Act's savings clause is thus very different from the one construed in State ex rel. Corbin v. Pickrell, 667 P.2d 1304 (Ariz. 1983), a case relied on extensively by the Attorney General. (Appellee Br. at 28.) Unlike the Consumer Act's savings clause, the savings clause in Pickrell directly spoke to the rights and remedies of the *State of Arizona*, providing that "[t]he provisions of this article [of the Arizona Consumer Fraud Act are in addition to all other causes of action, remedies and penalties *available to this state*." Id. (emphasis added). Therefore, Pickrell has no application here.

regulate. The Attorney General cannot point to anything in the Act demonstrating that the Legislature intended so profoundly absurd a result.

Indeed, in both the Complaint and Appellee's Brief, the Attorney General himself has failed to maintain his artificial distinction between the purchase and sale of securities and securities research. The Complaint, for example, alleges that

> Defendants . . . employed unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade and commerce, including the trade and commerce of buying and selling securities, and underwriting securities, in that securities of the companies that research analysts were covering were represented to be of a higher quality, more fundamentally sound, and, while on the contrary, defendants had knowledge that the opinions being issued were false, misleading and deceptive.

(Compl. ¶ 765; see also id. ¶¶ 762-764 (alleging that Defendants violated Act in "conduct of . . . the trade and commerce of buying and selling securities, *including . . . researching and issuing reports, opinions and target prices regarding securities*") (emphasis added).) Similarly, in Appellee's Brief, the Attorney General characterized his complaint as alleging "that defendants sold and otherwise disseminated misleading 'independent research,' and over-promoted certain stocks, *in order to distort the value* [i.e., the market price of the securities] *of companies in which defendants had a financial interest*." (Appellee Br. at 5 (emphasis added).) Thus, the Attorney General clearly considers research analyst reports to be an integral part of the "trade and commerce of buying and selling securities" – that is, trade and commerce not covered by the Act.[4]

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[4] The Attorney General cannot now avoid the consequences of pleading that the provision of research analyst reports constitutes the "trade and commerce of buying and selling securities" by asserting for the first time in Appellee's Brief that issuing such reports is a separate trade or commerce. It is axiomatic that a party cannot amend its pleadings in its briefing on appeal. See Wright v. Ernst & Young LLP, 152 F.3d 169, 178 (2d Cir. 1998) (plaintiff cannot amend complaint by raising issue in opposition

Likewise, the Attorney General has not adequately addressed Appellants' arguments regarding Article 6F of the Act, the later-enacted Telemarketing Article. If securities and related services were included within the meanings of "goods" and "services" that are contained in the Consumer Act as originally enacted, see W. Va. Code § 46A-1-102(21), (47), why would the Legislature redefine "[c]onsumer goods or services" only for the purposes of the Telemarketing Article to include "[a]ny property or service offered or sold for the purpose of providing . . . investment opportunity," which is, in turn, defined to embrace securities? See W. Va. Code § 46A-6F-104(2); id. § 46A-6F-107.

Instead of answering this fundamental question, the Attorney General focuses on the language of Article 6F, Section 702, a savings clause that provides that the Telemarketing Article does not take away from consumers or the State any rights or remedies they would otherwise have under the Act. See id. § 46A-6F-702. This provision is entirely irrelevant, however, since Appellants have never argued that the enactment of the Telemarketing Article stripped away the Attorney General's preexisting authority to bring a consumer protection action against them. What Appellants do argue, though, is that in defining "[c]onsumer goods or services" in the Telemarketing Article to include securities and related services, the Legislature indicated its belief that securities and related services did not otherwise fall within the definition of goods and services applicable to the rest of the Act, including Article 6, Section 104. The Telemarketing Article's definition section also indicates that when the Legislature wants to draft a statute that applies to securities, it knows how to do so, and will do so explicitly. Therefore, the Legislature's failure to draft the definition section applicable to Article 6, Section 104 to include

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memoranda to motion to dismiss); Graham v. Beverage, P.C., 211 W. Va. 466, 473 n.13 (2002) (refusing to consider nuisance claim referred to in plaintiffs' appellate briefs but not appearing in complaint).

buying and selling securities, including securities research, demonstrates that the Legislature did not intend Article 6, Section 104 to apply to such conduct.

B. DECISIONS OF OTHER COURTS REJECT ANY DISTINCTION BETWEEN SECURITIES AND RELATED SERVICES

The better-reasoned of the decisions of courts in jurisdictions with consumer protection acts most similar to the Consumer Act have refused to credit the distinction the Attorney General tries to draw between securities transactions and securities-related services.

New York and North Carolina provide particularly good examples. The consumer protection acts of New York and North Carolina are similar to the Consumer Act in respects the Attorney General has argued are important. Like the Consumer Act, the New York and North Carolina statutes contain neither a specific exclusion for securities nor a blanket exemption for otherwise-regulated transactions. See N.Y. Gen. Bus. Law § 349(e), (g) (exempting, like W. Va. Code § 46A-6-105, only media publishers of deceptive advertisements, and stating that provision applies "to all deceptive acts whether or not subject to any other law of this state"); N.C. Gen. Stat. § 71-1.1(b), (c) (exempting media publishers as well as "professional services rendered by a member of a learned profession"). Also like the Consumer Act, the New York statute contains a savings clause. See N.Y. Gen. Bus. Law § 349(g) (providing that act "shall not supersede, amend or repeal any other law of this state under which the attorney general is authorized to take any action").[5]

Federal and state courts in both New York and North Carolina have held that securities do not come within the scope of those states' consumer protection acts. Moreover, as explained

[5] By contrast, New York's securities act is fundamentally different from West Virginia's Securities Act, in that its enforcement is entrusted to the Attorney General of the State of New York. See N.Y. Gen. Bus. Law § 352.

in Appellants' Brief (id. at 13), these courts have held that because the respective acts do not apply to securities, the acts do not apply to securities-related services, including the provision of research analyst reports, either. See Gray v. Seaboard Sec., Inc., 788 N.Y.S. 2d 471, 473 (N.Y. App. Div.) (holding that because New York consumer protection act does not apply to securities, it does not cover service of providing research reports, since such reports are "clearly 'ancillary to the purchase of securities'") (citation omitted), lv. dismissed, __ N.E.2d __, 2005 WL 774900 (N.Y. Mar. 29, 2005); see also Harrah v. J.C. Bradford & Co., No. 93-2458, 37 F.3d 1493, 1994 WL 543528, at *4 (4th Cir. Oct. 6, 1994) (unpublished) (holding that because North Carolina consumer protection act does not apply to securities, it does not cover provision of brokerage services, since such services "are plainly securities-related activities"). Here, as in Gray and Harrah, there are no principled grounds for holding that Appellants' research product comes within the scope of the Consumer Act when transactions involving the securities underlying their research clearly do not.

The Attorney General has offered no persuasive basis on which to distinguish either of these cases. Though he contends that Gray's rationale has been "seriously undermined by two subsequent New York decisions rejecting 'pervasive regulation' as justification for preemption of consumer protection claims against insurance companies" (Appellee Br. at 41), he is incorrect. The cases referred to by the Attorney General were decided in 1984 and 1992, while Gray was decided in January 2005. Moreover, one of the cases cited by the Attorney General, the trial court decision in Sulner v. General Accident Fire & Life Assurance Corp., 471 N.Y.S. 2d 794 (N.Y. Sup. Ct. 1984), does not even mention the "pervasive regulation" justification that it supposedly rejects. See id. at 796-97. Even if it had, the Gray decision was not based solely on a "pervasive regulation" rationale. The court also emphasized that securities are not "traditional

consumer products" with respect to which the New York legislature intended to "provide a remedy" under the consumer protection act. See Gray, 788 N.Y.S. 2d at 472-73. Similarly, the Attorney General tries to denigrate the Fourth Circuit's Harrah opinion as "an unpublished federal decision" (Appellee Br. at 18), but this characterization is unimportant. The Fourth Circuit expressly permits its unpublished dispositions to be cited as persuasive authority. See 4th Cir. R. 36(c). More importantly, the Harrah decision was accepted by the Court of Appeals of North Carolina in Sterner v. Penn, 583 S.E.2d 670, 675 (N.C. Ct. App. 2003), which was "persuaded that the Fourth Circuit's reasoning in Harrah [was] sound."[6]

C. THE CONSUMER ACT DIRECTS THE WEST VIRGINIA COURTS TO FOLLOW FEDERAL TRADE COMMISSION ACT INTERPRETATIONS WHERE PRACTICABLE

The Attorney General's argument that the Court should not consider the Federal Trade Commission Act ("FTCA") is also unpersuasive. The Consumer Act, like many other state consumer statutes, does not apply to the buying and selling of securities, including securities research, because it is patterned on the FTCA, which itself does not reach that conduct. (Appellants Br. at 26-29.) The Attorney General suggests that this Court may ignore the FTCA when construing the scope of his authority under the Consumer Act. (See Appellee Br. at 30; see also id. at 25.) However, the Attorney General disregards the text of the Consumer Act itself,

[6] Algrant v. Evergreen Valley Nurseries, LP, 126 F.3d 178 (3d Cir. 1997), heavily relied on by the Attorney General (Appellee Br. at 21-22), does not help his case. Algrant does not hold that all securities-related services are actionable under Pennsylvania's consumer protection act. In fact, Algrant specifically holds that there is no consumer act remedy where "the fraud was in the valuation . . . of the investment securities themselves and misrepresentations . . . made concerning these securities," id. at 187 – exactly the conduct in which the Attorney General alleges Appellants engaged. (Compl. ¶ 765; Appelle Br. at 5.) Under Algrant, "to be actionable as 'services,' the fraud must be in the transaction, not the securities themselves"; that is, it must "relate to the actual sale and not the specific security." Baker v. Summit Bank, 64 F. Supp. 2d 466, 468 (E.D. Pa. 1999), aff'd, 46 Fed. Appx. 689, 690 (3d Cir. 2002). Here, however, the Attorney General maintains that "the Complaint did *not* rely on there being" any actual sale of securities (Appellee Br. at 2), clearly taking this case outside of Algrant's narrow rule.

which directs that "in construing [Article 6], the courts [shall] be guided by the interpretation given by the federal courts to the various statutes dealing with the same or similar matters." W. Va. Code § 46A-6-101. Likewise, the Attorney General overlooks his own prior statements urging a federal court to construe the Consumer Act in accordance with the FTCA. (See Appellants Br. at 26-27.)

On the basis of a single, inapposite decision, F.T.C. v. Ken Roberts Co., 276 F.3d 583 (D.C. Cir. 2001), the Attorney General seeks to abrogate the numerous cases cited by Appellants holding that the FTCA does not cover securities or securities-related conduct. However, the Ken Roberts court actually refused to decide whether the FTCA applies to securities. See 276 F.3d at 585. The Ken Roberts court determined only that the Commodity Exchange Act (CEA) and Investment Advisors Act (IAA) – two statutes not relevant to this case – do not "patently" or "manifestly" preempt the FTCA, because neither contains an express preemption provision clearly applicable to the conduct at issue in that case. Id. at 584, 591-93. Thus, under standards applicable to investigative subpoenas – also not relevant here – the Federal Trade Commission ("FTC") subpoena served on the defendant could not be quashed. Any additional commentary by the court regarding the interplay between the CEA, IAA and FTCA is purely dicta. Furthermore, in Ken Roberts, the FTC was not seeking to regulate the sale of securities, but rather was seeking to investigate advertising for educational materials about trading futures. Id. at 589. Here, by contrast, the research analyst reports at issue constitute advice on whether to buy or sell specific securities, and are not general instructional materials of the sort considered in Ken Roberts.

This Court also should not credit the illogical conclusions the Attorney General draws from Congress's decision, in enacting the Securities Exchange Act of 1934, to strip the FTC of

authority to regulate securities. (Compare Appellants Br. at 28-29 with Appellee Br. at 29-30.) The Attorney General seems to suggest that because the FTC once had authority to regulate securities and because the Consumer Act is patterned on the FTCA, the Consumer Act, too, must impart authority to regulate securities. (See Appellee Br. at 29-30.) This argument fails, however, because the FTC's authority to regulate securities came not from the FTCA, on which the Consumer Act is based, but from the Securities Act of 1933, on which it is not. See ch. 38, tit. I, § 2(5), 48 Stat. 74, 75 (codified as amended at 15 U.S.C. § 77a, et seq.). The Attorney General's argument also ignores the fact that the Consumer Act was enacted in 1974, not 1934, and was patterned on the FTCA as it existed in 1974 – i.e., without any application to buying and selling securities, including securities research.

The Attorney General also incorrectly asserts that "[i]t is the breadth of the SEC's authority that supports [the] . . . assertion that the FTC has no remaining power over securities after transfer of that function to the SEC in 1934," and it is "the *lack* of such breadth in the Auditor's powers that defeats defendants' attempt to apply the same reasoning to the State Securities Act." (Appellee Br. at 34.) In support of this argument, the Attorney General points out that the SEC may "[w]ithout the aid of a court . . . issue cease and desist orders, order the Appellee to disgorge ill-gotten funds, impose bars or suspensions from employment, and order the payment of civil penalties as well as disgorgement," powers he claims the Auditor lacks. (Id.) The Attorney General's distinctions, however, are somewhat misleading, because the SEC did not gain many of these powers until 1990, almost sixty years after Congress eliminated securities regulation from the scope of the FTC's authority, and almost twenty years after the Consumer Act was enacted. See Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, § 202 (authority to assess civil monetary penalties and enter

orders of disgorgement in administrative proceedings), § 203 (authority to issue cease-and-desist orders), 104 Stat. 931 (codified as amended at 15 U.S.C. §§ 78u-2, 78u-3). These powers, which did not exist in 1934, could not have affected Congress's determination to strip the FTC of its preexisting role in regulating securities. They likewise could not, and did not, figure into the West Virginia Legislature's decision to assign responsibility for securities regulation exclusively to the Auditor under the Securities Act, and not to the Attorney General under the Consumer Act.

D. THE LEGISLATURE INTENDED FOR SECURITIES TO BE REGULATED UNDER THE SECURITIES ACT, NOT THE CONSUMER ACT

This Court should not be distracted by the Attorney General's baseless suggestion that the Legislature has not given the Auditor any role in protecting West Virginia residents who invest in securities. The Attorney General is simply incorrect in contending that the Auditor is nothing more than an issuer of licenses, with no authority or power to curb abuses in the purchase or sale of securities or securities-related conduct. (See Appellee Br. at 32-33.) For example, the Attorney General entirely disregards the Auditor's broad authority to seek injunctions "[w]henever it appears to [him] that any person has engaged, or is about to engage in any act or practice constituting a violation of any provision of [the Securities Act] or any rule or order [t]hereunder . . . ." Compare W. Va. Code § 32-4-408 with Appellee Br. at 32-33; see also Appellants Br. at 20-23. Similarly, the Attorney General ignores the Auditor's recent role in the global settlement of claims against Appellants covering the very same conduct that is at issue in this case, which has already secured $ 4.125 million for the State of West Virginia.

As support for his attempt to usurp the Auditor's role in securities regulation, the Attorney General offers only confusing assertions about the respective powers of the Auditor and the Attorney General under the West Virginia Code. These assertions do not hold up to scrutiny.

The Attorney General states that the remedial provisions of the Consumer Act and the Securities Act are "very different and complementary, thus providing a rational basis for the Legislature's apparent decision to allow for concurrent jurisdiction." (Id. at 32.) But the remedy the Attorney General seeks here is not "complementary" to that already secured by the Auditor, because the Attorney General is attempting to penalize Appellants for *exactly* the same conduct with respect to which Appellants have already settled with the Auditor. The portions of the Complaint that describe the allegedly wrongful conduct in which Appellants engaged are copied directly from the documentation of the settlements entered into by Appellants with securities regulators, including the Auditor. (Appellants Br. at 1-3.) Moreover, the moneys already paid to the Auditor by Appellants and sought by the Attorney General are both earmarked for the State's general revenue fund. See W. Va. Code § 32-4-406(a); Compl., Case Summary. Thus, the Attorney General's conduct of this very case *proves* the incoherence that would result if the Attorney General and the Auditor were both given authority by the Legislature to regulate securities under the conflicting statutory regimes of the Consumer Act and the Securities Act. (Appellants Br. at 23-25.)

Contrary to the Attorney General's claims, it is also not the case that a specific "consumer" cause of action under the Consumer Act for securities-related services would be all that different from the remedies available under the Securities Act. The Attorney General expresses concern that under the Securities Act, "a civil remedy is only available to the purchaser of a security, *and can only be maintained against the seller*." (Appellee Br. at 33 (citing W. Va. Code § 32-4-410).) He claims that if the Consumer Act were held to apply to securities-related services, a consumer could sue a provider of such services under the Act even if that provider did not sell the consumer securities. The Attorney General's reading of the Securities Act, however,

is far more narrow than what the text actually says. First, while Section 410(a) of the Securities Act does permit actions against a seller of securities, it also permits actions against "[a]ny person who [o]ffers . . . a security" in violation of the Securities Act's provisions. See W. Va. Code § 32-4-410(a)(1)-(2). Section 410(b) also creates joint-and-several liability for other non-sellers, including (i) anyone who controls a liable seller; (ii) "every partner, officer or director of such seller" or the equivalent; and (iii) every employee, broker-dealer, or agent "who materially aids in the sale." Id. § 32-4-410(b). Thus, it would seem that a provider of deceptive securities-related services who did not actually sell a security to the plaintiff could still be liable under the Securities Act as either an offeror or as one of the types of non-sellers listed in Section 410(b).[7]

While the Attorney General appears to be correct that a person must have purchased a security in order to maintain a civil damages action under the Securities Act, there is nothing revolutionary about such a requirement. As the United States Supreme Court has found, a purchaser-seller requirement ensures that a plaintiff has suffered "actual damages." Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 734-35 (1975). Indeed, even the SEC, which the Attorney General believes to possess the powers of the Auditor and Attorney General "combined" (Appellee Br. at 30), can only act "in connection with the purchase or sale of any security." 15 U.S.C. § 78j(b). In any event, the Securities Act does not differ from the

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[7] In this regard, the Attorney General misplaces his reliance on Showpiece Homes Corp. v. Assurance Co. of America, 28 P.3d 47 (Colo. 2001), to support his contention about the "complementary" nature of the Consumer Act and the Securities Act. (See Appellee Br. at 35-36.) In Showpiece Homes, the Colorado Supreme Court held that Colorado's unfair insurance practices act did not preempt its consumer protection act from applying to deceptive conduct in the insurance industry. Crucial to the reasoning of Showpiece Homes, however, was the lack of a private right of action under the insurance practices act, which is strictly regulatory in nature. "As a result," the court concluded that "other statutes may also apply in order for private parties to obtain relief." Id. at 53; see also id. at 51, 55. Understandably, the Attorney General fails to mention this, since the existence of an effective private remedy under the West Virginia Securities Act vitiates the force of such reasoning in this case.

Consumer Act in this regard, since a consumer has no cause of action for damages under the Consumer Act unless he or she "purchases or leases goods or services and thereby suffers an[] ascertainable loss of money or property . . . ." W. Va. Code § 46A-6-106; accord Orlando v. Fin. One of W. Va., Inc., 179 W. Va. 447, 452-53 (1988). The Attorney General fails to mention this, and, confusingly, cites instead to Article 7, Section 106, which governs the Attorney General's authority to administratively enforce the Act. Although the Attorney General may not need to prove an "ascertainable loss of money or property" as an element of an administrative action under the Consumer Act, nothing in the Securities Act suggests that such a requirement applies to the Auditor, either. See, e.g., W. Va. Code §§ 32-4-407a (not listing requirement of actual injury or damages). Thus, the Attorney General's illusory distinction does not support his case.

CONCLUSION

For all of these reasons, Appellants respectfully request that this Court answer the certified question, as reformulated, in the negative, and dismiss the Attorney General's Complaint.

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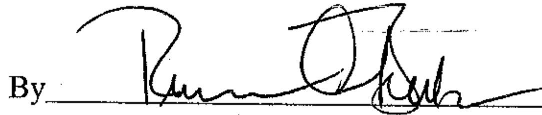
By 
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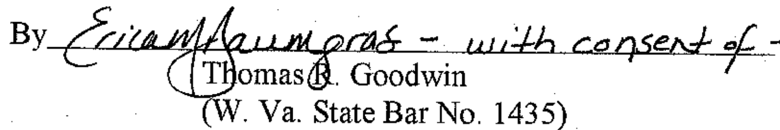
By 
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I, Erica M. Baumgras, do hereby certify that service of the foregoing *Reply Brief of Appellants* thereon, has been made upon the parties herein by mailing a true and exact copy of the same (except as noted below), in a properly stamped and addressed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

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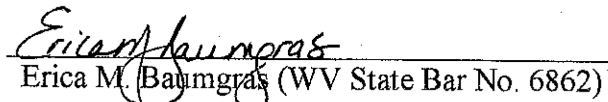

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