

No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

STATE OF WEST VIRGINIA ex rel.
DARRELL V. MCGRAW, JR.,
Attorney General,

Petitioner,

v.

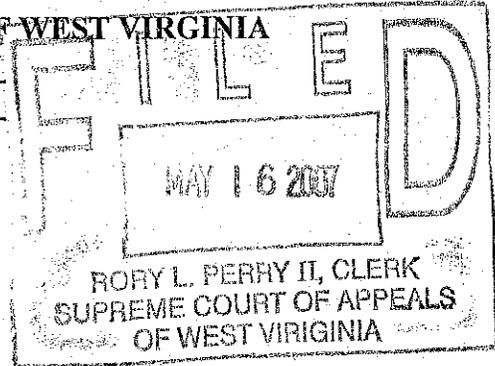
MISC. ACTIONS NOS. 05-C-71 & 05-C-72
(Circuit Court of Lincoln County)

THE HONORABLE JAY M. HOKE,
JUDGE, TWENTY-FIFTH JUDICIAL CIRCUIT,

Respondent.

**CAPITAL ONE BANK AND CAPITAL ONE SERVICES, INC.'S
RESPONSE TO THE PETITION FOR WRIT OF MANDAMUS**

COME NOW Capital One Bank and Capital One Services, Inc. (the "Capital One Entities"), by counsel, and submit their response in opposition to the memorandum of law filed by the State of West Virginia ex rel. Darrell V. McGraw, Jr., Attorney General ("Office of the Attorney General") in support of its "Petition for Writ of Mandamus" (the "Petition"). The Capital One Entities support and welcome rulings by the Honorable Jay M. Hoke ("Judge Hoke"), either *sua sponte* or by direction from this Court, on issues pending before the Circuit Court of Lincoln County, West Virginia ("Lincoln County Circuit Court"). The Capital One Entities, however, oppose any rulings that are predicated upon the multiple misrepresentations contained in the Office of the Attorney General's Petition, including the Office of the Attorney General's attempts to obtain rulings on matters which are not pending before the Lincoln County Circuit Court. While the Capital One Entities seek rulings from Judge Hoke, they file this response to advise this Court of the matters that are actually pending before the Lincoln County



Circuit Court and to address the material misstatements in the Office of the Attorney General's Petition.

I. MATTERS CURRENTLY PENDING BEFORE THE LINCOLN COUNTY CIRCUIT COURT

The Petition incorrectly states the issues that are currently pending before the Lincoln County Circuit Court. For example, as discussed more fully below, the Petition includes the issue of whether the Office of the Attorney General violated section 46A-7-104 by disclosing its investigation of the Capital One Entities. This issue has already been decided by the Circuit Court of Kanawha County, West Virginia ("Kanawha County Circuit Court"). Including it in the Petition and then asking this Court to order Judge Hoke to rule on it as a supposed "unresolved matter" is nothing more than an impermissible collateral attack on that ruling.

There are actually a limited number of matters pending before the Lincoln County Circuit Court. These matters are as follows:

1. "Petitions to Enforce Investigatory Subpoenas" filed by the Office of the Attorney General on May 9, 2005;
2. "Motion to Dismiss Petition to Enforce Investigatory Subpoena for Lack of Personal Jurisdiction" filed by Capital One Services, Inc. on June 8, 2005;
3. "Motion to Dismiss Petition to Enforce Investigatory Subpoena" filed by Capital One Bank on June 8, 2005;
4. "Respondent Capital One Bank's Motion to Dismiss for Lack of Subject Matter Jurisdiction" filed on June 14, 2005;
5. "Motion to Transfer Action" filed by the Office of the Attorney General on July 11, 2005; and
6. "Capital One Bank and Capital One Services, Inc.'s Motion to Dismiss Applications as Moot" filed on August 3, 2005.

In addition to the above motions, Capital One submitted a proposed "Procedural Order" on January 6, 2006, summarizing rulings made by the Lincoln County Circuit Court during hearings and identifying for the court all pending motions. On January 12, 2006, the Office of the

Attorney General submitted its own version of a proposed "Procedural Order." These proposed orders remain pending with the Lincoln County Circuit Court.

II. THE OFFICE OF THE ATTORNEY GENERAL'S PETITION MAKES SEVERAL SIGNIFICANT MISREPRESENTATIONS

The Office of the Attorney General's Petition contains numerous material misrepresentations. The misstatements and an actual explanation of each matter are set forth below. Since the Capital One Entities support entry of ruling by Judge Hoke, this response addresses only factual or procedural misrepresentations, and not the Office of the Attorney General's legal argument.¹

A. There was No Agreement that Judge Hoke would Decide All Issues Pending Before the Honorable James C. Stucky in the Circuit Court of Kanawha County.

The Office of the Attorney General's Petition asserts that, prior to the June 10, 2005 hearing², Judge Hoke met in chambers with counsel and advised counsel that he and the Honorable James C. Stucky ("Judge Stucky") of the Kanawha County Circuit Court had conferred and agreed that Judge Hoke would decide all issues that were raised in the three cases pending between the parties. This assertion is false. Judge Hoke did not state this, and there was no such agreement.

On June 13, 2005, Judge Stucky conducted a hearing in the action pending before the Kanawha County Circuit Court. If Judge Hoke and Judge Stucky had made an agreement

¹ The Attorney General's Petition also contains several misstatements in its legal argument regarding its belief as to the nature of mandamus, when the Attorney General can invoke mandamus, the type of relief it provides, and the time periods within which he is entitled to a decision. Petition at pp. 3 – 7. The Capital One Entities believe that the Attorney General is incorrect in its understanding of these legal principles. However, they have filed this response solely because they believe that this Court must be presented with an accurate record of the procedural history. The Capital One Entities are not now arguing against the Attorney General's statements of the law in its legal argument. They will omit any response to that portion of the Petition unless the Court advises that it would like the Capital One Entities to respond to that portion.

² The Attorney General's Petition claims that the Capital One Entities chose to not offer any evidence at the June 10, 2005 hearing. Petition at p. 3. Although the Petition is technically correct, it ignores the fact that the Capital One Entities have submitted sworn affidavits in support of their arguments at that hearing. Given the passage of time, the Capital One Entities reserve the right to request the opportunity to submit additional evidence.

whereby Judge Hoke would decide all issues in all three matters, Judge Stucky would not have entertained the motions that were pending before him. Instead, Judge Stucky conducted an extensive hearing on the Office of the Attorney General's posting of press releases on its Internet website and other public disclosures about its investigation of the Capital One Entities. (Tr. at pp. 7-8, 50, and 73).³ The Office of the Attorney General appeared, by counsel, for that hearing. He did not move to have the hearing continued or seek an agreement from Capital One's counsel to continue or cancel the hearing. Instead, Charli Fulton appeared for the hearing on behalf of the Office of the Attorney General. At no time did its counsel ever make mention of any alleged agreement to let Judge Hoke decide all of the issues.

During the hearing, Judge Stucky made clear that he was not ruling on the merits of the subpoenas or the Office of the Attorney General's applications to the Lincoln County Circuit Court for assistance regarding those subpoenas. (Tr. at pp. 7-8). Those matters were pending before Judge Hoke and not at issue in the Kanawha County Circuit Court action. (Id.). Instead, Judge Stucky intended only to address the matters set forth in Capital One Bank's "Complaint for Injunctive Relief and Declaratory Judgment." That complaint, which Capital One Bank was required to file in Kanawha County Circuit Court pursuant to Article VII, section 1 of the West Virginia Constitution and West Virginia Code § 14-2-2(a), sought, among other things, to enjoin certain aspects of the Office of the Attorney General's investigation of Capital One and the public statements he was making about that investigation. (Id.).

At the conclusion of the hearing before the Kanawha County Circuit Court, Judge Stucky ruled that a preliminary injunction would issue and that the action pending before the court would be sealed. (Tr. at pp. 48-49 and 87). The fact that the court not only conducted a hearing

³ The transcript of the June 13, 2005 hearing before the Kanawha County Circuit Court is attached as Exhibit 1 to "Petitioner's Response to Capital One Bank's/Capital One Services, Inc.'s Motion to Seal File."

but issued rulings from that hearing, which were later embodied in written orders, shows that no agreement was reached between Judge Hoke and Judge Stucky as alleged by the Office of the Attorney General.

Likewise, since the June 13, 2005 hearing before the Kanawha County Circuit Court, the Office of the Attorney General has filed many briefs and memoranda of law. None of those mention or even hint of this alleged agreement. In fact, on August 25, 2005, the Office of the Attorney General even filed a "Petition for Writ of Prohibition" with this Court, seeking to vacate Judge Stucky's rulings during the June 13, 2005 hearing and seeking to prohibit him from taking any further action in the case pending before the Kanawha County Circuit Court. That petition is silent as to any agreement between Judge Hoke and Judge Stucky as none existed.⁴

B. Whether the Capital One Entities are Precluded by the Maxwell Act from Disclosing Customers Information is Not a Pending Issue, But Whether the Office of the Attorney General has Violated the Maxwell Act is.

In its Petition, the Office of the Attorney General claims that one of the pending issues before Judge Hoke is whether the Maxwell Governmental Access to Financial Records Act, W.Va. Code §§ 31A-2A-1, *et seq.* ("the Maxwell Act"), "prohibits Capital One Bank and Capital One Services, Inc. from complying with the investigatory subpoenas." Petition p. 4. This is an incorrect statement of the issues pending before Judge Hoke. The issues pending before Judge Hoke relate to whether the Office of the Attorney General is violating the Maxwell Act in seeking customer information in the manner that he has and, in doing so, is the Office of the Attorney General committing a crime. (Appendix, *State v. Capital One Bank*, Case No. 05-

⁴ Indeed, this is not the first time that the Attorney General has made misstatement to a court about what another court has said. At the June 10, 2005 hearing, Judge Hoke sealed the entire proceeding to ensure confidentiality required by state and federal law. However, when the Kanawha County Circuit Court addressed the same issue three days later, the Attorney General claimed that Judge Hoke had sealed only an exhibit to a memorandum that the Attorney General had filed. That claim was wrong. Capital One Bank advised Judge Stucky of the real scope of Judge Hoke's ruling, that is, that Judge Hoke had sealed the entire proceedings pending before the Lincoln County Circuit Court. Judge Stucky recessed the hearing and contacted Judge Hoke to see exactly what had been sealed. After speaking with Judge Hoke, Judge Stucky reconvened the hearing and advised the parties that Judge Hoke had, in fact, and contrary to the Attorney General's representations, sealed the entire proceeding. (Tr. at p. 48).

MISC-71, Binder 1 of 2, "Capital One Bank's Response in Opposition to Petition to Enforce Investigatory Subpoena" at pp. 2 and 6-7).

Most of the information requested by the Office of the Attorney General is personally identifiable account information of Capital One Bank's customers. (Id. at pp. 3-4; Appendix, State v. Capital One Bank, Case No. 05-MISC-71, Binder 1 of 2, "Petition to Enforce Subpoena," at Exhibit A (Subpoena) at pp. 6-7 and 9-11). The Maxwell Act expressly prohibits a state entity⁵ "from gaining access to or obtaining from a bank the financial records of any bank customer," except under specific, limited circumstances set forth in the statute. W. Va. Code § 31A-2A-2.

First, a state entity may obtain access to the private financial records of a bank's customer only if the customer executes a written authorization that satisfies the requirements of section § 31A-2A-2(a)(1) of the Maxwell Act. The Office of the Attorney General has neither produced the requisite written authorization of a single Capital One customer, nor acknowledged receipt of express consent for disclosure from any consumer.

Second, a state entity may obtain access to the private financial records of a bank's customer in response to a subpoena and without an express authorization, *but only if certain procedural safeguards are met*. In pertinent part, the Maxwell Act states:

A financial institution may disclose or produce financial records to a state entity in compliance with a subpoena served upon it *if the subpoena contains a certification* that: (1) A copy of the subpoena has been served on the customer whose records are sought by the state entity seeking disclosure or production of the records at least ten days prior to the date on which disclosure or production is sought; or (2) that service on the customer has been waived for good cause by the circuit court of Kanawha County or other circuit court of competent jurisdiction.

⁵ A state entity is defined by the Maxwell Act as "as state or local governmental office, officer, department, division, bureau, board or commission, including the Legislature, and any other state or local government agency of West Virginia, its political subdivisions and any agent thereof." W.Va. Code § 31A-2A-1(f).

W. Va. Code § 31A-2A-5(a) (emphasis added). This section of the Maxwell Act establishes a procedure by which consumers, who have received notice of a state agency subpoena can move to quash the subpoena, at any time prior to the disclosure, the filing of which will automatically stay any duty of production by the financial institution. W. Va. Code § 31A-2A-5(b). The purpose of these safeguards is obvious: to give consumers the opportunity to maintain their privacy by keeping personal financial information out of the hands of a government agency. No hearings or court rulings have been conducted to allow disclosure of financial records.⁶

The Maxwell Act prohibits a state official from efforts to “knowingly and willfully induce[] or attempt[] to induce an officer, employee, agent or director of a financial institution to disclose financial records to a state entity with intent to violate this article.” W.Va. Code § 31A-2A-7(a). If a state official does so, he is guilty of a misdemeanor. *Id.* A bank, such as Capital One Bank, cannot disclose financial records to a state entity if the government has failed to comply with the Maxwell Act. Disclosure not only would aid the state’s criminal conduct, but could subject the bank to liability. W.Va. Code § 31A-2A-7. Thus, the issue is not the conduct of the Capital One Entities, but the Office of the Attorney General’s compliance or non-compliance with the Maxwell Act. W. Va. Code § 31A-2A-7(a).

C. The Office of the Attorney General’s subpoenas do not involve consumer credit transactions

The Office of the Attorney General’s Petition claims that one of the issues involved in the proceeding is “whether consumer credit transactions are covered by the West Virginia Consumer Credit and Protection Act.” Petition at p. 4. While the Capital One Entities acknowledge that

⁶ When the Capital One Entities originally stated that they could not disclose customer account information absent compliance with the Maxwell Act, the Attorney General responded that it was unaware of the law. Yet, ignorance of the law is not a defense, even for the State’s leading law enforcement officer. Despite now being apprised of the Maxwell Act, the Attorney General has taken no action to comply with the statute, such as obtaining consents or amending its subpoena requests. Indeed, the Capital One Entities have learned that the Attorney General has recently represented in correspondence to West Virginia consumers that he is not subject to the Maxwell Act, despite its clear provisions applying to him and its complete lack of any argument to refute its applicability.

Articles 2 and 3 of the West Virginia Consumer Credit and Protection Act, W. Va. Code §§ 46A-1-101 et seq. (“WVCCPA”), apply to certain types of consumer transactions, the Office of the Attorney General did not rely on those articles when issuing the subpoenas. Rather, the Office of the Attorney General clearly states in each subpoena that it is issuing the subpoenas to address “possible unfair or deceptive acts or practices” relating to Capital One’s credit card practices in violation of Article 6 of the WVCCPA. Appendix, State v. Capital One Bank, Case No. 05-MISC-71, Binder 1 of 2, “Petition to Enforce Subpoena,” at Exhibit A (Subpoena) at p. 1; Appendix, State v. Capital One Services, Inc., Case No. 05-MISC-72, “Petition to Enforce Subpoena,” at Exhibit A (Subpoena) at p. 1). In particular, the Office of the Attorney General alleged in his applications that he filed with the Lincoln County Circuit Court that he issued the subpoenas because he believed Capital One have violated § 46A-6-104 of the West Virginia Code in the marketing, advertising, sale, and issuance of credit cards. That is the only provision of the WVCCPA implicated by the subpoenas.

Article 6 only regulates acts or practices in the conduct of “trade or commerce.” W. Va. Code § 46A-6-104. The statute defines “trade or commerce” as the “advertising, offering for sale, sale or distribution of any **goods or services . . .**” W. Va. Code § 46A-6-102 (e). In other words, to be within the scope and application of the unfair and deceptive trade practices provision, the advertising or marketing must relate to the sale or offering for sale of a good or service. The issue pending before the Lincoln County Circuit Court is not whether loans are covered by the WVCCPA, but whether money or loans constitute goods or services subject to the provisions of Article 6 of the WVCCPA. (Appendix, State v. Capital One Bank, Case No. 05-MISC-71, Binder 1 of 2, “Capital One Bank’s Response in Opposition to Petition to Enforce Investigatory Subpoena” at pp. 11-13).

D. The Office of the Attorney General is Seeking Rulings on Matters that Have Already Been Addressed

The Office of the Attorney General claims that the issue of whether he violated § 46A-7-104 by disclosing information about its investigation is pending before the Lincoln County Circuit Court. Petition at p. 4. This too is incorrect. As the records of the Kanawha County Circuit Court clearly confirm, that issue exclusively arose in and was decided by the Kanawha County Circuit Court. Indeed, the Kanawha County Circuit Court has already ruled on this issue and entered a preliminary injunction against the Office of the Attorney General, based upon a finding that the Office of the Attorney General *had violated* § 46A-7-104 by failing to file its application under seal and by making other public disclosures, press releases, and Internet website postings about its investigation of Capital One Bank. Preliminary Injunction at p. 3. As such, the issue clearly is not pending with Judge Hoke. Moreover, the Office of the Attorney General cannot collaterally attack Judge Stucky's order by asking this Court to order Judge Hoke to rule upon an issue that not only is not pending in his court, but also has already been decided by another court.

E. The Issues Pending Before the Kanawha County Circuit Court Are Affirmative Claims Based on the Office of the Attorney General's Conduct and Are Not Merely Defenses to the Issues Pending Before the Lincoln County Circuit Court

The Office of the Attorney General claims in its Memorandum of Law in support of its Petition that the issues raised by Capital One Bank in the civil action pending before the Kanawha County Circuit Court are nothing more than defenses to the issues the Office of the Attorney General brought before the Lincoln County Circuit Court when it sought assistance with its subpoenas. Memorandum of Law at pp. 1-2. The Office of the Attorney General is incorrect. The matters pending before the Lincoln County Circuit Court involve the issue of whether the Office of the Attorney General violated the Maxwell Act in connection with its

attempts to obtain the private financial information of consumers. (Appendix, State v. Capital One Bank, Case No. 05-MISC-71, Binder 1 of 2, "Capital One Bank's Response in Opposition to Petition to Enforce Investigatory Subpoena" at pp. 2 and 6-7). The issues raised by Capital One Bank before the Kanawha County Circuit Court concern the manner in which the Office of the Attorney General has conducted its investigation of the Capital One Entities and do not relate to compliance with the Office of the Attorney General's subpoenas. (Appendix, Capital One Bank v. Darrell McGraw, Office of the Attorney General, Case No. 05-C-1216, Complaint). More specifically, in the Kanawha County Circuit Court civil action, Capital One Bank asserts claims resulting from the Office of the Attorney General's public disclosures in the form of press releases and Internet website postings in violation of 46A-7-104(4) of the WVCCPA. (Id.). Capital One Bank has sought leave in that civil action to amend its complaint to assert claims to address the Office of the Attorney General's failure to follow the West Virginia Freedom of Information Act, W. Va. Code §§ 29B-1-1 et seq., and the Office of the Attorney General's unlawful retention of third-party outside counsel in contravention of 46A-7-102(1)(f) of the WVCCPA. (Appendix, Capital One Bank v. Darrell McGraw, Attorney General, Case No. 05-C-1216, Plaintiff's Motion for Leave to File Amended Complaint and Plaintiff's Motion for Leave to File Second Amended Complaint). Those claims are unrelated to compliance with the subpoenas and, contrary to the Office of the Attorney General's arguments, are not defenses to those subpoenas. Rather, as Judge Stucky noted during the June 13, 2005 hearing, the issues before him are separate from the issues surrounding the subpoenas. (Tr. at p. 7). Moreover, as noted above, Article VII, section 1 of the West Virginia Constitution and West Virginia Code § 14-2-2(a) required Capital One Bank to file its claims with the Kanawha County Circuit Court and not with any other circuit court in this State.

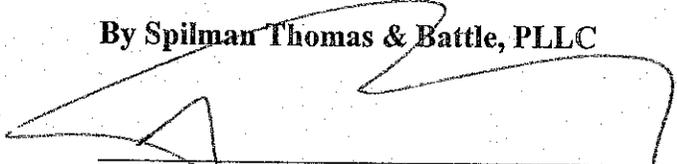
III. CONCLUSION

In filing this response, Capital One Bank and Capital One Services, Inc. seek only to correct the misrepresentations made by the Office of the Attorney General. As noted above, they welcome rulings by the Lincoln County Circuit Court, either *sua sponte* or at the direction of this Court. However, those rulings must be based on an accurate record of procedural history of this proceeding and an unbiased understanding of the nature of the issues pending before both the Lincoln County Circuit Court and the Kanawha County Circuit Court.

Respectfully Submitted,

**CAPITAL ONE BANK and
CAPITAL ONE SERVICES, INC.**

By Spilman Thomas & Battle, PLLC



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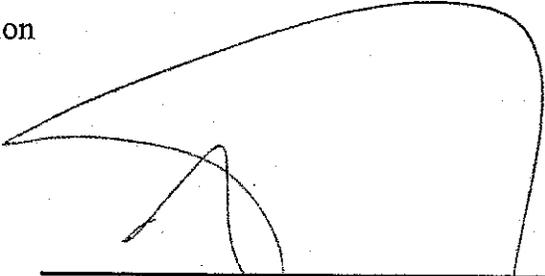
CERTIFICATE OF SERVICE

I, Niall A. Paul, hereby certify that I have caused the attached "**Defendants Capital One Bank and Capital One Services, Inc.'s Response to the Attorney General's Petition for Writ of Mandamus**" to be served by having a true copy thereof hand-delivered on this 16th day of May, 2007, to the following:

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Room E-26, WV State Capitol
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