

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHRISTIAN and ELIZABETH HARPER,
on their own behalves and
on behalf of those similarly situated,

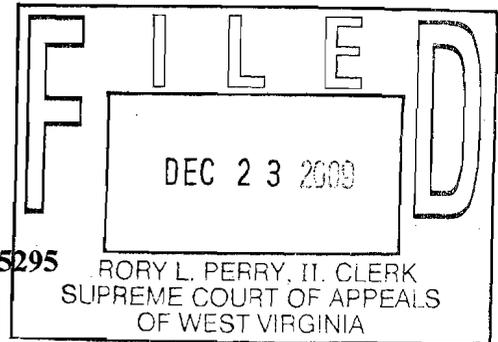
Plaintiffs,

v.

JACKSON HEWITT, INC.,

Defendant.

Case No. 35295



AMICI CURIAE Brief Of AARP, the Center for Responsible Lending, Consumer Action,
Consumer Federation of America, Consumer's Union, Public Citizen,
the National Consumer Law Center, U.S. PIRG, West Virginia Alliance for Sustainable
Families and West Virginia Senior Legal Aid
In Support of Plaintiffs Christian and Elizabeth Harper

On Certified Questions from the United States District Court
for the Southern District of West Virginia, Huntington Division
Honorable Robert C. Chambers
(Civil Action No. 3:06-0919)

Lonnie C. Simmons
WV Bar No. 3406
DiTrapano Barrett & DiPiero
604 Virginia Street
East Charleston, WV 25301
Phone (304) 342-0133
Fax (304) 342-4605
lsimmons@dbdlaw1.com

**Attorney for Amici Curiae AARP, CRL,
Consumer Action, CFA, Consumer's
Union, NCLC, Public Citizen, U.S. PIRG,
West Virginia Alliance for Sustainable
Families**

Cathy McConnell
WV Bar No. 7103
West Virginia Senior Legal Aid
235 High Street, #519
Morgantown, WV 26505
(304) 296-0082

**Counsel for Amicus Curiae West
Virginia Senior Legal Aid**

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
STATEMENT OF THE CASE.....	1
PRELIMINARY STATEMENT	1
ARGUMENT	2
I. Refund Anticipation Loans Are Abusive And Drain Millions Of Dollars From The Tax Refunds Of West Virginia’s Most Economically Vulnerable Consumers.....	2
A. Refund Anticipation Loans Are A Form Of Predatory Lending	3
1. RALs Are Part Of The “Fringe Banking” Industry	4
2. RALs Target The Poorest Taxpayers: Almost 60% Of West Virginia EITC Recipients Purchased A RAL, At A Collective Annual Cost Of Nearly \$13 Million	5
B. RALs Provide “Magic Money” For Only One Party To The Transaction – Guess Which One?.....	7
1. Tax Preparers Play A Pivotal Role In Marketing RALs.....	9
2. RALs Expose Borrowers To The Risk Of Unmanageable Debt.	11
II. West Virginia Has A Compelling Interest In Regulating Tax Preparers Who Also Broker High Rate Loans – Via Enforcement Of The Existing Consumer Protections In The CSOA.	11
III. Jackson Hewitt Is Subject To The CSOA Even If It Receives Payment Indirectly ..	15
1. SBB&T Has Always Shared RAL Fees With Jackson Hewitt, It Is Only The Form Of The Transaction That Has Changed.....	15
2. The Plain Language Of The West Virginia Act Covers Entities That Are Paid Indirectly To Arrange Loans.....	17
3. The Plain Language Of Similar State CSOAs Clearly Indicates That, Unless Expressly Exempted, Loan Arrangers Are Subject To The Act.....	18
4. Courts And Regulators Have Consistently Interpreted The Same Language At Issue Here To Cover Services Paid Indirectly	20

IV. Ms. Harper Is A Buyer Under The CSOA	23
CONCLUSION	23

TABLE OF AUTHORITIES

	Page
Cases	
<i>Arnold v. United Companies Lending Corp.</i> , 511 S.E.2d 854, 863 (W. Va. 1998).....	17, 23
<i>Asmar v. Benchmark Literacy Group, Inc.</i> , 2005 U.S. Dist. LEXIS 23197 (E.D. Mich. Oct. 11, 2005)	21
<i>Bankwest v. Baker</i> , 411 F.3d 1289 (11th Cir. 2005)	10
<i>Dunlap v. Friedman's, Inc.</i> , 5 S.E. 2d 841, 842 (W. Va. 2003)	18
<i>Goleta Nat'l Bank and ACE Cash Express, Inc. v. Lingerfelt</i> , 211 F. Supp. 2d 711 (E.D.N.C. 2002)	9
<i>Goleta Nat'l Bank v. O'Donnell</i> , 239 F. Supp. 2d 745 (S.D. Ohio 2002)	9
<i>Gomez v Jackson Hewitt, Inc.</i> , Case No. 30418-V, Montgomery County Circuit Court, MD, Memorandum and Order, June 18, 2009	22
<i>H&R Block Eastern Enterprises, Inc. v. Turnbaugh</i> , (D. Md. July 29, 2008), C.A. No. 07-1822, <i>appeal pending</i> , Nos. 08-2162, 2163 (4 th Cir.) ...	21
<i>Hood v. Santa Barbara Bank & Trust</i> , 49 Cal.Rptr.3d 369 (Cal. Ct. App. 2006).....	11, 13
<i>Hood v. Santa Barbara Bank & Trust</i> , California Superior Court, Santa Barbara County, Civil Case No. 1156354	11
<i>In re Bell</i> , 309 B.R. 139 (Bkrcty.E.D.Pa. 2004)	21
<i>JTH Tax v. H&R Block Eastern Tax Serv.</i> , 128 F. Supp. 2d 926 (E.D. Va. 2001)	13
<i>People of the State of California v. Jackson Hewitt</i> , Case No. 070304558 (Cal. Sup. Ct. Jan. 3, 2007)	13
<i>Kleven v. Household Bank</i> , 334 F.3d 638 (7th Cir. 2003)	3, 7

<i>Milgram v. Malqui Financial Group, Inc.</i> , No. HUD-C-39-07 N.J. Superior Court (Hudson County) (April 6, 2009).....	13
New York State Division of Human Rights v. Jackson Hewitt, Jan 17, 2008, available at http://www.dhr.state.ny.us/pdf/Division%20vs.%20Jackson%20Hewitt_Complaint.pdf	13
<i>Occidental Chemical Corp. v. Power Authority of State of N.Y.</i> , 786 F.Supp. 316, 329 (W.D.N.Y. 1992).....	22
<i>Pacific Capital Bank, N.A. v. Conn.</i> , 542 F.3d 341 (2 nd Cir. 2008).....	12
<i>Parker v. 1-800 Bar None</i> , 2002 U.S. Dist. LEXIS 2139 (N.D.Ill. Feb. 12, 2002)	17, 18, 21
<i>People of the State of California v. H&R Block</i> , (Cal. Sup. Ct. Dec. 31, 2008), Case No. 06-449461	22
<i>People of the State of California v. Jackson Hewitt</i> , (Cal. Sup. Ct. Jan. 3, 2007), Case No. 070304558	11, 22
<i>Reynolds v. Beneficial National Bank</i> , 277 F.3d 277 (7 th Cir. 2003)	3
<i>Salazar v. ACE Cash Express, Inc.</i> , 188 F. Supp. 2d 1282 (D. Colo. 2002).....	9
<i>Schneider v. Phelps</i> , 359 N.E.2d 1361 (N.Y. 1977).....	5
<i>Snook v. Ford Motor Co.</i> , 142 Ohio App.3d 212, 755 N.E.2d 380 (Ohio App. 2 Dist., 2001).....	19
<i>Whitworth & Yancy v. Adams</i> , 5 Rand 333, 26 Va. 333 (1827).....	5
Statutes	
15 USC § 1679.....	14, 17
Cal. Bus. & Prof. Code § 22250 to 22259	12
6 Del. Code § 2402	19, 20
6 Del. Code Ann. §§ 2404-2406	14
Md. Code Ann., Commercial Law Art. §14-1901(c).....	20

Md. Code Com. Law §§ 14-1903 – 1905, 1906, 1908	14
Md. Code Bus. Occ. & Prof. §§ 21-101 to 21-502.....	12
Ohio R.C. §§ 4712.02 - 4712.06.....	14
Okla. Stat. tit. 24, § 132(8).....	19
Okla. Stat. §24-133, 135-137, 144.....	14
Or. Rev. Stat. § 673.605.....	12
W. Va. Code § 46A-6C-2(a).....	1, 14, 23

Other Authorities

2009 RAL Report.....	passim
79 Md. Op. Att. Gen. 98, at 2-3 (1994)	22
IRS, <i>Publication 2043: e-file 2009 Refund Cycle Chart</i> (April 2009), available at http://www.irs.gov/pub/irs-pdf/p2043.pdf	3
Jackson Hewitt Tax Service Inc., <i>2007 Form 10-K: Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934</i>	7
Lynn Drysdale & Kathleen Keest, <i>The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and its, Challenge to Current Thinking About the Role of Usury Laws in Today's Society</i> , 51 S.C. L. Rev. 589, 591 (2000).....	4
Roger Swagler, et al., <i>The Alternative Financial Sector: An Overview</i> , 7 <i>Advancing the Consumer Interest</i> 7 (1995)	4
John R. Burton, et al., <i>The Alternative Financial Sector: Policy Implications for Poor Households</i> , 42 <i>Consumer Interests Annual</i> 279 (1996).....	4

Miscellaneous

<i>Consumer Advisory, Rapid Tax-Refund Loans</i> , Iowa Attorney General's Office, Jan. 2007; Press Release, Beware of Instant Tax Refund Loans, Minnesota Attorney General's Office.....	9
<i>Consumer Officials Warn Taxpayers of Refund Loans</i> , Oklahoman, Jan. 17, 2007; Press Release, <i>Truth About Tax Refund Anticipation Loans</i> , South Carolina Dept of Consumer Affairs, Jan. 16, 2007.....	9
David Twiddy, <i>H&R Block Calls on Competitors to End "Pay-Stub" Loans</i> , Associated Press, June 11, 2006	10

<i>Don't Borrow Trouble: Advances on Tax Refunds are Loans You Don't Need</i> , Charlotte Observer, Jan. 21, 2007.....	8
<i>Don't Borrow Trouble: Advances on Tax Refunds are Loans You Don't Need</i> , Charlotte Observer, Jan. 21, 2007; <i>McDaniel Warns Taxpayers of Refund Anticipation Loans</i> , Arkansas News Bureau, Feb. 24, 2007.....	9
Press Release, <i>Attorney General Masto Warns of Costly Tax Refund Loans</i> , Nevada Attorney General's Office, Apr. 10, 2007.....	9
Press Release, <i>Department of Consumer Services Cautions Consumers About Costs of 'Instant' Tax Refunds</i> , Chicago Department of Consumer Services, Jan. 22, 2007.....	9
Press Release, <i>Know the Facts Before Agreeing to a Refund Anticipation Loan</i> , New Jersey Attorney General's Office, Feb. 14, 2008; <i>Refund Anticipation Loans, Too Good to Be True....</i> , North Dakota Attorney General's Office, Jan. 2, 2008	8
Press Release, <i>Lt. Gov. Quinn Promotes State-Funded Tax Advice Centers, Encourages Taxpayer to Avoid Costly Refund-Anticipation Loans</i> , Office of Illinois Lt. Gov. Pat Quinn, Feb. 8, 2007.....	8
Press Release, <i>Office of Financial and Insurance Services Warns Taxpayers to Steer Clear of Tax Refund Loans</i> , Michigan Dept. of Labor and Economic Growth, March 14, 2007.....	9
Press Release, <i>Refund Anticipation Loans: Are They Worth It?</i> Georgia Office of Consumer Affairs, March 5, 2007	9

STATEMENT OF INTEREST

Amici's respective statements of interest are contained in their Motion for Leave to File Amicus Brief, filed herewith.

STATEMENT OF THE CASE

Amici adopt the statement of the case and the facts as presented by the Plaintiffs.

PRELIMINARY STATEMENT

Of the four questions certified by the district court, *amici* address only the first:

1. Does a tax preparer who receives compensation, either directly from the borrower or in the form of payments from the lending bank, for helping a borrower obtain a refund anticipation loan meet the statutory definition of a credit services organization, or "CSO," (W. Va. Code § 46A-6C-2(a)), and do the borrowers in such a transaction meet the definition of a buyer (*id.* § 46A-6C-1(1))?

Jackson Hewitt is paid by the lending banks for the RALs it arranges, and borrowers who purchase RALs pay fees to do so. Under the plain meaning of the statutory language, Jackson Hewitt meets the definition of a CSO because it "obtains extensions of credit" from others "in return for the payment of money or other valuable consideration." W. Va. Code § 46A-6C-2(a). Nothing in the statute restricts its application to credit arrangers who are paid directly by borrowers. Under the plain language borrowers in RAL transactions are "buyers" as well, because they "purchase the services" of Jackson Hewitt when they pay fees to obtain a RAL. All courts and regulators that have interpreted similar definitional language in other state CSOAs and the federal analog, but one, have found that the statute applies to indirect payments.

In addition to the plain statutory language, the nature of RAL lending and the lack of other regulation compel this result. RALs are a form of predatory lending, offering consumers access to their own money, their tax refund, only days sooner than the IRS, at

annual interest rates that exceed 100%. RALs are targeted to the poorest of taxpayers. In West Virginia, more than half of all Earned Income Tax Credit (EITC) recipients obtained RALs, thereby transforming the nation's "largest anti-poverty program" into a program that also provides significant support to the RAL industry. In addition, RALs subject taxpayers to potentially unmanageable debt if their refund is held up or is less than the tax preparer selling the RAL calculates it to be. Despite RALs' high costs and risks to borrowers, state usury laws are preempted because most RAL lenders are national banks. Nor do most states regulate tax preparers in any significant way. The modest protections of the CSOA – the requirement of basic disclosures to borrowers, the posting of a bond, and registration with the state – provide the only source for regulation of RALs in West Virginia. For all of these reasons, the Court should answer Certified Question No. 1 in the affirmative.

ARGUMENT

I. Refund Anticipation Loans Are Abusive And Drain Millions Of Dollars From The Tax Refunds Of West Virginia's Most Economically Vulnerable Consumers

Refund anticipation loans (RALs) are part of the fringe financial industry that includes payday loans, auto title loans, pawns, and rent-to-own transactions. RALs provide quick credit to vulnerable consumers at steep prices, and create the risk of ruined credit ratings and debt collection harassment. RALs target low- to moderate-income consumers with few resources and great financial needs.

RALs put cash into the consumer's hand one or two days after the tax return is filed. Many consumers who want refunds quickly do not realize that electronic filing of a tax return cuts the wait to 8-15 days, if the consumer has a bank account into which

Treasury can directly deposit the refund.¹ Thus, a RAL is only one to two weeks faster than an electronically delivered refund, but can reduce the refund by more than \$100.²

The Seventh Circuit Court of Appeals described RALs, and the RAL industry's target market of the working poor, in *Reynolds v. Beneficial National Bank*, 277 F.3d 277, 280 (7th Cir. 2003).

[E]ven a few weeks is too long for the most necessitous taxpayers [to wait for a refund], and so Beneficial through Block offers to lend the customer the amount of the refund for the period between the filing of the claim and the receipt of the refund. The annual interest rate on such a loan will often exceed 100 percent--easily a quarter of the refund, even though the loan may be outstanding for only a few days.

The 7th Circuit has a justifiably jaundiced view of RALs, noting that "an attack on RALs based on fairness and equity would certainly have some appeal." *Kleven v. Household Bank*, 334 F.3d 638, 639-40 (7th Cir.), cert denied, 540 U.S. 1073 (2003). A brief exposition of RALs' defining characteristics explains the 7th Circuit's pejorative viewpoint.

A. Refund Anticipation Loans Are A Form Of Predatory Lending

On both economic and equitable terms, RALs are essentially indefensible. A RAL is secured and paid by the consumer's own money, the tax refund. In 2007, consumers paid an estimated \$833 million to receive their own tax refunds mere days earlier than they could have by filing electronically and using direct deposit, as well as \$68 million

¹ IRS, *Publication 2043: e-file 2009 Refund Cycle Chart* (April 2009), available at <http://www.irs.gov/pub/irs-pdf/p2043.pdf>.

² See Chi Chi Wu and Jean Ann Fox, *Big Business, Big Bucks: Quickie Tax Loans Generate Profits For Banks And Tax Preparers While Putting Low-Income Consumers At Risk, The NCLC and CFA 2009 Refund Anticipation Loan Report* (February, 2009) ("2009 RAL Report"), at 4, 8-10. NCLC is the National Consumer Law Center, CFA the Consumer Federation of America.

more in “application,” “document preparation,” “electronic filing” or other fees.³ For this marginally quicker access to their refund, RAL customers pay interest rates that range from 50 to 500 percent.⁴ In 2009, the fee for a typical RAL of \$3,000 that Jackson Hewitt brokers translates into an Annual Percentage Rate of 134 or 140%.⁵ Thus, RALs have virtually all of the characteristics of predatory lending.

1. RALs Are Part Of The “Fringe Banking” Industry

RALs are part of an industry popularly referred to as “fringe banking” or the “alternative financial sector.”⁶ Fringe banking targets low-income, working poor, and minority consumers, those with blemished credit histories, and those depending on public benefits such as Social Security, who cannot access traditional sources of credit. This has resulted in a two-tiered economy, often referred to as a system of “financial apartheid” or the “second-class” marketplace, in which middle-income and affluent consumers are served by reasonably-priced credit from banks, and the poor are forced into expensive and, in many cases, poorly regulated – or as Jackson Hewitt argues here – *unregulated* alternatives.⁷

But the absence of meaningful choice historically has been a justification for *heightened* regulation, not an argument for its absence.

The purpose of usury laws, from time immemorial, has been to protect desperately poor people from the consequences of their own desperation. Law-

³ *Id.*, at 5, 7.

⁴ *Id.*, at 1, 14.

⁵ *2009 RAL Report*, at 10.

⁶ See Roger Swagler, et al., *The Alternative Financial Sector: An Overview*, 7 *Advancing the Consumer Interest* 7 (1995); John R. Burton, et al., *The Alternative Financial Sector: Policy Implications for Poor Households*, 42 *Consumer Interests Annual* 279 (1996).

⁷ See Lynn Drysdale & Kathleen Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and its Challenge to Current Thinking About the Role of Usury Laws in Today's Society*, 51 *S.C. L. Rev.* 589, 591 (2000).

making authorities in almost all civilizations have recognized that the crush of financial burdens causes people to agree to almost any conditions of the lender and to consent to even the most improvident loans.⁸

While many consumers have other ways to obtain short-term, unsecured loans, such as credit cards, the poor have significantly less access to these traditional sources of credit. Coupled with the decline in the availability of small, unsecured loans from banks and finance companies, many consumers, particularly those with modest incomes or impaired credit, find that fringe lenders represent their only source of credit. Well aware that such consumers have few alternatives, lenders in this market charge extremely high fees, translating into triple-digit APRs.

The notion that RAL lenders are providing credit to an underserved market is belied by the counter-productive effect of the RAL product. To provide some measure of protection, the West Virginia CSOA requires of loan arrangers that they provide certain disclosures and contract terms to protect consumers from the most egregious abuses of the fringe lending arena.

2. RALs Target The Poorest Taxpayers: Almost 60% Of West Virginia EITC Recipients Purchased A RAL, At A Collective Annual Cost Of Nearly \$13 Million

RALs target the working poor. In 2007, about 85% of those who applied for RALs had adjusted annual gross incomes of \$38,348 or less.⁹ More than 50% of RAL borrowers received the Earned Income Tax Credit, (“EITC”), a refundable credit intended to boost low-wage workers out of poverty. The EITC is often referred to as the

⁸ See, e.g., *Schneider v. Phelps*, 359 N.E.2d 1361, 1365 (N.Y. 1977) *Whitworth & Yancy v. Adams*, 5 Rand 333, 335, 26 Va. 333 (1827)(usury laws enacted to protect desperate borrowers from lenders eager to take advantage of their distress).

⁹ Data from IRS SPEC, *Return Information Database for Tax Year 2006* (Returns Filed in 2007), Jan. 2009.

largest anti-poverty program in the United States.

EITC recipients are easy prey for RAL arrangers. IRS data shows that in 2007 nearly two-thirds (63%) of RAL consumers, or 5.44 million families, were EITC recipients, yet EITC recipients made up only 17% of individual taxpayers in 2007.¹⁰ EITC forms, and the mathematical computations they require, are daunting to most recipients, who in turn rely on tax preparers to also prepare the EITC forms. EITC recipients often do not have bank accounts, and so cannot take advantage of the reduction in processing time offered by having refunds directly deposited.¹¹

NCLC estimates that in 2007 EITC recipients spent \$523 million of their EITC refunds in the form of tax preparation and RAL related fees, and “add-on fees added another \$44 million to the drain.”¹² RALs therefore effectively transfer more than half a billion of this anti-poverty program’s dollars away from the poorest of the poor, undermining the goal of this important taxpayer funded program.

This wealth transfer is particularly acute in West Virginia. In 2009, the West Virginia Center on Budget and Policy issued a blistering critique of RALs: “*Magic Money*” *A Mere Illusion: Refund Anticipation Loans And The Earned Income Tax Credit In West Virginia*. This report found that 59% of the approximately 77,000 West Virginians who purchased a RAL in 2007 were EITC recipients.¹³ The Center on Budget and Policy estimates that, as a result:

¹⁰ 2009 RAL Report, at 12.

¹¹ For example, nearly 5 million customers of the largest RAL provider, H&R Block, do not have an established bank relationship. H&R Block, *2005 U.S. Tax Interactive Press Kit – Reality Check*, January 2005.

¹² 2009 RAL Report, at 13.

¹³ *Magic Money Report* (July 2009), at 2. The report was written by Elizabeth Paulhus, the Center’s Policy Analyst.

the average EITC recipient who buys a RAL loses approximately \$280 from his or her actual refund in fees and services, [therefore] low to moderate-income working West Virginians were deprived of \$12.66 million that had been intended to reduce poverty by helping them make ends meet.¹⁴

B. RALs Provide “Magic Money” For Only One Party To The Transaction – Guess Which One?

As the Seventh Circuit Court of Appeals has famously, and caustically, observed:

[T]he bargain struck [for a RAL] is a good one for only one of the two parties. Guess which one?¹⁵

As rhetorical questions go, this is an easy one. Jackson Hewitt is the second largest tax preparation chain in the country, preparing 3.65 million returns in 2007, or about a 4% share of the paid preparer market.¹⁶ Its main bank partner for RALs and other tax financial products is Santa Barbara Bank and Trust (SBBT), which provides 65% of Jackson Hewitt’s RALs.¹⁷

In 2007, Jackson Hewitt sold one or more financial products to 3.4 million (or 93%) of its customers.¹⁸ It no longer breaks out the number of RALs it makes in its SEC filings. However, NCLC estimates that Jackson Hewitt brokered about 1.3 to 1.4 million RALs in 2006 and a similar number in 2007.

Jackson Hewitt derives a startling percentage of its profits from financial products. It earned \$80 million in financial product fees in 2007, about 27% of its total

¹⁴ *Id.*, at 5.

¹⁵ *Kleven v. Household Bank*, 334 F.3d 638, 639-40 (7th Cir.), *cert denied*, 540 U.S. 1073 (2003).

¹⁶ Jackson Hewitt Tax Service Inc., *2007 Form 10-K: Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934*, at 2 [hereinafter “Jackson Hewitt 2007 Form 10-K”]. H&R Block is the largest tax preparation firm in the U.S.

¹⁷ *Pacific Capital Bancorp Conference Call*, Financial Disclosure Wire, Nov. 1, 2007.

¹⁸ Jackson Hewitt 2007 Form 10-K at 28. This includes RALs, RACs and Hewitt’s “Gold Guarantee.”

revenues.¹⁹ In 2008, Jackson Hewitt earned \$71 million in financial product fees, or 26% of its revenues.²⁰ Thus, Jackson Hewitt relies substantially upon RALs and other tax financial products to boost its bottom line.

Ironically, or perhaps perversely, given the huge profits that RALs generate for their arrangers and lenders, knowledgeable economic observers almost uniformly consider RALs to provide essentially no benefit to the vast majority of consumers. Few financial experts would endorse obtaining a RAL as a prudent financial move. It is largely the converse that is true.

Virtually every informed commentator outside the industry who knows RALs criticizes them – courts, finance professors, legislators, federal agencies, state regulators, attorneys general, and financial advisors, as well as consumer advocates. A sampling follows:

National Taxpayer Advocate, *2007 Objectives Report to Congress: Volume II – The Role of the IRS in the Refund Anticipation Loan Industry*, June 30, 2006 [hereinafter “National Taxpayer Advocate 2007 Objectives Report”];

Government Accountability Office, *Refund Anticipation Loans*, GAO-08-800R, June 5, 2008, available at <http://www.gao.gov/new.items/d08800r.pdf>;

Press Release, *Sen. Schumer Warns of Tax Refund Scams That Cheat Hundreds of Thousands of Upstate New Yorkers Out of Millions of Dollars*, Office of Sen. Charles E. Schumer, Jan. 16, 2007;

Don't Borrow Your Own Money! Consumer Affairs Advises Tax Payers to Steer Clear of Tax Refund Anticipation Loans, Massachusetts Office of Consumer Affairs and Business Regulation, January 29, 2008.²¹

¹⁹ Jackson Hewitt 2007 Form 10-K at 3, 27.

²⁰ Jackson Hewitt 2008 Form 10-K at 3, 28.

²¹ See also Press Release, *Know the Facts Before Agreeing to a Refund Anticipation Loan*, New Jersey Attorney General's Office, Feb. 14, 2008; *Refund Anticipation Loans, Too Good to Be True....*, North Dakota Attorney General's Office, Jan. 2, 2008; *Don't Borrow Trouble: Advances on Tax Refunds are Loans You Don't Need*, Charlotte Observer, Jan. 21, 2007; Press Release, *Lt. Gov. Quinn Promotes State-Funded Tax Advice Centers, Encourages Taxpayer to Avoid Costly Refund-Anticipation Loans*, Office of Illinois Lt. Gov. Pat Quinn, Feb. 8, 2007; *Don't Borrow Trouble: Advances on Tax*

1. Tax Preparers Play A Pivotal Role In Marketing RALs

Tax preparers are the key actor in refund anticipation lending: banks rely heavily on them to broker the loan. Tax preparers advertise the loans, solicit customers, collect the borrowers' information, fill in the loan applications, print out the loan agreements, and issue the loan checks or cash.²² In fact, the borrowers only point of contact is the tax preparer and its employees, not bank personnel. Tax preparers are also involved in the collection of the loan; in the case of RALs, tax preparers play a critical role in cross-collection.²³

Indeed, the tax preparer engages in the most crucial of the underwriting functions in originating the loan. The tax preparer is responsible for figuring out the amount of the loan by properly determining whether the consumer is entitled to a refund and its amount.

Refunds are Loans You Don't Need, Charlotte Observer, Jan. 21, 2007; *McDaniel Warns Taxpayers of Refund Anticipation Loans*, Arkansas News Bureau, Feb. 24, 2007; *Costly Credit: Refund Anticipation Loans and Universal Default*, Illinois Attorney General's Office, Feb. 2007; *Consumer Advisory, Rapid Tax-Refund Loans*, Iowa Attorney General's Office, Jan. 2007; Press Release, *Beware of Instant Tax Refund Loans*, Minnesota Attorney General's Office; Press Release, *Attorney General Masto Warns of Costly Tax Refund Loans*, Nevada Attorney General's Office, Apr. 10, 2007; Press Release, *Refund Anticipation Loans: Are They Worth It?* Georgia Office of Consumer Affairs, March 5, 2007; Press Release, *Office of Financial and Insurance Services Warns Taxpayers to Steer Clear of Tax Refund Loans*, Michigan Dept. of Labor and Economic Growth, March 14, 2007; *Consumer Officials Warn Taxpayers of Refund Loans*, Oklahoman, Jan. 17, 2007; Press Release, *Truth About Tax Refund Anticipation Loans*, South Carolina Dept of Consumer Affairs, Jan. 16, 2007; Press Release, *Department of Consumer Services Cautions Consumers About Costs of 'Instant' Tax Refunds*, Chicago Department of Consumer Services, Jan. 22, 2007.

²² See also *State of Colorado ex rel. Salazar v. ACE Cash Express, Inc.*, 188 F. Supp.2d 1282 (D. Colo. 2002); *Goleta Nat'l Bank and ACE Cash Express, Inc. v. Lingerfelt*, 211 F. Supp.2d 711 (E.D.N.C. 2002); *Goleta Nat'l Bank v. O'Donnell*, 239 F. Supp.2d 745 (S.D. Ohio 2002).

²³ See text at footnotes 30, 31.

Thus, the preparer's role is to ensure that the loan is repaid. This involves the process of properly preparing a tax return, a substantial and complex task.

The arrangement between tax preparers and banks in RAL lending bears significant similarities to payday lending, especially the now-discredited practice of rent-a-charter payday lending, in which the non-bank payday lender uses the charter of a federally-regulated bank to evade state usury limitations.²⁴ New products being developed in the RAL industry are becoming even more similar to payday loans.

For example, the industry now offers "holiday loans" and "pay stub loans" that are made prior to the tax filing season. These are high-cost, short-term loans based on an estimate of the consumer's forthcoming tax refund calculated using the consumer's pay stub. These loans are made as early as November, prior to when the IRS permits tax returns to be filed.²⁵ In fact, the former CEO of H&R Block has admitted "[t]he economics of [paystub RALs] have more in common with payday lending than refund lending."²⁶

Jackson Hewitt's version of the paystub loan is the "ipower Line of Credit." The credit line goes up to \$500, and is issued by MetaBank. MetaBank charges a 1.5% fee for the first advance from the line, and a 10% charge per advance thereafter, plus 18% periodic interest. A taxpayer who borrows the entire \$500 in the first advance would be charged a \$57.65 fee. If the ipower loan is repaid in one month, the total fee would be \$65.15. A one month, closed-end loan with the same loan amount and fee would have an

²⁴ See, e.g., *Bankwest v. Baker*, 411 F.3d 1289, 1294 (11th Cir. 2005).

²⁵ *2009 RAL Report*, at 18.

²⁶ David Twiddy, *H&R Block Calls on Competitors to End "Pay-Stub" Loans*, Associated Press, June 11, 2006.

APR of 177%.²⁷

2. RALs Expose Borrowers To The Risk Of Unmanageable Debt.

RALs also present risks to low-income taxpayers. If the consumer's refund is not issued by the Internal Revenue Service ("IRS"), is held up in some way, or is less than the amount anticipated, the consumer is liable for the full amount of the loan. Thus, in addition to draining the refunds of taxpayers, RALs put them at risk of carrying unmanageable debt if they cannot repay the loan. Consumers who owe balances from past RAL debts are subject to the particularly abusive tactic of cross-collection, in which their current refunds are seized to pay old RAL debts when they try to get another RAL, even from a different tax preparer and lender.²⁸ Tax preparers play a critical role in cross-collection, because they act as debt collectors in soliciting consumers for the subsequent transactions in which the loan applications permit seizure of tax refunds to repay old RAL debts.²⁹ Despite some reforms,³⁰ the practice itself continues with tax preparers playing a major part.

II. West Virginia Has A Compelling Interest In Regulating Tax Preparers Who Also Broker High Rate Loans – Via Enforcement Of The Existing Consumer Protections In The CSOA.

Despite their high cost, significant potential for economic harm to the consumers who purchase them, and the experts' universally dim view of RALs, few regulatory

²⁷ 2009 RAL Report, at 18.

²⁸ See *Hood v. Santa Barbara Bank & Trust*, 49 Cal.Rptr.3d 369 (Cal. Ct. App. 2006).

²⁹ *Id.* at 374-75.

³⁰ See, e.g., *People of California v. Jackson Hewitt Inc.*, No. 07034558 (Sup. Ct. Cal. Alameda County 2007) (consent judgment with California Attorney General providing for, among other things, refunds of portions of monies Jackson Hewitt obtained via cross-collection); *Hood v. Santa Barbara Bank & Trust*, California Superior Court, Santa Barbara County, Civil Case No. 1156354 (nationwide class action settlement providing for, among other things, refunds of portions of monies Jackson Hewitt obtained via cross-collection).

protections apply to their terms. State usury laws do not apply to RALs because the national banks which make the loans can export their exponential interest rates by taking advantage of National Bank Act preemption.³¹ Nor is there any meaningful state regulation of the tax preparation industry. While there is a common perception that tax preparers must be accountants or some other sort of credentialed professional with an advanced or college degree, in reality, any person can become a tax preparer in West Virginia and in most states without any training or experience in the field. No federal law, and only three state laws,³² provide entry requirements to be a tax preparer, *i.e.*, there is no minimum level of education required, no testing or certification in most states, and no licensing in most states. According to the National Taxpayer Advocate “[a]nyone can prepare federal tax returns for others for a fee regardless of his or her education, training, experience, skill, or knowledge.”³³

The major tax preparation chains, such as Jackson Hewitt and H&R Block, do provide some training, consisting of an 11 to 12 week course.³⁴ However, the vast majority of tax preparers do not work for a tax preparation chain, but are independent in

³¹ *Pacific Capital Bank, N.A. v. Conn.*, 542 F.3d 341 (2nd Cir. 2008).

³² See Cal. Bus. & Prof. Code §§22250 to 22259; Md. Code Bus. Occ. & Prof. §§ 21-101 to 21-502; Or. Rev. Stat. §§673.605 to 673.740.

³³ National Taxpayer Advocate, *FY 2003 Annual Report to Congress*, Dec. 31, 2003, at 270, available at http://www.irs.gov/pub/irs-utl/nta_2003_annual_update_mcw_1-15-042.pdf. The National Taxpayer Advocate has noted problems with tax preparers on several occasions. *Statement of National Taxpayer Advocate before the Subcomm. on Oversight of the House Ways and Means Comm.*, July 20, 2005, available at http://www.irs.gov/pub/irs-utl/nta_2003_annual_update_mcw_1-15-042.pdf; National Taxpayer Advocate, *FY 2002 Annual Report to Congress*, Dec. 31, 2002, at 70, available at http://www.irs.gov/pub/irs-utl/nta_2003_annual_update_mcw_1-15-042.pdf.

³⁴ Jackson Hewitt’s course is 12 weeks and can be taken on-line. Jackson Hewitt, *Learn & Earn*, at http://www.jacksonhewitt.com/learn_courses.asp. H&R Block’s training consists of an 11 week course with 66 hours of instruction. H&R Block, *Income Tax Course*, at http://www.hrblock.com/taxes/planning/tax_courses/index.html?WT.svl=2011.

nature and have an estimated 70% share of the paid tax preparation market.³⁵ These independent preparers can range from highly educated CPAs to used car dealers and check cashing stores.

Despite this lack of professional certification or licensing, taxpayers rely heavily on paid preparers, and there is a strong degree of trust in the tax preparation relationship. This trust creates enormous potential for exploitation, including with respect to the RALs sold by preparers. Tax preparers who broker RALs have repeatedly demonstrated their willingness to exploit taxpayers' trust by engaging in deception.³⁶ For example, the New York City Department of Consumer Affairs has brought six enforcement actions against H&R Block over deceptive RAL marketing.³⁷ Thus, West Virginia has a compelling interest in protecting vulnerable consumers against unscrupulous preparers who would exploit their trust.

Only the provisions of state CSOAs provide some degree of protection for RAL

³⁵ 2009 RAL Report, at Appendix A, p.11.

³⁶ See *Milgram v. Malqui Financial Group, Inc.*, No. HUD-C-39-07 N.J. Superior Court (Hudson County) (April 6, 2009) (judgment entered and penalties assessed against tax preparer that provided RALs for false advertising, where preparer advertised one day refunds with no fees); Judgment, *People of the State of California v. Jackson Hewitt*, Case No. 070304558 (Cal. Sup. Ct. Jan. 3, 2007); Complaint, *New York State Division of Human Rights v. Jackson Hewitt*, Jan 17, 2008 (“The loans often include exorbitant fees and costs, and rates of up to 700% annualized, stripping New Yorkers of millions of dollars each year, even though tax payers can receive their refunds from the IRS, at no cost, usually within a week to ten days of filing.”) available at http://www.dhr.state.ny.us/pdf/Division%20vs.%20Jackson%20Hewitt_Complaint.pdf; *Hood v. Santa Barbara Bank & Trust*, 49 Cal.Rptr.3d 369 (Cal. Ct. App. 2006); *JTH Tax v. H&R Block Eastern Tax Serv.*, 128 F. Supp. 2d 926, 938 (E.D. Va. 2001), *aff'd*, 28 Fed. Appx. 207 (4th Cir. 2002) (District Court and Court of Appeals opinions reviewing prior actions against H&R Block over misleading advertising, especially by state Attorneys General).

³⁷ See Chi Chi Wu, Jean Ann Fox, and Elizabeth Renuart, NCLC and CFA, *Tax Preparers Peddle High Priced Tax Refund Loans: Millions Skimmed from the Working Poor and the U. S. Treasury* (Jan. 31, 2002) at 25-26, available at www.consumerlaw.org/action_agenda/refund_anticipation/content/RAL_final.pdf.

borrowers. Most states have CSOAs, which are modeled on the federal Credit Repair Organizations Act, 15 USC § 1679 *et seq.* While the federal statute only regulates credit repairers, most state analogs, including West Virginia, cover entities which obtain or arrange loans for consumers as well. Most state CSOAs define a credit service organization as an entity that obtains or assists in obtaining an extension of credit for a consumer. The typical CSOA requires entities that get paid to arrange loans to register with the state, provide certain written disclosures in connection with the loan transaction, and post a bond.³⁸ Each statute also authorizes a consumer injured by a violation of the CSO statute to sue the violator.³⁹ This near uniformity of the applicable law provides a guidepost for the Court in interpreting section 46A-6C-2.

Compelling public policy reasons explain why so many states have established comprehensive mechanisms to regulate loan brokers. The triangular relationship among the loan broker, borrower, and creditor creates many complications. A borrower assumes a loan broker is the borrower's agent, and to owe a duty of care to the borrower. Many common broker practices interfere with this relationship, however. Loan brokers are often compensated by lenders and receive monetary incentives to get the worst (most expensive) deal, while consumers believe brokers are assisting them in getting the best deal possible. Brokers may misrepresent or fail to explain their role or their fee, may misrepresent the nature or value of the credit they obtain for the borrower, and are often

³⁸ *See, e.g.*, Del. Code Ann. Title 6 §§ 2404-2406; Md. Code Com. Law §§ 14-1903 – 1905, 1906, 1908; Ohio R.C. §§ 4712.02 - 4712.06; Okla. Stat. §24-133, 135-137, 144; West Virginia Code § 46A-6C-4 to 6.

³⁹ *See* Chi Chi Wu, *et al.*, NCLC, Fair Credit Reporting, App. B (6th ed. 2006 and Supp.) (summarizing state laws governing credit reporting, including state credit services organization acts).

key players in predatory lending abuses.⁴⁰

III. Jackson Hewitt Is Subject To The CSOA Even If It Receives Payment Indirectly

The first certified question asks: “Does a tax preparer who receives compensation, either directly from the borrower or in the form of payments from the lending bank, for helping a borrower obtain a refund anticipation loan meet the statutory definition of a credit services organization, or ‘CSO’ (W. Va. Code § 46A-6C-2(a))?” Both the plain language of the statute and the interpretations of similar statutes point to an affirmative answer.

1. SBB&T Has Always Shared RAL Fees With Jackson Hewitt, It Is Only The Form Of The Transaction That Has Changed

It is undisputed that Jackson Hewitt gets paid to help consumers obtain loans. Its website lists RALs as a product it offers and further describes its available RAL-related services, including an in-office application process, the choice of how to obtain the refund, and the availability of an in-office check pick-up or a prepaid VISA card, among other things.⁴¹ And at all material times SBB&T has paid Jackson Hewitt for arranging the RALs.

In its 2004 Securities and Exchange Commission filing, Jackson Hewitt described

⁴⁰ See Elizabeth Renuart, *An Overview of the Predatory Lending Process*, 15 Housing Pol’y Debate 467, 470, 488, and 491-92 (2004), available at www.fanniemaefoundation.org/programs/hpd/pdf/hpd_1503_Renuart.pdf.

⁴¹ See [http://www.jacksonhewitt.com/Prepare-Your-Taxes/In-Office-Products-Services/REFUND-ANTICIPATION-LOAN-\(RAL\)](http://www.jacksonhewitt.com/Prepare-Your-Taxes/In-Office-Products-Services/REFUND-ANTICIPATION-LOAN-(RAL)). Jackson Hewitt also admits that it completes the customer’s RAL application, customers never deal directly with SBB&T, only Jackson Hewitt; Jackson Hewitt obtains documentation from the IRS on behalf of the customer to send to SBBT, documentation that SBBT requires to issue the RAL; and Jackson Hewitt prints the RAL checks for its customers and then informs SBBT the check was printed, as recounted in Plaintiff’s Brief.

how under a previous agreement with Santa Barbara Bank & Trust, it agreed to share the risks of unpaid RALs: “[If] actual loan losses exceed anticipated loan losses in a given year, we are obligated to reimburse [SBB&T] for a majority of the deficit. Conversely, if actual loan losses are less than anticipated, we receive a majority of the surplus.”⁴²

Jackson Hewitt further described how:

[A]s of May 5, 2004, . . . , the new agreement provides for Santa Barbara to pay us the following fees:

- a fixed fee of \$16.00 for each refund anticipation loan facilitated by our network;
- an additional fee of \$2.00 for each refund anticipation loan facilitated by our network if the amount of finance fees received by Santa Barbara exceeds uncollected loans by a threshold amount . . . ; and
- a variable fee equal to 50% of the amount by which the total amount of finance fees received by Santa Barbara exceeds uncollected loans by a threshold amount of at least 1.0% of the aggregate principal amount of refund anticipation loans made by Santa Barbara to our customers.

If the amount of uncollected loans exceeds the finance fees received by Santa Barbara, we have agreed to reimburse Santa Barbara in an amount equal to 50% of such difference.⁴³

In essence, Jackson Hewitt received \$16 plus a potential additional \$2 *plus 50% of any profit over 1%* of the aggregate loan volume of RALs – in other words, Jackson Hewitt received a significant percentage if not the majority of profits from RALs, but shared in a 50% risk if loan defaults resulted in a net loss to the bank. As noted in Plaintiffs’ Brief, although in 2006 this compensation agreement changed from a per-RAL payment to a lump sum model, the change served to enhance Jackson Hewitt’s RAL brokering profitability.

⁴² Jackson Hewitt, *Final Prospectus*, June 22, 2004, at 39, available at <http://ccbn.10kwizard.com/cgi/convert/rtf/JACKSONHEWITTTA424B1.rtf?rtf=1&repo=tenk&ipage=2856162&num=-3&rtf=3&xml=1&dn=2&dn=3>.

⁴³ *Id.*

2. The Plain Language Of The West Virginia Act Covers Entities That Are Paid Indirectly To Arrange Loans

The CSOA applies to any person who gets paid to help a consumer obtain a loan. The plain language of the Act does not require that the consumer pay the loan arranger directly. Here, Jackson Hewitt acknowledges that SBB&T pays it for facilitating these RALs, Jackson Hewitt cannot avoid complying with the CSOA simply by arranging to receive its compensation indirectly. The CSOA must be read “according to its unvarnished meaning.” *Arnold v. United Companies Lending Corp.*, 511 S.E.2d 854, 863 (W. Va. 1998).

Contrary to Jackson Hewitt’s argument, there is no requirement in the Act that the consumer must pay the CSO directly. Jackson Hewitt’s interpretation disregards the Act’s plain language. Jackson Hewitt would have this Court rewrite the definition of “buyer” to mean “an individual who is solicited to purchase or who purchases the services of a credit services organization *and makes a payment to the credit services organization directly*”.

The Court in *Parker v. 1-800 Bar None*,⁴⁴ construing identical payment language in the federal Credit Repair Organizations Act (“CROA”)⁴⁵ used a plain language analysis in rejecting the argument that only businesses receiving direct payments from consumers are covered by the CROA:

This section [15 U.S.C. § 1679a(3)(A)] does not specifically require that

⁴⁴ 2002 U.S. Dist. LEXIS 2139 (N.D.Ill. Feb. 12, 2002).

⁴⁵ The CROA defines a “credit repair organization” as:

(A) ... any person who uses any instrumentality of interstate commerce or the mails to sell, provide, or perform (or represent that such person can or will sell, provide, or perform) any service, *in return for the payment of money or other valuable consideration*, for the express or implied purpose of- (i) improving any consumer’s credit record, credit history, or credit rating; or (ii) providing advice or assistance to any consumer with regard to any activity or service described in clause (i) 15 U.S.C. § 1679a(3)(A)(emphasis added).

the credit repair organization receive the consideration directly from the consumer, only that the credit repair organization receive consideration. Therefore, *given the plain language* of the statute and the broad remedial purpose in enacting the CROA ... Bar None did *not need to receive consideration directly* from Parker to fall under [the Act].⁴⁶

Had the legislature intended that only those who receive direct consumer payments be covered by the CSOA, as Jackson Hewitt suggests, it obviously could have so provided. It is equally obvious, however, that had it done so it would have created a loophole so large the act would become meaningless, as businesses could simply avoid the statute entirely by arranging to channel payments through a third party. The court should not interpret a statute in a way that would render any of its provisions meaningless, nor should it interpret a consumer protection statute in such a way as to make it toothless.⁴⁷

3. The Plain Language Of Similar State CSOAs Clearly Indicates That, Unless Expressly Exempted, Loan Arrangers Are Subject To The Act

On that score, if the legislature wanted to protect only buyers who directly paid for the service, it could have defined a CSO as: “a person that, with respect to the extension of credit by another person, sells, provides, performs, or represents that the person can or will sell, provide, or perform in return for the payment of money or other valuable consideration *paid directly by the buyer....*”. Notably, this is how Ohio’s CSOA *formerly* read, but the Ohio legislature amended it to eliminate the direct payment requirement. Prior to June 29, 1999, the Ohio CSOA defined a “credit services organization” (“CSO”) as:

⁴⁶ *Id.*, at 4, 12 (emphasis added)(finding that a company that was paid for referring customers to Gateway, though not paid by the consumer directly, was subject to the Act).

⁴⁷ Syl. Pt. 6, *Dunlap v. Friedman’s, Inc.*, 5 S.E. 2d 841, 842 (W. Va. 2003)(W. Va. consumer credit and protection act to be “liberally construed to protect consumers from unfair, illegal or deceptive acts.”).

any person that charges or receives, *directly from the buyer*, money or other valuable consideration readily convertible into money, *and* that sells, provides, or performs, or represents that the person can or will sell, provide, or perform, any of the following services...

R.C. 4712.01(C)(1) (emphasis added).⁴⁸

The amended version of the Ohio Act, like West Virginia's, defines a CSO as "any person that, in return for the payment of money or other valuable consideration ... " offers or provides credit services. If Jackson Hewitt's indirect payment argument were correct, Ohio's amended language would still implicitly require a direct payment, even though the Ohio legislature deleted the "directly by the buyer" payment requirement when it amended its CSOA.⁴⁹ Simply stating the argument demonstrates the fallacy in it.

Similarly, as the plain language of the Act governs loan brokers, where state legislatures wished to exempt from the Act certain businesses that would otherwise be covered, they did so expressly. For example, the Oklahoma CSOA specifically exempts tax preparers brokering RALs, as long as they are not compensated for such. Okla. Stat. tit. 24, § 132(8) (exempting: "any person authorized to file electronic income tax returns who does not receive any consideration for refund anticipation loans").

Delaware's CSOA, unlike those of other states, explicitly exempts "loan brokers who are not engaged in the other activities of credit services organizations as described in subsection (a) of this section."⁵⁰ Delaware's definition of a CSO is otherwise identical to

⁴⁸ See *Snook v. Ford Motor Co.*, 142 Ohio App.3d 212, 217, 755 N.E.2d 380, 383 (Ohio App. 2 Dist., 2001)(explaining the history and amendment of the CSOA and construing the former statute),

⁴⁹ The operative definitions of CSO and "buyer" in the four state CSOAs described in this section are the same as those contained in West Virginia's. A chart excerpting the relevant provisions is appended to this brief.

⁵⁰ 6 Del. Code § 2402(b)(10).

West Virginia's.⁵¹

The Maryland Commissioner of Financial Regulation has issued an opinion that the Maryland Credit Services Act, which contains the same credit services organization definition as here⁵², unequivocally covers RAL arrangers. On May 15, 2008 the Commissioner issued *The Application of the Credit Services Businesses Act to Tax Preparers that Facilitate Refund Anticipation Loan*, which states, in pertinent part:

The Act applies to all businesses (*except those specifically excluded from coverage under the law*) that assist consumers in obtaining extensions of credit. [T]his law appl[ies] to tax preparers who are *compensated in any manner (either by the consumer or the lender)* to assist consumers in obtaining RALs from third-party lenders.⁵³

4. Courts And Regulators Have Consistently Interpreted The Same Language At Issue Here To Cover Services Paid Indirectly

There are seven judicial or regulatory actions addressing the “indirect payment” argument that Jackson Hewitt advances here. All but one, interpreting state and federal statutes containing the same definitional section as West Virginia’s CSOA, have concluded that the law applies to indirect payment arrangements like that between Jackson Hewitt and SBB&T.

⁵¹ 6 Del. Code § 2402.

⁵² "Credit services business" means any person who, with respect to the extension of credit by others, sells, provides, or performs, or represents that such person can or will sell, provide, or perform, any of the following services in return for the payment of money or other valuable consideration: (i) Improving a consumer's credit record, history, or rating or establishing a new credit file or record; (ii) Obtaining an extension of credit for a consumer; or (iii) Providing advice or assistance to a consumer with regard to either subparagraph (i) or (ii) of this paragraph. Md. Code Ann., Commercial Law Art. §14-1901(e).

A “consumer” is “any individual who is solicited to purchase or who purchases for personal, family, or household purposes the services of a credit services business.” Md. Code Ann., Commercial Law Art. §14-1901(c).

⁵³ *The Commissioner’s advisory notice is available at* <http://dllr.maryland.gov/finance/advisories/advisory5-08.shtml>.

The first of these cases is *Parker v. 1-800 Bar None*, discussed earlier. As the district court noted in that case, to accept the argument that the CROA (or here the CSOA) does not apply where the entity receives its payment indirectly, would “require the court to put the form of the transaction over the substance of the transaction.”⁵⁴

Similarly, in *Asmar v. Benchmark Literacy Group, Inc.*⁵⁵ the court rejected the argument that CROA did not apply to a business which claimed that it merely marketed credit repair services and received only indirect payments from a go-between. Likewise, in applying the Pennsylvania CSOA to a loan broker, the bankruptcy court ruled that the damages for the broker’s failure to comply with the CSOA included the amounts the broker received from the loan proceeds, as well as the yield spread premium from the lender, which it noted “is paid indirectly by the Debtor in the form of a higher interest rate.”⁵⁶

As noted above, the Maryland Commissioner of Financial Regulation has declared that Maryland’s CSOA “appl[ies] to tax preparers who are *compensated in any way (whether by the consumer or the lender)* to assist consumers in obtaining RALS from third party lenders.”⁵⁷ The Commissioner is currently enforcing Maryland’s CSOA against H&R Block in a case now on appeal in the Fourth Circuit.⁵⁸ And the Maryland Attorney General mirrors the Commissioner’s indirect payment analysis, in a different context. Where a “[c]ontractor received compensation, *from either the borrower or the financing entity*, for referring [a] loan application to the lender or performing other

⁵⁴ 2002 U.S. Dist. LEXIS 2139 at *5. (N.D.Ill. Feb. 12, 2002).

⁵⁵ 2005 U.S. Dist. LEXIS 23197 (E.D. Mich. Oct. 11, 2005).

⁵⁶ *In re Bell*, 309 B.R. 139, 163 (Bkrtcy.E.D.Pa. 2004).

⁵⁷ See May 15, 2008 Commissioner’s advisory notice.

⁵⁸ *H&R Block Eastern Enterprises, Inc. v. Turnbaugh*, (D. Md. July 29, 2008), C.A. No. 07-1822, *appeal pending*, Nos. 08-2162, 2163 (4th Cir.).

services directly connected with the financing aspect of the transaction” the contractor would be subject to the Maryland CSOA.⁵⁹

The California Attorney General takes the same view of the California CSOA. In two separate lawsuits involving Jackson Hewitt and H&R Block, ultimately resolved with consent judgments, the AG alleged that the sale of RALs by the two tax preparers was subject to state’s credit services act.⁶⁰

There is only one court, *Gomez v Jackson Hewitt, Inc.*, that has issued a contrary interpretation on this issue, finding that the Maryland CSOA was solely intended to apply to “traditional credit repair organizations”.⁶¹ But *Gomez* is an outlier. Its holding cannot be squared with the plain language of the statute; it contradicts the interpretations of both the Commissioner of Financial Regulation and the Maryland Attorney General; runs counter to every other interpretation of similar statutory language recounted above; and presumes to divine legislative intent from documents in the bill file, although none of those documents say that the Maryland CSOA was solely intended to apply to “traditional credit repair organizations”.⁶² In addition, *Gomez* is on appeal and its status is uncertain. Finally, of course, what *Gomez* concludes the Maryland legislature intended has no bearing on the statute at issue here.

⁵⁹ 79 Md. Op. Att. Gen. 98, at 2-3 (1994)(emphasis added).

⁶⁰ See, Judgment, *People of the State of California v. Jackson Hewitt*, (Cal. Sup. Ct. Jan. 3, 2007), Case No. 070304558; Judgment, *People of the State of California v. H&R Block*, (Cal. Sup. Ct. Dec. 31, 2008), Case No. 06-449461.

⁶¹ Case No. 30418-V, Montgomery County Circuit Court, MD, Memorandum and Order, June 18, 2009,

⁶² *Gomez* finds this legislative intent from a reading of two documents – a floor statement and letters from supporters. These are considered among the weakest sources of insight into legislative intent. See *Occidental Chemical Corp. v. Power Authority of State of N.Y.*, 786 F.Supp. 316, 329 (W.D.N.Y. 1992).

IV. Ms. Harper Is A Buyer Under The CSOA

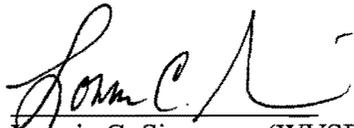
The certified question further asks whether “the borrowers in [a RAL] transaction meet the definition of a buyer [in] § 46A-6C-1(1).” The statute defines a buyer as follows: “Buyer” means an individual who is solicited to purchase or who purchases the services of a credit services organization as defined in section two of this article.” A buyer includes “prospective borrowers.”⁶³

There can be no serious argument that RAL borrowers don’t meet this definition. Jackson Hewitt’s own website lists RALs as a product it offers and it has admitted providing numerous services to its RAL customers. Jackson Hewitt derives more than a quarter of its annual revenues from selling RALs and other tax-related financial products. It solicits the purchase of a RAL from all likely prospects. It not only solicited the Harpers, it succeeded in selling them a RAL. By Jackson Hewitt’s interpretation, then, someone who buys the RALs it is offering is nevertheless not a buyer. Jackson Hewitt’s tortured interpretation cannot be reconciled with the statutory definition of a “buyer.”

CONCLUSION

Any objective economic analysis shows that RALs are virtually always a bad idea for consumers, but *unregulated* RALs are a travesty. Jackson Hewitt would have this Court allow it and all other RAL brokers to arrange these high interest loans, make substantial profits off the backs of West Virginia’s poorest citizens, and do so without the disclosures, bonding requirements and statutory framework that the CSOA contains to protect consumers from predatory lending practices. Jackson Hewitt’s approach makes neither legal nor policy sense. The CSOA does and should apply to RAL brokers.

⁶³ *Arnold v. United Companies Lending Corp.*, 511 S.E.2d 854, 863 n.10 (W. Va. 1998)(emphasis added).



Lonnie C. Simmons (WVSB #3406)
DiTrapano Barrett & DiPiero
604 Virginia Street
East Charleston, WV 25301-2184
Phone (304) 342-0133
Fax (304) 342-4605
lsimmons@dbdlaw1.com

**Attorney for *Amici Curiae* AARP, CRL,
Consumer Action, CFA, Consumer's
Union, NCLC, Public Citizen, U.S. PIRG,
and West Virginia Alliance for
Sustainable Families**

Cathy McConnell, Esq. (WVSB #7103)
West Virginia Senior Legal Aid
235 High Street, #519
Morgantown, WV 26505
(304) 296-0082

**Attorney for *Amicus Curiae* West
Virginia Senior Legal Aid**

DATED: December 23, 2009

CSO Definition

Delaware	Ohio	Maryland	Oklahoma	W. Va.
<p>a) A credit services organization is a person who, with respect to the extension of credit by others and in return for the payment of money or other valuable consideration, provides, or represents that the person can or will provide, any of the following services:</p> <p>(1) Improving a buyer's credit record, history or rating;</p> <p>(2) Obtaining an extension of credit for a buyer; or</p> <p>(3) Providing advice or assistance to a buyer with regard to paragraph (1) or (2) of this subsection.</p>	<p>(a) "Credit services organization" means a person who, with respect to the extension of credit by others, sells, provides, or performs, or represents that he or she can or will sell, provide or perform, any of the following services, in return for the payment of money or other valuable consideration:</p> <p>(1) Improving a buyer's credit record, history, or rating.</p> <p>(2) Obtaining a loan or other extension of credit for a buyer.</p> <p>(3) Providing advice or assistance to a buyer with regard to either paragraph (1) or (2).</p>	<p>1) "Credit services business" means any person who, with respect to the extension of credit by others, sells, provides, or performs, or represents that such person can or will sell, provide, or perform, any of the following services in return for the payment of money or other valuable consideration:</p> <p>(i) Improving a consumer's credit record, history, or rating or establishing a new credit file or record;</p> <p>(ii) Obtaining an extension of credit for a consumer; or</p> <p>(iii) Providing advice or assistance to a consumer with regard to either subparagraph (i) or (ii) of this paragraph.</p>	<p>(a) "Credit services organization" means any person who, with respect to the extension of credit by others, sells, provides, performs, or represents that the person can or will sell, provide, or perform, in return for the payment of money or other valuable consideration from any source, any of the following services more than twelve times in a calendar year:</p> <p>(1) improving a buyer's credit record, history, or rating,</p> <p>(2) obtaining an extension of credit for a buyer, or</p> <p>(3) providing advice or assistance to a buyer with regard to division (1) or (2) of this subparagraph.</p>	<p>(a) A credit services organization is a person who, with respect to the extension of credit by others and in return for the payment of money or other valuable consideration, provides, or represents that the person can or will provide, any of the following services:</p> <p>(1) Improving a buyer's credit record, history or rating;</p> <p>(2) Obtaining an extension of credit for a buyer; or</p> <p>(3) Providing advice or assistance to a buyer with regard to subdivision (1) or (2) of this subsection.</p>

Buyer Definition

Delaware	Ohio	Maryland	Oklahoma	W Va
<p>(1) "Buyer" means an individual who is solicited to purchase or who purchases the services of a credit service organization.</p>	<p>(c) "Buyer" means any natural person who is solicited to purchase or who purchases the services of a credit services organization.</p>	<p>(c) "Consumer" means any individual who is solicited to purchase or who purchases for personal, family, or household purposes the services of a credit services business.</p>	<p>1. "Buyer" means any individual who is solicited to purchase or who purchases the services of a credit services organization.</p>	<p>(1) "Buyer" means an individual who is solicited to purchase or who purchases the services of a credit services organization as defined in section two of this article.</p>

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHRISTIAN and ELIZABETH HARPER,
on their own behalves and
on behalf of those similarly situated,

Plaintiffs,

v.

Case No. 35295

JACKSON HEWITT, INC.

Defendant.

CERTIFICATE OF SERVICE

I, Lonnie C. Simmons, do hereby certify that a true copy of the foregoing *AMICI CURIAE* BRIEF OF AARP, THE CENTER FOR RESPONSIBLE LENDING, CONSUMER ACTION, CONSUMER FEDERATION OF AMERICA, CONSUMER'S UNION, PUBLIC CITIZEN, THE NATIONAL CONSUMER LAW CENTER, U.S. PIRG, WEST VIRGINIA ALLIANCE FOR SUSTAINABLE FAMILIES, AND WEST VIRGINIA SENIOR LEGAL AID IN SUPPORT OF PLAINTIFFS CHRISTIAN AND ELIZABETH HARPER was served upon the following counsel of record, via first class U.S. mail, postage prepaid, this 23rd day of December, 2009, addressed as follows:

Charles L. Woody
Spilman Thomas & Battle, PLLC
Kanawha Boulevard, East
P.O. Box 273
Charleston, WV 25321-0273

Paul A. Solomon, Esq.
Amanda M. Raines, Esq.
Richard L. Brusca, Esq.
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, NW
Washington, D.C. 20005-2111

John Barrett, Esq.
Brian Glasser, Esq.
Bailey & Glasser, LLP
209 Capitol Street
Charleston, WV 25301



Lonnie C. Simmons