

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

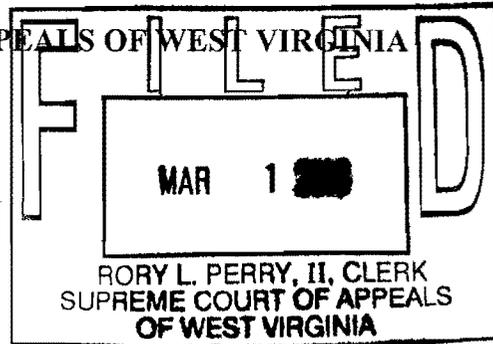
CHRISTIAN and ELIZABETH HARPER,
on their own behalves and
on behalf of those similarly situated,

Plaintiffs,

v.

JACKSON HEWITT, INC.,

Defendant.



Case No. 35295

PLAINTIFFS' REPLY BRIEF

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)

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Table of Contents

Summary.....	1
Argument.....	2
A. <i>First Certified Question</i> : Is a tax preparer who receives direct and indirect payments for facilitating refund anticipation loans subject to the credit services organization statute, W. Va. Code 46A-6C-1 <i>et seq.</i> ?.....	2
<i>Plaintiffs' Answer</i> : Yes.	
1. Jackson Hewitt's statutory interpretation disregards – and even denies the application of – the longstanding rule that the CCPA must be interpreted liberally to serve its purposes of protecting consumers.	2
2. A tax preparer that receives a direct payment for helping a consumer obtain a RAL, as Jackson Hewitt did until 2006, is subject to the CSO statute.	3
3. Tax preparers who receive indirect payments for helping consumers obtain a RAL are CSOs.	4
a. The Legislature's recent CSO exemption for car dealers, who are paid indirectly by lenders for arranging loans, is evidence of legislative that the CSO statute does not require direct payment	5
b. The plain language of the CSO statute covers entities that are paid indirectly to arrange loans	7
c. The Legislature could have required direct payment, as other statutes do.	8
d. Jackson Hewitt's argument cannot be reconciled with <i>Arnold</i>	9
e. A direct payment requirement would eviscerate the CSO laws by creating a massive loophole that would allow CSOs to evade the laws by arranging to receive indirect payment	9
f. Jackson Hewitt's direct-payment argument is contrary to the seminal decision under the federal CROA.....	10
g. Courts and regulators have consistently interpreted the same language at issue here to cover services paid for indirectly.....	12
h. Jackson Hewitt's parade-of-horribles argument has no merit	14
i. Jackson Hewitt's authority supports the Plaintiffs' position, not Jackson Hewitt's.....	15

B. *Second Certified Question:* Is the appropriate limitations period for actions alleging violations of the CSO statute (§ 46A-6C-1 *et seq.*) and the statutory prohibition on unfair or deceptive acts or practices (§ 46A-6-104) four-years under § 46A-5-101(1), or one-year under the general limitations period in § 55-2-12?17

Plaintiffs' Answer: Four years under § 46A-5-101(1).

1. A four-year limitation period applies to claims by consumers who are party to closed-ended credit transactions such as the RALs.....19
2. Jackson Hewitt's "creditor" argument conflicts with the plain language of the statute20

C. *Third Certified Question:* Are the contractual agency disclaimers in the refund anticipation loan enforceable under West Virginia law?.....23

Plaintiffs' Answer: No.

D. *Fourth Certified Question:* Is a tax preparer who helps a customer obtain a refund anticipation loan in exchange for compensation an agent under West Virginia law?.....24

Plaintiffs' Answer: Yes.

1. By agreeing to obtain a RAL and signing the RAL application, Plaintiffs directed and authorized Jackson Hewitt to act as their agent in obtaining a RAL, and Jackson Hewitt manifested consent through its conduct24
2. Subordination of financial interest is irrelevant to the certified question, because it relates only to breach of fiduciary duty, not establishment of an agency relationship in the first instance.31

Conclusion.....33

Table of Cases

<i>Agency Holding Corp. v. Malley-Duff & Assocs., Inc.</i> , 483 U.S. 143 (1987).....	22
<i>Arnold v. United Companies Lending Corp.</i> , 511 S.E.2d 854 (W. Va. 1998)	3, 9
<i>Asmar v. Benchmark Literacy Group, Inc.</i> , No. 04-70711, 2005 WL 2562965 (E.D. Mich. Oct. 11, 2005)	12
<i>Basile v. H&R Block, Inc.</i> , 761 A.2d 1115 (Pa. 2000)	31
<i>Beckett v. H&R Block, Inc.</i> , 714 N.E.2d 1033 (Ill. App. Ct. 1999).....	31
<i>Bizier v. Globe Fin. Servs.</i> , 654 F.2d 1 (1st Cir. 1981)	3
<i>Bluestone Paving, Inc. v. Tax Com's of West Va.</i> , 591 S.E.2d 242 (W. Va. 2003).....	20
<i>Brailsford v. Jackson Hewitt</i> , No. 06-00700 (N.D. Cal.)	6
<i>Cannon v. William Chevrolet/GEO, Inc.</i> , 794 N.E.2d 841 (Illinois 2003).....	16, 17
<i>Carnegie v. H&R Block, Inc.</i> , 269 AD.2d 145 (N.Y. App. Ct. 2000)	31
<i>Commonwealth v. Monumental Properties, Inc.</i> , 329 A.2d 812 (Pa. 1974).....	3
<i>Cummins v. H&R Block, Inc.</i> , No. 03-C-134 (Cir. Ct of Kanawha County).....	6
<i>Dunlap v. Friedman's, Inc.</i> , 582 S.E.2d 841 (W. Va. 2003)	<i>passim</i>
<i>Elmore v. State Farm Mut. Auto. Ins. Co.</i> , 504 S.E.2d 893 (W. Va. 1998)	32
<i>Gomez v. Jackson Hewitt, Inc.</i> , No. 308418-V, 209 MD. Cir. Ct. Lexis 4 (Md. Cir. June 18, 2009).....	12
<i>Green v. H&R Block, Inc.</i> , 735 A.2d 1039 (Md. 1999).....	<i>passim</i>
<i>H&R Block Eastern Enterprises, Inc. v. Raskin</i> , 591 F.3d 718 (4 th Cir. 2010).....	13
<i>H&R Block Eastern Enters., Inc. v. Turnbaugh</i> , No. 1:07-cv-01822 (D. Md. July 30, 2008).....	17
<i>Hood v. Santa Barbara Bank & Trust</i> , No. 1156354 (Cal. Superior Court, Santa Barbara County)	13
<i>In re Bell</i> , 309 B.R. 139 (Bkrtcy.E.D.Pa. 2004).....	13
<i>Knapp v. Am. Gen. Fin., Inc.</i> , 111 F.Supp. 2d 758 (S.D. W. Va. 2000.....	31

<i>Midstate Siding & Window Co. v. Rogers</i> , 789 N.E.2d 1248 (Ill. 2003)	15, 16, 17
<i>New York State Conf. of Blue Cross & Blue Shield v. Travelers Ins. Co.</i> , 514 U.S. 645 (1995).....	17
<i>Nymark v. Heart Fed. Savings & Loan Ass'n.</i> , 231 Cal. App. 3d 1089 (Cal. Ct. App. 1991).....	32
<i>Parker v. 1-800 Bar None, a Fin. Corp., Inc.</i> , No. 01-C-4488, 2002 WL 215530 (N.D. Ill. Feb. 11, 2002).....	3, 11, 12
<i>People of California v. Jackson Hewitt, Inc.</i> , No. 07034558 (Sup. Ct. Cal., Alameda County 2007)	13
<i>Peterson v. H&R Block Tax Svcs., Inc.</i> , 971 F.Supp. 1204 (N.D. Ill. 1997)	31
<i>Premium Air, Inc. v. Luchinski</i> , 303 Wis. 2d 748, 735 N.W.2d 194, 2007 WL 1345839 (Wis. 2007).....	13
<i>Preston Mem. Hosp. v. Palmer</i> , 578 S.E.2d 383,390	22
<i>Sannes v. Jeff Wyler Chev., Inc.</i> , 1999 WL 3331314 (S.D. Oh., March 31, 1999)	11
<i>Snook v. Ford Motor Co.</i> , 755 N.E.2d 380 (Ohio App. 2001).....	8
<i>Stanley v. Sewell Coal Co.</i> , 285 S.E.2d 679,683 (W.Va. 1982).....	22
<i>State ex rel. Clark v. Blue Cross Blue Shield of West Virginia, Inc.</i> , 510 S.E.2d 764 (W. Va. 1998)	24
<i>State ex rel. Key v. Bond</i> , 118 S.E. 276 (W. Va. 1923).....	24
<i>State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.</i> , 461 S.E.2d 516 (W. Va. 1995)	2
<i>State ex rel. Tucker County Solid Waste Auth. v. W. Va. Div. of Labor</i> , 668 S.E.2d 217 (W. Va. 2008).....	22
<i>State ex rel. Yahn Elec. Co. v. Baer</i> , 135 S.E.2d 687 (W. Va. 1964).....	26
<i>Teter v. Old Colony Co.</i> , 441 S.E.2d 728 (W. Va. 1994).....	24, 27, 28
<i>Thele v. Sunrise Chevrolet, Inc.</i> , No. 03-C-2626, 2004 WL 1194751 (N.D. Ill. May 28, 2004).....	16
<i>Thomson v. McGinnis</i> , 465 S.E.2d 922 (W. Va. 1995)	24, 27

Summary

Jackson Hewitt arranges high-cost, low-value refund anticipation loans (RALs) for West Virginia consumers, mostly the working poor. As AARP and the other *amici* pointed out in their brief that sharply criticized Jackson Hewitt's RAL practices, Jackson Hewitt is eminently worthy of State regulation, and should be required to modify its practices to conform to West Virginia's consumer protection laws.

Jackson Hewitt calls itself a RAL-facilitator, and indeed it handled *all* aspects of the Plaintiffs' RAL transaction, from the point of application, to the point of submitting all necessary paperwork and tax forms to the lending bank and the IRS, to the point of handing the Plaintiffs their RAL checks – minus, of course, the steep fees through which Jackson Hewitt was paid. This makes Jackson Hewitt both a credit services organization (CSO) and an agent of the Plaintiffs, but Jackson Hewitt complies with none of the duties that arise from its status.

Its restrictive arguments on the CSO statute and other provisions of the Consumer Credit and Protection Act all flow from the same false premise that those laws must be interpreted narrowly, against the Plaintiffs and in favor of Jackson Hewitt. This Court has repeatedly held the opposite is true, and in the face of these holdings, Jackson Hewitt's equation of the remedial provisions of the CCPA with criminal laws requiring narrow construction is nothing short of bizarre. Equally unavailing is Jackson Hewitt's attempt to rewrite the CSO statute to impose requirements that simply are not there, as well as its constrained view of agency that cannot be reconciled with the broad principles this Court has articulated in its extensive agency jurisprudence.

For all these reasons, the Plaintiffs urge the Court to answer the certified questions as Plaintiffs propose.

Argument

- A. ***First Certified Question:*** Is a tax preparer who receives direct and indirect payments for facilitating refund anticipation loans subject to the credit services organization statute, W. Va. Code § 46A-6C-1 *et seq.*?

Plaintiffs' Answer: Yes.

1. **Jackson Hewitt's statutory interpretation disregards – and even denies the application of – the longstanding rule that the CCPA must be interpreted liberally to serve its purposes of protecting consumers.**

Inexplicably, Jackson Hewitt's entire interpretation of the credit services organization statute proceeds from the unprecedented view that West Virginia's consumer protection statutes should be construed *strictly*, against consumers. Jackson Hewitt bizarrely equates the CCPA (of which the CSO statute is part) with "other criminal statutes" that require a narrow and strict construction. (Def.'s Br. at 27 n.25.)

Jackson Hewitt has no basis to make such an assertion. The Court has long held that the CCPA is a remedial statute intended to protect consumers from unfair, illegal and deceptive business practices, and must be liberally construed to accomplish that purpose. *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516, 523 (W. Va. 1995); *Dunlap v. Friedman's, Inc.*, 582 S.E.2d 841, 846 (W. Va. 2003). Any ambiguity in the CCPA must be resolved against the *defendant*, not, as Jackson Hewitt urges again and again, against the consumer. *Scott Runyan*, 461 S.E.2d at 523 ("[E]ven if we found

there was ambiguity [in the CCPA provision at issue], we would resolve any doubt in this case against the defendants.”).¹

2. A tax preparer that receives a direct payment for helping a consumer obtain a RAL, as Jackson Hewitt did until 2006, is subject to the CSO statute.

Simply put, any entity that receives money to assist a prospective borrower obtain a loan is a credit services organization under West Virginia law. The CSO statute provides:

- (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:
- (1) Improving a buyer's credit record, history or rating;
 - (2) Obtaining an extension of credit for a buyer; *or*
 - (3) Providing advice or assistance to a buyer with regard to subdivision (1) or (2) of this subsection.

W. Va. Code § 46A-6C-2(a) (emphasis added). A “buyer” is defined as “an individual who is solicited to purchase or who purchases the services of a credit services organization[,]” *id.* § 46A-6C-1(1), and includes “prospective borrowers.” *Arnold v. United Companies Lending Corp.*, 511 S.E.2d 854, 862 n.10 (W. Va. 1998).

Jackson Hewitt does not dispute that before 2006, it *directly* received hundreds of thousands of dollars in “documentation fees” from its West Virginia RAL customers. Its only resistance to the unquestionable significance of this fact is to point out feebly that

¹ West Virginia’s approach to interpreting the CCPA is consistent with other courts that interpret consumer protection statutes liberally to effect their object, to protect consumers, and to correct marketplace imbalances. *See, e.g., Parker v. 1-800 Bar None, a Fin. Corp., Inc.*, No. 01-C-4488, 2002 WL 215530 (N.D. Ill. Feb. 11, 2002) (federal Credit Repair Organization Act must be construed liberally in favor of consumers); *Bizier v. Globe Fin. Servs.*, 654 F.2d 1 (1st Cir. 1981) (Truth in Lending Act “is intended to balance scales thought to be weighted in favor of lenders and is this to be liberally construed in favor of borrowers)(citing cases); *Commonwealth v. Monumental Prop., Inc.*, 329 A.2d 812, 816 (Pa. 1974) (Pennsylvania’s consumer protection laws are “remedial statutes ... predicated on a legislative recognition of the unequal bargaining power of opposing forces in the marketplace[,]” and must be construed liberally).

the Plaintiffs paid their documentation fees to Jackson Hewitt's franchisee, not Jackson Hewitt itself. For purposes of this certified question proceeding, this is a distinction without a difference.

Whether some documentation fees were paid to Jackson Hewitt franchisees and some were paid to Jackson Hewitt, Inc. has no bearing on the Court's answer to the first certified question. The question the District Court certified is whether a "tax preparer" who helps a consumer obtain a RAL and receives a direct payment or indirect from the consumer is subject to the CSO statute. Jackson Hewitt admits as it must that the "tax preparer" charged documentation fees. (Def.'s Br. at 17.) Its invocation of a purported distinction between franchisee and franchisor is obfuscation, intended to distract from the question at hand.

Because consumers who obtained RALs before 2006 at Jackson Hewitt stores paid documentation fees to Jackson Hewitt for RALs that it helped them obtain, Jackson Hewitt is a CSO, even under the restrictive and incorrect statutory interpretation it urges this Court to adopt.

3. Tax preparers who receive indirect payments for helping consumers obtain a RAL are CSOs.

After 2006, Jackson Hewitt changed nothing substantive about its RAL program. It continued to advertise the availability of RALs, complete and submit RAL applications for its customers, and receive and distribute the loan proceeds to its customers.

However, it stopped charging RAL customers the direct documentation fee and instead arranged to receive annual lump-sum payments from the lending bank. Jackson Hewitt did this to evade application of the CSO laws – a futile effort, for all the reasons discussed below.

a. The Legislature’s recent CSO exemption for car dealers, who are paid indirectly by lenders for arranging loans, is evidence that the CSO statute does not require direct payment.

In 2004, the Legislature amended the law to exempt car dealers from the definition of “credit services organization.” *See* W. Va. Code § 46A-6C-2(b) (listing car-dealer exemption in subsection (10), and ten additional exemptions for banks, credit unions, nonprofit organizations, real estate brokers, lawyers, accountants, and others). Like Jackson Hewitt after 2006, car dealers are paid for arranging car loans not by charging consumers up-front fees, but on the back-end in the form of payments from the banks that issue the loans. But unlike Jackson Hewitt and other RAL-facilitators, car dealers are expressly exempted from the CSO law.

Jackson Hewitt’s contention that the CSO statute only applies when the consumer directly pays the CSO cannot be squared with the car-dealer exemption. Jackson Hewitt weakly claims the exemption “proves only that automobile dealers were able successfully to lobby for an exemption.” (Def.’s Br. at 19.) This assertion defies accepted principles of statutory interpretation. *See* 73 Am. Jur. 2d Statutes § 212 (“An exception exempts something absolutely from the operation of a statute by express words in the enacting clause; *an exception takes out of the statute something that otherwise would be part of the subject matter.*”) (emphasis added). Jackson Hewitt’s assertion also defies common sense. Why would car dealers lobby for, the Legislature enact, and the Governor sign into law an exemption for car dealers if no exemption were necessary?

The car-dealer exemption conclusively demonstrates legislative intent – supported by the plain language of the Act – to subject entities who receive indirect payment for arranging credit to regulation under the State’s CSO laws.²

Similarly, where other state legislatures wished to exempt from their CSO laws businesses that arrange certain kinds of loans, they did so expressly. For example, the credit services acts in Oklahoma and Delaware, which have definitional sections identical to West Virginia’s,³ exempt RAL-facilitators and loan brokers, respectively. The Oklahoma CSO law specifically exempts tax preparers brokering RALs, as long as they are not compensated for such. *See* Okla. Stat. § 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 law exempts “loan brokers who are not engaged in the other activities of credit services organizations as described in subsection (a) of this section.” 6 Del. Code § 2402(b)(10). West Virginia’s statute contains no similar exemptions.

² Jackson Hewitt says it had no reason to seek an exemption because this was the first case to allege RAL-facilitators are subject to the CSO statute. This statement is simply wrong. Its chief competitor, H&R Block, paid \$32.5 million in 2006 to a class of West Virginians to settle claims that its RAL program violated the State’s CSO laws, and paid another \$30 million to settle CSO claims in twenty-six states. *Cummins v. H&R Block, Inc.*, No. 03-C-134 (Cir. Ct of Kanawha County). And in 2007 Jackson Hewitt itself paid \$672,000 to settle claims that its RAL program violated California CSO laws. *Brailsford v. Jackson Hewitt*, No. 06-00700 (N.D. Cal.). Jackson Hewitt easily could have either registered as a CSO and conformed its practices to the statute, or lobbied for an exemption, but chose instead to tinker superficially with its compensation arrangements.

³ Okla. Stat. § 24-132(2); 6 Del. Code § 2402.

b. The plain language of the CSO statute covers entities that are paid indirectly to arrange loans.

The CSO statute contains no requirement that a consumer must pay the CSO directly, and to construe the statute otherwise disregards its plain language. Jackson Hewitt would have the Court rewrite the definition of CSO as follows:

- (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 [**paid directly by the buyer to the credit services organization,**] provides, or represents that the person can or will provide, any of the following services:
- (1) Improving a buyer's credit record, history or rating;
 - (2) Obtaining an extension of credit for a buyer; or
 - (3) Providing advice or assistance to a buyer with regard to subdivision (1) or (2) of this subsection.

In disregard of the broad "payment of money or other valuable consideration" language, Jackson Hewitt would interpret the word "buyer" to require that the consumer directly pay the loan-facilitator through separate, earmarked funds, not simply for tax-preparation, but also for loan-facilitation.

A direct payment requirement is not in the statute – Jackson Hewitt simply reads it in. This restrictive interpretation violates the liberal-construction rule discussed above, and encourages the elevation of form over function. (*See supra* at 9.) The fact is that Jackson Hewitt helped the Plaintiffs obtain an extension of credit from the lending bank, and Jackson Hewitt was paid. This makes Jackson Hewitt a CSO.

Jackson Hewitt attempts to work around the statute by characterizing itself as a third-party who merely contracted with a lender to provide services, but its assertion has no basis in reality. Jackson Hewitt aggressively advertises the availability of RALs (which provide a significant chunk of its annual profits), and tax preparers in its stores complete and submit RAL applications to the lending bank for the consumer. The

consumer pays steep fees for these services, *all* of which are provided by Jackson Hewitt, not by the bank. In fact, the RAL customer has no contact with the bank at all, and it is Jackson Hewitt who actually hands the check to the consumer. And in the end, the bank pays Jackson Hewitt for its work. Jackson Hewitt is no mere third-party.

Not only does Jackson Hewitt's purported direct-payment requirement appear nowhere in the statute, the statute explicitly states that it governs indirect relationships between a buyer and a CSO. Specifically, the Legislature expressly refers to payments to third-parties through the mandate that CSOs disclose "[t]he terms and conditions of payment, including the total of all payments to be made by the buyer, *whether to the credit services organization or to another person.*" W. Va. Code § 46A-6C-2(a)(2). This language quite clearly contemplates that consumers may make payments either to the CSO or to a third-party, and the fact they are made to a third-party has no effect on the statute's coverage.

c. The Legislature could have required direct payment, as other statutes do.

Had the Legislature intended that only those who receive direct consumer payments be covered by the CSO law, as Jackson Hewitt suggests, it obviously could have so provided, as some states have done. For example, Ohio's CSO law formerly defined a credit services business as one that offered services "in return for the payment of money or other valuable consideration *paid directly by the buyer.*" Ohio Rev. Code Ann. § 4712.01(C)(1)(2010) (emphasis added). However, the statute was amended to *delete* the italicized language. See *Snook v. Ford Motor Co.*, 755 N.E.2d 380, 383 (Ohio Ct. App. 2001) (explaining the history and amendment of Ohio's CSO statute).

If Jackson Hewitt's indirect payment argument were correct, Ohio's law would still implicitly require direct payment, even though the Ohio Legislature deleted the "directly by the buyer" language when it amended the law. Such a view of course is nonsensical.

d. Jackson Hewitt's argument cannot be reconciled with *Arnold*.

Jackson Hewitt's argument that the Harpers are not "buyers" must also be rejected because it is irreconcilable with *Arnold*, the West Virginia case that interprets the CSO statute. There the Court undertook a thorough analysis of the statute, cited the statute's "buyer" definition, and stated, broadly and in no uncertain terms, "We find that this definition includes 'prospective borrowers.'" 511 S.E.2d at 863 n.10. The Harpers undoubtedly are "prospective borrowers," and therefore are buyers under the CSO law.⁴

e. A direct payment requirement would eviscerate the CSO laws by creating a massive loophole that would allow CSOs to evade the laws by arranging to receive indirect payment.

If the CSO statute required direct, earmarked payment from the consumer to the CSO, credit-arrangers would be able to evade the statute simply by arranging to receive payment channeled through third-parties. Form would prevail over function, and the CSO law would be rendered meaningless. No statute, much less a consumer-protection statute that requires liberal construction, may be interpreted in a way that would render any of its provisions meaningless.

⁴ Jackson Hewitt dismisses *Arnold* in a single sentence on the ground that in that case, a broker directly charged the Arnolds a \$50 fee to help obtain a loan. This was not a fact the Court cited when it equated the term "buyer" with "prospective borrower." And of course, from 2002 through 2005, Jackson Hewitt did charge direct, earmarked fees to West Virginia consumers for its RAL facilitation services. After 2006, Jackson Hewitt functionally was compensated in the same manner, but arranged for indirect payment. The only thing that distinguishes Jackson Hewitt from the credit-facilitator in *Arnold* is Jackson Hewitt's transparent efforts to skirt the law through slick but ultimately futile legal gamesmanship.

f. Jackson Hewitt’s direct-payment argument is contrary to the seminal decision under the federal CROA.

The federal Credit Repair Organizations Act (“CROA”) defines a “credit repair organization” as:

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 CROA is similar to the West Virginia statute, but, as shown by the above definition, applies only to credit-repair services, not credit-facilitation services.⁵

However, significantly for purposes of the direct-payment issue, it contains the same “in return for the payment of money or other valuable consideration” as West Virginia’s statute, language Jackson Hewitt wrongly contends imposes a direct-payment

⁵ Jackson Hewitt is dead wrong to suggest West Virginia’s CSO statute only applies to so-called credit repair companies. Many statutes – such as the aptly-titled federal Credit Repair Organizations Act – apply only to credit repair. West Virginia’s CSO statute applies not only to the credit-repair services covered by the federal act, but *also* to entities that provide “*any* of the following services,” including obtaining and providing assistance in obtaining an extension of credit by others. W. Va. Code § 46A-6C-2(a).

Jackson Hewitt’s claim that the CSO statute’s prohibitions and disclosure requirements “make [no] sense” outside the context of credit-repair companies is a self-serving attempt to interpose its judgment over the Legislature’s. First, where a statute regulates *both* credit repair and credit services, it is not at all surprising that some of its provisions will relate to credit repair, and some will relate to credit services. And second, the statute’s requirements *do* make sense in the credit-services context. For example, a CSO’s obligation to provide written disclosure of the credit-facilitation services it will provide (§ 46A-6C-6(a)(1)), and disclose all payments, including payments to parties other than the CSO, are both reasonable and sensible when applied to credit-services businesses. Considering the fact the lender can decline to issue a RAL, so too is the § 46A-6C-6(4) requirement that a consumer have the right to obtain credit-reporting information. And the three-day right-to-cancel provision (§ 46A-6C-7(4)) is perfectly appropriate for RAL borrowers who go to Jackson Hewitt for tax preparation, and when presented with a pitch for a RAL, walk out roughly \$300 poorer, all for the dubious (and roundly criticized) benefit of receiving their money a few days quicker than the IRS would get it to them for free.

requirement. The United States District Court for the Northern District of Illinois considered and rejected just such a contention in *Parker v. 1-800 Bar None, a Financial Corp., Inc.*, No. 01-C-4488, 2002 WL 215530 (N.D. Ill. Feb. 11, 2002). There the defendant company tried the same gambit Jackson Hewitt uses: trying to avoid the law by arguing that it only receives payments from third-parties, and not directly from consumers. The Court was not persuaded:

While it is true that, like the plaintiff in *Sannes [v. Jeff Wyler Chev., Inc.]*, 1999 WL 3331314 (S.D. Ohio March 31, 1999), Parker did not pay directly for Bar None' credit services, unlike the dealership in *Sannes*, Bar None *was* paid for its services by Gateway, which paid Bar None for the referral of customers. Thus, the Court finds that this is sufficient to constitute payment required by section 1679a(3)(A).

2002 WL 215530 at *3.

The court based its ruling on the plain language of the statute, which, like West Virginia's CSO law, only requires that the business receive the payment of money or other valuable consideration, but does not require that it receive the consideration directly from the consumer:

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

Id. at * 4.

This is the correct analysis to apply here. Because West Virginia's CSO law contains no specific requirement that the consumer pay the CSO directly, and because the statute must be liberally construed, the CSO law *does not* require direct payment. To hold otherwise, as *Parker* noted, would "require the court to put the form of the

transaction over the substance of the transaction[.]” *id.* at *5, and create a statutory loophole that would make it easy for regulated businesses to avoid the CSO laws.

g. Courts and regulators have consistently interpreted the same language at issue here to cover services paid for indirectly.

Nine judicial or regulatory actions address the “indirect payment” argument that Jackson Hewitt advances here. With the exception of a single Maryland trial court whose decision is on appeal,⁶ no other court or regulator interpreting state and federal statutes containing the same definitional section as West Virginia’s has concluded the law does not apply to indirect payment arrangements like that between Jackson Hewitt and the lending RAL bank.

The first of these cases is *Parker v. 1-800 Bar None*, discussed above. Similarly, *Asmar v. Benchmark Literacy Group, Inc.*, No. 04-70711, 2005 WL 2562965 (E.D. Mich. Oct. 11, 2005), rejected the argument the federal CROA did not apply to a business that claimed it merely marketed credit-repair services and received only indirect payments from a go-between. While Jackson Hewitt tries to distinguish these cases on the ground that they involve credit-repair and not credit-services, the cases rely on the same “in return for the payment of money or other valuable consideration” language here, and both decisions find indirect payments to the defendants satisfy the test.

⁶ The lone contrary case, *Gomez v. Jackson Hewitt, Inc.*, No. 308418-V, 2009 Md. Cir. Ct. LEXIS 5 (Md. Cir. June 18, 2009), was incorrectly decided and should be reversed on appeal. In finding Maryland’s Credit Services Business Act applied only to credit-repair companies, the court relied exclusively on purported legislative history, but disregarded the statutory language, which, like West Virginia’s law, defines a CSBA as “any person who provides . . . 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).” Md. Conn. Ann. § 14-1901(e) (emphasis added). Maryland’s law clearly applies both to credit-repair and credit-services.

Likewise, in applying the Pennsylvania Credit Services Business Act to a loan broker, the bankruptcy court ruled that the damages for the broker's failure to comply with the CSBA 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." *In re Bell*, 309 B.R. 139, 163 (Bkrctcy. E.D. Pa. 2004).

As noted above, the Maryland Commissioner of Financial Regulation is currently enforcing Maryland's CSBA against H&R Block, Jackson Hewitt's chief RAL competitor, in a case recently vacated by the Fourth Circuit and remanded to the federal district court to determine whether the CSBA applies. *H&R Block Eastern Enterprises, Inc. v. Raskin*, 591 F.3d 718 (4th Cir. 2010). 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 services directly connected with the financing aspect of the transaction[,]" the contractor would be subject to the Maryland CSBA. *See also Premium Air, Inc. v. Luchinski*, 735 N.W. 2d 194 (Wis. 2007) (state CSBA applied to a heating contractor who arranged financing for customer).

The California Attorney General takes the same view of the California CSBA. In two separate lawsuits involving Jackson Hewitt and H&R Block, ultimately resolved with consent judgments, the Attorney General alleged that the sale of RALs by the two tax preparers was subject to state's credit services act.⁷ While Jackson Hewitt is correct that the settlements are not "evidence of liability," Plaintiffs do not offer them as evidence of

⁷ *People of California v. Jackson Hewitt, Inc.*, No. 07034558 (Sup. Ct. Cal., Alameda County 2007); *Hood v. Santa Barbara Bank & Trust*, No. 1156354 (Sup. Ct. Cal., Santa Barbara County).

liability, but rather of further support for the overwhelming view of courts and regulators that the CSO laws do not require direct payment.

h. Jackson Hewitt's parade-of-horribles argument has no merit.

Jackson Hewitt's sole expert in this case, David Gibbons, testified at his deposition that Jackson Hewitt met the definition of a CSO under West Virginia law. Jackson Hewitt offers his testimony to support a parade-of-horribles argument that applying the CSO statute to Jackson Hewitt "would subject hundreds of retailers across West Virginia to substantial forfeitures and would prohibit, as a practical matter, any retailer from contracting with a bank in connection with allowing customers to apply for credit." (Def.'s Br. at 26.) A ruling against Jackson Hewitt here will not cause the sky to fall, for several reasons.

First, the certified question asks whether tax preparers who help customers get RALs and receive direct or indirect payment are CSOs. The credit practices of "hundreds of retailers" are not of record, and Jackson Hewitt's statement about their practices is unsupported conjecture that ventures far outside the issues in this case. *Second*, this case involves Jackson Hewitt, not ordinary retail stores. Unlike retailers like Target whose cashiers merely invite the consumer to open a store credit account and hand the consumer forms to complete, Jackson Hewitt holds itself out as its customers' trusted tax advisor, and acts as the RAL-purchasers' agent in filing tax returns and obtaining the RAL.

Third, the Plaintiffs' interpretation of the statute by all indications is consistent with the Legislature's, as evidenced by the 2004 amendment to the CSO statute excluding car dealers, who are paid for arranging financing indirectly by the lender, just as Jackson Hewitt is paid. If Jackson Hewitt wants an exemption, it should follow the car dealers'

lead and lobby for one. *Fourth*, the “everyone does it” defense that Jackson Hewitt offers is a sign of capitulation, the white flag to waive when the words of the statute do not yield the desired result.

Finally, unlike the “hundreds of retailers” Jackson Hewitt invokes, Jackson Hewitt is no ordinary retailer. It is in the business of selling valueless loan-products to the working poor, causing them to pay hundreds of times more for a RAL than the consumers would have to pay for a 43-cent stamp and their refund a few days later. Jackson Hewitt is eminently worthy of regulation by a law designed to protect consumers from unscrupulous business practices, and along with other RAL-industry players has long been targeted by state and federal regulators. Notably, Jackson Hewitt has not even *tried* to defend its predatory RAL practices against the sharp criticisms of the widely-respected *amici curiae*, which include the AARP, West Virginia Senior Legal Aid, West Virginia Alliance for Sustainable Families, Consumer’s Union, the Center for Responsible Lending, Consumer Federation of America, and other advocacy groups. Any ruling on the certified questions can and should be limited to tax-preparer/loan-facilitators like Jackson Hewitt, which could have registered as a CSO years ago and complied with its statutory obligations, but instead attempted to avoid application of the laws through sleight of hand.

i. Jackson Hewitt’s authority supports the Plaintiffs’ position, not Jackson Hewitt’s.

Jackson Hewitt cites *Midstate Siding & Window Co. v. Rogers*, 789 N.E.2d 1248 (Ill. 2003) for the proposition that other courts have recognized the inapplicability of CSO statutes to businesses such as the “hundreds of retailers” cited by Jackson Hewitt whose activities would be outlawed if the Court accepts the statutory analysis urged by

the Plaintiffs. Jackson Hewitt's reliance on *Midstate* misses the point that it is not the *kind* of business that determines CSO applicability, but *whether the business is paid for arranging credit*, as Jackson Hewitt was here.

In *Midstate*, the court concluded the home improvement contractor who helped its customer get a home equity loan was not a CSO because *the contractor was not paid for arranging the loan*; the nature of the business the contractor was engaged in was not a factor. As the court held in determining that *Midstate* was not a CSO:

The Credit Services Act requires that the credit services organization, in return for the payment of money or other valuable consideration, agree to provide, or represent that it will provide, credit services to the buyer. The services must be related to an extension of credit for the buyer or improvement of the buyer's credit record, history or rating. *The contract at issue does not provide for payment of money or other valuable consideration in return for credit services provided by Midstate.*

Id. at 1254 (emphasis added). By contrast, Jackson Hewitt provided credit services, and was paid for its work. *That* is the analysis demanded by the CSO statute, and that analysis demands the conclusion that Jackson Hewitt is a CSO.

Thele v. Sunrise Chevrolet, Inc., No. 03-C-2626, 2004 WL 1194751 (N.D. Ill. May 28, 2004), and *Cannon v. William Chevrolet/GEO, Inc.*, 794 N.E.2d 841 843 (Illinois 2003), make similar points. In *Thele*, there is no indication whatsoever that the car dealer who arranged financing for the plaintiff/consumer was paid a fee for arranging the loan. In *Cannon*, the Court held the Illinois CSO statute did not apply to a car dealer who assisted the plaintiff obtain a loan because the plaintiff presented no evidence that the dealer was paid for obtaining credit.

If *Midstate*, *Thele* and *Cannon* are instructive on any issue, it is that the critical determining factor regarding application of the CSO laws is whether the business is paid for arranging credit, as Jackson Hewitt was here.⁸

B. *Second Certified Question:* Is the appropriate limitations period for actions alleging violations of the CSO statute (§ 46A-6C-1 *et seq.*) and the statutory prohibition on unfair or deceptive acts or practices (§ 46A-6-104) four-years under § 46A-5-101(1), or one-year under the general limitations period in § 55-2-12?

Plaintiffs' Answer: Four years under § 46A-5-101(1).

The district court certified the second question because Jackson Hewitt contends certain of Plaintiffs' claims are time-barred. Jackson Hewitt claims the four-year limitations period in West Virginia Code § 46A-5-101(1) "encompasses only actions brought against 'creditors' – which Jackson Hewitt plainly is not." (Def.'s Br. at 2.) If Jackson Hewitt's position is adopted by this Court, West Virginia consumers harmed by deceptive business practices by retailers, drug companies, financial institutions and others would see a drastic shortening of the limitations period commonly applied in courts

⁸ In a case involving four certified questions, Jackson Hewitt essentially asks the Court to decide a fifth when it asserts, offhandedly and in a single paragraph, that federal preemption strips the State of the right to regulate RAL-facilitators through the CSO statute. By the reference to preemption, Jackson Hewitt has opened a door that need not be opened, because the District Court did not certify the preemption question to this Court, and in any event, Jackson Hewitt is wrong on the issue. For example, Jackson Hewitt misleadingly states that the District Court for the District of Maryland recently "held that certain provisions of the CSO statute were preempted by the National Bank Act, including the three-day right of rescission and the interest rate limitation." (Def.'s Br. at 26, citing *H&R Block Eastern Enters., Inc. v. Turnbaugh*, No. 1:07-cv-01822 (D. Md. July 30, 2008)). Jackson Hewitt does not mention the Maryland District Court found *other* key provisions of that state's CSO statute were not preempted, including the prescribed form of contract, consumer disclosures, and bonding and licensing requirements. Nor does Jackson Hewitt reference the strong presumption against the derogation of state regulatory powers through the preemption doctrine, *New York State Conf. of Blue Cross & Blue Shield v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995)), or the threshold preemption question of whether state regulation in a given field will "obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized non-real estate lending powers[.]" 12 C.F.R. § 7.4008. Of the many issues this certified question proceeding asks this Court to resolve, federal preemption is not among them.

throughout the State, and thereby would lose critical protections available under the CCPA. Fortunately for consumers, Jackson Hewitt’s argument has no merit. This Court has already determined that claims arising from transactions such as the RAL at issue here are governed by Section 5-101’s four-year limitation period. And for the other reasons discussed below, Jackson Hewitt’s argument is contrary to the language, structure and purposes of the CCPA.

As background, the legal claims at issue in this case arise from Jackson Hewitt’s violations of the requirements imposed upon credit services organizations by West Virginia’s CSO statute – violations that § 46A-6C-7(d)⁹ states constitute per se unfair or deceptive acts or practices (or UDAPs) – and from its unfair and deceptive practices prohibited by §§ 46A-6-104 and -102(7).¹⁰

All of the statutory provisions at issue here are part of the CCPA, and therefore implicate the liberal-construction rule discussed in Section A of this Brief, *supra*. In fact, the Court has applied the liberal-construction rule *specifically* to the statute at issue here – Section 5-101(1). Syl. Pt. 6, *Friedman’s*, 582 S.E.2d at 846. (“West Virginia Code § 46A-5-101(1) is a remedial statute to be liberally construed to protect consumers from unfair, illegal or deceptive acts.”). In *Friedman’s*, which involved a closed-ended credit transaction just like the RALs at issue here, the Court was faced with ambiguity in Section 5-101(1), and held, “[A]ny doubt about this particular transaction’s inclusion

⁹ West Virginia Code § 46A-6C-7(d) states, “The breach by a credit services organization of a contract under this article, or of any obligation arising from this article, is an unfair or deceptive act or practice.”

¹⁰ West Virginia Code § 46A-6-104 provides, “Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” West Virginia Code § 46A-6-102(7) contains a nonexclusive list of conduct that violates Section 104.

within the more liberal four-year statute of limitations period [must] be resolved in favor of such inclusion.” 582 S.E.2d at 846.

As explained below, both this principle and the precise holding of *Friedman’s* compel the conclusion that a four-year limitation period applies to Plaintiffs’ claims.

1. A four-year limitation period applies to claims by consumers who are party to closed-ended credit transactions such as RALs.

A RAL is a short-term, closed-ended credit transaction that is repaid in full when the RAL-purchaser receives his or her refund approximately a week after the loan is approved. In *Friedman’s*, the Court held a four-year limitation period applies to consumer claims involving closed-ended credit transactions.

Syllabus Point 6 of *Friedman’s* reads in its entirety:

West Virginia Code § 46A-5-101(1) (1996) (Repl. Vol. 1998) is a remedial statute to be liberally construed to protect consumers from unfair, illegal, or deceptive acts. In the face of the ambiguity found in that statute, a consumer who is party to a closed-ended credit transaction, resulting from a sale as defined in West Virginia Code § 46A-6-102(d), may bring any necessary action within either the four-year period commencing with the date of the transaction or within one year of the due date of the last payment, whichever is later.

582 S.E.2d at 846.

Plaintiffs are neatly described by Syllabus Point 6. They are consumers who are party to a closed-ended credit transaction – the RAL. A “sale as defined in West Virginia Code § 46A-6-102(d)” is “any sale, offer for sale or attempt to sell any goods for cash or credit or any services or offer for services for cash or credit.” The RAL resulted from Jackson Hewitt’s sale of credit-facilitation services, for which Jackson Hewitt was paid both directly and indirectly. As explained in Part A, *supra*, Jackson Hewitt helped the

Plaintiffs get their RAL “in return for the payment of money or other valuable consideration.” W. Va. Code § 46A-6C-2(a).

Syllabus Point 6 of *Friedman’s* is thus directly on point and holds the applicable the limitations period is four years.

2. Jackson Hewitt’s “creditor” argument conflicts with the plain language of the statute.

Inexplicably, Jackson Hewitt does not so much as cite the *Friedman’s* holding in its limitations period analysis. Jackson Hewitt does, however, attempt an end-run around Section 5-101 by claiming, in effect, that its first sentence must be read to modify the entire subsection, and that the four-year limitation period thus “applies only to actions brought against a ‘creditor.’” (Def.’s Br. at 28.)¹¹ This argument cannot be reconciled with the language of the statute, which reads as follows:

§ 46A-5-101. Effect of violations on rights of parties; limitation of actions.

(1) If a creditor has violated the provisions of this chapter applying to collection of excess charges, security in sales and leases, disclosure with respect to consumer leases, receipts, statements of account and evidences of payment, limitations on default charges, assignment of earnings, authorizations to confess judgment, illegal, fraudulent or unconscionable

¹¹ Although Jackson Hewitt’s “creditor” argument fails in light of Syllabus Point 6 of *Friedman’s* and the Section 5-101(1) analysis in this section, Jackson Hewitt’s premise – that it is not a “creditor” – is incorrect, and its argument also fails on that ground.

Jackson Hewitt *is* a creditor. Because the CCPA does not define the term, one must look to the common, ordinary and accepted meaning of creditor. Syl. Pt. 4, *Bluestone Paving, Inc. v. Tax Com’s of West Va.*, 591 S.E.2d 242 (W. Va. 2003). Merriam Webster defines creditor as “one to whom a debt is owed; *especially*, a person to whom money or goods are due.” Merriam Webster Online, <http://www.merriam-webster.com/dictionary/creditor>, last visited Feb. 24, 2010. In the context of the RAL transaction, Jackson Hewitt is “a person to whom money is due.” It was paid for helping the Plaintiffs get their RALs, both directly by the Plaintiffs and indirectly by the bank. The conclusion that Jackson Hewitt is a creditor in the RAL transaction also accords with the reasonable expectations of RAL customers, who go to Jackson Hewitt for tax preparation, leave having applied for a RAL, and deal exclusively with Jackson Hewitt in the process. When ultimately they pick-up their RAL checks at the Jackson Hewitt store, steep tax-preparation and RAL fees are deducted.

conduct, any prohibited debt collection practice, or restrictions on interest in land as security, assignment of earnings to regulated consumer lender, security agreement on household goods for benefit of regulated consumer lender, and renegotiation by regulated consumer lender of loan discharged in bankruptcy, the consumer has a cause of action to recover actual damages and in addition a right in an action to recover from the person violating this chapter a penalty in an amount determined by the court not less than one hundred dollars nor more than one thousand dollars.

With respect to violations arising from *consumer credit sales or consumer loans* made pursuant to revolving charge accounts or revolving loan accounts, *or from sales as defined in article six [§§ 46A-6-101 et seq.] of this chapter*, no action pursuant to this subsection may be brought more than four years after the violations occurred.

With respect to violations arising from other consumer credit sales or consumer loans, no action pursuant to this subsection may be brought more than one year after the due date of the last scheduled payment of the agreement.

(Emphasis and spaces between sentences added.)

The plain import of this language – applying a four-year limitations period “[w]ith respect to violations arising . . . from sales as defined in article six of this chapter” – is that the four-year period applies to violations arising from any sale that meets Article 6’s definition of “sale.” Article 6 defines “sale” as “any sale, offer for sale or attempt to sell any goods for cash or credit or any services or offer for services for cash or credit.” As explained *supra* Part A, Jackson Hewitt sold its credit-facilitation services to the Plaintiffs, and was paid directly by the Plaintiffs and indirectly by the bank. The RAL transaction therefore is a “sale” under Article 6.¹²

¹² If any additional support were needed for the proposition that a CSO violation relates to a “sale” as defined in Article 6, it is supplied by the fact the Legislature explicitly equated a violation of the CSO statute with a UDAP. *See* W. Va. Code § 46A-6C-7(d). UDAPs – or “unfair or deceptive acts or practices in the conduct of any *trade or commerce*,” § 46A-6-104 – by definition relate to sales, as “[t]rade’ or ‘commerce’ means the advertising, offering for sale, sale or distribution of any goods or services[.]” W. Va. Code § 46A-6-102.

Jackson Hewitt's view that Section 5-101 applies only to persons who extend credit to consumers would have the impermissible effect of rendering provisions of Section 5-101 meaningless.¹³ Here's why: As stated above, Article 6 defines "sale" as any sale of goods or services "for cash *or* credit." In other words, the definition of "sales" under Article 6 clearly encompasses *cash* transactions. If Jackson Hewitt is correct and Section 5-101(1) applies only to *credit* transactions, then the statute would effectively be rewritten as follows (changes bracketed in bold): "With respect to violations arising from . . . sales as defined in article six of this chapter, [**excluding the sale of goods or services for cash,**] no action pursuant to this subsection may be brought more than four years after the violations occurred." The statute cannot be rewritten in this manner. Its unambiguous reference to the Article 6 definition of "sales" indicates application to *both* cash and credit sales. Jackson Hewitt's argument impermissibly reads cash transactions out of the scope of Section 5-101.¹⁴

¹³ See, e.g., Syl. Pt. 7, *State ex rel. Tucker County Solid Waste Auth. v. West Virginia Div. of Labor*, 668 S.E.2d 217, 228 (W. Va. 2008) ("In matters of statutory construction, every effort is made to give effect to each word and phrase adopted by the Legislature, the presumption being that the Legislature would not have committed a futile act. In other words, "[i]t is always presumed that the legislature will not enact a meaningless or useless statute.") (cited authority omitted).

¹⁴ Under interpretive analyses employed by this Court and the United States Supreme Court, a four-year limitation period would apply here even if Section 5-101(1) were silent on the issue. When determining the appropriate limitations period for claims brought under statutes of limitation that lack express limitations period, courts sometimes "'borrow' the most suitable statute or other rule of timeliness from some other source." *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 146-47, 152 (1987) (where federal RICO statute does not provide an express limitations period, the Court applied the limitations period found in the Clayton Act, the statute most closely analogous to civil RICO in purpose, structure and legislative intent). A similar approach has also been followed in this Court. See *Friedman's*, 582 S.E.2d at 849 (Davis, J., dissenting) (in service of the rule that "a statute should be read to make it harmonize with other statutory enactments," stating the Uniform Commercial Code's four-year limitations period, W. Va. Code § 46-2-725(1), applies to consumer claims involving goods) (quoting *Preston Mem. Hosp. v. Palmer*, 578 S.E.2d 383, 390 (Davis, J., concurring)). The Court used a similar "borrowing" analysis in *Stanley v. Sewell Coal Co.*, 285 S.E.2d 679, 683 (W. Va. 1982), where the Court held the two-year fraud limitations period applied to a common-law wrongful discharge

C. ***Third Certified Question:*** Are the contractual agency disclaimers in the refund anticipation loan enforceable under West Virginia law?

Plaintiffs' Answer: No.

The Plaintiffs and Jackson Hewitt have found some common ground with respect to the third certified question. The parties agree the agency disclaimers are not controlling, but disagree as to their effect on the nature of the relationship between Plaintiffs and Jackson Hewitt. Jackson Hewitt contends the disclaimer simply affirms what it believes to be true. But as the Plaintiffs explain in their discussion on the fourth certified question, the disclaimers are ineffectual, and what they “affirm” is manifestly untrue. Under any analysis, Jackson Hewitt acted as the Plaintiffs’ agent in the RAL transaction.

The agency disclaimers are an attempt to vitiate Jackson Hewitt’s liability, and it is perfectly valid for the Court to consider this in determining whether to attach any significance to them. As the Restatement makes clear, “It is appropriate for the court to consider whether the parties’ characterization serves a function other than circumventing an otherwise-applicable statute, regulation, or rule of law, or invoking a statute, regulation, or rule of law to prevent or limit liability.” Restatement (Third) of Agency § 1.02 cmt. b (2006). Here, the avoidance of liability is the entire *point* of Jackson Hewitt’s agency disclaimers. Why else would the disclaimers be in the RAL applications?

For all the reasons stated in Plaintiffs’ opening brief, exculpatory agency disclaimers in adhesion contracts are unenforceable, particularly when they are founded

claim, or so-called *Harless* claim. The Court reasoned that principles of fraud “closely parallel” the contravention of public policy required to support a *Harless* claim, and therefore the fraud limitations period was most appropriate. *Id.* at 682-83. Clearly, and consistent with the *Friedman’s* dissent, principles in the UCC (Chapter 46) closely parallel principles encompassed in the CCPA (Chapter 46A).

on untruths. Because the disclaimers are so plainly contrary to the facts of the RAL transaction and the nature of the relationship between Jackson Hewitt and the Plaintiffs, they are entitled to no weight at all.

D. *Fourth Certified Question:* Is a tax preparer who helps a customer obtain a refund anticipation loan in exchange for compensation an agent under West Virginia law?

Plaintiffs' Answer: Yes.

1. By agreeing to obtain a RAL and signing the RAL application, Plaintiffs directed and authorized Jackson Hewitt to act as their agent in obtaining the RAL, and Jackson Hewitt manifested consent through its conduct.

This Court has described the establishment of an agency relationship in broad and clear terms.

When a person is ***authorized and directed to act on behalf of another***, that person or entity is generally recognized to be acting in the capacity of an agent. We have held that an agent in the restricted and proper sense is a representative of his principal in business or contractual relations with third persons.

State ex rel. Clark v. Blue Cross Blue Shield of West Virginia, Inc., 510 S.E.2d 764, 788 (W. Va. 1998) (internal quotation marks omitted) (quoting Syl. Pt. 2, *State ex rel. Key v. Bond*, 118 S.E. 276 (W. Va. 1923)); Syl. Pt. 2, *Teter v. Old Colony Co.*, 441 S.E.2d 728 (W. Va. 1994); Syl. Pt. 3, *Thomson v. McGinnis*, 465 S.E.2d 922 (W. Va. 1995)).¹⁵

¹⁵ Throughout its brief, Jackson Hewitt's statement of applicable agency law bounces confusingly from West Virginia cases, to current and past volumes of the Restatement and other treatises, to cases from outside this jurisdiction. West Virginia's agency caselaw is sufficiently developed to support a thorough review of the standards governing the existence of an agency relationship. To the extent Jackson Hewitt faults the Plaintiffs for "ignor[ing]" one treatise's statement of the "three essential elements that are integral to an agency relationship[.]" (Def.'s Br. at 34-35), Plaintiffs would point out that this Court has never adopted those "three essential elements," which, consistent with this Court's agency cases, are better viewed as "considerations" that are "neither determinative nor conclusive . . . in determining the existence of an agency relationship." *Green v. H&R Block, Inc.*, 735 A.2d 1039, 1049 (Md. 1999).

Jackson Hewitt was “authorized and directed to act on behalf of” the Plaintiffs to handle – and did handle – every aspect of the RAL transaction, from start to finish. Because the Plaintiffs applied for a RAL, Jackson Hewitt completed and filed the Plaintiffs’ tax return, completed and submitted the RAL application to the lending bank, told the IRS where to deposit the Plaintiffs’ expected tax refund, and printed and delivered the RAL proceeds check to the Plaintiffs. More specifically:

- The Plaintiffs provided confidential financial information to Jackson Hewitt, and directed and authorized Jackson Hewitt to file their tax returns with state and federal tax authorities.
- The Plaintiffs directed and “authorize[d] Jackson Hewitt Tax Service, the preparer and transmitter of [their] tax return and the IRS (or state taxing authority) to disclose [their] 2004 tax return or refund information to SBBT.”
- The Plaintiffs “consent[ed] to SBBT, Jackson Hewitt Tax Service . . . and other RAL lenders sharing information about [them] from time to time.”
- The Plaintiffs “authorize[d] . . . Jackson Hewitt Tax Service to obtain consumer reports on [them] from time to time in connection with [their] RAL[.]”
- Jackson Hewitt filed a form for the Plaintiffs with the IRS authorizing the Plaintiffs to electronically file their returns.
- Jackson Hewitt told the IRS where to deposit the Plaintiffs’ refund check so the loan could be repaid.
- Jackson Hewitt obtained confirmation from the IRS that the Plaintiffs’ tax refund was unencumbered by other debt.
- Jackson Hewitt printed the RAL check, and provided it to the Plaintiffs.¹⁶

Jackson Hewitt performed all of this work, all at the Plaintiffs’ direction, to help the Plaintiffs obtain their RAL. Jackson Hewitt simply had no power to file the

¹⁶ Plaintiffs outlined these bullet-pointed facts in their original brief (Pls.’ Br. at 23-24), and the quoted language above is taken directly from the RAL application attached to that brief as Exhibit 1. Apart from its view that its franchisor and not Jackson Hewitt performed the acts listed above, Jackson Hewitt disputes none of these facts.

Plaintiffs' tax returns or obtain a RAL for them unless the Plaintiffs authorized and directed it to do so.

Jackson Hewitt mainly contests the establishment of an agency relationship by relying on superficial aspects of the transaction – the lack of a written contract, the self-serving agency disclaimers, the fact it did not negotiate loan terms specifically for the Plaintiffs' RALs. These aspects of the transaction are not material, because an agency relationship is not determined by written contracts or labels, but by conduct. “While agency is usually created by express contract between the parties, it may be *implied from the conduct of the parties and the nature and the circumstances of the particular acts done.*” Syl. Pt. 1, *State ex rel. Yahn Elec. Co. v. Baer*, 135 S.E.2d 687, 690 (W. Va. 1964) (citations omitted) (emphasis added).¹⁷ See also Restatement (Third) of Agency § 1.02 (“Whether a relationship is characterized as agency in an agreement between parties or in the context of industry or popular usage is not controlling.”).

Jackson Hewitt also resists an agency finding by asserting that the Plaintiffs did not control its conduct and dealings with the lending bank, because those matters were the subject of a separate agreement between Jackson Hewitt and the bank. This argument skips a step. The RAL transaction was commenced when the Plaintiffs decided to obtain a RAL, and signed a RAL application that authorized and directed Jackson Hewitt to take all

¹⁷ *Yahn* illustrates the principle that conduct, and not written agreements or the parties' characterization of the relationship, determines the establishment of an agency relationship. The case involved a dispute over whether a mailroom worker employed by the State Department of Finance and Administration acted as the agent of a separate agency, the West Virginia Board of Education, when the worker signed for a registered letter addressed to the Board. The Court held that, regardless of whether the Board of Education gave express authority or consent to the mailroom worker to sign for its mail, the fact that it did not repudiate the practice sufficed to establish an agency relationship. *Id.* at 690. Jackson Hewitt's narrow, formalistic view of consent fails in view of these principles, and for good reason, it neglects to discuss *Yahn* in any meaningful way.

necessary actions to obtain it for them, including handling all dealings with the bank and the tax authorities.¹⁸ Jackson Hewitt also overlooks the fact that the principal need not control every aspect of the agent's conduct, but instead must only exercise "some degree of control," as this Court held in *Thomson*. 465 S.E.2d at 926.

In *Thomson* the plaintiffs purchased a home without knowledge that the home's furnace was defective. Before the sale, the plaintiffs' real-estate broker hired a building inspector to examine the heating system and told the inspector to sign a certificate stating the system worked properly, even though the inspector was not qualified to make that certification. *Id.* at 925. The Court held these facts constituted sufficient evidence that the broker retained an element of control over the inspector's actions, and concluded the Circuit Court erred in granting summary judgment against the plaintiffs. *Id.* Thus, while there was no evidence in *Thomson* that the broker literally controlled the inspector's conduct in performing the inspection or deciding to issue the certification, the plaintiffs established at least the minimum level of control required to support an agency finding.

Jackson Hewitt cites this Court's *Teter* decision for the proposition that "[m]erely hiring a company does not create a principal-agency relationship." (Def.'s Br. at 43.) But unlike the real estate agent in *Teter* who hired the engineer to inspect a home but in no way oversaw or directed the manner of the inspection, 441 S.E.2d at 736, the Plaintiffs' relationship with Jackson Hewitt was far more involved. The Plaintiffs entrusted their tax information to Jackson Hewitt, entrusted Jackson Hewitt with completing and filing their returns, authorized it to share confidential information with the lending bank in order to bind

¹⁸ Even if Jackson Hewitt had no express power to bind the Plaintiffs to the RAL agreement, it still acted as the Plaintiffs' agent. "Agents who lack authority to bind their principals to contracts nevertheless often have authority to negotiation or to transmit or receive information on their behalf." Restatement (Third) of Agency § 1.01 cmt c. Jackson Hewitt had authority to transmit and receive information both to the IRS and to the lending bank.

the Plaintiffs to obtain and repay their RALs, and directed Jackson Hewitt to hold the RAL check for them. Unlike *Teter*, this is no mere hiring decision.

The facts of the transaction between the Plaintiffs and Jackson Hewitt are materially indistinguishable from those in *Green v. H & R Block, Inc.*, where Maryland's high court concluded the taxpayer-plaintiff provided sufficient evidence to prove the existence of an agency relationship between the plaintiff and the tax-preparation that obtained a RAL for her. 735 A.2d at 1039, 1047-1055. In *Green* – which is cited in the Restatement (Third) of Agency as authority on the agency issues implicated here, *see id.* at § 1.01 cmt f(1) – the following facts supported a finding of agency: (a) the tax-preparer prepared the taxpayer's federal income tax return; (b) the tax-preparer completed and submitted the RAL application to the lending bank; (c) the RAL application authorized the tax-preparer to disclose the federal return to the lending bank to allow the bank to determine whether to issue the loan; (d) the RAL application limited the tax-preparer's use of the confidential information; and (e) the confidential relationship between the taxpayer and the firm entrusted to prepare her taxes made it reasonable for the taxpayer to believe the firm acted as the taxpayer's agent. All those circumstances are present here.

The *Green* court rejected the tax-preparer's argument, identical to that which Jackson Hewitt urges here, that the plaintiff-taxpayer did not exercise the requisite control to establish the principal-agent relationship.

The control a principal exercises over its agent is not defined rigidly to mean control over the minutia of the agent's actions, such as the agent's physical conduct, as is required for a master-servant relationship. The level of control may be very attenuated with respect to the details. However, the principal must have ultimate responsibility to control the end result of his or her agent's actions; such control may be exercised by prescribing the agents' obligations or duties before or after the agent acts, or both.

Id. at 1051-52 (cited authority omitted).

The court held the requisite level of control was demonstrated by the facts the plaintiff-taxpayer controlled the tax-preparer's ultimate actions and representations with respect to filing the tax return and applying for the RAL. The court's careful explanation of its reasoning is persuasive and bears citation in full here:

H & R Block's relationship with its customers is analogous to other principal-agent relationships, such as between an attorney and his or her client. An attorney who, for example, serves as his or her client's representative in negotiations to settle a lawsuit is generally not subject to the client's control over the best strategy to use in order to arrive at a good settlement, but the client controls the final decision as to whether to settle or not. The client/principal may have little knowledge of the law or negotiating strategies and so trusts the attorney/agent to further his or her interests in the settlement negotiations.

Similar to the client who is represented by an attorney in settlement negotiations, the H & R Block customer may be unknowledgeable in tax and financial matters, trusting H & R Block to further his or her interests. Like the attorney representing a client in settlement negotiations, H & R Block undertakes to file customer tax returns with the IRS and the loan application with the bank, but only at the direction of the customer, who ultimately controls whether H & R Block takes either action with respect to the third party.

Id. at 1052. Because the taxpayer ultimately controlled the decision to apply for the RAL, the taxpayer retained sufficient control over the tax-preparer to establish the agency relationship. *Id.*

The *Green* court also rejected the tax-preparer's claim, similar to Jackson Hewitt's here, that it could not be the taxpayer's agent because it lacked power to alter the taxpayer's legal relations. The court concluded that the tax-preparer's (a) role in preparing and transmitting the RAL application to the bank; (b) implicit endorsement of the application's contents by submitting it to the bank; (c) work in obtaining the bank's

acceptance of the application; and (d) receiving and delivering the loan proceeds to the taxpayer, all established that the tax-preparer “played an integral part in the customer’s receipt of the bank loan, which indisputably has legal ramifications for the H&R Block customer and the bank.” *Id.* at 1053.

Another consideration present in *Green* and equally present here is the nature of the relationship of trust between taxpayer and tax-preparer.

Customers who enter the doors of the local H&R Block office . . . may reasonably believe that H&R Block is acting on their behalf – to obtain the highest and fastest return possible – in the preparation and filing of the tax returns with the IRS and, in the case of the RAL, in acting as the intermediary to the transactions with the lending bank.

....

Particularly in the context of its promotional efforts, it would be reasonable to conclude that H&R Block, as an agent, is seeking – and gaining – the consent of its customers to act on their behalf with respect to the transactions with the lending bank as well as the IRS. . . . H&R Block intended to create the circumstances under which customers would trust it to obtain the maximum refund fast, and it embarked on efforts to secure a loan in order to gain the refund quickly. In light of H&R Block’s conduct, its customers may reasonably believe that H&R Block is acting as their agent.

735 A.2d at 1053-54.¹⁹

The facts and legal analysis that supported the agency claim in *Green* are present here. The Plaintiffs controlled the decision to apply for a RAL, Jackson Hewitt consented to act on the Plaintiffs’ behalf to obtain the RAL, and Jackson Hewitt had the power to take and did take action to alter the Plaintiffs’ legal relations with the lending

¹⁹ It is this relationship of trust that renders absurd Jackson Hewitt’s claim that an agency finding in this case would outlaw the purported business practices of “hundreds of retailers” (Target, for example) who offer bank-issued credit to customers at the retailers’ store locations and are paid by the banks for arranging the loans. Jackson Hewitt misses a fundamental distinction: unlike Target, Jackson Hewitt does not sell soap, or clothing, or kitchen appliances. Jackson Hewitt is a national tax-preparation company that thousands of West Virginians entrust with handling their most sensitive and private personal and financial information, and entrust with the important and legally-perilous task of accurately and correctly filing their tax returns. It makes the bulk of its profits from RALs, negotiates favorable RAL terms with the lending bank, and intercedes on the customer’s behalf both with the IRS and the bank.

bank. This establishes that Jackson Hewitt acted as the Plaintiffs' agent in the RAL transaction.²⁰

2. Subordination of financial interest is irrelevant to the certified question, because it relates only to *breach of fiduciary duty*, not *establishment of an agency relationship in the first instance*.

Jackson Hewitt contends it “never agreed to subordinate its financial interest to the Harpers’ financial interest,” and therefore “no fiduciary relationship has been created.” (Def.’s Br. at 39, 40.) In support, it creates, without citation, a bright-line rule that “an agency relationship giving rise to fiduciary duties does not exist if the Harpers knew at the outset that Jackson Hewitt was pursuing non-mutual profit.” (*Id.* at 42.) Jackson Hewitt’s argument fails for at least two reasons.

First, this Court has never adopted Jackson Hewitt’s bright-line rule, nor to the Plaintiffs’ knowledge has any other, as evidenced by the fact Jackson Hewitt cites no case in support. The smattering of cases it cites in this section of its brief either state general and uncontroverted principles of agency law, or have nothing to do with agency issues. *See, e.g., Knapp v. Am. Gen. Fin., Inc.*, 111 F. Supp. 2d 758 (S.D. W. Va. 2000)

²⁰ One state high court has rejected the *Green* analysis. *Basile v. H&R Block, Inc.*, 761 A.2d 1115 (Pa. 2000). *Basile* contained no discussion of the principles that informed *Green* and have also been adopted by this Court – such as the rule that an agency relationship can be implied through conduct, or that only “some degree of control” is required. The reasons the *Basile* court concluded the tax-preparer lacked the ability to bind the borrowers to a RAL frankly are unclear, but in any event the two dissenting justices were persuaded by *Green* and agreed with the Superior Court (decision reported at 729 A.2d 574 (Pa. Super. Ct. 1999)) that the tax preparer was an agent and breached its accompanying duties. *Id.* at 1123-24. Another case cited by Jackson Hewitt, *Peterson v. H&R Block Tax Svcs., Inc.*, 971 F.Supp. 1204, 1215 (N.D. Ill. 1997), was decided on a motion to dismiss, and the plaintiff apparently (and inexplicably) did not allege she instructed the preparer to submit her RAL application. *Id.* at 1213. *Beckett v. H&R Block, Inc.*, 714 N.E.2d 1033 (Ill. App. Ct. 1999)) relied mainly on *Peterson*, and, like *Peterson*, was decided under Illinois law. Finally, *Carnegie v. H&R Block, Inc.*, 269 AD.2d 145, 147 (N.Y. App. Ct. 2000) consisted of a single paragraph of analysis, and relied on *Beckett* and *Peterson*. In contrast to these opinions, *Green* contained a thorough analysis of applicable agency law, and was decided on a well-developed factual record by a unanimous court. *Green* is the better, more persuasive opinion, and is in line with West Virginia’s agency jurisprudence.

(agency relationship not alleged; holding a creditor bank owed no fiduciary duty to its debtor customer); *Nymark v. Heart Fed. Savings & Loan Ass'n.*, 231 Cal. App. 3d 1089 (Cal. Ct. App. 1991) (same); *Elmore v. State Farm Mut. Auto. Ins. Co.*, 504 S.E.2d 893, 898 (W. Va. 1998) (agency relationship not alleged; referring to subordination principle in the context of breach, not establishment, of fiduciary duty).

Second, and more fundamentally, Jackson Hewitt's argument muddles and confuses the analysis governing the *establishment* of an agency relationship with the analysis governing the *breach* of duties that flow from that relationship.²¹ Only the former issue is before this Court, because the District Court found disputed factual issues regarding breach and damages, and certified to this Court only the threshold question of whether an agency relationship was established. ("The Court DENIES Jackson Hewitt's Motion for Summary Judgment on the grounds there is insufficient evidence of breach and damages with respect to Plaintiff's agency claim. However, the Court leaves to the West Virginia Supreme Court the decision of whether an agency relationship exists in the first instance.").

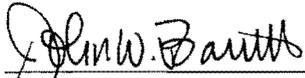
Whether an agency relationship exists in the first instance is established by the parties' *conduct*, not by their financial interests. Factors pertinent to establishment of an agency relationship are those discussed above – some element of control, direction and authority to act for the principal, consent manifested by conduct. Consideration of those factors leads to the conclusion that a tax preparer who helps a customer obtain a RAL acts as the RAL-purchaser's agent under West Virginia law.

²¹ The Restatement (Third) of Agency addresses the subordination principle in Section 8.01, cmt b, in a discussion of the agent's duty to act loyally for the principal's benefit. *Id.*, cmt. a. Section 1 of the Restatement addresses the agency formation issues implicated in this case.

Conclusion

For the reason stated, Plaintiffs request the Court answer the certified questions as proposed above.

Respectfully submitted,
Plaintiffs
By Counsel



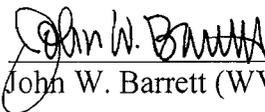
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Certificate of Service

The undersigned hereby certifies that the foregoing **Plaintiffs' Reply Brief** was served upon the Defendant as follows on this the 1st day of March, 2010:

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