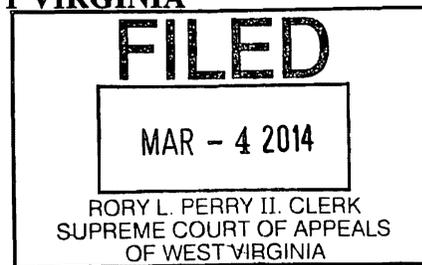


BRIEF FILED
WITH MOTION

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 13-1179



FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,

Defendant Below / Petitioner,

v.

**(CIVIL ACTION NO. 13-C-4
Judge Christopher C. Wilkes)**

FRANKLIN W. JAMES, JR.,

Plaintiff Below / Respondent.

RESPONDENT'S BRIEF

Andrew C. Skinner (WVSB #9314)
Skinner Law Firm
P.O. Box 487
Charles Town, WV 25414
(304) 725-7029
andrewskinner@skinnerfirm.com

and

Daniel F. Hedges (WVSB #1660)
Daniel T. Lattanzi (WVSB #10864)
Mountain State Justice, Inc.
1031 Quarrier St., Suite 200
Charleston, WV 25301
(304) 344-3144
dan@msjlaw.org
danlattanzi@msjlaw.org

Counsel for Respondent

TABLE OF CONTENTS

I. CERTIFIED QUESTION 1

II. STATEMENT OF THE CASE 3

III. SUMMARY OF THE ARGUMENT 5

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION 10

V. ARGUMENT 10

 A. Standard of review 10

 B. The circuit court’s answer is supported by the law (including the Curtis ruling) and the purpose of the statutory bond 11

 C. The bond does not preclude relief 16

 D. West Virginia consumers have no guarantee that they can obtain relief for the misconduct of a bankrupt and judgment proof lender unless they can bring suit against the surety 20

 E. Public policy supports Mr. James’ ability to obtain relief directly against the surety to a mortgage bond. 24

VI. CONCLUSION 27

TABLE OF AUTHORITIES

CASES:

<u>Apollo Civic Theatre, Inc. v. State Tax Com’r</u> , 223 W. Va. 79, 672 S.E.2d 215 (2008)	17
<u>Becker v. Four Points Inv. Corp.</u> , 708 N.E.2d 29 (Ind. App. 1999)	18
<u>Belcher v. WV Mortgage Store, Corp.</u> , No. 11-C-305 (H) (Raleigh Co. Cir. Ct., W. Va. Sept. 3, 2013)	2
<u>Biro v. Fairmont Gen. Hosp., Inc.</u> , 184 W. Va. 458, 400 S.E.2d 893 (1990)	23
<u>Board of Sup’rs of Fairfax County v. Sentry Ins.</u> , 391 S.E.2d 273 (Va. 1990)	12
<u>Clark v. Metro. Cas. Ins. Co.</u> , 142 A. 614 (R.I. 1928)	14
<u>Cruz-Mendez v. ISU/Insurance Services of San Francisco</u> , 722 A.2d 515 (N.J. 1999) . . .	12, 18
<u>Davis v. Celotex Corp.</u> , 187 W. Va. 566, 420 S.E.2d 557 (1992)	8
<u>Davis v. First Indem. of Am. Ins. Co.</u> , 56 S.W.3d 106 (Tex. App. 2001)	17
<u>Durant v. Changing, Inc.</u> , 891 P.2d 628 (Okl. App. 1995)	17, 20
<u>Feigenbaum v. Guaracini</u> , 952 A.2d 511 (N.J. Super. A.D. 2008)	11
<u>Gateway Communications, Inc. v. John R. Hess, Inc.</u> , 208 W. Va. 505, 541 S.E.2d 595 (2000)	11, 15
<u>Gloucester City Bd. of Educ. v. American Arbitration Ass’n</u> , 755 A.2d 1256 (N.J. Super. A.D. 2000)	17
<u>Hartford Fire Ins. Co. v. Curtis</u> , ___ W. Va. ___, 748 S.E.2d 662, 672 (2013)	<i>passim</i>
<u>Hartford Fire Ins. Co. v. Shumway</u> , No. 1:13-cv-939 (E.D. Va. 2013)	7
<u>Howze v. Surety Corp. of Am.</u> , 584 S.W.2d 263 (Tex. 1979)	13, 15, 26
<u>Jenkins v. Citimortgage, Inc.</u> , AP 2:11-ap-02008 (Bkr. S.D.W. Va. Aug. 3, 2011)	2, 12, 17
<u>John W. Egan Co., Inc. v. Major Const. Mgmt. Corp.</u> , 709 N.E.2d 66 (Mass. App. Ct. 1999) .	11
<u>Katz v. Innovator of America, Inc.</u> , 552 So.2d 724 (La. App. 1989)	12
<u>Lester v. The Bank of New York</u> , No. 09-C-477 (Mercer Co. Cir. Ct., W. Va. Aug. 19, 2011)	2, 12, 17
<u>Miller v. WV Mortgage Store Corp.</u> , No. 12-C-253 (H) (Fayette Co. Cir. Ct., W. Va., Dec. 31, 2012)	2, 12, 17
<u>Nance v. Gatlin</u> , 2 Tenn. App. 73 (Tenn. Ct. App. 1925)	14
<u>Pres. & Directors of Georgetown College v. Madden</u> , 660 F.2d 91 (4th Cir. 1981)	11

Quaker City Cold Storage Co., 45 F. Supp. 570 (E.D. Pa. 1942) 15

Satterfield v. Platte River Ins. Co., AP No. 10-57 (Bkr. N.D. W. Va. Aug. 13, 2012) 2

Smith v. JPMorgan Chase Bank, N.A., 2:10-cv-709 (S.D. W. Va. Sept. 13, 2010) 2, 12, 17

State ex rel. Copley v. Carey, 141 W. Va. 540, 91 S.E.2d 461 (1956) 15

State ex rel. Pope v. U.S. Fire Ins. Co., 145 S.W.3d 529 (Tenn. 2004) 17

Stayer v. Litton Loan Serv., LP, No. 08-c-3157 (Kan. Co. Cir. Ct., Aug. 18, 2010) 2, 12, 17

Stone v. Hole, 223 P. 1085 (Colo. 1924) 15

Succession of Moody, 158 So.2d 601 (La. 1963) 14

Traders Bank v. Dils, 226 W. Va. 691, 704 S.E.2d 691 (2010) 10

Wilson v. Bernet, 218 W. Va. 628, 625 S.E.2d 706 (2005) 10

Wolf v. Stix, 99 U.S. 1 (1879) 14

U.S. Fidelity and Guar. Co. v. Hathaway, 183 W. Va. 165, 394 S.E.2d 764 (1990) 11, 15

United States for Use and Benefit of Midland Loan Finance Company v. National Surety Corporation, 309 U.S. 165 (1940) 25

STATUTES:

11 U.S.C. § 1141 4

11 U.S.C. § 1141(d)(1)(A) 21

Ind. Code § 23-2-5-1 18

Ind. Code § 23-2-5-15 18

W. Va. Code § 31-17-4 1, 13, 19

W. Va. Code § 31-17-4(e)(3) *passim*

W. Va. Code § 31-17-8(m)(8) 5

W. Va. Code § 31-17-17(c) 17, 18, 19

W. Va. Code § 45-1-3 25

W. Va. Code § 46A-2-127 23, 24

W. Va. Code § 46A-5-101(1) 24

W. Va. Code § 46A-5-106 24

SECONDARY AUTHORITIES:

Black’s Law Dictionary (9th Edition 2009).11
 C.J.S. Principal and Surety § 77 11
 C.J.S. Principal and Surety § 191 13

RULES:

Rule 10(d) of the West Virginia Rules of Appellate Procedure3
 Rule 18(a)(3) of the West Virginia Rules of Appellate Procedure10
 Rule 19(a)(4) of the West Virginia Rules of Appellate Procedure 10
 Rule 20(a)(2) of the West Virginia Rules of Appellate Procedure 10

I. CERTIFIED QUESTION

The question certified to this Court by the Circuit Court of Berkeley County, West Virginia, is as follows:

May a plaintiff maintain an action solely against the surety on a judgment bond made pursuant to W. Va. Code § 31-17-4 without a judgment against the principal on the bond, when the principal has filed bankruptcy, and a judgment against the principal is precluded due to a Chapter 11 Plan confirmation?

The Circuit Court of Berkeley County provided the following answer to the certified question:

YES, the statutory purpose of the bond is to protect consumers against insolvent lenders, see, W. Va. Code § 31-17-4 and the public policy of this State should not allow the bankruptcy of insolvent lender to shield a surety on these bonds from liability for the principal's actions.

(JA000181-82.)

This Court should affirm the answer to the certified question provided by the Circuit Court of Berkeley County. In passing the bond provision of the West Virginia Residential Mortgage Lender, Broker and Servicer Act, W. Va. Code § 31-17-4 ("Mortgage Act"), the West Virginia Legislature intended to protect consumers in the event a mortgage broker or lender becomes bankrupt or defunct. In fact, the Commissioner of Banking has reformed the bond language to clarify that direct suit against the surety is permitted when the principal is "no longer in operation or has filed for bankruptcy," in keeping with the statutory purpose. (See App. A to Amicus Curiae.) Moreover, this case does not present an issue of first impression among the courts of West Virginia. Rather, numerous courts, including the Circuit Courts of Fayette, Mercer, Raleigh, and Kanawha Counties, as well as the Southern District of West Virginia, the Bankruptcy Court for the Southern District of West Virginia, and the Bankruptcy Court for the Northern District of West Virginia, have

ruled consistent with Judge Wilkes' proposed answer to the certified question.¹ In contrast, Petitioner Fidelity and Deposit Company of Maryland ("Fidelity") cannot point to a single West Virginia order supporting its position.

If the certified question is answered in the negative, West Virginia consumers will be precluded from obtaining relief for the misconduct of bankrupt mortgage lenders. For example, the lender in this case, Taylor Bean & Whitaker ("TBW"), filed bankruptcy in the Middle District of Florida and obtained a Chapter 11 confirmation order discharging its liability for claims arising before the confirmation date. This leaves consumers affected by TBW's previous predatory lending practices without any hope of recovery for its misconduct. Often, the consumers who have been affected by predatory lending practices are unsophisticated and poor individuals, and thus do not have the resources to avoid foreclosure of their homes. As the West Virginia Legislature has recognized in enacting the Mortgage Act, West Virginia consumers must be protected when faced with this situation. This protection is provided by allowing consumers to bring direct suit against the surety for the misconduct of defunct or bankrupt principal. Therefore, the proposed answer to the certified question must be affirmed.

¹ See, e.g., Miller v. WV Mortgage Store Corp., No. 12-C-253 (H) (Fayette Co. Cir. Ct., W. Va., Dec. 31, 2012); Lester v. The Bank of New York, No. 09-C-477 (Mercer Co. Cir. Ct., W. Va. Aug. 19, 2011); Jenkins v. Citimortgage, Inc., AP 2:11-ap-02008 (Bkr. S.D.W. Va. Aug. 3, 2011); Stayer v. Litton Loan Serv., LP, No. 08-c-3157 (Kan. Co. Cir. Ct., Aug. 18, 2010); Smith v. JPMorgan Chase Bank, N.A., 2:10-cv-709 (S.D. W. Va. Sept. 13, 2010) (JA000132-149.) See also Satterfield v. Platte River Ins. Co., AP No. 10-57 (Bkr. N.D. W. Va. Aug. 13, 2012); Belcher v. WV Mortgage Store, Corp., No. 11-C-305 (H) (Raleigh Co. Cir. Ct., W. Va. Sept. 3, 2013) (See Proposed Supplemental Appendix, attached hereto).

II. STATEMENT OF THE CASE

Respondent Franklin W. James, Jr., offers the following statement of the case as necessary to correct inaccuracies and/or omissions in the statement of case provided by the Petitioner Fidelity. See W. Va. R. App. Proc. 10(d).

Relevant Facts

Mr. James first purchased the subject property for \$20,000 in 2001. (JA000003.) After the purchase, Mr. James placed his doublewide mobile home on the property, which consisted of roughly 0.86 acres. (JA000003.) This doublewide was also purchased in 2001 for a price of \$69,000. (JA000003.)

Unfortunately, Mr. James' residence was sold at foreclosure in 2006. (JA000003.) Roughly two years later in 2008, he sought to repurchase the home. (JA000003.) To finance the transaction, Mr. James responded to a solicitation by the defendant broker. (JA000003.) The broker and TBW arranged for an appraisal on the property during the application process and subsequently informed Mr. James that the property appraised for over \$150,000. (JA000003.) Unbeknownst to Mr. James, in December 2008 the property had a total value of \$103,395.79, almost \$41,000 less than the loan amount. (JA000003.)

The closing took place at the offices of the broker on or about December 2, 2008. (JA000004.) Notwithstanding the sales price of \$145,000, the lender TBW set the contract purchase price at \$151,000 and originated a loan amount of \$149,049. (JA000004.) Because the loan amount vastly exceeds the value of the property, Mr. James cannot refinance or sell his home, thus making foreclosure a likelihood.

Mr. James discovered that the loan exceeded the value of the property shortly before he filed the instant suit on January 7, 2013. By the time Mr. James filed suit, TBW was bankrupt and judgment proof based on the Chapter 11 confirmation order. (See JA0000209.). Mr. James thus brought suit against Fidelity, TBW's surety, in an effort to obtain relief for TBW's illegal misconduct.

TBW Bankruptcy

TBW filed bankruptcy under Chapter 11 of the United States Code in the Middle District of Florida on August 24, 2009, Case No. 3:09-bk-07047. On July 21, 2011, the Chapter 11 plan was confirmed. (See JA000184-239.) The confirmation of the Chapter 11 plan discharges TBW's liability for all claims arising before the confirmation date. See 11 U.S.C. § 1141. The plan provides for a transfer of TBW's assets to Taylor Bean & Whitaker Plan Trust to be liquidated. Furthermore, the confirmation order provides the following:

Borrowers under residential mortgage loans ("Borrowers") who have not asserted or threatened to assert Claims against the Debtors [TBW] are not known Creditors The notice by publication of the Bar Date was reasonably calculated to reach all unknown Creditors Accordingly, pursuant to the stay and injunction set forth in paragraphs 55 and 56, respectively, any Claims of such Borrowers that were not timely filed against the Debtors *shall be forever enjoined, barred and expunged with respect to the Debtors.*

(JA000208-09) (emphasis added). Based on the confirmation order, any consumer is precluded from bringing an affirmative claim against TBW in its bankruptcy to obtain relief for its predatory lending practices.

Mr. James discovered the factual basis for his claims after the confirmation of the bankruptcy plan, and thus has no ability to obtain relief from the judgment proof TBW. As a result, Mr. James must seek relief for TBW's misconduct from Fidelity, the surety for TBW's statutory bond. Without

the ability to collect from Fidelity, Mr. James will be barred from obtaining any relief for TBW's misconduct relating to the loan origination, thereby negating the very purpose of the statutory bond.

Procedural History

Mr. James filed his Complaint in the Circuit Court of Berkeley County, West Virginia, on January 7, 2013. In the Complaint, Mr. James alleges two counts against Fidelity in its role as the surety for TBW. Mr. James alleges a claim under section 31-17-8(m)(8) of the West Virginia Code based on TBW's misconduct in originating a mortgage loan with a principal amount that exceeded the fair market value of the property on the date of the loan closing. (JA000007.) Mr. James also alleges a claim of unconscionable inducement pursuant to common law and the West Virginia Consumer Credit and Protection Act, W. Va. Code §§ 46A-2-101 et seq., based on TBW's misconduct in originating the mortgage loan, including that it originated a loan far in excess of the value of Mr. James' home and induced him into a loan agreement with unfavorable terms. (JA000006-7.) Mr. James seeks relief from Fidelity for the damages he has sustained from the illegal loan origination.

On July 19, 2013, Fidelity filed its Motion to Dismiss Plaintiff's Complaint or Alternatively Motion for Summary Judgment seeking judgment against Mr. James. (JA000022-120.) Mr. James filed his response to the motion on August 7, 2013. (JA000121-31.) After the parties submitted their briefs and proposed orders, the Circuit Court of Berkeley County certified the question that is now before this Court. (JA000179-83.)

III. SUMMARY OF THE ARGUMENT

Fidelity advances four arguments in response to the Circuit Court of Berkeley County's answer to the certified question. However, each argument ignores the purpose of the bond

provisions of the Mortgage Act and general principles of surety law. If this Court adopts the position of Fidelity, a majority of West Virginia consumers victimized by predatory lending practices between 2000 and 2012 will be denied compensation from the surety under the statutory bond. As a practical matter, consumers are usually unable to obtain service on defunct lenders and cannot sue bankrupt lenders, especially when the confirmation order has been entered by the bankruptcy court. The bond provisions of the Mortgage Act exist for the precise purpose of protecting West Virginia consumers in these situations. Indeed, the West Virginia Legislature created the bond remedy to protect consumers from the very situation before this Court. This statutory bond, for which Fidelity is surety, provides relief for consumers who have been defrauded or otherwise harmed by a bankrupt mortgage lender from which the consumer cannot obtain relief, nor even sue. This Court must therefore affirm Judge Wilkes' answer to the certified question.

Fidelity relies on Hartford Fire Insurance Company v. Curtis, ___ W. Va. ___, 748 S.E.2d 662, 672 (2013), in claiming that consumers must obtain a judgment against the principal before obtaining relief against the surety because this Court found the bond at issue to be a "judgment bond." However, this characterization does not preclude a consumer from seeking direct relief against the surety under a theory of joint and several liability. The bond explicitly states that TBW and Fidelity are "jointly and severally" liable for the "misconduct of the principal." (JA000039.) As such, Fidelity has direct and primary liability for the misconduct of TBW and may be sued independently of TBW. Hence, the judgment bond label does not preclude a consumer's ability to obtain relief against a surety directly when a principal is bankrupt and judgment proof.

Moreover, Curtis, in which the plaintiffs were able to obtain judgment on the principal, represents the exception to the frequently occurring case where no service or judgment is possible

because the principal in Curtis, though recalcitrant, was still in operation. In the majority of cases, however, the principal has either become defunct or bankrupt and no service is possible. Under these common scenarios, a consumer's only avenue relief for the principal's misconduct is to bring direct suit against the surety. Moreover, because the surety is jointly and severally liable for the misconduct of its principal, the surety may assert defenses to the principal's misconduct. The holding in Curtis does not conflict with Judge Wilkes' answer to the certified question.²

Furthermore, allowing direct suit against the surety does not interfere with the Commissioner of Banking's discretion. The Mortgage Act requires all mortgage lenders operating in the state to obtain a bond "for the benefit of consumers." W. Va. Code § 31-17-4(e)(3). It is clear from this statutory language that the West Virginia Legislature intended that the bond be available so that consumers could obtain relief from bankrupt lenders. In recognition of this legislative intent, the Commissioner reformed the required bond form in 2012 by adding the following clarification:

If any person shall be aggrieved by the misconduct of the principal, he may upon recovering judgment against such principal issue execution of such judgment and maintain an action upon the bond of the principal in any court having jurisdiction of the amount claimed, ***provided that a judgment against the principal shall not be***

² The Amicus Curiae brief filed by the Surety & Fidelity Association of America ("SFAA"), asks this Court to reverse Curtis and rule that the bond at issue is not a judgment bond. (Amicus Curiae Br. at 8.) It should be noted that counsel for the SFAA was counsel for Hartford Fire Insurance Company in Curtis. After this Court issued its decision in Curtis on June 5, 2013, Hartford brought suit against the originating lender in the United States District Court for the Eastern District of Virginia. See Hartford Fire Ins. Co. v. Shumway, No. 1:13-cv-939 (E.D. Va. 2013) on August 1, 2013. Upon information and belief, the lender agreed to pay the entire default judgment from Curtis and Hartford's attorney fees and expenses in the Eastern District of Virginia action.

It is uncommon for an existing entity to simply refuse to defend itself against a lawsuit, as was the case in Curtis. This scenario would be very infrequent. The SFAA seeks to wipe out the vast majority of all surety liability by its position here. The alleged concerns expressed by the SFAA must therefore be taken with a grain of salt.

required to maintain action on this bond if the principal is no longer in operation or has filed for bankruptcy.

(App. A to Amicus Curiae) (emphasis added). The reformation of the bond establishes the Commissioner's recognition that Fidelity's reading of the earlier bond requirements is inconsistent with the legislative intent of the Mortgage Act.

Fidelity also claims that the circuit court allegedly overlooks the fact that Mr. James could obtain relief for TBW's misconduct from the other parties in the case. Fidelity believes it should be entitled to a credit or setoff to settlement with other parties so that Mr. James does not obtain an alleged "double recovery." (Pet.'s Br. at 8.) Fidelity points to the settlement Mr. James reached with Bank of America, N.A. ("BANA"), the servicer of the mortgage account, to support its position that Mr. James can obtain relief for TBW's misconduct from its alleged assignee, in this case BANA.³ However, Fidelity fails to present facts establishing that BANA settled claims arising from an injury sustained by TBW's misconduct. To be clear, Mr. James did not suffer a single, indivisible loss based on the combined actions of the defendants in the case below. For example, the Complaint specifically sets forth a claim against BANA for post-origination debt collection abuse in connection with force-placing insurance to the mortgage account. (JA00008.) This constitutes a separate injury to Mr. James that shares no similarities with the illegal loan origination conducted by TBW. Furthermore, even an assignee may have limited fault in the context of the case, thus precluding Mr. James from obtaining full recovery for his injuries. Fidelity may not claim that Mr. James can be made whole from his settlement with BANA when Fidelity is the party directly responsible for

³ BANA is not the successor-in-interest to TBW because it did not take over TBW's business operations. Cf. Davis v. Celotex Corp., 187 W. Va. 566, 420 S.E.2d 557 (1992). BANA is solely the assignee of TBW's servicing rights to the mortgage contract. (See JA000002.)

TBW's misconduct. Moreover, any issues of setoff are best resolved after judgment and have no bearing on the question before this Court, which only relates to a consumer's ability to directly sue a surety.

Fidelity additionally asserts that Mr. James "sat on his rights" and failed to pursue a claim against TBW in its bankruptcy in the Middle District of Florida. (Pet.'s Br. at 8.) TBW filed for bankruptcy on August 24, 2009, and Mr. James filed his Complaint on January 7, 2013. As Fidelity is well aware, Mr. James did not learn of the factual basis for his legal claims until shortly before he filed his Complaint in early 2013, thus leaving him with no opportunity to obtain relief from TBW. (See JA000001-9.) Furthermore, Mr. James is an unsophisticated consumer residing in Martinsburg, West Virginia. (See JA000001-9.) The practical impact of requiring Mr. James to hire a Florida attorney to pursue a claim in the Florida bankruptcy—before he even knew the claim existed—directly contradicts the statutory requirement for mortgage lenders to obtain a bond "for the benefit of consumers." W. Va. Code § 31-17-4(e)(3). In fact, TBW's Chapter 11 plan was confirmed over the objection of other consumers who tried to bring claims against it in the bankruptcy. (See JA000195.) This demonstrates the hopelessness faced by individual consumers who bring a claim against a lender in a liquidating Chapter 11 plan, who are denied any chance of obtaining relief. After the Chapter 11 plan was confirmed on July 21, 2011, TBW was discharged from liability for all claims arising before the confirmation date. Hence, direct suit against Fidelity, as surety for TBW, is the only method of guaranteeing that Mr. James can be made whole from his injury arising from the illegal loan origination.

Finally, Fidelity argues that consumers should not be allowed to pursue direct claims against sureties as a matter of public policy. To the contrary, public policy overwhelmingly supports a

consumer's ability to bring direct suit against a surety for the misconduct of a bankrupt lender like TBW. This statutory bond, for which Fidelity is surety, provides relief for consumers who have been defrauded or otherwise harmed by a bankrupt mortgage lender from whom the consumer cannot sue or obtain relief. In recognition of this public policy, the Commissioner of Banking reformed the language in the statutory bond to make clear that the bond allows consumers to bring suit directly against sureties such as Fidelity when the principal is insolvent or in bankruptcy. Given these facts, there is no question that public policy supports a consumer's ability to obtain relief directly from the surety under these circumstances.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent Franklin W. James, Jr., believes oral argument is unnecessary for this matter because the issue before this Court has been authoritatively decided by other West Virginia courts pursuant to Rule 18(a)(3) of the Rules of Appellate Procedure. If this Court wishes to conduct oral argument, however, such argument would be appropriate pursuant to Rule 19(a)(4) of the Rules of Appellate Procedure because of the narrow legal issue presented. Oral argument would also be appropriate pursuant to Rule 20(a)(2) of the Rules of Appellate Procedure because a decision on this issue will affect the rights of consumers throughout the State of West Virginia.

V. ARGUMENT

A. Standard of review.

The appellate standard of review for questions of law certified and answered by a circuit court is de novo. See Syl. Pt. 1, Wilson v. Bernet, 218 W. Va. 628, 625 S.E.2d 706 (2005). The Court may reformulate the certified question in instances where it does not fully address the law at issue. See Syl. Pt. 2, Traders Bank v. Dils, 226 W. Va. 691, 704 S.E.2d 691 (2010). The question

at issue in this case is framed so as to fully address the issue before this Court and reformulation is not necessary.

B. The circuit court’s answer is supported by the law (including the Curtis ruling) and the purpose of the statutory bond.

The Mortgage Act requires all mortgage lenders operating in the state to obtain a bond “for the benefit of consumers.” W. Va. Code § 31-17-4(e)(3). The bond at issue identifies TBW as the principal/lender and Fidelity as the surety and states that TBW and Fidelity are “jointly and severally” liable for the “misconduct of the principal.” (JA000039.) A “surety” is defined as one who “is primarily liable for paying another’s debt or performing another’s obligation.” Black’s Law Dictionary (9th ed. 2009) (emphasis added). Fidelity therefore has direct and primary liability for the debt or misconduct of the principal, TBW. See, e.g., Pres. & Directors of Georgetown College v. Madden, 660 F.2d 91, 95 (4th Cir. 1981); Gateway Communications, Inc. v. John R. Hess, Inc., 208 W. Va. 505, 509, 541 S.E.2d 595, 599 (2000); U.S. Fidelity and Guar. Co. v. Hathaway, 183 W. Va. 165, 168, 394 S.E.2d 764, 767 (1990) (“In a contract of suretyship the obligation of the principal and his surety is original, primary and direct and the surety is liable for the debt, default or miscarriage of his principal.”); see also C.J.S. Principal and Surety § 77.

Importantly, judgment against a principal is not required to obtain judgment against the surety. See, e.g., Feigenbaum v. Guaracini, 952 A.2d 511, 518 (N.J. Super. A.D. 2008) (“Under the suretyship contract, the surety assumes a direct and primary obligation. . . . Accordingly, an obligee may bypass the primary obligor and enforce the obligation directly against the surety.”) (citations and quotations omitted); John W. Egan Co., Inc. v. Major Const. Mgmt. Corp., 709 N.E.2d 66, 69 (Mass. App. Ct. 1999) (“It follows that the creditor need not go to judgment against the principal in order to ground the surety’s liability toward the creditor; the creditor may sue both principal and

surety in one action (as in the present case) or sue each individually.”); Cruz-Mendez v. ISU/Insurance Services of San Francisco, 722 A.2d 515, 523 (N.J. 1999) (“An obligee may bypass the primary obligor and enforce the obligation directly against the surety.”); Board of Sup’rs of Fairfax County v. Sentry Ins., 391 S.E.2d 273, 274 (Va. 1990) (“[T]he right to sue the surety under the bond exists independently of the right to sue the principal.”); Katz v. Innovator of America, Inc., 552 So.2d 724, 726 (La. App. 1989) (“However, the accessorial nature of the contract of surety does not obligate the creditor to first proceed against the principal debtor rather than the surety to enforce a debt.”). As a result, under clearly established law, Fidelity is jointly and severally liable to Mr. James for the wrongs committed by TBW, up to the amount of the bond. Because Fidelity, as the surety, assumed a primary or direct obligation under the bond, Mr. James may recover directly against Fidelity. Several West Virginia courts have considered this issue and confirmed that direct suit against the surety is permissible. See, e.g., Miller v. WV Mortgage Store Corp., No. 12-C-253 (H) (Fayette Co. Cir. Ct. W. Va., Dec. 31, 2012); Lester v. The Bank of New York, No. 09-C-477 (Mercer Co. Cir. Ct., W. Va. Aug. 19, 2011); Jenkins v. Citimortgage, Inc., AP 2:11-ap-02008 (Bkr. S.D.W. Va. Aug. 3, 2011); Stayer v. Litton Loan Serv., LP, No. 08-c-3157 (Kan. Co. Cir. Ct., Aug. 18, 2010); Smith v. JPMorgan Chase Bank, N.A., 2:10-cv-709 (S.D. W. Va. Sept. 13, 2010) (JA000132-149.)

Despite this weight of authority, Fidelity argues that Mr. James may maintain an action against the bond only after obtaining judgment against TBW. Fidelity cites to Hartford Fire Insurance Company v. Curtis, ___ W. Va. ___, 748 S.E.2d 662, in support of this argument, claiming that this Court’s ruling that the bond at issue is a judgment bond requires that Mr. James must first obtain judgment against TBW before bringing suit against Fidelity. Curtis, however, did

not address the issue before this Court: whether a surety can be sued directly when the principal is bankrupt. Importantly, Curtis does not require a consumer to obtain default judgment against a principal before pursuing the surety. The opinion simply establishes that in the event that a consumer obtains an enforceable judgment order against a principal, the judgment is binding on the surety. ___ W. Va. at ___, 748 S.E.2d at 674. Indeed, Curtis explicitly recognizes that a surety may be sued in an initial action regarding the lender’s misconduct. ___ W. Va. at ___, 748 S.E.2d at 671 (“[a] consumer can only make a claim upon the surety when he has obtained a judgment against the principal, or when he sues them together in the same suit.” (quoting Howze v. Surety Corp. of Am., 584 S.W.2d 263, 265 (Tex. 1979))). This stands to reason, given that the statute was devised to protect consumers in the event that a mortgage broker or lender becomes bankrupt or defunct. See W. Va. § 31-17-4. This interpretation of Curtis aligns with the actual language of the bond, which identifies TBW as the principal and Fidelity as the surety and states that TBW and Fidelity are “jointly and severally” liable for the “misconduct of the principal.” (JA000039.) Nothing in the bond language prohibits direct suit against the surety. Furthermore, the right to maintain an action against a principal exists independently of the right to maintain an action against a surety, and thus a claimant may sue the surety individually. See 72 C.J.S. Principal and Surety § 191.

Despite the fact that Curtis clearly does not prohibit direct suit against a surety, the Amicus Curiae brief filed by the Surety & Fidelity Association of America (“SFAA”) asks this Court to reverse Curtis and rule that the bond at issue is not a judgment bond. (Amicus Curiae Br. at 8.) In support of its position, the SFAA cites to cases allegedly stating that an individual must have an enforceable judgment against a principal in order to recover against a surety. (Amicus Curiae Br. at 5-6.) However, those cases are not relevant to the present issue before this Court. For example,

SFAA cites to the United States Supreme Court case Wolf v. Stix, 99 U.S. 1 (1879), for the alleged proposition that an individual must have a judgment against a principal in order to recover against a surety on a judgment bond. SFAA fails to mention that the bond at issue in Wolf was not a judgment bond, but instead was an attachment bond that specifically existed under Tennessee law. Id. at 2. Nonetheless, SFAA cites the following dicta from the opinion without explaining the context of the actual case:

The cases are numerous in which it has been held, and we think correctly, that if one is bound as surety for another to pay any judgment that may be rendered in a specified action, if the judgment is defeated by the bankruptcy of the person for whom the obligation is assumed, the surety will be released.

Id. at 8-9. Importantly, the opinion then states the following: “Of this class of obligations are the ordinary bonds in attachment suits to dissolve an attachment, appeal bonds, and the like.” Id. at 9. With this sentence, the Court specifically noted that it was only evaluating attachment and appeal bonds. Nowhere in Wolf does the Court actually hold that a judgment bond precludes direct suit against a surety when no judgment has been entered against the principal.⁴ In fact, the Court proceeded to hold that the surety was liable to the claimants in Wolf because, under the terms of the bond, it specifically agreed to pay the value of the attached goods in the lower court proceeding if its principal took possession of the goods for his own use. Id. at 9-10. Hence, the dicta quoted by SFAA in its Amicus Curiae has no bearing on the case before this Court whatsoever.⁵

⁴ Similarly, the case Nance v. Gatlin, 2 Tenn. App. 73 (Tenn. Ct. App. 1925) is inapplicable because it specifically dealt with an appeal bond, not a judgment bond. Moreover, the cases Clark v. Metro. Cas. Ins. Co., 142 A. 614, 615 (R.I. 1928) and Succession of Moody, 158 So.2d 601 (La. 1963) did not involve bankrupt principals and are thus inapplicable to the issue before this Court.

⁵ Even in the appeal bond context, courts have recognized that the bankruptcy of the principal does not discharge the surety from liability because the purpose of the surety is to protect a party from a bankrupt and judgment proof principal: “The principal risk against which such [appeal] bonds

Furthermore, unlike in the cases cited by the SFAA, the bond language in this case states that TBW and Fidelity are “jointly and severally” liable for the “misconduct of the principal.” (JA000039.) Because Fidelity is jointly and severally liable for the misconduct of TBW, this Court does not have to overturn Curtis to provide consumers with the ability to sue the surety directly. In fact, Curtis relies, in part, on the case Howze v. Surety Corporation of America, 584 S.W.2d 263, which specifically recognizes that a principal and surety may be sued together under a judgment bond: “A consumer can only make a claim upon the surety when he has obtained a judgment against the principal, or when he sues them together in the same suit.” Indeed, because judgment against the principal is impossible due to the bankruptcy of TBW, and because Fidelity is jointly and severally liable as the surety, Mr. James may pursue claims for TBW’s misconduct directly against Fidelity. See, e.g., U.S. Fidelity & Guar. Co. v. Hathaway, 183 W. Va. 165, 168, 394 S.E.2d 764, 767 (“In a contract of suretyship the obligation of the principal and his surety is original, primary and direct and the surety is liable for the debt, default or miscarriage of his principal.”); Gateway Communications, Inc. v. John R. Hess, Inc., 208 W. Va. 505, 508-09, 541 S.E.2d 595, 598-99; State ex rel. Copley v. Carey, 141 W. Va. 540, 549, 91 S.E.2d 461, 467 (1956). Thus, despite the assertions of Fidelity and SFAA, Curtis in no way conflicts with Judge Wilkes’ answer to the certified question.

Fidelity’s argument would entirely foreclose relief for consumers when the wrongdoing principal is bankrupt and cannot be sued, making it impossible to obtain a judgment against the

are intended as a protection is insolvency. To hold that the very contingency against which they guard shall, if it, happen, discharge them, seems to us bad law and worse logic. The liability of the surety in such cases is upheld by numerous authorities.” In re Quaker City Cold Storage Co., 45 F. Supp. 570, 572 (E.D. Pa. 1942) (citing Stone v. Hole, 223 P. 1085 (Colo. 1924)).

principal. In this circumstance, adopting Fidelity’s reasoning, the surety could avoid any payment on the bond, as it is attempting to do in the instant case. Such a holding would entirely undermine the statutory bond’s purpose and render the statute meaningless.

C. The bond does not preclude relief.

Fidelity argues that Mr. James has failed to satisfy the conditions of the bond before bringing suit against the surety. According to Fidelity, Mr. James must comply with the following conditions under the bond: (1) obtain a judgment against TBW; (2) issue an execution against that judgment; and (3) obtain the “assent” of the Commissioner of Banking to an action on the Bond. (Pet.’s Brief at 14.) The bond, however, explicitly states that “any person . . . aggrieved by the misconduct of the principal” may recover from the bond. (JA000039.) Further, the Mortgage Act requires that a lender obtain the bond precisely “for the benefit of consumers.” W. Va. Code § 31-17-4(e)(3). To align with the legislative purpose of the statute, the new bond form clarifies that direct suit is permitted against the surety when the principal is defunct or bankrupt and removes the requirement of assent to maintain an action on the bond.⁶ (See App. A to Amicus Curiae.) Any conditions set forth in the TBW/Fidelity bond that would prohibit direct suit against Fidelity must therefore be disregarded because such conditions not only conflict with the legislative purpose of the Mortgage Act, but also conflict with the Commissioner of Banking’s understanding of the bond requirement.

It is undisputed that the statutory basis for the bond exists for the benefit of harmed consumers. In fact, harmed consumers may bring a claim under the Mortgage Act without approval

⁶ The Commissioner has regularly provided consent under the prior bond language to allow consumers to proceed directly against a surety. This demonstrates that the Commissioner agrees that direct suit is appropriate, notwithstanding that the bond is a judgment bond. Moreover, the issue of Commissioner assent has nothing to do with the certified question before this Court.

of the Commissioner of Banking pursuant to West Virginia Code § 31-17-17(c), which provides that “[a]ny residential mortgage loan transaction in violation of this article shall be subject to an action, *which may be brought in a circuit court having jurisdiction, by the borrower* seeking damages, reasonable attorneys fees and costs.” (emphasis added). In nearly identical circumstances, West Virginia courts have routinely permitted consumers to pursue relief directly from a surety bond based on the statutory language of the relevant act. See, e.g., Miller v. WV Mortgage Store Corp., No. 12-C-253 (H) (Fayette Co. Cir. Ct. W. Va., Dec. 31, 2012); Lester v. The Bank of New York, No. 09-C-477 (Mercer Co. Cir. Ct., W. Va. Aug. 19, 2011); Jenkins v. Citimortgage, Inc., AP 2:11-ap-02008 (Bkr. S.D.W. Va. Aug. 3, 2011); Stayer v. Litton Loan Serv., LP, No. 08-c-3157 (Kan. Co. Cir. Ct., Aug. 18, 2010); Smith v. JPMorgan Chase Bank, N.A., 2:10-cv-709 (S.D. W. Va. Sept. 13, 2010) (JA000132-149.)

Importantly, “when a surety bond is issued to satisfy the requirements of a statute, the bond will be construed in conformity with the legislative mandate Consequently, whatever is included in the bond, and is not required by the law, must be read out of it” Gloucester City Bd. of Educ. v. American Arbitration Ass’n, 755 A.2d 1256, 1264 (N.J. Super. A.D. 2000) (citing multiple authorities); see also, e.g., State ex rel. Pope v. U.S. Fire Ins. Co., 145 S.W.3d 529 (Tenn. 2004); Davis v. First Indem. of Am. Ins. Co., 56 S.W.3d 106, 111 (Tex. App. 2001); Durant v. Changing, Inc., 891 P.2d 628, 631 (Okl. App. 1995). As a result, neither Fidelity nor the Division of Banking may contravene the clear intent of the West Virginia Legislature through reference to the language of the bond. See, e.g., Apollo Civic Theatre, Inc. v. State Tax Com’r, 223 W. Va. 79, 672 S.E.2d 215 (2008) (agency’s interpretation must comport with the intention of the statute); Cruz-

Mendez v. ISU/Ins. Servs. of San Francisco, 722 A.2d 515, 523 (N.J. 1999) (insurers' choice of language may not circumvent the statute's intent).

An issue similar to the one before this Court arose in the case Becker v. Four Points Inv. Corp., 708 N.E.2d 29 (Ind. App. 1999), where the Indiana Court of Appeals held that a consumer could file suit directly against a mortgage broker surety when the broker was defunct. In Becker, the plaintiffs made various payments to a loan broker company to secure financing. Id. at 30. The broker failed to secure financing for the plaintiffs and refused to return their payments. Id. The plaintiffs filed suit against the broker company, which became defunct, and its bond company under Indiana's Loan Brokers Statute, Ind. Code § 23-2-5-1 et seq. In evaluating the legislative intent of the statute, the Indiana Court of Appeals held:

[I]t appears that the primary and perhaps sole purpose of the statute is to regulate loan brokering in an effort to protect those who transact business with loan brokers. It is entirely consistent with this purpose that the state would require a bond to protect the interests of individuals who are harmed by a loan broker and have no other recourse due to a loan broker's inability to pay damages due to bankruptcy, dissolution, or other events.

Id. at 31. When the bond company claimed that consumers should not be allowed to recover the bond proceeds, the court pointed to the section of the statute providing consumers with a private right of action against loan brokers, similar to the West Virginia Mortgage Act. See Ind. Code § 23-2-5-15; W. Va. Code § 31-17-17(c). The court found, after noting that nothing in the statute precluded consumers from obtaining payment through bond proceeds, that the "purpose of the statute supports an interpretation allowing bond proceeds to be used whenever a claim for damages is successfully made against a loan broker who is insolvent." Id. at 31. The court therefore held that

the Loan Brokers Statute did not preclude claims against the bonding company brought by consumers seeking relief for broker misconduct. Id. at 32.

The Becker opinion has direct application to the issue before this Court. West Virginia and Indiana require the bond for the same reason: to protect consumers against bankrupt and judgment proof lenders and brokers. Furthermore, similar to the Indiana statute, harmed West Virginia consumers may bring a claim under the Mortgage Act without approval of the Commissioner of Banking pursuant to W. Va. Code § 31-17-17(c), “[a]ny residential mortgage loan transaction in violation of this article shall be subject to an action, which may be brought in a circuit court having jurisdiction, by the borrower seeking damages, reasonable attorneys fees and costs.” Similarly, no language in the Mortgage Act precludes payment through bond proceeds to harmed consumers for the misconduct of brokers or lenders. The bond and cause of action provisions of the Mortgage Act thus establish that the statute exists for the benefit of West Virginia consumers.

Fidelity asserts that the specific bond language prescribed by the Commissioner of Banking takes precedence over the language in the Mortgage Act under rules of statutory construction. (Pet.’s Br. at 19.) Fidelity argues that the language in the Mortgage Act requiring the bond “for the benefit of consumers” is general and that the delegation language to the Commissioner is specific, such that the conditions prescribed by the Commissioner in the bond form at issue do not interfere with the purpose of the statute. (Pet.’s Br. at 19-20.) This interpretation of the statute is misguided, as the bond provisions of the Mortgage Act provide a general delegation to the Commissioner for the specific purpose of protecting West Virginia consumers. See W. Va. Code § 31-17-4. Further, the Commissioner recognizes that consumers should be permitted to go after the bond in these circumstances based on her reformation of the bond form. Indeed, if this Court accepts Fidelity’s

position, the Commissioner could write all liability out of the bond—clearly this is not permitted under the statute. The West Virginia Legislature intended that the bond be posted to provide protection to consumers who were aggrieved by lenders that may in the future become bankrupt. “[A] statutory bond must be construed and enforced in accordance with the purposes of the statute creating the obligation.” Durant, 891 P.2d at 631. The Commissioner’s clarification that consumers may pursue the surety directly when a principal is bankrupt aligns with the statutory purpose of the bond. Thus, the bond language does not preclude direct suit against a surety in the situation before this Court.

D. West Virginia consumers have no guarantee that they can obtain relief for the misconduct of a bankrupt and judgment proof lender unless they can bring suit against the surety.

In many predatory lending cases, harmed West Virginia consumers struggle to obtain full relief for their injuries because the mortgage lender is bankrupt and judgment proof. The TBW confirmation order specifically precludes mortgage borrowers from bringing any claims against TBW, and consumers are unable to obtain a judgment against TBW. Many consumers who have been harmed by predatory lending practices are poor and survive on a fixed income, and thus do not have the resources to avoid foreclosure or seek other legal remedies to obtain relief. Even when other parties are brought into the suit, relief can still be limited or nonexistent. If this Court adopts the position of Fidelity and holds that a consumer must obtain an enforceable judgment against a bankrupt principal, the statutory bond would be rendered a nullity. The bond was established by the West Virginia Legislature for a specific purpose: to provide relief to harmed consumers who have suffered injuries caused by the misconduct of a bankrupt lender. The result Fidelity wishes to obtain significantly harms West Virginia consumers and interferes with the statutory purpose of the bond

provision. This Court should not allow Fidelity and other sureties to disregard their legal obligation to West Virginia consumers.

Fidelity claims that Mr. James has misrepresented that he cannot obtain relief for TBW's misconduct because he could have either pursued relief against TBW in its bankruptcy or pursued relief against the other parties in the case below. (Pet.'s Br. at 21.) Fidelity ignores the fact that the other parties to the case are responsible for separate injuries to Mr. James, and thus there is no guarantee that he will obtain relief for TBW's specific misconduct arising out of its illegal lending practices. Fidelity also ignores the immense hurdle it wishes to create by forcing West Virginia consumers to pursue claims against defunct lenders in out-of-state bankruptcy proceedings. Fidelity's position is especially problematic when Chapter 11 bankruptcy plans are confirmed years before an individual such as Mr. James discovers the factual basis of his legal claims or when the Chapter 11 plan liquidates the assets of the lender/debtor and provides for individual consumers to receive nothing, as is the case here. (See JA000195.) Both of Fidelity's arguments should be rejected.

Fidelity argues that Mr. James should have pursued a claim against TBW in its Florida bankruptcy to obtain relief. As noted previously, TBW filed for Chapter 11 bankruptcy protection in the Middle District of Florida on August 24, 2009. The deadline to file claims in the bankruptcy passed over three years ago, and TBW's Chapter 11 plan was confirmed over two years ago. (See JA000184.) Upon the filing of the bankruptcy case, TBW is granted the protection of an automatic stay which prevents creditors from continuing or instigating collection efforts. Upon confirmation of the Chapter 11 plan, "the confirmation of a plan discharges the debtor from any debt that arose before the date of such confirmation." See 11 U.S.C. § 1141(d)(1)(A). TBW's plan was confirmed on July 21, 2011, well before Mr. James discovered the facts underlying his legal claims. Mr. James

should not be punished for failing to pursue a claim through TBW's Florida bankruptcy that he did not even know existed.

Fidelity wishes to obtain a result that would harm countless West Virginia consumers by depriving them of relief from bankrupt or defunct lenders or brokers. The bond provision of the Mortgage Act exists to protect consumers from the predatory lending practices of bankrupt lenders, yet Fidelity claims consumers could easily obtain relief for such lending misconduct from the assignee of a mortgage or by hiring out-of-state bankruptcy attorneys to pursue a claim against a lender that was discharged from bankruptcy in years past. Here, the Chapter 11 confirmation order specifically provides that any claims against TBW "shall be forever enjoined, barred and expunged with respect to the Debtors [TBW]." (JA000209.) Moreover, in many older cases, certain brokers and lenders never filed bankruptcy but simply became defunct. In this situation, there is no method to obtain service on the principal and obtaining a judgment against the principal is impossible. The practical impact of Fidelity's position would slam the door shut on a consumer's ability obtain full relief for the specific harm caused by a bankrupt or defunct lender. This Court should thus ensure that West Virginia consumers are protected in this instance by affirming the answer to the certified question provided by the Circuit Court of Berkeley County.

Fidelity also argues that Mr. James can obtain relief from the other parties in the case below. Fidelity points to the fact that Mr. James has reached a settlement with BANA, the servicer of the mortgage loan. Fidelity believes that this settlement is evidence of Mr. James' ability to obtain relief for TBW's misconduct, and thus Fidelity should be entitled to a setoff or credit to the settlement. This question has no bearing on the issue before this Court and should only be decided after

judgment. In the event judgment against Fidelity exceeds Mr. James' settlement with BANA, such judgment would certainly result in liability for Fidelity.

Even if this issue were relevant to the certified question, there is no evidence that Mr. James has obtained complete relief for his injury arising from TBW's misconduct or that Fidelity is entitled to a setoff. Under West Virginia law, the threshold question of whether a party is entitled to any settlement credit is based on whether the loss is a single, indivisible loss. Biro v. Fairmont Gen. Hosp., Inc., 184 W. Va. 458, 461, 400 S.E.2d 893, 896 (1990) ("In order to permit a verdict reduction reflecting a prior settlement, Zando held that there must be a 'single indivisible loss arising from the actions of multiple parties who have contributed to the loss.' ") (citation omitted). A setoff may be appropriate when there is an indivisible injury. 184 W. Va. at 461, 400 S.E.2d at 896. If there are divisible, separate injuries causing loss, then no setoff will be allowed. Id. at 462, 400 S.E.2d at 897 (concluding that an injury from negligently performed surgery was divisible from injuries resulting from a fall in the hospital and thus no offset was warranted).

As alleged in the Complaint, Mr. James suffered different injuries from the defendants in the case below. For example, within a few short months after the loan closing, force-placed insurance was added to the mortgage account. (JA000004.) When BANA obtained the servicing rights of the loan, it continued to charge Mr. James for the force-placed insurance, even though Mr. James had purchased his own hazard insurance policy. (JA000004.) Mr. James thus brought a claim against BANA pursuant to section 46A-2-127 of the West Virginia Code for misrepresentations in debt collection. (JA000008.) Mr. James alleges that BANA breached the loan agreement by force-placing insurance when he already had in place a hazard insurance policy that met the requirements of the agreement. (JA000008.) Mr. James further alleged that BANA violated section 46A-2-127 of the

West Virginia Code by misrepresenting the amount of its claim against him when it attempted to collect the force-placed insurance premium. (JA000008.) Section 46A-2-127 provides “[n]o debt collector shall use any fraudulent, deceptive or misleading representation or means to collect or attempt to collect claims or to obtain information concerning consumers.” Consumers may obtain actual damages and civil penalties in the amount of \$4,750 for violations of this section. W. Va. Code §§ 46A-5-101(1) & -106. Thus, Count IV arises from a separate injury to Mr. James that does not involve the misconduct of TBW. BANA’s settlement relates to this separate misconduct.

Fidelity, in its role as the surety for TBW, is liable only for the claims involving the illegal loan origination. While Fidelity argues that the holder of the loan is also liable for the illegal loan origination, Fidelity ignores the fact that a consumer must still prove that the holder is liable for acts of a lender under the theory of assignee liability. For example, the holder may assert a holder-in-due course defense that limits Mr. James’ ability to obtain complete relief. Further, an assignee may have limited assets, thus limiting the relief available to Mr. James. If part of Mr. James’ settlement with BANA included its alleged interest in the illegal loan itself, then Fidelity may be entitled to a settlement credit or setoff. To be clear, however, the settlement with BANA did not provide complete relief to Mr. James, and any question of setoff cannot be resolved until the end of the litigation. Fidelity is thus incorrect to assert that Mr. James will obtain an alleged “double recovery” if relief is obtained from Fidelity. (Pet.’s Br. at 8.)

E. Public policy supports Mr. James’ ability to obtain relief directly against the surety to a mortgage bond.

Fidelity finally argues that public policy prohibits a consumer from suing a bond directly. To illustrate this point, Fidelity cites to the United States Supreme Court case United States for Use and

Benefit of Midland Loan Finance Company v. National Surety Corporation, 309 U.S. 165 (1940), where the Court found that claims made under a statutory postmaster's bond could not be permitted without the consent of the United States. The United States Supreme Court case has no relevance to the present matter. To begin, the Commissioner of Banking has issued a bond form clarifying that neither her assent nor a judgment against the principal is required to pursue claims against the bond. The Commissioner's decision to mirror the legislative intent of the bond provision of the Mortgage Act demonstrates the clear public policy supporting the ability of a consumer to pursue relief from the bond directly, and weighs heavily against Fidelity's position. Furthermore, this is not a situation where millions of individuals will maintain an action on a bond for alleged lost mail, thereby increasing costs for the Government. Here, West Virginia consumers may bring suit against a surety for the misconduct of specific mortgage lenders such as TBW. Allowing consumers to have a direct claim against sureties does not interfere with the interests of the State of West Virginia or the Commissioner of Banking. In fact, such allowance directly supports their respective interests.⁷

Moreover, Fidelity claims that if direct suit is allowed against a surety, it will not be allowed to raise any defenses to the consumer claims. Fidelity points again to the Curtis decision, where this Court found that sureties may not assert their principals' defenses pursuant to section 45-1-3 of the West Virginia Code once judgment has been entered against the principal. ___ W. Va. ___, 748 S.E.2d at 675. However, the issue before this Court is quite different than the issue presented in Curtis. With regard to the right to assert defenses, this Court noted in Curtis that "the issue for our resolution is whether the surety on a judgment bond who does not receive notice of an action prior

⁷ The question of government interest and Commissioner assent has no bearing on whether direct suit is allowed against the surety. Of course, the Commissioner has clarified that her assent is not necessary or appropriate in this context.

to the entry of default judgment against its principal is obligated to pay the judgment without the opportunity to present defenses that would have been available to its principal.” __ W. Va. __ , 748 S.E.2d at 672. This Court proceeded to find that entry of judgment against the principal precluded the surety from raising defenses because the bond at issue is a judgment bond. __ W. Va. __ , 748 S.E.2d at 675.

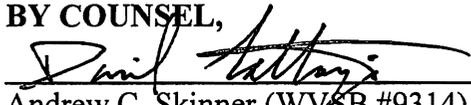
In the present matter, liability has not been established and no judgment has been entered against TBW. Because the surety is jointly and severally liable for the misconduct of its principal, Fidelity may assert defenses to the allegations in the Complaint. While SFAA argues that the judgment bond label prohibits a consumer from suing a surety directly, this is not the case. Although this Court has defined the bond at issue as a judgment bond, this characterization does not preclude a consumer from bringing direct suit against the surety. See Curtis, __ W. Va. at __ , 748 S.E.2d at 671 (stating that a surety may be sued in the initial action along with the principal (quoting Howze v. Surety Corp. of Am., 584 S.W.2d at 265)). If the judgment bond was interpreted to preclude direct suit, such an interpretation would contradict the statutory purpose of the bond provision. As explained above, the Mortgage Act requires all mortgage lenders operating in the state to obtain a bond “for the benefit of consumers.” W. Va. Code § 37-17-4(e)(3). The bond must therefore be construed and enforced in accordance with its statutory purpose, which is to provide relief to harmed consumers for the specific misconduct of bankrupt and judgment proof mortgage lenders. This Court does not need to revisit Curtis in order to affirm the Circuit Court of Berkeley County’s answer to the certified question.

VI. CONCLUSION

The West Virginia Legislature created a remedy to protect consumers from the situation before this Court: the statutory mortgage lender bond. This statutory bond, for which Fidelity is surety, provides relief for consumers that have been defrauded or otherwise harmed by a bankrupt mortgage lender. Fidelity attempts to shield itself from any liability under the bond by requiring Mr. James to undertake a legal impossibility (judgment against TWB) prior to collection from Fidelity. Fidelity cannot evade its statutory obligation to provide compensation to consumers for the misconduct of the principal. As a result, Fidelity's arguments must be rejected and Mr. James should be permitted to pursue the only relief available for TBW's misconduct — by maintaining his suit against TBW's surety, Fidelity. This Court should therefore affirm the answer to the certified question provided by the Circuit Court of Berkeley County.

Respectfully submitted this 4th day of March, 2014.

**FRANKLIN W. JAMES, JR.,
BY COUNSEL,**


Andrew C. Skinner (WVSB #9314)
Skinner Law Firm
P.O. Box 487
Charles Town, WV 25414
(304) 725-7029
andrewskinner@skinnerfirm.com

and

Daniel F. Hedges (WVSB #1660)
Daniel T. Lattanzi (WVSB #10864)
Mountain State Justice, Inc.
1031 Quarrier St., Suite 200
Charleston, WV 25301
(304) 344-3144
dan@msjlaw.org
danlattanzi@msjlaw.org
Counsel for Respondent

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 13-1179

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,

Defendant Below / Petitioner,

v.

(CIVIL ACTION NO. 13-C-4
Judge Christopher C. Wilkes)

FRANKLIN W. JAMES, JR.,

Plaintiff Below / Respondent.

CERTIFICATE OF SERVICE

I, Daniel T. Lattanzi, counsel for Respondent, do hereby certify that the foregoing *Respondent's Brief* has been served upon the following counsel of record as indicated below on the 4th day of March, 2014:

William W. Booker, Esq.
Thomas H. Ewing, Esq.
Erin J. Webb, Esq.
Kay Casto & Chaney PLLC
707 Virginia St., E., Suite 1500
P.O. Box 2031
Charleston, WV 25327
Via Hand Delivery

Kathy M. Santa Barbara, Esq.
518 West Stephen Street
Martinsburg, WV 25401
Via U.S. Mail

Archibald Wallace, III, Esq.
Thomas J. Moran, Esq.
WallacePledger, PLLC
7100 Forest Avenue
Suite 302
Richmond, Virginia 23226
Via U.S. Mail

Carrie Goodwin Fenwick, Esq.
Goodwin & Goodwin, LLP
300 Summers Street, Suite 1500
Charleston, WV 25301
Via Hand Delivery


Daniel T. Lattanzi (WV SB # 10864)