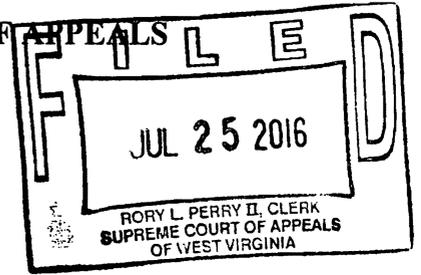


BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS
NO. 16-0127



VALENTINE & KEBARTAS, INC.
DEFENDANT BELOW/PETITIONER

V.

GARY J. LENAHAN
PLAINTIFF BELOW/RESPONDENT

**VALENTINE & KEBARTAS, INC.'S REPLY TO RESPONDENT'S RESPONSE TO
PETITION FOR APPEAL**

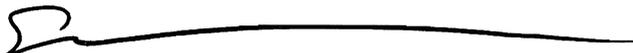

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ARGUMENT

After the bench trial in this case, the Court requested and was provided proposed Findings of Fact and Conclusions of Law from counsel. In Plaintiff's counsel's post-trial brief, for the first time in the case, the argument was made that Valentine & Kebartas, Inc. (hereinafter V&K) "ramped up" its attempt to collect the debt from Plaintiff by increasing the volume of automated dialer calls it made to the phone number it had been given by ADT for Plaintiff, starting on March 26, 2012, when it made 6 calls to Plaintiff. This factual argument was never presented as a theory of the case in discovery or supported by Plaintiff in his deposition in the case; in fact, Plaintiff testified in his deposition he had no idea when or how many times V&K attempted to contact him by phone but he thought it was less than 100. In any event, in order to attempt to create some factual basis for the lower Court to rule in Plaintiff's favor after the presentation of evidence, Plaintiff's counsel obviously looked closely at V&K's account notes and came up with the concept that after the first two weeks of calling the phone number it was given for Plaintiff, because it called 22 times the next week; the argument was created that V&K intended to harass Plaintiff by calling his phone by virtue of this "ramping up" of collection calls. After the submission of the post-trial briefs by counsel, the Court issued a "memorandum" letter to counsel adopting Plaintiff's counsel's proposed findings of fact and conclusions of law with modification; and, asked for the submission of a proposed Verdict Order from Plaintiff's counsel consistent with the discussion in the Memorandum.

In the lower Court's Memorandum, it stated on page 3 of 4, that it agreed with Plaintiff's counsel's assessment of the facts gleaned from V&K's account notes and the trial Court Judge Burnside concluded that the collection calls starting on March 26, 2012 were intended to annoy or harass the Plaintiff instead of V&K intending to legitimately "communicate" with him, based upon

the factual finding offered by Plaintiff's counsel that the frequency of calls to the number provided by ADT for Plaintiff was increased starting with this week of March 26th. Thereafter, the Court then entered the Verdict Order in this case making the same findings of fact and conclusions of law. The entire factual and legal basis for the adverse verdict against V&K simply became the following: that from March 10, 2010 through March 24, 2010, V&K made 22 unanswered phone calls to the phone number given to it by the original creditor for Plaintiff that were unanswered (obviously for some reason unknown by V&K; that Plaintiff never returned a call made by V&K; then V&K called the same number 22 times during the week of March 26, 2012; and proceeded to place unanswered calls to the same number through September, 2012; there were no calls in October and only 7 in November until Plaintiff actually answered a call. From these very basic facts, the Plaintiff's counsel and the Court drew a number of unsupported factual findings and conclusions based upon inferences from these facts; and, concluded that V&K was not attempting to call Plaintiff to attempt to collect a debt but was instead simply intending to harass him by calling his phone "continuously or repeatedly" in violation of *West Virginia Code*, 46A-2-125(d).

Although there clearly was no additional evidence presented at the trial of the case from which it could possibly be concluded that V&K intended to harass or annoy Plaintiff other than this "call frequency" during the week of March 26th in which it called him on 4 days; Respondent takes the position in this appeal that the trial Court's conclusion was based upon a proper analysis of the facts and law of the case; and, that the sole basis of the adverse verdict in this case is simply the finding that there was a "ramping up" of unanswered calls by V&K which fact, standing alone, evidenced its intent to annoy or harass Plaintiff instead of try to communicate with him in an attempt to collect an alleged valid debt. In fact, Respondent clearly takes the position that this case is not a

case that involves an assessment of the volume of calls over a specific period of time and whether the debt collector called too many times over that period; it is simply contended that the verdict against V&K is appropriate because it called the phone number provided to it for Plaintiff; regardless of whether it even had the requisite intent to harass Plaintiff specifically or just the person who owned the phone number that was being called; simply because for 1 week out of 36, it called the phone number 22 times when previously it had called the same number 22 times in a 2 week period. The terms “ramping up”; “ramped up”; increase in frequency of calls or something similar to support this erroneous factual finding that V&K intended to harass Plaintiff is used in Respondent’s brief no fewer than 10 times; it was this one fact alone that Plaintiff’s counsel and the Court erroneously relied upon to support a factual finding based purely on circumstantial evidence that Petitioner **intended** to harass Respondent. The support for the adverse verdict was not the number of calls made over the nine month time period in question; not any communication every actually had between the parties; not any other conduct of Petitioner other than it calling Plaintiff 22 times in 4 days during one week before which and after which it never made that same level of calls to the number it had been given.

In Respondent’s brief, counsel in numerous places, calls Petitioner’s arguments that this adverse verdict against it was the result of an abuse of discretion, absurd; nonsensical; unfounded; etc.; when Respondent’s arguments in support of upholding the lower Court’s decision is simply not logical, consistent with any statement of law, or based upon a reasonable interpretation of the very limited facts regarding V&K “intent” to engage in debt collection. Amazing, Respondent’s counsel basically argues in the later part of the Response Brief that it would have been better for V&K to simply have sued Plaintiff (an individual who took the position that he never owed the debt but who

never once in 9 months bothered to answer one of 250 phone calls to state this fact); than to have called him 22 times in one week after he refused to answer the phone or call it back after having made 22 the first two weeks for whatever reason(s) unknown by V&K. The adverse verdict against V&K is based solely upon an unreasonable and flawed inference of fact drawn from one point in time: that after V&K placed 22 unanswered calls to the number it was provided by ADP for Plaintiff during March 10th through March 25th; that it then on March 26th made the conscious decision that that because it must have had the correct phone number for Plaintiff; that because it had called that number 22 times without communicating with Plaintiff; that Plaintiff must have decided he did not want to talk to it and would never answer a call or return a call; therefore, it might as well then just begin calling the phone number given with the intent not to contact Plaintiff to verify his identity; determine if he disputed the debt; determine if the two parties could reach an agreement as to the payment of the debt; but instead to simply call the number it was given with the intent to harass whoever was on the other end of the phone for the next 4 days. This attempt to draw a conclusion as to the state of mind of V&K on March 26 based upon the one fact that it knew; that 22 calls were unanswered; and then to attempt to draw a conclusion from this **one** fact that it solely **intended** to then call the number at issue for purpose of harassing the owner of the phone instead of attempt to communicate with the Plaintiff to collect a debt which it had every legal right to do; is what is absurd. Then, Respondent spends time in the last 8 pages of the Brief arguing why debt collectors are horrible companies and how they routinely intent to harass someone who can't pay a debt in today's economic climate; how in this case V&K should have done a number of other things other than try to get the person they assumed was the debtor at the number they were given by the creditor to simply talk to it on the phone about the debt; and that there is no other possible explanation for the

conduct of V&K other than to conclude that it intended to spend 9 months calling someone who did not answer the phone as a simple plan to harass that person; the debtor or even anyone else. This argument is simply unsupported by any logical and unbiased analysis of the facts of this very basic case.

A. *West Virginia Code, 46A-2-125 and 125(d).*

Respondent takes the position that this is not a “call volume” case; that this case is about “call frequency”. Respondent argues that the verdict in this case is supported under the law not because V&K called the phone number it was given by ADP for Plaintiff 251 times in 9 months but solely on the basis that it called that number 22 times in 4 days when previously it had only called 22 times in 15 days without communication with the owner of the phone; thereafter, any number of calls made after that 4 day period the week of March 26th were made solely for the purpose of harassing the owner of the phone regardless if it was Plaintiff or not. The logical extension of this argument is that Respondent and the trial Court clearly believe then that had V&K only called the number given 10 or 11 times the week of March 26th without answer as it had the two weeks prior that there would then have been no factual basis of the finding V&K violated the law. In order to understand just how flawed this reasoning is, we only have to look at the what is clearly the conclusion of the Court: that in order for a debt collector to comply with Code, 26A-2-125, it may only attempt to contact a debtor by phone in order to confirm the debtor’s identity; to determine whether the debt is disputed or valid; to determine if some form of agreement on the payment of the account can be reached between the parties; by placing a series of calls to the number provided with a consistent pattern and number of calls over a short period of time then simply sue the debtor in a jurisdiction that the collector believes the debtor lives in; otherwise, any further manner to attempt to collect the debt will

be deemed harassment and not for a legitimate business purpose. This is not what the law requires. The only other alternative interpretation of the conclusion reached by the trial Court and supported by Plaintiff's counsel is simply that no violation of the law would have been found and it would have been entirely appropriate under the law for V&K to have continued to call the number it had been provided by ADT, without response from the owner of that phone, for the 9 month period of time that it did call, so long as it didn't call more than 22 times in any two week period or didn't call more than 3 times a day as it had previously done before March 26th; i.e., there would have been no factual basis to conclude that V&K intended to harass the owner of the phone number it was given by calling that number "repeatedly or continuously" had it simply continued to call the number without response on average 10 times a week for 9 months (360 calls) so long as it did not at any point in time "ramp up" the number of calls made. We can see how the logical extension of the findings and conclusions made by the lower Court and supported by Plaintiff's counsel demonstrates that the adverse verdict against V&K was an abuse of discretion.

And even more important and telling in this case is that Respondent draws this Court's attention to the fact that the trial Court concluded there was a "sudden and dramatic increase" in the number of calls after the first two weeks and that this sole fact is what properly supports a violation of 125(d); the fact V&K made 22 calls to Plaintiff that went unanswered the week of March 26, 2012 is the only fact that the lower Court relied upon to conclude that it intended to harass Plaintiff and not the total number of calls made; and that every call after that point could only have been made with the intent to harass. This flawed argument of both fact and law dictate that this Court overturn the decision of the trial Court.

First, this crucial factual finding that V&K "ramped up" its calling campaign after March 24,

2012 when it proceeded to call 22 times over the four days of March 26th through the 29th is simply not evidence of “ramping up” or increasing the call frequency **starting on March 26th** when the undisputed evidence of record is that this was simply the one week out of 9 months in which the most calls per week were made. What is also clear is that this week could not be the “threshold” of when V&K “ramped up” its call frequency thereafter because in no week after that from April through November, 2012 did V&K **ever again** call 22 times; on no day after that week did V&K **ever** call 5 to 6 times a day. The following is the monthly call frequency after March 29th:

April: 54 calls with 14 being the highest number of calls per week.
May: 53 calls with 13 being the highest number of calls per week.
June: 34 calls with 10 being the highest number of calls per week.
July: 25 calls with 8 being the highest number of calls per week.
Aug.: 17 calls with 5 being the highest number of calls per week.
Sept.: 27 calls with 11 being the highest number of calls per week.
Oct.: No calls.
Nov.: 7 calls with 4 being the highest number of calls per week.

It is undisputed that factually, after March 26th, not only was there not a “ramping up” or increase in either daily, weekly or even monthly calls; there statistically was a decrease in the number of daily, weekly and monthly calls. Therefore, the basic factual foundation of Plaintiff’s counsel’s and the lower Court’s conclusion of law in this case is simply, unequivocally not supported by the facts of the case. The trial Court’s only support for the conclusion that the call frequency evidenced V&K’s intent to harass Plaintiff (because there is no other fact possibly supporting such a conclusion as the two parties didn’t speak until the 251st call) was that there was an increase in the number of calls after March 24th is simply incorrect; there were 4 days in which 22 unanswered calls were made then there were 8 months in which a decreasing number of unanswered calls were made, cumulating with the month of October, 2012 when not one single call was made and November, 2012 when only 7 calls were made in 3 weeks before Plaintiff

actually picked up the phone for the first time. The undeniable fact of this case is that the average monthly or weekly call frequency **decreased** immediately after the point in time that Plaintiff's counsel and this trial Court concluded that V&K **formed the intent** to begin to harass Plaintiff by "ramping up" the call frequency. The lower Court's conclusion that 22 calls in 4 days followed by a lesser volume of calls thereafter evidenced V&K intent to harass Plaintiff was an abuse of discretion; and, using this improper factual basis to support its conclusion of law that V&K intended to harass Plaintiff in violation of 125(d) after March 24th, 2012, was necessarily erroneous as a matter of law.

Respondent's counsel argues in their Brief that Judge Burnside made "several findings of fact" that fully support a conclusion that V&K's conduct was intended to annoy, abuse, oppress or threaten Respondent; then, they go on again to simply state that the only basis of this conclusion was after the first 22 calls over a two week period, a sudden increase in the frequency of the calls had no conceivable purpose other than to annoy, abuse, oppress or threaten Respondent. This is simply not accurate; the Court relied on one fact alone to support this conclusion of fact that V&K intended to harass Plaintiff; the fact that V&K called Plaintiff's phone 22 times between the 26th and the 29th. And as stated in the Petition for Appeal, the trial Court took the simple fact that the 22 calls the week before went unreturned or unanswered coupled with the fact that for the next week 22 calls were then made, as evidence that Plaintiff did not want to talk to V&K; that V&K should have somehow drawn this conclusion from this very limited set of facts; then, based upon what would clearly have been speculation on behalf of V&K at that time, the only explanation for the fact that it had not talked to Plaintiff during the first two weeks of calling him and then it called 22 times the next week was that it simply

determined that from that point on, it intended to call the same number to annoy the owner of the number instead of continue to try to communicate with the Plaintiff for the legitimate purpose of attempting to collect a debt. This is such an illogical conclusion and inference from two basic facts that it defies logic to support.

The flawed inferences of fact that Plaintiff's counsel and this Court have relied upon to infer V&K's state of mind or intent to harass compound and build upon themselves to the extent that the factual conclusion meets the definition of arbitrary and capricious: V&K was given a phone number by a creditor which was assumed to be Plaintiff's; however, this fact was unconfirmed by the fact that Plaintiff never answered the phone or returned a call after attempts were made to contact him at that number. As stated in the Petition for Appeal, it is certainly not unusual in this day and age for someone's phone number to change; it simply is not fair to work off the assumption that V&K is charged with having assumed the phone number was correct without verification. Next; V&K had no way to know the phone was a cell phone; that the phone had caller ID; that Plaintiff ever knew it specifically was calling; that Plaintiff not only knew it was calling but as to which debt that he owed and that Plaintiff was not answering the phone calls from creditors because he didn't have money to pay his debts; or, that he disputed this debt in question. V&K had no way of knowing any of these facts which could have allowed it to infer that because its calls were not being answered or returned that this had to have meant the Plaintiff himself intended not to speak to it about the debt it was trying to collect. This conclusion of fact is at the heart of the lower Court's erroneous conclusion that V&K consciously decided to start to increase the volume of calls to the Plaintiff to harass him knowing that he would not answer or return a call. This inference of fact and subsequent finding of fact by the

Court is just not a logical fact that could have been drawn from the limited facts V&K had available to it; and this conclusion of fact is certainly not sufficient to support a finding that a commercial entity then formed the intent to harass another person. To the extent that one attempts to draw some meaning from these limited facts as to the intent of the parties from their actions; Petitioner would argue that it is more reasonable to conclude that if 22 calls to a residence go unanswered and no return call made; that the exact opposite conclusion would seem logical other than the one that the person intended to be reached knows he is being called but doesn't want to find out who is calling; why the person or calling; or how to stop the calls; the most logical conclusion to be drawn from these very basic facts is that a reasonable person must either not know that the calls are being made or must not be able to answer the phone or return a call. This is a more logical conclusion than one can draw, not the opposite conclusion by the Court that V&K should have been deemed to know that it was calling Plaintiff and that Plaintiff didn't want to talk to it.

Further, Respondent's argument that V&K's position is absurd because it places some unreasonable burden on a person to engage the person calling "by giving in to the harassment" is self-serving and not reasonable. This type of argument requires the collector to draw assumptions that it cannot make based upon the limited knowledge that it has: that it has made unanswered calls to someone it hopes it can later affirm is responsible for a debt it is trying to collect or that; at the minimum, it will communicate with someone who will dispute the debt; and the simple fact that calls go unanswered means something more specific than just the fact that the calls are not getting answered. Respondent would argue just the opposite inferences should be drawn from this very limited set of facts: that the calls are not being received; that the

person being called cannot answer the phone or return a call for any of a number of reasons; vacation; sickness; etc. The point is that is it not unreasonable for a commercial entity to assume that if it is calling someone who truly does not want to engage it, that the person will answer a call and state same; return a call and state same; or contact the caller in some manner and inform the caller that there is no reason to continue to make the calls; this conduct by the person being called would be the more reasonable thing for the caller to assume would occur than the opposite.

B. The Court's erroneous finding of intent on behalf of V&K to support the conclusion that it intended to harass Plaintiff

First of all, Respondent illogically argues that whether V&K knew that it had the correct phone number for Plaintiff and that it was actually calling Plaintiff as a requisite for the finding that it had formed the intent to harass Plaintiff, is irrelevant and absurd. Respondent's argument is again not persuasive.

The trial Court, in order to support its finding that V&K intended to harass Plaintiff, made findings of fact unsupported by the evidence or unreasonable inferences from the evidence. Respondent argues that Petitioner's challenge to this error is supported by the facts but is also irrelevant because the lower Court could have concluded that V&K was liable for having intended to harass anyone that it attempted to call with increased frequency even it has no idea who it was calling because *West Virginia Code*, 46A-2-125 protects "any person" and not just the debtor. In other words, Respondent's counsel wants this Court to accept the argument that V&K could have formed the requisite intent to have harassed someone it didn't think owed the debt or just someone it was making calls to at some random number; that the intent to harass is not necessary to be tied to a debtor but to anyone who owns a phone if the collector happens to be

calling the wrong number. Surely, Counsel doesn't seriously believe that debt collectors just pick numbers out of a phone book and decide to call that number every day for weeks or months with no purpose of attempting to communicate with someone about a debt it is trying to collect, but instead to just annoy someone. Respondent's argument in this entire case has always missed one critical piece of analysis; that in order to harass someone else, the intent to harass has to be formed. It is a factual impossibility for V&K to have formed the intent to harass someone other than Plaintiff if it was attempting to collect on the debt assigned to it by ADT to collect from Plaintiff. However, until it made some form of contact with Plaintiff to verify his identity; by writing or call; there is no way for it to know that Plaintiff is at the number dialed. The Undersigned can foresee a scenario in which "a person" who is not "the consumer" would be the victim of harassment by a debt collector under the following fact pattern. A collector calls a number it is given by the creditor or which it believes otherwise is the number for the debtor; someone not the debtor answers the phone (spouse, relative, roommate, friend, etc.) and that person indicates that he/she is not the person the collector is trying to reach; maybe the person obtained the phone number for some reason; maybe the person knows the debtor in some manner; etc.; the collector then proceeds to continue to call this person at this number even though the person answering the phone says something like: I don't know who the person is you are trying to reach; the person is my ex; I will try to let the person know you called; I can't help you; etc. Under any number of scenarios like this, the Undersigned can foresee a situation in which it could be deemed annoying or harassing for the collector to then continue to call this "person" who is not the "consumer". This is obviously why the legislature thought it was proper to not limit the subject this section to the consumer but give other persons the ability to assert a

claim. But again, under such a fact pattern, the fact finder would still have a basis to conclude that the collector did not have a legitimate business reason to continue to call the person; not that the collector simply can be held liable for harassing someone by repeated or continuous calls simply by virtue of having called a number # number of times without communication. And again, this analysis is consistent with Petitioner's analysis of the case law cited in the Petition for Appeal that generally, in order to find a violation of 125(d), the plaintiff has to show simply more than a number of unanswered phone calls; there has to be some actual form of communication.

And, in addition, Plaintiff's counsel's argument that it is irrelevant whether V&K intended to call Plaintiff or just some stranger; that its attempt to call any number too frequently would still support the lower Court's conclusion of law that a violation of 125(d) is clearly not persuasive. The truth is that the lower Court **clearly** felt that it was necessary to make a finding that V&K was attempting to contact **Plaintiff** and that V&K knew it **was** calling Plaintiff because these are the conclusions of fact and law that the Court specifically made in paragraph 3 of the Court's conclusion of law which stated "the question for the Court is did the Defendant intend to harass Mr. Lenahan". In conclusion number 5, the Court held that "it is clear that Defendant knew it was calling Gary Lenahan". The trial Court based its conclusion of law that V&K engaged in harassing phone calls by concluding that it intended to call and harass Plaintiff, not some other "person". Again, although the lower Court erred in making the finding of fact that it made, it at least recognized that it was necessary to find a violation of 125(d) that V&K intended to harass Plaintiff instead of just having intended to place calls to someone and some number.

Petitioner would also point to some other arguments in the Response Brief that need to be

discussed. In Judge Burnside's "Memorandum", it was stated that "the Defendant intended to annoy or harass the Respondent to answer Petitioner's calls and play a debt that he denied owing". Respondent cites to this conclusion on page 12 of the brief. This conclusion is not supported by the evidence; V&K was never told by Plaintiff that he did not owe the debt; how could this have happened when Plaintiff never answered a call, returned a call or letter. Next, Judge Burnside's finding of fact number 4 in the Verdict Order attempting to support the conclusion that V&K knew it was calling Plaintiff, stated that "the telephone Defendant was calling was equipped with caller ID. Furthermore, a letter was sent to Mr. Lenahan's home which outlined the debt . . . before the first call was placed. As discussed in the Petition for appeal, the fact that Plaintiff's phone had caller ID could not have told a computer that V&K had the correct number. Also, the fact that it sent a letter that was not answered in any manner to Plaintiff's home address also did nothing to establish that the phone number was the correct number or that the address was even correct. Neither of these facts can form the basis to conclude that V&K knew it was actually calling the correct number. One fact that has not been discussed is that Plaintiff's cell phone number was not a (304) area code number or a WV number; so if any reasonable conclusion could be drawn as to what V&K should have believed it knew as fact, it would be logical that they would have questioned whether they had the correct number in the first place with having been given a West Virginia address for Plaintiff. Counsel states at page 23 of the Brief that Petitioner never testified it ever doubted that the telephone number given to it by its principal belonged to Respondent. This is not accurate and, even if it was not testified to, the opposite conclusion of fact cannot be inferred. In addition, at the beginning of the 251st call that Plaintiff did actually answer; the call in which he refused to

identify himself; the first thing the caller did was attempt to confirm the identity of the person who answered the phone; debt collectors routinely want to confirm who they are talking to before they discuss the account with the person on the other end of the phone; even when someone answers the phone, the caller does not assume the number is correct or the person on the other end of the phone is the debtor. This is certainly logical.

On page 24, paragraph 2 of the Brief; Counsel attempts to argue that V&K used a computer dialer to “shield itself” from liability in order to be able to argue that it the computer wouldn’t be able to understand the meaning of a voicemail. This argument is both unsupported by any facts, industry standard evidence, logic, etc. There is no prohibition against a collector using a computer dialer. Likewise; there is no legal argument that a collector should be somehow held to know what two computers can’t know by communicating with each other.

Respondent’s argument that Petitioner’s theory of the case somehow misplaces some burden in the consumer instead of focusing on the conduct of the debt collector; that Petitioner’s argument someone stands for the proposition that a person has to give in to harassment by answering their phone and saying something like: “I’m not the person you want”; I am the person who owed the debt but I’m not paying it”; I am the person who owes the debt but I can’t pay it”; etc. is again not persuasive. Petitioner’s challenge to the adverse ruling in this case is upon the factual basis for the ruling, the finding of fact made by the trial Court that without any communication from the Plaintiff (such as the above), V&K still could have somehow formed the intent to harass or annoy him knowing that if it ever did talk to him, he would have told it something consistent with the above. Petitioner’s argument is not changing the focus of the analysis of the fact but simply showing why limited facts like in this case cannot form a basis of a

finding of intent to annoy, abuse or harass. The analysis of V&K's conduct under the law has to be based upon a reasonable person standard and, to do that, one has to look at all the facts that V&K was aware of; one of these facts simply was that it had made phone calls to a number provided by ADT and no verification of the accuracy of the information was obtained simply by a lack of communication with the owner of the phone. The conclusion in the case that "the calls to Plaintiff were "not wanted" simply because the first 22 calls were not answered or returned is not a logical fact to draw.

C. Effect of 2015 Amendment to Consumer Protection Statute and *West Virginia Code*, 24A-2-125(d) specifically

Petitioner does not contend that the entire Amendment to the Act should be applied retroactively. What petitioner would specifically state at this time is that even if the 2015 amendment is not applied retroactively and is not deemed to be controlling under the facts of this case, the fact that the Legislature thought it was important enough to clarify section 125 with the amendment to add quantitative standards to the conduct of debt collectors regarding the ability to call a consumer should certainly be deemed instructive in this case. The fact that the legislature deems 30 calls a week and/or 10 conversations a week not too much by its very nature, should clearly shed some light on the fact that 22 unanswered calls a week, at the most, is not harassing. Further, if the legislature had even intended for facts such as in this case to support a violation of 125(d), i.e., "ramping up of calls", it could have clearly said such in the act: either the previous act of the amended provisions; however, there is no language anywhere to be found that supports the conclusion that calling 22 times a week after having called 22 times in 2 weeks is annoying, harassing or abusive. Petitioner recognizes that there is still a provision in

the amended 125(d) to permit a finding of harassment even if only 30 calls or less are made per week of 10 communications or less per week are had; but again, there has to be some other fact to establish same other than the sheer number of calls like in this case.

CONCLUSION

Based upon the arguments in the Petition for Appeal and the above, Petitioner respectfully requests that this Court reverse the ruling of the trial Court in this case and hold as a matter of law the V&K did not violate *West Virginia Code*, 46A-2-125 by the manner in which it attempted to communicate with Plaintiff to attempt to collect a debt, by phone. Petitioner requests that the Court hold that the trial Court's findings of fact that formed the basis for the conclusion of law that V&K intended to harass Plaintiff by increasing the volume of automated dialer calls that it made to Plaintiff during one week starting March 26, 2016, as compared to the number of calls it made the two weeks before and the weeks and months, does not support a factual finding that V&K intended to harass Plaintiff. As a result of the fact that this factual finding was an abuse of discretion; the conclusion of law that V&K violated 125(d) was erroneous as a matter of law.

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IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

GARY J. LENAHAN,

Plaintiff,

v.

**Civil Action No. 13-C-190(B)
Honorable Robert Burnside**

VALENTINE & KEBARTAS, INC.,

Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing **“Valentine & Kebartas, Inc.’s Reply to Respondent’s Response to Petition for Appeal”** was served upon the following parties by U.S. Mail on this day, Monday, July 25, 2016:

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