IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 31745

JACKIE LUCAS, JANICE LUCAS, JACK OVERBAUGH, CHARLOTTE OVERBAUGH, DALE MICHAELSON, PANSY MICHAELSON, and ANGELA KENNEDY, individually and on behalf of all others similarly situated,
Plaintiffs,

v.

FAIRBANKS CAPITAL CORP.,
a corporation,
R. VANCE GOLDEN, III,
JOHN DOE and ROBERT DOE, as trustees,
Defendants.

BRIEF *AMICI CURIAE* ON BEHALF OF THE WEST VIRGINIA BANKERS ASSOCIATION, INC. AND THE WEST VIRGINIA ASSOCIATION OF COMMUNITY BANKERS, INC.

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I. STATEMENT OF INTEREST

The West Virginia Bankers Association ("WVBA") and the West Virginia Association of Community Bankers ("WVACB") each represent the interests of approximately eighty (80) federally-insured lending institutions in West Virginia. All of the members of the WVBA and the WVACB provide mortgage lending services that involve the use of deeds of trust which are at issue in this proceeding regarding foreclosure on deeds of trust. Accordingly, this Court's rulings on the certified questions presented will significantly affect the day-to-day business practices and expenses of members of the WVBA and the WVACB. The members of the WVBA and the WVACB have a vital interest in the Court's ruling on the certified questions presented and wish to bring to the Court's attention important additional circumstances and policy concerns. The WVBA and the WVACB believe that their perspective will be of assistance to this Court in the resolution of the matters before the Court.

A. The Answers to the Certified Questions Below, If Allowed to Stand, Will Abrogate the Statutory Remedy of Non-Judicial Foreclosure and Will Result in More Costly Home Loans.

Because of Fairbanks Capital Corporation's ("Fairbanks'") violation of the West Virginia Consumer Credit and Protection Act, West Virginia Code Section 46A-1-101, *et seq.*, we are before the Court on two (2) certified questions. While the facts presented in the instant scenario are compelling, the WVBA and the WVACB urge the Court to consider the potential consequences of answering the certified questions affirmatively. The WVBA and the WVACB believe that affirmative answers disregard West Virginia's legislatively mandated[1] and judicially recognized[2] practice of using deeds of trust to secure loans on real property[3] and of exercising the statutory power of non-judicial foreclosure when a grantor defaults on the secured loan. Additionally, the WVBA and the WVACB believe that affirmative answers discount the

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[1] As recently as 1997 this Court refused to alter West Virginia's statutory foreclosure process, stating that "the issue presented...should be resolved by the legislature [because] . . . the lending institutions of this state have operated under the current trustee foreclosure scheme since the founding of this state." *Fayette County Natl. Bank v. Lilly*, 199 W. Va. 349, 357, 484 S.E.2d 232, 240 (1997).

[2] This Court has upheld West Virginia's trustee foreclosure scheme, stating that "the provisions of W. Va. Code, ch. 38, art. 1, which permit, pursuant to the terms of a trust deed, a public sale of property by a trustee upon the default of the grantor of the trust deed, *do not violate the public policy of this State.*" *Dennison v. Jack*, 172 W. Va. 147, 156, 304 S.E.2d 300, 309 (1983) (emphasis added).

[3] The discussion only refers to consumer mortgage loans.

substantial consumer protections and existing remedies established in the West Virginia Consumer Credit and Protection Act (W. Va. Code §§ 46A-1-101, *et seq.*), such as those relied upon by the Petitioners herein, and in the Fair Debt Collection Practices Act (15 U.S.C. § 1692-1692o). If allowed to stand, these findings will abrogate the codified foreclosure process and displace the traditional role trustees have played in the foreclosure process. Moreover, affirmative answers to the certified questions vitiate the promise to pay contained in the promissory note executed between a bank and its borrower. A consumer mortgage loan secured by a deed of trust is priced and amortized based on the original terms of the contract between a consumer-borrower and a bank. Affirmative answers to the certified questions, however, would effectively permit one contracting party to unilaterally change the terms of this agreed upon and negotiated contract when such party's circumstances change.[4] Besides breaching accepted principles of contract law, such a holding would negate the force or effect of mortgage loans and deeds of trust. The result will be a dramatic increase in the financial and non-financial costs of lending for both financial institutions and, consequently, for consumers throughout West Virginia. The effects of such a response would be borne by every lender and consumer in West Virginia.

B. The Status of the Mortgage Loan Industry in 2004

To assist the Court in analyzing the certified questions, the WVBA and the WVACB believe that it would be useful to begin their analysis by describing the current mortgage industry and how it generally operates in today's economy to increase the availability of home loans. Although mortgage loans were originally written exclusively as fixed-rate, fully amortizing loans, they have evolved into more flexible contracts. After the mid-1970s, alternative types of mortgage financing became more available, and a national market for mortgage lending arose with the innovation of packaging mortgage loans for resale on the secondary mortgage market. Today, banks originate loans and sell them to private entities as well as quasi-governmental bodies including the Federal National Mortgage Association (F.N.M.A., also known as Fannie Mae), the Federal Home Loan Mortgage Corporation (F.H.L.M.C., also known as Freddie Mac), and the Government National Mortgage Association

[4] The logical extension of this holding would require that a lender also have the ability to unilaterally change the terms of the contract, such as accelerating the repayment of the loan, when a consumer-borrower's circumstances change positively, such as by winning the lottery or receiving a substantial inheritance.

(G.N.M.A., also known as Ginnie Mae). These conduits assemble the loans into pools and sell them to investors on the "secondary market," providing additional liquidity to mortgage lenders.

Consumers benefit significantly from the secondary market because it assures that mortgage originators, regardless of where they are located, have access to pools of capital managed by pension funds, insurance companies, and other institutional buyers of mortgage-backed bonds. This assures homebuyers of an adequate supply of mortgage financing, as secondary market sales lessen the possibility that a lending institution will become loaned up and cease making new loans. *See generally, The Handbook of Mortgage Banking: Trends, Opportunities, and Strategies* (Jess Lederman ed., rev. ed., Probus Pub. 1993). Therefore, prospective homeowners in West Virginia benefit from West Virginia lenders' ability to utilize the capital made available by reselling loans on the secondary market.[5]

C. Activities that Typically Occur When a Grantor of a Deed of Trust Defaults on a Loan Secured by a Deed of Trust

The WVBA and the WVACB believe that it would also be useful to describe the activities that typically occur when a consumer defaults on a mortgage loan before beginning their argument. Initially, if a consumer (a "borrower") wants to borrow money to purchase real property, such person or entity will or may typically grant to the lender a lien on real property as collateral to secure repayment of the loan. Such loans are typically referred to as "mortgage loans." In West Virginia, the borrower must execute an instrument known as a deed of trust, which conveys title to real property to a trustee until the borrower repays the mortgage loan and which outlines the responsibilities of the trustee with respect to the conveyed property. The recordation of the deed of trust in the public land records for the county where the real property is located perfects the lender's lien on the real property collateral. The borrower retains possession and use of the real property and the lien is removed when the mortgage loan is repaid in full.

When a borrower misses a payment on the mortgage loan, fails to insure the real property or otherwise defaults on his or her obligations under the loan and deed of trust, the West

[5] Notably, within the membership of the WVBA and the WVACB, a significant number of banks sell their mortgage loans on the secondary market.

Virginia Consumer Credit and Protection Act (W. Va. Code §§ 46A-1-101, *et seq.*) shields the borrower from any abrupt proceedings by requiring that a lender mail the borrower a notice of the default and the right to cure the default. W. Va. Code § 46A-2-106.[6] If the borrower responds to the notice and cures the default, then all rights and payments under the loan agreement will continue as if default never occurred. *Id.* However, in those circumstances where a borrower is unable to cure the default, West Virginia Code Section 38-1-3 permits lenders to direct a trustee to foreclose on the real property securing the underlying loan. The provisions of Article 1, Chapter 38 of the West Virginia Code provide guidelines to a trustee for selling property under a deed of trust, unless the deed of trust directs otherwise. Specifically, Section 38-1-3 requires that a "trustee in any trust deed given as security *shall*, whenever required by any creditor secured . . . by the deed, . . . after the debt due . . . shall have become payable and default shall have been made in the payment thereof . . . sell the property conveyed by the deed." W. Va. Code § 38-1-3 (emphasis added).

Although the West Virginia Legislature granted lenders this statutory power to direct trustees to foreclose on collateral, lenders are reluctant to exercise this remedy because of the high costs of foreclosure. If the property is not purchased by a third party bidding at the foreclosure sale, the lender will likely purchase the property and credit the mortgage loan. At that point, the lender then becomes responsible for the costs of restoring and maintaining the collateral,[7] insuring it,[8] paying taxes on it, and addressing any environmental liabilities related to or arising from the property. Additionally, if purchased by the lender, real estate collateral becomes "Other Real Estate Owned" or OREO, which negatively affects a lender's loan quality numbers in addition to requiring the lender to expend time and money to create a plan for the disposition of the property, update the plan annually, and dispose of the property within ten (10)

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[6] *See infra* n. 20. The West Virginia Consumer Credit and Protection Act further protects borrowers by prohibiting attorneys' fees, investigation fees, and other damages from being added onto an account balance. W. Va. Code § 46A-2-115; § 46A-2-127(g); § 46A-2-128(c). For example, Petitioners successfully relied on the protections afforded by the West Virginia Consumer Credit and Protection Act to obtain the injunction requested in their original Complaint.

[7] Lenders often face high costs of restoring property "due to the deterioration of the property that commonly occurs when property is in foreclosure." Debra P. Stark, *Foreclosing on the American Dream: An Evaluation of State and Federal Foreclosure Laws*, 51 Okla. L. Rev. 229, 232 (1998).

[8] Lenders, especially in West Virginia, find it very difficult to obtain insurance on unoccupied property.

years.[9] Although Petitioners suggest that this model of lending has changed due to the growing practice of selling loans on the secondary market, lenders on the secondary market are equally resistant to foreclosing, as they do not wish to be encumbered with unwanted property and the costs associated therewith. Practically speaking, any entity, whether a local lender or a secondary market investor, reaps more profit from steady, regular loan payments than from the burdensome ownership of unwanted real property.

Although Fairbanks may not have adhered to the requirements of the West Virginia Consumer Credit and Protection Act in its handling and processing of loans to West Virginia consumers secured by real estate, such failures do not justify modification of the statutory foreclosure proceedings and trustee duties to the detriment of all lenders doing business in West Virginia and the public-at-large. We are mindful of the burdens placed on many West Virginians by Fairbanks' practices and do not condone their methods. However, while Fairbanks should be required to answer for their inappropriate actions, West Virginia's historic and statutory scheme of non-judicial foreclosure should not be judicially overturned and redesigned in the process.

D. Potential Financial and Non-Financial Costs if the Answers to the Certified Questions are Allowed to Stand

The WVBA and the WVACB urge the Court to weigh carefully the current reliance upon West Virginia's statutory deed of trust and foreclosure procedures and the ultimate cost to the consumer of altering these well-established practices. If the certified questions are answered affirmatively, the financial and non-financial costs of mortgage loans will significantly increase, and the greater costs will ultimately be borne by the public-at-large. Primarily, the actual cost of obtaining a loan secured by a deed of trust would increase. If lenders are required to pursue alternative or judicial remedies in place of the codified non-judicial foreclosure proceeding, a financial institution's risks and costs in providing loans would substantially increase. Eventually, these costs would be transferred to all borrowers and banking clients. Similarly, the additional burdens placed on trustees would result in fewer individuals being willing to serve as trustees, and would certainly result in a much more time-consuming and

[9] W. Va. Code § 31A-4-13(e).

costly foreclosure process. As with lenders' other expenses, these costs would also be communicated to consumers.

In addition to the substantial financial costs that would result from an affirmative answer to the certified questions, non-financial costs and effects would increase significantly, as well. Currently, foreclosures take place privately. However, if the affirmative answers to the certified questions are upheld, foreclosures would become protracted proceedings. For instance, if trustees were required to seek judicial assistance, both borrowers and lenders could wait for months or years, depending on the back-log of a court's docket, to find out whether the borrower would keep the home or the lender would recoup any of its loss. These factors likely would prevent West Virginia lenders from selling their mortgages on the secondary market, thereby reducing the availability of home loans in West Virginia. Moreover, courts' dockets across this State would be severely burdened by the increased number of cases, thereby slowing the judicial process for others utilizing the State's judicial system. Additionally, requiring trustees to consider and weigh every objection of grantors invites abuse by consumers seeking to delay foreclosure on property securing loans they are unable to pay. Therefore, in deciding the questions now before it, this Court must consider the loss of time and convenience to the public-at-large that would inevitably result if a trustee's duties were broadened and if lenders were required to pursue alternative remedies prior to foreclosing.

Moreover, affirmative answers to the certified questions are likely to result in extensive litigation, including challenges to the constitutionality of the holdings. Most important, judicial changes to the statutory remedy of foreclosure and established trustee duties could affect all existing deeds of trust, thereby retroactively impairing the contractual rights of both lenders and consumer-borrowers. Both the Constitution of West Virginia and the Constitution of the United States of America prohibit *ex post facto* laws or laws that impair existing contractual rights.[10] Additionally, a holding prohibiting lenders from exercising the statutory remedy of foreclosure could result in claims of an unlawful taking in violation of due

[10]Article III, § 4 of the Constitution of West Virginia provides, in pertinent part, that "No bill of attainder, ex post facto law, or law impairing the obligation of a contract, shall be passed." W. Va. Const. art. III, § 4.

Article I, § 10 of the Constitution of the United States of American provides, in pertinent part, that "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts." U.S. Const. art I, § 10.

process.[11] As a result, affirmative answers to the certified questions, which could raise numerous constitutional challenges, would result in the expenditure of unnecessary time and money by lenders, consumers, and the State of West Virginia.

An equally important factor for the Court to consider is the potential impact its decision may have on industries other than the banking industry and on transactions other than non-judicial foreclosures on consumer mortgage loans. If this Court finds that the statutory remedy of foreclosure on real property is inadequate, thereby requiring additional trustee responsibilities and utilization of alternative remedies, by logical extension, foreclosure on personal property securing loans pursuant to West Virginia's version of Article 9 of the Uniform Commercial Code, could also be adversely affected. *See* W. Va. Code §§ 46-9-101, *et seq.* Any such change to the remedies provided under Article 9 would negatively affect all commercial entities, and, consequently, the public-at-large. Moreover, this Court's holding, although arising in a consumer mortgage loan context, could adversely affect commercial lending, as some commercial loans are secured by real property. If lenders cannot rely on the statutory remedy of foreclosure and if trustees' duties are significantly expanded, commercial lending will become much more costly and difficult. With unavailable or unaffordable financing in West Virginia, many businesses will be forced to translate their escalated costs to consumers, leave the State, or cease doing business altogether.

If this Court answers the certified questions affirmatively, West Virginia's statutorily based deed of trust and foreclosure scheme will change dramatically, affecting the entire banking, financial services, and general lending systems in West Virginia, as well as all commercial entities and the public-at-large. Historically, West Virginians have benefited when this Court has refrained from exercising its power in a way that effectively modifies codified practices. The WVBA and the WVACB urge the Court to exercise similar restraint in considering the certified questions.

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[11]Article III, § 10 of the Constitution of West Virginia states that "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." W. Va. Const. art. III, § 10.

The Fourteenth Amendment to the Constitution of the United States of American provides, in pertinent part, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . .." U.S. Const. amend. XIV, § 1.

II. CERTIFIED QUESTIONS

The WVBA and the WVACB will address both of the certified questions which were answered affirmatively by the Lincoln County Circuit Court.

1. Does the fiduciary duty of the trustee to both parties of a deed of trust include the duty to proceed to foreclosure (a) only after review [of] the account records to ascertain the actual amount due, and (b) to consider legitimate objections of the grantor/homeowner to foreclosure sale?

2. Does the principle that equity abhors a forfeiture require home equity loan services such as Fairbanks Capital Corp. to pursue another remedy (*e.g.*, a repayment plan or other remedy at law) other than foreclosure when it can be made whole through such other remedy?

III. STATUTE INVOLVED

Section 3, Article 1, Chapter 38 of the West Virginia Code provides as follows:

§ 38-1-3. Sales under trust deeds.

> The trustee in any trust deed given as security shall, whenever required by any creditor secured or any surety indemnified by the deed, or the assignee or personal representative of any such creditor or surety, after the debt due to such creditor or for which such surety may be liable shall have become payable and default shall have been made in the payment thereof, or any part thereof, by the grantor or other person owing such debt, and if all other conditions precedent to sale by the trustee, as expressed in the trust deed, shall have happened, sell the property conveyed by the deed, or so much thereof as may be necessary, at public auction, having first given notice of such sale as prescribed in the following section [§ 38-1-4].

IV. ARGUMENT

A. A Trustee's Only Duty Is that of Impartiality to Both Parties to a Deed of Trust and Does Not Include (i) a Duty to Review Account Records, (ii) a Duty to Determine the Amount Due, and (iii) a Duty to Consider the Objections of the Grantor

The first certified question asks whether the statutorily prescribed and traditionally recognized duties of a trustee should be expanded to include (i) a duty to review account records, (ii) a duty to determine the actual amount due on a promissory note, and (iii) a duty to consider the objections of a consumer as the deed of trust grantor. These expanded duties were initially introduced in this case in the Agreed Order dated January 27, 2004, solely as a measure to remedy and prevent further questionable actions on behalf of Fairbanks. Despite that limited intent, Petitioners now seek to have these judicially established duties apply universally to all trustees of deeds of trust in West Virginia. Not only would such an application radically change the current deed of trust and foreclosure scheme, but it would also drastically increase the burden on trustees, consequently increasing the financial and non-financial costs of consumer loans secured by deeds of trust.

Historically, a trustee under a deed of trust has a fiduciary **duty to both parties** to a deed of trust. *Moore v. Hamilton*, 151 W. Va. 784, 155 S.E.2d 877 (1967) (duty of a trustee to look to the interests of the trust debtor as well as to those of the creditor); *Livey v. Winton*, 30 W. Va. 554, 4 S.E. 451 (1887) (a trustee in a deed of trust is the agent of both parties, and bound to act impartially between them); *Matheny v. Sanford*, 26 W. Va. 386 (1885); *Anchor Stove Works v. Gray*, 9 W. Va. 469 (1876) ("trustee should act as agent of all parties in such a way as would promote the interest of all, and not be prejudicial to the rights of either party"). This duty of neutrality requires that a trustee maintain objectivity in complying with the terms of a deed of trust and with West Virginia Code Section 38-1-3, which provides statutory guidance for a trustee foreclosing on a deed of trust. *See, e.g., Copelan v. Sohn*, 75 W. Va. 83, 86, 82 S.E. 1016, 1017 (1914) (the statute "supplies the power" for a trustee to sell upon default); *MacHir v. Sehon*, 14 W. Va. 777, 785 (1879) (the object of this section seems to be to provide a general rule for the government of trustees, except where it is otherwise provided in the deed of trust).

In 1931 the West Virginia Legislature enacted Section 38-1-3 which "constitute[s] a legislative codification of nonjudicial foreclosure procedure under trust deeds." *Dennison*, 172 W. Va. at 155, 304 S.E.2d at 308. That section provides specific guidance to a trustee, stating that a "trustee . . . *shall*, whenever required by any creditor . . . sell the property conveyed by the deed" (emphasis added). W. Va. Code § 38-1-3. So long as this statute is effective,[12] a trustee's duty requires him to impartially act in accordance with the statute by foreclosing in circumstances that satisfy the terms of the statute, namely where a creditor so directs. Therefore, when a trustee exercises the statutory power to foreclose on a deed of trust, the trustee is acting impartially and not as the lender's agent, as suggested by the Petitioners.

Although a consumer-grantor is free to seek a judicial remedy or intervention in the foreclosure process, a trustee is under no duty to independently seek judicial assistance to foreclose on a deed of trust. Recognizing the authority to foreclose conferred on a trustee by West Virginia Code Section 38-1-3, this Court pointed out in *Young v. Sodaro,* 193 W. Va. 304, 456 S.E.2d 31(1995), that "in the event there is a default in payment of a debt secured by a deed of trust, the [trustee] therefore need not apply to a court to foreclose it . . . instead, the property merely becomes liable to sale under the power of sale conferred upon a trustee." *Young*, 193 W. Va. at 307 n.7, 456 S.E.2d at 36 n.7; *see also,* 13A M.J., *Mortgages and Deeds of Trust*, §§ 4, 7 (1991).

Multiple decisions of this Court recognize that trustees are actually limited in their rights to seek judicial assistance. For instance, in *Rexroad v. Raines*, 63 W. Va. 511, 60 S.E. 495 (1908), this Court held that a trustee may only seek assistance of a court of equity where there is an actual impediment to the exercise of his established powers to foreclose. Similar holdings were reached in *McCrum v. Lee* and in *Copelan v. Sohn. McCrum v. Lee*, 38 W. Va. 583, 591, 18 S.E. 757, 760 (1893); *Copelan*, 75 W. Va. 83, 82 S.E. 1016; *see also Pence v. Jamison*, 80 W. Va. 761, 772, 94 S.E. 383, 388 (1917) ("a court of equity will not lend its aid unless there is necessity thereof"). Although the Petitioners attempt to construe the holdings in *McCrum* and *Copelan* as a requirement that a trustee must always seek the aid of a court when foreclosing, this Court actually held that a trustee is only required to seek judicial assistance where facts or

[12] In *Dennison v. Jack* this Court upheld the constitutional validity of West Virginia Code Section 38-1-3. 172 W. Va. 147, 304 S.E.2d 300 (1983).

circumstances interfere with the proper execution of a trustee's statutorily granted power of foreclosure. *Copelan v. Sohn*, 75 W. Va. at 90, 82 S.E. at 1018. Where such circumstances exist, a trustee may refrain from foreclosing, as is the practice with many trustees in West Virginia, thereby allowing the lender to seek a judicial remedy. Where, however, the circumstances present no limitations to a trustee's statutory foreclosure power, a trustee is under no duty to seek judicial assistance prior to foreclosing.

Similarly, a trustee is under no duty to review evidence and weigh disputes between a lender and a consumer debtor prior to foreclosing. The West Virginia Legislature and West Virginia courts do not require a trustee to assume the role of referee. In addressing this issue, this Court explicitly stated that:

> the trustee has limited powers, which *do not include the power to resolve controversies* over debts owed by the secured creditor to the debtor. [Citations omitted]. There is no requirement that a trustee invoke judicial action to consummate a trust deed sale.

Villers v. Wilson, 172 W. Va. 111, 115, 304 S.E.2d 16, 19 (1983) (emphasis added), *citing George v. Zinn*, 57 W. Va. 15, 49 S.E. 904 (1905). Other deed of trust states limit a trustee's powers in the same way. Although Petitioners claim that other jurisdictions allow for discretionary conduct on the part of trustees, the cases they cite hold otherwise. For instance, Petitioners suggest that Missouri courts require a trustee to conduct an investigation prior to foreclosure. Brief of Plaintiffs, p. 33. However, the cases cited actually state that a trustee's duties are fixed by the deed of trust and do not include a duty to investigate prior to foreclosing. *Spires v. Edgar*, 513 S.W. 2d 372, 378-79 (Mo. 1974) (trustee may proceed upon a request for foreclosure from the creditor "without making any affirmative investigation"); *see also, Killion v. Bank Midwest, N.A.*, 987 S.W.2d 801, 813 (Mo. App. 1998) ("when requested by the creditor to foreclose, the trustee may proceed without making any affirmative investigation").[13]

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[13] Similarly, Petitioners claim that North Carolina imposes upon trustees a duty to ensure fair and equitable foreclosure proceedings, yet the case cited stands for the proposition that a trustee breaches the duty of impartiality and is liable to the beneficiary when he cancels a deed of trust without authorization of the principal, thereby advancing the interest of one party to the injury of another. *Smith v. Martin*, 478 S.E.2d 228 (N.C. App. 1996).

Petitioners also assert that Virginia imposes a duty on trustees to correct any impediments to a fair and just foreclosure. While the Virginia cases do recognize that a trustee must correct *legal* impediments to foreclosure such as a cloud on the title or litigation over the collateral, they also acknowledge that "it is not the duty of a trustee in

Not only do a trustee's duties not include the duty to evaluate a consumer-grantor's objections, but a trustee's duty of impartiality actually prevents him from evaluating and assuming a consumer-grantor's objections to foreclosure. Upholding and maintaining such objections constitutes a conflict of interest and violates a trustee's duty of impartiality, requiring the trustee to act in direct contravention of the statutory mandate.[14] Consequently, when a consumer-grantor objects to a foreclosure, the consumer-grantor must seek a judicial remedy.

Even if this Court believes that a trustee should have duties greater than the duty of impartiality, any extension of a trustee's duties must be accomplished by statute. The Petitioners and Trustee ask that this Court formulate and approve standards and a review procedure for trustees to use when exercising the statutory foreclosure remedy.[15] For instance, the Petitioners and Trustee suggest that trustees be permitted or required to obtain affidavits from lenders providing specific details about all aspects of the transactions between the lender and the grantor.[16] Any such request on behalf of a trustee would breach the trustee's duty of impartiality, as the trustee would be effectively acting on behalf of the consumer-grantor.[17] As a result, permitting or requiring trustees to follow judicially mandated procedures such as obtaining affidavits from lenders would reinvent and redefine a trustee's duties, and is therefore a responsibility of the legislature.

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every case to invoke the aid of a court of equity before making a sale of the trust subject . . . and to hold that it is...would be to impose serious delays, involving costs and expenses in the execution of deeds of trust, which the law never contemplated, and without promoting the interest of either creditor or debtor." *Hudson v. Barham*, 101 Va. 63, 67-68, 43 S.E. 189, 190 (Va. 1903).

[14] Petitioners assert that a trustee has a duty to exercise his judgment with respect to foreclosures. In support of this allegation, the Petitioners cite *Moore v. Hamilton* in which this Court held that a trustee may not sell more property than is necessary to pay the indebtedness. 151 W. Va. 784, 155 S.E.2d 877 (W. Va. 1967). However, in so holding, this Court was not expanding a trustee's duties to require him to apply his judgment to foreclosures. Rather, the Court was merely enforcing the statute which limits a trustee's statutory foreclosure duties by providing that a trustee shall "sell the property conveyed by the deed, or *so much thereof as may be necessary.*" W. Va. Code § 38-1-3 (emphasis added).

[15] Brief of Petitioners, pp. 4, 6-7.

[16] Petitioners restate the Trustee's suggestions for the affidavit which should be provided for each of Fairbanks' future foreclosures. It appears that the Trustee intended this list to apply only to the Fairbanks foreclosures covered under the Agreed Order, however, Petitioners acknowledge no such limitation.

[17] For instance, if a trustee were truly acting impartially, an affidavit would be required of not just one party, but of both parties.

In *Fayette County National Bank v. Lilly*, 199 W. Va. 349, 484 S.E.2d 232, this Court recognized that any deviation from the existing foreclosure scheme required legislative involvement. In that case, the statutory provision permitting a trustee to foreclose on real property did not address the raised question of whether the value of foreclosed real property may be challenged. *Id.* Rather than judicially altering the statutory scheme to reflect the practice in the majority of states, this Court exercised restraint in holding that such an alteration was best left to the legislature that originally drafted the statute. *Id.* The present situation is similar to the scenario in *Lilly* in that the statutory provision permitting a trustee to foreclose on real property does not address any additional duties required of a trustee. Moreover, Article 1A, Chapter 38 of the West Virginia Code, entitled "Trustees of Security Trusts," provides the requirements for trustees of deeds of trust, but does not include any additional duties that trustees must satisfy prior to foreclosing. W. Va. Code §§ 38-1A-1, *et seq.* Where statutes provide the mechanism for trust deeds, trustees, and foreclosure proceedings, yet do not address any heightened fiduciary duties of a trustee when foreclosing, any modification of a trustee's current duty should be determined by the legislative body which chose and formulated West Virginia's existing deed of trust and foreclosure scheme.

In addition to the policy reasons reserving this decision for the legislature, many practical motivations dictate the same result. An affirmative answer to the first certified question would encumber trustees with the additional duties of reviewing account records, determining amounts due, considering objections of consumer-grantors, and requesting and reviewing affidavits of lenders. These additional responsibilities would overburden trustees and put trustees at risk of being sued, reducing the number of individuals willing to serve in the position. Moreover, the additional requirements would result in drastically higher costs for foreclosures, which would ultimately be imposed upon consumers seeking home loans. The significance of these consequences further suggests that any modification of trustees' duties should be a question for the legislature to decide, as representatives of both lender and consumer interests.

B. The Principle that "Equity Abhors a Forfeiture" Does Not Apply to Foreclosure of Deeds of Trust Because the West Virginia Legislature Has Statutorily Prescribed the Remedy of Non-Judicial Foreclosure

The second certified question asks this Court to apply the principle that "equity abhors a forfeiture" to foreclosure sales, thereby requiring equity lenders to exercise all alternative remedies prior to selling property conveyed by a deed of trust.[18] This request is in direct contradiction of the legislatively mandated and judicially recognized foreclosure scheme codified in Section 1, Article 3, Chapter 38 of the West Virginia Code. Based on the laws of the Commonwealth of Virginia, the West Virginia Legislature determined the manner in which foreclosures should take place. The current foreclosure statute was drafted in 1931, and has been upheld by this Court ever since. Any change to this statutory process of foreclosure is the responsibility of the legislature because the ramifications of such a change to the current system would be borne by not only lending institutions, but also by the public-at-large.

(1) The Principle that "Equity Abhors a Forfeiture" is Only Applicable Where No Statutory Remedy Exists

Petitioners ask this Court to apply the common law principle that "equity abhors a forfeiture" to foreclosures on deeds of trust. This principle has never been applied to foreclosure situations, and it is inapplicable in such a context because foreclosures are a statutory remedy and not a common law remedy. West Virginia common law does recognize that "equity abhors a forfeiture," and Petitioners cite many such cases. In those cases, however, this common law principle was applied because in each case, the Court had to rely on equitable principles or on common law contract interpretation where no statutory remedy existed.

For instance, Petitioners and the Trustee cite *Bailey v. Savage*, 160 W. Va. 523, 236 S.E.2d 203 (1977), in which the Court held that a land sale contract could not be canceled due to a delinquency in payments because "equity abhors a forfeiture." The common law principle was applied in *Bailey* because the disputed issue was a contract, for which the

[18] Although Petitioners claim that the principle "equity abhors a forfeiture" would only affect "home equity loan servicers," it would, in fact, adversely affect all banks, mortgage lenders, and consumers in West Virginia. Many lenders in West Virginia retain and service their own loans, and the lenders that sell loans on the secondary market may still continue to service the loans sold. Moreover, application of the principle to only secondary-market servicers will still result in an inability to resell West Virginia originated loans on the secondary market, thereby adversely affecting consumers by cutting off West Virginia lenders' access to financing capital and their ability to make future loans to potential West Virginia homeowners.

legislature had prescribed no statutory remedy. Therefore, it was necessary to look to common-law principles for guidance. Similarly, the Court in *Warner v. Haught, Inc.*, 174 W. Va. 722, 329 S.E.2d 88 (1985), used equitable principles in refusing to allow a declaration of forfeiture where no statutory remedy applied to the oil and gas lease in dispute.

These and the other cases cited by Petitioners are unlike the present case involving foreclosure of property conveyed by a deed of trust. The West Virginia Legislature specifically addressed when and how a trustee must sell property conveyed by a deed of trust in West Virginia Code Section 38-1-3, entitled "Sales under trust deeds." W. Va. Code § 38-1-3. That statute provides that:

> The trustee in any trust deed given as security shall, whenever required by any creditor secured or any surety indemnified by the deed, or the assignee or personal representative of any such creditor or surety, after the debt due to such creditor or for which such surety may be liable shall have become payable and default shall have been made in the payment thereof, or any part thereof, by the grantor or other person owing such debt, and if all other conditions precedent to sale by the trustee, as expressed in the trust deed, shall have happened, sell the property conveyed by the deed, or so much thereof as may be necessary, at public auction, having first given notice of such sale as prescribed in the following section [§ 38-1-4].

W. Va. Code § 38-1-3.

Not only does the West Virginia Code include this provision, but this Court has upheld the validity and sound policy of this statute on numerous occasions. In *Dennison*, the debtor-petitioners asserted that this statute violated West Virginia public policy. 172 W. Va. 147, 304 S.E.2d 300. In response, this Court unambiguously held that "the provisions of W. Va. Code, ch. 38, art. 1, which permit, pursuant to the terms of a trust deed, a public sale of property by a trustee upon the default of the grantor of the trust deed, do not violate the public policy of this State." *Dennison*, 172 W. Va. at 156, 304 S.E.2d at 309, *cited affirmatively in Lilly*, 199 W. Va. at 484 S.E.2d at 239. This Court has also recognized, with favor, the process of non-judicial foreclosure that is provided for in West Virginia Code Section 38-1-3. In *Lilly* this Court stated that "the high cost attendant to the judicial system and time lapse between the actual default and time of sale make the [judicial sale] less popular...In contrast, [trustee] sale is a

'streamlined more efficient version of judicial foreclosure.'" 199 W. Va. at 355, 484 S.E.2d at 238, *quoting* Pamela Giss, *An Efficient and Equitable Approach to Real Estate Foreclosure Sales: A Look at the New Hampshire Rule*, 40 St. Louis L.J. 929, 939 (1996).

Petitioners only briefly mention that the West Virginia Legislature provided a statutory mechanism for foreclosing on deeds of trust, and they disregard entirely this Court's explicit approbation for West Virginia Code Section 38-1-3. Furthermore, Petitioners ignore the distinction between common law contract situations where common law principles are applicable and cases for which a statutory remedy is provided, such as foreclosure proceedings. Rather than being an "unprincipled distinction," as suggested by Petitioners, there is an essential difference between common-law disputes and those for which the West Virginia Legislature has provided statutory guidance.

Petitioners additionally assert that other deed of trust states apply the principle that "equity abhors a forfeiture" to foreclosure sales. In support of the proposition, Petitioners cite numerous cases, many of which are from mortgage jurisdictions that do not even have the same statutory scheme as West Virginia and other deed of trust states.[19] The cases that the Petitioners do cite from deed of trust states acknowledge the principle that "equity abhors a forfeiture," however, they do not employ it in the context of a typical foreclosure on a deed of trust. Rather, the cases cited by the Petitioners apply equitable principles in the context of a contract for deed, contract for sale, "lease and option" agreement, or a mortgage. *Rosenberg v. Smidt*, 727 P.2d 778 (Alas. 1986) (foreclosure sale voided only because home owner did not receive *notice* of the sale prior to the sale); *Strack v. Miller*, 645 P.2d 184 (Alas. 1982) (equitable principles used because no deed of trust or statute involved as this was a lawsuit for specific performance on an unexecuted contract); *Gore Trading Co. v. Alice*, 35 Colo. App. 97, 324, 529 P.2d 324 (Colo. App. 1974) (quiet title proceeding involving a contract for the sale of land); *Scarberry v. Bill Patch Land & Water Co.*, 7 Cal. Rptr. 408, 184 Cal. App.2d 87 (Cal. App. 1960) (involving forfeiture of rights under a "lease and option" agreement); *Fleet Mortg. Corp.*

[19] In support of their statement that other deed of trust states apply the principle "equity abhors a forfeiture" to foreclosure sales, Petitioners cite cases from Ohio, Connecticut, Florida and Rhode Island, which are all "mortgage jurisdictions" rather than deed of trust states. Brief of Petitioners, pp. 6-7, 25. Petitioners similarly cite cases from "mortgage jurisdictions" (New Jersey, Rhode Island, Arkansas, Minnesota, Florida) in support of the statement that other jurisdictions apply the principle "equity abhors a forfeiture" to foreclosures. Brief of Petitioners, p. 26.

v. Deale, 678 N.E.2d 35, 37 (Ill. App. 1997) (a judicial foreclosure sale on a mortgage where the mortgagor tendered payment in full and the mortgagee accepted the payment, yet failed to cancel the foreclosure); *Yates v. Halford*, 73 P.3d 1236 (Alas. 2003) (contract to purchase realty, and the debtors attempts to cure default were rejected).

(2) The West Virginia Legislature Codified the Foreclosure Process, and any Modification to the Statutory Scheme Requires Legislative Involvement

In requesting that this Court apply equitable principles to statutory deeds of trust, Petitioners ask this Court to require lenders to pursue remedies besides the statutorily prescribed foreclosure mechanism. However, even if "times have changed," as Petitioners suggest, any revision of the current foreclosure scheme should be resolved by the Legislature. First, foreclosure is a statutory remedy that has been practiced and relied upon in West Virginia since the founding of the state. Second, when the West Virginia Legislature enacted the deed of trust and foreclosure statutes, they took into account the equitable principles such as the principle that "equity abhors a forfeiture." Third, in consideration of this and other equitable principles, the Legislature passed the West Virginia Consumer Credit and Protection Act, which provides adequate protections for consumer-borrowers. Finally, this Court has continuously upheld the statutory foreclosure scheme because it permits a grantor-debtor the autonomy to seek independent actions to either prevent a foreclosure from taking place, or to have a foreclosure set aside.

When the West Virginia Legislature enacted West Virginia Code Section 38-1-3, the Legislature was codifying the long-recognized practice of non-judicial foreclosure. *See, Dennison*, 172 W. Va. at 155, 304 S.E.2d at 308. In West Virginia, the trust deed method, including trust deed sales, "has long been both legislatively and judicially sanctioned." *Villers*, 172 W. Va. at 115, 304 S.E.2d at 19. In *Lilly* the Court deferred to the judgment of the legislature because lending institutions in West Virginia "have operated under the current trustee foreclosure scheme since the founding of this state." 199 W. Va. at 357, 484 S.E.2d at 240. This Court believed that, as a result, judicial modification would unsettle "the very foundation of our trustee foreclosure laws." *Id.* Therefore, the Court held that any deviation from the existing foreclosure laws required legislative consideration. *Id.*

Additionally, when the West Virginia Legislature formulated and enacted the foreclosure remedy, they undoubtedly considered the questions Petitioners now present to this Court. Before passing the legislation that codified the deed of trust system, including the remedy of foreclosure, the West Virginia Legislature certainly compared foreclosure to the alternative remedies, taking into account equitable principles such as the principle that "equity abhors a forfeiture." The Legislature's attention to equity is evident in the related statutes that ensure an evenhanded foreclosure sale. For instance, West Virginia Code Section 38-1-4 provides detailed requirements for publishing notice of a foreclosure sale, West Virginia Code Section 38-1-5 specifies the terms of a sale, and West Virginia Code Section 38-1-7 directs a trustee in the application of the proceeds of a sale. It is therefore evident that the deed of trust and foreclosure scheme practiced in West Virginia was codified only after careful consideration of equitable principles. Even after considering principles of fairness and alternative remedies, the West Virginia Legislature found that foreclosure was a sufficient remedy where a consumer-grantor defaults on a loan secured by a deed of trust.

Further evidencing the Legislature's appreciation of equitable principles are the significant consumer protections included in Chapter 46A of the West Virginia Code, entitled the Consumer Credit and Protection Act. Specifically, West Virginia Code Section 46A-2-106 requires that a lender give a debtor notice of a default and a right to cure the default upon notice. W. Va. Code § 46A-2-106.[20] The enactment of this section demonstrates the Legislature's

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[20] West Virginia Code Section 46A-2-106 provides, in pertinent part, that:

> After a consumer has been in default on any installment obligation or any other secured obligation for five days for failure to make a scheduled payment or otherwise perform pursuant to such . . . consumer loan . . . the creditor may give him or her notice of such fact in the manner provided for herein . . . Notice shall be in writing and shall conspicuously state the name, address and telephone number of the creditor to whom payment or other performance is owed, a brief description of the transaction, the consumer's right to cure default and the amount of payment and other required performance and date by which it must be paid or accomplished in order to cure the default.
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> Except as hereinafter provided in this section, after a default on any installment obligation or any other secured obligation . . . a creditor may not accelerate maturity of the unpaid balance of any such installment obligation or any other such secured obligation, commence any action or demand or take possession of collateral on account of default until ten days after notice has been given to the consumer of his or her right to cure such default. Until such period expires, the consumer shall have the right to cure any default . . . Any such cure shall restore

concern with consumer protections, and their careful balancing of lenders' statutory rights with the need to protect borrowers. Therefore, when a lender complies with this section by giving a consumer-grantor notice of the right to cure default, the lender should not be required to then pursue additional alternative remedies prior to foreclosing. Practically speaking, if a consumer-grantor is unable to cure the default after receiving notice of it pursuant to West Virginia Code Section 46A-2-106, he or she will most likely be unable to meet any other payment arrangements that a lender would propose. Consequently, lenders and borrowers should continue to rely upon and follow the proven statutory process of foreclosure and associated consumer protections established by the West Virginia Legislature.

Finally, this statutory foreclosure scheme has received this Court's endorsement because it "has always permitted a grantor to seek an independent action to either prevent a real property foreclosure from taking place, or to have a real property foreclosure sale set aside." *Lilly,* 199 W. Va. at 358, 484 S.E.2d at 240. In *Dennison,* this Court recognized that West Virginia Code Section 38-1-3 did not violate public policy because other remedies are available to debtors under a promissory note by which the public sale of their property may be precluded or challenged. 172 W. Va. at 156, 304 S.E.2d at 310. For instance, a consumer-grantor may contact the Attorney General or may engage Mountain State Justice, as Plaintiffs herein did, or other counsel to seek a court injunction against a proposed foreclosure sale. *See, e.g., Wood v. The West Virginia Mortg. & Discount Corp.*, 99 W. Va. 117, 127 S.E. 917 (1925), *cf. Villers,* 172 W. Va. 111, 304 S.E.2d 16. The original case filed by Petitioners, culminating in the present certified questions, is a perfect example of how West Virginia's statutory scheme protects consumer-grantors by permitting them to enjoin improper foreclosures.[21] Similarly, if a foreclosure sale has already taken place, a grantor still has the remedy of having the sale set aside. *See, e.g., Moore,* 151 W. Va. at 792, 155 S.E.2d at 882. As a result of these options, a grantor of a deed of trust has "ample access to the courts by way of injunctive relief or an action to set aside the foreclosure sale." *Dennison,* 172 W. Va. at 157, 304 S.E.2d at 310. Therefore,

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a consumer to all his or her rights under the agreement the same as if there had been no default.

[21] Petitioners suggest that a homeowner has "only the remedy to sue the creditor after losing the home." Brief of Petitioners, p. 19. However, Petitioners fail to mention the option of obtaining an injunction prior to foreclosure, such as the numerous injunctions successfully achieved by the Petitioners in this case.

equity is satisfied and lenders are not required to pursue all available remedies prior to exercising their statutory right of foreclosure.

(3) Changing the Current Foreclosure Scheme Would Significantly Affect the Public-at-Large in West Virginia

If the second certified question were to be answered in the affirmative, West Virginia's statutory foreclosure system would be drastically altered, and the ramifications would affect all lenders, commercial entities and the public-at-large. First, if lenders could no longer rely on the remedy of foreclosure provided by the West Virginia Legislature, the entire lending process would significantly change. As this Court stated in *Lilly*, "what has formerly been a relatively quick and inexpensive proceeding, would turn into protracted and expensive litigation. The implications could negatively effect lending institutions from providing loans to its customers." 199 W. Va. at 357; 484 S.E.2d at 240. To cover their expenses and risks, lending institutions would be forced to pass on the added costs to consumers seeking loans or doing business with such institution.[22] As a result, consumers would not only experience more difficulty in obtaining a home loan, they would also face significantly higher costs associated with banking and lending in West Virginia.

In addition to affecting loans secured by real property, an affirmative answer to the second certified question would affect the way that all secured loans are processed, such as those secured by personal property under West Virginia's version of Article 9 of the Uniform Commercial Code. W. Va. Code §§ 46-9-101, *et seq.* If the principle that "equity abhors a forfeiture" applies to loans secured by real property, it would arguably apply to loans secured by any type of personal property. In *Lilly* this Court recognized the similarities between foreclosure sales on real property under West Virginia Code Section 38-1-3 and foreclosures on personal property under Article 9, Chapter 46 of the West Virginia Code. 199 W. Va. 349, 484 S.E.2d 232. Therefore, if this Court finds that lenders may not exercise their statutory right to foreclose, but must first pursue all alternative remedies, both home and commercial lenders will be

[22] *See, e.g.*, Debra P. Stark, *Foreclosing on the American Dream: An Evaluation of Sate and Federal Foreclosure Laws*, 51 Okla. L. Rev. 229 (1998) ("The more expensive the process to collect on bad debt, the higher the interest rates or loan fees to future borrowers because lenders pass along their collection costs to new borrowers").

effected. The ramifications of such a holding would be severely felt by all consumers because the entire scheme of commercial transactions would be disrupted.

V. CONCLUSION

The WVBA and the WVACB urge the Court to consider the important additional circumstances and policy concerns set forth herein when it answers the certified questions presented. Although Fairbanks, a defendant herein, violated provisions of the West Virginia Consumer Credit and Protection Act, affirmative answers to the certified questions presented could disrupt the historically recognized and judicially endorsed statutory schemes for deeds of trust and trustee foreclosure. The Court's decision could also affect industries other than the mortgage lending industry and transactions other than mortgage loan transactions. Moreover, remedies other than those proposed in the certified questions currently exist under the West Virginia Consumer Credit and Protection Act and under a variety of existing federal and regulatory structures. For these reasons, the Court should exercise restraint in answering the certified questions.

THE WEST VIRGINIA BANKERS ASSOCIATION, INC.

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