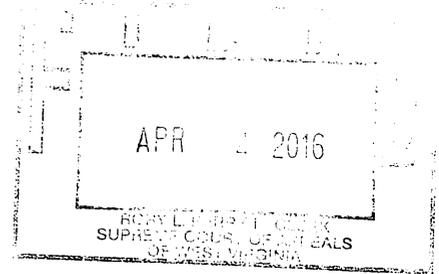


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SCHUMACHER HOMES OF CIRCLEVILLE, INC.,

Defendant Below, Petitioner



APPEAL NO.: 14-0441

**JOHN SPENCER and
CAROLYN SPENCER,**

Plaintiffs Below, Respondents.

**AMICUS CURIAE BRIEF SUBMITTED BY THE DEFENSE TRIAL COUNSEL OF
WEST VIRGINIA IN SUPPORT OF PETITIONER, SCHUMACHER HOMES OF
CIRCLEVILLE, INC.**

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II. STATEMENT OF INTEREST¹

The Defense Trial Counsel of West Virginia (DTCWV) is an organization of over 500 attorneys who engage primarily in the defense of individuals and corporations in civil and administrative litigation in West Virginia. DTCWV is an affiliate of the Defense Research Institute, a nationwide organization of over 23,000 attorneys committed to research, innovation, and professionalism in the civil defense bar.

Pursuant to the Court's invitation in its Order dated March 2, 2016, DTCWV submits this brief as *amicus curiae* because many DTCWV members represent employers and other companies that regularly use arbitration agreements in contracts as an alternative dispute mechanism. Rightly or wrongly, these companies believe that arbitration can provide a prompt, efficient and just resolution of disputes at less cost than traditional litigation in the court system. This belief coincides with federal legislative policies reflected in the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA"), and the decisions of the Supreme Court of the United States that have consistently endorsed arbitration.

DTCWV, therefore, has a strong interest in the uniform, consistent, and accurate application of the FAA, as interpreted by the Supreme Court of the United States, on arbitration issues that are before West Virginia courts, including this Court. Here, DTCWV believes that the dictates of the Court as expressed in Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 130 S. Ct. 2772 (2010), should be followed by West Virginia state courts. As reflected in DIRECTV, Inc. v. Imburgia, 577 U.S. _____, 136 S. Ct. 463 (2015), decisions by state courts that run counter to the FAA run afoul of the Supremacy

¹ Pursuant to W. Va. R. App. P. 30(e)(5), DTCWV states that no counsel for any party authored this *amicus curiae* brief, in whole or in part, and no party or its counsel made a monetary contribution specifically intended to fund the preparation or submission of this *amicus curiae* brief.

Clause. The DTCWV believes that such decisions not only add to an already complex and complicated area of the law, but they ultimately add uncertainty and expense to parties that have clearly agreed to arbitration as the preferred method to settle disputes, including disputes about the validity, revocability, and enforceability of the arbitration agreement.

For these reasons, the DTCWV files this *amicus curiae* brief in support of Petitioner, Schumacher Homes of Circleville, Inc. (“Schumacher Homes”).

III. STATEMENT OF RELEVANT FACTS

DTCWV defers to the full statement of facts contained in prior briefs filed by Schumacher Homes. Only a few of those facts are relevant to the issues raised in this *amicus curiae* brief.

First, the existence and wording of the delegation provision is uncontested: “The arbitrator(s) shall determine all issues regarding the arbitrability of the dispute.” Schumacher Homes of Circleville, Inc. v. Spencer, 235 W. Va. 335, 341, 774 S.E.2d 1, 7 (2015).

Second, the Spencers never challenged the validity of the arbitration provision, either before the Circuit Court or before this Court: “The plaintiffs responded to the motion [to refer to arbitration] by asserting that the [circuit] court should find that the entire arbitration clause was unconscionable and unenforceable under state contract law.” Schumacher Homes, 235 W. Va. at 341, 774 S.E.2d at 7. See also 235 W. Va. at 341, 774 S.E.2d at 7 (“The plaintiffs, apparently caught off guard, did not mention the delegation provision in their oral argument to the circuit court. The plaintiffs' argument centered solely upon the unconscionable aspects of the arbitration clause.”); and 235 W. Va. at 348,

774 S.E.2d at 14 (“[I]mportantly, the [Spencers’] brief makes no mention of Schumacher’s assertion of the delegation provision.”).

Notwithstanding these uncontested facts, this Court nonetheless found that the delegation provision “does not reflect a clear and unmistakable intent by the parties to delegate state contract law questions about the validity, revocability, or enforceability of the arbitration clause to an arbitrator.” Schumacher Homes, 35 W. Va. at 348, 774 S.E.2d at 14. For the reasons detailed below, however, DTCWV believes that this Court’s invalidation of the delegation provision at issue contravened the mandate of the Supreme Court of the United States in violation of the Supremacy Clause.

IV. ARGUMENT

A. The Supremacy Clause Requires That State Courts Follow the Federal Arbitration Act As Interpreted by the United States Supreme Court.

This Court is, of course, “cognizant that the Supremacy Clause of the United States Constitution ‘invalidates state laws that interfere with or are contrary to federal law.’” Dan Ryan Builders, Inc. v. Nelson, 230 W. Va. 281, 286, 737 S.E.2d 550, 555 (2012) (citing Cutright v. Metropolitan Life Ins. Co., 201 W.Va. 50, 491 S.E.2d 308, Syl. Pt. 1 (1997)). As a result, “when a statute or common-law doctrine . . . targets arbitration provisions for disfavored treatment not applied to other contractual terms generally, then the conflicting doctrine is displaced by the FAA.” Dan Ryan Builders, 230 W. Va. at 286, 737 S.E.2d at 555 (citation omitted).

Importantly, the “federal law” encompassed by the Supremacy Clause includes decisions by the Supreme Court of the United States, which routinely interprets federal law such as the FAA. For that reason, “[w]hen this Court has fulfilled its duty to interpret

federal law, a state court may not contradict or fail to implement the rule so established.”
Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1202 (2012).

B. Under Clear Precedent of the United States Supreme Court, The Severability Doctrine Must Be Applied To Arbitration Agreements, Including Delegation Provisions.

The United States Supreme Court has stated that a “delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement.” Rent-A-Center, 561 U.S. at 68, 130 S. Ct. 2778. Further, a delegation provision represents an agreement to have “arbitrability” issues decided in arbitration: “We have recognized that parties can agree to arbitrate “gateway” questions of “arbitrability,” such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.” Rent-A-Center, 561 U.S. at 69, 130 S. Ct. 2778.

As this Court understands, “[a]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the [] court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.” Rent-A-Center, 561 U.S. at 69, 130 S. Ct. 2777-2778; Schumacher Homes, 235 W. Va. at 335, 774 S.E.2d 1 (2015). For that reason, a delegation provision is valid under the FAA “save upon such grounds as exist at law or in equity for the revocation of any contract.” Schumacher Homes, 235 W. Va. at 344, 774 S.E.2d at 10 (quoting Rent-A-Center, 561 U.S. at 70, 130 S. Ct. 2777-2778).

When interpreting the FAA as it relates to delegation provisions, the Court in Rent-A-Center issued an important mandate that is binding on every court that examines the validity of a delegation provision:

“[U]nless [the party challenging arbitration] *challenged the*

delegation provision specifically, we must treat it as valid under [FAA] § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator.”

Rent-A-Center, 561 U.S. at 72, 130 S. Ct. 2779 (emphasis added). This Court is fully aware of that important rule:

Rent-A-Center stands for the proposition that a delegation provision is a mini-arbitration agreement divisible from both the broader arbitration clause and the even broader contract in which the delegation provision and arbitration clause are found. *Therefore, a party must specifically object to the delegation provision in order for a court to consider the challenge.* A party resisting delegation to an arbitrator of any question about the enforceability of an arbitration agreement must challenge the delegation provision exclusively.

Schumacher Homes, 235 W. Va. at 344, 774 S.E.2d at 10 (emphasis added).

This Court did not, however, follow that important rule, and thus contravened the Supreme Court of the United States’ interpretation of the FAA, in violation of the Supremacy Clause. Specifically, as this Court noted, “[t]he plaintiffs [below] responded to the motion [filed by Schumacher Homes to compel arbitration] by asserting that the court should find that *the entire arbitration clause was unconscionable and unenforceable under state contract law.*” Schumacher Homes, 235 W. Va. at 340, 774 S.E.2d at 6. The Spencers never “challenged the delegation provision specifically” as clearly and explicitly required by the Court in Rent-A-Center. Despite that, this Court unilaterally examined a delegation provision that the Spencers never challenged and that the Circuit Court never examined.

To implicitly justify its disregard of the Supreme Court’s mandate in Rent-A-Center, this Court chastised the way that Schumacher Homes “raised the delegation

provision to the circuit court.” Schumacher Homes, 235 W. Va. at 347, 774 S.E.2d at 13. Specifically, this Court was “troubled” that counsel for Schumacher Homes did not raise the issue of the delegation provision “until the motion was orally argued to the circuit court seven months after the plaintiff filed suit.” Schumacher Homes, 235 W. Va. at 347, 774 S.E.2d at 13. This delay, however, does not, and cannot, invalidate operation of the Supremacy Clause any more than ignorance of the law is a valid defense.

Perhaps counsel for Schumacher Homes should have raised the delegation provision issue earlier. Perhaps the Spencers’ counsel should have asked for additional time to research and brief the delegation issue when raised at oral argument in the Circuit Court instead of simply ignoring it. Perhaps the Circuit Court should have given the Spencers additional time to address the issue even in the absence of a request to do so. Perhaps, in certain contexts, a circuit court may find that a party waived its right to raise a delegation issue. Certainly, common practice in West Virginia dictates that additional time be given parties to fully brief an important issue that is belatedly raised either at or shortly before oral argument on a motion. In no case, however, should application of a mandate from the Supreme Court of the United States be ignored simply because an attorney, or a circuit court, or in this case, both, simply do not address the issue.

Here, the Spencers’ failure to “challenge[] the delegation provision specifically” extended to the proceedings before this Court. As this Court explicitly stated, the Spencers “failed to specifically respond to *any* of Schumacher’s seven assignments of error; importantly, the brief makes no mention of Schumacher’s assertion of the delegation provision.” Schumacher Homes, 235 W. Va. at 347-348, 774 S.E.2d at 13-14.

This failure -- before the Circuit Court and before this Court -- violated the specific mandate in Rent-A-Center, i.e. “[U]nless [the party challenging arbitration] challenged the delegation provision specifically, *we must treat it as valid.*” Rent-A-Center, 561 U.S. at 72, 130 S. Ct. 2779 (emphasis added). Because the Spencers never -- not before the Circuit Court, and not in this Court -- “challenged the delegation provision specifically” in the arbitration agreement at issue, this Court “must treat it as valid.” That is the specific mandate in Rent-A-Center that this Court, pursuant to the Supremacy Clause, was, and is, obligated to follow.

C. The Court’s Decision in DIRECTV, Inc. v. Imburgia Shows That the Supremacy Clause Requires That State Courts Respect and Follow the United States Supreme Court’s Decisions Interpreting the FAA.

The lesson of the Supreme Court of the United States’ decision in DIRECTV, Inc. v. Imburgia, 577 U.S. ___, 136 S. Ct. 463 (2015), should be clear. That Court will not tolerate an effort by a state court to find ways around the clear mandates of the Court on issues of federal law.

In DIRECTV the Court addressed a decision of the Court of Appeal of California that invoked California state law to invalidate an arbitration agreement in a consumer contract. The arbitration agreement contained the provision that “if the ‘law of your state’ makes the waiver of class arbitration unenforceable, then the entire arbitration provision ‘is unenforceable.’” DIRECTV, 577 U.S. at ____, 136 S. Ct. at 466. The California court’s decision centered on the meaning of the phrase “law of your state” as used in the arbitration agreement, which in the case before it meant California law. Specifically, at one time, California statutory law had prohibited so-called “class action waivers” in arbitration agreements, meaning that, under California law, any language that purported to

waive the right of a party to bring a class action claim in arbitration was deemed invalid. See Discover Bank v. Superior Court, 36 Cal. 4th 148, 113 P.3d 1100 (2005). The Supreme Court of the United States, however, found the so-called “Discover Bank rule” to be invalid under the FAA in AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

Notwithstanding the Court’s clear decision in Concepcion, the Court of Appeal of California in DIRECTV nonetheless found that the “law of your state” (i.e., California) would find the class action waiver in the arbitration provision before it to be unenforceable. In essence, the California court found that state law should be applied to an arbitration agreement even if such state law had been deemed invalid by the Supreme Court of the United States.

Not surprisingly, the Supreme Court of the United States took a dim view of the decision reached by the California court. For that reason, the Court started its substantive analysis in DIRECTV with this forceful reminder:

No one denies that lower courts must follow this Court’s holding in Concepcion. That fact that Concepcion was a closely divided case, resulting in a decision from which four Justices dissented, has no bearing on that undisputed obligation. Lower court judges are certainly free to note their disagreement with a decision of this Court. But the “Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.” Howlett v. Rose, 496 U.S. 356, 371 (1990); cf. Khan v. State Oil, 93 F.3d 1358, 1363-1364 (7th Cir. 1996), vacated, 522 U.S. 3 (1997). The Federal Arbitration Act is a law of the United States, and Concepcion is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it. U.S. Const., Art. VI, cl.2 (“[T]he Judges in every State shall be bound” by “the Laws of the United States”).

DIRECTV, 577 U.S. at _____, 136 S. Ct. at 468. Perhaps as importantly, the Court made it clear that, while “the interpretation of a contract is ordinarily a matter of state law to

which we defer,” it would not hesitate to invalidate such an “interpretation” unless that “interpretation” under “state law is consistent with the Federal Arbitration Act.” DIRECTV, 577 U.S. at _____, 136 S. Ct. at 468.

Here, this Court’s decision in Schumacher Homes contravenes the dictates in Rent-A-Center and DIRECTV in two ways. First, as detailed above, this Court disregarded the requirement in Rent-A-Center that a party challenging a delegation provision must challenge the delegation specifically; otherwise, the delegation provision is considered valid. Rent-A-Center, 561 U.S. at 72, 130 S. Ct. 2779 (“[U]nless [the party challenging arbitration] challenged the delegation provision specifically, we must treat it as valid under [FAA] § 2”). In examining the validity of the delegation provision in the arbitration agreement at issue in this case without the Spencers having ever challenged the validity of that provision, both the Circuit Court and this Court ignored the Supreme Court of the United States’ interpretation of the FAA in violation of the Supremacy Clause.

Second, this Court’s finding that the term “arbitrability” is ambiguous, and therefore “does not ‘clearly and unmistakably’ confer authority to the arbitrator to decide the gateway questions regarding the validity, revocability, and enforceability of the arbitration clause,” is a finding that the Supreme Court of the United States, as demonstrated in DIRECTV, would consider to be inconsistent with the FAA. In DIRECTV, the California court did virtually the same thing that this Court did in Schumacher Homes; i.e., find a contractual term “ambiguous” under state law and interpret the provision against the drafter of the contract. The Court in DIRECTV, however, did not simply accept the California court’s finding under state law. Instead, it critically examined such finding and found that it did “not place arbitration contracts ‘on

equal footing with all other contracts” and, “[f]or that reason, [did] not give ‘due regard . . . to the federal policy favoring arbitration.’” DIRECTV, 577 U.S. at _____, 136 S. Ct. at 471 (citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006)).

Specifically, the Court in DIRECTV disagreed with the California court that the phrase “law of your state” was ambiguous under state law, finding that no court decision found that phrase to mean anything other than “its ordinary meaning: *valid* state law.” DIRECTV, 577 U.S. at _____, 136 S. Ct. at 469 (emphasis in original added). Here, this Court found the word “arbitrability” to be ambiguous. Yet, this Court has also clearly defined “arbitrability” to mean “whether there is an enforceable agreement to arbitrate[.]” State ex rel. Kaufmann v. TD Ameritrade, Inc., 225 W. Va. 250, 254, 692 S.E.2d 293, 297 (2010) (“Discussing the general rule that courts are to decide the threshold issue of arbitrability (*i.e. whether there is an enforceable agreement to arbitrate*), the United States Supreme Court [has] recognized the limited nature of that initial determination”). With due deference to this Court’s finding that “arbitrability” is a “nebulous term,” therefore, the Supreme Court of the United States will undoubtedly find that “questions about the validity, revocability or enforceability of an arbitration agreement” (Schumacher Homes, 235 W. Va. at 347, 774 S.E.2d at 13) means the same thing as “whether there is an enforceable agreement to arbitrate.” TD Ameritrade, 225 W. Va. 250, 254, 692 S.E.2d 293, 297.

This conclusion is buttressed by the Court’s determination in DIRECTV that the California court interpreted the phrase “law of your state” differently -- and in a way that restricted arbitration -- because it arose in the arbitration context. DIRECTV, 577 U.S. at _____, 136 S. Ct. at 469-471 (“nothing in the Court of Appeal’s reasoning suggests that a

California court would reach the same interpretation of ‘law of your state’ in any context other than arbitration”); (“the language used by the Court of Appeal focused only on arbitration”); (“Framing the question in such terms, rather than in generally applicable terms, suggests that the Court of Appeal could well have meant that its holding was limited to the specific matter of this contract -- arbitration.”); (“there is no other principle invoked by the Court of Appeal that suggests that California courts would reach the same interpretation of the words ‘law of your state’ in other contexts”); (“The fact that we can find no similar case interpreting the words ‘law of your state’ to include *invalid* state laws indicates, at the least, that the antidrafter cannon would not lead California courts to reach a similar conclusion in similar cases that do not involve arbitration.”) (emphasis in original)).

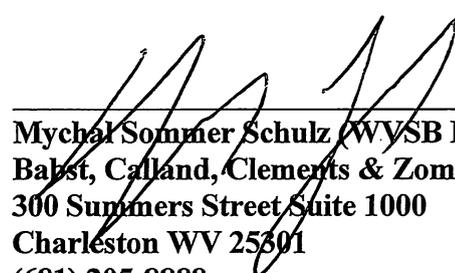
Here, this Court’s decision in Schumacher Homes necessarily arises in the arbitration context because the term “arbitrability” will likely not appear anywhere else. By finding such a term to be ambiguous -- despite it being clearly defined in TD Ameritrade -- this Court virtually ensures that the Supreme Court of the United States will, much as it did in DIRECTV, critically scrutinize this Court’s actions that ultimately invalidated the arbitration provision at issue. As explained above, the outcome of that scrutiny likely will, and should, reaffirm that, under the Supremacy Clause, this Court must follow the mandates of the Supreme Court of the United States in the arbitration area, even when such mandates may be “eye-glazing,” “a tad oversubtle,” or “difficult . . . to comprehend.” Schumacher Homes, 235 W. Va. at 340, 774 S.E.2d at 6.

V. CONCLUSION

For all of these reasons, the DTCWV asks that this Court reverse the Circuit Court's order and remand with instructions that the Spencers' claims against Schumacher Homes be referred to arbitration pursuant to the terms of their arbitration agreement.

Respectfully submitted,

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Plaintiffs Below, Respondents.

CERTIFICATE OF SERVICE

I, Mychal S. Schulz, hereby certify that on the 4th day of April, 2016, a copy of the foregoing "AMICUS CURIAE BRIEF SUBMITTED BY THE DEFENSE TRIAL COUNSEL OF WEST VIRGINIA IN SUPPORT OF PETITIONER SCHUMACHER HOMES OF CIRCLEVILLE, INC." was mailed, postage prepaid, by First Class Mail to the following:

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