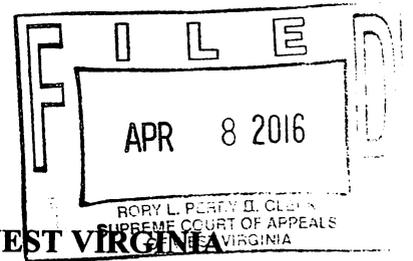


NO. 14-0441



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SCHUMACHER HOMES OF
CIRCLEVILLE, INC., a foreign corporation,

Defendant Below,
Petitioner,

v.

JOHN SPENCER and
CAROLYN SPENCER,

Plaintiffs Below,
Respondents.

**FROM THE CIRCUIT COURT OF
MASON COUNTY, WEST VIRGINIA**

RESPONDENTS' SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Pursuant to this Court's Order dated March 2, 2016, Respondents John Spencer and Carolyn Spencer submit their Supplemental Brief to address the relevance of the United States Supreme Court's decision in *DIRECTV, Inc. v. Imburgia*, 577 U.S. ____, 136 S.Ct. 463, 193 L.Ed.2d 365 (2015). For the following reasons, *DIRECTV* does not alter the outcome of this case and, indeed, underscores that the decision in *Schumacher Homes of Circleville, Inc. v. Spencer*, 235 W. Va. 335, 774 S.E.2d 1 (2015), should be reaffirmed.

II. SUPPLEMENTAL ARGUMENT

A. *DIRECTV, Inc. v. Imburgia*

In *DIRECTV*, the United States Supreme Court reversed a decision by the California Court of Appeal that held an arbitration provision with a class-arbitration waiver was unenforceable under California law. *DIRECTV*, 577 U.S. ____, 136 S.Ct. 463, 471, 193 L.Ed.2d 365. The arbitration provision there said that it would be unenforceable if class-arbitration waivers were unenforceable under "the law of your state." *Id.* at ____, 136 S.Ct. at 466, 193 L.Ed.2d 365. The plaintiffs in *DIRECTV* were California residents. *Id.* at ____, 136 S.Ct. at 464, 193 L.Ed.2d 365. At the time the *DIRECTV* plaintiffs entered into the contract that included the arbitration provision, class-arbitration waivers were unenforceable under the California rule of law known as the "Discover Bank" rule. *Id.* at ____, 136 S.Ct. at 466, 193 L.Ed.2d 365. However, the United States Supreme Court later held that the *Discover Bank* rule was pre-empted by the Federal Arbitration Act (the "FAA"). *Id.* (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352, 131 S.Ct. 1740, 1753, 179 L.Ed.2d 742 (2011)). The California Court of Appeal interpreted "the law of your state" as the law in effect on the date the agreement was executed. That is, it interpreted

the contract's reference to "the law of your state" as the law as it existed prior to the Supreme Court's decision holding the *Discover Bank* rule pre-empted. *Id.* at _____, 136 S.Ct. at 466, 473, 193 L.Ed.2d 365. As a result, the California Court of Appeal concluded that the class-arbitration waiver rendered the entire arbitration provision unenforceable. *Id.*

The United States Supreme Court reversed. The Supreme Court began by "recognizing" that it was required to defer to the California Court of Appeal's decision, under California law, that "the law of your state" meant the law as it existed under the *Discover Bank* rule. *Id.* at _____, 136 S.Ct. at 468, 193 L.Ed.2d 365. That was true, the Supreme Court held, because "California courts are the ultimate authority on that law." *Id.* The Supreme Court then went on to reverse, however, because this rule of California law did not "place[] arbitration contracts 'on equal footing with all other contracts.'" *Id.* (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S.Ct. 1204, 1207, 163 L.Ed.2d 1038 (2006)). For six reasons, the Supreme Court explained, California law would not have given the term "the law of your state" the same meaning in non-arbitration contracts as the California Court had given it in the arbitration context. *Id.* at _____, 136 S.Ct. at 469-71, 193 L.Ed.2d 365. This "equal footing" principle is important because, under the FAA, agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any contract*." 9 U.S.C. § 2 (emphasis added). Thus, because, as noted, the California Court of Appeal had applied a rule of law that did not apply to "any contract" (but only to arbitration contracts), it was preempted. *DIRECTV*, 577 U.S. at _____, 136 S. Ct. at 471, 193 L.Ed.2d 365.

B. This Case Does Not Involve the "Equal Footing" Principle.

This Court is of course required to apply the United States Supreme Court's "equal footing" principle, and so its contract-law doctrines must be applied even-handedly to both arbitration and

non-arbitration contracts. But this case has never been about that principle, as Schumacher's own arguments show.

All along, Schumacher has sought to rely not on the "equal footing" principle but rather on *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010). In that case, the United States Supreme Court held that when a party challenges the validity of an arbitration clause's so-called delegation provision – that is, a contract provision delegating matters to an arbitrator – that party must specifically challenge that provision apart from the arbitration agreement as a whole.

Schumacher's reliance on that argument was misplaced because the original decision of this Court is fully consistent with *Rent-A-Center*. In *Rent-A-Center*, the parties stipulated that a clause expressly delegating questions of "interpretation, applicability, *enforceability* or formation" to the arbitrator, 561 U.S. at 66, 130 S.Ct. at 2775, 177 L.Ed.2d 403 (emphasis added), covered the enforceability question at issue, *id.* at 69 n.1, 130 S.Ct. at 2777 n.1, 177 L.Ed.2d 403. Thus, the Supreme Court's holding was premised on the existence of a clearly and unmistakably applicable delegation clause. *See id.* at 69 n.1, 71-72, 130 S.Ct. at 2777-2779 n.1, 177 L.Ed.2d 403.

The issue in this case, by contrast, as this Court's initial opinion recognized, *Schumacher Homes*, 235 W. Va. at 345, 774 S.E.2d at 11, is whether the arbitration agreement included a clear and unmistakable delegation of the issue of enforceability. That question turns on applying the rule of *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995), not on *Rent-A-Center*. *Accord Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 761 n.5 (3d Cir. 2016) (rejecting the argument that *DIRECTV* governs the question

whether arbitration provision delegates enforceability, relying instead on *First Options*' "clear and unmistakable" test).

In *First Options*, the United States Supreme Court held that a contractual provision does not delegate a gateway issue to an arbitrator unless it contains "clea[r] and unmistakabl[e]" language to that effect. 514 U.S. at 944, 115 S.Ct. at 1924, 131 L.Ed.2d 985 (alterations in original); *see also Rent-A-Center*, 561 U.S. at 69 n.1, 130 S.Ct. at 2777 n.1, 177 L.Ed.2d 403 (recognizing this rule). Schumacher has never disputed that the "clear and unmistakable" standard applies in this case. Rather, Schumacher has simply asserted that this Court erred in holding that the provision at issue does not "clearly and unmistakably delegate[] to the arbitrator the authority to decide challenges to the validity or enforceability of the parties' arbitration agreement as a whole." *See* Schumacher's Pet. for Cert. 21.

But this Court has already held that Schumacher is incorrect on that score, and there is no reason for this Court to reverse course. The contractual reference here—to "the arbitrability of [a] dispute"—does not "clearly and unmistakably" encompass disagreements concerning the enforceability of the arbitration agreement.

The term "arbitrability" does not clearly and unmistakably refer to whether an arbitration agreement is *enforceable*. Rather, arbitrability generally means "whether the parties have agreed to arbitrate the merits of a dispute," *Schumacher Homes*, 235 W. Va. at 345, 774 S.E.2d at 11 – in other words, whether a substantive dispute falls within the *scope* of the arbitration agreement. For example, *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986), defined the question of arbitrability as one of scope – namely, "whether a collective-bargaining agreement creates a duty for the parties to arbitrate a particular grievance," *id.* at 649, 106 S.Ct. 1419, 89 L.Ed.2d 648 (emphasis added); *see also First Options*,

514 U.S. at 944-46, 115 S.Ct. at 1924-1925, 131 L.Ed.2d 985. Likewise in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002), the Supreme Court noted that a “question of arbitrability” is “a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.” *Id.* at 84, 123 S.Ct. at 592, 154 L.Ed.2d 491.

Schumacher itself used the term “arbitrability” in this very case to refer to *scope*. In its motion to compel arbitration in the Circuit Court of Mason County, Schumacher discussed “arbitrability” under the heading “[t]he Arbitration Agreement purports to cover the dispute.” Motion to Dismiss (“MTD”) 5-6. In that section, Schumacher argued that the arbitration clause was “broad,” with a citation to *Oldroyd v. Elmira Savings Bank, FSB*, 134 F.3d 72, 76 (2d Cir. 1998), *abrogated on other grounds by Katz v. Cellco P’ship*, 794 F.3d 341 (2d Cir. 2015). MTD 5-6. *Oldroyd* held that the plaintiff’s claim of retaliatory discharge must be sent to an arbitrator – a question of *scope* (not enforceability). 134 F.3d at 76-77. Schumacher then concluded by saying that “[t]he allegations in the Complaint fall within the *scope* of the arbitration agreement.” MTD 6 (emphasis added).

Along the same lines, the leading arbitration association also uses the term “arbitrability” to delegate only questions of scope. The American Arbitration Association’s Consumer Arbitration Rules, which are often incorporated into contracts, designate that the arbitrator “shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.” Am. Arbitration Ass’n, Consumer Arbitration Rules 17 (2014). Whether a claim or counterclaim is “arbitrabl[e]” can only refer to whether the claim or counterclaim falls within the substantive scope of the agreement.

The provision in the contract between Schumacher and the Spencers, by contrast, contains no express or implied reference to enforceability. Accordingly, as numerous courts have recognized in the face of similar language, the meaning of the word “arbitrability” is at best ambiguous. *See, e.g., GGIS Ins. Servs., Inc. v. Lincoln Gen. Ins. Co.*, 773 F. Supp.2d 490, 504 (M.D. Pa. 2011); *Anderton v. Practice-Monroeville, P.C.*, 164 So.3d 1094, 1104 n.4 (Ala. 2014) (Murdock, J., dissenting); *Bruni v. Didion*, 160 Cal.App.4th 1272, 1286, 73 Cal. Rptr. 3d 395, 407 (2008); George A. Bermann, *The “Gateway” Problem in International Commercial Arbitration*, 37 *Yale J. Int’l L.* 1, 10-13 (2012); Stephen H. Reisberg, *The Rules Governing Who Decides Jurisdictional Issues: First Options v. Kaplan Revisited*, 20 *Am. Rev. Int’l Arb.* 159, 159-60 (2009). The word may well cover questions of scope, but it is unclear – that is, it is ambiguous – as to whether it also covers questions of enforceability.

Moreover, the word “arbitrability” does not stand alone in the arbitration provision at issue here. Instead, the term modifies the word “dispute.” This usage underscores that, in this contract, “arbitrability” refers only to scope, not to enforceability. “Dispute” ordinarily refers to the underlying “conflict or controversy” that “has given rise” to a lawsuit. *Dispute*, *Black’s Law Dictionary* (10th ed. 2014). And Schumacher used the word “dispute” elsewhere in the arbitration clause to mean exactly that. The clause states that “any claim, *dispute* or cause of action” will be sent to the arbitrator. MTD 2 (emphasis added). “Claim” and “cause of action” both involve a request for substantive relief. *See Cause of action*, *Black’s Law Dictionary* (10th ed. 2014); *Claim*, *Black’s Law Dictionary* (10th ed. 2014). Under the “associated-words canon,” the word “dispute” must mean something similar to “claim” and “cause of action.” *See Murray v. State Farm Fire & Cas. Ins. Co.*, 203 W. Va. 477, 485, 509 S.E.2d 1, 9 (1998). That is, “dispute” should be read in both places in this contract to refer to a substantive controversy, such as whether petitioner

breached its warranties. So, the language “the arbitrability of the dispute” appears to contemplate issues of scope, but not enforceability.

The foregoing discussion further illuminates why this Court was right the first time around when it held that *First Options*’ stringent standard had not been met. But we expounded on the issue here for a different reason that is directly relevant to this Court’s March 2 Order: to show that the “equal footing” principle was not violated because it was not the bone of contention before this Court, as Schumacher’s own arguments show. The only issue that was ever at issue here is the *First Options* principle – whether the contract “clearly and unmistakably” delegated issues of enforceability to the arbitrator. Because this Court correctly held that the contract did not meet that high standard, the issue of enforceability was therefore one for the Circuit Court.

C. In Any Case, the “Equal Footing” Principle Was Not Violated.

Even assuming (incorrectly) that the “equal footing” principle were at issue here, this Court’s earlier decision did nothing to offend that principle. First, this Court’s prior decision was based on valid contract law consistent with the FAA. Second, there is no indication that this Court would have ruled a different way involving a non-arbitration contract.

i. This Court’s First Decision Is Rooted in Valid Law Consistent with the FAA.

At their cores, arbitration cases are simple cases of contract interpretation. The FAA provides that arbitration provisions are valid and enforceable except upon “grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. Therefore, pursuant to the FAA, the enforceability of arbitration provisions must be interpreted according to valid state contract law. In the prior decision this Court recognized, “[T]he FAA requires a severed arbitration clause to be evaluated under precepts of contract law applicable to any contract (not just arbitration agreements).” *Schumacher Homes*, 235 W. Va. at 342, 774 S.E.2d. at 8.

As noted above, this Court's earlier decision was based on its interpretation of the ambiguous word "arbitrability." *Id.* at 346-347, 774 S.E.2d. at 12-13. It is well-established, based on generally applicable West Virginia contract-law principles, that the determination of whether a contract is ambiguous is dealt with the same manner whether or not the contract is an arbitration contract. Syl. Pt. 1, *Berkeley County Pub. Serv. Distr. v. Vitro Corp. of America*, 152 W. Va. 252, 162 S.E.2d 189 (1968). Under West Virginia law, the court must interpret ambiguity in a contract when contract language is "[susceptible] of two or more meanings" or is "of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning." Syl. Pt. 1, in part, *Shamblin v. Nationwide Mut. Ins. Co.*, 175 W. Va. 337, 332 S.E.2d 639 (1985), Syl. Pt. 13, *State v. Harden*, 62 W. Va. 313, 58 S.E. 715 (1907), and Syl. Pt. 1, *Prete v. Merchants Property Ins. Co.*, 159 W. Va. 508, 223 S.E.2d 441 (1976). Once a contract is determined by the court to be ambiguous, it is then subject to construction by the court. *Estate of Tawney v. Columbia Natural Resources, L.L.C.*, 219 W. Va. 266, 272, 633 S.E.2d 22, 28 (2006).

This Court concluded that "'arbitrability' is an ambiguous term that can encompass multiple distinct concepts." As a result, the word had to be interpreted and it cited a generally-applicable West Virginia contract-law precedent in support. *Schumacher Homes*, 235 W. Va. at 346, 774 S.E.2d at 12 (citing *Bruni v. Didion*, 160 Cal.App.4th at 1286, 73 Cal.Rptr.3d at 407, and *GGIS Ins. Servs., Inc. v. Lincoln Gen. Ins. Co.*, 773 F.Supp.2d 490, 504 (M.D.Pa.2011)).

The multiple concepts of which this Court was referring were (1) the validity, revocability, or enforceability of the agreement or (2) the scope of the agreement. *Id.* at 347, 774 S.E.2d at 13. This Court explained that "arbitrability" is generally used in referring to "the *scope* of the arbitration provisions." *Id.* As such, it interpreted that the word "arbitrability" referred to the scope of the provision and not its validity, revocability, or enforceability. *Id.*

This Court thus applied valid state law. consistent with the FAA and the decision must be upheld. We stress, however, that under applicable federal law, this Court is operating under a specific rule regarding ambiguity: unless the contract provision “clearly and unmistakably” delegated questions of enforceability to the arbitrator, then the questions of arbitrability were for the court. *First Options*, 541 U.S. at 944, 115 S.Ct. at 1924, 131 L.Ed.2d 938.

ii. This Court Treats Arbitration and Non-Arbitration Contracts Alike, and Nothing Suggests That This Court Would Have Ruled Differently in a Non-Arbitration Context.

The contract-ambiguity principles applied by this Court in its original decision apply to all contracts. In *Henson v. Lamb*, for instance, this Court held that “the construction of a written instrument is to be taken strongly against the party preparing it.” 120 W. Va. 552, 558, 199 S.E. 459, 461-462 (1938). *See also* Syl. Pt. 4, *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987) (“It is well settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured.”) and Syl. Pt. 6, *Moore v. Johnson Service Co.*, 158 W. Va. 808, 219 S.E.2d. 315 (1975) (“Ambiguous or doubtful provisions of a lease agreement should be construed most strongly against the party who prepared the instrument.”) Construing ambiguous terms against the drafter is not only applicable in arbitration cases, but all contracts.

The United States Supreme Court in *DIRECTV* stated that the California Court of Appeal used language that “focused only on arbitration” and this proved that the court would not have come to the same conclusion in other cases than arbitration. *DIRECTV*, 577 U.S. at ____, 136 S. Ct. at 470. To be sure, this Court’s analysis also focused on arbitration. However, this fact only underscores that it is the *First Options* principle, and not the “equal footing” principle, that has

been (and remains) at issue here. The word “arbitrability” would not have been used in any other contract but arbitration. An arbitration agreement is the only context within which this word would appear.

D. The United States Supreme Court’s *DIRECTV* Decision Supports a Finding That Schumacher’s Challenge Has Been Waived Under Generally Applicable West Virginia Law.

As noted earlier, the Supreme Court in *DIRECTV* emphasized that, in our federalist system, state high courts enunciate state law and “are the ultimate authority on that law.” 577 U.S. at _____, 136 S. Ct. at 468. That statement has a particular bearing here on Schumacher’s waiver of the delegation question that it raised before this Court. In its initial decision, this Court strongly suggested that Schumacher waived its right to enforce the alleged delegation provision by failing to raise the issue until oral argument on its motion to compel arbitration. *Schumacher Homes*, 235 W. Va. at 347, 774 S.E. 2d at 13 & n.12.

This suggestion was correct. Because a delegation provision is effectively a separate contract from the arbitration agreement as a whole, *see Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 70, 130 S.Ct. 2772, 2778, 177 L.Ed.2d 403 (2010), it is not enough simply to raise the arbitration agreement as a whole. A party seeking to enforce an alleged delegation provision must raise that specific provision in a timely manner. Federal courts have made this clear. *See Entrekin v. Internal Medicine Assocs. of Dothan P.A.*, 689 F.3d 1248, 1252 (11th Cir. 2012); *Mercadante v. Xe Servs., LLC*, 864 F.Supp.2d 54, 56-57 (D.D.C. 2012).

More importantly under *DIRECTV*, this is a generally applicable principle of West Virginia waiver law, wholly independent of federal law, on which this Court is the “ultimate authority.” *DIRECTV*, 136 S. Ct. at 468. Under West Virginia law, a party waives a claim by failing to raise it “at the appropriate time” in the Circuit Court. *See State ex rel. Cooper v. Caperton*, 196 W. Va.

208, 216, 470 S.E.2d 162, 170 (1996) (non-arbitration context); *Chesapeake Appalachia, L.L.C. v. Hickman*, 236 W. Va. 421, 781 S.E.2d 198, 203, 214-15 (2015) (arbitration context). Here, in its motion to compel arbitration in the Circuit Court, Schumacher failed to raise the alleged delegation provision and instead asked *the trial court itself* to “review and resolve questions of arbitrability.” Schumacher’s Mem. Law MTD 8. In sum, the Spencers “were never put on notice that[] in their opposition to the motion to compel” – or in their preparation for oral argument on the motion to compel – “they might need to address the enforceability of the delegation provision.” *Schumacher Homes*, 235 W. Va. at 347, 774 S.E.2d at 13.

In its petition for certiorari, Schumacher claimed that “there was simply no reason” to raise the delegation provision “before [the Spencers] challenged the enforceability of the arbitration agreement.” Pet. for Cert. 9 n.4 (quoting dissenting opinion)). But that is not so. The reason was (and is) clear under West Virginia law: failure to make the challenge in a timely fashion waives the right. Thus, Schumacher has forfeited the right to invoke the delegation provision on an independent ground of West Virginia law. Under *DIRECTV*, that determination of West Virginia law is this Court’s alone to make.

III. CONCLUSION

This Court should reaffirm its earlier holding that the provision at issue here did not “clearly and unmistakably” delegate the question of enforceability to an arbitrator under *First Options*. On that dispositive question, *DIRECTV* has no bearing, as the Third Circuit has recently held. See *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 761 n.5 (3d Cir. 2016). In any case, this Court’s initial decision placed the contract at issue here “on equal footing with all other contracts,” *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S.Ct.

1204, 1207, 163 L.Ed.2d 1038 (2006)., because it applied well-settled and generally applicable contract principles to construe the arbitration provision. Finally, employing the principle emphasized by the United States Supreme Court in *DIRECTV*—that state high courts are the ultimate arbiters of their own law—this Court should find that Schumacher waived its challenge to the purported delegation clause at issue here.

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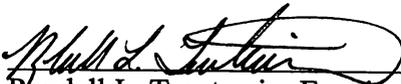
JOHN SPENCER and
CAROLYN SPENCER,

Plaintiffs Below,
Respondents.

CERTIFICATE OF SERVICE

The undersigned counsel does hereby certify that service of the foregoing RESPONDENTS' SUPPLEMENTAL BRIEF has been made this the 7th day of April, 2016, by serving the same, postage prepaid, in the United States mail, to the following counsel of record.

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