

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 35740

MARK CASTLE,
Appellee,

v.

NEWTOWN ENERGY, INC.,
Appellee,

v.

ROXIE SUE BRINAGER d/b/a
BELO MINE SERVICES,
Appellant,

v.

LEXINGTON INSURANCE COMPANY,
Appellee.

APPELLEE'S BRIEF

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I. INTRODUCTION

Roxie Sue Brinager d/b/a Belo Mine Services (“Belo”) requests in its Appellant’s Brief that (1) this Court reverse the March 12, 2008 Order by the Circuit Court of Boone County (entered on June 27, 2008) compelling the coverage dispute between Belo and Lexington Insurance Company (“Lexington”) to arbitration (Record at 29); and (2) this Court reverse the March 22, 2010 Order by the Circuit Court confirming and incorporating the arbitration award in Lexington’s favor. (Record at 55). Both of these requests should be rejected.

First, the Circuit Court’s Order compelling Belo and Lexington to arbitrate their insurance coverage dispute was plainly right. The Circuit Court properly found that the arbitration provision contained in the insurance policy issued by Lexington to Belo was valid and enforceable under West Virginia law. West Virginia law is well-settled as to the validity and enforceability of arbitration clauses, and Belo’s argument that the arbitration provision at issue is unconscionable and unenforceable has routinely been rejected by this Court. Belo’s Appeal for reversal of this Order should be rejected.

Second, the Circuit Court’s Order confirming and incorporating the final arbitration award in Lexington’s favor was also plainly right. West Virginia law allows judicial review of an arbitration award only in very limited circumstances, none of which are applicable in the instant case. The Circuit Court properly found that Belo failed to raise any grounds permissible under well-settled West Virginia law for vacating the arbitration award.

Therefore, this Court should affirm the Circuit Court’s judgment in all respects.

II. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

A. Procedural History and Background

On or about July 24, 2006, Mark Castle (“Castle”) filed a lawsuit in the Circuit Court of Boone County, West Virginia (the “Castle Action”) against Newtown seeking damages for injuries he allegedly sustained on December 5, 2005, while working in a coal mine owned by Newtown. (See Record at 1; Complaint). At the time of the incident, Castle was employed by Belo as an underground mine worker. *Id.* Belo provided general labor and security services to Newtown pursuant to a Contract Labor Service Agreement (“Agreement”) that it entered into with Kanawha Eagle Coal, LLC (“Kanawha”) and its subsidiaries and affiliates, including Newtown. (See Record at 4; Belo’s Fourth-Party Complaint, ¶ 4). Lexington issued Commercial General Liability Policy No. 0275284 to Belo, effective April 16, 2005 to April 16, 2006 (the “Policy”) and named Newtown as an additional insured under the Policy at Belo’s request. (See Record at 4; the Policy, attached as Exhibit A to Belo’s Fourth-Party Complaint).

On January 10, 2007, Newtown filed a Third-Party Complaint against Belo alleging that Belo breached the Agreement by failing to defend and indemnify Newtown for the Castle Action. (See Record at 2; Third-Party Complaint). Belo requested coverage from Lexington under the Policy, and Lexington agreed to defend Newtown under a Reservation of Rights based upon the terms of the Policy and demanded arbitration to resolve the coverage dispute pursuant to the Policy’s arbitration provision. (See Record at 5; Ex. A, Reservation of Rights letter with Arbitration Demand). Belo failed to respond to Lexington’s arbitration demand and instead filed a Fourth-Party Complaint against Lexington seeking a declaratory judgment for coverage for the Castle Action, attorneys’ fees and costs. (See Record at 4; Belo’s Fourth-Party Complaint).

Shortly thereafter, the American Arbitration Association informed Belo that arbitration would proceed despite the fact that Belo had not responded to Lexington's Demand for Arbitration. Belo responded by filing a Motion to Stay Arbitration on September 12, 2007. (*See* Record at 5; Belo's Motion to Stay Arbitration). Lexington then filed a Motion to Compel Arbitration and Dismiss or in the Alternative Stay Belo's Fourth-Party Complaint on September 18, 2007. (*See* Record at 9; Lexington's Motion to Compel Arbitration and to Dismiss or in the Alternative to Stay Fourth-Party Plaintiff's Complaint). During a hearing on November 5, 2007, the Circuit Court stayed the arbitration and ordered the parties to engage in limited discovery for a period of sixty days to focus on the negotiation and formation of the Policy in order for the Circuit Court to determine whether the Policy's arbitration provision was valid and enforceable, targeted specifically to Belo's involvement in the negotiation and formation of the Policy. (*See* Record at 15; Order of November 27, 2007).

B. The Policy

The Arbitration Provision in the Policy issued to Belo states:

16. Arbitration

Notwithstanding Condition 15. Service of Suit, in the event of a disagreement as to the interpretation of this policy, it is mutually agreed that such dispute shall be submitted to binding arbitration before a panel of three (3) Arbitrators, consisting of two (2) party nominated (nonimpartial) Arbitrators and a third (impartial) arbitrator (hereinafter "umpire") as the sole and exclusive remedy. The party desiring arbitration of a dispute shall notify the other party, said notice including the name, address and occupation of the Arbitrator nominated by the demanding party. The other party shall within 30 days following receipt of the demand, notify the demanding party in writing of the name, address and occupation of the Arbitrator nominated by it. The two (2) Arbitrators so selected shall, within 30 days of the appointment of the second Arbitrator, select an umpire. If the Arbitrators are unable to agree upon an umpire, each Arbitrator shall submit to the other Arbitrator a list of three (3) proposed individuals, from which list each Arbitrator shall choose one (1) individual. The names of two (2) individuals so

chosen shall be subject to a draw, whereby the individual drawn shall serve as umpire.

The parties shall submit their cases to the panel by written and oral evidence at a hearing time and place selected by the umpire. Said hearings shall be held within thirty (30) days of the selection of the umpire. The panel shall be relieved of all judicial formality, shall not be obligated to adhere to the strict rules of law or of evidence, shall seek to enforce the intent of the parties hereto and may refer to, but are not limited to, relevant legal principles. The decision of at least two (2) of the three (3) panel members shall be binding and final and not subject to appeal except for grounds of fraud or gross misconduct by the Arbitrators. The award will be issued within 30 days of the close of the hearings. Each party shall bear the expenses of its designated Arbitrator and shall jointly and equally share with the other the expense of the umpire and of the arbitration proceeding.

The arbitration proceeding shall take place in or in the vicinity of the Named Insured's address as shown in the Declarations or such other place as may be agreed to by the Named Insured and us. The procedural rules applicable to this arbitration, shall, except as provided otherwise herein, be in accordance with the Commercial Arbitration Rules of the American Arbitration Association.

(See Record at 4; Policy, p. 24 attached as Exhibit A to Belo's Fourth-Party Complaint).

Endorsement 5 to the Policy, the Subsidence Exclusion, provides as follows:

SUBSIDENCE EXCLUSION

THIS ENDORSEMENT CHANGES THE POLICY, PLEASE READ IT CAREFULLY

This policy does not provide coverage and the Company (or insurer or We, if applicable) will not pay any defense expenses, claim expenses and/or any damages or losses, or any other loss, cost or expense, including, but not limited to losses, costs, or expenses related to, arising out of, based upon, attributable to, associated with, caused directly or indirectly by, or contributed to, or aggravated by "subsidence" regardless of any other cause, event, material, product and/or building component that contributed concurrently or in any sequence to that loss, cost or expense or to such defense expenses, claim expenses and/or any damages or losses.

For the purpose of this exclusion, the following definitions are added to the policy:

"Subsidence" means earth movement of any kind whatsoever, including, but not limited to earthquake, landslide, "mine subsidence," "sinkhole collapse," earth sinking, rising or shifting, mud flow, expansion, contraction, consolidation,

freezing, thawing, settling, falling away, caving in, eroding, flowing, tilting, or other movement of land, earth or mud.

“Mine Subsidence” means subsidence of a man-made mine, whether or not mining activity has ceased.

“Sinkhole Collapse” means loss or damage caused by the sudden sinking or collapse of land into underground empty spaces created by the action of water on limestone or dolomite.

ALL OTHER TERMS AND CONDITIONS REMAIN UNCHANGED.

Id.

C. Discovery Period Regarding Belo’s Involvement in the Negotiation and Formation of the Policy Issued by Lexington

Pursuant to the Circuit Court’s November 27, 2007 Order, Belo and Lexington engaged in limited discovery focusing on Belo’s involvement in the negotiation and formation of the Policy. Gene Brinager, Belo’s corporate designee, was deposed regarding his involvement with procuring the Policy. Mr. Brinager ran the day-to-day operations of Belo Mine Services during the relevant time period. (*See* Record at 17; Dep. Transcript of G. Brinager, p. 15, attached as Exhibit 1 to Lexington’s Supplemental Memorandum of Law in Support of its Motion to Compel Arbitration, filed Feb. 7, 2008). Belo was in business from April 2003 to December 2006. *Id.* at p. 24. At that point, all of Belo’s assets were ‘sold’ to Regional Mine Service (“Regional”), which has been in business since October or November of 2006 and is operated by Mr. Brinager’s son. *Id.* at pp. 24-25. Mr. Brinager testified that Belo was a successful business and that Regional is currently a successful business. *Id.* at p. 145.

Mr. Brinager testified that he worked for Pittston Coal Corporation for thirty-eight years, and was employed as a mine manager for the last eighteen of those years. *Id.* at p. 89. As mine manager, he was responsible for the budget, production, costs, and all labor issues for nine to thirteen different mines. *Id.* at p. 90. Mr. Brinager was one of two mine managers at Pittston

and reported directly to the Vice President of the company, which at one time had 16,000 employees and continued to have 1,400-1,500 employees until Mr. Brinager left the company. *Id.* at pp. 91-92. Mr. Brinager also testified that he participated in about a half dozen arbitrations in his capacity as mine manager at Pittston, half of which were decided in favor of the company he represented. *Id.* at pp. 97, 139. Mr. Brinager referred to Belo as his own business at least once during the deposition and testified he had the “final say” in all decisions. *Id.* at pp. 100, 104. Mr. Brinager believes his name was known to mine operators with whom Belo entered into contracts, and that he is known as a good, honest, and knowledgeable coal miner. *Id.* at p. 101.

Mr. Brinager testified that was responsible for negotiating *all* of the mining contracts entered into with Belo’s customers. *Id.* at 31. Mr. Brinager stated that he did have a lawyer review the mining contracts before entering into them.¹ *Id.* at pp. 33-34. When asked if he read the contracts he negotiated with the mining companies, he responded:

I read them but I don’t just stop everything and sit down and say, oh, this says --- I read them when I get a chance to read them.

Id. at p. 38.²

Mr. Brinager testified that Belo had between 80 to 90 employees at the time the Policy was purchased. *Id.* at pp. 30-31. At the time the application for the Policy was completed, Belo estimated its annual payroll to be \$1.3 million. *Id.* at p. 55. However, it was later determined to be three times as large – around \$4 million payroll during the Policy period. *Id.* at pp. 56, 173. Projected revenue for 2005 was \$400,000 based on the \$1.3 million payroll. *Id.* at p. 57.

Mr. Brinager testified that he was involved in the procurement of the Policy and that he negotiated the previous insurance policy issued to Belo by United. *Id.* at pp. 41-42. Belo sought

¹ Belo did give conflicting testimony that no attorney reviewed these contracts, on page 38 of the transcript.

² When asked if he read them before signing them, he responded, “For the most part I flip through and look at ‘em.” *Id.*

out Wayne Runyon to act as its insurance agent when Belo first opened for business. *Id.* at p. 47. Before the Policy was issued, Mr. Runyon brought an application to the office, and Belo provided information needed to fill out the application. *Id.* at pp. 48, 116. Mr. Brinager recalled looking over the application after it was completed, and then Denise, his daughter-in-law, signed the application. *Id.* at p. 49.

Mr. Runyon continues to be the agent for Regional. *Id.* at p. 79. Mr. Brinager also testified that the initial Lexington Policy was renewed. *Id.* at p. 46. Thus, Regional continued to carry Lexington coverage. *Id.* at p. 46. Mr. Brinager became aware of the arbitration provision in August of 2006. *Id.* at p. 135. At that time, no one at Belo called Mr. Runyon to protest the arbitration provision. Furthermore, Belo never requested that the arbitration provision be changed or removed from the renewal policy. Importantly, Belo never expressed any concern that the arbitration provision contained in the Policy was unfair. *Id.* at p. 136.

Mr. Brinager testified that he paid \$200,000 for the Policy premium. *Id.* at p. 127. He also confirmed that he was the person charged with procuring insurance. *Id.* at pp. 100, 104. When asked if the people running Belo, now Regional, were smart business people, Mr. Brinager responded “[u]sually when you are successful you know what you’re doing.” *Id.* at p. 146. When specifically asked at his deposition how arbitration would be unfair to Belo, Mr. Brinager responded: “I can’t answer that. I don’t – I don’t know. I mean, there’s a lot of things that comes [sic] out in arbitration that I just can’t answer that at this time.” *Id.* at p. 138. He went on to testify that there is no real difference between arbitration and court. *Id.*

Mr. Brinager testified that he spoke to Mr. Runyon at least one to two dozen times since Mr. Runyon became Belo’s insurance agent. *Id.* at p. 118. Mr. Brinager and his daughter-in-law, Denise, have called Mr. Runyon on prior occasions to request additional coverage in

exchange for paying additional premiums. *Id.* at pp. 61, 63. In fact, at the time of his deposition, Mr. Brinager was in the process of requesting additional coverage on behalf of Regional. *Id.* at pp. 85-86. Mr. Brinager also testified that at some point during the Policy period, it was decided that all of the companies Belo entered into mining contracts with would be named as additional insureds and certificate holders on its Policy. *Id.* at pp. 75-76. This decision was made by Belo, not Mr. Runyon. *Id.* at p. 77. This negotiation was successfully completed and all such companies were, in fact, made certificate holders and additional insureds under the Policy.

D. Circuit Court's Order Compelling Arbitration

Following the discovery period ordered by the Circuit Court on November 27, 2007, Lexington filed a supplemental memorandum in support of its Motion to Compel Arbitration arguing that Belo participated in the negotiation and formation of the Policy through its insurance agent as evidenced by the testimony of Mr. Brinager. (*See* Record at 17; Lexington's Supplemental Memorandum of Law in Support of its Motion to Compel Arbitration). Lexington also argued that Belo did not indicate dissatisfaction with the Policy at any time since the issuance of the Policy. *Id.* The Circuit Court heard oral argument on the motion on March 12, 2008, and orally granted Lexington's Motion to Compel Arbitration. The Circuit Court subsequently entered its written order compelling arbitration on June 27, 2008. (*See* Record at 29).

The Circuit Court held that the arbitration provision contained in the Policy is not unconscionable and is therefore valid and enforceable under West Virginia law. *See id.* at p.2. The Circuit Court found that, although "Belo may not have seen a copy of the Policy before the end of the Policy period," this fact was not dispositive. *Id.* The Circuit Court also found that Belo's corporate designee could not articulate anything unfair about the arbitration provision and that the corporate designee has been involved in numerous prior arbitrations. *Id.* The Circuit

Court further concluded that Belo's argument that it would be deprived of attorney's fees and costs if compelled to arbitrate was not persuasive. *Id.* Accordingly, the Circuit Court dismissed without prejudice Belo's Fourth-Party Complaint against Lexington seeking coverage under the Policy and ordered the parties to proceed to arbitration to resolve the coverage dispute. *Id.*

E. Belo's Petition for Writ of Prohibition Regarding the Circuit Court's Order Compelling Arbitration

Despite the Circuit Court's ruling, Belo sought to prevent the arbitration from proceeding by filing a Motion to Stay Arbitration Pending Appeal. (*See* Record at 31; Belo's Motion to Stay Pending Appeal). Following oral argument on Belo's motion, the Circuit Court granted the motion and stayed the entire case, including the arbitration proceeding, for a period of sixty days, but declined to make its order final and appealable under Rule 54(b) of the West Virginia Rules of Civil Procedure. (*See* Record at 30; second Order dated June 27, 2008, from the Circuit Court's June 9, 2008 hearing). On June 26, 2008, Belo filed a Petition for Writ of Prohibition with this Court seeking to prohibit enforcement of the Circuit Court's June 27, 2008 Order compelling arbitration pursuant to the valid and enforceable arbitration provision contained in the Policy. This Court refused Belo's request for a Writ of Prohibition on September 4, 2008. (*See* Record at 37; Order of Sept. 4, 2008 Refusing Writ of Prohibition, attached to Lexington's Motion to Stay as Exhibit A).

F. Arbitration

The initial planning conference for the arbitration proceeding was held on October 6, 2008. (*See* Record at 5; Order Granting Lexington's Motion to Confirm and Reduce Arbitration Award to Judgment, dated March 22, 2010 at ¶ 9). The Arbitration Panel ("Panel") initially asked the parties to write brief position statements on the issue of whether the Policy's

Subsidence Exclusion was a legal issue, which could be examined by the Panel without further factual development, or whether the issue was intertwined with factual matters that necessitated discovery and factual development. *Id.* The parties concluded filing their arbitration statements by November 18, 2008. *Id.*

Lexington urged the Panel to consider the subsidence issue immediately as a matter of law, while Belo and Newtown urged the Panel to allow a period of discovery. *Id.* at ¶ 10. The Panel held another conference on this issue on January 28, 2009, at which time the parties were instructed to submit additional statements regarding the need (or lack thereof) to conduct factual discovery. *Id.* at ¶ 11. On February 6, 2009, the Panel granted Belo and Newtown a ninety (90) day discovery period. *Id.* at ¶ 12.

Following the close of the discovery period, a briefing schedule was set regarding application of the Policy's Subsidence Exclusion and Belo's defense to application of the Subsidence Exclusion pursuant to the doctrine of reasonable expectations. *Id.* at ¶ 13. The Panel scheduled a hearing on the applicability of the Subsidence Exclusion for September 4, 2009. *Id.*

At the conclusion of September 4, 2009 hearing, the Panel instructed the parties to further brief the issue of whether use of the term "subsidence" in Endorsement No. 5 in the Policy is ambiguous in light of the common and ordinary understanding of that term as reflected in reference materials identified by Umpire Arceneaux. *Id.* at ¶ 14.

Following the second hearing on October 27, 2009, the Panel ordered the parties to submit proposed findings of fact and conclusions of law regarding the Subsidence Exclusion by November 13, 2009. *Id.* at ¶ 17. On December 9, 2009, the Panel declared the hearings on this matter closed. *Id.* at ¶ 18.

A Final Award was entered by the Panel on January 7, 2010 - 29 days after the hearings were declared closed - in favor of Lexington and against Newtown and Belo. (*See* Record at 47; Final Award attached as Exhibit A to Belo's Motion to Vacate Arbitration Award). The Panel majority found that "the Subsidence Exclusion in the Lexington Insurance Policy is not ambiguous and should be applied as written to deny insurance coverage in this instance." *Id.* at p.3. The arbitration award issued by the Panel divides the costs of the umpire and arbitration proceedings between Lexington, Newtown, Belo, and Kanawha Eagle, all of whom were parties to the arbitration. *Id.* at p.40.

G. The Circuit Court's Order Confirming and Reducing the Arbitration Award to Judgment in favor of Lexington

Following entry of the arbitration award in favor of Lexington, Belo unsuccessfully sought to have the arbitration award vacated by the Circuit Court. (*See* Record at 47; Belo's Motion to Vacate Arbitration Award). Because Belo failed to raise any grounds to vacate the arbitration award which are permissible under West Virginia law, the Circuit Court properly rejected Belo's Motion to Vacate the Arbitration Award and on March 22, 2010, entered an Order granting Lexington's motion which incorporated the arbitration award and dismissed Lexington from the instant action with prejudice. (*See* Record at 55; Order Granting Lexington's Motion to Confirm Arbitration Award, dated March 22, 2010).

III. STATEMENT OF THE ISSUES

A. The Circuit Court's Order compelling Lexington and Belo to arbitrate their coverage dispute pursuant to the valid and enforceable arbitration provision contained in the Policy issued by Lexington to Belo was plainly right and was clearly supported by the evidence in this case.

B. The Circuit Court was also plainly right in refusing to vacate the final arbitration award and by confirming it and reducing it to judgment, as the narrow circumstances under which arbitration awards are subject to judicial review under West Virginia law are not present here.

IV. STANDARDS OF REVIEW

A. Standard of Review of an Order Compelling Arbitration

In *McGraw v. American Tobacco Co.*, 224 W.Va. 211, 681 S.E.2d 96, Syl. Pt. 4 (2009), this Court established the standard of review of an order compelling arbitration:

This Court will preclude enforcement of a circuit court's order compelling arbitration only after a de novo review of the circuit court's legal determinations leads to the inescapable conclusion that the circuit court clearly erred, as a matter of law, in directing that a matter be arbitrated or that the circuit court's order constitutes a clear-cut, legal error plainly in contravention of a clear statutory, constitutional, or common law mandate.

B. Standard of Review of an Arbitration Decision

In *Barber v. Union Carbide Corp.*, 172 W. Va. 199, 203, 304 S.E.2d 353, 357 (1983), this Court discussed the standard of review of an arbitration decision:

“Where other courts have chosen to supervise the justice of arbitration awards by allowing “constructive fraud” and similar challenges, we have chosen to limit the availability of arbitration to knowledgeable commercial parties. *Board of Education v. Miller*, 160 W.Va. 473, 236 S.E.2d 439 (1977). Furthermore, we are willing to inquire into such matters as whether the agreement to arbitrate was a contract of adhesion and whether arbitration is proper under the totality of the commercial circumstances. All of these inquiries may be made by the judge in the hearing on the motion for summary judgment, since they appear from the four corners of the contract or from the nature of the parties themselves. Once it appears, however, that the litigants are parties to a proper commercial contract and knowingly bargained for an arbitration clause, we will not inquire further into the correctness of the arbitrator's result in the absence of *actual fraud*.”

(Emphasis added).

Furthermore, judicial review of arbitration awards is extremely limited – in fact, it is ‘among the narrowest known to the law.’” *U.S. Postal Serv. v. Am. Postal Workers Union*, 204

F.3d 523, 527 (4th Cir. 2000) (quoting *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 91 (1978) (internal quotation marks omitted)).

V. DISCUSSION OF LAW

A. The Circuit Court's Order Compelling Arbitration was Plainly Right under Well-Settled West Virginia Law and the Evidence before the Circuit Court Clearly Supported its Findings.

This Court has recognized that West Virginia law highly favors arbitration agreements. *Bd. of Educ. v. W. Harley Miller, Inc.*, 159 W. Va. 120, 126, 221 S.E.2d 882 (1975) [hereafter *Bd. of Educ.* *I*]. It is also well-settled in West Virginia that arbitration agreements are enforceable. West Virginia's arbitration statute provides as follows:

Persons desiring to end any controversy, whether there be a suit pending therefor or not, may submit the same to arbitration, and agree that such submission may be entered of record in any court. Upon proof of such agreement out of court, or by consent of the parties given in court, in person or by counsel, it shall be entered in the proceedings of such court; and thereupon a rule shall be made that the parties shall submit to the award which shall be made in pursuance of such agreement.

W. Va. Code § 55-10-1. Under West Virginia law, submission to arbitration is irrevocable without leave of court. W. Va. Code § 55-10-2.

West Virginia's arbitration statute supports and follows the Federal Arbitration Act ("FAA"). Section 2 of the FAA provides that a written arbitration agreement "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. The United States Supreme Court has recognized that Section 2 of the FAA "declare[s] a national policy favoring arbitration of claims that parties contract to settle in that manner" and that this national policy "appl[ies] in state as well as federal courts." *Preston v. Ferrer*, 552 U.S. 346, 352 (2008) (citing *Southland Corp. v. Keating*, 465 U.S. 1 (1984)).

In accordance with the FAA and West Virginia's arbitration statute, this Court has recognized the enforceability of arbitration agreements. In *Board of Education v. W. Harley Miller, Inc.*, 160 W. Va. 473, 236 S.E.2d 439 (1977) [hereinafter *Bd. of Educ. II*], this Court noted:

Where parties to a contract agree to arbitrate either all disputes or particular limited disputes arising under the contract, and where the parties bargained for the arbitration provision, then, *arbitration is mandatory*, and any causes of action under the contract which by the contract terms are made arbitrable are merged, in the absence of fraud, with the arbitration award and the arbitration award is enforceable upon a complaint setting forth the contract, the arbitration provision, and the award of the arbitrators upon motion for summary judgment made at the proper time.

Id., 160 W. Va. at 486 (emphasis added). This Court also noted that “[t]he end result of the rule which we enounce today is that all arbitration provisions in all contracts which indicate that the parties intended to arbitrate their differences rather than litigate them are presumptively binding, and specifically enforceable.” *Id.* at 487-88.

The rule acknowledged by this Court in *Board of Education II* clarified and confirmed its earlier ruling in a prior case involving the same parties. In the initial decision, this Court noted that West Virginia Code Section 55-10-1 is in need of modernization, and specifically noted that “[t]he wisdom of the Legislature should be employed to insure that standard arbitration clauses in commercial contracts, fairly consented to by the parties, be enforceable, whether the disputes covered thereunder be of present existence or of future contemplation.” *Bd. of Educ. I*, 159 W. Va. at 127.

In the present case, the Circuit Court correctly adhered to West Virginia and federal law by compelling arbitration pursuant to the arbitration clause contained in the Policy. Belo is a sophisticated party to a commercial contract, and it agreed in advance to arbitrate all disputes arising out of the interpretation of the Policy issued to it by Lexington. Accordingly, the

arbitration provision in the Policy is enforceable and the Circuit Court correctly compelled arbitration. Consequently, this Court should affirm the Order compelling arbitration.

1. **The evidence before the Circuit Court clearly demonstrated that the arbitration provision in the Policy is valid and enforceable.**

Specifically with respect to enforceability challenges to written arbitration clauses, this Court has stated:

[I]t is presumed that an arbitration provision in a written contract was bargained for and that arbitration was intended to be the exclusive means of resolving disputes arising under the contract; however, where a party alleges that the arbitration provision was unconscionable or was thrust upon him because he was unwary and taken advantage of, or that the contract was one of adhesion, the question of whether an arbitration provision was bargained for and valid is a matter of law for the court to determine by reference to the entire contract, the nature of the contracting parties, and the nature of the undertakings covered by the contract.

State ex rel. Saylor v. Wilkes, 216 W. Va. 766, 774, 613 S.E.2d 914, 922 (2005) (citing *Bd. of Educ. II*, 160 W. Va. 473, 486 (1997)). This principal was recently reaffirmed by this Court in *Ruckdeschel v. Falcon Drilling Co.*, 225 W. Va. 450, 693 S.E.2d 815 (2010). In other words, West Virginia courts are required to enforce an arbitration provision in a contract, unless a showing is made by the opposing party, clearly and convincingly, that the provision was not bargained for “by reference to the entire contract, the nature of the contracting parties, and the nature of the undertakings covered by the contract. “ No such showing can be made in this case.

Belo first argues that the Circuit Court committed reversible error by *implicitly* ruling that the Lexington insurance policy was not a contract of adhesion. No such *implied* ruling was made in the March 12, 2008 Order. The Circuit Court *explicitly* ruled that as a matter of law:

- (1) West Virginia law is well settled that arbitration clauses are enforceable unless they are unconscionable;

(2) The arbitration provision in the Policy is not unconscionable; and

(3) Belo's argument that it would be deprived of attorney's fees and costs if arbitration is compelled is not persuasive.

(See Record at 29; March 12, 2008 hearing Order entered June 27, 2008 at p. 2).

Belo has made no showing (nor can it) that it did not bargain for the provisions of the Policy at issue. There is no legal requirement that every single provision of an insurance policy be separately negotiated. In fact, this particular argument was raised unsuccessfully in *Joslin v. Mitchell*, 213 W. Va. 771, 584 S.E.2d 913 (2003). The *Joslin* decision arose out of a dispute regarding uninsured motorist coverage. The issue was whether it is permissible for insurance companies to include anti-stacking language in insurance policies, so long as the insured received a multi-car discount in return. Appellees/policyholders argued that "insurance contracts are contracts of adhesion, and that allowing insurance companies to unilaterally insert policy language in exchange for minimal consideration is grossly unfair to insurance consumers." *Id.* at 778. This Court disagreed, holding that such contentions involve public policy determinations that are best addressed by the Insurance Commissioner or the Legislature. *Id.* In so holding, the Court noted that it is the Legislature's, not the Court's, province to enact legislation compelling insurance carriers to offer consumers more choices. *Id.*

Although the context is different, this is the same argument that Belo is raising, and the same conclusion should be reached. There is no case law or statutory authority prohibiting an insurer from unilaterally inserting policy language into an insurance policy. To now hold that any such provisions are automatically unenforceable, solely on the grounds that insurance contracts are contracts of adhesion, would be in contravention of well established West Virginia law. As this Court reaffirmed recently, "the fact that the Agreement is a contract of adhesion

does not necessarily mean that it is also invalid.” *State ex rel. Clites v. Clawges*, 224 W. Va. 299, 306, 685 S.E.2d 693, 700 (2009). Following Belo’s logic would lead to the conclusion that insurance policies can *never* contain a valid arbitration provision, which is expressly contrary to federal law and West Virginia law. As such, West Virginia law mandates that the arbitration provision is valid and enforceable.

In the present case, the Circuit Court was correct in finding that the arbitration provision is valid and enforceable. Belo’s arguments that it did not agree to the arbitration provision and that the provision is unconscionable and is contained within a contract of adhesion are unfounded and unsupported. The evidence before the Circuit Court plainly showed that Belo is a sophisticated commercial entity that negotiated the Policy through its insurance agent. Contrary to the assertions made by Belo in footnote 1 of its Brief, West Virginia law is clear that Mr. Runyon is the agent of *Belo*, not Lexington, as Lexington is a surplus lines insurer. W.Va. Code § 33-12-1 (Article 12 does not apply to excess line and surplus line agents and brokers); 114 CSR 20-8.2 (b) (Surplus lines insurers are not permitted to appoint individual insurance producers). Furthermore, the arbitration provision in the Policy is appropriate given the type of contract at issue. The arbitration provision is not oppressive and was not intended to prevent Belo from bringing claims under the Policy; rather, it provides an efficient and often less-expensive alternative means of resolving claims.³ Accordingly, the Circuit Court did not commit clear legal error by enforcing the arbitration provision.

- a. **The Circuit Court correctly found that the arbitration provision is not unconscionable simply because it is contained in an insurance policy.**

³ Lexington recognizes in this particular case that arbitration was neither quick nor inexpensive, but posits that 100% of the reason for this is Belo’s numerous challenges to the arbitration, in the Circuit Court, this Court, and even to the arbitration panel itself.

The Circuit Court ultimately did not need to rule on the issue of whether or not the Policy was a contract of adhesion, as it found that there was nothing unfair about the arbitration provision contained within the Policy. However, courts have recognized under West Virginia law that insurance policies are not contracts of adhesion in situations involving parties of relatively equal bargaining power. *See, e.g., Supertane Gas Corp. v. Aetna Cas. & Sur. Co.*, No. 92-00014-M, 1994 U.S. Dist. LEXIS 21602 (N.D.W. Va. Sept. 27, 1994). This is so because the duty of an insured to read an insurance contract is applicable to contracts negotiated at arm's length between parties of reasonably equivalent bargaining power. *Id.* In fact, the court in *Supertane Gas Corp.* noted that a reasonable businessman in a fairly large business spending \$24,000 for an insurance premium would do something more than scan the policy and that "[i]f the contract language of an insurance policy is ever to mean anything, it must be enforced in this situation." *Id.* at 12. For this reason, the insurance policy in that case was found *not* to be a contract of adhesion. *Id.*

In the present case, the evidence belies Belo's contention that the Policy is a contract of adhesion. Mr. Brinager is a sophisticated businessman who operated a large commercial business. (See Record at 17; Dep. Transcript of G. Brinager, pp. 15, 89 attached as Exhibit 1 to Lexington's Supplemental Memorandum of Law in Support of its Motion to Compel Arbitration). He was responsible for obtaining insurance on behalf of Belo and worked with Mr. Runyon to procure insurance for Belo in light of the size of the business and the types of coverage needed. Belo negotiated eleven endorsements to the policy and paid \$200,000 for the Policy premium. *Id.* at p. 127. Mr. Brinager attested to the business acumen of the individuals operating Belo at his deposition by stating, "[u]sually when you are successful you know what

you're doing.” *Id.* at p. 146. In light of the bargaining powers of both parties, the Policy is not a contract of adhesion.

Belo also failed to establish that the arbitration clause is unconscionable, and the Circuit Court correctly held that the arbitration clause is *not* unconscionable. As the Circuit Court correctly found, Belo’s corporate designee failed to articulate how the arbitration provision is unfair. (*See* Record at 29; Order dated June 27, 2008, from Circuit Court’s March 12, 2008 hearing; Record at 17; Dep. Transcript of G. Brinager, pp. 97, 138-139). Mr. Brinager allegedly first became aware of the arbitration provision in August of 2006. *Id.* at p. 135. Yet no one from Belo called Mr. Runyon to protest the arbitration provision after it was discovered. *Id.* at p. 136. Of even greater significance is the fact that Belo never requested that the arbitration provision be changed or removed from the renewal policy after discovering its presence. *Id.* The Policy was subsequently renewed with the arbitration provision intact. Belo also never expressed any concern that the arbitration provision contained in the Policy was unfair. *Id.*

By taking the position that the arbitration clause is unconscionable, Belo is attempting to single out this clause while seeking to uphold the remaining contents of the Policy. Belo tendered the defense of Newtown under the Policy, claiming Newtown is an additional insured. Newtown’s defense was provided by Lexington, under a Reservation of Rights, until the Circuit Court adopted the arbitration award. Belo has thus availed itself of the benefits of the Policy. It cannot do so while trying to invalidate one provision of the Policy.

As discussed above, Section 2 of the FAA provides that a written arbitration agreement “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. “Generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements

without contravening §2 [of the FAA], but courts may not invalidate arbitration agreements under state laws applicable only to arbitration provisions.” *Montrosse v. Conseco Fin. Servicing Corp.*, No. 5:00-0434, 2000 U.S. Dist. LEXIS 20792, *10 (S.D.W. Va. Dec. 20, 2000) (citations omitted). In other words, by enacting Section 2, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts. *Id.* at *10-11 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)). The Supreme Court of the United States has stated:

In any event, § 2 gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause “upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (emphasis added). ***What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause.*** The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal “footing,” directly contrary to the Act's language and Congress' intent.

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995) (emphasis added).

This is precisely what Belo is attempting to accomplish. Belo is not arguing that the Policy as a whole is unconscionable under general contract law principals – only that the arbitration provision should be invalidated.

In *Schultz v. AT&T Wireless Services, Inc.*, 376 F. Supp. 2d 685, 686-87 (N.D.W. Va. 2005), a controversy arose out of a binding arbitration provision contained in a wireless telephone service contract that the plaintiff purchased from AT&T. AT&T argued that the plaintiff must settle all disputes with AT&T through arbitration, pursuant to the terms and conditions of the service contract. *Id.* The plaintiff asserted that the arbitration clause was unconscionable and unenforceable under West Virginia law because the arbitration provision must be “bargained for” to be valid. *Id.* at 688. The court first analyzed and rejected the “not

bargained for" argument, holding that any such law in West Virginia was preempted by the FAA, as it was targeted solely towards arbitration provisions contained within contracts. *Id.* The court also rejected the plaintiff's second argument, that the arbitration clause was unconscionable because it limited his rights under West Virginia law by prohibiting all class action lawsuits. *Id.* In this regard, the court specifically noted that the plaintiff would be able to vindicate his rights through arbitration. *Id.*

The *Schultz* court held that "the agreement at issue was an adhesion contract, as it was a standardized contract that AT&T offered on a 'take it or leave it' basis." *Id.* at 692. However, the contract as a whole did not state unreasonable terms or unfairly take advantage of the plaintiff, and it did not 'offend the developed policy of the law in the area under consideration,' given judicial precedent upholding such agreements *Id.* Moreover, the court noted that the plaintiff was a sophisticated, educated consumer in a reasonable bargaining position, given the meaningful alternatives that he held in obtaining phone service." *Id.* at 692.

Belo asserts similar arguments in the instant case, namely that the arbitration clause is invalid because it was not bargained for and that the provision is unconscionable because it limits Belo's rights under West Virginia law. Belo's arguments must also fail. In fact, Belo insisted upon and was granted discovery and a protracted briefing schedule, even raising jurisdictional arguments for the first time nearly two years after Lexington filed its demand for arbitration.⁴ There is nothing unreasonable in the Policy, it does not unfairly take advantage of Belo, it does not "offend" West Virginia insurance law, and Belo is a sophisticated commercial entity. Accordingly, Belo's arguments that the Policy is a contract of adhesion and that the arbitration provision is unconscionable are in direct contradiction of the FAA and West Virginia

⁴ Belo's own conduct in this regard increased the cost of arbitration for everyone involved. Nevertheless, Belo wishes to start the entire process over again with this appeal.

law. *See also* W. Va. Code § 33-6-30(a) (stating that “[e]very insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy and as amplified, extended or modified by any rider, endorsement or application attached to and made a part of the policy”).

For these reasons, the Circuit Court did not commit clear legal error in finding that the arbitration provision in the Policy is not unconscionable and in ordering the parties to proceed to arbitration.

b. The Circuit Court correctly found that the arbitration provision is valid and enforceable because Belo was involved in the negotiation and formation of the Policy.

Although Belo argues in its Appellant’s Brief that it did not bargain for the Policy or the arbitration provision, the evidence before the Circuit Court revealed that the Policy as a whole was bargained for by Belo, a sophisticated commercial entity, by and through its insurance agent. Several of the Policy terms were negotiated, as evidenced by the eleven separate endorsements to the Policy. Although Belo argues that it did not have an opportunity to review the Policy before it was purchased and did not receive a copy of the Policy until after the Policy period ended, the Court, within its discretion, specifically discounted these arguments in its Order from the March 12, 2008 hearing. The Court found this to be the fault of Belo’s agent, not Lexington. Belo incorrectly cites W. Va. Code § 33-12-22 for the proposition that under West Virginia law the insurance agent is the agent of the insurance company. While that is generally true, Belo is aware from losing this argument below that this is not applicable to surplus lines carriers such as Lexington, and in fact W. Va. Code § 33-12-1 *explicitly states* that article 12 it does not apply to surplus lines carriers.

The evidence before the Circuit Court demonstrated that Belo was a sophisticated business at the time it entered into the Policy with Lexington. (*See* Record at 17; Dep. Transcript of G. Brinager, pp. 24-25, attached as Exhibit 1 to Lexington's Supplemental Memorandum of Law in Support of its Motion to Compel Arbitration). According to Mr. Brinager, Belo was a successful business and Regional is also a successful business. *Id.* at p. 145. Mr. Brinager's deposition testimony also revealed that he is a sophisticated businessman and had participated previously in arbitrations. *Id.* at pp. 15, 89, 90-92, 97, 100-101, 104.

Mr. Brinager was responsible for negotiating *all* of the mining contracts entered into with Belo's customers. *Id.* at p. 31. At the time the Policy was purchased, Belo had between 80 to 90 employees. *Id.* at pp. 30-31. At the time the application for the Policy was completed, Belo estimated its annual payroll to be \$1.3 million. *Id.* at p. 55. It ended up being three times as large – around \$4 million payroll during the policy period. *Id.* at pp. 56, 173. Projected revenue for 2005 was \$400,000 based on the \$1.3 million payroll. *Id.* at p.57.

Mr. Brinager testified that he was involved in the procurement of the Policy and that he previously negotiated Belo's prior insurance policy with United Insurance. *Id.* at pp. 41-42. According to the testimony of Mr. Brinager, the Policy was renewed and Regional continued to carry Lexington coverage (at least until 2009). *Id.* at p. 46. Belo sought out Wayne Runyon to act as its insurance agent when Belo first opened for business, and Mr. Runyon continues to act as the agent for Regional. *Id.* at pp. 47, 79. Prior to the issuance of the Policy, Mr. Runyon brought an application to the office, and Belo provided information needed to fill out the application. *Id.* at pp. 48, 116.

Mr. Brinager's testimony belies the contention that Belo had no role in the negotiation and procurement of the Policy. Mr. Brinager often spoke with his agent and called his agent to

request additional coverages in exchange for paying additional premiums. *Id.* at pp. 61, 63, 118. In fact, at the time of his deposition, Mr. Brinager was in the process of requesting additional coverage on behalf of Regional and had previously added companies Belo entered into mining contracts with as additional insureds and certificate holders on its Policy. *Id.* at pp. 75-76, 85-86.

This compelling evidence illustrates that Belo was deeply involved in the negotiation and formation of the Policy. At Belo's request, several changes were made to the Policy after it was issued, including an increase in coverage limits and the addition of insureds. This clearly was not a "take-it-or-leave-it" transaction, as Belo claims. It is also quite evident that Belo is a successful, sophisticated commercial entity with sufficient bargaining power, and one that was represented by its own insurance agent through the underwriting process; *not* a small family-run business as Belo implies. Without question, Belo was involved in the negotiation and formation of the Policy at issue.

Despite Belo's involvement with negotiating the Policy, Belo claims that it was not given the option to consent to the arbitration provision or the option of purchasing an endorsement to override the arbitration provision. Interestingly, despite the other changes Belo made to the Policy after it was issued, Belo never requested that the arbitration clause be removed after "discovering it" in August 2006. *Id.* at pp. 135, 136. In fact, Belo renewed the Policy even after discovering that the Policy contained an arbitration clause. Belo also claims that no one pointed out the arbitration provision or explained the effects of the arbitration provision, yet Belo did not call its insurance agent, Wayne Runyon, to inquire about the arbitration provision or seek an explanation as to the effects of the provision after learning of it.

Although the arbitration provision was not specifically discussed prior to the issuance of the Policy, there is no legal requirement that every single provision of an insurance policy be

separately negotiated. *Joslin*. Contrary to Belo's argument, there is no case law or statutory authority prohibiting an insurer from unilaterally inserting policy language into an insurance policy. Accordingly, the Circuit Court was plainly right in following well-settled West Virginia law to find that the arbitration provision is valid and enforceable and the evidence before the Circuit Court clearly supported its finding.

c. **The arbitration provision does not deprive Belo of protections under West Virginia law or the right to seek attorney's fees and costs.**

Belo's arguments that the arbitration provision is unconscionable because it deprived Belo of its attorney's fees and costs and the "protection" of West Virginia law and procedure are baseless. The Circuit Court expressly held that Belo's argument in this regard was unpersuasive. (See Record at 29; Order dated June 27, 2008, from March 12, 2008 hearing). This Court has also rejected similar arguments made in attempts to invalidate arbitration agreements. In *State ex rel. Wells v. Matish*, 215 W. Va. 686, 600 S.E.2d 583 (2004), this Court was called upon to determine whether an arbitration provision contained in an employment contract was unconscionable and therefore unenforceable because of the costs incurred in participating in arbitration. *Id.*, 215 W. Va. at 691. In support of its decision that the provision was not unconscionable because of the cost, this Court noted that Rule 34(d) of the AAA's National Rules states that "the arbitrator shall, in the award, assess arbitration fees, expenses, and compensation . . . in favor of any party, and in the event any administrative fees or expenses are due the AAA, in favor of the AAA." *Id.*, 215 W. Va. at 692.

Likewise in the present case, the Circuit Court correctly held that Belo's argument that it was deprived of the right to seek attorney's fees and costs was unpersuasive. The arbitration provision holds that Belo will have to pay its own expenses and half of the expenses for a neutral

arbitrator. (See Record at 4; the Policy, p. 24, attached as Exhibit A to Belo's Fourth-Party Complaint). However, since Belo would have to pay its own expenses if this matter had proceeded in the Circuit Court as well, it is unclear how arbitration is a greater financial burden. In fact, arbitration is widely considered a much faster, less expensive means of dispute resolution than traditional litigation. See e.g., *Bd. of Educ. I*, 159 W. Va. at 126 ("The desire for quick and efficient determinations of disputes between contracting parties, which arbitration generally encourages, has gradually replaced judges' overweening concern for preserving courts of their jurisdiction"); *Id.*, 159 W. Va. at 122 ("The use of arbitration as a mechanism for settling contractual disputes was permitted at common law and even favored because of its potential to terminate controversies speedily and cheaply"); *Bd. of Educ. II*, 160 W. Va. at 476 ("where both parties are concerned with speedy, economical, conflict resolution, and harmonious business relations, they will often prefer arbitration to litigation, and incorporate this preference in their contracts").

Moreover, Belo's argument that the arbitration provision limits its rights to recover attorney's fees and costs under West Virginia law also wholly ignores the fact that Belo is not entitled to attorney's fees and costs simply because it is involved in a coverage dispute with its insurer. Rather, Belo would be entitled to seek an award of attorney's fees and costs in the coverage litigation before the Circuit Court *only in the event that it had prevailed against its insurer*. *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 193-195, 342 S.E.2d 156, 159-161 (1986). In all actuality, it is not clear even in *that* instance that Belo would be entitled to any attorney fees, as this line of cases deals with expenses incurred by an insured trying to establish the duty to defend. In this instance, Lexington provided a defense to Newtown and sought arbitration regarding any ultimate duty to indemnify.

But in any event, if Belo were to ultimately be unsuccessful in the coverage litigation – as it was unsuccessful in arbitration – it must bear its own fees and costs. It is unclear how the arbitration provision limits Belo’s rights in this regard. Rule 34(d) of the AAA National Rules allows arbitrators to award fees and costs as they see fit. Belo was informed by the AAA panel that it could similarly seek attorney fees if it prevailed in the arbitration proceeding, and in fact *did* file a post-hearing motion seeking attorney fees.

Finally, Belo’s arguments that the arbitration provision is unconscionable because it was denied the protection of West Virginia law, rules of evidence and rules of procedure and because arbitration was Belo’s “sole and exclusive remedy” are similarly groundless. This argument was soundly rejected in *Schultz*, in which the court specifically noted that the plaintiff would be able to vindicate his rights under the law through arbitration. Moreover, the arbitration provision specifically states that the arbitration will be held in a location convenient to the named insured, and the arbitration was, in fact, held in West Virginia. Accordingly, the arbitrators chosen by the parties were well-versed in West Virginia law as it applies to insurance coverage disputes. Belo selected its own non-neutral arbitrator pursuant to the AAA’s rules, West Virginia attorney Vincent J. King, and the neutral Umpire, Jay Arceneaux, is also a West Virginia attorney, which belies Belo’s argument that the arbitration provision is unconscionable because Belo was subjected to a vigilante arbitration panel that disregarded well-established law, rules of evidence and procedure. Although the arbitration was not required to be conducted in accordance with West Virginia rules of procedure, the arbitration was conducted in accordance with the AAA’s well-established rules of procedure. ***The arbitration award was determined under West Virginia law.***

Recently, in *State ex. rel. AT&T Mobility v. Wilson*, 226 W. Va. 572, 703 S.E.2d 543 (2010), this Court reiterated the factors regarding unconscionability added to the analysis by the Court's decision in *State ex. rel. Dunlap v. Berger*, 211 W. Va. 549, 550-51, 567 S.E.2d 265, 266-67 (2002): (1) whether the contract prevents a claimant from vindicating his or her rights; and (2) whether the costs of arbitration are unreasonably burdensome.

Neither of these factors is applicable to Belo. If any of Belo's concerns raised herein had merit, arbitration would not be a highly favored method of alternative dispute resolution that is routinely enforced by West Virginia courts, *as they are nothing more than generic concerns which would apply in all arbitration proceedings*. The Circuit Court was plainly right in finding that the arbitration provision was not unconscionable.

d. **The fact that fees were awarded against Belo at arbitration does not render the provision unconscionable.**

The evidence before the Circuit Court clearly supported its finding that the arbitration provision in the Policy is *not* unconscionable. Belo, however, argues that the fees properly awarded by the Panel at the conclusion of the arbitration render the arbitration provision unconscionable. The Arbitration Provision in the Lexington Policy issued to Belo provides, in relevant part, that:

“[e]ach party shall bear the expenses of its designated Arbitrator and shall jointly and equally share with the other the expense of the umpire and of the arbitration proceeding.”

(See Record at 4; the Policy, p. 24, Exhibit A to Belo's Fourth-Party Complaint (emphasis added)). Additionally, Rule 43 of the AAA Commercial Arbitration Rules states:

R-43. Scope of Award

(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.

(b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.

(c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-49, R-50, and R-51. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.

(d) The award of the arbitrator(s) may include:

(i) interest at such rate and from such date as the arbitrator(s) may deem appropriate; and

(ii) an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

The Circuit Court found that the Panel apportioned only the costs of the arbitration proceeding and of Umpire Arceneaux's compensation between Lexington, Belo, Newtown, and Kanawha Eagle, all of whom were parties to the arbitration, in accordance with the Policy provision, and in accordance with Rule 43(c). (*See Record at 55; Order Granting Lexington's Motion to Confirm Arbitration Award, at ¶¶ 20-22*). There are no valid grounds upon which to challenge the Panel's determination of costs and expenses, as there are no typographical, mathematical, or computational errors in the award. Belo requested a modification of this award for the same reasons directly through the AAA, and such relief was denied on February 10, 2010. (*See Record at 50; Lexington's Opposition to Belo's Motion to Vacate Arbitration Award, p. 4*). The fact that Belo's portion of arbitration costs to the arbitrators exceeds \$21,000 is a testament only to Belo's litigiousness and determination to argue and brief every single point it could dredge up, no matter how specious. For example, during the arbitration, countless hours and several thousand dollars were spent briefing the issue of whether or not the arbitration panel actually had jurisdiction over the coverage dispute. (*See Record at 55; Order Granting Lexington's Motion to Confirm Arbitration Award, ¶ 15, n2*). This argument was raised by Belo

for the first time two years after the arbitration demand was filed, after it had submitted briefs on the substantive merits, and well after the Circuit Court had compelled the entire dispute to arbitration, with no good cause.

Belo's argument that the expense of arbitration makes the arbitration provision in the Policy unconscionable has been expressly rejected by this Court. In *Matish*, the plaintiff, an individual whose employment contract contained an arbitration provision, argued that he could not afford arbitration and that the costs rendered the arbitration clause in his contract unconscionable and therefore unenforceable. This Court disagreed, finding that the employment contract, although prepared by the employer, was clearly negotiated by both parties. *Id.*, 215 W. Va. at 692. Further, this Court stated that Mr. Wells was a sophisticated party to the contract, rather than an unsophisticated party forced to sign a form contract:

Rather, Mr. Wells was an experienced anchor and reporter who, along with his wife, actively and jointly negotiated his employment agreement. Mr. Wells was given the opportunity to examine the agreement at home and modifications were made after his overnight review. While the arbitration clause may not have been subject to alteration, there is no evidence that Mr. Wells was under any duress to sign this or any other contract. He was employed at another news station while he was negotiating this employment contract.

Id. The Court held that, in light of these facts, it could not find that the contract in question was one of adhesion, and that Mr. Wells "has simply not shown that arbitration would be prohibitively expensive." *Id.*

In support of this holding, this Court noted that Rule 34(d) of AAA's National Rules states that "the arbitrator shall, in the award, assess arbitration fees, expenses, and compensation . . . in favor of any party, and in the event any administrative fees or expenses are due the AAA, in favor of the AAA." *Id.* Consequently, this Court found no merit in Mr. Wells' claim that he

should not have to submit his case to arbitration because of the potential \$8,500.00 cost to him.
Id.

Belo is a sophisticated commercial entity with a payroll of \$4 million dollars during the policy period in question. To the extent it is arguing that costs exceeding \$21,000 are prohibitively expensive, this is an argument that is not supported by the facts, nor by Belo's own behavior in continuing to seek out new avenues of litigation against Lexington. Importantly, the rules clearly contemplate an award of arbitrator fees, as well as attorney fees if allowed by law. Further, these fees were also incurred by Lexington in establishing *that there is no coverage available for Belo or Newtown under the Lexington Policy*. Most importantly, the Circuit Court allowed discovery as to the enforceability of the arbitration provision in the Policy, read briefs and held oral arguments on two different occasions on whether the arbitration provision in the Policy is unconscionable, and held that it is not.

Belo repeatedly cites to the *Dunlap* case in support of its claim that the arbitration provision in the Policy is unconscionable. In *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 567 S.E.2d 265 (2002), a plaintiff filed a consumer protection suit against a jewelry store chain in West Virginia state court, alleging that the store engaged in a fraudulent scheme to charge customers surreptitiously for credit life, credit disability and property insurance. *Id.*, 211 W. Va. at 552. The plaintiff asserted that he had been forced to sign a purchasing and financing agreement, which included an arbitration provision. *Id.* at 554. Based on the arbitration provision, the circuit court entered an order staying all court proceedings. *Id.* at 555. Upon review, this Court noted that the state consumer protection laws sought to eradicate unconscionability in consumer transactions. *Id.* at 556. This Court found the arbitration provision at issue to be unconscionable, noting that the plaintiff "signed a contract of adhesion

containing provisions that would bar him from utilizing two remedies – punitive damages and class action relief – that are essential to the enforcement and effective vindication of the public purposes and protections” underlying consumer protection laws. *Id.* at 563.

Dunlap is a well reasoned decision holding that there is an exception to the presumed validity and enforceability of an arbitration clause in a written contract in situations of gross unconscionability. There are no similarities between the insurance contract between Belo and Lexington to the contract at issue in *Dunlap*. Belo is not a consumer who unwittingly purchased life, disability, and property insurance and unknowingly consented to arbitration in its finance agreement. *See Id.* Belo is a sophisticated commercial entity that purchased a contract of insurance from Lexington. In its purchase, it was represented by a broker and negotiated for numerous Endorsements to the Policy to change the scope of coverage. As such, *Dunlap* is inapposite and the Circuit Court correctly found that the arbitration provision in the Policy is valid and enforceable. Belo continued to renew this Policy without objecting to the arbitration provision contained within, long after it became aware of that provision.

The Circuit Court was plainly right in holding that the arbitration provision was not unconscionable and in compelling arbitration, and the evidence clearly supported its findings in this regard. Accordingly, the Circuit Court’s Order should be affirmed.

B. The Circuit Court’s Order Confirming the Arbitration Award was Plainly Right because Belo has Failed to Raise any Grounds Permissible under West Virginia Law Pursuant to which a Court may Vacate an Arbitration Award.

The Circuit Court did not commit clear legal error in confirming the arbitration award because, as a matter of law, neither of the grounds raised by Belo as reasons to vacate the award -- (1) that the arbitrators exceeded their jurisdiction by issuing an award outside the time limits mandated by the controlling arbitration agreement; and (2) that the arbitration panel failed to

appropriately apply West Virginia law when deciding the dispute -- are permissible reasons under the FAA, West Virginia law, or case law to vacate an arbitration award. The Circuit Court was correct in finding that the arbitration award in favor of Lexington and against Belo and Newtown was not procured by fraud, corruption, mistake, or any other undue means. The Circuit Court further found that the Panel of arbitrators, and each one individually, acted impartially and properly, such that the Final Award is mutual (by the majority), final, and definite. *See* W. Va. Code § 55-10-4.

West Virginia law is clear that an arbitration award shall be entered as a judgment of the court, unless good cause be shown against it. W. Va. Code § 55-10-3. In *Board of Education II*, this Court reviewed the case of *Hughes v. National Fuel Co.*, 121 W. Va. 392, 3 S.E.2d 621 (1939) and held:

To the extent that *Hughes* implied that a court should grant a hearing upon challenges to the arbitration award not amounting to actual fraud it is overruled, and to the extent that it stands for the enforceability and presumptive regularity of arbitration awards, it is approved.

Bd. of Educ. II, 160 W. Va. at 489, n.7. This Court went on to hold: “for emphasis we state and endorse syllabus pt. 3 of the *Hughes* case: ‘Awards by arbitration are to be favorably and liberally construed and are not to be set aside unless they appear to be founded on grounds clearly illegal.’” *Id.* This principal was reaffirmed by this Court as recently as April 18, 2011, in *Diversified Enterprises v. CIT Technology Financing Services, Inc.*, No. 101516 (W. Va. Apr. 18, 2011) (memorandum). This Court in *CIT* also examined the applicable West Virginia statute, which provides that an arbitration award shall not be set aside:

Except for errors apparent on its face, unless it appears to have been procured by corruption or other undue means, or by mistake, or that there was a partiality or misbehavior in the arbitrators, or any of them, or that the arbitrators so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.

Id. (citing W. Va. Code § 55-10-4, in relevant part). Nowhere in the case law or statutory law is there a provision for overturning the arbitration award because you do not like the result.

1. The arbitration award was not issued untimely; even if it were, timeliness is not grounds to vacate the arbitration award under well-settled West Virginia law.

Belo argues that because the arbitration award was allegedly 29 days late in being issued, it should be declared null and void. The Circuit Court, however, found that the arbitration award could not legally be considered untimely given that the neutral arbitrator sent a letter to all parties on December 9, 2009, stating that the hearings were deemed closed as of that date. (*See* Record at 55; Order Granting Lexington’s Motion to Confirm Arbitration Award, dated March 22, 2010, p. 10, ¶ 13). The Circuit Court’s finding was in accord with West Virginia law and supported by the evidence in this case. AAA rules allot 30 days to render a decision once the hearings are closed, and the arbitration award was rendered on January 7, 2010 -- 29 days after the hearings were determined to be closed by the Panel. Similarly, the arbitration provision in the Policy states that each party shall bear the expenses of its designated Arbitrator and shall jointly and equally share with the other the expense of the umpire and of the arbitration proceeding. The arbitration provision, however, does not contain a “time is of the essence” clause, or any other language which voids an arbitration decision if it is not rendered in the proper time frame.

Even to the extent that the award should have been rendered thirty (30) days after the proposed findings and conclusions were submitted by the parties on November 13, 2009 (so by December 13, 2009), the Circuit Court found that a 25 day delay was *di minimis*. *Id.* at p. 10; ¶ 14. In *Anderson v. Nichols*, 178 W. Va. 284, 359 S.E.2d 117 (1987), the arbitration award was

issued in that case six days later than the arbitration agreement called for, rather than the 25 days alleged herein. *Id.* at 288. This Court stated:

Appellants would have us believe that it is of great moment that the arbitration award was rendered six days later than specified in the arbitration agreement. ***Had the arbitration clause provided that time was of the essence in the arbitration process we might agree with the appellants; however, there was no agreement by the parties that a late award would nullify the whole arbitration proceeding and we see no reason to set aside an otherwise exemplary decision for a de minimis delay.***

Id. (emphasis added). In the instant case, the arbitration provision in the Policy similarly contains no provision that “time is of the essence,” nor an agreement that a late award would nullify the entire proceeding, which clearly supported the Circuit Court’s finding that the delay was *de minimis*.

This Court held in *Anderson*, that the threshold question is whether the party raising the delay issue has been prejudiced by the delay. *Id.* Although a 25-day delay (January 7, 2010 award allegedly due on December 13, 2009) is clearly *de minimis*, Belo argues that it was prejudiced by this delay because it desired a prompt resolution that would affirm its coverage rights, and the prolonging of the arbitration while the underlying civil case moved forward created substantial prejudice to Belo, as “any realistic opportunity to settle the *Castle* Action hinged on the outcome of the arbitration,” and its arbitration fees and expenses continued to grow. (See Appellant’s Brief, at p. 31).

Belo’s arguments are absurd for a number of reasons. Importantly, Belo is ignoring the fact that ***it lost the arbitration***. It has no coverage rights under the Policy for the claims made in the *Castle* Action. Accordingly, it is unclear how Belo could possibly have been prejudiced by finding this out in January rather than December, especially as *no* activity went on in the *Castle* Action during that time. Further, Belo’s argument that mediation and trial dates were postponed

while waiting for the Award is unsupported by the record. Finally, Belo incurred no added arbitration fees or expenses between the time the final briefs were submitted and the Award was rendered, as *there was no activity in the arbitration other than the panel's time rendering its decision*, which would have occurred regardless of Belo's timing argument. As this Court noted in *Anderson*:

Usually, however, the delay issue is used only to establish colorable grounds for challenging an otherwise just and reasonable award to postpone paying off the winner. We disapprove of that tactic. As is usual in these cases that use delay to buy more delay, we have in the case before us only a classic example of *damnum absque injuria* (more commonly expressed in the coal fields as no hurt, no foul).

Id. Belo's argument that it was prejudiced by the delay is nothing more than "using delay to buy more delay," and is also a classic example of no hurt, no foul. Belo complains of delay and yet wishes to start the briefing process over again. For these reasons, the Circuit Court's finding that the delay was *di minimis* was clearly supported by the evidence before it.

2. The arbitration award does not contain mistakes of law; even if it did, it is not permissible grounds under well-settled West Virginia law for vacating the award

Belo's argument that the Arbitration Award was wrongly decided is specious. *Arbitration awards are not subject to attack simply because they may be wrongly decided. Bd. of Educ. II*, 160 W. Va. at 489. The Circuit Court correctly found that the arbitration award, a 41 page decision in which the Panel concluded that "the Subsidence Exclusion in the Lexington Insurance Policy is not ambiguous and should be applied as written to deny insurance coverage in this instance," was grounded in West Virginia law.⁵ (*See* Record at 55; Order Granting Lexington's Motion to Confirm Arbitration Award p. 12, ¶ 22).

⁵ Although Belo takes issue with the fact that the Arbitration Award contained detailed findings of fact and conclusions of law, that is precisely what this Court requires when reviewing summary judgment orders.

West Virginia law is well-settled that arbitration awards “are not to be set aside unless they appear to be founded on grounds clearly illegal.” *Bd. of Educ. II*, 160 W. Va. at 489. As previously noted, this principal was reaffirmed by this Court as recently as April 18, 2011, in *Diversified Enterprises*.

The standard cited by Belo from an 1885 case (“clear and palpable mistake”) has long been set aside and is not the current law regarding when arbitration awards can be set aside. Recent courts have also stated: “[i]t is important to note at the outset that judicial review of arbitration awards is extremely limited – in fact, it is ‘among the narrowest known to the law.’” *U.S. Postal Serv. v. Am. Postal Workers Union*, 204 F.3d 523, 527 (4th Cir. 2000) (quoting *Union Pac. R.R. v. Sheehan*, 439 U.S. 89, 91 (1978) (quotations omitted). “A court sits to ‘determine only whether the arbitrator did his job – not whether he did it well, correctly, or reasonably, but simply whether he did it.’” 204 F.3d at 527 (quoting *Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int’l Union*, 76 F.3d 606, 608 (4th Cir. 1996)). “In order for a reviewing court to vacate an arbitration award, the moving party must sustain the heavy burden of showing one of the grounds specified in the Federal Arbitration Act or one of certain limited common law grounds.” *Three S Del., Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 527 (4th Cir. 2007).

The FAA provides that a court may only vacate an arbitration award on one of the following grounds:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Id. § 10(a). This Court has narrowed those grounds even further, holding that “[O]nce it appears, however, that the litigants are parties to a proper commercial contract and knowingly bargained for an arbitration clause, we will not inquire further into the correctness of the arbitrator’s result in the absence of actual fraud.” *Barber v. Union Carbide Corp.*, 172 W.Va. 199, 203, 304 S.E.2d 353, 357 (1983). No fraud is alleged by Belo in its Appellant’s Brief.

Belo’s argument that the arbitration award contains “clear and palpable mistakes of law” is not a basis for vacating an arbitration award based on common law grounds. The permissible common law grounds for vacating an award include those circumstances where an award fails to draw its essence from the contract, or the award evidences a manifest disregard of the law. *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230, 234 (4th Cir. 2006). An arbitration award fails to draw its essence from the agreement at issue “when an arbitrator has disregarded or modified unambiguous contract provisions or based an award upon his own personal notions of right and wrong.” *Three S Del., Inc.*, 492 F.3d at 528. Moreover, an arbitration award “does not fail to draw its essence from the agreement merely because a court concluded that an arbitrator has misread the contract.” *Id.* (citations omitted). “[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.” *U.S. Postal Serv.*, 204 F.3d at 527 (4th Cir. 2000) (citations omitted).

The evidence before the Circuit Court on this issue revealed that the Panel carefully considered voluminous briefs by the parties, large amounts of evidence submitted by the parties, and two days of oral arguments. The Panel rendered a 41 page arbitration award containing its findings of facts and conclusions of law on the application of the Subsidence Exclusion in a commercial general liability policy and did a very thorough job of reviewing all applicable West

Virginia law in rendering its decision. Belo claims the arbitration award contains mistakes of law simply because the Panel majority found against Belo on this issue.

Belo argues that at the September 4, 2009, arbitration hearing, Arbitrator Arceneaux advised that he had tentatively concluded that Belo should prevail in the arbitration, and that with little explanation, he reversed himself in the Final Award. In reality, oral arguments on the issue of the applicability of the Subsidence Exclusion in the Policy were held before the Panel on September 4, and at the conclusion of that hearing, the Panel instructed the parties to further brief the issue of whether the use of the term “subsidence” in Endorsement No. 5 of the Policy is ambiguous in light of the common and ordinary understanding of that term as reflected in reference materials, such as a geological dictionary that Arbitrator Arceneaux referenced. (*See* Record at 55; Order Granting Lexington’s Motion to Confirm Arbitration Award, pp. 4-5). Additional briefs were submitted by the parties as required by the Panel and at the following arbitration hearing, held October 26, 2009, Arbitrator Arceneaux stated:

Okay. Here is what I want to tell the parties. I appreciate everybody’s diligence and briefing. I think Lexington did that which a good advocate does, that they have presented me with a persuasive argument that caused me to look at more carefully this whole issue of ambiguity.

When I went on this path to begin with, I think I got on this path as an offshoot to the reasonable expectations argument of Belo’s. I didn’t find that a particularly strong or persuasive argument. I started to look at subsidence and ambiguity and say, “Gee, what does this really mean?” And Lexington has said, “Hey, you don’t need to go look at external source, because it’s a defined term [in the Policy], and therefore there is no ambiguity.” And probably the argument that resonated the most with me from Lexington was to say, “Gee, how ambiguous can this be, because this isn’t even the argument raised by Belo in this matter?” which is your own argument, not theirs. So I have looked at this carefully. I have not definitely made up my mind, and I certainly didn’t mean to suggest to anybody in the last proceeding that I had made up my mind.

See id. at p.5. The Panel never said that it had tentatively concluded that Belo should prevail, and Arbitrator Arceneaux’s detailed explanation above regarding why he determined the

Subsidence Exclusion was not in fact ambiguous in this case is grounded in West Virginia law, thereby causing the Circuit Court to confirm the arbitration award in this case, as required by law.

Even assuming *arguendo* that the Panel's arbitration award does contain mistakes of law, it simply would not be proper grounds upon which to vacate the award. *Bd. of Educ. II*, 160 W. Va. at 489. This Court stated: "for emphasis we state and endorse syllabus pt. 3 of the *Hughes* case: 'Awards by arbitration are to be favorably and liberally construed and are not to be set aside unless they appear to be founded on grounds clearly illegal.'" *Id.* Because no actual fraud is alleged by Belo (nor could it be), and because the award is clearly *not* illegal, the Circuit Court was plainly right in upholding the arbitration award and did not commit clear legal error in this regard.

Belo argues that the Policy is ambiguous regarding the application of the Subsidence Exclusion to underground losses. Although Lexington does not believe this to be a proper argument for this Appeal, a brief response is warranted.⁶

C. The Circuit Court's Order Confirming the Arbitration Award was Plainly Right because the Subsidence Exclusion in the Policy Bars Coverage for Mr. Castle's Claim.

1. West Virginia Law

The rules of construction under West Virginia law are simple and clear. When construing the language employed in insurance policies, it should be given its "plain, ordinary meaning." *Russell v. State Auto. Mut. Ins. Co.*, 188 W. Va. 81, 83, 422 S.E.2d 803, 805 (1992)

⁶ Belo also argues that comparing the four corners of the Complaint against the Policy is not the proper way to determine coverage obligations and that the Arbitration Award should be reversed on that ground. This is insurance coverage 101, and an arbitration to determine coverage rights is *exactly* the same as a declaratory judgment action. (See Record at 47; Final Award attached as Exhibit A to Belo's Motion to Vacate Arbitration Award at pp. 23-24) Comparing the allegations in the Complaint to the insurance policy at issue is most certainly how an insurer's

(citations omitted). “Where the provisions of an insurance policy are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended.” Syllabus, *Keffer v. Prudential Ins. Co.*, 153 W. Va. 813, 172 S.E.2d 714 (1970).

In the absence of fraud or mutual mistake (which Belo is not alleging), using parol evidence to contradict, add to, alter, enlarge, or explain a complete written agreement, which is clear and unambiguous, or to vary its legal effect, is inadmissible. *Spencer v. Travelers Ins. Co.*, 148 W. Va. 111, 133 S.E.2d 735, 741 (1963). The Subsidence Exclusion in the Policy contains clear and explicit terms, which means utilizing outside sources to determine the meaning of the Exclusion is not proper under West Virginia law.

The language of an insurance policy itself must govern if it is clear and explicit. *Transamerica Ins. Co. v. Arbogast*, 662 F. Supp. 164 (N.D.W. Va.), *aff'd mem.*, 835 F.2d 875 (4th Cir. 1987); *Kronjaeger v. Buckeye Union Ins. Co.*, 200 W. Va. 570, 490 S.E.2d 657 (1997). Only when a document is found to be ambiguous does a determination of intent through extrinsic evidence become an issue. Exclusions are interpreted narrowly to limit their effect. *Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987), *overruled on other grounds*, *Potesta v. U.S. Fid. & Guar. Co.*, 202 W. Va. 308, 504 S.E.2d 135 (1998) (insurer must make exclusionary clauses conspicuous, plain, and clear to bring them to the attention of the insured).

Courts will not indulge in forced construction so as to impose a liability on an insurer that the insurer has not assumed. *Eureka-Security Fire & Marine Ins. Co. v. Maxwell*, 276 F.2d 132 (4th Cir. 1960). This is because the policy is the best evidence of the intention of the parties. *If*

obligations are determined. *See, e.g. Bruceton Bank v. United States Fid. & Guar. Ins. Co.*, 199 W. Va. 548, 554-555, 486 S.E.2d 19, 22 (1997); *Butts v. Royal Vendors Inc.*, 202 W. Va. 448, 453; 504 S.E. 2d 911, 916 (1998).

the policy language clearly defines the coverage, courts will not look beyond its language to interpret it. Castellina v. Vaughan, 122 W. Va. 600, 11 S.E.2d 536 (1940) (emphasis added).

2. **Analysis**

- a. **The Policy clearly defines subsidence, and when comparing the four corners of the Complaint to the Policy, there is no coverage by operation of Endorsement Number 5.**

Endorsement 5 to the Policy, the Subsidence Exclusion, provides as follows:

SUBSIDENCE EXCLUSION

THIS ENDORSEMENT CHANGES THE POLICY, PLEASE READ IT CAREFULLY

This policy does not provide coverage and the Company (or insurer or We, if applicable) will not pay any defense expenses, claim expenses and/or any damages or losses, or any other loss, cost or expense, including, but not limited to losses, costs, or expenses related to, arising out of, based upon, attributable to, associated with, caused directly or indirectly by, or contributed to, or aggravated by “subsidence” regardless of any other cause, event, material, product and/or building component that contributed concurrently or in any sequence to that loss, cost or expense or to such defense expenses, claim expenses and/or any damages or losses.

For the purpose of this exclusion, the following definitions are added to the policy:

“Subsidence” means earth movement of any kind whatsoever, including, but not limited to earthquake, landslide, “mine subsidence,” “sinkhole collapse,” earth sinking, rising or shifting, mud flow, expansion, contraction, consolidation, freezing, thawing, settling, falling away, caving in, eroding, flowing, tilting, or other movement of land, earth or mud.

“Mine Subsidence” means subsidence of a man-made mine, whether or not mining activity has ceased.

“Sinkhole Collapse” means loss or damage caused by the sudden sinking or collapse of land into underground empty spaces created by the action of water on limestone or dolomite.

ALL OTHER TERMS AND CONDITIONS REMAIN UNCHANGED.

(See Record at 4; Exhibit A, the Policy, Endorsement 5).

The Complaint in the Castle Action alleges that on or about December 5, 2005, Plaintiff Castle was working on the No. 3 section at the Eagle mine, which was a pillar section. (See Record at 1; Complaint, ¶6). The Complaint alleges that the pillar section had previously and was on that day experiencing unstable, adverse conditions with the walls (“ribs”) of pillars that were being mined on the No. 3 section. *Id.* at ¶7. The Complaint further alleges that on December 5, 2005, there was a roof collapse, or as defined by Plaintiff Castle, a “rib roll,” which caused “severe crushing injuries to his right leg, which resulted in surgeries that eventually led to amputation of his right leg just below the knee.” *Id.* at ¶12.

“Subsidence” is defined very broadly in the Policy – as *earth movement of any kind whatsoever*. (See Record at 4; Exhibit A, the Policy, Endorsement 5). It is not a word that stands alone. The definition lists, *but is not limited to*, several examples of earth movement, including the falling away, caving in, and other movement of land, earth, or mud. *Id.* Further, “mine subsidence” is also defined as “subsidence of a man-made mine, whether or not mining activity has ceased.” *Id.* Under this definition, the allegations made in the Complaint, that there was a rib roll/rock fall *in the mine*, fall squarely within the Subsidence Exclusion. When construing the language employed in insurance policies, it should be given its “plain, ordinary meaning.” *Russell v. State Auto. Mut. Ins. Co.*, 188 W. Va. 81, 83, 422 S.E.2d 803, 805 (1992) (citations omitted).

The Arbitration Panel Majority specifically held that “the language in the Lexington Insurance Policy specifically includes within its Subsidence Exclusion the definitional provision that “mine subsidence” includes “subsidence of a man-made mine, whether or not mining activity has ceased.”” (See Record at 47; Final Award attached as Exhibit A to Belo’s Motion to Vacate Arbitration Award at pp. 23-24). The Panel Majority went on to hold that “any

occurrences that may happen as a result of subsidence or mine subsidence in the form of earth movement of any kind whatsoever, man-made or naturally-occurring, are excluded from insurance coverage under the Subsidence Exclusion.” *Id.* at p. 24. For that reason, the Panel Majority held that the “Subsidence Exclusion in the Lexington Insurance Policy is not ambiguous and should be applied as written to deny insurance coverage for the allegations in the Amended Complaint in the Underlying Action.” *Id.*

b. Appellant’s attempts to create ambiguity in the definition of subsidence by looking outside the Policy fail.

Belo argues that the term “subsidence” and “mine subsidence” refer only to surface events, based on the common understanding of the term “subsidence” that Belo and/or its agent may have had, and citing as support dicta in a footnote from *Payne v. Weston*, 195 W. Va. 502, 509, n.7, 466 S.E.2d 161, 178 n.7 (1995). The Lexington Policy very clearly defines the coverage relating to subsidence. It does not use the words “surface” or “subsurface” because it already excludes coverage for *all loss, and describes events occurring both above and below the ground*. Subsidence is a defined term in the Exclusion, and that definition must trump all outside sources, under West Virginia law. In the Policy, “Subsidence” is defined as “earth movement of any kind whatsoever, including, but not limited to earthquake, landslide, ‘mine subsidence,’ ‘sinkhole collapse,’ earth sinking, rising or shifting, mud flow, expansion, contraction, consolidation, freezing, thawing, settling, falling away, caving in, eroding, flowing, tilting, or other movement of land, earth or mud.” “Mine Subsidence” is defined to mean “subsidence of a man-made mine, whether or not mining activity has ceased.” Turning to outside sources that may define the term “subsidence” is unnecessary when the term in question already has clear meaning in the Policy.

If any of the described events take place, then the Endorsement goes on to explain that the Policy does not provide coverage and Lexington “will not pay any defense expenses, claim expenses and/or any damages or losses, or any other loss, cost or expense, including, but not limited to losses, costs, or expenses *related to, arising out of, based upon, attributable to, associated with, caused directly or indirectly by, or contributed to, or aggravated by ‘subsidence’* regardless of any other cause, event, material, product and/or building component that contributed concurrently or in any sequence to that loss, cost or expense or to such defense expenses, claim expenses and/or any damages or losses.”

The definition of Subsidence in the Endorsement includes falling away and caving in, which is what happened in the mine that caused the injury to Mr. Castle. The Exclusion clearly prohibits coverage for *any* loss, cost, or expense related to that. It is not necessary to specify whether or not it applies only to surface events or only to subsurface events— it is a broadly worded Exclusion that applies to all events which occur due to subsidence. There is no other reasonable way to read *this Exclusion*. Even if in *other* contexts subsidence is used to refer only to surface events, the wording of *this Exclusion* makes clear that it applies to *all* occurrences that may happen as a result of subsidence.

Under West Virginia law, a valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent. *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962); *Melbourne Bros. Constr. Co. v. Pioneer Co.*, 181 W. Va. 816, 384 S.E.2d 857 (1989). A policy provision is ambiguous only if it is capable of two or more different constructions, both of which are reasonable. *Huggins v. Tri-County Bonding Co.*, 175 W. Va. 643, 337 S.E.2d 12 (1985); *Shamblin v. Nationwide Mut. Ins. Co.*, 175 W. Va.

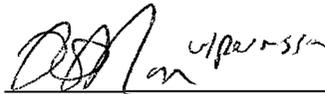
337, 332 S.E.2d 639 (1985), *aff'd in part, rev'd in part*, 183 W. Va. 585, 396 S.E.2d 766 (1990). In this case, it would not be reasonable to expect that this Exclusion would apply only to surface events. Following Belo's logic that it did not understand that the Subsidence Exclusion would apply to bodily injury inside of a coal mine is just not reasonable. Belo's business is leasing employees to work in underground mines, and this would mean the Exclusion would exclude nothing from coverage if interpreted as only applicable to surface damages. There is no first party coverage under the Policy which would provide coverage for property damage but for this Exclusion, and there is no readily imaginable scenario where a bodily injury claim would arise from a surface injury due to subsidence. As such, any interpretation of the Exclusion as only applying to surface events is patently unreasonable. Belo makes no credible argument that the Arbitration Panel Majority founded its decision on grounds that are "clearly illegal," and as such, its Appeal for reversal should be denied.

VI. CONCLUSION

The Circuit Court did not err in compelling this matter to arbitration. The Circuit Court further correctly refused to vacate the arbitration award, as there was no fraud, and the award was clearly not illegal. For all of the foregoing reasons, Lexington Insurance Company respectfully requests this Court to affirm the Circuit Court's judgment in all respects.

Dated this 22nd day of April, 2011.

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