

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GEORGE A. GRAYIEL, JR.,

Petitioner,



v.

No. 11-0371

APPALACHIAN ENERGY PARTNERS 2001-D, LLP,
APPALACHIAN ENERGY PARTNERS 2001-S, LLP,
APPALACHIAN ENERGY PARTNERS 2001 II, LLP,
APPALACHIAN ENERGY PARTNERS 2003 S-II, LLP,
BURNING SPRINGS ENERGY PARTNERS 1999, LLP,
BURNING SPRINGS ENERGY PARTNERS 2000, LLP,
BURNING SPRINGS ENERGY PARTNERS 2001-S, LLP,
CHEROKEE ENERGY COMPANY, HAYNES #2 ENERGY
PARTNERS 2001, LLP, MARTIN TWIST ENERGY
COMPANY, LLC, MARTIN R. TWIST, DREW THOMAS,
TAMMY CURRY TWIST and TODD PILCHER,

Respondents.

RESPONDENTS' BRIEF

Counsel for Respondents

Scott H. Kaminski (WV Bar 6338)
Balgo and Kaminski, L.C.
P.O. Box 3548
Charleston, WV 25335-3548
304-344-0444



TABLE OF CONTENTS

Table of Contents.....2

Table of Authorities.....3

Respondents’ Statement Regarding Alleged Assignments of Error.....5

Statement of the Case.....6

Summary of Argument.....8

Statement Regarding Oral Argument and Decision.....9

Argument.....9

 I. The circuit court correctly found the arbitration clauses were severable and enforceable.....9

 II. The circuit court correctly found that the arbitration agreements were not unconscionable, nor were they fraudulently procured....14

 A. Allegations of unconscionability.....14

 B. Allegations of fraud.....20

 III. The Petitioner failed to follow Rule 37 of the *West Virginia Rules of Civil Procedure* when he failed to make proper objection to alleged issues with the deposition testimony of Respondent Martin Twist. Nonetheless the circuit court properly considered and rejected Petitioners claim that Martin Twist prevented meaningful discovery.....21

 IV. The circuit court properly considered and rejected Petitioner’s claim that there was ever an offer to repay the Petitioner. The parties never agreed upon such an offer.....22

Conclusion.....23

Certificate of Service.....26

TABLE OF AUTHORITIES

Cases

<i>Allied-Bruce Terminix Cos. v. Dobson</i> , 130 L.Ed. 753 (1995).....	11
<i>Arnold v. United Cos. Lending Corp.</i> , 204 W.Va. 229, 511 S.E.2d 854 (1998).....	13
<i>Board of Education of the County of Berkeley v. W. Harley Miller, Inc.</i> , 160 W.Va. 473, 236 S.E.2d 439 (1977).....	10
<i>Clayton Brown v. Genesis Healthcare Corp, et al.</i> No. 35494 (June 29, 2011).....	15-19, 24
<i>Cohen v. Wedbush, Noble, Cooke, Inc.</i> , 841 F.2d 282, 286 (9 th Cir. 1988).....	11
<i>Kyriazis v. University of West Virginia</i> , 192 W.Va. 60, 450 S.E.2d 649 (1994).....	16
<i>McGraw v. American Tobacco Company</i> , 224 W.Va. 211, 681 S.E.2d 96 (2009).....	10, 23
<i>Perry v. Thomas</i> , 482 U.S. 483 (1987).....	11
<i>Shearson American Express, Inc. v. McMahon</i> , 482 U.S. 220 (1987).....	10
<i>Southland Corp. v. Keating</i> , 464 U.S. 1, 104 S.Ct. 852, 79, L.Ed.2d 1 (1984).....	11
<i>State ex rel. Dunlap v. Berger</i> , 211 W.Va. 549, 567 S.E.2d 265, cert. denied sub nom, <i>Friedman's Inc. v.</i> <i>W.Va. ex rel. Dunlap</i> , 537 U.S. 1087 (2002).....	12
<i>State ex rel. McGraw v. Scott Runyan Pontiac-Buick</i> , 194 W.Va. 770, 461 S.E.2d 516 (1995).....	6
<i>State ex rel. TD Ameritrade, Inc. v. Kaufman</i> , 225 W.Va. 250, 692 S.E. 2d 293 (2010).....	5, 11, 23

Troy Mining Corp. v. Itmann Coal Co.,
176 W.Va. 599, 346 S.E.2d. 749 (1986).....15

Statutes, Regulations and Rules

Burns Ind. Code Ann. § 34-57-2-1(a) 2007.....10

Federal Arbitration Act, 9 U.S.C. § 1, *et seq*.....9, 10

W.Va. Code § 55-10-1.....10

W.VA. R. Civ. P. 37.....5, 8, 21

RESPONDENTS' STATEMENT REGARDING ALLEGED ASSIGNMENTS OF

ERROR

1. The circuit court correctly found the arbitration clauses were severable and enforceable.

2. The circuit court correctly found that the arbitration agreements were not unconscionable, nor were they fraudulently procured.¹

3. Petitioner failed to follow Rule 37 of the *West Virginia Rules of Civil Procedure* when he failed to make proper objection to alleged issues with the deposition testimony of Respondent Martin Twist. Nonetheless the circuit court properly considered and rejected Petitioners claim that Martin Twist prevented meaningful discovery.

¹ On or about June 2, 2011 Glen B. Gainer III, West Virginia State Auditor and Commissioner of Securities filed an Amicus Brief. The Amicus Brief references two Assignments of Error. The first is that the trial court's decision that the arbitration clauses were not unconscionable mirrors the Assignment of Error made by the Petitioner, therefore the argument contained herein should apply to both claims.

The second Assignment of Error referenced by the Auditor states that arbitration should not be available to the Respondents because of alleged "unclean hands". However, the Auditor oversteps in failing to acknowledge that, when it comes to enforceability of arbitration agreements, "the authority of the trial court is limited to determining the threshold issues of (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that agreement." Syl. Pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W.Va. 250, 692 S.E.2d 293 (2010). Therefore the question as to the existence, and relevance of the alleged "unclean hands" claim is left to the arbiter. To the extent that the "unclean hands" allegation references claims of fraud, those allegations are discussed herein.

4. The circuit court properly considered and rejected Petitioner's claim that there was ever an offer to repay the Petitioner. The parties never agreed upon such an offer.²

STATEMENT OF THE CASE

Respondents (Defendants below) Appalachian Energy Partners 2001-D, LLP, Appalachian Energy Partners 2001-S, LLP, Appalachian Energy Partners 2001, II, LLP, Appalachian Energy Partners 2003 S-II LLP, LLP, Burning Springs Energy Partners 1999, LLP, Burning Springs Energy Partners 2000, LLP, Burning Springs Energy Partners 2001-S, LLP, Cherokee Energy Company, Haynes #2 Energy Partners 2001, Martin Twist Energy Company, LLC, Martin R. Twist, Tammy Curry Twist and Todd Pilcher³ (hereinafter "Respondents") aver that the "Statement of Case" section of the brief of Petitioner (Plaintiff below) George A. Grayiel, Jr. (hereinafter "Grayiel" or "Petitioner") repeatedly skews the facts in this matter by using inflammatory language and argument, rather than stating the undisputed facts that are relevant to exploration of the assignments of error.

² The standard of review as to the circuit court's conclusions of law is de novo. *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W.Va. 770, 461 S.E.2d 516 (1995).

³ Counsel for the Respondents does not represent Respondent/Defendant Drew Thomas. Counsel for Petitioner has represented that Mr. Thomas was served with the Complaint in the underlying action, but he has not filed an Answer or any other responsive pleading. In the interests of clarity and brevity reference is made throughout to "Respondents" which should be construed to mean all named Respondents save Mr. Thomas.

The actual, undisputed facts are that in January 2000 the Petitioner voluntarily entered into the first of twenty (20) subscription and partnership agreements (hereinafter “agreements”) with the Respondents in which the Petitioner purchased investment units in a natural gas exploration program. (Order Granting Defendants’ Motion for Summary Judgment, A.R. 4-10)⁴. Over the next two years Petitioner readily invested approximately \$886,000 with the Respondents and Petitioner’s investment was used to drill for natural gas in and around Kanawha County, West Virginia. At no time over that two year period did Petitioner avail himself of the opportunity to seek the advice of an attorney, an oil and gas expert, an accountant or any other professional regarding his investment and/or the execution and terms of the twenty agreements. (*Id.*)

Early during the contractual period the investment returned a profit, which was promptly passed on to the Petitioner. (*Id.*) However production diminished and the investment was no longer a profitable one. Petitioner was unhappy with the results of his investment and filed suit in the Circuit Court of Putnam County on or about November 17, 2008. On or about January 9, 2009 the Respondents filed their Motion to Dismiss pursuant to the arbitration clause contained in the agreements which read, in pertinent part, “any unresolved dispute or controversy arising under or in connection with this agreement ... [shall] be settled exclusively by arbitration, conducted in Jeffersonville, Indiana.” (A.R. 432). Therefore each and every allegation contained in the Petitioner’s underlying Complaint is arbitrable. Petitioner, for the first time in the nine-year relationship between the parties, objected to the enforceability of the arbitration clauses,

⁴ References to Appendix Record agreed upon by the parties are designated as “A.R. ___.”

claiming unconscionability. Petitioner further requested an opportunity to engage in discovery on the issue, a request granted by the Court. (A.R. 5.)

After nearly two years of discovery, including multiple depositions Petitioner filed a Supplemental Response in Opposition to the Respondents' Motion to Dismiss. Petitioner's support for that Response was "primarily based upon the Defendants' vagueness and memory lapses answering certain questions" (A.R. 6.), however at no time did the Petitioner file a Motion to Compel under *West Virginia Rule of Civil Procedure* 37 with regard to any alleged failure to respond to deposition questions.⁵ (A.R. 1-3.)

The Circuit Court of Putnam County disagreed with the Petitioner's assertion that the arbitration clauses in the agreements were unconscionable and on February 1, 2011 granted the Defendants' Motion to Dismiss/Motion for Summary Judgment, finding the arbitration clauses contained in the agreements between the parties were controlling and that the court did not possess jurisdiction over the matter. (A.R. 10.)⁶

SUMMARY OF ARGUMENT

Despite Petitioner's efforts to obscure the real issues in this matter by attempts to portray the Respondents (specifically, Martin Twist) as bad actors, the issue before this

⁵ Pursuant to W.V.R.C.P Rule 37(a)(2) that would have been the only proper method for an initial addressing of alleged failures to properly respond to discovery.

⁶ The fact that the court specifically drew attention to the Petitioner's claims that Defendants' "vagueness and memory lapses" were the primary "evidence" of Petitioner's claim of unconscionability clearly indicated that the court considered same and did not find this "evidence" persuasive.

court is simply whether the Circuit Court of Putnam County erred in upholding the arbitration agreements contained in the agreements entered into by the parties. In applying the applicable tests set forth in West Virginia for examination of these agreements the assignments of error are not well-founded and decision of the lower court that the arbitration agreements are valid must be upheld. In addition the allegations of failure to engage in meaningful discovery and an alleged offer to repay monies are specious and unsupported by any evidence.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents believe that this matter is appropriate for memorandum decision. The Respondents object to the Petitioner's argument in this procedural section of the brief, specifically the unsubstantiated allegations and the inference that arbitration does not convey any "judicial authority" (Petitioner's brief, 10). This is patently false. In any arbitration that is subject to a forum selection clause, judicial remedies are available, and in this instance they will be available in the forum set for the arbitration, Indiana. (A.R. 432.)

ARGUMENT

- I. The circuit court correctly found the arbitration clauses were severable and enforceable.**

The Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (hereinafter “Federal Arbitration Act”) requires that a court enforce an agreement to arbitrate once one of the parties of the agreement demands arbitration. (Federal Arbitration Act, 9 U.S.C. § 9 U.S.C., Section 2.) This includes any claims made under state law. *Shearson American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). By their terms the laws of the state of Indiana govern the agreements at issue. (A.R. 432.) Like both Federal law and West Virginia law, Indiana law favors the enforcement of contractual arbitration provisions as a matter of law.⁷ In West Virginia contract law, arbitration agreements are not uncommon and are generally looked upon favorably as, “(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.” Syl.Pt. 3 *Board of Education of the County of Berkeley v. W. Harley Miller, Inc.*, 160 W.Va. 473, 236 S.E.2d 439 (1977) (per curiam). West Virginia law provides additional guidance in appellate cases involving review of lower court’s arbitration decisions: “[t]he 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.” *McGraw v. American Tobacco Company*, 224 W.Va. 211, 681 S.E.2d 96 (2009). Therefore, the Petitioner’s lengthy assertions

⁷ 9 U.S.C §§ 2 and 3, W.Va. Code § 55-10-1 and “A written agreement to submit to arbitration is valid, and enforceable, [and] and existing controversy or a controversy thereafter arising is valid and enforceable, except upon such grounds as exist at law or in equity for the revocation of any contract.” *Burns Ind. Code Ann.* § 34-57-2-1(a) 2007.

regarding the Federal Arbitration Act, Indiana law and West Virginia law are irrelevant in that the results would be the same: in all jurisdictions contracts requiring arbitration are enforceable.

Petitioner would have the court apply “West Virginia state arbitrability rules” (Petitioner’s brief, 13), which apparently Petitioner believes would conceivably allow the lower court to decide that the arbitration clauses would be examined as part of the larger contract. What Petitioner avoids saying, however, is that this argument is totally specious. The Federal Arbitration Act specifically prohibits any state policy that would “single out” an arbitration clause for invalidation. These clauses must be viewed in the same way as any other contract term. *Allied-Bruce Terminix Cos. v. Dobson*, 130 L.Ed. 753 (1995). There is no possible way to apply some body of “West Virginia state arbitrability rules” because the Federal Arbitration Act, as federal law trumps any state laws that are in conflict with its terms. *Perry v. Thomas*, 482 U.S. 483 (1987), *Southland Corp. v. Keating*, 464 U.S. 1, 104 S.Ct. 852, 79, L.Ed.2d 1 (1984). *See also Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 286 (9th Cir. 1988) (rejecting plaintiff’s adhesion argument and holding that “state law adhesion contract principles may not be invoked to bar arbitrability of disputes under the [Federal] Arbitration Act.”). In addition, West Virginia law strictly limits the powers of state courts in making determinations regarding arbitration clauses, holding that “when a trial court is required to rule upon a motion to compel arbitration pursuant to the Federal Arbitration Act...the authority of the trial court is limited to determining the threshold issues of (1) whether a valid arbitration

agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that agreement.” Syl. Pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W.Va. 250, 692 S.E.2d 293 (2010).

Further, in an amendment to the arbitration clause at issue specifies that, “[t]he Federal Arbitration Act... not state law, shall govern the arbitrability of all disputes. [State law] shall govern the construction and interpretation of this Agreement, subject to the forgoing provision regarding the Federal Arbitration Act.” (A.R. 429.) In discussion of this term the Petitioner engages in misdirection of the worst kind, claiming that it “appears to be a document fashioned *ad hoc* to support Respondents’ motion”. (Petitioner’s brief, page 13). This is an outrageous allegation, and one that Petitioner’s counsel knows is untrue. At the outset of litigation, the Respondents were unable to locate full and complete copies of each of the twenty agreements executed by the Petitioner and the Respondents. However, Petitioner did possess a full and complete copy of the agreements, which were shared with the Respondents during the deposition of Martin Twist and after the filing of the initial Motion to Dismiss. The Petitioner was aware of the amendment, the sole purpose of which was to modify the arbitration agreements to the degree required under West Virginia law after this Court made its decision in *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 567 S.E.2d 265, *cert. denied sub nom, Friedman’s Inc. v. W.Va. ex rel. Dunlap*, 537 U.S. 1087 (2002) which prohibited arbitration agreements from disallowing punitive damages. After this decision was handed down, and on the advice of counsel, the Respondents added this extremely limited amendment to all West Virginia

agreements. What's more, Petitioner testified that he was aware of this amendment and its terms (A.R. 65-71.) This amendment was hardly created wholesale by the Respondents, but rather was produced to Petitioner, memorialized a modification made by force of law and, further, one that existed solely to the detriment of the Respondents.

Petitioner's statement that "[t]he arbitration clause deny several important claims and remedies, including statutory causes of actions and punitive damages" is patently false, and the circuit court's order states "all remedies available in [the Circuit Court of Putnam County] are available in arbitration," and specifically notes that the Respondents acknowledged the punitive damages will be available under the arbitration agreement (Petitioner's brief, 19, A.R. 9). Petitioner cites as support for his assertion *Arnold v. United Cos. Lending Corp.*, 204 W.Va. 229, 511 S.E.2d 854 (1998) but fails to inform the court that in that case the lender retained the right to sue in trial court, but the borrower gave up that right in the arbitration clause. This key factual distinction makes the *Arnold* case irrelevant to the matter at bar. In fact, the Petitioner references the awarding of punitive damages in an arbitrator's award made against some of these Respondents in his own brief, only one page before his claim that punitive damages are not available. (Petitioner's brief, 18.). In addition, if the Petitioner prevails at arbitration he is entitled to his attorneys' fees and costs, making Petitioner's claim that the arbitration fee is too costly a moot issue. (Petitioner's brief, 26, 30.)

In addition, the Petitioner never presented his allegations regarding some alleged impropriety regarding the existence and/or nature of the amendment before the lower court. They are first being addressed here in an unfair attempt to sway this Court and, as such, are inappropriate for consideration, as they were not addressed below. Respondent is reluctant to ascribe ineffectual Motion practice in Petitioner's failure to raise this issue in circuit court. Nonetheless said failure cannot be tolerated.

Petitioner correctly states that "arbitration 'is a matter of consent, not coercion'" (Petitioner's brief, 11), but fails to note that the lower court found that the Petitioner did not allege coercion in his Complaint, that he presented no evidence of coercion and, in fact, testified that he had entered into the agreements of his own volition. (A.R. 9.) In addition, the Petitioners have made no allegation that the arbitration clauses included in the twenty (20) agreements executed by the parties are anything other than those similar to those found in millions of contracts that exist in the United States. The recitation regarding the arbitration agreement is relatively short and succinct, and is fully and totally applicable to both parties to the agreements. (A.R. 432)

II. The circuit court correctly found that the arbitration agreements were not unconscionable, nor were they fraudulently procured.

A. Allegations of unconscionability

To show “unconscionability” of contract terms, the Petitioner must show “gross inadequacy of bargaining power, together with terms unreasonably favorable to the stronger party.” *Troy Mining Corp. v. Itmann Coal Co.*, 176 W.Va. 599, 604, 346 S.E.2d. 749, 753 (1986). The Petitioner fails to show either. The circuit court was correct in its finding that Petitioner could point to no evidence showing an inequality of bargaining power, such as that which might exist when an individual is forced to act quickly to enter a nursing home. The fact is that Petitioner voluntarily entered into not one, not five, not ten, but twenty separate agreements with the Respondents over a two-year period. On each and every one of those occasions the Petitioner could have consulted with counsel or any number of other types of experts regarding the arbitration clause or any other aspect of the agreements. He chose not to do so. And, most importantly, Petitioner could have chosen not to invest with the Respondents.

This Court has, quite recently, issued a ruling on unconscionability as relates to arbitration clauses in its decision in *Clayton Brown v. Genesis Healthcare Corp, et al.* No. 35494 (June 29, 2011). Although the facts in that case differ greatly from those at issue here, the test used by the Court offers the most up-to-date analysis of the Court’s views on arbitration clauses, encompassing three separate actions regarding

the alleged unconscionability of two arbitration clauses contained within nursing home contracts.⁸

The *Brown* court stated that “unconscionability” has two pertinent component parts, procedural unconscionability and substantive unconscionability. *Id.* at 55. Procedural unconscionability consists of “inequalities, improprieties or unfairness in the bargaining process” in the formation of the contract. *Id.* This is could be demonstrated by examining “ [t]he manner in which the contract was entered, whether each party had ‘a reasonable opportunity to understand the terms of the

⁸ Three contracts were at issue in *Brown*; in all the Plaintiff’s alleged conflicts between the arbitration clauses and the West Virginia Nursing Home Act, which is not at issue in the instant case, and in only two of those three did the Court address the issue of unconscionability.

The factual distinctions in the *Brown* case are quite significant here. In each instance the contract involved an individual who was “ill or incapacitated and needed extensive, ongoing nursing care” who was signed into the facility by a family member. *Id.* at 3. The court also referenced the “urgency, confusion and stress” surrounding the time that the family members were to review the relevant paperwork, which made those individuals “vulnerable” as they were forced to make decisions quickly and in the midst of a crisis. *Id.* at 15. Perhaps most importantly, the terms of the arbitration agreements did not cover “all disputes” as in the instant case, but only those for negligence actions; the nursing homes had the right to seek redress for non-payment and/or eviction in the circuit courts. *Id.* at 5.

In addition, in making its decision the Court focused on the fact that the issues of the three individuals involved were certain types of personal injury, specifically bodily injury, and wrongful death. *Id.* at 72. Further, the Court opined that a nursing home is a unit providing a “public service” and, therefore, subject to a different level of scrutiny pursuant to *Kyriazis v. University of West Virginia*, 192 W.Va. 60, 450 S.E.2d 649 (1994). Clearly businesses offering oil and gas investments to investors would not be considered to be “public servants” under the *Kyriazis* test.

Finally, the plaintiffs in *Brown* appear not to have had the ability to engage in discovery before their respective suits were dismissed. *Brown* at 25. Here, of course, Petitioner has engaged in discovery for nearly two years.

contract' and whether 'the important terms [were] hidden in a maze of fine print.' “
Id. at 55-56.

In his appeal the Petitioner spends a great deal of time discussing contracts of adhesion (referencing “overwhelming evidence” of same without actually offering any) as if it were an undisputed fact that the contract at issue is one of adhesion. (Petitioner’s brief, 17), However the circuit court did not make a determination of that issue and, in any event, it is irrelevant to the issue at hand; the *Brown* decision contains a lengthy discourse on contracts of adhesion and states that most contracts are contracts of adhesion, and that fact alone is not at all determinative of unconscionability. *Brown* at 58. The Court found that procedural unconscionability should only be found in contracts of adhesion where there is “an imbalance in bargaining power, absence of meaningful choice, unfair surprise or sharp or deceptive practices (fine print, legalese disclaimers, or boilerplate clauses on the back of contracts, for examples.) *Id.* at 60.

Therefore, even if the Court assumes that the agreements at issue here are contracts of adhesion, which require a heightened standard, one applies the test proffered in *Brown*. Was there an imbalance of bargaining power? Looking to the Court’s own definition of same as discussed above the Petitioner has offered no evidence that the contract was entered into in some questionable manner, that he failed to understand the terms of same or that important terms were hidden in the fine print (as he admits that he read the contract, including the arbitration clause). (A.R.

46-47.) Petitioner's efforts to present himself to the Court as an unsophisticated rube are disingenuous. By his own admission Petitioner was an investor with nearly a million dollars in capital. One need not be sophisticated to hire a lawyer to review contracts before handing that money over, and Petitioner clearly had the financial wherewithal to hire as many lawyers as he wished.

Was there an absence of meaningful choice? Certainly not, especially compared with the facts surrounding "meaningful choice" discussed in *Brown* (could other nursing facilities take the individual, and would they have differing requirements?) as well as the specific distinction made between the facts in *Brown* and the very different "situation that exists when a customer signs a contract for a product or service" which is precisely what was anticipated in the agreements at issue here. *Id.* at 77, 18. The other "meaningful choice" available to Petitioner? Not to invest with the Respondents at all. Next, was there surprise here? Again, Petitioner admits that he read the agreements and that he had an opportunity to consult counsel (the *Brown* decision states that additional distinctions to be considered are whether the party challenging the clause had a lack of time to read and deliberate on the terms of the agreement, and a lack of ability to ask questions; the Petitioner admits that neither is true. *Id.* at 19. The final question involves that of "fine print" or legalese, neither of which the Petitioner puts at issue in this matter.

Therefore, pursuant to the tests established in *Brown* as to procedural unconscionability, the Petitioner has not offered any evidence to support same, which

leads to the second part of the two-part test, substantive unconscionability.

Substantive unconscionability exists when there is an “overly harsh or one-sided result” and the “paramount consideration is mutuality.” *Id.* at 61-62. In the instant matter this is a non-issue. There is no dispute that the arbitration agreement applies equally to all parties and covers all disputes, if anything the ability of the Petitioner to seek punitive damages actually provides him with greater protection than is available to the Respondents. This is clearly very different than the facts as presented in *Brown*, where the exclusivity of arbitration applied only to the patient. *Id.* at 5.

“A contract term is unenforceable if it is both procedurally and substantively unconscionable”. *Id.* at 65. Petitioner can meet neither prong here, and, therefore the circuit court’s ruling regarding the lack of unconscionability should stand.

In addition, Petitioner repeatedly refers to evidence the lower court “ignored” without providing any basis for his claim that the evidence was ignored. The Petitioner had two years to conduct discovery, file appropriate Motions and supplement his opposition to the Motion to Dismiss. Petitioner ultimately failed in his effort and is unhappy with the result. The facts that the court did not, and does not, find Petitioner’s evidence (or lack thereof) persuasive does not give rise to an allegation that it was ignored. As discussed above and below, in some cases the Petitioner simply presented no evidence at the circuit court level (with regard to allegations of coercion, allegations of improprieties with the amendment or with regard to Mr. Twist’s deposition testimony), in others it appears that the court simply

rejected Petitioner's argument (the alleged "remoteness" of the forum, etc.). This is simply not evidence of unconscionability.

Perhaps the most striking evidence that the arbitration clause is not unconscionable comes from Petitioner's own testimony. Petitioner filed a self-serving affidavit claiming to have discussed the arbitration clause with Mr. Twist, but then denied having had this discussion during his deposition testimony. (A.R. 268, 44). As Mr. Twist has no recollection of having discussed these clauses with Petitioner and as, under questioning the Petitioner admitted that the arbitration clause was not something that he discussed with Mr. Twist or with any other representative of the Respondents, despite the fact that he had read it. (A.R. 46-47). He knew all about it, but never questioned it until suit was filed.

B. Allegations of fraud

The Petitioner makes the outrageous claim that he "offered overwhelming evidence that Twist deceived Mr. Grayiel into executing the arbitration clauses" (Petitioner's brief, 10) and further alleges that Mr. Twist "conned" Petitioner into signing twenty agreements (Petitioner's brief, 17, FN 28). There is no authority or footnote included with these statements, and that is because they are patently untrue. Again, the lower court found that the Petitioner did not allege coercion in the Complaint and provided no evidence of deception or coercion and used the Petitioner's own deposition testimony to substantiate that conclusion of law. (A.R. 9)

In fact, the lower court indicated that the fact that Petitioner entered into twenty separate agreements was proof to the contrary (as well as evidence that Petitioner had ample opportunity to seek counsel). Any allegations of fraud must have been made at the trial court level in order to properly be considered here.

III. Petitioner failed to follow Rule 37 of the *West Virginia Rules of Civil Procedure* when he failed to make proper objection to alleged issues with the deposition testimony of Respondent Martin Twist. Nonetheless the circuit court properly considered and rejected Petitioners claim that Martin Twist prevented meaningful discovery.

Petitioner failed to follow Rule 37 of the *West Virginia Rules of Civil Procedure* when he failed to file a Motion to Compel with regard to his allegations that the responses made by Martin Twist, during his discovery deposition were intended to “thwart” efforts at discovery (Petitioner’s brief, 9.) Pursuant to Rule 37(a)(2) Petitioner’s should have sought relief through a Motion to Compel filed immediately after the deposition of Mr. Twist or, at the very least, prior to the close of the discovery period at the lower court. Petitioner did not avail himself of the protection under the *Rules*, therefore raising the issue, for the first time, in his supplemental memorandum regarding the Respondents’ Motion to Dismiss/Motion for Summary Judgment was untimely and unfair to the Respondents in that they have had no opportunity to respond to these allegations until they were improperly brought before

this Court. Therefore this assignment of error is not one that is appropriate for review by this Court.

Despite Petitioner's failure to follow the procedures for objection outlined in the *West Virginia Rules of Civil Procedure*, the circuit court clearly considered the Petitioner's allegations regarding Mr. Twist's deposition testimony, as the court referred to them in its Order. (A.R. 4-10.) However, clearly the allegations did not sway the Court.

IV. The circuit court properly considered and rejected Petitioners claim that there was ever an offer to repay the Petitioner. The parties never agreed upon such an offer.

The Petitioner's claim that there was some type of meeting of the minds or an offer and acceptance of the return of Petitioner's investment is ludicrous and the Court was under no obligation to address same, because, again, Petitioner failed to file a Motion to Enforce Settlement, which would have been the proper method of attempting to enforce any alleged offer and acceptance. Petitioner did not do so, because the claim is ridiculous, so he included it as a minor portion of his memorandum at the lower court level.

Petitioner discusses Mr. Twist's deposition testimony where he states that his companies would offer money back to investors *if Defendants [had] the money* and

the company did not possess the required money, a fact conveniently omitted by Petitioner through judicious editing. (A.R. 140.) Further, Petitioner presented no evidence at the trial court level that Defendant had the money to offer back to Petitioner. Finally, the Petitioner states that he “immediately” “accepted” the “offer” made during Mr. Twist’s deposition by including same in his supplemental response to the Motion to Dismiss, however he fails to offer any evidence as to why anyone might consider that a valid meeting of the minds as to offer and acceptance. Further the claim of immediacy is suspect in that the deposition occurred on October 29, 2009 and the supplemental Response was not filed until September 10, 2010, nearly one year later. Accordingly, the trial court did not address this unfounded issue in its Order, as there was no evidence of an offer and acceptance, summarily rejecting petitioner’s argument.

CONCLUSION

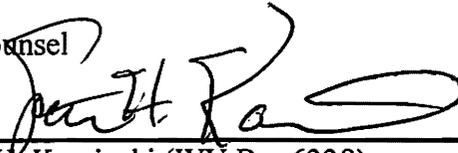
The crux of Petitioner’s argument is that the Petitioner thinks that Martin Twist is a bad man, which he intimates by allegations of wrongdoing generally unsubstantiated and are certainly not at issue in this matter and, therefore, he is not required to make any attempt to prove. He hopes if he is successful in making the Court dislike Mr. Twist, the Court will decide that universally accepted contract law should not apply to him and the other Respondents. However, the validity of contracts is not and cannot be based on the Petitioner’s personal feelings toward Martin Twist and the other Respondents.

This is the underlying basis for Petitioner’s entire argument because he does not have the force of the applicable law on his side. The circuit court was limited to what it is authorized to do under West Virginia law, namely “determining the threshold issues of (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement” Syl. Pt.2 *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W.Va. 250, 692 S.E.2d 293 (2010) and the threshold for choosing not to enforce a circuit court’s order under *McGraw v. American Tobacco Company* at 96, *et seq.*, is high. An examination of the law reveals that the lower court properly applied the relevant tests under the most recent West Virginia cases to determine that the arbitration clauses, which essentially mirror those contained in thousands of contracts each year, are not unconscionable nor are they fraudulent. Neither do they fall into one of the special classes discussed in *Brown v. Genesis Healthcare Corp.* at 3, *et seq.* as requiring additional examination by the Court – an individual who has nearly \$900,000 to invest in an oil and gas drilling concern cannot be compared to an individual signing a contract with a nursing home while ill, and this Court took pains to distinguish that type of situation from the one at issue here. To find for the Petitioner would be an invitation for parties to seek to invalidate any arbitration clause if a party felt like making personal attacks against a party to an agreement would substitute for applicability of the law.

Accordingly, the Respondents respectfully request that this Court **AFFIRM** order of the Circuit Court of Putnam County dismissing the Petitioner’s action for lack of jurisdiction and requests all other relief as Respondents may be entitled to under the law.

**APPALACHIAN ENERGY PARTNERS 2001-D, LLP,
APPALACHIAN ENERGY PARTNERS 2001-S, LLP,
APPALACHIAN ENERGY PARTNERS 2001 II, LLP,
APPALACHIAN ENERGY PARTNERS 2003 S-II,
LLP, BURNING SPRINGS ENERGY PARTNERS
1999, LLP, BURNING SPRINGS ENERGY
PARTNERS 2000, LLP, BURNING SPRINGS
ENERGY PARTNERS 2001-S, LLP, CHEROKEE
ENERGY COMPANY, HAYNES #2 ENERGY
PARTNERS 2001, LLP, MARTIN TWIST ENERGY
COMPANY, LLC, MARTIN R. TWIST, TAMMY
CURRY TWIST and TODD PILCHER,**

By Counsel



Scott H. Kaminski (WV Bar 6338)
Balgo and Kaminski, L.C.
P.O. Box 3548
Charleston, WV 25335-3548
Telephone: 304-344-0444
Fax: 304-344-sdfj

CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2011, true and accurate copies of the foregoing Respondents' Brief were deposited in the U.S. Mail contained in postage-paid envelopes to counsel for all other parties to this appeal as follows:

Jeffrey K. Phillips
Robert L. Bailey
Steptoe & Johnson PLLC
P.O. Box 910810
Lexington, KY 40591-0810

Lisa A. Hopkins
Shane P. McCullough
West Virginia State Auditor's Office
Capitol Complex, Bldg. 1, Room W-100
Charleston, WV 25303



Scott H. Kaminski
Counsel for Respondents