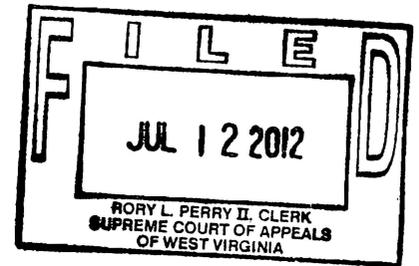


No. 12-0592



---

---

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
At Charleston

---

---

DAN RYAN BUILDERS, INC.,

**COPY**

*Petitioner,*

v.

NORMAN C. NELSON AND ANGELIA NELSON,

*Respondents.*

---

*From the United States Court of Appeals for the Fourth Circuit  
No. 11-1215*

---

---

PETITIONER'S BRIEF ON CERTIFIED QUESTION

---

---

MARTIN & SEIBERT, L.C.  
Susan R. Snowden  
(W.Va. Bar No. 3644)  
Post Office Box 1286  
1453 Winchester Avenue  
Martinsburg, WV 25402-1286  
(304) 262-3220

*Counsel for Dan Ryan Builders, Inc.*

## TABLE OF CONTENTS

I.	NATURE OF PROCEEDINGS AND RULINGS BELOW .....	1
II.	ISSUE PRESENTED .....	4
III.	STATEMENT OF FACTS .....	4
IV.	ARGUMENT .....	6
	A. In West Virginia, Individual Clauses Of Contracts Need Not Be Supported By Mutuality Of Obligation Or Separate Consideration .....	8
	B. The <i>Saylor</i> Decision And Its Rationale Is Not Applicable To This Courts Determination Of The Instant Case.....	10
	C. The West Virginia Consumer Credit And Protection Act Is Not Applicable To The Instant Case, Therefore Mutuality Of Obligation Is Not Required Under West Virginia Law.....	12
	D. In Determining The Enforceability Of Contract Provisions, West Virginia Courts Are To Consider The Fairness Of The Contract As A Whole.....	14
V.	CONCLUSION .....	19
VI.	CERTIFICATE OF SERVICE .....	21

## TABLE OF AUTHORITIES

### A. West Virginia Cases.

<i>Arnold v. United Companies Lending Corp.</i> , 204 W.Va. 229, 511 S.E.2d 854, 860-61 (1998) .....	18
<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).....	8, 9, 10, 12
<i>Brown v. Clarksburg Nursing &amp; Rehabilitation Center, Inc.</i> , Nos. 35949, 35546, 35635, 2012 W.Va. LEXIS 311 (June 13, 2012) .....	14, 15
<i>Cotiga Dev. Co. v. United Fuel Gas Co.</i> , 147 W.Va. 484, 128 S.E.2d 626 (1962).....	10
<i>Merrill Lynch, Pierce, Fenner &amp; Smith, Inc. v. Coe</i> , 313 F. Supp. 2d 603 (S.D.W.Va. 2004).....	8
<i>Sally-Mike Properties v. Yokum</i> , 175 W.Va. 296, 332 S.E.2d 597 (1985).....	10
<i>Schultz v. AT&amp;T Wireless Svcs.</i> , 376 F.Supp.2d 685 (N.D.W.Va. 2005) .....	8
<i>State ex rel. Dunlap v. Berger</i> , 211 W.Va. 549, 567 S.E.2d 265, 273 (2002).....	17
<i>State ex rel. City Holding Co. v. Kaufman</i> , 216 W.Va. 594, 609 S.E.2d 855 (2004).....	9
<i>State ex rel. Richmond American Homes of West Virginia Inc. v. Sanders</i> , 228 W.Va. 125, 717 S.E.2d 909 (2011).....	15, 16
<i>State ex rel. Saylor v. Wilkes</i> , 216 W. Va. 766, 613 S.E.2d 914 (2005).....	2, 10, 11, 12, 17, 18, 19
<i>Troy Min. Corp. v. Itmann Coal Co.</i> , 176 W.Va. 599, 346 S.E.2d 749 (1986).....	15, 17, 18, 19
<i>Wince v. Easterbrooke Cellular Corp.</i> , 681 F.Supp.2d 679 (N.D.W.Va. 2010) .....	8

### B. Federal Cases.

<i>Adkins</i> , 303 F.3d at 501.....	17
--------------------------------------	----

<i>American General Life &amp; Accident Ins. Co. v. Wood</i> , 429 F.3d 83 (4th Cir. 2005) .....	17
<i>Buckeye Check Cashing, Inc. v. Cardegna</i> , 546 U.S. 440 (2006) .....	2
<i>Dan Ryan Builders, Inc. v. Nelson</i> , No. 11-1215, 2012 U.S. App. LEXIS 9512 (4th Cir. May 10, 2012) .....	6, 10, 11, 16, 17
<i>Enderlin v. XM Satellite Radio Holdings, Inc.</i> , No. 4:06-CV-0032 GTE, 2008 U.S. Dist. LEXIS 27668 (W.D. Ark. Mar. 25, 2008) .....	7, 8, 12
<i>Harris v. Green Tree Fin. Corp.</i> , 183 F.3d 173 (3rd Cir. 1999).....	7
<i>Marmet Health Care Center, Inc. v. Brown</i> , 132 S. Ct. 1201 (2012).....	16, 17
<i>Prima Paint Corp. v. Flood &amp; Conklin Mfg. Co.</i> , 388 U.S. 395 (1967).....	18
<i>Snowden v. Checkpoint Check Cashing</i> , 290 F.3d 631, 637-38 (4th Cir.), <i>cert. denied</i> , 537 U.S. 1087 (2002).....	18
<i>Southeastern Stud &amp; Components, Inc. v. American Eagle Design Build Studios, LLC</i> , 588 F.3d 963, 967 (8th Cir. 2009).....	7
<i>Southland Corporation v. Keating</i> , 465 U.S. 1 (1984) .....	7
<b>C. <u>Constitutions, Codes &amp; Regulations.</u></b>	
9 U.S.C. §1 .....	1, 6, 7
9 U.S.C. §4 .....	7
W.Va. Code §46A-1-102 .....	13
W.Va. Code §46A-2-121 .....	14
<b>D. <u>Statutes and Rules.</u></b>	
Federal Rule of Civil Procedure 59(e) .....	2

## **I. NATURE OF PROCEEDINGS AND RULINGS BELOW.**

Dan Ryan Builders, Inc. (hereinafter “DRB”) is a builder and seller of new homes. Norman and Angelia Nelson are husband and wife. In 2008, DRB contracted with Norman Nelson for the sale of a new home, which was consummated with the improved realty being deeded to Mr. Nelson. J.A. at 11, 122, 205. The contract of sale contained an arbitration provision requiring Mr. Nelson to resolve any disputes arising under the sale contract through the arbitration process. This same arbitration provision specified certain limited instances in which DRB could forgo arbitration and pursue litigation, but in all disputes other than those so identified, DRB was also required to resort to arbitration. J.A. at 15.

On or about May 28, 2010, the Nelsons commenced a civil action against DRB in the Circuit Court for Berkeley County, West Virginia seeking redress for certain claimed deficiencies in the construction of the home. J.A. at 67-74, 114-21, 243-49. In their civil complaint, the Nelsons alleged fraud in the inducement, negligence, and gross negligence, seeking rescission of the sale contract and various other elements of fraud for which they sought monetary damages. *Id.*

DRB commenced an action in the United States District Court for the Northern District of West Virginia seeking to enforce the arbitration provision of the sale contract pursuant to the Federal Arbitration Act (hereinafter “FAA”), 9 U.S.C. §§1, *et seq.* J.A. at 6. The Nelsons resisted referral to arbitration arguing, *inter alia*, that the arbitration provision must fail for lack of consideration and that the arbitration provision was void for unconscionability. J.A. at 6-9. On December 23, 2010, the federal district court dismissed the present action, holding that the arbitration provision could not be enforced for lack of mutual consideration. J.A. at 284-96. The

district court did not rule upon the Nelsons' other arguments. J.A. at 284-96.

Thereafter, DRB brought a motion for reconsideration pursuant to Federal Rule of Civil Procedure 59(e), arguing that the court's initial ruling was founded upon erroneous legal reasoning. DRB proffered that, (1) as a matter of law, an arbitration provision contained within a larger contract which is undeniably supported by mutual consideration does not require separate consideration; (2) mutuality of obligation within such an arbitration provision is not a requirement of enforceability; and (3) even if separate consideration and/or mutuality of obligation were required, both elements were present in the arbitration provision. Central to the parties' arguments was the question of whether and to what extent the arbitration provision must be read with reference to the entirety of the sale contract. J.A. at 297-316.

In denying DRB's motion, the district court held that the enforceability of the arbitration provision must be determined entirely from the arbitration provision itself and without reference to the contract as a whole, relying upon *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006). Extrapolating, the district court found that the arbitration provision failed for lack of mutual consideration in that resort to the arbitration process was optional as to DRB<sup>1</sup> and no other form of consideration was given for it. The court further found, in reliance upon *State ex rel. Saylor v. Wilkes*, 216 W. Va. 766, 613 S.E.2d 914 (2005), that West Virginia law would require mutuality of obligation within an arbitration provision as a requisite of enforceability (J.A. at 350-58), notwithstanding that the contract as a whole was undeniably supported by mutual consideration. A timely notice of appeal was filed on March 9, 2011 (J.A. at 359-61) and the issues were briefed and argued before the Fourth Circuit, which certified the narrow question

---

<sup>1</sup> The federal district court failed to acknowledge that DRB's right to remedies other than arbitration was limited, and that in most disputes DRB had no option other than arbitration.

presently before this Court. J.A. at 582-89.

Before proceeding, it is necessary to clarify certain terminology. The arguments in the court below were framed in terms of lack of mutual “consideration” but encompassed two concepts. There is no doubt that the sale contract at issue was supported by mutual consideration. Whether mutuality within the arbitration provision within it was a requirement of enforceability is more correctly characterized as one of mutuality of obligation or remedy – not one of consideration unless it is to be viewed that separate consideration must be given in support of such a provision.

Secondly, it is necessary to bear in mind the distinction between a stand-alone arbitration agreement, which undeniably must be supported by some form of mutual consideration either in the form of mutuality of obligation or some other value, and an arbitration provision contained within a larger contract which is supported by consideration. For purposes of this argument, DRB will use the term “arbitration agreement” to refer to stand-alone contracts to arbitrate and “arbitration provision” to refer to arbitration provisions contained within larger contracts which are supported by mutual consideration.

## **II. ISSUE PRESENTED.**

Certified Question presented:

Does West Virginia law require that an arbitration provision, which appears as a single clause in a multi-clause contract, itself be supported by mutual consideration when the contract as a whole is supported by adequate consideration?

Proposed Answer:

No, West Virginia law does not require that an arbitration provision that is contained within a multi-clause contract, which is supported by adequate consideration, be supported by separate consideration. Nor does it require mutuality of obligation or remedy within the arbitration provision.

## **III. STATEMENT OF FACTS.**

The parties to this action entered into an Agreement of Sale for the purchase of a home, which was signed by the Appellee, Norman C. Nelson. J.A. at 11-66, 122-77, 250-56. The Nelsons have never disputed that the Agreement of Sale contains abundant mutual consideration. To wit, in the state court complaint, the Nelsons allege in Paragraph 4 that, "In 2008, Plaintiffs purchased a home built by Defendants DRB and Eagle, located in Berkeley County, West Virginia, paying some \$385,000.00." J.A. at 67-74, 114-21, 243-49.

On or about May 28, 2010, the Nelsons brought suit by commencing a civil action in the Circuit Court of Berkeley County, West Virginia. That civil action seeks damages against Dan Ryan Builders, Inc., their residential home builder, relying on the following Counts:

Count 1 – Fraud – Failed, Illegal Septic System and Othyer (sic) Defects

Count II – Fraud – Basement Flooding

Count III – Fraud – Substandard Concrete

Count IV – Negligence, Gross Negligence, Willful, Wanton Reckless Misconduct (Property Damage)

Count V – Negligence Gross Negligence, Willful, Wanton Reckless Misconduct (Bodily Injury)

J.A. at 67-74, 114-21, 243-49.

By filing said Complaint, the Nelsons disregarded the contractual agreement to arbitrate claims. The Agreement of Sale specifically provided that,

(a) Any dispute arising under or pursuant to this Agreement, or in any way related to the Property and/or with respect to any claims arising by virtue of any representations alleged to have been made by Us, or any agents and/or employees thereof, (with the exception of “Consumer Products” as defined by the Magnuson-Moss Warranty Federal Trade Commission improvements Act, 15 U.S.C. Section 2301 et seq. and the regulations promulgated thereunder) shall be settled and finally determined by arbitration and not in a court of law, irrespective of whether or not such claim arises prior to or after Settlement hereunder, pursuant to the Construction Industry Arbitration Rules and the Supplementary Procedures for Residential Construction Disputes of the American Arbitration Association (“AAA”) then in effect. Prior to commencing arbitration, the dispute shall first be mediated in accordance with the Construction Industry Mediation Rules of AAA, or any other mediation service designated by Us. The parties hereto specifically acknowledge that they are and shall be bound by arbitration and are barred from initiating any proceeding or action whatsoever in connection with this Agreement. Notwithstanding anything to the contrary herein contained, in the event You default by failing to settle on the Property within the time required under this Agreement, then We may either (i) commence an arbitration proceeding under this Section 19, or (ii) bring an action for its damages, including reasonable attorneys’ fees, as a result of the default in a court having jurisdiction over the Purchaser. You expressly waive your right to mediation and arbitration in such event. Each party shall be entitled to full discovery in accordance with the local rules of court in the event that arbitration is invoked under this Section 19. The provisions of this Section 19 shall survive the execution and delivery of the deed, and shall not be merged therein.

J.A. at 11-66, 250-56.

DRB was served with the summons and complaint on June 17, 2010. On July 15, 2010, DRB wrote to the Nelsons' counsel, demanding arbitration of the claims and enforcement of all applicable provisions of the parties' agreement, and advising the Nelsons' counsel that Judge Bailey had just recently ordered arbitration in a similar case on an identical contract provision. J.A. at 75, 178, 387-88. On July 19, 2010, DRB answered the state court complaint, raising the existence of the arbitration clause as an affirmative defense.<sup>2</sup>

The Nelsons refused to honor the agreement to arbitrate signed by Norman C. Nelson; therefore, on August 6, 2010, DRB filed a petition to compel arbitration in the court below, pursuant to the FAA, 9 U.S.C. §§1, *et seq.*<sup>3</sup> J.A. at 6-10.

#### IV. ARGUMENT.

The narrow question certified to this Court from the certified question from the Fourth Circuit Court is:

Does West Virginia law require that an arbitration provision, which appears as a single clause in a multi-clause contract, itself be supported by mutual consideration when the contract as a whole is supported by adequate consideration?

J.A. at 583. See *Dan Ryan Builders, Inc. v. Nelson*, No. 11-1215, 2012 U.S. App. LEXIS 9512, at \*1 (4th Cir. May 10, 2012).

The inquiry by this Court is whether, as a matter of substantive law in the state of West Virginia, an arbitration clause in a contract which as a whole is supported by consideration must nonetheless fail for lack of mutuality of obligation or a lack of separate consideration. As a

---

<sup>2</sup> The state court action has been stayed pending a ruling by the Fourth Circuit.

<sup>3</sup> Section 4 of the FAA provides that “[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement to arbitrate matters may petition a United States District Court . . . for an order

matter of federal substantive law, mutuality of obligation is not a required element of a binding arbitration provision. *See Harris v. Green Tree Fin. Corp.*, 183 F.3d 173 (3rd Cir. 1999)(discussion at 180).

The issue before the Court is governed by the Federal Arbitration Act, 9 U.S.C. §§1, *et seq.*, and both the federal district court and the Fourth Circuit held that all prerequisites to DRB's invocation of the FAA were met. Undeniably, the FAA preempts state law and state statutory or common law which singles out arbitration agreements or arbitration provisions within a larger contract for disparate treatment is void. *See Southland Corporation v. Keating*, 465 U.S. 1 (1984). State courts must define the contract law applicable to arbitration provisions to be in concert with the FAA.

The Supreme Court's position was discussed in the case of *Enderlin v. XM Satellite Radio Holdings, Inc.*, No. 4:06-CV-0032 GTE, 2008 U.S. Dist. LEXIS 27668, at \*22-\*31 (W.D. Ark. Mar. 25, 2008); and again by the Eighth Circuit, which endorsed the view stated in *Enderlin*.

[A]s early as 1984 the Supreme Court held that the Federal Arbitration Act (FAA) "preempts a state law that withdraws the power to enforce arbitration agreements." *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.10, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984). Over a decade later, the Court again explained that "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions. . . . 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.'" *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974)) (internal citations omitted). Thus, pursuant to Supreme Court precedent, . . . Arkansas could not have imposed additional requirements that applied only to arbitration agreements. Moreover, in 2003, five years before

---

directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. §4. J.A. at 6-10.

*Enderlin*, the United States District Court for the Western District of Arkansas stated that, “mutuality of obligation is not required for arbitration clauses so long as the contract as a whole is supported by consideration.” *Scherrey v. A.G. Edwards & Sons, Inc.*, No. 02-2286, 2003 U.S. Dist. LEXIS 11010, at \*10 (W.D. Ark. Apr. 15, 2003) (unpublished). Thus, in spite of [the defendant’s] assertions, *Enderlin* did not make new law; it merely correctly applied existing law.

*Southeastern Stud & Components, Inc. v. American Eagle Design Build Studios, LLC*, 588 F.3d 963, 967 (8th Cir. 2009). Both West Virginia federal district courts have held, in accordance with the foregoing, that state law principles which single out arbitration provisions for disfavored treatment are preempted by the FAA. *Wince v. Easterbrooke Cellular Corp.*, 681 F.Supp.2d 679 (N.D.W.Va. 2010); *Schultz v. AT&T Wireless Svcs.*, 376 F.Supp.2d 685 (N.D.W.Va. 2005); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Coe*, 313 F. Supp. 2d 603 (S.D.W.Va. 2004).

Therefore, this Court, upon question from the federal appellate court, must determine the predicate contract law applicability of West Virginia harmoniously with the preemption of the FAA.

**A. In West Virginia, Individual Clauses Of Contracts Need Not Be Supported By Mutuality Of Obligation Or Separate Consideration.**

This Court has not issued an opinion which is explicit with regard to the specific question presented. However, the predicate law of this State supports DRB’s proposition that individual clauses of contracts, including arbitration clauses, need *not* be supported by additional consideration where the contract *as a whole* is supported by sufficient and mutual consideration.

Specifically, this Court ruled extensively on the issue of arbitration in the case of *Board of Education of the County of Berkeley v. W. Harley Miller, Inc.*, 160 W.Va. 473; 236 S.E.2d 439 (1977). As part of this Court’s extensive discussion of the public policy concerning arbitration

provisions, the Court recognized that “in spite of all the reasons for being suspicious of arbitration, the weight of modern, enlightened authority favors arbitration as a preferred means of conflict resolution.” *Id.* at 482. This Court further determined that “the trend among the jurisdictions is to apply ordinary principles of contract interpretation to determine whether the parties have impliedly agreed to arbitrate, or submit particular issues to arbitration.” *Id.* This Court then held, based on its analysis of West Virginia law, that “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 ...” *Id.* at 486.

This Court emphatically noted that the existence of a “bargained for exchange,” which would support an arbitration provision, must be found within the four corners of the contract as a whole and not within the arbitration clause itself.

[U]nder modern case law in other jurisdictions there is a strong presumption that an arbitration provision is part of the bargain. Therefore in West Virginia only if it appears from the four corners of a written contract or from the obvious nature of the contracting parties, or from the obvious nature of the activity covered by the contract, that the arbitration provision is so inconsistent with the other terms of the contract or so oppressive under the circumstances that it could not have been bargained for, should a court refuse to enforce the arbitration provision.

*W. Harley Miller, Inc.*, 160 W.Va. at 487.

Since *W. Harley Miller, Inc.*, this Court has reemphasized that to determine whether an arbitration provision is supported by consideration and is consistent with public policy, one must look to the *entirety* of the contract, and not consider the arbitration provision in a vacuum. *See State ex rel. City Holding Co. v. Kaufman*, 216 W.Va. 594, 609 S.E.2d 855 (2004).

In the instant case, the presence or absence of consideration must be found within the four corners of the contract between the buyer and seller of the home at issue. It is axiomatic under West Virginia law that an unambiguous contract will be applied as written and will not be construed. See *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W.Va. 484, 128 S.E.2d 626 (1962); *Sally-Mike Properties v. Yokum*, 175 W.Va. 296, 332 S.E.2d 597 (1985). In the matter of the contract at issue in this case, the contract within its four corners is plain and unambiguous as regards the question of consideration: for a stated sum of money paid by the Nelsons, DRB would convey all of its right, title and interest in the improved realty which was the subject of the contract. There is no question that the contract as a whole was supported by valuable consideration.

**B. The *Saylor* Decision And Its Rationale Is Not Applicable To This Courts Determination Of The Instant Case.**

This Court has relied on the rationale in the *W. Harley Miller, Inc.* decision in nearly all subsequent cases involving arbitration clauses. Among them is *State ex rel. Saylor v. Wilkes*, 216 W.Va. 766; 613 S.E.2d 914 (2005), upon which the Nelsons have relied in arguing that the arbitration clause can not be enforced, as it lacks mutuality of obligation. Noting that this argument confuses the distinction between a stand-alone arbitration contract and a larger contract within which an arbitration provision is contained, the Fourth Circuit has held it to be inapplicable to the present case. See *Dan Ryan Builders, Inc. v. Nelson*, No. 11-1215, 2012 U.S. App. LEXIS 9512, at \*2-\*3 (4th Cir. May 10, 2012). *Saylor* involved a stand-alone arbitration contract with a third-party, EDSI, which Ms. Saylor was required to sign as part of an application for employment with Ryan's Family Steak Houses. This Court found that Ryan's reciprocal

“consideration” for this contract – that it would consider her application for employment – to be illusory. It vested no enforceable right in Ms. Saylor and, as a result, the contract as a whole was unsupported by mutual consideration.

The Fourth Circuit, in its analysis found the *Saylor* case inapposite.

We also conclude that the holding in *Saylor* is not applicable to the present case... Unlike the arbitration provision at issue before us, the arbitration agreement in *Saylor* was a separate contract entered into between the employee and the dispute resolution agency, a third party to the employment contract. Significantly, the employer in *Saylor* was not a party to the arbitration agreement executed by the prospective employee. In contrast, the arbitration provision before us is part of a multi-clause contract between parties who both made certain promises regarding arbitration and other substantive rights. Therefore, the holding in *Saylor* that the arbitration agreement failed for want of consideration does not answer the question presented in this case.

J.A. at 586-87. See *Dan Ryan Builders, Inc. v. Nelson*, No. 11-1215, 2012 U.S. App. LEXIS 9512, at \*2-\*3 (4th Cir. May 10, 2012).

As noted by the Fourth Circuit, these considerations are simply not at issue in the instant litigation. The provision in question in the instant litigation does not conceal material facts regarding arbitration or the relationship between any of the parties involved in the arbitration, as this Court found in *Saylor*. J.A. at 11-18, 122-129, 250-56. Further, the contract in the instant case does not misrepresent DRB’s rights and responsibilities with regard to arbitration, as was the case in *Saylor*. Here, the provision is clear that DRB is bound to arbitrate in certain instances, and is not in other, limited circumstances. *Id.* This is wholly unlike the factual situation presented by *Saylor*, in which Ms. Saylor signed a contract with EDSI to arbitrate all disputes with Ryan’s, and in which Ryan’s concealed from Ms. Saylor that its own agreement with EDSI did not require it to submit claims to arbitration.

Further, the lack of consideration argument set forth in *Saylor* is inapposite to the instant litigation. In *Saylor*, the Court determined that there had been no meeting of the minds as to the *entire contract* because 1) Ryan's concealed material facts from Ms. Saylor and 2.) offered no valuable consideration, as it had offered only to consider her application for employment, not, as the circuit court had found, to offer her employment. *Id.* at 775-76 (emphasis added). In the instant case, however, the contract *in its entirety* is supported by valuable consideration. In exchange for the purchase price offered by the Nelsons, DRB agreed to sell them a home. J.A. at 11-18, 122-129, 250-56. *Saylor* involved a contract whose whole purpose was to create an arbitration agreement, as opposed to the instant case where the arbitration agreement is a portion of the contract as a whole to be considered under *W. Harley Miller, Inc.*

**C. The West Virginia Consumer Credit And Protection Act Is Not Applicable To The Instant Case, Therefore Mutuality Of Obligation Is Not Required Under West Virginia Law.**

It is only within contracts governed by the West Virginia Consumer Credit and Protection Act (WVCCPA) that mutuality of obligation, i.e. both parties are mutually and equally obligated to submit disputes to arbitration, is required as a matter of law. Neither the legislature nor this court has mandated mutuality of obligation as a required element of arbitration provisions generally. Further, federal law does not impose such a requirement. *See Enderlin v. XM Satellite Radio Holdings, Inc.*, No. 4:06-CV-0032 GTE, 2008 U.S. Dist. LEXIS 27668, at \*22-\*31 (W. D. Ark. Mar. 25 2008). Accordingly, an arbitration provision contained within a larger contract which is undeniably supported by valid mutual consideration need not impose equal obligations upon both parties, just as other provisions of the contract may favor or disfavor one party over the other. Again, the Court must look to the contract as a whole and, except for

contracts governed by the WVCCPA, nonmutuality of obligation within the arbitration provision of the larger contract is irrelevant to the question presented by the Fourth Circuit.

Before the appellate court, the Nelsons argued that the contract at issue falls within that WVCCPA because it is a transaction “giving rise to” a consumer credit sale, consumer lease or consumer loan. J.A. at 439. That argument is self-defeating in that the transaction in question fits none of the statutory definitions of a “consumer credit sale” or “consumer loan”.

“[C]onsumer credit sale’ is a sale of goods, services or an interest in land in which . . . Credit is granted either by a seller who regularly engages as a seller in credit transactions of the same kind or pursuant to a seller credit card.

W. Va. Code §46A-1-102(13)(a). In this case, DRB made no extension of credit to the plaintiffs and the transaction in question was not a consumer credit sale. Nor, for the same reason, was it a consumer loan. “‘Consumer loan’ is a loan made by a person regularly engaged in the business of making loans.” *Id.* at §46A-1-102 (15).

Here, DRB was a seller which was paid cash at closing. It was a matter of indifference to DRB whether or not the plaintiffs sought financing or paid outright from their own funds. Any financing necessarily derived from a third-party lender by separate contract to which DRB was not a party. The “giving rise to” language relied upon by the plaintiffs has never been applied by the Supreme Court of Appeals to any person or entity other than a lender and, most certainly, not to an outright seller. *A fortiori*, the plaintiffs’ “giving rise to” interpretation would render every transaction in which a customer pays a merchant by credit card (other than one issued by the merchant) a “consumer credit sale” or “consumer loan” even though the merchant is paid cash on the spot by the credit card issuer and is a stranger to the extension of credit.

Clearly, the West Virginia legislature did not intend such a sweeping reach of the WVCCPA, but intended to regulate transactions between lender and borrower *inter se*. Thus, the plaintiffs' reliance upon W. Va. Code § 46A-2-121 is misguided. Upon the face of the contract, there was no consumer credit sale, no consumer loan and it did not thereby "give rise to" a consumer credit sale or consumer loan as those terms have been statutorily defined. The statute does not extend to all contract interpretation within the state of West Virginia.

The overwhelming trend of decisions has favored enforcing agreements to arbitrate, and the district court's decision stands out as an anachronistic holdover of animus toward this national jurisprudential policy.

**D. In Determining The Enforceability Of Contract Provisions, West Virginia Courts Are To Consider The Fairness Of The Contract As A Whole.**

Before this Court is a narrow certified question, stated in the abstract:

Does West Virginia law require that an arbitration provision, which appears as a single clause in a multi-clause contract, itself be supported by mutual consideration when the contract as a whole is supported by adequate consideration?

This Court has not been requested to rule upon the validity of the contract *sub judice* or the enforceability of the arbitration provision within it. Those are matters to be ruled upon by the Fourth Circuit. Accordingly, the issue of unconscionability should not arise in this proceeding at all. However, recognizing that this Court has broad discretion to reformulate certified questions and that the issue of unconscionability might peripherally interact with the question presented, DRB addresses it as follows.

In the case of *Brown v. Clarksburg Nursing & Rehabilitation Center, Inc.*, Nos. 35949, 35546, 35635, 2012 W.Va. LEXIS 311 (June 13, 2012), this Court further discussed the role of

unconscionability. These consolidated cases involved negligence claims against nursing homes, and a dispute regarding whether arbitration clauses could be enforced to compel arbitration in cases involving personal injury or wrongful death. In that decision, the Court reiterated that the doctrine of unconscionability, which involves unfairness in the contract itself, is tied to the notion that the provisions of a contract must be bargained-for when the contract is viewed as a whole. *Id.* at \*24, n. 28. The Court noted that, “we are hostile toward contracts of adhesion that are unconscionable and rely upon arbitration as an artifice to defraud a weaker party of rights clearly provided by the common law or statute.” *Id.* at \*20, citing *State ex rel. Richmond American Homes of West Virginia Inc. v. Sanders*, 228 W.Va. 125, 717 S.E.2d 909 (2011). The Court then reiterated that determining whether a contract term is unconscionable requires looking to the circumstances surrounding the execution of the contract ***and the fairness of the contract as a whole.*** *Id.*, citing Syl. Pt. 3, *Troy Min. Corp. v. Itmann Coal Co.*, 176 W.Va. 599, 346 S.E.2d 749 (1986)(emphasis added). Under this analysis, two forms of unconscionability must be determined and found in order for a provision to be struck down. The provision must be found to be procedurally unconscionable, as well as substantively unconscionable.

Pursuant to the Court:

Procedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract. Procedural unconscionability involves a variety of inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties, considering all the circumstances surrounding the transaction. These inadequacies include, but are not limited to, the age, literacy, or lack of sophistication of a party; hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner and setting in which the contract was formed, including whether each party had a reasonable opportunity to understand the terms of the contract.

*Id.* at 26-27. Conversely, substantive unconscionability

involves unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party. The factors to be weighed in assessing substantive unconscionability vary with the content of the agreement. Generally, courts should consider the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns.

*Id.* at 28.

Having set all these provisions forth, this Court then held that the consolidated cases must be remanded for further proceedings and discovery, consistent with its opinion and with *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012) (holding *inter alia* that West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA). In the instant case, the Fourth Circuit concluded that *Marmet* did not resolve the issue before it. The Fourth Circuit held that,

the Supreme Court vacated the state court's public policy determination that pre-dispute arbitration agreements are unenforceable in cases of personal injury and wrongful death claims. The Court held that the state court decision violated the FAA as an unlawful categorical prohibition of arbitration. *Marmet*, 132 S. Ct. at 1203-04. The Supreme Court further held that the state court's alternative holding may have been influenced by the state court's public policy determination. *Id.* at 1204. The Supreme Court therefore remanded the case to the state court for a determination whether, absent the public policy considerations, the arbitration clauses were otherwise enforceable based on state common law principles. *Id.*

Although two of the arbitration clauses reviewed in *Marmet* contained provisions that were not mutually coextensive regarding the parties' obligation to arbitrate, similar to the arbitration provision at issue before us, the Supreme Court's holding was limited to the state court's consideration of public policy under West Virginia law. Neither the

Supreme Court nor the state court addressed the separate issue whether the arbitration provisions failed for want of mutual consideration.

J.A. at 585-86. See *Dan Ryan Builders, Inc. v. Nelson*, No. 11-1215, 2012 U.S. App. LEXIS 9512, at \*5-\*6 (4th Cir. May 10, 2012).

Further, the instant case is not a contract of adhesion, and even if it were, this fact does not render the provision *ipso facto* void or voidable. Under the law of this state, adhesion contracts are “form contracts submitted by one party on the basis of this or nothing.” See *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 567 S.E.2d 265, 273 (2002) (internal quotations and citations omitted). As the Fourth Circuit noted in *American General Life & Accident Ins. Co. v. Wood*, 429 F.3d 83 (4th Cir. 2005), even where the contract is one of adhesion, the aggrieved party still must meet the test of unconscionability. In that case the court stated that

[s]ince the bulk of contracts signed in this country, if not every major Western nation, are adhesion contracts, a rule automatically invalidating adhesion contracts would be completely unworkable.

*Id.* at 88; citing *Dunlap*, 567 S.E.2d at 273 (internal citations omitted); *Adkins*, 303 F.3d at 501 (remarking that a ruling of unconscionability based solely on the gross bargaining disparities between the parties “could potentially apply to every contract of employment in our contemporary economy”).

It has always been the law of this state that West Virginia courts are charged with “distinguishing good adhesion contracts which should be enforced from bad adhesion contracts which should not.” *Dunlap*, 567 S.E.2d at 273 (internal citations omitted). The majority of the cases on this issue instruct a court to determine whether “‘gross inadequacy in bargaining power’ and ‘terms unreasonably favorable to the stronger party’ exist, so as to make the contract

unconscionable and therefore unenforceable.” *Saylor*, 613 S.E.2d at 922 (quoting *Troy Mining Corp. v. Itmann Coal Co.*, 176 W.Va. 599, 346 S.E.2d 749, 753 (1986)).

In the instant matter, the Nelsons, as the buyers and (as they argue) the weaker party, cannot simply rely on inequities inherent in the bargaining process, but must identify the existence of unfair terms in the contract. *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229, 511 S.E.2d 854, 860-61 (1998); *Troy Mining*, 346 S.E.2d at 753 (“A litigant who complains that he was forced to enter into a fair agreement will find no relief on grounds of unconscionability.”).

The record below is devoid of any evidence upon which the district court, the appellate court, or this court can make such a finding. These allegations present contested issues of fact which remain unresolved. As a matter of law, they could not be ruled upon by the court below and cannot presently be ruled upon by this Court *nisi prius*.

Substantively, claims of fraud in the inducement of a contract are arbitrable issues and are not recognized under the FAA as grounds for avoidance of arbitration. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 637-38 (4th Cir.), *cert. denied*, 537 U.S. 1087 (2002). The result should be no different with claims of coercion or duress. All such claims raise fact-dependent issues which would invariably be contested. If merely making a bare allegation of fraud, coercion or duress were grounds for avoidance, the FAA would be rendered toothless. If a district court jury were required to resolve the factual issues underlying such claims before ruling whether an issue is arbitrable under the FAA, its purpose would be defeated. Full litigation and trial would be necessary in order to determine if full litigation and trial might be avoided through the arbitration

process.

The issue reduces to one of whether the contract, considered as a whole, is so unfairly one-sided as to shock the conscience. Every provision or nearly every provision within a contract will favor one party over the other and their bargain is struck in the tradeoffs among the numerous provisions. If it were a requirement that each provision of a contract must equally favor and burden both parties, virtually every contract would fail. For this reason, a determination of one-sidedness cannot focus on a single provision but must look to the contract as a whole and not to a single provision or small group of provisions. The Supreme Court of Appeals of West Virginia has recognized this as the appropriate perspective from which this question must be considered to determine if, in this instance, it unfairly favors DRB. *State ex rel. Saylor v. Wilkes*, 216 W.Va. 766, 613 S.E.2d 914 (2005); *Troy Mining Corp. v. Itmann Coal Co.*, 176 W.Va. 599, 346 S.E.2d 749 (1986). Nor may the plaintiffs rely upon broad assertions of one-sidedness to sustain their position, but must identify the particular terms of the contract which they contend unfairly favor DRB.

Here, the Nelsons identify only a single term of the contract which they contend unfairly favors DRB – the arbitration provision at issue. This falls far short of fulfilling the plaintiffs’ burden of proving unconscionability as an affirmative avoidance of arbitration under West Virginia law.

## **V. CONCLUSION**

It has long been the predicate law of this State that individual clauses of contracts need not be supported by mutuality of obligation or separate consideration. This Court has always

looked to the fairness of the contract as a whole. This maxim should apply even to the terms of an arbitration provision.

Arbitration is governed by the FAA and the United States Supreme Court has expressed the desire to enforce the applicability of arbitration provisions to further Congress' intent to place arbitration agreements upon the same footing as other contracts.

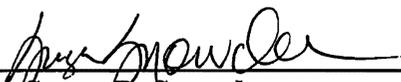
This Court, to further this goal, should answer the Certified Question in the negative. West Virginia should treat its evaluation of an arbitration clause in a contract the same as that of any other – if the contract as a whole is supported by adequate consideration – then the provision should be enforced.

Respectfully Submitted,

**DAN RYAN BUILDERS, INC.,**  
**BY COUNSEL**

**MARTIN & SEIBERT, L.C.**

BY:



**Susan R. Snowden**  
**(W.Va. Bar No. 3644)**  
**Post Office Box 1286**  
**1453 Winchester Avenue**  
**Martinsburg, WV 25402-1286**  
**(304) 262-3220**

**CERTIFICATE OF SERVICE**

I, Susan R. Snowden, counsel for Petitioner, Dan Ryan Builders, Inc., do hereby certify that I served the foregoing Petitioner's Brief on Certified Question upon the following counsel, by first class mail, postage pre-paid, on this the 11th day of July, 2012.

Lawrence M. Schultz  
Post Office Box 1935  
Martinsburg, West Virginia 25402

  
Susan R. Snowden