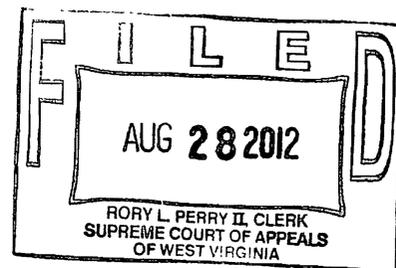


No. 12-0592



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

DAN RYAN BUILDERS, INC.,

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 REPLY BRIEF ON CERTIFIED QUESTION

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I. THIS COURT SHOULD CONFINE ITS REVIEW TO THE QUESTION PRESENTED BY THE FOURTH CIRCUIT AND DECLINE THE RESPONDENTS' INVITATION TO USURP THE JURISDICTION OF THAT COURT OVER THE PRESENT CONTROVERSY BY RULING UPON MATTERS EXTRANEEOUS TO THAT QUESTION.

In rebutting the Respondents' arguments, it is helpful to begin by reiterating the posture of the case as it stands before this Court. Appellate jurisdiction over the substantive merits of the case lies in the Fourth Circuit, not the Supreme Court of Appeals of West Virginia which has been requested to aid the Fourth Circuit by resolving only a narrow and discrete question of West Virginia law. *Nisi prius* jurisdiction lies in the United States District Court for the Northern District of West Virginia. This perspective is critical insofar as, throughout much of their argument, the Respondents invite this Court to disregard principles of comity and *de facto* assume jurisdiction over the entire substance of the controversy, usurping the jurisdiction of the federal courts and ruling upon matters not committed to this Court. Some of these matters are not ripe for appellate review as the Fourth Circuit has noted and others are not ripe for decision in the district court insofar as they entail newly-introduced factual matters that were never developed in discovery.

Respondents' position is an invitation this Court should emphatically decline, particularly with regard to the issue of unconscionability, which has not been adjudicated in the district court and, as noted by the Fourth Circuit appellate panel at oral argument, not an issue which an appellate court might properly consider. If the case proceeds to that point, it is an issue which must be remanded to the district court for full factual development through the discovery process

and ultimate adjudication before it would be ripe for appellate review by the Fourth Circuit.¹ Likewise, the Court should not address the Respondents' argument that the contract as a whole is not supported by adequate consideration. The Fourth Circuit, in its opinion, specifically noted that

[T]he Nelsons argued in the district court that the arbitration provision was unenforceable as a matter of law because it was not supported by mutual consideration, notwithstanding the fact that the contract as a whole was supported by adequate consideration.

J.A. at 584. See *Dan Ryan Builders, Inc. v. Nelson*, No. 11-1215, 2012 U.S. App. LEXIS 9512, at *3 (4th Cir. May 10, 2012).

It is improper for the Respondents to raise this issue before this Court, as noted, jurisdiction over the substantive issues in this case is vested in the federal courts. This is an argument which this Court should disregard in its entirety.

The Fourth Circuit requested this Court to address the question of whether, under West Virginia law, mutuality of obligation is necessary to support an arbitration provision contained within a larger contract which is otherwise supported by consideration. Admittedly, the mutuality

¹ In advancing this argument, the Respondents, in addition to a colorful recitation of "facts" contrived to inflame the emotions of the Court, *Respondents' Brief* at pp. 1-4, proffer the affidavits of Norman Nelson and James Dunleavy, representing to the Court that "none of the allegations in these Affidavits was countered in the district court," *id.* at 6, and thereby implying that their contents should be viewed as uncontested facts. The Respondents would note that these affidavits were first presented as attachments to Respondents' brief in opposition to DRB's then-pending summary judgment motion to compel arbitration. As this Court is aware, it would have been improper for the district court to consider the affidavits or for DRB to argue them insofar as all factual matters on summary judgment must be construed in the light most favorable to the non-moving party. Thus, it would have been improper for DRB to take issue with them at that stage and the failure to do so cannot be construed as an admission of the accuracy of any of the factual representations contained therein. The appropriate mechanism would have been for the district court to conduct an evidentiary hearing on any issues of fact. Accordingly, the Respondents' representation that DRB has not contested the assertions of fact therein is misleading and the implication that this Court should thus accept those factual assertions as admitted or uncontested is inappropriate. Moreover, those averments go to the Respondents' unconscionability argument which was not developed in discovery or ruled upon by the district court. Therefore, it is not within the appellate jurisdiction of the Fourth Circuit and, derivatively, is not properly before this Court.

of obligation issue is intertwined with the consideration issue to a limited degree. While a reciprocal promise to arbitrate may constitute a form of consideration, it is not the only form that valuable consideration may take. Using a stand-alone arbitration contract as an example,² a promise by one party to submit future disputes to arbitration may be given in return for money or value other than a reciprocal promise to submit future disputes to arbitration. There is valuable consideration given by both parties, though mutuality of obligation to submit to arbitration is lacking. Thus, an implicit corollary to the question presented by the Fourth Circuit is: if under West Virginia law “an arbitration provision, which appears as a single clause in a multi-clause contract” must be supported by separate mutual consideration, is mutuality of obligation the only form of consideration which will suffice? If necessary to consider this ancillary question, the Court must also consider whether an affirmative answer singles out arbitration provisions for disfavored treatment in contravention of *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 281 (1995). *See also E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 293 (2002); *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). To the extent that this Court finds it necessary to address the issue of mutuality of obligation at all, it should limit itself to this question. This case was certified to the West Virginia Supreme Court of Appeals pursuant to W.Va. Code §51-1A-3, which states:

² As noted in DRB’s principal brief, a stand-alone arbitration agreement is one in which the entire subject matter is an agreement to arbitrate and, thus, the promise to arbitrate must be supported by mutual consideration. *See, e.g., State ex rel. Saylor v. Wilkes*, 216 W. Va. 766, 613 S.E.2d 914 (2005). By contrast, the contract at issue here is a larger contract, supported by mutual consideration, containing within it an arbitration provision. DRB refers to the former as an example only for purposes of illustration. *See Dan Ryan Builders, Inc. v. Nelson*, No. 11-1215, 2012 U.S. App. LEXIS 9512, at *4 (4th Cir. May 10, 2012), J.A. at 585.

§51-1A-3. Power to answer.

The supreme court of appeals of West Virginia may answer a question of law certified to it by any court of the United States or by the highest appellate court or the intermediate appellate court of another state or of a tribe or of Canada, a Canadian province or territory, Mexico or a Mexican state, if the answer may be determinative of an issue in a pending cause in the certifying court and if there is no controlling appellate decision, constitutional provision or statute of this state.

Although W.Va. Code §51-1A-4 allows for the Court to reformulate a questions, it does not grant the power to decide the merits of the case.³

Confining the argument to the specific question certified to this Court by the Fourth Circuit within whose jurisdiction this case, in its substantive entirety, remains:

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?

II. THE SALE CONTRACT AT ISSUE DOES NOT FALL WITHIN THE WEST VIRGINIA CONSUMER CREDIT AND PROTECTION ACT.

Undeniably, West Virginia requires an arbitration provision within a larger contract to be supported by mutuality of obligation when the contract falls within the West Virginia Consumer Credit and Protection Act (WVCCPA). *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229, 511 S.E.2d 854 (1998).⁴ Here, the Respondents make an unsuccessful effort to bring the sale contract at issue within the WVCCPA notwithstanding that it did not involve an extension of credit by DRB, arguing that the mortgage contract between the Respondents and a third-party lender bring it within the Act. Respondents have attempted to bootstrap the sale contract, which does not entail an extension of credit to the third-party mortgage contract, and further attempt to

³ §51-1A-4. Power to amend question.

The supreme court of appeals of West Virginia may reformulate a question certified to it.

⁴ DRB questions whether such a rule violates the FAA as argued *infra*, but for purposes of the present

transsubstantiate a standard financing escape clause benefitting the buyer into a condition precedent to the parties' contractual obligation to perform when such was not factually the case.

The clause in question, *Respondents' Brief* at pp. 9-10, makes the buyer's obligation to perform contingent upon the buyer's ability to obtain a mortgage commitment, allowing the buyer to rescind the contract without penalty if unable to do so.⁵ The fallacy of the Respondents' argument is evident in the first words of the subject clause. They do not state that the contract in its entirety is contingent upon the buyer obtaining an extension of credit. Rather, they state that "Your [the buyer's] obligation to settle hereunder is contingent upon You obtaining" a mortgage commitment. *Respondents' Brief* at p. 8. The clause in question was not a condition precedent to either party's obligation to perform and does not implicitly incorporate the third-party mortgage contract or any other extension of credit into the sale contract.

Viewing the contract as a whole, DRB was to be paid cash at closing and would be obligated to convey the property upon tender of that cash, whether it came from a mortgage lender or the buyer's own bank account. Likewise, if the buyer elected to pay cash rather than seek financing, he would still be obligated to perform; the source of the payment is of no consequence. *A fortiori*, the clause specifically states that, unless the buyer exercises best efforts to obtain financing, the buyer does not have the right to terminate. The contract requires the seller to sell and the buyer to buy. The only function and purpose of the financing clause is to allow the buyer

argument only assumes for hypothetical purposes its validity.

⁵ It permits DRB to rescind the contract without penalty to the buyer if, within 30 days, the buyer fails to obtain a mortgage commitment. However, if DRB does not exercise that right and the buyer later obtains a mortgage commitment, DRB's right to rescind is extinguished.

In the event a Lender has not committed to provide a Mortgage within thirty (30) days after the date You sign this Agreement, We shall have the right to terminate this Agreement at any time thereafter until a commitment for a Mortgage is obtained.

to escape the contractual obligations if unable to obtain financing despite his or her best efforts. It is not a condition precedent or a contingency which must be met before either party or both would be obligated to perform. The extension of credit by way of the mortgage contract is not an implicit part of the sale contract or necessary to it.⁶

III. THIS COURT SHOULD DECLINE THE RESPONDENTS' INVITATION TO ADDRESS THE ISSUE OF UNCONSCIONABILITY.

The bulk of the Respondents' argument is that the arbitration clause within the sale contract is unconscionable for lack of mutuality of obligation. While they do not directly aver that

Respondents' Brief at pp. 9-10. Thus DRB's right of rescission is a defeasible option.

⁶ A second fallacy relied upon by the Respondents is their argument of the fact that if the mortgage were written by Monocacy Home Credit, an affiliate of DRB, the sale contract would clearly be within the Act. In advancing this argument, the Respondents merely ask the Court, on the basis of a nonexistent hypothetical, to pierce the corporate veil of Monocacy without making any showing whatsoever of the requisites for doing so.

In stating that personal jurisdiction, in the parent-subsidary context of *Norfolk Southern*, "must be made on a case by case basis," this Court, in the *Norfolk Southern* opinion, set forth the following factors to be considered concerning piercing the corporate veil:

- (1) Whether the parent corporation owns all or most of the capital stock of the subsidiary;
- (2) Whether the parent and subsidiary corporations have common directors and officers;
- (3) Whether the parent corporation finances the subsidiary;
- (4) Whether the parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation;
- (5) Whether the subsidiary has grossly inadequate capital;
- (6) Whether the parent corporation pays the salaries and other expenses or losses of the subsidiary;
- (7) Whether the subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation;
- (8) Whether in the papers of the parent corporation or in the statement of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own;
- (9) Whether the parent corporation uses the property of the subsidiary as its own;
- (10) Whether the directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter's interest; and
- (11) Whether the formal legal requirements of the subsidiary are not observed.

190 W.Va. at 118, 437 S.E.2d at 282. *Town of Fayetteville v. Law*, 201 W.Va. 205, 210, 495 S.E.2d 843, 848 (1997). Not a single one of the foregoing factors has been established as a matter of record in this case or even pleaded or argued. Nor has it even been established that a parent-subsidary relationship exists between the two corporate

the sale contract itself is unconscionable as a whole, much of their argument and the pleadings in the courts below imply such.⁷ This Court should decline their invitation to address these issues. As noted above, substantive jurisdiction over the merits of the case is vested in the federal courts and principles of comity counsel that this Court defer to them. As also noted above, the factual matters relevant to such a determination have not been adjudicated below or even developed through the discovery process such that they would be ripe for adjudication. Many of these factual assertions – principally the affidavits tendered with the Respondents’ brief – first arose during the summary judgment proceedings in the district court when it would have been improper for DRB to argue factual issues. They have never been the subject of discovery as to their accuracy, context or completeness or to the development of such counter-evidence as may exist. They are bare, self-serving allegations.

The one point that is worthy of note is the Respondents’ repeated implication that this Court’s ruling in *Brown v. Genesis Healthcare Corp.*, 2012 W.Va. LEXIS 311 (W.Va. June 13, 2012) (“*Brown II*”), would *ipso facto* hold an arbitration provision void for unconscionability unless it contains some element of mutuality of obligation. In this argument, the Respondents seek to transform *dictum* into a holding of the Court notwithstanding that this language does not appear as a holding in the syllabus and further notwithstanding that the Court explicitly states that, while unconscionability is a question of law for the Court, *id.*, Syl. Pt. 7, it is one that is made in consideration of the totality of the circumstances. *Id.*, Syl. Pts. 5-6. The “modicum of

entities.

⁷ In addition to averring fraudulent concealment, coercion and intimidation as expressed in the Dunleavy affidavit which, presumably, was drafted by Respondents’ counsel and not Mr. Dunleavy.

bilaterality” language upon which the Respondents rely appears only in the course of discussion and is not a holding of the Court.

Substantive unconscionability may manifest itself in the form of "an agreement requiring arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party." "Some courts suggest that mutuality of obligation is the locus around which substantive unconscionability analysis revolves." "Agreements to arbitrate must contain at least 'a modicum of bilaterality' to avoid unconscionability."

Id. at *28-29. Nor was it the single controlling factor in *State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders*, 717 S.E.2d 909 (W.Va. 2011), also relied upon by the Respondents and cited by the Court in Footnote 40 of *Brown II*, but only one of many factors considered by the Court in finding unconscionability based upon the totality of the circumstances.

Because the totality of the circumstances has not been fully developed through discovery and the issue of unconscionability has not been ruled upon by the courts below, this Court should confine itself to the question posed by the Fourth Circuit and defer to the federal courts on the unconscionability issue.⁸

IV. AN ARBITRATION PROVISION WITHIN A LARGER CONTRACT WHICH IS SUPPORTED BY CONSIDERATION DOES NOT REQUIRE SEPARATE OR ADDITIONAL CONSIDERATION.

The correct perspective which should be adopted by this court which would be consistent with federal law is that lack of mutuality of obligation within an arbitration provision may be

⁸ The oft-heard mantra that arbitration precludes a party from recovering damages rings somewhat hollow in light of the fact that the American Arbitration Association rules state that the arbitrator may award any remedy available in a court of law, including equitable relief, specific performance and punitive damages. Apparently the Respondents' concern is in having the issues adjudicated by professionals in dispute resolution whom they perceive to be less likely to be swayed by emotional considerations or irrelevancies than a jury of laypersons. Throughout their argument, Respondents cynically insinuate that an arbitration panel would lack impartiality, but cite no facts or record in support of such a premise.

considered as a factor in the overall determination of unconscionability as referenced in *Brown II* and *Richmond American*. However, it cannot be imposed – nor can any other form of separate or additional consideration – as a requirement of validity of an arbitration provision contained within a larger contract.

The Respondents seek to circumvent this requirement in arguing that, because the arbitration clause is the only provision of the contract which survives merger into the deed at closing, it is a stand-alone arbitration agreement which must be supported by separate consideration, citing as their sole authority *Gonzalez v. West Suburban Imports*, 411 F. Supp.2d 970 (N.D. Ill. 2006)⁹ and *Vassilkovska v. Woodfield Nissan, Inc.*, 358 Ill. App. 3d 20, 830 N.E.2d 619 (Ill. App. Ct. 2005).¹⁰ The Respondents omit to point out to the Court that both of these cases involve the *purchase of vehicles* in which the arbitration agreement was a *separate document* from the purchase order sale contract and was thereby construed to be a separate, stand-alone contract which required separate consideration, as noted in and distinguished by *Estep v. World Finance Corp. of Illinois*, 735 F.Supp.2d 1028 (C.D.Ill. 2010) and *Cook v. River Oaks Hyundai, Inc.*, No. 06-C-376 (N.D.Ill. Apr. 5, 2006), 2006 U.S. Dist. LEXIS 21646.

Unlike the present case, both *Vassilkovska* and *Gonzalez* involved arbitration agreements which were deemed to be stand-alone agreements. In cases involving stand-alone arbitration agreements, often, the consideration for one party's promise to arbitrate is the other party's promise to do the same. The *Vassilkovska* Court determined that the stand-alone arbitration agreement lacked consideration because it contained no promise by defendant to submit to arbitration. *Vassilkovska*, 830 N.E.2d at 625. The *Gonzalez* Court, citing *Vassilkovska*, reached the same conclusion. *Gonzalez*, 411 F.Supp.2d at 971-72.

⁹ Erroneously cited as 411 F. Supp. 970.

¹⁰ Erroneously captioned as *Vassilrovska* and erroneously cited at 830 N.E.2d 49.

Thus, *Vassilkovska* and *Gonzalez* support the proposition that if only one party to a stand-alone arbitration agreement is bound to arbitrate its claims, the promise to arbitrate is illusory and does not constitute valid consideration. This proposition is inapplicable to the instant case because the Arbitration Agreement at issue here is not a stand-alone agreement, but rather it is incorporated by reference into the Loan Agreement, which provides valid consideration.

Estep, 735 F.Supp.2d at 1032-33. Similarly,

Though, like the present matter, *Gonzales* and *Vassilkovska* involve contemporaneous arbitration agreements and purchase order agreements, those arbitration agreements were found to be stand-alone contracts. Analyzed as such, they were found to not be supported by the consideration for the distinct purchase order agreements. In contrast to the arbitration agreements at issue in those cases, here, the Arbitration Agreement expressly states, "This Agreement is part of the purchase order for your Vehicle." (See D.E. 12 at 5 (Ex. A) (underlining in original).) Illinois law permits incorporation by reference of documents in contracts, including arbitration agreements. *See, e.g., Wilson v. Wilson*, 217 Ill. App. 3d 844, 577 N.E.2d 1323, 1329, 160 Ill. Dec. 752 (Ill. App. Ct. 1991) (teaching that contractual documents may be incorporated where the documents "show an intention to incorporate the document and make it part of the contract.") (citation omitted). The quoted text of the Arbitration Agreement reflects that it is part of the Purchase Order Agreement, under which substantial consideration changed hands. This language also indicates that the Arbitration Agreement is not a stand-alone contract; therefore, because it is a subsidiary agreement, the Arbitration Agreement is supported by the consideration for the Purchase Order Agreement.

Cook at *6 - *7.

Thus, the authority cited by the Respondents does not support their premise that, because the arbitration clause in the instant case survives by its own terms merger into the deed, it is a stand-alone contract which must be supported by separate consideration. In sum and substance, they cite no persuasive authority in support of this contention and none is found within the jurisprudence of West Virginia. They ask the Court to create new legal precedent and declare a new and alien principle of law. To the contrary, those authorities which have placed *Gonzales*

and *Vassilkovska* in their true perspective support the position taken by DRB.¹¹

No position or case guidance has been found in the law where it has ever been held that an individual provision within a contract which is supported by consideration requires separate or additional consideration other than as concerns arbitration agreements. Certainly, the Respondents direct the Court to no such authority.

Mutuality of obligation has been noted by some courts, including this one (as to contracts within the WVCCPA), to be a requirement of an arbitration clause contained within a larger contract. Mutual binding promises to arbitrate constitute a form of consideration. When applied only to arbitration clauses in larger contracts, they in essence state that such a provision must be supported by separate, additional consideration in the specific form of mutuality where neither a requirement of separate consideration nor mutuality is imposed upon other individual contract provisions. Such a requirement in essence discriminates against arbitration provisions within a larger contract in direct contravention of well accepted case law in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974). See also *Senior Mgmt., Inc. v. Capps*, 240 Fed. Appx. 550, 553 (4th Cir. 2007)¹², *Southeastern Stud & Components, Inc. v. American Eagle Design Build Studios, LLC*, 588 F.3d 963, 967 (8th Cir. 2009).^{13, 14}

¹¹ It is also worthy of note that the Respondents' own pleadings contradict their premise. In their complaint in circuit court, they seek rescission of the contract. J.A. at 247, ¶28 and 248 ¶35. If as they contend the sale contract is merged into the deed except for the arbitration clause, it would have been rendered a nullity by delivery of the deed and there would be no contract to rescind.

¹² "*Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) does not stand for the proposition that the district court may look to an arbitration provision in isolation to determine if that provision is independently supported by consideration." *Id.* at 553.

¹³ Arkansas could not impose requirements that applied only to arbitration provisions.

¹⁴ DRB is cognizant that the Fourth Circuit, in *Howard v. King's Crossing, Inc.*, 264 Fed. Appx. 345 (2008), appeared to endorse a mutuality of obligation requirement of Maryland law which applied only to arbitration provisions. It does not appear from the opinion, however, that the issue was briefed or considered from the

V. PROSPECTIVE APPLICATION.

If, despite the foregoing points, the Court is disposed to answer the certified question in the affirmative – that West Virginia law requires an arbitration provision contained in a larger contract to require separate and additional consideration, the Court should apply that rule prospectively and not retroactively. In *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979) and *Caperton v. A.T. Massey Coal Co.*, 225 W.Va. 128, 690 S.E.2d 322 (2009), the Court enunciated a test for determining when a new interpretation of law presents an exception to the rule of retroactivity and should be applied prospectively, noting that there is no Constitutional impediment to such in a civil action.¹⁵

In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, . . . by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we have weighed the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.

perspective of whether such a requirement discriminated against arbitration provisions by imposing a requirement of separate, additional consideration peculiar only to arbitration provisions as a condition of validity. Similarly, in *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229, 511 S.E.2d 854 (1998), where the Court held that, under the WVCCPA, an arbitration provision which lacks mutuality of obligation is *ipso facto* void for unconscionability, the issue was not addressed from this perspective. Moreover, this Court's subsequent decisions in *State ex rel. Richmond Am. Homes of W.Va., Inc. v. Sanders*, 717 S.E.2d 909 (W.Va. 2011) and *Brown v. Genesis Healthcare Corp.*, 2012 W. Va. LEXIS 311 (W.Va. June 13, 2012) ("*Brown II*"), appear to depart from *Arnold* in their assertion that the totality of the circumstances must be considered in making an unconscionability. By negative inference, such a determination cannot be made *ipso facto* on the basis of a single element as suggested by *Arnold*.

¹⁵ Within the context of tort law, this may be largely accurate. However, where vested property or contractual interests are concerned, it may be limited by Article I, § 10 of the Constitution: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." Construction of state law by highest state court is as much part of law as though embodied in it, so far as contract obligations incurred under it are concerned. *Louisiana v. Pilsbury*, 105 U.S. 278, 15 Otto 278 (1882). A law which alters the terms of a contract by imposing new conditions or dispensing with those expressed impairs the contract. *Case of State Tax on Foreign-Held Bonds*, 82 U.S. 300, 15 Wall 300 (1872). Because the *Bradley/Caperton* test strongly counsels in favor only of prospective application, DRB finds it unnecessary to argue the issue from a Constitutional perspective but merely notes it.

Bradley, 163 W.Va. at 347, 256 S.E.2d at 888.

This Court has deviated from this presumption where retroactivity would impair vested property interests. “When interests in property are involved, courts usually give only prospective effect to a new court-made rule because property law is a traditionally settled area of the law, requiring, for example, finality of transactions to promote the marketability of real estate titles.” *Geibel v. Clark*, 185 W. Va. 505, 510; 408 S.E.2d 84, 89 (1991). Similarly, in *Caperton*, while the Court held that the forum-selection clause principles announced in that decision would apply retroactively, the Court did so to preserve the parties’ contractual expectations where prospective application would have inequitably allowed one signatory to the contract in question to escape the effects of the forum-selection clause and renege upon its bargained-for exchange. *Caperton*, 225 W. Va. at 160, 690 S.E.2d at 354. Applying the *Bradley/Caperton* test:

A holding across the spectrum of contract law in this State that an arbitration provision in a larger contract which is supported by consideration must be supported by separate consideration would be a new principle of law which has not clearly been foreshadowed by prior law. To the extent that *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229, 511 S.E.2d 854 (1998), may be argued as foreshadowing a requirement of mutuality of obligation as required consideration (as opposed to an element to be considered in the totality of circumstances test for unconscionability), it did so only in the narrow context of the WVCCPA. In so holding, the Court relied entirely upon the legislative intent underlying the WVCCPA. Nothing therein hinted of a requirement of separate additional consideration in exchange for an arbitration agreement as a matter of general contract law. To the contrary, the entire jurisprudence of contract law was and is such that only the contract as a whole and not individual provisions within it be supported by

consideration. Nor do *Brown II* or *Richmond American* foreshadow such a holding. As noted above, neither of these decisions viewed mutuality of obligation as required consideration, but merely as *one element* to be considered in assessing whether a contract is unconscionable under the totality of the circumstances.

The second and third elements of the test are intertwined. Undoubtedly within West Virginia there are at this very moment numerous open contracts containing arbitration provisions for which no separate consideration was given.¹⁶ Retroactive operation of a requirement of separate consideration would have the effect of negating contractual provisions for which the parties to those contracts bargained as part of their exchange and of rewriting them. Moreover, it will defeat the expectations of the parties who fashioned their bargain, at least as to this element, in reliance upon then-existing law. Where they have fashioned their bargain to maximize their rewards and minimize their risks, retrospective application of such a requirement would in many instances alter the balance for which they bargained, leaving them no means to protect their interests in light of the new interpretation of contract law, other than to enter into a new contract – if the other party were willing. If not, it alters in this respect the basis of the bargained exchange, leaving the parties no recourse.

Accordingly, application of the *Bradley/Caperton* test counsels that, if the Court is disposed to find as a matter of general contract law that an arbitration clause within a larger contract must be supported by separate and additional consideration, that that finding be applied prospectively only.

¹⁶ The Court must be mindful that arbitration clauses are commonplace in commercial contracts and are not limited to residential realty sales contracts, such as in the present case at bar.

VI. CONCLUSION.

For the reasons argued in Petitioner's Brief on Certified Question and in this Reply, DRB requests that this Court find that West Virginia law does not require that an arbitration provision, which appears as a single clause in a multi-clause contract – which as a whole is supported by adequate consideration, be supported by mutual consideration.

This Court should continue to follow the predicate law that individual clauses of contracts need not be supported by mutuality of obligation or separate consideration, but rather the contract be viewed as a whole.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Susan R. Snowden, counsel for Petitioner, Dan Ryan Builders, Inc., do hereby certify that I served the foregoing Petitioner's Reply Brief on Certified Question upon the following counsel, by first class mail, postage pre-paid, on this the 27th day of August, 2012.

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