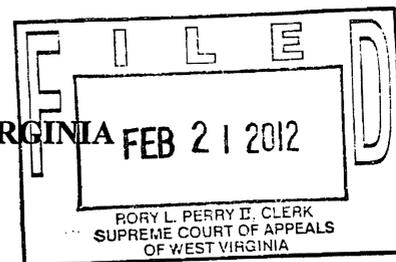


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-1646



**CREDIT ACCEPTANCE
CORPORATION,**

**Defendant Below,
Petitioner,**

v.

**Appeal from a final order of the
Circuit Court of Raleigh County
(11-C-289-K & 11-C-290-K)**

**ROBERT J. FRONT AND
BILLYE S. FRONT,**

**Plaintiffs Below,
Respondents.**

PETITIONER CREDIT ACCEPTANCE CORPORATION'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. Whether, under the precedent of the Supreme Court of the United States and Syllabus Point 20 of this Court's decision in *Brown*, the Circuit Court of Raleigh County, West Virginia (the "Circuit Court") erred in holding that a valid agreement to arbitrate may be struck down based on a determination of procedural unconscionability that relies entirely on circumstances existing years after the arbitration agreement's formation even though it specifically concluded that the agreement was not procedurally unconscionable when it was executed and the Circuit Court's conclusion of substantive unconscionability was based only on the unavailability of one of two non-specialized arbitration forums named in the parties' arbitration agreement?

2. Whether the Circuit Court erred in refusing to enforce an arbitration agreement for reasons applying only to arbitration, including the Circuit Court's belief that the West Virginia Consumer Credit and Protection Act's, W. Va. Code § 46A-1-101, *et seq.* ("WVCCPA") anti-waiver provision specifically bans arbitration agreements and creates a public policy categorically denying arbitration of claims brought under the WVCCPA, despite the Supreme Court of the United States' directive that the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA") preempts any such statutory provision?

II. STATEMENT OF THE CASE

Today, the Supreme Court of the United States issued its decision in *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. ---, --- S. Ct. ---, --- L.Ed.2d ---, Nos. 11-391 and 11-394, 2012 WL 538286 (Feb. 21, 2012), Slip Op. In that decision, the Supreme Court made clear that state laws that categorically deny arbitration based on public policy (like the Circuit Court's interpretation of the WVCCPA) are "both incorrect and inconsistent with clear instruction in the precedents of"

the Supreme Court in its interpretation of the FAA. *Id.* at Slip Op. 3. In this case, the Circuit Court interpreted the WVCCPA to categorically prohibit arbitration in any circumstance. Such an interpretation cannot stand. The Supreme Court reiterated today that “[a]s this Court reaffirmed last Term, ‘[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.’” *Id.* at Slip Op. 3-4 (citing *AT&T Mobility LLC v. Concepcion*, 563 U. S. ---, ___, 131 S. Ct. 1740, 1743, 179 L.Ed.2d 742 (2011)). Thus, the Circuit Court’s reliance on a public policy giving a plaintiff an inviolate right to proceed in court cannot stand. Even if such public policy existed, the Supreme Court of the United States reiterated today that it would be inconsistent with and preempted by the FAA. *Id.*

The Supreme Court’s decision leaves unaffected several points of law in this Court’s decision in *Brown v. Genesis Healthcare Corp.*, --- W. Va. ---, --- S.E.2d ---, Nos. 35494, 35546, 35635, 2011 WL 2611327 (W. Va. June 29, 2011), Slip Op., *vacated sub nom. Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. ---, --- S. Ct. ---, --- L.Ed.2d ---, Nos. 11-391 and 11-394, 2012 WL 538286 (Feb. 21, 2012), Slip Op. Two of those are significant and critical to this appeal. First, *Brown* made clear that a contractual arbitration provision is unenforceable if, and only if, it is *both* procedurally *and* substantively unconscionable. While a sliding scale weighing the purported substantive and procedural “defects” may be employed, a circuit court must find *both* procedural *and* substantive unconscionability, no matter how slight, to render a contractual provision unenforceable.

Second, *Brown* confirmed the supremacy of the FAA over state laws that would frustrate the Congressional intent in enacting the FAA. The Supreme Court of the United States reiterated this supremacy in *AT&T Mobility, Inc. v. Concepcion*, 563 U.S. ---, 131 S. Ct. 1740, 1745, 179

L.E.2d 742 (2011), *CompuCredit Corp. v. Greenwood*, ---U.S. ---, --- S. Ct. ---, --- L.Ed.2d ---, No. 10-948, 2012 WL 43514 (Jan. 10, 2012), Slip Op, and most recently in today’s *Marmet* decision. While agreements to arbitrate may be invalidated by common law defenses applicable to *all* contracts generally, states may not target agreements to arbitrate specifically. For example, to the extent a state invalidates an agreement to arbitrate in order to preserve a right to trial by judge or jury in a circuit court, that state’s law must yield to the preemptive force of the FAA.

The Circuit Court has run afoul of *Marmet*, *Brown*, the FAA, and the longstanding precedent of the Supreme Court of the United States, and in doing so committed clear errors of law. Although the Circuit Court dutifully articulated *Brown*’s duality requirement, its conclusions of procedural and substantive unconscionability are both flawed. The Circuit Court’s admission that the “original contract is not procedurally unconscionable . . .” is correct. (A.R. 6). Its analysis should have stopped there. Instead, the Circuit Court erred when it then reasoned that because “one of the specific arbitration forums has [later] been eliminated” there was “no meeting of the minds to create the contract as it **exists today**.” (*Id.*) Underscoring this error is the fact that the Circuit Court relied on the same basis – the “elimination of an arbitration forum” – for its finding of *substantive* unconscionability. (A.R. 7).

Further, the Circuit Court erroneously concluded that a consumer’s alleged right to a trial in a circuit court under the West Virginia Constitution and the WVCCPA cannot be waived, even by an agreement to arbitrate. (A.R. 9). The Circuit Court concluded that “public policy” considerations favor a plaintiff having his day in court. (*Id.*) Yet, the Circuit Court adopted and applied this “public policy” at the expense of the well-established federal policy and precedent favoring the arbitration of claims. Indeed, the Circuit Court’s judicially crafted “public policy” stands as an obstacle to the objectives of the FAA and, as the Supreme Court of the United States

makes clear today, is “both incorrect and inconsistent” with the supreme law of the land. *Marmet*, 2012 WL 538236, at Slip Op. 3. Moreover, the WVCCPA does not grant a right to bring a claim only in a circuit court.

If left uncorrected, the clear errors of law committed by the Circuit Court in its final order of October 20, 2011 (“Final Order”), denying defendant Credit Acceptance Corporation’s (“Credit Acceptance”) motions to compel arbitration, will effectively ignore clear points of law articulated by this Court and the Supreme Court of the United States. The Circuit Court’s order should be reversed, the cases remanded, and the claims of plaintiffs Robert J. Front and Billye S. Front (collectively the “Fronts”) compelled to binding arbitration.

A. Factual Background.

On August 17, 2007, the Fronts executed a Retail Installment Contract and Security Agreement (“2007 Contract”) with Finish Line Pre-Owned Auto Sales (“Finish Line”) for the purchase of a 2003 Chevrolet Cavalier (the “First Vehicle”). (A.R. 41-42). Finish Line assigned all its rights, title, and interest in the 2007 Contract and the First Vehicle to Credit Acceptance, which financed the purchase. (*Id.*). A year later, on April 17, 2008, the Fronts executed a second Retail Installment Contract (“2008 Contract”), this time with Prestige Ford Lincoln-Mercury, Inc. (“Prestige”), for the purchase of a 2005 Ford Focus (the “Second Vehicle”). (A.R. 55-56). Prestige assigned all its rights, title, and interest in the 2008 Contract and the Second Vehicle to Credit Acceptance, which again financed the purchase. (*Id.*).

Both the 2007 Contract and the 2008 Contract contain identical, conspicuous notices on the **front** page of each agreement in the space directly between the first and second blank lines

for a buyer's signature.¹ (A.R. 41, 55). These notices emphasize the existence of an arbitration agreement ("Arbitration Agreement") and instruct the Fronts to read the entire Contract:

ARBITRATION NOTICE: PLEASE SEE THE REVERSE SIDE OF THIS CONTRACT FOR INFORMATION REGARDING THE ARBITRATION CLAUSE CONTAINED IN THIS CONTRACT.

ADDITIONAL TERMS AND CONDITIONS: THE ADDITIONAL TERMS AND CONDITIONS, INCLUDING THE ARBITRATION CLAUSE SET FORTH ON THE REVERSE SIDE HEREOF, ARE A PART OF THIS CONTRACT AND ARE INCORPORATED HEREIN BY REFERENCE.

(Id.) (emphasis in original).

The Fronts do not dispute that these notices or the Arbitration Agreements were included in the contracts. The Fronts have never articulated an inability to read or understand the notices. Nor have the Fronts claimed that they were deprived of an opportunity to ask questions or understand the contracts or the Arbitration Agreements.

These Arbitration Agreements are virtually identical. For simplicity and brevity, the portions of the Agreements that are relevant to the appeal are quoted below with the minor differences between the 2008 Contract and the 2007 Contract indicated in footnotes. The Arbitration Agreements state, in relevant part:²

You or we may elect to arbitrate under the rules and procedures of either the National Arbitration Forum or the American Arbitration Association; however in the event of a conflict between these rules and procedures and the provisions of this Arbitration Clause, You and we agree that this Arbitration Clause governs for that specific conflict. You may obtain the rules and procedures, information on fees and costs (including waiver of the fees), and other materials, and may file a claim by contacting the organization of your choice. The addresses and websites of the organizations are: National Arbitration Forum, P.O. Box 50191, Minneapolis, Minnesota, 55405, www.arb-forum.com; and American Arbitration Association, 335 Madison Avenue, Floor 10, New York, New York 10017-1605, www.adr.org. **We agree for only the first day of**

¹ The first signature line pertains to the purchase of Gap Protection, which the Fronts chose to purchase. The second signature line pertains to the Fronts' agreement that they have received a copy of the contract, read it, understood it, and agreed with its terms.

² The full text of both Arbitration Agreements can be found at (A.R. 42, 56).

arbitration to pay the following fees: (1) the arbitrator's fee, plus (2) those reasonable arbitration expenses or costs (excluding attorney fees) assessed to You that You would not pay if You had brought a Dispute in court, plus (3) any other reasonable expense or cost unique to the arbitration process. We will also pay amounts that the arbitrator determines that we must pay in order to assure the enforceability of this Arbitration Clause. Arbitration will take place near where You signed this Contract. Notice of the time, date and location shall be provided to the parties under the rules and procedures of the arbitration organization You select.

Your Right to Reject:³ If You don't want this Arbitration Clause to apply, You may reject it by mailing us at P.O. Box 5070, Southfield, Michigan 48088-5070 a written rejection notice which describes the Contract and tells us that You are rejecting this Arbitration Clause. A rejection notice is only effective if it is signed by all buyers and cosigners and the envelope that the rejection is sent in has a post mark of 14 days or less after the date of this Contract. If You reject this Arbitration Clause, that will not affect any other provision of this Contract or of the status of your Contract. If You don't reject this Arbitration Clause, it will be effective as of the date of this Contract.

(A.R. 41, 55) (emphasis added).

Importantly, the Arbitration Agreements contain an "opt out" provision which gave the Fronts the ability to forego arbitration entirely without incurring a penalty under the 2007 Contract or 2008 Contract. (See A.R. 42, 56) ("If You reject this Arbitration Clause, that will not affect any other provision of this Contract or of the status of your Contract."). The 2007 Contract and the 2008 Contract both clearly gave the Fronts 14 days after they signed and executed those contracts to reject the Arbitration Agreements and still obtain the loans. (A.R. 42, 56). Nowhere in the record before the Court have the Fronts contested that they were unaware of the "opt out" provisions. Nor have the Fronts claimed that they did not understand the language used in those provisions or suggested that they were unable to understand the 2007

³ "Your Right to Reject" was not underscored in the 2007 Contract. (A.R. 42).

Contract or 2008 Contract as a whole at the time they were signed.⁴ Despite having the opportunity to opt out of arbitration, the Fronts declined to do so.

B. Procedural Background.

On May 3, 2011, the Fronts commenced two civil actions against Credit Acceptance in the Circuit Court of Raleigh County, West Virginia. Each Complaint asserts four causes of action: (i) violations of the WVCCPA, (ii) negligence, (iii) intentional infliction of emotional distress, and (iv) invasion of privacy. (A.R. 14-18, 24-28). These causes of action all relate to communications the Fronts allege they were receiving from Credit Acceptance after they voluntarily stopped paying the debts they owed on the 2007 Contract and the 2008 Contract. The Fronts never sought to arbitrate their claims.

On June 6, 2011, Credit Acceptance moved in both cases to compel the Fronts' claims to arbitration and dismiss or, in the alternative, stay their actions pending arbitration ("Motions to Compel Arbitration"). The Fronts responded on July 26, 2011, and the Circuit Court heard oral argument on July 28, 2011, at which time it decided to consider the motions in the two cases jointly. (A.R. 609). The Circuit Court denied Credit Acceptance's Motions to Compel Arbitration by the Final Order dated October 20, 2011. (A.R. 10). That Final Order was certified as a final order by the Circuit Court for immediate appeal to this Court. Since that time, the Circuit Court has stayed the Fronts' cases pending the resolution of this appeal. (A.R. 621-26).

⁴ In addition to the opt out provision, other provisions of the Arbitration Agreement also favor the Fronts. For example, Credit Acceptance agreed to pay the fees for the arbitrator, expenses and costs (excluding attorneys' fees) incurred by the Fronts, and any other reasonable expense(s) or cost(s) unique to the arbitration process. (*See* A.R. 42, 56). Credit Acceptance further agreed to pay any and all amounts that an arbitrator determined must be paid to ensure the enforceability of the Arbitration Agreement. Finally, Credit Acceptance agreed that arbitration would take place "near where [the Fronts] signed th[e] Contract." (*Id.*)

C. The Circuit Court’s Final Order Denying Credit Acceptance’s Motions to Compel Arbitration.

The crux of the Circuit Court’s Final Order is that the “elimination of an arbitration forum” several years after the formation of the contract “materially change[d] the terms of the contract[,]”⁵ thereby rendering the Arbitration Agreement both procedurally and substantively unconscionable. (A.R. 6-7). At the hearing on the Motions to Compel Arbitration, the Circuit Court expressly took the motions under advisement “to study Brown versus Genesis Healthcare and perhaps issue a ruling that considers the principles of law set forth in Brown.” (A.R. 616).

When the Circuit Court issued its Final Order, it cited *Brown* for the proposition that “[a] contract term is unenforceable if it is **both procedurally and substantively unconscionable[,]**” (A.R. 5) (citing Syl. pt. 20, *Brown*, 2011 WL 2611327, Slip Op.) (emphasis added). The Circuit Court held that, at the time of the creation of the contract, there was no procedural unconscionability. (A.R. 6). However, the Circuit Court then held the Arbitration Agreement was procedurally unconscionable based on “the fact that one of the specific arbitration forums has been eliminated, materially changing the terms of the contract” years after its formation. (*Id.*). The Circuit Court also concluded that the Arbitration Agreement to be substantively unconscionable on two grounds: (i) “that one of the specific arbitration forums has been eliminated, materially changing the terms of the contract . . . [.]” (A.R. 6), and (ii) that “[p]ublic policy favors a plaintiff having his day in court should the terms of a contract be materially altered after the execution of said contract.” (A.R. 7).⁶ The Circuit Court based this “public policy” on its reading of the West Virginia Constitution and the WVCCPA, and the fact that the Circuit Court “has been reluctant in the past, and continues to be reluctant today, to uphold

⁵ Because the Order referred to the 2007 Contract and the 2008 Contract in the singular, where applicable, they, and the Arbitration Agreements, will be referred to as such hereafter.

⁶ As will be shown later, the Circuit Court made a factual error as to which arbitration forum is unavailable.

arbitration agreements which essentially eliminate a party's right to a trial." (A.R. 7-9).

Finally, the Circuit Court invalidated the Arbitration Agreement because it concluded that the WVCCPA prohibits consumers from waiving their "rights" to "a jury trial." (A.R. 9). The Circuit Court was "of the opinion that a consumer's . . . rights afforded under the [WVCCPA] include the right to a jury trial." (*Id.*) Because the WVCCPA prohibits consumers from waiving their rights under the WVCCPA, the Circuit Court held that the Arbitration Agreement could not stand. (*Id.*).

III. SUMMARY OF ARGUMENT

Over the past decade, this Court, much like other courts in other jurisdictions (both state and federal), has devoted substantial attention to arbitration and the FAA. While the frequency of decisions from this Court addressing the arbitrability of consumer claims has increased, the principles of law governing agreements to arbitrate remain unequivocally clear. Yet, circuit courts in this State have, at times, struggled with the application of governing federal arbitration law and state law contract defenses in a manner consistent with that contemplated by this Court. This case and the Circuit Court below are no exception.

This Court has repeatedly recognized that a circuit court's inquiry in ruling on a motion to compel arbitration is two-fold. Syl. pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 251, 692 S.E. 2d 293, 294 (2010). First, a circuit court must assess whether a valid arbitration agreement exists between the parties – that is, one that survives scrutiny when analyzed under common law defenses applicable to *all* contracts generally, not just "rules" of law targeting agreements to arbitrate. Pursuant to the FAA's Savings Clause, which expressly reserves "those grounds as exist at law or in equity for the revocation of any contract[,]" 9 U.S.C. § 2, the validity of an agreement to arbitrate is determined through the application of state

contract law. Second, a circuit court must determine whether the parties' dispute falls within the substantive scope of their agreement to arbitrate. Here, the Circuit Court erred as a matter of law in assessing the validity of the parties' Arbitration Agreement.

Specifically, the Circuit Court concluded that the Arbitration Agreement is unenforceable based on a misunderstanding of the required analysis of unconscionability. The precedent in *Brown* is clear: “[a] contract term is unenforceable if it is **both procedurally and substantively unconscionable.**” Syl. pt. 20 (in part), *Brown*, 2011 WL 2611327, Slip Op. (emphasis added). Although the Circuit Court analyzed procedural and substantive unconscionability separately, its findings are mistaken.

When the Circuit Court considered procedural unconscionability, it erred by considering “**the contract as it exists today.**” (A.R. 6) (emphasis added). Procedural unconscionability is concerned with “the real and voluntary meeting of the minds’ of the parties **at the time that the contract was executed**” *Brown*, 2011 WL 2611327, at Slip Op. 56 (citing *High v. Capital Senior Living Properties 2-Heatherwood, Inc.*, 594 F. Supp. 2d 789, 799 (E.D. Mich. 2008)). When analyzing the contracts as they existed at the time they were executed, the Circuit Court determined the Arbitration Agreement not to be procedurally unconscionable. But, the Circuit Court then invalidated the Arbitration Agreement based on procedural unconscionability after improperly analyzing the agreement as it exists today.

The Circuit Court’s analysis regarding substantive unconscionability analysis also fails as a matter of law. The Circuit Court held that the Arbitration Agreement was substantively unconscionable because it found one of the arbitration forums to be unavailable. Again, the Final Order is unclear as to which forum it references. If it means the AAA, then it is mistaken, because that forum still accepts the type of claims that the Fronts are alleging. If it means the

NAF, then it is factually correct, but the precedent shows that even the unavailability of this forum does not invalidate the Arbitration Agreement. In fact, even if *both* forums were unavailable, section 5 of the FAA provides a means for appointing an arbitrator.

The Circuit Court also erroneously based its decision on the conclusion that “[t]he plaintiffs enjoy the rights afforded them under the West Virginia Constitution, the right to file their claim and have their day in court.” (A.R. 9). In so doing, it held that the WVCCPA affords consumers “the right to a jury trial” which “cannot be waived by an agreement” (A.R. 9). Observing that the West Virginia Constitution “protects the right of the people to open access of the courts to seek justice,” the Circuit Court expressed reluctance to enforce an arbitration agreement precluding a trial in court. (A.R. 7-9). However, rights afforded to West Virginia residents under the West Virginia Constitution can be waived and, in fact, are waived in any arbitration case that has been before this Court. Further, the WVCCPA does not say “right to a jury trial” but merely states that a “consumer has a cause of action” W. Va. Code § 46A-5-101(1). A cause of action is not synonymous with the “right to a jury trial.” *See Greenwood*, 2012 WL 43514, at Slip Op. 4. Even if the WVCCPA gave a private right of action in a circuit court in West Virginia, the Supreme Court of the United States again made clear today that it would be preempted by the FAA. *See Marmet*, 2012 WL 538236, at Slip Op. 1; Syl. pt. 8, *Brown*, 2011 WL 2611327, Slip Op.

It is the charge of this Court, as our State’s court of last resort, to ensure that “arbitration agreements [are placed] on an equal footing with other contracts and enforce[d] . . . according to their terms.” *Concepcion*, 131 S. Ct. at 1745 (citations omitted). This case is an opportunity to do just that. The Circuit Court’s Final Order should be reversed, and these cases remanded with instruction that the Fronts’ claims in both cases be submitted to arbitration.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Revised Rule 18(a) of the West Virginia Rules of Appellate Procedure, Credit Acceptance respectfully requests that this Court grant oral argument under Revised Rules 20(a)(1), (a)(2), and (a)(3). This case involves three issues of first impression: (i) whether, under the precedent of the Supreme Court of the United States and Syllabus Point 20 of this Court's decision in *Brown*, a valid agreement to arbitrate may be struck down based on a finding of procedural unconscionability that relies entirely on circumstances existing years after the Arbitration Agreement's formation; (ii) whether, in light of section 5 of the FAA, the unavailability of one of two non-specialized arbitration forums named in the parties' Arbitration Agreements constitutes a "material change" rendering the Arbitration Agreement substantively unconscionable under Syllabus Point 20 of *Brown*, and (iii) whether the WVCCPA's anti-waiver provision, which the Circuit Court improperly interpreted as a ban on arbitration agreements, is preempted by the FAA.

Further, the Circuit Court's Final Order implicates the constitutional right to a trial by jury, as well as the validity of certain sections of the WVCCPA vis-à-vis the FAA. The issues of law raised herein are of great public importance to the residents of West Virginia. None of the criteria articulated in Revised Rule 18(a) that would obviate the need for oral argument is present, and oral argument, with a precedential decision, is appropriate under Revised Rule 20.

V. ARGUMENT

A. Standard of Review.

"A party to a civil action may appeal to [this Court] . . . from an order of any circuit court constituting a final judgment as to one or more but fewer than all claims" W. Va. Code § 58-5-1. Pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure,

[w]hen more than one claim for relief is presented in an action . . . , the court may direct the entry of a final judgment as to one or more but fewer than all of the claims . . . only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all of the claims and the rights and liabilities of the parties.

W. Va. R. Civ. P. 54(b). In this case, the Circuit Court expressly stated that the Final Order was just that – final.

This Court “appl[ies] a two-prong test to review a circuit court’s Rule 54(b) certification.” *Province v. Province*, 196 W. Va. 473, 478, 473 S.E.2d 894, 899 (1996) (citing *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 10, 100 S. Ct. 1460, 64 L.Ed.2d 1 (1980)). First, this Court “scrutinize[s] the circuit court’s evaluation of the interrelationship of the claims . . .” *Id.* “Claims are separable when there is more than one possible recovery . . . or if ‘different sorts of relief’ are sought . . .” *Id.* (citations omitted). Second, it determines “whether there is any just reason for delay . . .” *Id.* at 479, 473 S.E.2d at 900. Certification “should be granted only if there exists some danger of hardship or injustice through delay, that would be alleviated by immediate appeal.” *Id.*

The second prong is paramount to this appeal. If the Final Order denying Credit Acceptance’s Motions to Compel is permitted to stand, without immediate appeal, the precise relief sought by Credit Acceptance – arbitration – will be lost by the time a judgment on the Fronts’ wholly separate common law and statutory claims is entered. That is why the Circuit Court granted a stay of the cases pending the resolution of this appeal. Moreover, the Final Order is properly designated as final because the Fronts’ claims for statutory relief pursuant to the WVCCPA and compensatory relief for their common law claims are wholly separable from

Credit Acceptance’s requested relief through arbitration. Certainly, “there is more than one possible recovery” and “different sorts of relief’ are sought . . .” in the cases below. *Id.* at 478, 473 S.E.2d at 899.

On appeal to this Court, “review of whether [an] [arbitration] [a]greement represents a valid and enforceable contract is *de novo*.” *Brown*, 2011 WL 2611327, at Slip Op. 14 n.12 (quoting *State ex rel. Saylor v. Wilkes*, 216 W. Va. 766, 772, 613 S.E.2d 914, 920 (2005)). Likewise, “[i]nterpreting a statute . . . presents a purely legal question subject to *de novo* review.” Syl. pt. 1, *Fountain Place Cinema 8, LLC v. Morris*, 227 W. Va. 249, 707 S.E.2d 859 (2011).

“When it is argued that a state law is preempted by a federal law, the focus of analysis is upon congressional intent. Preemption is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.” Syl. pt. 4, *Morgan v. Ford Motor Co.*, 224 W. Va. 62, 680 S.E.2d 77 (2009). Because preemption is a question of law, it is reviewed *de novo*. Syl. pt. 1, *id.*

B. A Circuit Court’s Inquiry in Ruling on a Motion to Compel Arbitration is Two-Fold: Validity and Scope.

It is “beyond dispute that the FAA was designed to promote arbitration.” *Concepcion*, 131 S. Ct. at 1749. And, there is “. . . an emphatic federal policy in favor of arbitral dispute resolution.” *Marmet*, 2012 WL 538236, at Slip Op. 3 (citing *KPMG LLP v. Cocchi*, 565 U. S. ---, --- (2011) (*per curiam*) (slip op., at 3) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 631 (1985)). This Court has repeatedly applied a two-part threshold inquiry for circuit courts to apply when ruling on a motion to compel arbitration: “(i) whether a valid arbitration agreement exists between the parties; and (ii) whether the claims

averred by the plaintiff fall within the substantive scope of that arbitration agreement.” Syl. pt. 2 (in part), *TD Ameritrade*, 225 W. Va. 250, 692 S.E.2d 749.

The Circuit Court invalidated the Arbitration Agreement on the first prong of the *TD Ameritrade* test – whether or not the Arbitration Agreement is valid and enforceable. Its analysis of contractual defenses under the FAA’s Savings Clause was limited to one: unconscionability. That finding of unconscionability was flawed and reached the wrong result.

C. The “Validity” of an Agreement to Arbitrate is a Matter of State Contract Law Applicable to All Contracts Generally.

Section 2 of the FAA provides that an agreement to arbitrate “shall be valid, irrevocable, and enforceable, **save upon such grounds as exist at law or in equity for the revocation of any contract.**” 9 U.S.C. § 2; *see* Syl. pt. 6, *Brown*, 2011 WL 2611327, Slip Op. (emphasis added). Under the FAA’s Savings Clause, “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [Section] 2[.]” *Id.* at Slip Op. 35-36 (citing 9 U.S.C. § 2).

However, arbitration agreements cannot be targeted for suspect status or invalidated for reasons unique to arbitration, including notions of public policy unique to arbitration. *See Marmet*, 2012 WL 538236, at Slip Op. 1; Syl. pt. 8, *Brown*, 2011 WL 2611327, Slip Op; *Rent-a-Center, W., Inc. v. Jackson*, --- U.S. ---, 130 S. Ct. 2772, 2776, 177 L.E.2d 403 (2010) (“The FAA thereby places arbitration agreements on equal footing with other contracts”); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S. Ct. 1204, 1207, 163 L.Ed.2d 1038 (2006) (same); *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686, 116 S. Ct. 1652, 1655, 134 L.Ed.2d 902 (1996) (What States may not do is decide that a contract is fair enough to enforce all its basic terms . . . , but not fair enough to enforce its arbitration clause.”); *Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265, 271, 115 S. Ct. 834, 838, 130 L.Ed.2d 753

(1995) (citing *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L.Ed.2d 1 (1984)) (same); *Volt Info. Sci., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474, 109 S. Ct. 1248, 1253, 103 L.Ed.2d 488 (1989) (same). A state law stands “as an obstacle to the purposes of the FAA if it targets arbitration provisions for disfavored treatment not applied to other contractual terms generally.” *Brown*, 2011 WL 2611327, at Slip Op. 34-35 (quoting *Concepcion*, 131 S. Ct. at 1747); see *Marmet*, 2012 WL 538236, at Slip Op. 1. In that same vein, a state law stands as “an obstacle to . . . the FAA if it takes its ‘meaning from the fact that a contract to arbitrate is at issue or frustrate[s] arbitration, or provide[s] a defense to it.’” *Id.* (quoting *Dobson*, 513 U.S. 265, 281, 115 S. Ct. 834, 843, 130 L.Ed.2d. 753 (1995)). With these bedrock principles of arbitration law in mind, the Circuit Court erred in its rulings in the Final Order.

1. The Circuit Court ignored the requirement that procedural unconscionability relate to the bargaining process and formation of a contract and not to any subsequent events.

“Procedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract.” Syl. pt. 17, *Brown*, 2011 WL 2611327, Slip Op. Specifically, “[p]rocedural 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.” *Id.* The absence of “‘the ‘real and voluntary meeting of the minds’ of the parties **at the time that the contract was executed**”” requires the consideration of several factors. *Id.* at Slip Op. 56 (quoting *High*, 594 F. Supp. 2d at 799) (emphasis added). These can include “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.” *Brown*, 2011 WL 2611327, Slip Op.

In considering whether the Arbitration Agreement was procedurally unconscionable, the Circuit Court correctly relied on *Brown*. (A.R. 6). However, it did not properly consider at what point in time a procedural unconscionability analysis must be focused: the time when the contract was executed. *See Brown*, 2011 WL 2611327, at Slip Op. 56. After noting its approval of certain factors of the Arbitration Agreement, including (1) the opt-out provision, (2) that the Arbitration Agreement was brought to the Fronts’ attention, and (3) that the Arbitration Agreement provided two arbitration forums, the Circuit Court concluded that the formation of the contracts was not procedurally unconscionable. (*Id.*). Yet, the Circuit Court then improperly turned its attention to the present and found that the elimination of one of the arbitration forums, years after the time when the contracts were executed, allowed the Circuit Court to determine that “there was no meeting of the minds to create the contract as it exists today.” (*Id.*).

The Circuit Court’s conclusion of procedural unconscionability is premised on a misunderstanding of the concept’s temporal limits. Procedural unconscionability is a question of contract formation, and the Circuit Court correctly determined that the contract’s formation was not unconscionable. When the Circuit Court admitted that “the original contract is not procedurally unconscionable,” (*Id.*), its procedural unconscionability analysis should have ended.

Because the Circuit Court erred in concluding that there was procedural unconscionability where there in fact – and by the Circuit Court’s own admission – was *not* unconscionability in the formation of the contract as it was executed, the Circuit Court erred as a matter of law when it concluded that the Arbitration Agreement was unconscionable. *Brown* aligned West Virginia with “[t]he prevailing view . . . that procedural and substantive unconscionability **must both be present** in order for a court to exercise its discretion to refuse to

enforce a contract or clause under the doctrine of unconscionability.” *Brown*, 2011 WL 2611327, at Slip Op. 65 n.140 (quoting *Armendariz v. Found. Health Psychare Serves., Inc.*, 6 P.3d 669, 690 (Cal. 2000)) (emphasis added). Both cannot be present here because the Circuit Court specifically determined that there was no procedural unconscionability in the way the contract was executed. Because the Circuit Court’s finding of procedural unconscionability is incorrect, it cannot support a finding that the Arbitration Agreement is unconscionable and unenforceable.

2. The Circuit Court erred as a matter of law in finding that the Arbitration Agreement was substantively unconscionable.

The Circuit Court’s determination of substantive unconscionability was also in error. In arriving at its conclusion, the Circuit Court considered the definition of substantive unconscionability set forth by this Court in *Brown*:

‘Substantive unconscionability involves unfairness in the contract itself and whether the 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.’

(A.R. 7) (quoting Syl. pt. 19, *Brown*, 2011 WL 2611327, Slip Op.). In concluding that the Arbitration Agreement was substantively unconscionable, the Circuit Court relied on its analysis that “the elimination of [one of the] . . . arbitration forum[s] [contained in the Arbitration Agreement] is a substantive change in the terms of the contract.” (*Id.*) It further ruled that “[p]ublic policy favors a plaintiff having his day in court should the terms of a contract be materially altered after the execution of said contract.” (*Id.*)

The contract was not altered at all. The only “material alteration” referred to in the Final Order was the Circuit Court’s belief that the AAA is no longer available to hear the Fronts’

claims. That is incorrect. The AAA is still available to hear the Fronts' claims in these cases. (A.R. 615).

A cursory review of the Consumer Arbitration Procedures on the AAA website reveals that the AAA still accepts arbitration claims filed by consumers, like the claims in the cases below.⁷ American Arbitration Association, Notice on Consumer Collection Arbitrations, <http://www.adr.org/sp.asp?id=36427> (last accessed on Feb. 13, 2012) (hereinafter "Notice on Consumer Collection Arbitrations"); (A.R. 615). Indeed, the AAA has only stopped administering arbitration claims filed by businesses against consumers. *Id.* The AAA's website states, in pertinent part:

[T]he American Arbitration Association's previously announced moratorium on debt collection arbitrations remains in effect. That moratorium was instituted based on public discourse and an evaluation of the AAA's own experiences. Matters included in this moratorium are: consumer debt collections programs or bulk filings and individual case filings in which the company is the filing party and the consumer has not agreed to arbitrate at the time of the dispute and the case involves a credit card bill or, the case involves a telecom bill or the case involves a consumer finance matter.

The AAA will continue to administer all demands for arbitration filed by consumers against businesses, and all other types of consumer arbitrations.

See, supra, "Notice on Consumer Collection Arbitrations" (emphasis added). The arbitration claim in this case would be a "demand for arbitration by a consumer" because the Fronts (consumers) would be filing a claim against Credit Acceptance (a business). The Fronts' claim for arbitration would be accepted and administered by the AAA because it is not a "debt collection arbitration" claim filed by a business, and does not fall under the moratorium announced by the AAA.

Indeed, courts around this country have addressed the misconception that the AAA is an

⁷ Recent claims by consumers alleging the same debt collection violations of the WVCCPA as in the cases below have all been accepted by the AAA.

unavailable forum for consumer arbitrations and have agreed that, when the claims are filed by a **consumer** against a **creditor** or **debt collector**, the AAA still accepts those claims, and those claims must be compelled to arbitration.⁸ *Montgomery v. Applied Bank*, No. 5:11-cv-00698, 2012 WL 275404, at *3 (S.D.W. Va. Jan. 31, 2012); (*Jezek v. Carecredit, LLC*, No. 10 C 7360, 2011 WL 2837492, at *4 (N.D. Ill. July 18, 2011) (citing *Estept v. World Fin. Corp. of Ill.*, 735 F. Supp. 2d 1028, 1029-30 (C.D. Ill. 2010)); *Pfeiffer v. Dominion Mgmt. of Del.*, Adv. No. 11-0421, 2011 WL 4005504, at *8-9 (Bkrcty. E.D. Pa. Sept. 8, 2011) (finding consumer’s argument to be irrelevant because the AAA remains available and able to administer the arbitration); *Clerk v. Ace Cash Express, Inc.*, No. 09-05117, 2010 WL 364450, at *10 (E.D. Pa. Jan. 29, 2010) (“Here, however, as Defendant correctly points out, the instant dispute is not one in which the *company* is the filing party. Instead, it is *Plaintiff* who is the filing party, as she seeks to prosecute her claims against Defendant ACE. Such an argument [to the contrary] is irrelevant where, as here, the AAA remains available and able to administer the arbitration.”); *In re Cal. Title Ins. Antitrust Litig.*, No. 08-01341, 2011 WL 2566449, at *4 (N.D. Cal. 2011) (although the NAF was unavailable, the availability of the AAA as referenced in the arbitration agreement was enforceable); *Jones v. Green Tree Servicing, LLC*, No. 1:10CV119, Doc. No. 14 (N.D.W. Va. Oct. 04, 2010) (finding that the AAA will still accept and administer plaintiffs’ WVCCPA claims).

If the Final Order meant to refer to the NAF being unavailable to hear the Fronts’ claims, Credit Acceptance does not contest that the NAF is no longer accepting consumer arbitration claims. However, the unavailability of the NAF does not make the Arbitration Agreement

⁸ The Circuit Court also overlooked the commercial reasonableness of the Arbitration Agreement: the Fronts could have opted out. (A.R. 42, 56). The Fronts had 14 days in which to consider the possible effects of the Arbitration Agreement, calculate any risks involved, the benefits inuring to them under the Arbitration Agreement, and any other concerns they had. They did not. This, too, should have been considered by the Circuit Court.

substantively unconscionable. *Khan v. Dell Inc.*, --- F.3d ---, No. 10-3655, 2012 WL 163899 (3d Cir. Jan. 20, 2012) (overturning the district court and compelling the consumer's claims to arbitration despite the fact that the NAF was unavailable as an arbitration forum); *see cf.*, *CompuCredit Corp. v. Greenwood*, --- S. Ct. ---, 556 U.S. ---, --- L.Ed.2d ---, No. 10-948, 2012 WL 43514 (Jan. 10, 2012), Slip Op. (upholding an arbitration agreement contained in a consumer contract despite the fact that the arbitration agreement's selected arbitration forum, the NAF, "entered into a consent decree barring it from handling consumer arbitrations").

Moreover, courts are clear that the mere naming of a possible arbitration forum does not equate to an invalidation of the arbitration agreement if that forum later turns out to be unavailable. *Montgomery*, 2012 WL 275404, at *3 ("Even if AAA [or the NAF] is unable or unwilling to serve as an administrator, the Court is empowered to select a substitute arbitrator under § 5 of the FAA."). Specifically, when an arbitration agreement provides a mechanism for the selection of an arbitrator but the mechanism cannot be implemented, "upon the application of either party to the controversy the court shall designate and appoint an arbitrator [. . .] who shall act under the . . . [A]greement with the same force and effect as if he or they had been specifically named therein" 9 U.S.C. § 5 (emphasis added). Relying on Section 5 of the FAA, a majority of jurisdictions have consistently held that the unavailability of the chosen arbitration forum (or arbitrator) does not affect the enforceability of an arbitration agreement. *See, e.g., Reddam v. KPMG LLP*, 457 F.3d 1054, 1060 (9th Cir. 2006) (*abrogated on other grounds by Atl. Nat'l Trust LLC v. Hawley Ins. Co.*, 621 F.3d 931 (9th Cir. 2010) (internal citations omitted)); *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000) (rejecting the plaintiff's argument that the arbitration clause was void because the entity chosen to administer arbitration had dissolved where the choice of forum was not an integral part of the

arbitration agreement, but was an “ancillary logistical concern”); *Estate of Eckstein ex rel. Luckey v. Life Care Cntrs. of Am., Inc.*, 623 F. Supp. 2d 1235 (E.D. Wash. 2009) (when faced with an unavailable arbitration forum, the court stated that “[a]nother arbitrator may easily be substituted.”). *See also Rivera v. Am. Gen. Fin. Servs., Inc.*, 259 P.3d 803, 812-14 (N.M. 2009) (whether a named arbitrator “is integral to the parties’ agreement to arbitrate is a matter of contract interpretation” and a court should consider whether the parties designated one or several arbitrators, whether the contractual language naming the arbitrator was mandatory or permissive, and whether the clause named the arbitrator “exclusively throughout.”); *ITT Consumer Fin. Corp.*, 211 F.3d at 1222 (same).

In order to “ensure[] that private agreements to arbitrate are enforced according to their terms[,]” Syl. pt. 8, *Brown*, 2011 WL 2611327, Slip Op., a court may refuse to enforce an otherwise valid agreement to arbitrate *only* when there is “evidence that the naming of the [arbitrator] was so central to the arbitration agreement that the unavailability of the arbitrator brought the agreement to an end.” *Reddam*, 457 F.3d at 1060 (internal citations omitted); *see also Marmet*, 2012 WL 538236, at Slip Op. 3 (The FAA “requires courts to enforce the bargain of the parties to arbitrate.”) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985)). Absent such a compelling showing, courts should not “annihilate [an] arbitration agreement.” *Id.* In this case, the naming of the NAF was not so central to the Arbitration Agreement to render it unenforceable.

The Circuit Court’s Final Order is incorrect in its analysis of substantive unconscionability. It does not “place[] arbitration agreements on an equal footing with other contracts” *Brown*, 2011 WL 2611327, at Slip Op. 34 (quoting *Rent-a-Center, W., Inc. v. Jackson*, ---U.S.---, 130 S. Ct. 2722, 2774, 177 L.Ed.2d 403 (2010)). Instead, the Final Order

makes clear: “This court has been reluctant in the past, and continues to be reluctant today, to uphold arbitration agreements which essentially eliminate a party’s right to a trial.” (A.R. 8). Practically speaking, arbitration agreements will not be enforced in the Tenth Judicial Circuit. It is inescapable that the Circuit Court’s Final Order relegates arbitration to the type of disfavored status that the Supreme Court of the United States made clear is forbidden and this Court in *Brown* declared cannot, and will not, be tolerated in this State. *Marmet*, 2012 WL 538236, at Slip Op. 1; Syl. pt. 8, *Brown*, 2011 WL 2611327, Slip Op. This Court has the opportunity to assuage the Tenth Circuit’s hesitation, as well as place the parties’ Arbitration Agreement on “an equal footing with other contracts and enforce[d] . . . according to . . . [its] terms.” *Concepcion*, 131 S. Ct. at 1745 (citations omitted).

3. The Circuit Court erred in determining that the Fronts improperly waived their rights under the West Virginia Constitution and the WVCCPA.

The Circuit Court also erred as a matter of law when it refused to enforce the parties’ Arbitration Agreement because that agreement allegedly constitutes an improper waiver of consumers’ rights under the under the West Virginia Constitution and a waiver of their rights under the WVCCPA. “As this Court made clear in *Dunlap*, the denial of the consumer’s right to present claims to a jury was not a basis for our determination that the contract at issue was unconscionable. See 211 W.Va. at 561, 567 S.E. 2d at 277 (**acknowledging ‘complex issues of federalism’ and stating that ‘we . . . give no weight to Mr. Dunlap’s state constitutional rights to a jury trial in the public court system’.**)” *State ex rel. AT&T Mobility, LLC v. Wilson*, 226 W. Va. 572, 707 S.E. 2d 543 (2010) (emphasis added); *Gilmer v. Interstate / Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S. Ct. 1647, 1652, 114 L.Ed.2d 26 (1991) (“[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”)

(quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S. Ct. 3346, 3354, 87 L.Ed.2d 444 (1985))).

“While access to courts is a recognized fundamental right [in West Virginia], it is also a commonly recognized principle that such right of access is not without limitations.” *Mathena v. Haines*, 219 W. Va. 417, 422, 633 S.E. 2d 771, 777 (2006).⁹ One of those limitations to the West Virginia Constitution and other conflicting state laws is the Supremacy Clause of the United States Constitution. U.S. Const. art. VI. Pursuant to the Supremacy Clause of the United States Constitution, the FAA preempts all otherwise applicable inconsistent state laws. *See Marmet*, 2012 WL 538236, at Slip Op. 1 (“When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established.” (citing U. S. Const., Art. VI, cl. 2); *Allied–Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 272, 115 S. Ct. 834, 838, 130 L.Ed.2d 753 (1995). Indeed, over the past decade, the Supreme Court of the United States has reaffirmed, time and again, that “[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.”¹⁰ *Concepcion*, 131 S. Ct. at 1747 (citing *Preston v. Ferrer*, 552 U.S. 346, 353, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008) (“when parties agree to arbitrate all questions

⁹ If that right were not without limitations, every decision of this Court on arbitration would begin and end with a simple statement that the West Virginia Constitution prohibits arbitration. That has never been the law of this State.

¹⁰ Courts have held that this principle is even clearer under *Concepcion*. *Arellano v. T-Mobile USA, Inc.*, No. 10-05663, 2011 WL 1842712, *2 (N.D. Cal. May 16, 2011) (rejecting argument that state law injunctive claims exempt from arbitration); *Nelson v. AT&T Mobility, LLC*, No. 10-4802, 2011 WL 3651153, *4 (N.D. Cal. Aug. 18, 2011) (holding that the Supreme Court has made clear that a state “cannot require a procedure that is inconsistent with the FAA’ regardless of how desirable that procedure may be.”); *Kaltwasser v. AT & T Mobility LLC*, — F. Supp. 2d —, No. 07–00411, 2011 WL 4381748, *7 (N.D. Cal. Sept. 20, 2011) (compelling arbitration of statutory claims where the state statutes prohibited arbitration); *In re Gateway LX6810 Computer Prods. Litig.*, No. SACV 10–1563, 2011 WL 3099862, *3 (C.D. Cal. July 21, 2011) (same); *In re Apple & AT & T iPad Unlimited Data Plan Litig.*, No. C10–2553, 2011 WL 2886407, at *4 (N.D. Cal. July 19, 2011) (FAA under reasoning announced in *Concepcion* preempts state laws prohibiting the arbitration of claims seeking injunctive relief); *Zarandi v. Alliance Data Sys. Corp.*, No. CV 10–8309, 2011 WL 1827228, at *2 (C.D. Cal. May 9, 2011) (“FAA preempts state law to the extent it prohibits arbitration of a particular type of claim”).

arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA”). Thus, “it is well-settled that waivers of jury trial are fully enforceable under the FAA.” *Harrington v. Atlantic Sounding Co., Inc.*, 602 F.3d 113, 126 (2d Cir. 2010) (citing *Gilmer*, 500 U.S. at 26, 111 S. Ct. 1647; *Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 480-81, 109 S. Ct. 1917, 104 L.Ed.2d 526 (1989); *Mitsubishi Motors*, 473 U.S. at 628, 105 S.Ct. 3346).

Along those lines, this Court recently held that “[a] state statute, rule, or common-law doctrine, which targets arbitration provisions for disfavored treatment and which is not usually applied to other types of contract provisions, stands as an obstacle to the accomplishment and execution of the purposes and objectives of the Federal Arbitration Act, 9 U.S.C. § 2, and is preempted.” Syl. pt. 8, *Brown*, 2011 WL 2611327, at Slip Op. And, “[s]ection 2 of the FAA applies to a written arbitration provision in ‘a contract,’ and preempts any state law, regulation or other action that would interfere with the arbitration portion of ‘a contract’ freely entered into by all parties.” *Brown*, 2011 WL 2611327, at Slip Op. 48, n.97. Applying these principles to an anti-waiver provision in the West Virginia Nursing Home Act prohibiting the waiver of the right to an in-court proceeding, this Court in *Brown* held that

[t]o the extent that the West Virginia Nursing Home Act, *W.Va. Code*, 16-5C-15(c) [1997], attempts to nullify and void any arbitration clause in a written contract, which evidences a transaction affecting interstate commerce, between a nursing home and a nursing home resident or the resident’s legal representative, the statute is preempted by the Federal Arbitration Act, 9 U.S.C. § 2.

Id. at Syl. pt. 11.

In *Brown*, the plaintiffs argued that an arbitration clause was unenforceable because it violated Section 15(c) of the West Virginia Nursing Home Act, which “creates a cause of action for violations of the Act’s requirements, and prohibits waivers of the right to bring an action.”

Id. at Slip Op. 6. “The disputed portion of Section 15(c) says: Any waiver by a resident or his or her legal representative of the right to commence an action under this section, whether oral or in writing, shall be null and void as contrary to public policy.” *Id.* “The plaintiffs assert[ed] that the arbitration clauses at issue are nothing more than a written contractual requirement that a nursing home resident (or his or her legal representative) waive the resident’s right to commence an action in circuit court, and therefore under Section 15(c) of the Nursing Home Act are null and void as contrary to public policy.” *Id.* at Slip Op. 24.

This Court rejected that argument as Section 15(c) of the West Virginia Nursing Home Act specifically targets arbitration clauses and, therefore, is preempted by the FAA. *See id.* at Slip Op. 25-49. Specifically this Court ruled as follows:

[W]e believe that Section 15(c) of the Nursing Home Act conflicts with the FAA's intended purpose of putting arbitration clauses on an equal footing with other contractual clauses. By adopting Section 15(c), the West Virginia Legislature clearly intended for the right of a nursing home resident to pursue a civil action in court to be unwaivable, a right that the resident (or the resident's representative) could not be compelled to relinquish as a condition of admission to a nursing home. The Nursing Home Act is a comprehensive statutory scheme of public oversight of nursing homes, designed to ensure that the rights and dignity of nursing home residents are protected. Although arbitration may be an expeditious way of resolving some disputes, it is also a way for the nursing home industry to resolve violations of the Act out of the public's eye. The Constitution, however, preserves inviolate the right of any person to air their grievances in a public courtroom. In adopting Section 15(c), the Legislature intended that any suit to resolve subversions of a nursing home resident's rights and dignity would occur in a public forum. Arbitration clauses in nursing home admission agreements are clearly contrary to the Legislature's goal of full protection of the rights of nursing home residents.

Still, Section 15(c) singles out for nullification written arbitration agreements with nursing home residents, and does not apply to any other type of contractual agreements. It therefore is not a defense that exists at law or equity “for the revocation of any contract” under Section 2 of the FAA. There may be other types of agreements that Section 15(c) may operate to nullify, but the FAA preempts Section 15(c) from nullifying an existing, written, arms-length agreement reflecting a transaction in interstate commerce between a nursing home and a resident to arbitrate any dispute. ‘State laws that are applicable to

arbitration contracts and some other types of contracts, but not all contracts, are not grounds for the revocation of any contract.’

In conclusion, we hold that to the extent that Section 15(c) of the Nursing Home Act attempts to nullify and void any arbitration clause in a written contract, which evidences a transaction affecting interstate commerce, between a nursing home and a nursing home resident or the resident's legal representative, the statute is preempted by Section 2 of the Federal Arbitration Act.

Id. at Slip Op. 47-49.

The defendants appealed to the Supreme Court of the United States, and that Court issued its decision today. The majority of this Court’s analysis in *Brown* was left unchanged by the Supreme Court of the United States’ *Marmet* decision. However, in *Marmet*, the Supreme Court of the United States vacated that part of *Brown* that held that a pre-injury arbitration agreement violated public policy. *Marmet*, 2012 WL 538236, at Slip Op. 1. The Supreme Court of the United States held that this portion of the *Brown* decision by this Court was “both incorrect and inconsistent with clear instruction in the precedents of” the Supreme Court of the United States in its interpretation of the FAA. *Id.* at Slip Op. 3. The “. . . emphatic federal policy in favor of arbitral dispute resolution” is to be upheld and cannot be disregarded based on reasons that only apply to arbitration. *Id.* at Slip Op. 3 (citing *KPMG LLP v. Cocchi*, 565 U. S. ---, --- (2011) (*per curiam*) (slip op., at 3) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 631 (1985))).

The United States District Court for the Northern District of Ohio addressed an identical issue with respect to the same Arbitration Agreement in *Credit Acceptance Corp. v. Davisson*. There, it addressed a consumer’s right to file an action in court under Ohio’s Consumer Sale Practices Act (“CSPA”). The *Davisson* court found that the FAA supersedes the CSPA. *Credit Acceptance Corp. v. Davisson*, 644 F. Supp. 2d 948, 958 (N.D. Ohio 2009). Specifically, the court ruled as follows:

Defendant argues that the Arbitration Clause is unenforceable because it violates Ohio's Consumer Sales Practice Act ("CSPA"). (Def.'s Opp'n Br. 9.) Defendant contends that requiring a consumer to waive his or her recourse to the courts is unfair, deceptive, and unconscionable and is also prohibited by the CSPA. (Id.) However, when the FAA governs an arbitration agreement it supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative. *Preston v. Ferrer*, 552 U.S. 346, 128 S.Ct. 978, 987, 169 L.Ed.2d 917 (2008). Moreover, the FAA declares that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). Given that the CSPA does not apply to all contracts, it cannot be used to invalidate the Arbitration Clause. Moreover, Plaintiff did not require Defendant to waive her recourse to the courts. The Contract provided that '[i]f You don't want this Arbitration Clause to apply, You may reject it by mailing us at P.O. Box 5070, Southfield, Michigan 48086-5070 a written rejection notice which describes the Contract and tells us that You are rejecting this Arbitration Clause.' (Compl. Ex. B at 4.)

Id. The *Davisson* court ultimately held that Credit Acceptance's arbitration agreement was not an impermissible attempt to require a consumer to waive his right to file an action in court, and it upheld that arbitration agreement. *Id.*

Here, the Circuit Court erred when relying on the WVCCPA to support the proposition that an agreement to arbitrate can never be enforced because a consumer's right to a trial in a circuit court cannot be waived by an agreement. The WVCCPA provision under which the Fronts brought their claims does not give them a right to bring in action in court. Section 5-101 of the WVCCPA merely provides that "the consumer has a cause of action to recover actual damages and in addition, a right in an action to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one hundred dollars nor more than one thousand dollars." W. Va. Code § 46A-5-101(1).

As recent as one month ago, the Supreme Court of the United States rejected the argument that mere words such as "action," "class action," and "court" are "sufficient to establish the 'contrary congressional command' overriding the FAA . . ." such that an otherwise

valid and binding agreement to arbitrate can be struck down. *CompuCredit Corp. v. Greenwood*, --- 556 U.S. ---, --- S. Ct. ---, --- L.Ed.2d ---, No. 10-948, 2012 WL 43514 (Jan. 10, 2012), at Slip Op. 5. In *Greenwood*, the Supreme Court of the United States considered whether the Credit Repair Organizations Act, 15 U.S.C. § 1679, *et seq.* (“CROA”), contains a congressional command overriding the FAA and in turn making the arbitration agreement at issue unenforceable. *Greenwood*, 2012 WL 43514, at Slip Op. 3 (citing *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226, 107 S. Ct. 2332, 2337, 96 L.Ed.2d 185 (1987)). *Greenwood* alleged that the CROA’s disclosure provision, which informs consumers of “a right to sue a credit repair organization . . . [.]” 15 U.S.C § 1679c(a), combined with its anti-waiver provision that prohibits waivers of “any right of the consumer under this subchapter[.]” 15 U.S.C. § 1679f(a), constituted such a command. *Id.* Although the Supreme Court of the United States found the argument’s premise flawed because CROA’s disclosure does not *create* rights, *id.* at Slip Op. 4, it nonetheless considered the language upon which *Greenwood* inferred Congress’s command to override the FAA. Justice Scalia, writing for the Court, was not persuaded:

[*Greenwood*] cite[s] [CROA’s civil liability provision’s] repeated use of the terms ‘action,’ ‘class action,’ and ‘court’ – terms that they say call to mind a judicial proceeding. These references cannot do the heavy lifting that respondents assign them. It is utterly commonplace for statutes that create civil causes of action to describe the details of those causes of action, including the relief available, in the context of a court suit.

Id. (citing *Gilmer*, 500 U.S. at 28, 111 S. Ct. at 1653; *McMahon*, 482 U.S. at 240, 107 S. Ct. at 2344; *Mitsubishi Motors Corp*, 473 U.S. at 637, 105 S. Ct. at 3359. In short, the Supreme Court of the United States explained that, although a statute provides for a cause of action using “judicial enforcement” language, it does not follow that waiving judicial enforcement is synonymous with waiving a “right” held by a consumer. *Id.*

In light of *Greenwood*, the Circuit Court’s reasoning that consumers have an unwaivable

right to a trial in the circuit court under the WVCCPA is incorrect. Section 5-101(1) provides that “the consumer has a **cause of action** to recover actual damages and in addition a **right in an action** to recover from the person violating this chapter a penalty in an amount determined by the **court** not less than one hundred dollars nor more than one thousand dollars.” W. Va. Code § 46A-5-101(1) (emphasis added). Neither this provision nor section 1-107’s anti-waiver provision expressly grants consumers a right to sue **only in a circuit court in West Virginia**. Instead, just as in *Greenwood*, the Fronts’ alleged right under the WVCCPA to *judicial* enforcement of their claims is inferred from language used “in the context of a court suit” that “is utterly commonplace for statutes that create civil causes of action” *Greenwood*, 2012 WL 43514, at Slip Op. 5. The Supreme Court of the United States rejected this attenuated inference from the language contained in the CROA. So too must it be rejected by this Court in interpreting the WVCCPA. *See* Syl. pt. 11, *Brown*, 2011 WL 2611327, Slip Op. (holding that “[t]o the extent that [a West Virginia statute], attempts to nullify and void any arbitration clause in a written contract, which evidences a transaction affecting interstate commerce, . . . the statute is preempted by the Federal Arbitration Act, 9 U.S.C. § 2.”).

The Circuit Court’s interpretation of the WVCCPA to invalidate arbitration is precisely the type of “disfavored treatment” of agreements to arbitrate that this Court sought to abolish in *Brown*. *Id.* If the WVCCPA is found to afford consumers the right to a trial by judge or jury to the exclusion of arbitration, those provisions are preempted by the FAA.

VI. CONCLUSION

The Circuit Court struck down the parties’ Arbitration Agreement based on an incorrect analysis of procedural and substantive unconscionability with a misunderstanding of the arbitration forums available to the Fronts. It further erroneously concluded that, in any event, the

West Virginia Constitution and the WVCCPA affords consumers a non-waivable right to a trial in a circuit court in West Virginia. The Circuit Court has effectively announced that the Tenth Judicial Circuit will never uphold arbitration agreements under any circumstance.

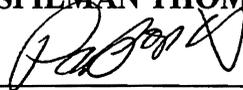
Neither the courts within Tenth Judicial Circuit, nor any other Judicial Circuit in this State for that matter, can unilaterally strike down the Syllabus Points articulated by this Court, or ignore the clear holdings of law announced by the Supreme Court of the United States. As the Supreme Court of the United States articulated today, decisions finding “the FAA’s coverage to be more limited than mandated by the Court’s previous cases” cannot stand. *Marmet*, 2012 WL 538236, at Slip Op. 1. The Tenth Judicial Circuit – as well as the other Judicial Circuits in this State – must understand that the FAA and state and federal decisions advancing the Congressional intent in enacting the FAA cannot go ignored. Valid, enforceable agreements to arbitrate, such as the Arbitration Agreement in this case, must be enforced according to their terms.

Based on the foregoing, Credit Acceptance respectfully requests that this Honorable Court:

1. reverse the decision of the Circuit Court;
2. dismiss the Fronts’ lawsuits;
3. compel to arbitration the Fronts’ claims in both lawsuits; and
4. grant such other and further relief as this Court deems just and proper.

CREDIT ACCEPTANCE CORPORATION

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-1646

CREDIT ACCEPTANCE
CORPORATION,

Defendant Below,
Petitioner,

v.

Appeal from a final order of the
Circuit Court of Raleigh County
(11-C-289-K & 11-C-290-K)

ROBERT J. FRONT AND
BILLYE S. FRONT,

Plaintiffs Below,
Respondents.

CERTIFICATE OF SERVICE

I, Don C. A. Parker, hereby certify that service of the foregoing **Petitioner Credit Acceptance Corporation's Brief and Appendix** thereto, has been made via U.S. Mail, on this 21st day of February, 2011, addressed as follows:

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