FILED
APR 23 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-1646

CREDIT ACCEPTANCE CORPORATION,

Defendant Below, Petitioner,

v.

ROBERT J. FRONT AND BILLYE S. FRONT,

Plaintiffs Below, Respondents.

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

PETITIONER CREDIT ACCEPTANCE CORPORATION'S REPLY BRIEF

Don C. A. Parker (WV Bar No. 7766) (*Counsel of Record*)
Bruce M. Jacobs (WV Bar No. 6333)
Nicholas P. Mooney II (WV Bar No. 7204)
300 Kanawha Boulevard, East (25301)
Post Office Box 273
Charleston, West Virginia 25321-0273
304.340.3800 (*phone*); 304.340.3801 (*facsimile*)
dparker@spilmanlaw.com
bjacobs@spilmanlaw.com
nmooney@spilmanlaw.com

Counsel for Petitioner Credit Acceptance Corporation

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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

Credit Acceptance Corporation ("Credit Acceptance") appeals from a final order of the Circuit Court denying its motion to compel arbitration and dismiss the claims of Robert J. Front and Billye S. Front (the "Fronts"), plaintiffs below, or in the alternative, stay the proceeding pending arbitration ("Final Order"). (A.R. 588-606.)

In accordance with Rules 10(g) and (d) of the Revised West Virginia Rules of Appellate

Procedure, Credit Acceptance relies on its statement of the case in Petitioner's Brief. (Petitioner's Brief, at 1-9.) However, Credit Acceptance emphasizes, in reply to Respondents' Brief, that the Fronts elected arbitration of their claims by failing to exercise their rights under opt-out provisions contained in the Arbitration Agreements to the parties' 2007 and 2008 Contracts ("Contracts"). (Petitioner's Brief, at 6; A.R. 42, 56.) Further, the *Fronts* – not Credit Acceptance – filed the lawsuit underlying this appeal. The Fronts should have filed their claims with the American Arbitration Association ("AAA"), but chose not to do so. (Petitioner's Brief, at 19; A.R. 615.) The fact that the National Arbitration Forum ("NAF") "is no longer accepting this type of consumer debt collection case" (Respondents' Summary Response, at 3), does not preclude the Fronts from exercising their rights under the Arbitration Agreements. (*See id.*). The AAA is still available to accept the Fronts' claims for arbitration. (Petitioner's Brief, at 19; A.R. 16.) Regardless, the Circuit Court could have appointed an arbitrator pursuant to section 5 of the FAA.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

By filing a summary response, the Fronts are "deemed to have consented to the waiver of oral argument." Rev. W. Va. R. App. P. 10(e). Notwithstanding the Fronts' waiver, oral argument remains appropriate for the following reasons:

Credit Acceptance raises several issues of fundamental public importance. The first issue is 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 Agreements substantively unconscionable under Syllabus Point 20 of *Brown v. Genesis Healthcare Corp.*, --- W. Va. ---, --- S.E.2d ---, Nos. 35494, 35546, 35635, 2011 WL 2611327 (W. Va. June 29, 2011), *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. A second issue is whether a finding of procedural unconscionability can be based on factors occurring after the contracts' formation. A third issue is whether the WVCCPA's anti-waiver provision, which the Circuit Court improperly interpreted as a ban on arbitration agreements, is preempted by the FAA.

Finally, and contrary to the Fronts' contention, the Final Order implicated 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.

IV. ARGUMENT

A. This Court has jurisdiction over Credit Acceptance's appeal of the Final Order.

"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.

The Fronts incorrectly contend that because the Circuit Court failed to make an "express determination that there is no just reason for delay[,]" this Court conclusively lacks jurisdiction. As the Fronts even acknowledge, this Court has approached orders that fail to use the "magic words" of "final order" or "no just reason for delay" with flexibility. (Respondents' Summary Response, at 7); *see Durm v. Heck's, Inc.*, 184 W. Va. 562, 401 S.E.2d 908 (1991); *see also Hubbard v. State Farm Indem. Co.*, 213 W. Va. 542, 549, 584 S.E.2d 176, 183 (2003). In *Durm*, this Court held that the absence of language "indicating that 'no just reason for delay' exists and 'direct[ing] . . . entry of judgment' will not render the order interlocutory and bar appeal provided that this Court can determine from the order that the trial court's ruling approximates a final order in its nature and effect." *Id.* at Syl pt. 2. "With the enactment of Rule 54(b), an order may be final prior to the ending of the entire litigation on its merits if the order resolves the litigation as to a claim or a party." *Id.* at 566, 401 S.E.2d at 912.

In accepting an appeal of a summary judgment order that lacked certification under Rule 54(b) of the West Virginia Rules of Civil Procedure, this Court provided two reasons for affording such flexibility. First, as the Fronts correctly state, this court noted that appeal was discretionary and could therefore be denied. *Id.* Second, and more importantly, the *Durm* Court explained that a party "armed with a [. . .] judgment, which may be of questionable value . . . does not gain by having to wait until the entire case is tried before the [. . .] judgment can be appealed." *Id.* Recent changes to West Virginia's appellate rules did not overrule *Durm* and *Hubbard.*

The only relevant question is whether the Final Order in this case "approximates a final order in its nature and effect." *Id.* at Syl pt. 2. It does. Contrary to the Fronts' claim, the absence of an explicit declaration that there is "no just reason for delay" does not determine the

effect of the order. (*See* Respondents' Summary Response, at 7.) In fact, such circular reasoning would render the flexibility employed by this Court nonsensical. Instead, the effect considered by this Court has been whether the order terminates a claim or a party to the lawsuit. *See Durm*, 184 W. Va. at 566, 401 S.E.2d at 912. The Final Order in this case, which importantly was noted as such, did just that: it terminated Credit Acceptance's claim for arbitration. Credit Acceptance is entitled to arbitration pursuant to the Arbitration Agreements.

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. "Claims are separable when there is more than one possible recovery . . . or if 'different sorts of relief' are sought . . . ." *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)) ("Claims are separable when there is more than one possible recovery . . . or if 'different sorts of relief' are sought . . . ."). Certainly, in this case, different sorts of relief are sought: Credit Acceptance seeks to enforce the Contracts and arbitrate the Fronts' claims.

Moreover, there is "no just reason for delay" of Credit Acceptance's appeal. If the Circuit Court erred in determining that the parties' Arbitration Agreement is unenforceable and this Court deems Credit Acceptance's appeal premature, Credit Acceptance will have lost the benefit of a later appeal. By the time it could file (and succeed) on an appeal, the benefits of arbitration – namely savings of cost and time – would be nonexistent.

Credit Acceptance would have no incentive to appeal after the case is fully litigated. In arbitration, the parties seek an efficient and economical resolution of their dispute. If Credit Acceptance is forced to fully litigate the Fronts' claims, it will already bear costs for which it did

not bargain. Why would it choose to increase that expenditure by seeking to arbitrate already-litigated claims? The reason that parties contract for arbitration is to avoid the time, expense, and complications associated with litigation. *See Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504 (7th Cir. 1997) ("Arbitration clauses reflect the parties' preference for non-judicial dispute resolution, which may be faster and cheaper. These benefits are eroded, and may be lost or even turned into net losses, if it is necessary to proceed in both judicial and arbitral forums, or to do this sequentially. The worst possible outcome would be to litigate the dispute, to have the court of appeals reverse and order the dispute arbitrated, to arbitrate the dispute, and finally to return to court to have the award enforced. Immediate appeal . . . helps to cut the loss from duplication."). If Credit Acceptance must wait until after the prevailing party fully litigates the dispute in court, then it will effectively lose the very relief it seeks on appeal.

The Fronts are also incorrect in asserting that, because West Virginia has not adopted the Uniform Arbitration Act ("UAA"), it should, in "alleged" conformity with other similarly situated states, deny Credit Acceptance's immediate appeal. (Respondents' Summary Response, at 5.) The Fronts argue, without direct citation, that "[w]hether an order denying arbitration is immediately appealable generally depends on whether the State has adopted the Uniform Arbitration Act." (*Id.*) In an attempt to support this assertion, the Fronts provide two examples comparing a case from Maryland with one from Kentucky. (*Id.*) The Fronts' brief suggests that Maryland has not adopted the UAA, while Kentucky has adopted it. (*Id.*). In fact, Maryland <u>has</u> adopted the UAA. *See* Md. Code, Court & Judicial Proceedings §§ 3-201 through 3-234; *see also Addison v. Lochearn Nursing Home, LLC*, 411 Md. 251, 272, 983 A.2d 138, 150 (2009) (refusing to certify as a final order an order denying a motion to compel arbitration where the

circuit court had **expressly denied certification**). Therefore, the Fronts' contention is unsubstantiated and the cases cited inapposite to the disposition of this appeal. Moreover, even if the alleged "trend" between UAA and non-UAA states truly existed with respect to the availability of immediate appeals, West Virginia is not bound by it.

States that have not yet adopted the UAA have nonetheless permitted immediate appeals from denied motions to compel arbitration. For example, under Alabama law, "[a] direct appeal is the proper procedure by which to seek review of a trial court's order denying a motion to compel arbitration." *Title Max of Birmingham, Inc. v. Edwards*, 973 So.2d 1050, 1052 (Ala. 2007) (quoting *Homes of Legend, Inc. v. McCollough*, 776 So.2d 741, 745 (Ala. 2001) (citing, in part, 9 U.S.C § 16 (1994))). Alabama's case law takes guidance from the FAA, namely 9 U.S.C. § 16, with respect to appealing an order denying a motion to compel arbitration. *Id.*

An order from a United States District Court[1] denying a petition to compel arbitration is immediately appealable. 9 U.S.C. § 16(B) (citing 9 U.S.C. § 4). The federal scheme for appealing orders denying motions to compel arbitration is consistent with Rule 54(b) of the West Virginia Rules of Civil Procedure,[2] since the order has the effect of precluding one party's entire claim: arbitration. This is indeed what Alabama has relied upon. Likewise, states adopting the UAA employ a similar approach, as alleged by the Fronts. (Respondents' Summary Response,

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[1] Respondents' Brief emphasizes Credit Acceptance's error in including 9 U.S.C. § 16(C) as a ground for state court appeal on an Extra Sheet in its Notice of Appeal. Respondents note that, "[a]pparently catching the mistake, Credit Acceptance did not include this 'Extra Sheet' within the Appendix Record or cite 9 U.S.C. § 16 in its opening brief." (Respondents' Brief, at 6.) Respondents entered into an Agreed Stipulation to Correct the Record on Appeal with Credit Acceptance on February 9, 2012. (Stipulation, Feb. 9, 2012.) Credit Acceptance received permission from this Court to correct its Notice of Appeal on February 23, 2012. (Order, Feb. 23, 2012.) Credit Acceptance corrected its Notice of Appeal by omitting the erroneous Extra Sheet from the Appendix Record it filed. Because the error was corrected with Respondents' cooperation and this Court's permission, it is a null issue.

[2] West Virginia differs from the federal scheme insofar as it permits an immediate appeal of orders granting motions to compel arbitration. *See Brown*, 2011 WL 2611327 (W. Va. June 29, 2011), Slip Op. 8, 10. Under section 16(B)(2) of the FAA, orders from United States District Courts granting motions to compel arbitration are not immediately appealable. 9 U.S.C. § 16(C)(2).

at 5.) In fact, when employing this Court's flexible approach to Rule 54(b), *see Durm*, 184 W. Va. at 566, 401 S.E.2d at 912, 9 U.S.C. § 16 actually comports with West Virginia's code and rules of civil procedure. Accordingly, a finding by this Court that West Virginia Code 58-5-1 and Rule 54(b) of the West Virginia Rules of Civil Procedure permit the immediate appeal of a final order denying a motion to compel arbitration would further align West Virginia with the federal approach toward arbitration.

B. The Arbitration Agreements are not unconscionable.

1. Procedural unconscionability necessarily requires consideration of only the Contracts' formation.

The Fronts urge this Court to accept as law a position this Court has never explicitly adopted: that procedural unconscionability does not always need to be "evaluated as of the time of contracting." (Respondents' Summary Response, at 9.) In support of their position, the Fronts rely on the proposition that "'[i]n this ever changing world one must be sensitive to the need to evolve rules to fit changed circumstances.'" (Respondents' Summary Response, at 9 (quoting *Brown v. Genesis Healthcare Corp.*, --- W. Va. ---, --- S.E.2d ---, Nos. 35494, 35546, 35635, 2011 WL 2611327 (W. Va. June 29, 2011), *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. (quoting *McGinnis v. D.B. Cayton*, 173 W. Va. 102, 312 S.E.2d 765 (1984) (Harshburger, J., concurring)). The quote that Respondents have taken from *McGinnis* does not stand for the proposition for which they have stated it, because they have taken it out of context.

In fact, this Court in *Brown* borrowed that statement from *McGinnis v. D.B. Cayton*, 173 W. Va. 102, 312 S.E.2d 765 (1984) (Harshburger, J., concurring), in which the concurrence found the majority's scope too limited. *Id.* at 107, 312 S.E.2d at 770. Relying on Professor

Leff's analysis of unconscionability in Article 2 of the UCC, the concurrence concluded its comments about unconscionability – in which the selection cited by the Fronts originally appeared – as follows:

> Unconscionability can arise at a later date: even though a bargain was not unconscionable when made, it may become so, because leaving the parties as they were is unpalatably unfair. If one accepts Professor Leff's divisions of unconscionability into procedural and substantive aspects, ***it seems that unconscionability at the time the contract is made is the correct test for procedural problems within the bargaining process***, but substantive unconscionability (overall and gross imbalance, oppression, or unfairness) can be raised at any time during the life of the contract.

Id. at 115, 312 S.E.2d at 779 (emphasis added).

Since *McGinnis*, this Court has made clear that it accepts Professor Leff's divisions; in *Brown*, this Court affirmed that procedural and substantive unconscionability are required before a contract provision may be voided for 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)). When quoting *McGinnis* in *Brown*, this Court did not suggest that *procedural* unconscionability could be evaluated at some time other than the formation of the contract. Rather, it stated that "[w]hether **an unconscionable bargain occurred** 'is usually evaluated as of the time a contract is written, but not always . . . . In this everchanging world one must be sensitive to the need to evolve rules to fit changed circumstances.'" *Id.* at Slip Op. 54-55. The unconscionable nature of the bargain is still comprised of two parts: procedural and substantive unconscionability. Moreover, this Court confirmed that "we hold that the doctrine of procedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and the **formation of the contract**." *Id.* at Slip Op. 55 (emphasis added). The law is clear: "[a] contract term is unenforceable if it is **both** procedurally and substantively

unconscionable." *Id.* at Syl. pt. 20.[3]

In this case, the Circuit Court's analysis of procedural unconscionability should have ended when it determined that "the original contract is not procedurally unconscionable . . . ." (A.R. 6.) The Circuit Court's determination that the original Arbitration Agreements were not procedurally unconscionable at the time they were made means that they not procedurally unconscionable, period. The Arbitration Agreements should be enforced, the Final Order should be overturned, and the Fronts' claims should be compelled to arbitration.

2. The AAA's moratorium does not render the Agreements too one-sided.

The Fronts further seek to persuade this Court that the AAA's unavailability to initiate arbitration against a consumer who fails to consent at the time of a dispute renders the Arbitration Agreements substantively unconscionable. This is a red herring. The AAA is only barring claims by creditors to collect debts. This is not a debt collection claim by a creditor. Credit Acceptance has not sued the Fronts. Rather, the Fronts have sued Credit Acceptance.

Courts have routinely rejected the argument propounded by the Fronts, namely that the AAA moratorium on **creditor's debt collection suits** renders an arbitration agreement unconscionable. Those courts that reject the Fronts' argument have compelled the consumers' claims to arbitration. *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

[3] If courts are permitted to consider post-contract formation factors in assessing a contract's "procedural" unconscionability for arbitration clause disputes, so too must courts conduct that analysis for other contracts, generally. It is well established that states may only invalidate arbitration agreements based upon generally applicable contract defenses. 9 U.S.C. § 2; *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L.Ed.2d 902 (1996). However, even when using doctrines of general applicability, such as unconscionability, states are not permitted to employ these doctrines in a manner which would subject arbitration agreements to special scrutiny or a different set of rules. *See, e.g., Perry v. Thomas*, 482 U.S. 483 n.9, 107 S. Ct. 2520, 96 L.Ed.2d 426 (1989).

*8-9 (Bkrtcy. 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).

Moreover, "substantive unconscionability involves unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party." Syl. pt. 19, *Brown*, 2011 WL 2611327, Slip Op. The Fronts are indeed not disadvantaged. Absolutely no evidence suggests that they necessarily would have chosen the NAF over AAA if both remained available to hear their claims. One of the two forums in the Arbitration Agreements remains available. Even if AAA did not remain available, section 5 of the FAA provides a means of selecting an arbitrator where one has become unavailable.

C. The arbitration forums were not material to the Arbitration Agreements and therefore the unavailability of one does not constitute a material change.

1. Under section 5 of the FAA, the Circuit Court could have appointed an arbitrator if, in fact, the arbitration forums were unavailable (and in fact the AAA is not).

The Fronts incorrectly suggest that performance of the Arbitration Agreements with Credit Acceptance is impracticable because the NAF is no longer available and the AAA would

not accept claims brought by Credit Acceptance without the Fronts' present-day consent. (Respondents' Summary Response, at 10.) This Court has set forth the doctrine of impracticability as follows:

> a party to a contract who claims that a supervening event has prevented, and thus excused, a promised performance must demonstrate each of the following: (1) the event made the performance impracticable; (2) the nonoccurrence of the event was a basic assumption on which the contract was made; (3) the impracticability resulted without the fault of the party seeking to be excused; and (4) the party has not agreed, either expressly or impliedly, to perform in spite of impracticability that would otherwise justify his nonperformance.

Syl. pt. 2, in part, *Waddy v. Riggleman*, 216 W. Va. 250, 606 S.E.2d 222 (2004). "Although the present rule is less strict than its inflexible ancestor [impossibility], it, nevertheless, ***remains a difficult standard to meet***." *Id* at 258, 606 S.E.2d at 238 (emphasis added). In fact, "'[w]hile impracticability embraces situations short of absolute impossibility, mere increase in difficulty is not enough.'" *Id.* (quoting 30 Williston on Contracts § 77:1, at 277-78).

In this case, the Fronts' argument is unavailing for two reasons. First, the AAA remains available to take the Fronts' claims and is therefore not an "impracticable" option under the *Waddy* test. Second, section 5 of the FAA vests the Court with the power to appoint an arbitrator upon either party's petition, thereby removing any impracticability associated with an unavailable arbitrator. That the Circuit Court refused to appoint a substitute arbitrator (to the extent one is even necessary, which it is not) in lieu of invalidating the parties' Arbitration Agreement constitutes clear error of law. *See* 9 U.S.C. § 5.

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) ("[t]he fact that the AAA no longer hears these types of disputes does not render the Agreement invalid. Another arbitrator may easily be substituted."). *See also Rivera v. Am. Gen. Fin. Servs., Inc.*, --- P.3d ----, No. 32,340, 2011 WL 3687624, at **7-9 (N.M. June 15, 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).

Because the AAA remains available to the Fronts and because section 5 of the FAA affords courts with the means and power to appoint an arbitrator where the one chosen by the parties has become unavailable, the Arbitration Agreements are not "impracticable." The Fronts simply chose to ignore their contractual obligations and the Circuit Court facilitated and condoned their breach. The Fronts' claims belong in arbitration. The Final Order should be

overturned and the Fronts' claims should be compelled to arbitration.

2. The purported unavailability of an arbitration forum does not constitute a material change to the Arbitration Agreements.

The Fronts correctly state that there are three approaches traditionally employed by courts to determine whether section 5 of the FAA allows the court to appoint a substitute arbitrator. Nonetheless, the Fronts incorrectly assert that, under the "middle approach" for which they advocate, the NAF's unavailability constitutes a "material change" to the Arbitration Agreements.

In order to "ensure[] that private agreements to arbitrate are enforced according to their terms[,]" Syl. pt. 8, *Brown*, 2011 WL 2611327, at Slip Op. ii-iii, 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 v. KPMG LLP*, 457 F.3d at 1060 (internal citations omitted)). The Third Circuit has held that "[i]n this light, the parties must have unambiguously expressed their intent not to arbitrate their disputes in the event that the designated arbitral forum is unavailable." *Khan v. Dell Inc.*, 669 F.3d 350, 354 (3d Cir. 2012). In other words, courts should not "annihilate [an] arbitration agreement." *Reddam v. KPMG LLP*, 457 F.3d at 1060 (internal citations omitted)). In this case, the parties never made the named arbitration forums so central to their bargaining so as to refuse arbitration in the event one forum became unavailable. Therefore, under the Third Circuit's approach, the Circuit Court should have employed section 5 of the FAA to appoint an arbitrator.

Even if the Fronts' "middle approach" (Respondents Summary Response, at 14) were to apply, the arbitration forums at issue in the Arbitration Agreements in this case are merely "ancillary logistical concerns" and they should be upheld. Under *Rivera v. American General*

Financial Services, Inc., 259 P.3d 803 (N.M. 2009), the Supreme Court of New Mexico relies on the Eleventh Circuit's "integral versus ancillary concern test," which focuses on the intent of the parties in naming arbitration forums. *Id.* at 812. However, even the *Rivera* court acknowledged that "[c]ourts have concluded that the identity of the arbitration provider is an ancillary logistical concern in contracts where the arbitration provisions do not specifically designate a provider or where a provision gives transacting parties a choice of providers." *Id.* at 812-13 (citing and quoting *Jackson v. Payday Loan Store of Ill.,* No. 09 C 4189, 2010 WL 1031590, at *1 (N.D. Ill. Mar. 17, 2010) (concluding that where "'the arbitration agreement offers a choice of arbitrators, the selection of a single particular arbitrator cannot logically be so central to the agreement as to merit voiding it'")). In this case, the Fronts were given a choice between the NAF and the AAA, thereby suggesting that arbitration with either was not integral to the Arbitration Agreements.

Further, other cases cited by the Fronts, such as *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 132, 678 S.E.2d 435, 439 (2009), focus on the substantive effect of an arbitration forum selection. In *Grant*, the court stated that "[w]here designation of a specific arbitral forum has implications that may substantively affect the substantive outcome of the resolution, we believe that it is neither 'logistical' nor 'ancillary.'" *Id.* (citations omitted). Here, unlike in *Grant*, the substantive issues involve the WVCCPA. The claims are straightforward and set forth concisely in one chapter of the West Virginia Code. Courts rarely find "gray area" but instead find that violations either occurred or they did not. Unlike the American Health Lawyers Association, which was at issue in *Grant*, nothing about the AAA or NAF is unique or specialized. In truth, any arbitrator should be able to apply the WVCCPA and arrive at a resolution of the parties' dispute. The named arbitration forums in the parties' Arbitration Agreements were ancillary logistical concerns and nothing more. The Final Order should be

overturned and the Fronts' claims compelled to arbitration.

D. Contrary to the Fronts' assertion, the Final Order implicated the West Virginia Constitution and the West Virginia Consumer Credit and Protection Act

Finally, the Fronts allege that Credit Acceptance focuses on "the state constitutional right to a trial by jury and the state statute prohibiting consumers from waiving their rights under the [West Virginia] Consumer Credit and Protection Act" to avoid the Circuit Court's conclusion that "the elimination of one of the specified forums as a material change . . . renders the clause void." (Respondents' Summary Response, at 8.) This is simply not true on either account. Credit Acceptance explained in its Brief why restrictions on claims brought before AAA and a prohibition of consumer claims under NAF were not "material changes" to the Contracts. (Petitioner's Brief, at 18-23.) This Reply Brief fully supports those arguments made in the initial briefing.

The Circuit Court clearly and unequivocally based its decision, in part, on its interpretation of the Fronts' ability to waive their rights under the West Virginia Constitution and the WVCCPA. (A.R. 7-9.) The Circuit Court's Final Order contained discrete sections addressing "Constitutional Rights under the Constitution of West Virginia" (A.R. 7) and "West Virginia Consumer Credit Act" (A.R. 9). Additionally, the Circuit Court first stated that it "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. 7-9.)

The Circuit Court then merely qualified its original statement, emphasizing a particular discomfort "to uphold such a contract where the terms of the original contract have been altered as a result of the elimination of an arbitration forum." (*Id.*) The Circuit Court unequivocally based its second statement on the "tradition" espoused in its first. So, too, did the Circuit Court

state that a consumer's right to a jury trial, as allegedly granted by the WVCCPA, "cannot be waived by agreement . . . ." (*Id.* at 9.) By adding "especially an agreement which no longer exists in its original form" (*id*), the Circuit Court emphasized a particular category of agreements to which its interpretation of the WVCCPA particularly applies: arbitration agreements.

The Circuit Court did not limit its interpretation of the WVCCPA to only agreements "which no longer exist in [their] original form." Consequently, the Circuit Court's interpretations of the West Virginia Constitution and the WVCCPA, to the detriment of arbitration, are properly issues before this Court on appeal.

V. CONCLUSION

In sum, the Circuit Court correctly held that the Arbitration Agreements were not procedurally unconscionable at the time they were formed; that is, after all, the definition of procedural unconscionability. However, the Circuit Court then went on to hold that a material change, namely the elimination of one of the two named arbitration forums, rendered the Arbitration Agreements procedurally unconscionable. It bolstered its decision with the determination that the WVCCPA contains a right to a jury trial that "cannot be waived by an agreement, especially an agreement to arbitrate." (A.R. 9.) It also relied on its reluctance, past and present, "to uphold arbitration agreements which essentially eliminate a party's right to a trial." (*Id.* 8). In so holding, the Final Order failed to align with West Virginia's definition of procedural unconscionability, unconscionability generally, and the facts of this case. The AAA is still available to accept the Fronts' claims. Moreover, if necessary, section 5 of the FAA statutorily provides for the appointment of arbitrators. 9 U.S.C. § 5. No "material change" has occurred.

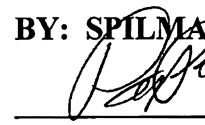
Based on the foregoing, Credit Acceptance respectfully requests that this Honorable

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

BY: SPILMAN THOMAS & BATTLE, PLLC



Don C. A. Parker (WV Bar No. 7766) (*Counsel of Record*)
Bruce M. Jacobs (WV Bar No. 6333)
Nicholas P. Mooney II (WV Bar No. 7204)
300 Kanawha Boulevard, East (25301)
Post Office Box 273
Charleston, West Virginia 25321-0273
304.340.3800 (*phone*); 304.340.3801 (*facsimile*)
dparker@spilmanlaw.com
bjacobs@spilmanlaw.com
nmooney@spilmanlaw.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-1646

CREDIT ACCEPTANCE CORPORATION,

Defendant Below, Petitioner,

v.

ROBERT J. FRONT AND BILLYE S. FRONT,

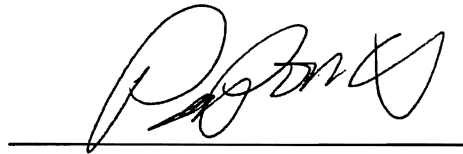
Plaintiffs Below, Respondents.

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

CERTIFICATE OF SERVICE

I, Don C. A. Parker, hereby certify that service of the foregoing **Petitioner Credit Acceptance Corporation's Reply Brief**, has been made via U.S. Mail, on this 23rd day of April, 2012, addressed as follows:

Ralph C. Young, Esquire
Christopher B. Frost, Esquire
Steven R. Broadwater, Esquire
Hamilton, Burgess, Young & Pollard, PLLC
P.O. Box 959
Fayetteville, WV 25840
Counsel for Respondents



Don C. A. Parker (WV State Bar No. 7766)