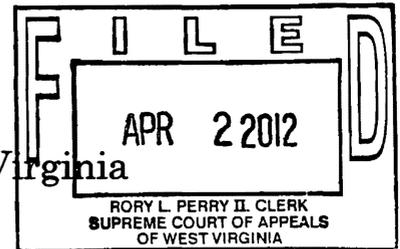


In the Supreme Court of Appeals of West Virginia



Credit Acceptance Corporation.  
Defendant Below, Petitioner

vs.

11-1646  
Docket No. ~~1640~~

Robert J. Front and Billye S. Front,  
Plaintiffs Below, Respondents

**Respondents' Summary Response to  
Credit Acceptance's Brief**

Ralph C. Young (W.Va. Bar # 4176)  
ryoung@hamiltonburgess.com

Christopher B. Frost (W.Va. Bar # 9411)  
cfrost@hamiltonburgess.com

HAMILTON BURGESS YOUNG &  
POLLARD  
P.O. Box 959  
Fayetteville, WV 25840-0959  
304/574-2727

Counsel for the Respondents  
Robert J. Front and Billye S. Front

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## Questions Presented

1. The circuit court denied a motion to compel arbitration without certifying that “there is no just reason for delay.” Does this Court have jurisdiction to hear an immediate appeal?

2. The boiler-plate arbitration clause at issue gave the Fronts the right to arbitrate in a forum and under rules that no longer exist. Does this render the clause unconscionable or impracticable?

3. An arbitration clause within a consumer loan transaction is unenforceable if it requires consumers to arbitrate yet preserves the lender’s rights to a judicial forum. Credit Assurance may now go to court on its claims against debtors yet wants its debtors to arbitrate their claims against it. Does this one-sidedness render the arbitration clause unenforceable?

4. Credit Assurance’s arbitration clause gave the Fronts the right to arbitrate in two forums, one of which no longer exists and the other which considers its copyrighted rules so unfair to consumers that it will not handle consumer debt collection arbitrations unless the consumer – at the time of the dispute – agrees to arbitrate. May the judiciary appoint another arbitrator and impose another set of arbitral rules without the Fronts’ assent?

## Statement of the Case

In 2007 and 2008, the Fronts entered into retail installment contracts to purchase two automobiles. App. 41-42, 55-56. The contracts contain arbitration clauses which provide, “You or we may elect to arbitrate under the rules and procedures of either the National Arbitration Forum or the American Arbitration Association.” App. 42, 56. The clauses fail to identify any other arbitral forum or any other rules and procedures on how to select an arbitrator or conduct the arbitration.

The State of Minnesota later sued the NAF and alleged that it worked behind the scenes with debt collectors against the consumers’ interests.<sup>1</sup> The NAF within days entered into a consent decree forbidding it from handling or participating in any new consumer arbitrations.<sup>2</sup>

Less than a week later, the AAA told Congress that consumers had “legitimate concerns” about arbitrating consumer claims and admitted that it needed to “substantially boost the orientation and training of consumer debt collection arbitrators” in certain areas, including the “substantive law regarding

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<sup>1</sup>This complaint is available at [www.ag.state.mn.us/PDF/PressReleases/SignedFiledComplaintArbitrationCompany.pdf](http://www.ag.state.mn.us/PDF/PressReleases/SignedFiledComplaintArbitrationCompany.pdf).

<sup>2</sup>Credit Assurance’s acknowledges at page 20 of its brief that the NAF no longer accepts consumer arbitration claims.

consumer protection statutes.”<sup>3</sup> The AAA accordingly issued a moratorium effective July 27, 2009 on it administering, processing, or participating in arbitrating consumer debt collections unless the consumer – at the time of the dispute – agrees to arbitrate. It continues to handle consumer cases where the consumer agrees to arbitrate at the time of the dispute, such as where the consumer seeks arbitration. This moratorium remains in effect.<sup>4</sup>

In 2011, Robert and Billye Front filed suit against Credit Acceptance in the Circuit Court for Raleigh County. They claim that Credit Acceptance injured them mentally by engaging in multiple unfair, oppressive, and unconscionable methods to collect the debt. App. 13-20, 23-30. They further allege that this misconduct, if deemed willful, is criminal. App. 17, 27.

Credit Acceptance moved to compel arbitration. The Fronts responded that the NAF is no longer accepting this type of consumer debt collection case, thus precluding them from exercising their already limited rights under the agreement. App. 561, 576. They further noted that Credit Assurance was precluded from choosing either of its chosen forums to arbitrate its debt collection claims against its consumers. App. 561 n. 2, 576 n. 2.

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<sup>3</sup>See <http://www.ftc.gov/os/comments/debtcollectroundtable1/542930-00016.pdf> (the AAA testimony). The quotations are within the testimony at pages 2 and 8.

<sup>4</sup>Credit Acceptance’s brief at page 19 cites the moratorium.

The circuit court denied arbitration because the elimination of one of the two specified arbitration forums materially changed the terms of the contract. App. 6-5, 10. Within this order, the circuit court further stated, “[t]his is a final order” and that “[t]he court shall reserve any objections and exceptions by either party to this ruling for purposes of appeal to the West Virginia Supreme Court of Appeals.” App. 10. The court did not resolve any of the claims on their merits or expressly determine that “there is no just reason for delay.” App. 10. Credit Assurance immediately appealed this order.

### **Argument**

The Court lacks appellate jurisdiction over the interlocutory denial of the motion to compel arbitration. Absent the circuit court’s determination that “there is no just reason for delay,” the order lacks the requisite finality to be immediately appealable.

Should the Court nevertheless reach the merits, the arbitration clause is void for unconscionability, impracticability of performance, or both. One of the forums specified to arbitrate no longer arbitrates consumer claims while the other implemented rules that render the clause too one-sided to enforce. And Credit Assurance’s proposed cure is for the court to improperly re-write the parties’ contract to provide new terms without Fronts’ assent.

This Court should dismiss the appeal as premature or affirm the denial of

arbitration.

**1. The Court lacks appellate jurisdiction.**

Whether an order denying arbitration is immediately appealable generally depends on whether the State has adopted the Uniform Arbitration Act. States which have not enacted the Uniform Act generally do not allow immediate appeals. Compare *Addison v. Lochearn Nursing Home, LLC*, 411 Md. 251, 983 A.2d 138 (2009)(holding that an order denying a motion to compel arbitration is not immediately appealable) with *Padgett v. Steinbrecher*, 355 S.W.3d 457, 460 (Ky.App. 2011)(holding that an order denying arbitration is by definition interlocutory but is appealable under the Kentucky Uniform Arbitration Act).

West Virginia has not enacted the Uniform Arbitration Act or otherwise enacted specific statutes on appealing arbitration orders. Credit Assurance tries to overcome the lack of specific authorization by pointing to the Federal Arbitration Act, W.Va. Code § 58-5-1, and Rule 54(b) of the *West Virginia Rules of Civil Procedure*. None of this has merit.

Credit Assurance initially offered a Notice of Appeal which contains an “Extra Sheet” that cites a FAA provision on appeals. Under the cited provision, a party can appeal certain orders entered under § 205 of the FAA. *See* 9 U.S.C. § 16. Section 205, however, requires a court to have jurisdiction “under this chapter.” 9 U.S.C. § 205. The chapter referred involves a treaty known as the

“Convention on the Recognition of Foreign Arbitral Awards of June 10, 1958.”  
9 U.S.C. § 201. The case does not involve this or any other international treaty.  
Apparently catching its mistake, Credit Assurance did not include this “Extra  
Sheet” within the Appendix Record or cite 9 U.S.C. § 16 in its opening brief.

It now relies solely on W.Va. Code § 58-5-1 and Rule 54(b) of the *West Virginia Rules of Civil Procedure*. But both the statute and rule require that the circuit court expressly determine that “there is no just reason for delay.” The order sought to be appealed lacks this required finding. App. 3-10.

This determination is designed to allow the circuit court as the Rule 54(b) dispatcher to assess any inequities and efficiencies implicated by the requested piecemeal review. Without the benefit of the circuit court’s reasoning on this score, this Court ordinarily cannot evaluate whether an immediate appeal is warranted. *Province v. Province*, 196 W.Va. 473, 479-480, 473 S.E.2d 894, 901 (1996).

Credit Assurance does not deal with this requirement. Its citation to the statute uses ellipses to omit the requirement altogether.

It instead argues that the circuit court said that the order was a “final order” and “reserve[d] any objections and exceptions by either party to this ruling for purposes of appeal to the West Virginia Supreme Court of Appeals.” App. 10. While true, this is not an express determination that there is no just

reason for delay.

This Court has in the past construed Rule 54(b) flexibly enough to allow for an immediate appeal despite the lack of the required determination. The key, the Court held, is whether the order approximates a final order in its nature and effect. *Drum v. Heck's Inc.*, 184 W.Va. 562, 401 S.E.2d 908 (1991). Here, however, the lack of certification means that the order “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.” Rule 54(b), *West Virginia Rules of Civil Procedure*. An order which may be revised at any time is not final in its nature or effect.

Besides, the reason for this past flexibility no longer exists. When this flexibility was established, the Court’s appellate jurisdiction was discretionary in that it could deny a petition for an appeal. *Drum*, 184 W.Va. at 566, 401 S.E.2d at 912. Construing the “no just reason for delay” requirement leniently makes sense when jurisdiction is discretionary. The Revised Rules of Appellate Procedure, however, now make appeals a matter of right. Flexibility makes less sense for appeals taken as a matter of right.

Lastly, this Court has held that orders granting arbitration are not appealable prior to a dismissal of the circuit court action unless the order otherwise complies with W.Va. Code § 58-5-1 and Rule 54(b) of the *West Virginia*

*Rules of Civil Procedure. McGraw v. American Tobacco Co.*, 224 W.Va. 211, 220, 681 S.E.2d 96, 105 (2009). For purposes of finality, there is no reason to treat orders denying motions to compel arbitration differently.

**2. The NAF consent decree renders the arbitration agreement unconscionable or impracticable.**

If the Court reaches the merits, rather than dismiss the appeal for lack of jurisdiction, it should affirm because of the impact of the NAF consent decree. The arbitration clause expressly granted the Fronts the right to use NAF rules and procedures. App. 42, 56. After the NAF consent decree, that right no longer exists. *See Rivera v. American General Financial Services, Inc.*, 150 N.M. 398, 259 P.3d 803, 815 (2011)(noting that “there cannot be any NAF rules that remain ‘in effect’ for administering consumer disputes.”). The circuit court repeatedly cited the elimination of one of the specified forums as a material change that renders the clause void. App. 4-10.

A good part of Credit Assurance’s brief sidesteps this finding to focus instead on the state constitutional right to a trial by jury and the state statute prohibiting consumers from waiving their rights under the Consumer Credit and Protection Act. App. 7-9. This focus is obviously designed to bring into play the recent United States Supreme Court decision holding that States may not categorically carve out a class of claims from arbitration. *Marmet Health Care*

*Center v. Brown*, 132 S.Ct. 1210 (2012). Yet this focus truncates the circuit court's order.

In addressing a consumer's constitutional and statutory rights, the circuit court tied both back into the elimination of an arbitration forum. See App. 8 ("In this case, the court is especially hesitant 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."); App. 9 ("This right cannot be waived by agreement, especially an agreement which no longer exists in its original form."). This shows that the driving impetus for the order was the changed circumstances.

On this point, Credit Assurance wrongly suggests that the United States Supreme Court has held that an arbitration must proceed even if the NAF is unavailable. In the case cited, however, the Court dealt with whether a federal statute precluded arbitration under the Federal Arbitration Act. The Court did not address – at all – the impact of the NAF's unavailability. *Compucredit Corp. v. Greenwood*, 132 S.Ct. 665, 181 L.Ed.2d 584 (2012).

Credit Acceptance further attacks the ruling on the lack of the forum by arguing that procedural unconscionability must be evaluated as of the time of contracting. But this is not always true. "In this ever changing world one must be sensitive to the need to evolve rules to fit changed circumstances." *Brown v. Genesis Healthcare Corp.*, Nos. 35494, 35546, 35635 (W.Va. June 29, 2011), Slip

Op. 54-55, *overruled on other grounds Marmet Health Care Center v. Brown*, 132 S.Ct. 1210 (2012). “[A]ll of the facts and circumstances particular to the entire contract must be taken into consideration.” *State ex. rel. Richmond American Homes of West Virginia, Inc.*, 228 W.Va. 125, 717 S.E.2d 909, 919 (2011).

Here, the circuit court examined all of the facts and circumstances presented and ruled that the contract’s material alteration rendered the agreement void. App. 10. This is perfectly proper under the “changed circumstances” aspect of unconscionability.

And unconscionability is also not the only contract doctrine in play. The four-factored test for impracticability of performance shows that it fits too. *See Waddy v. Riggleman*, 216 W.Va. 250, 606 S.E.2d 222 (2004), Sly.Pt. 2 (listing four factors).

The NAF consent decree means that there are no longer any NAF rules in effect for consumer disputes. *Rivera*, 259 P.3d at 815. And prior to the decree, the NAF rules provided that they cannot be used by anyone other than the NAF or those contracting with the NAF. *Id.* The consent decree forbids this. Secondly, NAF’s availability and rules were a basic assumption on which the arbitration agreement was made. The explicit right to use NAF rules, and thus use NAF as a forum, is meaningless unless the NAF handles such claims. Thirdly, the Fronts

had nothing to do with the NAF shenanigans that prompted the State of Minnesota to shut down its consumer business. Lastly, the Fronts have not agreed – either expressly or impliedly – to arbitrate despite the NAF’s unavailability.

This Court may affirm on any legal ground disclosed by the record regardless of the theory that the circuit court employed. *Barnett v. Wolfolk*, 149 W.Va. 246, 140 S.E.2d 466 (1965), Syl.Pt. 3. This record allows the Court to affirm based on impracticability of performance.

**3. The AAA moratorium renders the arbitration clause too one-sided to be valid.**

Credit Assurance may argue that performance is not impracticable because the AAA remains available to arbitrate the Fronts’ claims. The AAA forum, however, faces a separate problem in that the AAA moratorium creates a contract too one-sided to enforce. Under the moratorium, Credit Assurance may freely take into court its debt collection claims against its customers. The AAA no longer handles debt collection claims brought by creditors unless the consumer – at the time of the dispute – agrees to arbitrate. So, we have one forum and set of rules that do not exist at all and another forum whose rules allow Credit Assurance to by-pass it completely.

This is unconscionable. An arbitration clause within a consumer loan

transaction is unconscionable and void where a contract requires consumers to arbitrate yet preserves the lender's rights to a judicial forum. *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229, 511 S.E.2d 854 (1998), Syl.Pt. 5. Such one-sidedness, the Court held, creates a contract between rabbits and foxes. *Id.* at 234-237, 511 S.E.2d at 859-862. *See also Rivera*, 259 P.3d at 815-819 (2011)(citing and applying *Arnold* and other decisions on one-sided arbitration provisions).

The AAA rules also unconscionable a second way. The AAA issued its moratorium precisely because consumers have "legitimate concerns" about arbitrating consumer claims, including concerns over the arbitrator's orientation and training on consumer protection statutes. The AAA rules that Credit Assurance points to are so flawed that the AAA itself considers them unfair.

This Court dealt with all of this last November. The Court then reviewed a petition for a writ of prohibition for an order that denied arbitration in part because of the AAA moratorium. The Court refused to issue the writ. *State of West Virginia ex rel. Green Tree Servicing, LLC v. Honorable Judge Robert A. Burnside, Jr., Judge of the Circuit Court of Raleigh County*, No. 11-1378 (W.Va.Sup.Ct. Nov. 14, 2011). The same law firms that represented the parties there represent the parties here. Nothing has changed. And unlike fine wine, the creditor's arguments over the AAA moratorium have not grown better with time.

In sum, Credit Acceptance wants to force the Fronts to arbitrate their claims even though it can take its claims against them into court. *Arnold* outlaws such contracts.

**4. The court correctly declined to rewrite the parties' contract.**

Credit Assurance lastly says that § 5 of the FAA requires that the court appoint an arbitrator. From there, arbitration would proceed under rules and procedures that remain unidentified. This argument was also raised last year in counsel's petition for a writ of prohibition against Judge Burnside. It too has not grown better with age.

For background, courts generally take one of three approaches in handling § 5 of the FAA. The Second Circuit holds that the statute does not apply – at all – when a named arbitrator subsequently becomes unavailable. *In re Salomon Inc. Shareholders' Derivative Litigation*, 68 F.3d 554, 560 (2nd Cir. 1995). Under this view, § 5 never saves an arbitration agreement.

At the other extreme, some courts scour an arbitration clause for any ambiguity which could allow a court to sever the agreement to arbitrate out from the defunct agreement on how an arbitrator is selected and how the proceeding is conducted. The parties are then compelled to arbitrate under terms that they never agreed to. A Third Circuit panel recently split over this approach. *Khan v. Dell, Inc.*, 669 F.3d 350 (3<sup>rd</sup> Cir. 2012).

The middle approach applies ordinary contract principles to determine whether the selection of the arbitrator and rules are an integral or material term. Courts using this analysis look at a number of factors, including whether the specified rules may substantially affect the substantive outcome of the resolution. *See., e.g., Rivera*, 259 P.3d at 813; *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 678 S.E.2d 435 (2009); *Carr v. Gateway, Inc.*, 395 Ill.App.3d 1079, 918 N.E.2d 598 (Ill.App. 2009); *Geneva-Roth Capital, Inc. v. Edwards*, 956 N.E.2d 1195 (Ind.App. 2011).

This middle ground best comports with this Court's precedent. In West Virginia, arbitration clauses are construed like any other contract – no worse, but also no better. *State ex. Rel. Richmond American Homes of West Virginia, Inc.*, 228 W.Va. 125, 717 S.E.2d 909 (2011), Syl.Pts. 2-3.

In this case, applying ordinary contract principles demonstrates that the NAF or AAA rules and procedures are an integral part of the agreement. At the time of contracting, the NAF rules provided that they could not be used by anyone other than the NAF or those contracting with the NAF. *Rivera*, 259 P.3d at 815. The face of the AAA rules show that they are likewise copyrighted. This shows that a Court cannot simply appoint an arbitrator and have him or her apply the NAF or AAA rules. Assuming that there are NAF rules to apply (there are not), a court-appointed arbitrator would have to violate the NAF's or AAA's

prohibition against their rules' unauthorized use.

And there are no other rules or procedures to apply. The boiler-plate arbitration clause does not identify any other way to either select an arbitrator or select the rules that the arbitrator will apply. The NAF and AAA rules and procedures are it. They are integral by default.

### Conclusion

This Court lacks appellate jurisdiction and should dismiss the appeal as premature. If the Court reaches the merits, it should affirm because the NAF consent decree renders the arbitration agreement unconscionable, impracticable, or both; the AAA moratorium renders the agreement too one-sided and unfair to enforce; and because ordinary contract principles require that contract modifications be based on assent – and not judicial fiat.

Respectfully submitted,



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Ralph C. Young (W.Va. Bar # 4176)  
[ryoung@hiltonburgess.com](mailto:ryoung@hiltonburgess.com)  
Christopher B. Frost (W.Va. Bar # 9411)  
[cfrost@hiltonburgess.com](mailto:cfrost@hiltonburgess.com)  
Steven R. Broadwater, Jr. (W.Va. Bar # 11355)  
[sbroadwater@hiltonburgess.com](mailto:sbroadwater@hiltonburgess.com)  
HAMILTON BURGESS YOUNG &  
POLLARD  
P.O. Box 959  
Fayetteville, WV 25840-0959  
304/574-2727

Counsel for the Respondents

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**DOCKET NO. 11-1646**

CREDIT ACCEPTANCE CORPORATION,

Petitioner and  
Defendant Below,

v.

ROBERT J. FRONT and BILLYE S. FRONT,

Respondents.

**CERTIFICATE OF SERVICE**

I, **CHRISTOPHER B. FROST**, counsel for the Respondents, Robert J. Front and Billye S. Front, do hereby certify that a copy of the **RESPONDENTS' SUMMARY RESPONSE TO CREDIT ACCEPTANCE'S BRIEF** was served upon counsel of record in the above cause by enclosing the same in an envelope addressed to said attorney at the business address as disclosed in the pleadings of record herein as follows:

Nicholas P. Mooney II, Esq.  
Bruce M. Jacobs, Esq.  
Patrick R. Barry, Esq.  
SPILMAN THOMAS & BATTLE, PLLC  
P. O. Box 273  
Charleston, WV 25321

the same being the last known address with postage fully paid and depositing said envelope in the United States Mail on the 2nd day of April, 2012.



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**CHRISTOPHER B. FROST**