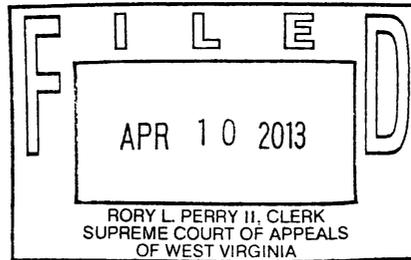


April 9, 2013



Rory L. Perry, II, Clerk  
 West Virginia Supreme Court of Appeals  
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Re: *Charlene A. Shorts v. AT&T Mobility, LLC and AT&T Mobility Corp.*, No. 11-1649

Dear Mr. Perry:

AT&T Mobility LLC and AT&T Mobility Corporation (collectively “ATTM”), respondents in the above-captioned matter, respectfully submit this letter pursuant to Rule 10(i) of the West Virginia Rules of Appellate Procedure to bring to the Court’s attention recent authority that relates to ATTM’s brief pending before this Court, for which oral argument is scheduled on April 16, 2013.

1. On January 17, 2013, this Court decided *State ex rel. Advance Stores Co. v. Recht*, \_\_\_ S.E.2d \_\_\_, 2013 WL 216232 (W. Va. Jan. 17, 2013). *Advance Stores* strongly supports our position that the circuit court would have committed reversible error had it entertained Shorts’ request that it deviate from its December 2009 determination that “the focus of the legal issue before the court” is “the 2005 arbitration agreement, with its consumer oriented revisions in December 2006 and March 2009” (A-3).

In *Advance Stores*, this Court explained that “[w]hen this Court remands a case to the circuit court, the remand can be either general or limited in scope. Limited remands explicitly outline the issues to be addressed by the circuit court and create a narrow framework within which the circuit court must operate.” 2013 WL 216232, Syl. pt. 1. The Court further indicated that “[u]pon remand of a case for further proceedings after a decision by this Court, the circuit court must proceed in accordance with the mandate and the law of the case as established on appeal. The trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court’s opinion and the circumstances it embraces.” *Id.* at \*3. Concluding from the circumstances that the mandate in its earlier decision in the case was limited (*id.* at \*4-6), the Court proceeded to hold that the circuit court had exceeded the mandate by allowing the plaintiffs to amend their complaint to raise a new theory of liability (*id.* at \*6).

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Here, the mandate was *expressly* limited: After noting that “[w]hile the trial court made a finding as to which arbitration provisions governed the parties’ dispute, it did not proceed to make the determinations required for declaring an adhesion contract to be unconscionable,” the Court instructed the circuit court to “evaluate the provisions of the arbitration clause *it has found to control* against the ability of Ms. Shorts to enforce here rights in connection with her claims.” *State ex rel. AT&T Mobility, LLC v. Wilson*, 703 S.E.2d 543, 551 (W. Va. 2010) (emphasis added). That expressly limited mandate left the circuit court with no more authority to evaluate the enforceability of a *different* arbitration provision than the circuit court in *Advance Stores* had to allow the plaintiffs to invoke a different theory for avoiding the limitation on their warranty.

2. On April 1, 2013, the United States Court of Appeals for the Fourth Circuit held that an arbitration provision in an employment agreement was not unconscionable, rejecting three of the arguments that petitioner Charlene Shorts raises here. *See Muriithi v. Shuttle Express, Inc.*, \_\_\_ F.3d \_\_\_, 2013 WL 1287859 (4th Cir. Apr. 1, 2013).

First, although the district court there had reasoned that a class action waiver was “one factor preventing Muriithi from fully vindicating his statutory rights” (*id.* at \*4)—akin to Shorts’ position here (*see* Pet. Br. 21-22)—the Fourth Circuit concluded that *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), foreclosed that basis for unconscionability. *Muriithi*, 2013 WL 1287859, at \*4.

Second, the plaintiff had argued that a cost-splitting provision in the arbitration clause made it prohibitively expensive for him to pursue his claims on an individual basis in arbitration. The Fourth Circuit held that he had not met his burden of establishing prohibitive costs. 2013 WL 1287859, at \*6. It went on to note that “our conclusion further is supported by [the defendant’s] agreement, at oral argument before this Court, to pay all arbitration costs if this case is referred to arbitration.” *Id.* Although it expressed qualms about the “eleventh-hour” nature of this offer, the court explained that “[a] party’s agreement to pay all arbitration costs, when made in a timely manner such as before a district court has ruled on the enforceability of the arbitration clause, moots the issue and forecloses the possibility that the opposing party could endure any prohibitive costs in the arbitration process.” *Id.* at \*6 n.10 (internal quotation marks and brackets omitted). Here, ATTM made the consumer-friendly terms of its 2006 and 2009 arbitration provisions available to all current and former customers—not just a single customer in the course of a proceeding to compel arbitration—and certainly before the circuit court had “ruled on the enforceability of the arbitration clause.” *See* Resp. Br. 1-2 & n.2. Accordingly, here, even more than in *Muriithi*, the availability of the 2006 and 2009 provisions “moots” Shorts’ contention that she should be excused from her obligation to arbitrate because of supposed defects in the 2003 and 2005 provisions.

Third, the Fourth Circuit rejected the argument—which Shorts urges here (Pet. Br. 22)—that a shortened limitations period that is not part of the arbitration provision can render the arbitration provision unenforceable. 2013 WL 1287859, at \*7. Consistent with our position

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(Resp. Br. 20), the court explained that the enforceability of the shortened limitations period presents an issue for the arbitrator to resolve. *Id.*

3. On February 27, 2013, the United States District Court for the District of Colorado granted a telephone company's motion to compel arbitration and rejected arguments similar to Shorts'. See *Vernon v. Qwest Comm'ns*, 2013 WL 751155 (D. Colo. Feb. 27, 2013). In particular, the court rejected the plaintiffs' argument that their arbitration agreements were substantively unconscionable because, among other things, the subscriber agreements of which they were part allegedly limited damages to the monthly and usage fees paid by the subscriber in the preceding month. *Id.* at \*9. Consistent with our argument (Resp. Br. 18), the court explained that, in light of U.S. Supreme Court precedent, "whether the potential recovery is limited to \$200 or less \* \* \*, as plaintiffs fear, or could be supplemented by statutory damages, as defendants argue, is a matter for the arbitrator to address. *Id.* (citing *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 405-07 (2003)). As here, the plaintiffs in *Vernon* also argued that their arbitration agreements were unenforceable because the defendant had retained the right to modify the subscriber agreement unilaterally. The court held that the arbitration agreements were not fatally illusory because, among other reasons, Qwest had to provide notice of changes on its website (*id.* at \*6-7), as ATTM did here.

4. On March 21, 2013, the United States District Court for the Northern District of California denied a plaintiff's requested discovery in connection with his attempt to resist enforcement of his arbitration agreement with ATTM. See *McArdle v. AT&T Mobility LLC*, 2013 WL 1190277 (N.D. Cal. Mar. 21, 2013). The plaintiff had sought discovery about customers' actual experience with ATTM's arbitration procedures in an effort to establish that his arbitration agreement was "substantively unconscionable and illusory" (*id.* at \*2), but the court concluded that discovery was improper for two reasons. First, information about other consumers would "not assist the court in determining whether the agreement at issue is unconscionable." *Id.* Second, requests for documents about the purported "fairness" or "unfairness" of the American Arbitration Association ("AAA") were "impermissibly vague," and in any event were "based solely on suspicion of bias in the arbitration process." *Id.* at \*3. Like the plaintiff in *McArdle*, Shorts requests discovery to establish that her arbitration agreement is "illusory" and imposes "unfair and burdensome costs." Pet. Br. 23. And as in *McArdle*, Shorts' requested discovery would not assist the circuit court, and is infected by groundless speculation of unfairness.

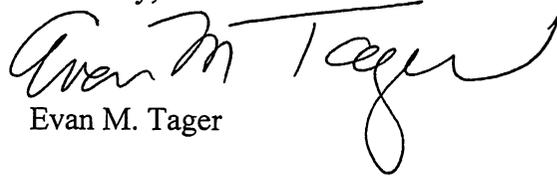
5. Courts continue to reject variations of Shorts' argument that her arbitration agreement cannot be performed due to the AAA's voluntary moratorium on administering arbitrations filed against debtors by creditors. See, e.g., *In re Checking Account Overdraft Litigation MDL No. 2036*, 685 F.3d 1269, 1283 n.20 (11th Cir. 2012); cf. *Management Group, LLC v. Baker*, 2013 WL 1314734 (D. N.J. Mar. 28, 2013) (noting that the AAA has represented that despite the moratorium it "will in fact accept debt collection matters" if a court enters an order compelling arbitration). In any event, as we have previously explained (Resp. Br. 21-22),

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the moratorium does not apply to Shorts, who in arbitration would be the filing party, initiating and pursuing claims against a creditor.

We would appreciate your bringing these recently decided authorities to the Court's attention.

Sincerely,

A handwritten signature in black ink, appearing to read "Evan M. Tager". The signature is fluid and cursive, with a large loop at the end of the last name.

Evan M. Tager

cc: Christopher J. Regan  
James G. Bordas, Jr.  
Jason E. Causey  
Thomas E. McIntire  
Jeffrey M. Wakefield  
William D. Wilmoth