11-1649

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

PALISADES COLLECTIONS LLC,

Plaintiff,

v. Civil Action No. 06-C-127

CHARLENE A. SHORTS,

Defendant/
Counterclaim Plaintiff.

v.

PALISADES COLLECTIONS, LLC,
AT&T MOBILITY, LLC, and
AT&T MOBILITY CORPORATION,

Counterclaim Defendants

ORDER DENYING DEFENDANT/COUNTERCLAIM PLAINTIFF, CHARLENE A. SHORTS' MOTION TO CLARIFY AND RECONSIDER ORDER COMPELLING ARBITRATION

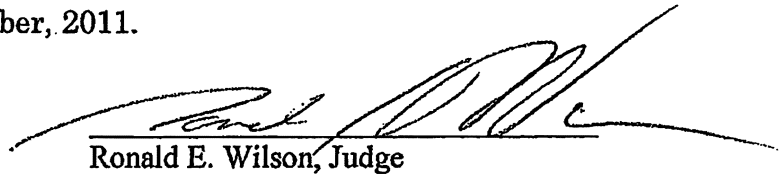
The Court, after carefully considering the arguments set forth in Shorts' Motion to Clarify and Reconsider Order Compelling Arbitration, Defendant's Opposition to Shorts' Motion, Shorts Reply in Support of Motion to Clarify and Reconsider Order Compelling arbitration, and the case of *Brown v. Genesis Healthcare Corp.*, ___ S.E.2d ___, 2011 WL 2611327 (W.Va. June 29, 2011) and after a careful consideration of the staggering consequences of the analysis of the Federal Arbitration Act by Justice Antonin Scalia in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 179 L.Ed.2d 742, 79 USLW 4279 (April 27, 2011), the Court is satisfied

that the July 25, 2011 Order granting Counterclaim Defendant's Motion to Compel Arbitration is the proper decision in this case.

Therefore, it is hereby **ORDERED, ADJUDGED** and **DECREED** that Charlene A. Shorts' Motion to Clarify and Reconsider Order Compelling Arbitration is DENIED. It is the further finding of the Court that this is a final appealable order.

Copies of this Order have been distributed to all counsel by this Court.

ENTERED this 26th day of October, 2011.



Ronald E. Wilson, Judge

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

PALISADES COLLECTIONS LLC,

Plaintiff,

v. Civil Action No. 06-C-127

CHARLENE A. SHORTS,

Defendant/
Counterclaim Plaintiff.

v.

PALISADES COLLECTIONS, LLC,
AT&T MOBILITY, LLC, and
AT&T MOBILITY CORPORATION,

Counterclaim Defendants

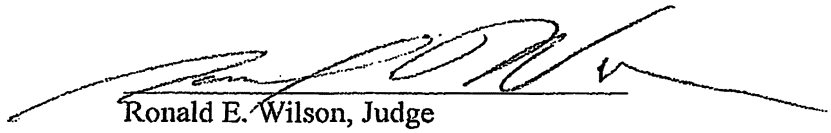
ORDER GRANTING COUNTERCLAIM DEFENANTS' MOTION TO COMPEL ABRITRATION

This matter is before the Court on Counterclaim Defendants' Motion to Compel Arbitration. Based upon the Findings of Fact and Conclusions of Law contained in this Court's Memorandum Opinion incorporated herein, it is hereby,

ORDERED, ADJUDGED and DECREED that the Counterclaim Defendants' Motion to Compel Arbitration is hereby **GRANTED**.

Copies of this Order have been distributed to all Counsel by this Court.

ENTER this 25 day of July, 2011.



Ronald E. Wilson, Judge

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

PALISADES COLLECTIONS LLC,

Plaintiff,

v. Civil Action No. 06-C-127

CHARLENE A. SHORTS,

Defendant/
Counterclaim Plaintiff.

v.

PALISADES COLLECTIONS, LLC,
AT&T MOBILITY, LLC, and
AT&T MOBILITY CORPORATION,

Counterclaim Defendants

MEMORANDUM OPINION

I decided to address in the first person the issues returned to me in this case by the Supreme Court of Appeals. I did this because it gives me more freedom to express the reasons for my findings and conclusions and the limitations on them.

Judge Charles E. Wyzanski, a Massachusetts U.S. District Court Judge, said in a 1941 Cardozo Lecture before the Association of the Bar of the City of New York that: "The ethical test of a judge is not whether his judgments run parallel to the judgments of a moralist, but whether the judge administers his office true to its traditional limitations as well as to its aspirations." He acknowledged that from the day a judge takes his seat he is aware that he is hemmed in by canons, and legitimate expectations. While he has choice, he cannot exercise it even to his own satisfaction unless it is disciplined according to standards.

I am hemmed in by the choice left to me in this case. Although our Supreme Court continues to cite Syllabus Point 1 of *Troy Min. Corp. v. Itmann Coal Co.*, 176 W.Va. 599, 346 S.E.2d 749 (1986): "Unconscionability is an equitable principle, and the determination of whether a contract or a provision therein is unconscionable should be made by the court," there is very little left in this case on the issue of unconsionability that is not preordained by what has already occurred. To be specific:

1. I have already made a finding that:

> "It is the 2005 arbitration agreement, with its consumer oriented revisions in December 2006 and March 2009, that the court finds to be the agreement that is the focus of the legal issue before the court." See, *Memorandum Opinion and Order Denying AT&T's Motion to Compel Arbitration Dec. 2009.*

2. The Supreme Court of Appeals of West Virginia has already concluded that even though the contact in issue is a contract of adhesion, that does not necessarily mean that it is invalid. Actually the court may several positive statements about the arbitration agreement:

> "Based on the limited record that is before us, it appears that this case stands in severe contrast to the concerns of legal representation; burdensome mediation costs; and nominal recovery that we articulated in *Dunlap*.
>
> Pursuant to the arbitral provisions that the trial court found to be controlling (2005 agreement plus the 2006 and 2009 modifications), Ms. Shorts bears no costs with regard to an arbitration proceeding.
>
> As to her potential recovery, the governing arbitration clause provides that there is a minimum recovery of $10,000 for any customer who is awarded more in arbitration than the last written settlement offer made by AT&T Mobility. If the arbitral award exceeds the last settlement offer extended by AT&T Mobility, the claimant has a right to double attorney's fees. This double award is in addition to any attorney's fees and expenses the customer has a right to under applicable state laws.
>
> Finally, as mentioned above, Ms. Shorts' relief is not limited by the arbitration forum as she is entitled, under the provisions the trial court found to govern, to an award that provides for all statutory and punitive relief that is available in a court. These same arbitration provisions were recently upheld by a federal district court judge. *See Wince v. Easterbrooke Cellular Corp.*, 681 F.Supp.2d 679, 685 (N.D. W.Va. 2010)."

It is also now clear that the rights given in Syllabus Point 3 of *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 567 S.E.2d 265 (2002) to West Virginia trial judges to examine arbitration contract exculpatory provisions to see if they prohibit or substantially limit a person from enforcing and vindicating rights and protections, or from seeking and obtaining statutory or common-law relief and remedies that are afforded by or arise under state law and that exists for the benefit and protection of the public are of little value to this court in this case because:

1. The arbitration agreement in issue. The issue of the alleged unconscionable adhesion contract in this case must be examined on the basis of the language of the particular contract in this case and with the specific facts surrounding this dispute. I have already addressed in this decision the positive comments made by the Supreme Court in this case about the arbitration agreement we are considering;

2. My previous findings concerning the agreement that I am considering in this dispute;

3. The limiting language found in Syllabus points 2 and 4 of Dunlap ("unless the court determines that exceptional circumstances exist that make the provisions conscionable"). That clause severely limits a judge's discretion when considering the arbitration agreement used by a company like AT&T. The nationwide use of the contract in this case is an "exceptional circumstance" that a West Virginia court cannot disregard.

4. The Supreme Court's positive comments on the AT&T arbitration agreement made in *State ex rel. AT & T Mobility, LLC v. Wilson, 226 W.Va. 572, 578, 703 S.E.2d 543, 549 (2010)*;

5. The U.S. Supreme Court decision in *A&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 179 L.Ed.2d 742, 563 U.S.___ (2011); and

6. My obligations as a circuit court judge to the highest court of this State.

In compliance with the directions of the Supreme Court of Appeals in *AT&T Mobility v. Wilson*, that I make specific findings on the issue of unconscionability that comport with the tests for unconscionability established in *Art's Flower Shop* and in *Dunlap*, I find and conclude as follows:

My application of the four-part test identified in *Art's Flower Shop* ,186 W.Va. at 614, 413 S.E.2d at 671, syl. pt. 4. - a useless test in this case except for point four - is as follows:

TEST (1): An examination of the relative position of the parties.

ANALYSIS

AT&T is a rich corporation and there is no evidence that Ms. Shorts is either rich or poor.

TEST (2): An inquiry into each party's bargaining power.

ANALYSIS

The parties are at the extremes in bargaining power. Shorts had a very limited choice in wireless service. If she wanted Cingular wireless service she had to agree to arbitration

TEST (3): Consideration of the availability of meaningful alternatives.

ANALYSIS

There was none. If Shorts wanted the phone and the service she had to agree to arbitration.

and

TEST (4): The identification of specific unfair terms in the subject contract.

ANALYSIS

Class actions, jury trials, punitive damages presented to a jury are all prohibited by the arbitration agreement and are, in my opinion, unconscionable. However the loss of these rights in an arbitration agreement have all been found by our Supreme Court of Appeals as not making the agreement facially unconscionable and do not prevent a claimant from vindicating his or her rights. After the *AT&T Mobility* decision of our Supreme Court it is very clear that standing alone, the loss of these procedural rights, even in a contract of adhesion, do not prohibit or substantially limit a person from enforcing and vindication rights and protections or from seeking and obtaining statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public, and they do not make the arbitration agreement unconscionable.

A trial judge must also consider whether the costs of arbitration are unreasonably burdensome. However, the Supreme Court has already concluded that Mrs. Shorts bears no costs with regard to an arbitration proceeding. Thus, costs are not a factor to be further addressed in this Opinion.

Therefore, the inevitable further findings of this court:

1. The contract is not unconscionable. A valid, enforceable arbitration agreement exists as a matter of law.

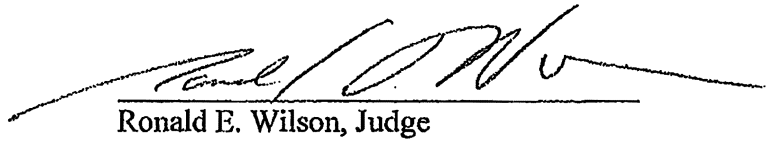
2. Relying on the law in our AT&T Mobility case, the law in *A&T Mobility LLC v. Concepcion*, the findings already made by this court and the Supreme Court of Appeals, the terms in the Arbitration Agreement in this case, the specific facts surrounding the dispute, and, of extreme importance, my duty to follow the law as interrupted by our highest State Court, I find that the applicable arbitration terms, with the continued assistance of counsel, do not prevent Ms. Shorts from addressing her claims in arbitration and enforcing her rights, as limited by our hisgest state and federal courts, in connection with her claims.

3. The costs attendant to pursuing her claims in arbitration are not unreasonably burdensome.

IT IS SO ORDERED.

An Order will be entered granting the Counterclaim Defendants' Motion to Compel Arbitration and Stay Litigation Pursuant to the Federal Arbitration Act.

Copies of this Order have been forwarded by the Court to all interested parties.



Ronald E. Wilson, Judge

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

PALISADES COLLECTIONS LLC,

Plaintiff,

v. Civil Action No. 06-C-127

CHARLENE A. SHORTS,

Defendant/
Counterclaim Plaintiff.

v.

PALISADES COLLECTIONS, LLC,
AT&T MOBILITY, LLC, and
AT&T MOBILITY CORPORATION,

Counterclaim Defendants

MEMORANDUM OPINION AND ORDER DENYING AT&T'S MOTION TO COMPEL ARBITRATION

I. INTRODUCTION

This matter is before the Court on the Motion to Compel Arbitration brought by Counterclaim Defendants AT&T Mobility LLC and AT&T Mobility Corp.

After reviewing the parties' briefs and supporting materials and reviewing, not only the applicable legal authorities but a review of several related federal and state cases, and after a review of law review articles and ALR Annotations, the Court hereby makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW.

II. PROCEDURAL HISTORY

HEREINAFTER:

A. Palisades Collections LLC ("Palisades")

B. AT&T Wireless Services, Inc. ("AWS")

C. Cingular Wireless LLC ("Cingular")

D. AT&T Mobility LLC ("ATTM")

E. West Virginia Consumer Credit and Protection Act, W. VA. CODE § 46A-1-101 et seq. ("WVCCPA")

This overly protracted saga began in February 2003, when Shorts purchased a cellular phone and wireless phone service from AWS. On or before May 6, 2003, AT&T Wireless determined that Shorts was in default on her account, terminated her service, and charged her a $175.00 early termination fee. Years later, on June 23, 2006, Palisades filed a debt collection complaint against Defendant Charlene A. Shorts in the Magistrate Court of Brooke County, West Virginia, seeking to recover Shorts' alleged debt to AWS, which Palisades had purchased from AWS.

On July 14, 2006, Shorts filed her answer and counterclaim against Palisades for violations of the West Virginia Consumer Credit & Protection Act. Shorts alleged generally the same defenses and counterclaims currently at issue—namely, that Palisades "attempted to collect interest, charges, and fees not authorized by agreement" and in violation of the West Virginia Consumer Credit and Protection Act. W.Va. Code §§ 46A-1-101, et seq.

Palisades removed the case to the Circuit Court and Shorts amended her counterclaim to add claims against an additional Counterclaim Defendant, Cingular, now known as ATTM. Her amended counterclaim includes three claims under the WVCCPA: actual damages, statutory damages (see W. VA. CODE § 46A-5-101), statutory attorneys' fees (see id. § 46A-5-104), and cancellation of her debt (see id. § 46A-5-105).

Shorts seeks to bring her claims against ATTM on behalf of a class of customers with West Virginia billing addresses. ATTM responded to Shorts' claims by filing a motion to

compel arbitration.

ATTM removed the case to the U.S. District Court for the Northern District of West Virginia under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d)(2)(A). The District Court subsequently remanded the case to this Court. ATTM appealed to the U.S. Court of Appeals of the Fourth Circuit. In December 2008, the Fourth Circuit affirmed the District Court's order remanding the case. In June 2009, the U.S. Supreme Court denied ATTM's petition for certiorari. With all proceedings in federal court at an end, ATTM's motion to compel arbitration is now ripe for this Court's resolution.

Palisades brought the collection action against Shorts as assignee of AT&T Wireless under the account number for the 2003 purchase. Although Shorts purchased a cellular phone and service with Cingular in May 2005 and entered into a new contract with Cingular, that purchase was not the subject of Palisades' 2006 suit, but it is relevant to the issue before the court because AWS was acquired by Cingular in October 2004 and renamed ATTM in January 2007. Thus, it is important to the issue of what arbitration agreement is applicable in this dispute. This issue is addressed in the argument section of this Order.

III. ARGUMENT

The issue presented by Defendant's motion is whether Shorts' contracts with AWS, Cingular and ATTM are subject to the mandatory arbitration requirements of the Federal Arbitration Act or are they exempt from the Federal Arbitration Act because Shorts' adhesion contracts-2003 and 2005- prohibit her from seeking punitive damages from a jury and prohibit class action relief, which make the contracts unconscionable under the standards announced in State ex Rel. Dunlap v. Berger, 567 S.E.2d 265 (W.Va. 2002)

Defendants rely upon the Federal Arbitration Act ("FAA"), 9 U.S .C. § 1, et seq., enacted

in 1925, in support of its motion to compel arbitration. The FAA applies to "[a] written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof ...." 9 U.S.C. § 2.

The FAA "establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution" and "calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration." Preston v. Ferrer, 128 S. Ct. 978, 981 (2008).

Congress enacted the FAA to "overcome judicial resistance to arbitration . . . and to declare a national policy favoring arbitration of claims that parties contract to settle in that matter." Vaden v. Discover Bank, 129 S.Ct., 1262, 1271 (2009). "As matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. " Drews Distrib., Inc. v. Silicon Gaming, Inc., 245 F.3d 347, 349 (4th Cir.2001) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)).

However the FAA also provides that contracts 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." Under the FAA, a claim of unconscionability is available to a party contesting the validity and enforceability of a contractual provision that requires submission of disputes to arbitration. Doctors' Associates, Inc. v. Casarotto, 517 U.S. 681, 687, 116 S.Ct. 1652, 1656, 134 L.Ed.2d 902, 908 (1996) ("generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening [the FAA].")

Although an arbitration provision may be invalidated under state law for reasons that

would apply equally to the other terms of the contract, "the uniqueness of an agreement to arbitrate" may not be raised as grounds for its invalidation under state law. Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987).

In this case, ATTM seeks to compel arbitration under the arbitration agreement Shorts accepted with Cingular in 2005, further stating that the features included in the 2006 and 2009 revisions are available to all of ATTM's customers, including Shorts

Shorts contends that the only applicable arbitration terms are those that she accepted with AWS in 2003; that both the 2005 provision she accepted with Cingular and the 2006 and 2009 revisions that ATTM made available to all current and former customers are inapplicable.

The terms and conditions of Cingular's service contract include a provision under which "Cingular and [Shorts] (such references include * * * **predecessors in interest [and] successors** * * *) agree to arbitrate all disputes and claims * * * arising out of or relating to this Agreement, ***or to any prior oral or written agreement***, for equipment or services between Cingular and [Shorts]." Thus, when Shorts was sued in 2006 by Palisades, she had the right to arbitrate her 2003 AWS phone service disagreement under the more beneficial Cingular arbitration terms.

Plaintiff's argument that only the 2003 arbitration agreement for a cellular phone and wireless phone service from AWS is relevant to the issue before the court is found to be without merit. It is the 2005 arbitration agreement, with its consumer oriented revisions in December 2006 and March 2009, that the court finds to be the agreement that is the focus of the legal issue before the court. (Cingular made the revised 2006 provision available on its website and also sent notice of the 2006 provision to its then-current customers with their December 2006 bills.)

Because of the benchmarks established in the Dunlap case, the fact that both the AWS and the Cingular contracts prohibit any form of a representative or class proceeding is of critical

importance in this case.

The fact that the AWS and Cingular terms and conditions at issue here are in standardized, pre-printed form contracts with no individualized terms relating to individual consumers does not invalidate the arbitration agreement. Neither does the fact that AWS and Cingular did not offer customers an opportunity to negotiate the terms of the agreements. If a consumer wanted AWS and Cingular phones and service the consumer had to agree to the standardized contracts. However, there were other meaningful alternatives for obtaining wireless phone services from other wireless phone providers available to Shorts.

It is the finding of the Court that the Contracts that Shorts signed to obtain wireless phone services, all on pre-printed form contracts, were adhesion contracts under West Virginia law and are subject to the legal standards set forth in Dunlap.

Although the 2005 agreement is also an adhesion contract, the arbitration agreement in issue is a lot more consumer oriented than the one signed by Shorts in 2003. For example, Cingular is to pay all of the customer's "reasonable attorneys' fees and expenses incurred for the arbitration" if the arbitrator awards relief equal to or greater than the demand. Even if the arbitrator does not award such relief, the provision does not bar the arbitrator from awarding the customer attorneys' fees and expenses under any applicable law; an arbitration must take place in the county of the customer's billing address. Counsel for ATTM also asserts that the customer can recover punitive and statutory damages to the same extent as in court, and there is no requirement that the arbitration be kept confidential.

The 2006 arbitration provision retains many of the features of the Cingular provision that Shorts accepted in 2005: Cingular will pay all arbitration fees unless the customer's claims are frivolous; the arbitrator may award the same remedies to individual consumers that a court could

award; the arbitration will take place in the county of the customer's billing address; the arbitration need not be kept confidential; and either party may bring a claim in small claims court instead of arbitration. In addition, the 2006 provision also adds three new features to encourage individual customers to pursue arbitration:

a. There is a minimum recovery of $5,000 for any West Virginia customer who is awarded more in arbitration than Cingular's last written settlement offer. (The amount of the minimum recovery varies by jurisdiction, as it is defined as the greater of $5,000 or the jurisdictional maximum for the small claims court in the county of the customer's billing address.)

b. If the arbitrator awards the customer more than ATTM's last written settlement offer but less than $5,000, ATTM is obligated to pay the customer's attorney twice the amount of attorneys' fees plus the amount of any expenses that the attorney reasonably accrued in investigating, preparing, and pursuing the customer's arbitration claim. The provision specifies that this right to double attorneys' fees "supplements any right to attorneys' fees and expenses [the customer] may have under applicable law."

c. Customers have the exclusive right to choose the manner by which the arbitration will be carried out: a customer may choose an in-person hearing, a telephonic hearing, or a "desk" arbitration in which "the arbitration will be conducted solely on the basis of documents submitted to the arbitrator."

In March 2009, Cingular (now renamed ATTM), again revised the arbitration provision applicable to its customers. The most important change was to make the minimum recovery a uniform $10,000 rather than basing it on the jurisdictional limit for the customer's local small claims court. The practical effect of the change in West Virginia is that the minimum payment increases from $5,000 to $10,000.

IV. CONCLUSIONS

For the reasons set forth below, the Court concludes that it has no choice in this matter but to rule that the 2005 arbitration provision that Shorts accepted when she obtained Cingular service, and the 2006 and 2009 arbitration provisions that are more favorable to her, are not enforceable under West Virginia law.

This is not a case of first impression. At least the principles of law that apply to the case have been previously expounded by our Supreme Court of Appeals. If this Court had the right to rule upon a clean slate, this decision might be different. But the Court is led irresistibly to the conclusion that the answer to the issue presented by AT&T's motion is found in Dunlap and this Court is obligated to follow its mandates.

Dunlap teaches that in addressing a motion to compel arbitration a trial judge must, in the first instance, determine whether a valid, enforceable arbitration agreement exists as a matter of law. The terms of the written arbitration agreement in this case clearly require the matter in dispute to be arbitrated. However, the Court cannot rule in favor of arbitration without contravening the law set forth in Dunlap. Dunlap held that the language in a retailer's purchase and financing agreement document that prohibited punitive damages and class action relief was unconscionable and unenforceable. The case specifically addressed arbitration under the FAA:

> "The Federal Arbitration Act, 9 U.S.C. Sec. 2 [1947] does not bar a state court that is examining exculpatory provisions in a contract of adhesion that if applied would prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public from considering whether the provisions are unconscionable-merely because the prohibiting or limiting provisions are part of or tied to provisions in the contract relating to arbitration."

The Dunlap court concluded that requiring arbitration in a contract of adhesion that also prohibits punitive damages and class action relief unconscionably limited the consumer's rights

and remedies. Shorts' Contracts are adhesion contracts that prohibit punitive damages (at a trial to a jury) and prohibit class actions.

The Court's reasoning in the Dunlap case is explained in a few words in footnote 17of the opinion:

> "We emphasize that the attempted avoidance of legally-required accountability for wrongdoing under the laws of West Virginia that Friedman's has attempted to accomplish with exculpatory arbitration-related provisions in a contract of adhesion in the instant case would be just as objectionable and unconscionable if that attempted avoidance arose from language that made no mention of arbitration. Also, we emphasize that our concern in the instant case is with the attempted prohibition or limitation of rights, remedies, and protections that are afforded for the benefit of the public by statutes and the common law; and we do not address the assertion, vindication, and enforcement of rights that arise purely from the contract itself. Finally, we note that Justice Neely, in Bd. of Ed. v. Harley Miller, supra, stated that arbitration clauses that were abusively included in contracts of adhesion, that were unconscionable, that were wholly inappropriate given the nature of the contract and could only have been intended to defeat just claims, or were oppressive under the circumstances, could not be held to have been truly "bargained for" and therefore should not be enforced. 160 W.Va. at 486, 236 S.E.2d at 443. This standard, applied to the facts of the instant case, also supports this Court's decision."

An argument can be made that Dunlap's facts do not make this case a fortiori to Shorts. The facts in Dunlap, as they applied to the plaintiff in Dunlap, were a lot more inexcusable than the claims of wrongdoing suffered by Shorts in this case. The arbitration provision in Dunlap was clearly unconscionable and would not, in this Court's opinion, be found to be subject to the Federal Arbitration Act if the case came before the current Supreme Court of Appeals. Dunlap was decided in 2002. In 2009 only Justice Robin Davis remains from that 2002 Supreme Court of Appeals that was generally acknowledged as a court that protected consumer rights. Gone, but not forgotten by hard working West Virginians, are Justices Starcher, Albright and McGraw.

It may very well be that our current appellate Court will follow other state courts and be

more protective of consumers than Federal Courts and hold that the national policy favoring arbitration does not mean that consumers can be abused by unconscionable terms in dispute resolution clauses. It could mean the Syllabus point 3 of Dunlap remains good law:

> "The Federal Arbitration Act, 9 U.S.C. Sec. 2 [1947] does not bar a state court that is examining exculpatory provisions in a contract of adhesion that if applied would prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public from considering whether the provisions are unconscionable merely because the prohibiting or limiting provisions are part of or tied to provisions in the contract relating to arbitration."

However, it could also mean that when faced with an arbitration agreement that is used nationwide for a product used by consumers throughout the country, where there is an obvious need for uniform treatment of those agreements throughout the country, the Court may conclude that syllabus Point 3 of Dunlap is still good law, but in the contracts before the Court and circumstances presented in this case, that the provision barring punitive damages and class actions do not unconscionably limit the consumer's rights and remedies and do not remove the arbitration agreement from the protections provided to AT&T in the Federal Arbitration Act.

Of course, that interpretation of Dunlap is reserved for our highest Court and not a state court judge. The limitations placed upon this court are clear. First, a trial court's decision concerning the law is not subject to any deferential review. Questions of law are subject to a de novo review. Therefore, when the Supreme Court considers this Court's opinion as to what law should be applied to the facts in this case, the trial court's opinion will be of no importance.

ACCORDINGLY, it is ORDERED, ADJUDGED, and DECREED that Counterclaim Defendants' Motion to Compel Arbitration and Stay Litigation Pursuant to the Federal Arbitration Act is **DENIED**. However, the litigation between Shorts and ATTM is STAYED

UNTIL MARCH 30, 2010 TO GIVE ATTM THE OPPORTUNITY TO SEEK A WRIT FROM THE SUPREME COURT OF APPEALS.

ENTERED this 1 day of December, 2009.

Ronald E. Wilson, Judge

CERTIFICATE OF SERVICE

I, Christopher J. Regan, counsel of record on appeal for Petitioner Charlene Shorts, certify that on this 22nd day of November, 2011, I served the foregoing **NOTICE OF APPEAL** with all attachments thereto via e-mail and/or by mailing a true and correct copy thereof in the United States Mail, postage prepaid, and addressed as follows:

Jeffrey M. Wakefield, Esq.
FLAHERTY SENSABAUGH & BONASSO, PLLC
200 Capitol Street
Charleston, WV 25301
Counsel for AT&T Mobility LLC

William D. Wilmoth, Esq.
STEPTOE &JOHNSTON, PLLC
PO Box 751
Wheeling, WV 26003-0751
Counsel for Palisades Collection LLC

Glenda Brooks, Circuit Clerk
Brooke County Courthouse
PO Box 474
Wellsburg WV 26070-0474

By: _____

Christopher J. Regan #8593
James G. Bordas, Jr. #409
Jason E. Causey #9482
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
(304) 242-8410 phone
(304) 242-3936 fax
CRegan@bordaslaw.com
JBordas@bordaslaw.com
JCausey@bordaslaw.com

and

Thomas E. McIntire #
82½ 14th Street
Wheeling, WV 26003
(304) 232-8600 phone
(304) 232-5719 fax
mcintire@wvdsl.net

Counsel for Petitioner, Charlene Shorts