

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

NO. 11-1649

CHARLENE A. SHORTS

Petitioner,

v.

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

Respondents.

PETITIONER'S BRIEF

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Since the correct contract fails the tests prescribed by Syllabus Point 4 of *Art’s Flower Shop, Inc. v. Chesapeake and Potomac Telephone Co.* and Syllabus Points 2 and 4 of *State ex rel. Dunlap v. Berger*, the Circuit Court’s error in failing to apply it led to the wrong result below --- the Motion to Compel Arbitration should have been denied.

In the alternative, the Circuit Court erred in failing to find that AT&T’s unilaterally re-drafted contracts were unconscionable *without allowing discovery*, since Shorts properly requested discovery so she could make a record regarding the factors for this Court’s review.

In the alternative, the Circuit Court erred in failing to find that AT&T’s unilaterally re-drafted contracts were unconscionable on the record presented.

Because Palisades has never moved to compel arbitration and chose to litigate in court, the Circuit Court erred in requiring the parties to arbitrate the claim brought by Palisades against Shorts and the counterclaim by Shorts against Palisades.

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ASSIGNMENTS OF ERROR

The Circuit Court applied the wrong contract in granting AT&T's Motion to Compel Arbitration. Instead of applying the language in the agreement out of which the case arose, and to which Ms. Shorts nominally agreed, the Circuit Court permitted AT&T to substitute language it unilaterally drafted during the litigation, to which Shorts never agreed, in clear violation of Syllabus Point 10 of *Brown v. Genesis* and basic contract principles.

Since the correct contract fails the tests prescribed by Syllabus Point 4 of *Art's Flower Shop, Inc. v. Chesapeake and Potomac Telephone Co.* and Syllabus Points 2 and 4 of *State ex rel. Dunlap v. Berger*, the Circuit Court's error in failing to apply it led to the wrong result below --- the Motion to Compel Arbitration should have been denied.

In the alternative, the Circuit Court erred in failing to find that AT&T's unilaterally re-drafted contracts were unconscionable *without allowing discovery*, since Shorts properly requested discovery so she could make a record regarding the factors for this Court's review.

In the alternative, the Circuit Court erred in failing to find that AT&T's unilaterally re-drafted contracts were unconscionable on the record presented.

Because Palisades has never moved to compel arbitration and chose to litigate in court, the Circuit Court erred in requiring the parties to arbitrate the claim brought by Palisades against Shorts and the counterclaim by Shorts against Palisades.

STATEMENT OF THE CASE

Summary

This is an appeal from an Order Compelling the Appellant, Charlene Shorts, to arbitrate her Complaint against her former cell phone carrier, Appellee AT&T Mobility, Inc., ("AT&T"). AT&T had Shorts sued by its assignee, Palisades Collections, LLC ("Palisades"), and Shorts alleged violations of the Consumer Credit Protection Act against Palisades and AT&T in a counterclaim filed in response to that debt-collection action. AT&T demanded arbitration.

The Circuit Court declined to apply the arbitration provision contained in the contract out of which the claims arose and to which Shorts nominally agreed (the "2003 contract"). The

Circuit Court likewise declined to apply the arbitration provision from a later contract, involving a different account, between Shorts and another AT&T entity (the “2005 contract”). Instead, the Circuit Court permitted AT&T to substitute new contract language it unilaterally drafted during the litigation, and to which Shorts never agreed (“the 2006 and 2009 contracts”).

The Circuit Court went on to find that the unilaterally drafted 2006 and 2009 contracts were not unconscionable under this Court’s prescribed tests, while remarking that those tests were “useless”¹ in this case, and that Shorts was bound to honor the language therein, despite never agreeing to those contracts and despite the fact that they were not even drafted until after this litigation commenced. Shorts submits that it is error for the Circuit Court to bind her to an arbitration provision *she never signed or endorsed or agreed to in any way*. Shorts further submits that she was entitled to take discovery below and that the unilaterally-imposed contracts are themselves unconscionable.

Facts and Procedural History Relevant to the Assignments of Error

In 2003, the Appellant, Charlene Shorts, purchased a cellular phone and wireless phone service from an AT&T predecessor, AT&T Wireless Services, Inc.² The phone and service were obtained pursuant to an adhesion contract that included an arbitration provision.³

In 2005, Shorts obtained another cell phone from another AT&T predecessor, Cingular Wireless. This case does not arise out of that contract.⁴ However, the existence of that contract may be material since AT&T contended that the 2005 agreement between Shorts and Cingular

¹ Memorandum Opinion at 4 (A-2). Appendix pages are designated as “(A-_)”

² Civil Complaint of Palisades Collection, LLC. (A-550).

³ 2003 AT&T Wireless Terms and Conditions (A-427).

⁴ 2005 Cingular Wireless Terms and Conditions (A-465).

superseded the 2003 agreement between AT&T and Shorts.⁵ Cingular and Shorts ceased doing business on that contract by early 2006.

In mid-2006, an assignee of AT&T, Palisades, filed a lawsuit against Shorts alleging that she failed to make certain payments required *under the 2003 contract*. Shorts answered with a defense and compulsory counterclaim alleging that the transaction out of which the suit against her arose was carried out in violation of the West Virginia Consumer Credit Protection Act in that it purported to require the payment of excessive and illegal fees.⁶ When Shorts counterclaimed, Palisades removed the case from the Magistrate Court of Brooke County to Circuit Court. Shorts later added AT&T as an additional Defendant to her counterclaim.⁷

AT&T then moved to dismiss Shorts' counterclaim. However, AT&T insisted that the governing arbitration provision was not the 2003 provision in the contract out of which the litigation arose, and to which Shorts had at least nominally agreed. Rather, *AT&T claimed that a wholly new arbitration provision written during the pendency of the Shorts litigation in 2006*⁸ controlled the outcome. After filing its first motion to compel arbitration, AT&T evidently concluded that its re-write in 2006 was unsatisfactory. It therefore wrote a new arbitration agreement in 2009 and filed a motion contending that the new agreement was controlling in this case.⁹

In 2009, the Circuit Court entered a ruling denying AT&T's request for dismissal in favor of arbitration, holding that under *State ex rel. Dunlap v. Berger*, Syl. Pt. 2, 4, 211 W. Va. 549, 550, 567 S.E.2d 265, 266 (2002), the 2006 and 2009 arbitration provisions AT&T relied on were

⁵ Motion of AT&T to Compel Arbitration and Memorandum in Support (A-26).

⁶ Shorts's original Answer and Counterclaim (citing W.Va. Code §§ 46A-1-101, et al.) (A-547).

⁷ Shorts's Amended Counterclaim (A-17).

⁸ AT&T Mobility 2006 Arbitration Provision (A-470).

⁹ AT&T Mobility 2009 Arbitration Provision (A-473).

unconscionable. The Circuit Court concluded that class action bans, without more, made the provisions unconscionable. Since the Circuit Court believed a class-action ban was *per se* unconscionable, the other issues raised by Shorts were lightly analyzed or not analyzed at all.¹⁰

AT&T Mobility sought a writ of prohibition and this Court took that writ up, but “limited [its] consideration in this proceeding to the issue of whether the absence of class wide arbitration in a consumer arbitration agreement renders the arbitration agreement unconscionable *per se* under West Virginia law.” *State ex rel. AT&T Mobility LLC v. Wilson*, 226 W.Va. 572, 703 S.E.2d 543 (2010). This Court found that the presence of a class action ban and consumer arbitration agreement did not compel a finding of unconscionability and remanded the case for further consideration by the Circuit Court. *Id.*

On remand, Judge Wilson heard additional briefing from the parties and then entered a highly unusual order. Judge Wilson indicated that he would issue his order “in the first person” in order to give himself “more freedom to express the reasons for [his] findings and conclusions and the limitations on them.” Memorandum Opinion dated July 25, 2011 at 1. Judge Wilson stated his belief that the analysis this Court ordered him to conduct was circumscribed and his conclusions foreordained by what had gone before and this Court’s decision in *Wilson, supra*. *Id.* at 2-5. While making the findings required by this Court’s remand opinion, Judge Wilson indicated his view that the test prescribed was largely “useless” in this case.¹¹ Judge Wilson reiterated his view that the 2006 and 2009 contracts, unilaterally drafted by AT&T during the litigation applied and further concluded that this Court’s favorable comments on those contracts required him to uphold them. *Id.*

¹⁰ See, Order of December 1, 2009, at 5 (A-135).

¹¹ Memorandum Opinion at 4 (A-5).

A month before Judge Wilson made his decision; this Court issued its opinion in *Brown v. Genesis Healthcare Corp.*, __W.Va.__, __ S.E. 2d __, 2011 WL 2611327, (2011), *rev'd on other grounds by, Marmet Health Care Center, Inc. v. Brown* __ S.Ct. __, 2012 WL 538286 (2012). Since Judge Wilson had not cited *Brown* in his decision, Shorts sought reconsideration in light of the detailed syllabus points of *Brown*, including in particular Syllabus Point 10,¹² declaring that only a “clear and unmistakable” writing could serve as a basis for compelling arbitration. Judge Wilson denied reconsideration in an order dated October 26, 2011. While stating that the compunction he was under from prior events and rulings was “staggering,” Judge Wilson declined to make any specific findings of fact or conclusions of law applying the syllabus of *Brown* despite Appellant’s vehement contention that the new syllabus points of *Brown* made it more clear than ever that AT&T was not entitled to the breathtaking power to rewrite arbitration contracts at will and impose new terms on its customers without their consent.

Finally, and perhaps dispositively, during the pendency of this matter, the supposed arbitral forum for the AT&T provisions, the American Arbitration Association, imposed a moratorium on this type of arbitration being conducted under its rules. On July 27, 2009, due to concerns about the adequacy of protections for consumers, the American Arbitration Association announced its decision not to accept new consumer debt-collection arbitration cases effective immediately. The Association said the following matters are included in the moratorium:

¹² The Court in *Marmet Health* took issue with syllabus point 21 of *Brown* but had no issue with the established principle set out in syllabus point 10. *Cf. Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1773-75 (2010) (holding that arbitration under the FAA is strictly limited to what both parties consented to and rejecting the rights of courts, arbitrators or parties to add or modify the procedures of arbitration without an agreement by the parties to be charged); *State ex rel. City Holding Co. v. Kaufman*, 216 W.Va. 594, 598, 609 S.E.2d 855, 859 (2004) (*per curiam*) (“Parties are only bound to arbitrate those issues that by clear language they have agreed to arbitrate; arbitration agreements will not be extended by construction or implication.”).

- Consumer debt collections programs or bulk filings
- Individual case filings in which:
- The company is the filing party and,
- The consumer has not agreed to arbitrate at the time of the dispute and,
 1. The case involves a credit card bill or,
 2. The case involves a telecom bill, or
 3. The case involves a consumer finance matter.¹³

Ms. Shorts' case is within these parameters. The moratorium is still in effect.¹⁴ Ms. Shorts raised this issue with the Circuit Court, pointing out that the arbitral forum does not exist, but the Circuit Court did not address the issue.

Ms. Shorts has therefore appealed.

SUMMARY OF THE ARGUMENT

A. The 2006 and 2009 contract language cannot be applied since Shorts did not consent to it.

This Court stated in *Brown* that

Under the Federal Arbitration Act, 9 U.S.C. § 2, parties are only bound to arbitrate those issues that by clear and unmistakable writing they have agreed to arbitrate. An agreement to arbitrate will not be extended by construction or implication.

Id. at Syl. Pt. 10. West Virginia law is not to the contrary:

we hold that a court may not direct a nonsignatory to an agreement containing an arbitration clause to participate in an arbitration proceeding absent evidence that would justify consideration of whether the nonsignatory exception to the rule requiring express assent to arbitration should be invoked.

Syl. Pt. 3, State ex rel. United Asphalt Suppliers, Inc. v. Sanders, 204 W. Va. 23, 28, 511 S.E.2d 134, 139 (1998). AT&T has attempted an end-run around *Brown* and *United Asphalt* in this case

¹³ American Arbitration Association Moratorium on Consumer Debt Collection Actions (A-475).

¹⁴ See, <http://www.adr.org/sp.asp?id=24714> & <http://www.adr.org/sp.asp?id=36427>, visited on February 23, 2012.

by arguing that once a customer has signed an arbitration agreement with AT&T or one of its related companies, AT&T has the power to re-draft the language at any time and make new, unconsented-to language enforceable against its customers. The Circuit Court explained how AT&T bound Shorts to the new agreements as follows: “*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.*”¹⁵

AT&T therefore contended, and the Circuit Court accepted, that AT&T can unilaterally modify its arbitration contracts and bind others to new contracts simply by posting new language on websites and mailing it out. Shorts was not a current customer and received no mailing, but this is evidently immaterial “in AT&T’s view,” as is her lack of consent. Such unilateral contract formation is anathema to *Brown* and decades of West Virginia contract law.

In asserting the modification of the contract, the defendant has the burden of proof. He must show that the partnership and the plaintiff definitely agreed to the change. This burden is not sustained, as a matter of law, by merely showing the failure of plaintiff to protest the change. 13 C. J. p. 762, § 950.

Monto v. Gillooly, 107 W. Va. 151, 147 S.E. 542, 543 (1929); *see also, Bischoff v. Francesa*, 133 W. Va. 474, 489, 56 S.E.2d 865, 873-74 (1949) (“a party bears the burden of providing “clear and positive evidence” that there was a meeting of the minds on the alteration”); *Troy Min. Corp. v. Itmann Coal Co.*, 176 W. Va. 599, 606, 346 S.E.2d 749, 755 (1986) (same); *see also, Brown, supra*, (“Even though arbitration is favored, “there still must be an underlying agreement between the parties to arbitrate.”), *citing Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 501 (4th Cir.2002).

Here, there is not even any pretense of a meeting of the minds, much less proof. AT&T simply alleges, and the Circuit Court without analysis accepts, that posting new terms on its

¹⁵ Order of December 1, 2009, at 5 (A-135).

website and mailing them to some customers makes those new terms a binding contract on all past and current customers.

The Circuit Court's decision is thus wholly contrary to fundamental contract principles and long-standing case law and major holdings of the *Brown* decision. Allowing unilateral, unconsented-to modifications of consumer contracts to be imposed by companies like AT&T would make a mockery of consumers' rights.

B. The Circuit Court should have found that the 2003 contract and 2005 contracts were unconscionable and denied the Motion to Dismiss because they fail the test prescribed by *State ex rel. Dunlap v. Berger*.

This Court's landmark decision in *State ex rel Dunlap v. Berger* stated in its syllabus that:

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 are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable.

And:

Provisions in a contract of adhesion that if applied would impose unreasonably burdensome costs upon or would have a substantial deterrent effect upon a person seeking to enforce and vindicate rights and protections or to obtain 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, are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable. In any challenge to such a provision, the responsibility of showing the costs likely to be imposed by the application of such a provision is upon the party challenging the provision; the issue of whether the costs would impose an unconscionably impermissible burden or deterrent is for the court.

Dunlap, Syl. Pt. 2, 4, 211 W. Va. 549, 567 S.E.2d 265. Here, Shorts is attempting to pursue precisely such "rights, remedies and protections"—those afforded to her under a remedial act dedicated to the protection of West Virginia consumers.

The legislature in enacting the West Virginia Consumer Credit Protection Act, West Virginia Code, 46A-1-101, et seq., 1974, decided to eliminate the practice of including unconscionable terms in consumer agreements covered by the act....

Syl. pt. 2, *U.S. Life Credit Corp. v. Wilson*, 171 W.Va. 538, 301 S.E.2d 169 (1982). With these principles in mind, the Court must first determine *whether* the contract at issue is a contract of adhesion and, if so, closely scrutinize the arbitration provisions for fairness and even-handedness.

AT&T conceded that its contracts are all contracts of adhesion and the trial court agreed.¹⁶ A great disparity of bargaining power existed between the parties, as the trial court also found (“the parties are at the extremes in bargaining power”).¹⁷ Moreover, Shorts had no meaningful choice; the deal was take-it-or-leave-it.¹⁸ The Circuit Court found that “[c]lass actions, jury trials, punitive damages” are all prohibited by the arbitration provision.¹⁹ Moreover, the arbitration provision voids the fee-shifting provision of the WVCCPA²⁰ and vitiates the statutory penalty scheme.²¹ Furthermore, the provision provides one-sided access to the courts in violation of *Ashland Oil, Inc. v. Donahue*, 159 W. Va. 463, 470, 223 S.E.2d 433, 438 (1976), among other pertinent cases.²² This case is a perfect example of a one-sided access provision, as AT&T is allowed to sue (and have its assignees sue) Shorts, while Shorts’ counterclaims are subject to the restrictive arbitration provision. *Id.*; *cf. Arnold v. U.S. Lending Corp.*, 204 W.Va. 229, 234-35, 511 S.E.2d 854, 859-60 (1998). Shorts is, of course, the *Defendant* below.

¹⁶ Memorandum Opinion at 3 (A-4).

¹⁷ *Id.* at 4 (A-5).

¹⁸ *Id.*

¹⁹ *Id.* at 5 (A-6).

²⁰ 2003 AT&T Wireless Terms and Conditions at 30 (A-457); 2005 Cingular Wireless Terms and Conditions at 4 (A-468); *cf.* W.Va. Code § 46A-5-104.

²¹ 2003 AT&T Wireless Terms and Conditions at 29-30 (A-456-57); 2005 Cingular Wireless Terms and Conditions at 3 (A-467); *cf.* § 46A-5-101(1).

²² 2003 AT&T Wireless Terms and Conditions at 30, § 5(a) (A-427).

These wholesale exculpations of AT&T contained in the applicable provision make it unenforceable under *Dunlap*, *Arnold*, *Ashland Oil* and *Brown*. Since this is not reasonably open to question, AT&T is forced to rely on the contention addressed above, that it may unilaterally alter its contracts without consent, a meeting of the minds or any contract formation formalities whatsoever, so as to make its 2006 and 2009 re-writes applicable in this case. Since that effort fails, a finding of unconscionability as to the arbitration provisions that apply is required.

C. Shorts was entitled to discovery.

Shorts sought the right to take discovery to establish that the allegedly “consumer-friendly” 2006 and 2009 arbitration provisions were anything but, and that the practical experience under those provisions would show that they were every bit as exculpatory and unfair in application as the 2003 and 2005 provisions.²⁵ Multiple decisions of this Court prescribe a detailed inquiry for the trial court to perform on unconscionability. In fact, this Court has cautioned litigants to develop a record on this issue so this Court has the key facts before it on review. *See e.g., Brown, supra*, at 75 of slip opinion; *Wilson*, 226 W.Va. at 580, 703 S.E.2d at 551.

In fact, in this very case, this Court noted that “this Court takes no position on whether the contractual provisions at issue are unconscionable. Given the undeveloped record on the issue, such a determination cannot be made.” *Id.* at n. 22. But instead of allowing the parties to develop that record on remand, Judge Wilson denied discovery. Thus, if this Court were to conclude that Ms. Shorts had not met her burden to show unconscionability, a remand to allow her discovery limited to that issue would be the correct result.

²⁵ *See, e.g.,* Shorts’s Motion to Reconsider Applicable Arbitration Provision at 8-9 (A-153-54); Shorts Proposed Order at 15-17 (Feb. 28, 2011) (A-224-26); Shorts Reply to AT&T’s Proposed Order at 1-3 (“In sum, this case will be before the Supreme Court of Appeals again. *Shorts respectfully asks that there be discovery and development of a fact record before it does*”) (A-321-23).

D. The 2006 and 2009 revisions were unconscionable as well and should not have been enforced for that reason.

AT&T's 2006 and 2009 "consumer-friendly" arbitration provisions are a mirage. The provisions are cleverly drafted to make it appear as though large premiums will be available to prevailing consumers in the cases. However, what those provisions give with the right hand, they take away with the left, as a series of procedural mechanisms allow AT&T to avoid paying more than a little over \$100 even to the most intrepid customers. As *Steiner v. Apple Computer, Inc.*, 556 F. Supp. 2d 1016 (N.D. Cal. 2008), held, the Premium and Attorney Premium are illusory. Specifically, the court noted:

AT&T need not settle in full with all or most plaintiffs, but need only do so with a *certain percentage* of plaintiffs, denying them the Premium. At some percentage point, other AT&T customers, who have not yet sought arbitration, would believe the only likely potential recovery available through arbitration would be the \$114.95, but not the Premium. Without the premium as an inducement to arbitrate, these consumers would only make the allegedly minimal effort to arbitrate, if they had the time, resources, or inclination to seek the \$114.95, by itself... *[A]s a practical matter, the Premium is illusory.*

Id. at 1030 (emphasis supplied). Essentially, AT&T offers the premiums to induce courts to force cases into arbitration, but then avoids paying any premiums by using various escape clauses in the contract. Once it is clear that the premiums are illusory, no further arbitrations will be pursued. The Circuit Court took absolutely no notice of these facts and made no findings on the issue at the same time it denied Shorts discovery as set forth above. Upon review by this Court, Shorts submits that either fair discovery or an outright finding that the 2006 and 2009 agreements are illusory should be the result.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Shorts believes that this case should be set for oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure because (1) this case involves issues of fundamental public importance, including whether a party to litigation, such as AT&T, can re-write an

unconscionable consumer contract during the litigation and enforce it against a consumer without notice or consent; and (2) there are conflicting opinions among the lower tribunals.

ARGUMENT

I. The 2006 and 2009 provisions were improperly applied, since Shorts never agreed to them, they were prepared during the litigation, and the case does not arise out of them, and therefore the Circuit Court committed reversible error.

A. Arbitration is a matter of consent, and it is error to force any person to arbitrate based on language to which they did not consent.

In *Brown*, this Court held that “under the Federal Arbitration Act, 9 U.S.C. § 2, parties are only bound to arbitrate those issues that by clear and unmistakable writing they have agreed to arbitrate. An agreement to arbitrate will not be extended by construction or implication.” *Id.* The 2006 and 2009 provisions are “writings,” in the barest sense – AT&T wrote them. But there is nothing in the record to suggest that Shorts *ever agreed to either of them*, explicitly or implicitly and in fact, the case was already in litigation when AT&T purports to have re-written the applicable agreements. Shorts never signed or endorsed in any way the 2006 or the 2009 arbitration provisions and AT&T does not contend otherwise.

As this Court explained in *Brown*:

“[P]arties are only bound to arbitrate those issues that by clear language they have agreed to arbitrate; arbitration agreements will not be extended by construction or implication.” A party must clearly assent to arbitration before it can be forced into arbitration and denied access to the courts. State law governs the determination of whether a party agreed to arbitrate a particular dispute.

Brown, supra, at 37-38 of slip opinion (internal footnotes omitted). AT&T’s 2006 and 2009 provisions were never consented to by Shorts and therefore cannot be applied.

Shorts’ lack of consent to the provisions the Circuit Court applied, is, without more, sufficient to warrant reversal of the Circuit Court’s conclusion that those provisions are

applicable in this case and to require detailed findings on the unconscionability of the 2003 and 2005 provisions.

The provisions the Circuit Court found applicable *did not even exist* at the time AT&T Wireless terminated Shorts's service — let alone the time at which Shorts purchased such services. *See, Arnold.*, 511 S.E.2d at 859-60 (determining unconscionability “under the circumstances existing at the time the conduct occurs or . . . at the time of the making of the contract.”). In fact, neither the 2006 or 2009 arbitration provisions existed at the time Palisades brought suit against Shorts or when she first asserted the defenses and counterclaims at issue. Shorts was already locked in litigation at the time these new provisions were drafted and it would be manifest injustice to permit any party to litigation to simply draft new contract terms to be applied to long-past transactions as litigation progresses.

AT&T has successfully pressed the heretofore unknown theory that its adhesion contracts are so flexible that they permit AT&T to rewrite its contracts with its customers at will. Moreover, according to AT&T, the modifications *are retroactive*, taking effect without consent, or even actual notice to its customers. Such a doctrine is wholly alien to the contract law of the State of West Virginia, which requires not only the substantive meeting of the minds that is the *sine qua non* of all contract formation, but also the required formalities. *See, Monto* 107 W.Va. 151, 147 S.E. 542, 543; *Bischoff v. Francesa*, 133 W. Va. at 489, 56 S.E.2d at 873-74; *Troy Min. Corp.*, 176 W. Va. at 606, 346 S.E.2d at 755; *Brown, supra*, Syl. Pt. 10.

Finally, the idea that because AT&T's unilateral modifications purport to sanitize the 2003 and 2005 provisions of their unconscionable nature does not improve AT&T's position. Indeed, the *Dunlap* court rejected the notion firmly. There, like here, the defendant attempted to cure an unconscionable arbitration provision by waiving or changing the offending terms after

litigation ensued. This Court called that tactic an effort to “sanitize” an arbitration agreement after the fact: “We think a court doing equity should not undertake to sanitize any aspect of the unconscionable contractual attempt.” 567 S.E.2d at 283-84. Certainly the litigant may not do unilaterally what the Court itself would not be permitted to do. *Cf. Paetzold v. AT&T Mobility Corp., et. al.*, Ohio County Civil Action No. 07-C-272 (W.Va. Cir. Ct., Dec. 26, 2007) (concluding, in a nearly identical case against the same defendant involving the same AT&T/Cingular contracts, that the arbitration provision within the four corners of the service agreement that was in effect is the one that controls) (A-539); *Kinkel v. Cingular Wireless, LLC*, 857 N.E.2d 250 (Ill. 2006) (finding “the original arbitration clause should be the focus of the unconscionability analysis”).

Other Courts have reached the same conclusion – corporations cannot unilaterally re-write and adjust their arbitration contracts as litigation progresses – contracts will be applied as they were written, when they were entered into. In *Murray v. United Food & Commercial Workers Int’l Union*, 289 F.3d 297, 304 (4th Cir. 2002), the court concluded, “The arbitration agreement is unenforceable as written and [the defendant] may not rewrite the arbitration clause and adhere to unwritten standards on a case-by-case basis in order to claim that it is an acceptable one.” *See also, Tillman v. Commer. Credit Loans, Inc.*, 655 S.E.2d 362, 372 (N.C. 2008) (“[I]t is inappropriate to rewrite an illegal or unconscionable contract . . . [B]ecause the underlying concern is whether individuals, upon reading an arbitration agreement, will be deterred from bringing a claim, courts must consider the agreement as drafted.”).

This Court should firmly reject AT&T’s claim of an unrestrained power to unilaterally modify its “agreements” with customers as contrary to *Brown*, *Arnold* and basic contract law cases like *Bischoff*.

B. Shorts preserved at all relevant times her position that only the 2003 provision applied to this case.

Throughout this litigation, both before and after the extraordinary writ proceeding, Shorts has preserved her position that the 2006 and 2009 arbitration agreements cannot be validly applied to her. In 2008, in her response to Defendants' Motion to Compel Arbitration, she argued that "The 2005 and 2006 Arbitration Provisions Are Not Applicable And Should Be Disregarded."²⁷ Shorts submitted a proposed order to Judge Wilson in 2009, before he ruled on the original Motion to Compel Arbitration, specifically refusing to apply the 2005, 2006 and 2009 provisions.²⁸ In his order denying the Motion to Compel Arbitration in 2009, Judge Wilson specifically referenced: "Plaintiff's"²⁹ argument that only the 2003 arbitration agreement . . . is relevant to the issue before this Court . . ."³⁰ In responding to AT&T's Petition for a Writ of Prohibition, Shorts specifically argued that AT&T's revisions to its arbitration provisions should not be considered ("There is no legal doctrine that would allow AT&T to rescue an unconscionable arbitration clause after the fact by unilaterally modifying the agreement").³¹ On remand, Shorts again opposed arbitration and argued that the revisions be disregarded; Shorts filed a specific motion for a decision on that issue which was never ruled on.³² Shorts filed an additional motion for reconsideration, again raising her objection to the application of AT&T's

²⁷ Shorts' Response in Opposition to Motion of AT&T to Compel Arbitration at 5 (A-54).

²⁸ Shorts' Proposed Order at 10-11 (August 31, 2009) (A-118-19).

²⁹ While Shorts is not the 'Plaintiff' below, Judge Wilson clearly means Ms. Shorts in this passage.

³⁰ Order of December 1, 2009, at 5 (A-139).

³¹ *Id.* at pp. 10-13. *See also*, Shorts Response to Rule to Show Cause at 12-16 ("In no way, shape, or form does this test leave wiggle room for AT&T to resuscitate its unconscionable arbitration clause with after-the-fact revisions.") (A-577-81).

³² Shorts's Motion to Reconsider Applicable Arbitration Provision (A-146).

revised agreements³³ and noting the Circuit Court's failure to address the issue, which was denied.³⁴

Accordingly, the record is clear that Shorts has, at every stage, objected to the application to her of an arbitration contract which she did not sign, to which she never agreed and which was written by AT&T after these issues began to be litigated in 2006. In a footnote in *Wilson, supra*, this Court stated that Shorts' counsel conceded at oral argument that Shorts did not object to the application of the 2006 and 2009 documents drafted by AT&T. As the above made clear, this footnote does not accurately set forth Ms. Shorts' position.

Moreover, the webcast of the oral argument happened to be recorded and transcribed and the colloquy on that issue is to the opposite effect:

JUSTICE McHUGH: Did you -- in reference to that 2003 -- and, certainly, Judge Wilson accepted the 2005. You argued initially -- and I see references in here -- that you wanted to go under the 2003 agreement.

MR. REGAN: Well, it was our thought that the agreement out of which the dispute arose was the controlling agreement.

JUSTICE McHUGH: Did you -- go ahead. Did you object then to his finding that the 2005 was applicable?

MR. REGAN: Well, begging your pardon, Justice McHugh, Judge Wilson actually applied the '06 and '09 versions.

JUSTICE McHUGH: Well, I can read the --

MR. REGAN: And we absolutely objected to that. In fact, had we not prevailed, we would have sought relief from Judge Wilson.

CHIEF JUSTICE DAVIS: That's not what he asked you. He asked you if you all objected when Judge Wilson didn't apply the 2003 agreement.

MR. REGAN: *Yes, yes. Yes, we did.*

CHIEF JUSTICE DAVIS: And where do we find that?

MR. REGAN: Well, you would find that in the briefs that were before Judge Wilson before he decided the issue, which should be part of the record here.³⁵

³³ Shorts Motion to Clarify and Reconsider Order Compelling Arbitration (A-401).

³⁴ Order entered October 28, 2011 (A-8).

³⁵ Exhibits A & B to Shorts's Motion to Reconsider Applicable Arbitration Provision (Tr. of oral argument of September 8, 2010 and audio recording of same) (A-155). The transcript reflected Justice Davis' remark that counsel was speaking too quickly to be understood in the acoustics of the courtroom, and this perhaps accounted for the miscommunication.

And as reflected above, the briefing indeed showed the strong objection of Shorts to the application of any agreements other than the 2003 agreement as stated by counsel. In fact, Justice McHugh's original statement that "I see references in here -- that you wanted to go under the 2003 agreement" was the correct statement of Shorts' position.

In any event, the 2009 proceeding was on original jurisdiction and not an appeal. As the prevailing party below, Ms. Shorts could not seek extraordinary relief from the reasoning resulting in an order in her favor. Nonetheless, she aggressively argued her position that AT&T could not impose its rewritten positions and that the Circuit Court should not have permitted them to be applied. Moreover, the question of what arbitration agreement applied was beyond the scope of this Court's inquiry as set forth by this Court when it stated: "we limited our consideration in this proceeding to the issue of whether the absence of class wide arbitration in a consumer arbitration agreement renders the arbitration agreement unconscionable *per se* under West Virginia law." *Wilson*, 226 W.Va. at 577, 703 S.E.2d at 548. Accordingly, the issue is properly preserved for review at this time.³⁶

II. The 2003 contract provision that should have been applied fails the conscionability test because it is exculpatory and clearly designed to prevent consumers from vindicating important statutory rights. The 2005 provision fails for substantially the same reason.

A. The 2003 and 2005 contracts are adhesion contracts.

The contracts at issue here are, by their nature, adhesion contracts and this is undisputed.³⁷ They are standardized, pre-printed form contracts. The contractual terms for the

³⁶ See also, *Wilson, supra*, at n. 20. In the final analysis, this Court was explicit that it was not reaching the issue of what contract properly applied, stating "This Court does not address the issue of which agreement is controlling, finding that the issue is not properly before us." *Id.* at 580, 551.

³⁷ As to the 2003 AT&T Wireless contract, AT&T hasn't even attempted to defend its terms either here or before the Circuit Court. Shorts maintains that her 2005 contract with Cingular did not contemplate or replace her 2003 contract with AT&T Wireless, but the difference between

2003 AT&T Wireless Service Agreement are simply included within an instruction booklet that dedicates its first twenty pages to explaining how to use the cellular phone and the service. As far as AT&T is concerned, the contract does not even need to be accepted in writing. AT&T presumes a consumer's acceptance via use of service, acceptance of any benefit, or payment.³⁸ Moreover, the terms and conditions of these form agreements are not negotiable and are offered on a take it or leave it basis.

IF YOU DO NOT AGREE WITH THESE TERMS AND
CONDITIONS...DO NOT USE THE SERVICE OR DEVICE
AND NOTIFY US IMMEDIATELY TO CANCEL SERVICE

(*Id.*) Because AT&T's agreements are adhesion contracts, the arbitration provisions must survive close scrutiny for unconscionability or else they are unenforceable.

B. The 2003 and 2005 provisions are exculpatory and designed to prevent the vindication of important statutory rights.

1. The 2003 and 2005 provisions interfere with the right to attorney's fees under the WVCCPA.

In *Dunlap*, this Court went out of its way to say:

We do observe that, entirely independent of the arbitration issue, a provision in a contract of adhesion that would operate to restrict the availability of an award of attorney fees to less than that provided for in applicable law would, under our decision today, be presumptively unconscionable.

Dunlap, 211 W. Va. at 567, n. 15, 567 S.E.2d at 283.

AT&T's 2003 and 2005 agreements did just that. The 2003 AT&T Wireless arbitration provision states that "each party will bear the expense of its own counsel, experts, witnesses and

the arbitration provisions of those contracts are not significant with respect to the issues briefed here. As set forth below, Judge Wilson refused to allow discovery on what contract should apply, while actually receiving into the record affidavits of un-cross-examined testimony from AT&T executives.

³⁸ 2003 AT&T Wireless Terms and Conditions at 21 (A-427).

preparation and presentation of evidence at the arbitration.”³⁹ Likewise, the 2005 Cingular arbitration provision also limits the availability of attorney fee awards: “If the arbitrator grants relief to you that is equal to or greater than the value of your Demand, Cingular shall reimburse you for your reasonable attorneys’ fees and expenses incurred in arbitration.”⁴⁰ The Consumer Protection Act has no such requirement for recovering attorneys’ fees. Under *Dunlap*, these restrictions on remedies are unconscionable as a matter of law.⁴¹

2. The 2003 and 2005 provisions prevent an award of punitive damages.

Dunlap also made it clear that prohibiting punitive damages was unconscionable as it would clearly deprive the victim of an important remedy provided by law to deter wrongdoing:

In the instant case, the intended effect of the “no punitive damages” provision that is included in Paragraph 14 of Friedman's purchase and financing agreement document is that *every Friedman's customer* is deprived of their right to invoke and employ an important remedy provided by law to punish and deter illegal, willful, and grossly negligent misconduct-and that Friedman's would be categorically shielded from any liability for such sanctions, regardless of Friedman's level of wrongdoing

Id. at 562, 278. But the 2005 and 2003 agreements exist for just that purpose and prevent the award of punitive damages and statutory penalties that are punitive in nature.⁴²

The arbitration provisions within the 2003 and 2005 form agreements prohibit punitive damages by incorporating other provisions of the form agreements.⁴³ AT&T’s attempt to strip West Virginians of these important, substantive remedies must fail under *Dunlap*.

³⁹ 2003 AT&T Wireless Terms and Conditions at 30, § 5(c) (A-457).

⁴⁰ 2005 Cingular Wireless Terms and Conditions at 4 (A-468).

⁴¹ Both the 2003 and 2005 contracts also require the consumer to pay AT&T’s attorneys’ fees incurred in enforcing the contract and collecting any debt. (2003 AT&T Wireless at 29, § 4(b) (A-456) & 2005 Cingular Wireless at 2 (A-466)). These provisions like the early termination fees violate WV Code § 46A-2-115.

⁴² Although AT&T at this stage of the litigation argues that Shorts is not seeking punitive damages, this is merely misdirection. Shorts is indisputably seeking statutory penalties and *Dunlap* expressly included statutory penalty damages within its “no punitive damages” analysis. Thus, AT&T’s agreement runs plainly afoul of *Dunlap* once again.

3. The 2003 and 2005 provisions create one-sided access to the courts.

In *Arnold*, this Court held, “Where an arbitration agreement entered into is part of a consumer loan transaction and contains a substantial waiver of the borrower’s rights, including access to the courts, while preserving the lender’s right to a judicial forum, the agreement is unconscionable and, therefore, void and unenforceable as a matter of law.” Syl. pt. 4, *Arnold*, 511 S.E.2d 854 (1998). Similarly, in *Dunlap*, this Court determined that arbitration provisions in a consumer loan agreement were unconscionable where they preserved for the lender its “primary [contractual] enforcement tools” while effectively denying the use of the courts to the borrowers for their most important remedies. *Dunlap*, 211 W. Va. 549, n. 12, 567 S.E.2d 265. As in *Arnold*, the court held the arbitration provisions unconscionable and unenforceable. *Id.*

Here, AT&T’s arbitration clause accomplishes the same kind of one-sided result. If enforced as written, the arbitration provisions keep the courts open for AT&T but effectively closed to Shorts. Specifically, the AT&T Wireless contract requires arbitration of all claims broadly construed but carves out the following exceptions:

- (1) you may take claims to small claims court if they qualify for hearing by such a court, or
- (2) you or we may choose to pursue claims in court if the claims relate solely to the collection of any debts you owe to us.⁴⁴

Thus, the agreement purports to allow AT&T to bring to court any type of collection action on consumer accounts, but it prevents Shorts from pursuing in court most, if not all, economically

⁴³ 2003 AT&T Wireless Terms and Conditions at 30, § 5(b)(“an arbitrator may not award relief in excess of or contrary to what this Agreement provides...”) (A-457); *Id.* at 29, § 4(a)(“We ... are not liable for any incidental, punitive or consequential damages”) (A-456); 2005 Cingular Wireless Terms and Conditions at 3 (Cingular shall not be liable for any ... punitive ... damages) (A-467).

⁴⁴ 2003 AT&T Wireless Terms and Conditions at 30, § 5(a) (A-457).

justifiable actions against AT&T. That is, any action seeking money from AT&T in excess of small-claims-court jurisdiction.

While AT&T has no reason to sue its customers other than to collect a debt, and thus it may pursue its claims in court, nearly all consumer claims, including those detailed in the Counterclaim here, would be prohibited by the arbitration provisions. This arrangement is nothing less than predatory. Because creditors may not reserve access to the courts to the exclusion of their customers, AT&T's arbitration provisions are unconscionable and unenforceable as a matter of law.

This type of one-sided access to the Courts was decried in *Arnold* and the doctrine traces its roots to the original case on this topic: *Ashland Oil v. Donahue, supra*. AT&T should not be permitted to use this predatory type of arrangement in any contract in West Virginia.

4. The 2003 and 2005 provisions ban class actions.

This Court held in this case, that “[s]tanding alone, the lack of class action relief does not render an arbitration agreement unenforceable on grounds of unconscionability under this Court’s decision in *Dunlap*.” *Wilson*, 226 W.Va. at 579, 703 S.E.2d at 550. The Court went on to reverse Judge Wilson’s initial ruling because of the Circuit Judge’s decision to rely entirely on the class action ban, and his concomitant failure to do the balance of the analysis required by this Court’s case law.⁴⁵

⁴⁵ The trial court made no findings as to the four-part test we articulated in *Art's Flower Shop*. See 186 W.Va. 613, 413 S.E.2d 670, syl. pt. 4. Similarly, while relying on *Dunlap* as the basis for its ruling, the trial court failed to rule on whether the applicable arbitration terms prevent Ms. Shorts from vindicating her rights and whether the costs attendant to pursuing her claims in arbitration are unreasonably burdensome. See *Dunlap*, 211 W.Va. at 550–51, 567 S.E.2d at 266–67, syl. pts. 2, 4. When this matter is returned to the circuit court, the trial court should evaluate the provisions of the arbitration clause it has found to control against the ability of Ms. Shorts to enforce her rights in connection with her claims.²³”

Wilson, 226 W. Va. at 580, 703 S.E.2d at 551.

However, in the context of the broad exculpatory provisions detailed above, the class action ban weighs in favor of a finding of unconscionability because it is one component of a variegated strategy to discourage and defeat the consumer's attempt to obtain statutory remedies for misconduct. It is, of course, undisputed that the class action ban exists in all of AT&T arbitration provisions.

5. Additional unconscionable provisions also exist in the 2003 and 2005 provisions.

The one-sidedness of the arbitration provisions is further exemplified by AT&T's right to elect that the arbitration hearing be conducted by telephone rather than in person.⁴⁶ The aim of the provisions is to effectively deprive its customers of any real opportunity for redress. Additional unconscionable terms include requiring the consumer to pay in advance the AAA filing fee⁴⁷ and the attempt to reduce the statute of limitations to two years in the AT&T Wireless contract⁴⁸ and a mere 100 days in the 2005 Cingular contract.⁴⁹

The Circuit Court failed to analyze these provisions and compare them to the *Dunlap* standard as directed by this Court. An analysis as directed by this Court would clearly have revealed that the applicable agreements do not pass muster under this Court's precedents. Accordingly, reversal is the correct result.

III. Shorts was entitled to discovery so she could make a record on the unconscionability of the 2006 and 2009 provisions for the Circuit Court and this Court to rule on. The failure to allow a party to make a record on an issue requiring factual development is reversible error.

The tests for unconscionability under *Ashland Oil*, *Dunlap*, *Brown* and *Art's Flower Shop* are fact and case-intensive. In particular, the circumstances of formation, including the relative

⁴⁶ 2003 AT&T Wireless Terms and Conditions at 30, § 5(b) ("At either party's election, the arbitration shall be held telephonically.") (A-457).

⁴⁷ 2005 Cingular Wireless Terms and Conditions at 3 (A-467).

⁴⁸ 2003 AT&T Wireless Terms and Conditions at 31, §5(e) (A-458).

⁴⁹ 2005 Cingular Wireless Terms and Conditions at 1 (A-465).

bargaining power and opportunity to negotiate terms as well as the costs of arbitration, and the deterrent effect arbitration provisions may have on the vindication of important rights, are all matters that may require some discovery to develop. Arbitration by its nature throws the matter into a new forum. If that forum is in the habit of imposing unfair and burdensome costs, the arbitration agreement is unlikely to say so on its face. Moreover, where, as here, one Court has already found the rosy promises of AT&T's 2006 and 2009 provisions to be illusory, (*see infra*, Part IV), reasonable and targeted discovery to establish the fact of such a matter is essential.

This Court places the burden to show these factors on the party seeking the declaration of unconscionability. *Dunlap*, 211 W. Va. 549, 566, 567 S.E.2d 265, 281. If discovery can be denied to such parties, their ability to create a proper record for trial courts and this Court would be unfairly impaired. This Court found that the record was insufficiently developed to evaluate the conscionability of the contract provisions in 2010 and the Circuit Court spurned Shorts efforts after-remand to create a more detailed record.⁵⁰ Accordingly, should this Court decline to find that Judge Wilson erred in applying the 2006 and 2009 contracts, discovery should be permitted on remand so a record of what those provisions actually mean in practice for customers can be built.

IV. In the alternative, based on *Steiner, supra*, and the information in the contracts themselves, this Court could find that the 2006 and 2009 agreements are unconscionable on their face.

A. The “premiums” in AT&T’s 2006 and 2009 agreements are illusory.

Several courts have already addressed and rejected AT&T’s position regarding the substantive unconscionability of the 2006 and 2009 provisions. This Court should also reject

⁵⁰ Shorts’s Motion to Reconsider Applicable Arbitration Provision at 8-9 (A-153-54); Shorts Proposed Order at 15-17 (Feb. 28, 2011) (A-224-26); Shorts Reply to AT&T’s Proposed Order at 1-3 (“In sum, this case will be before the Supreme Court of Appeals again. *Shorts respectfully asks that there be discovery and development of a fact record before it does*”) (A-321-23). Judge Wilson refused to allow discovery after remand despite the specific direction of this Court that a proper record be developed. Shorts submits that is a clear error and one highly prejudicial to a party bearing the burden of persuasion.

them. The Circuit Court stated in its order that it felt the result of its analysis was foreordained by this Court's favorable comments about the 2006 and 2009 provisions in its 2010 Opinion, despite this Court indicating it was taking no position on what the result should be and calling for a better-developed record.

Nor does the Supreme Court's opinion in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (U.S. 2011) dictate a result here. The *Concepcion* Court ruled 100% consistently with the decision of this Court in *Wilson*—holding that California's categorical prohibition of class-action bans in arbitration clauses cannot stand. “Because it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress’, California's Discover Bank rule is preempted by the FAA.” *Id.* at 1753 (citation omitted). This Court already rejected the argument that the *Dunlap* decision created a comparable, categorical prohibition in this State. What is plainly not preempted by *Concepcion* or *Wilson*, is a case by case, multi-factor analysis pertaining to generally applicable contract defenses, which are expressly preserved under the savings clause of Section 2 of the Federal Arbitration Act.

Shorts is asking for nothing more than a fact specific inquiry into the circumstances of these arbitration provisions which she contends are unconscionable under West Virginia's generally applicable contract law. Shorts submits that a detailed analysis of the so-called “premiums” in AT&T's allegedly “consumer-friendly” agreements are illusory. In *Steiner v. Apple Computer, Inc.*, 556 F. Supp. 2d 1016, the Northern District of California found the Premium and Attorney Premium to be illusory. Specifically, the court noted:

AT&T need not settle in full with all or most plaintiffs, but need only do so with a *certain percentage* of plaintiffs, denying them the Premium. At some percentage point, other AT&T customers, who have not yet sought arbitration, would believe the only likely potential recovery available through arbitration would be the \$114.95, but not the Premium. Without the premium as an inducement to arbitrate, these consumers would only

make the allegedly minimal effort to arbitrate, if they had the time, resources, or inclination to seek the \$114.95, by itself [A]s a practical matter, the Premium is illusory.

Id. at 1030.

Also, in *Hall v. AT&T Mobility LLC*, 608 F. Supp. 2d 592 (D. N.J. 2009), the District of New Jersey addressed the same ETF charges at issue in this case and rejected AT&T's arguments regarding its Premium and Attorney Premium. The court explained:

Much like the \$114.95 claim in *Steiner*, the \$175 ETF claim at issue in this case is the most likely recovery for ATTM consumers who choose to bring an action in arbitration. However, those consumers only collect the \$7,500 Premium if the arbitrator renders a judgment greater than the value of ATTM's last written settlement offer. Once consumers begin to believe that the only compensation available is the \$175, rather than the Premium, ATTM's argument against invalidating the class-action waiver disappears. In the end, the waiver allows ATTM to escape liability for any alleged fraud involving small sums of money, because while it may settle with several individuals for \$175, the truth of the matter is that a large percentage of consumers will not file suit. Moreover, that percentage increases as the possibility of recovering a Premium decreases. At the end of the day, as conceivably consumer-friendly as the provisions may be, it does not induce individuals to bring suit and it still operates to immunize ATTM from claims that would be suitable for class action resolution.

Id. at 603-04. Accordingly, if the *Wilson* decision had been followed, and a fact-intensive examination of the 2006 and 2009 provisions undertaken, the result would have been a finding that the "consumer-friendly" provisions are a mirage, designed to strip the consumer at large of her protections and give her nothing in return.

B. The arbitral forum has ceased to take this type of case because of serious problems with its process, making arbitration impossible in any case.

Each of the AT&T/Cingular arbitration provisions requires administration of the arbitration by the American Arbitration Association. "[A] pre-dispute agreement to use arbitration as an alternative to litigation in court may be enforced pursuant to the [Federal Arbitration Act] only when arbitration, although a different forum with somewhat different and

simplified rules, is nonetheless one in which the arbitral mechanisms for obtaining justice permit a party to fully vindicate their rights.” *Dunlap*, 211 W. Va. 549, 556, 567 S.E.2d 265, 272. Here, it appears that neither AT&T Mobility nor Shorts may “fully vindicate their rights” before the AAA because the AAA has ceased administering the very type of consumer debt-collection action that is at issue.⁵¹

Palisades’ debt-collection action falls squarely within the announced parameters of the AAA’s moratorium. Because neither Palisades nor AT&T Mobility can file the debt-collection action before AAA, Shorts cannot assert her defenses and counterclaims there either. Accordingly, even if this Court were to compel arbitration, it appears that the AAA would not provide Shorts an adequate and available arbitral forum. This Court should not risk depriving Shorts of an adequate forum, particularly when the moratorium itself was declared because of the apparent unsuitability of arbitration resolution for this type of case.

V. Because Palisades has never moved to compel arbitration and chose to litigate in court, the Circuit Court erred in requiring the parties to arbitrate the claim brought by Palisades against Shorts and the counterclaim by Shorts against Palisades.

Neither Palisades, the plaintiff in this action, nor any other party, asked the Circuit Court to compel arbitration of the claim brought by Palisades against Shorts or the counterclaim by Shorts against Palisades. Thus, the parties never briefed the issue. The July 27, 2011 Order and Memorandum Opinion is silent as to the claims between Shorts and Palisades. However, because the Circuit Court’s order below appears to be a final appealable order disposing of all claims and parties, Shorts asked for clarification of the Order as to this fundamental issue.⁵²

⁵¹ American Arbitration Association Moratorium on Consumer Debt Collection Actions (A-475).

⁵² Shorts’ Motion to Clarify and Reconsider Order Compelling Arbitration (A-401).

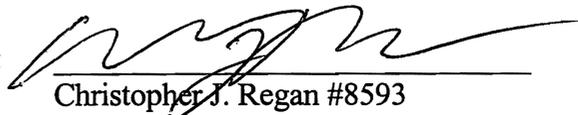
And when Shorts moved for clarification in this regard, the Circuit Court declined to provide any guidance.⁵³

Under Rule 54 of the West Virginia Rules of Civil Procedure, the Circuit Court’s final order below disposes of all claims and all parties. Yet the motion before the Circuit Court (as well as the briefing) did not request this relief. Indeed, when Shorts asked the Circuit Court to reconsider its decision and clarify that the scope of its order did not include the Palisades claims, AT&T responded only to the reconsideration argument, and Palisades did not respond at all. Further, Palisades waived any right to arbitration by filing this lawsuit in court and by failing to timely request arbitration. Thus, the Circuit Court erred by compelling arbitration of the claims brought by and against Palisades. This Court should review the issue to correct that error and to provide Shorts with an opportunity to be heard on the issue, which has heretofore been denied.

CONCLUSION

WHEREFORE, Shorts asks that this Court reverse the July 27, 2011 Order of the Circuit Court Compelling Arbitration and to grant all additional relief to which Shorts is entitled.

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⁵³ Order of October 28, 2011 Denying Shorts’ Motion to Clarify and Reconsider Order Compelling Arbitration (A-8-9).

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Charlene Shorts*

CERTIFICATE OF SERVICE

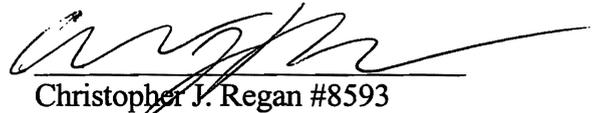
I, Christopher J. Regan, counsel of record on appeal for Petitioner Charlene Shorts, certify that on this 25th day of February, 2012, I served the foregoing **PETITIONER'S BRIEF** and **APPENDIX** with all attachments thereto via e-mail and/or by mailing a true and correct copy thereof in the United States Mail, postage prepaid, and addressed as follows:

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