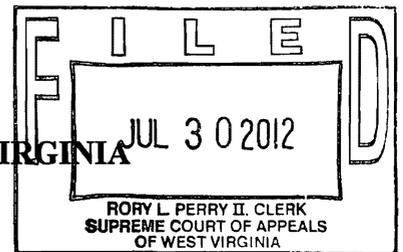


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



CREDIT ACCEPTANCE CORPORATION,

Defendant Below, Petitioner,

v.

DOCKET NO. ~~11-1646~~

ROBERT J. FRONT AND BILLYE S. FRONT,

Plaintiffs Below, Respondents,

CREDIT ACCEPTANCE CORPORATION,

Defendant Below, Petitioner,

v.

DOCKET NO. 12-0545

OCIE SHREWSBURY,

Plaintiff Below, Respondent.

PETITIONER CREDIT ACCEPTANCE CORPORATION'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. Whether, under the precedent of the Supreme Court of the United States and Syllabus Point 20 of this Court's decision in *Brown*, the Circuit Court of Raleigh County, West Virginia (the "Circuit Court") erred in holding that a valid agreement to arbitrate may be struck down based on a determination of procedural unconscionability that relies entirely on circumstances existing years after the arbitration agreement's formation even though it specifically concluded that the agreement was not procedurally unconscionable when it was executed and the Circuit Court's conclusion of substantive unconscionability was based only on the alleged unavailability of the non-specialized arbitration forums named in the parties' arbitration agreement?

2. Whether the Circuit Court erred in refusing to enforce an arbitration agreement for reasons applying only to arbitration, including the Circuit Court's "reluct[ance] to uphold an arbitration agreement which essentially eliminates a party's constitutional right to file suit" and reliance on a public policy denying arbitration where arbitration forums have become unavailable notwithstanding the provisions of 9 U.S.C. § 5 and despite the Supreme Court of the United States' directive that the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA") preempts any such common law doctrine?

II. STATEMENT OF THE CASE

When the Supreme Court of the United States issued its decision in *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. ___, 132 S. Ct. 1201, 182 L.Ed.2d 42, Nos. 11-391 and 11-394, 2012 WL 538286 (Feb. 21, 2012), it made clear that state laws that categorically deny arbitration based on public policy (like the Circuit Court's interpretation of the West Virginia Consumer Credit and Protection Act, W. Va. Code §§ 46A-1-101, *et seq.* ("WVCCPA")) are "both

incorrect and inconsistent with clear instruction in the precedents of” the Supreme Court in its interpretation of the FAA. *Id.* at 1203. In this case, the Circuit Court espoused a public policy whereby a plaintiff must “have his day in court” if the circumstances of a contract are “materially altered” after execution of the contract. (A.R. 7.) Such a public policy, which inherently targets only those contracts not providing for judicial resolution in the first instance, cannot stand. The Supreme Court reiterated that “[a]s this Court reaffirmed last Term, ‘[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.’” *Id.* at 1203-04 (citing *AT&T Mobility LLC v. Concepcion*, 563 U. S. ___, ___, 131 S. Ct. 1740, 1743, 179 L.Ed.2d 742 (2011)). The Circuit Court cannot rely on a purported public policy giving a plaintiff an inviolate right to proceed in court because such public policy would be inconsistent with and preempted by the FAA. *Id.*

The United States Supreme Court’s decision and this Court’s decision in *Brown v. Genesis Healthcare Corp.*, ___ W. Va. ___, 724 S.E.2d 250, Nos. 35494, 35546, 35635, 2011 WL 2611327 (W. Va. June 29, 2011), *vacated sub nom. Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. ___, 132 S. Ct. 1201, 182 L.Ed.2d 42, Nos. 11-391 and 11-394, 2012 WL 538286 (Feb. 21, 2012), *remanded to* ___ W. Va. ___, ___ S.E.2d ___, Nos. 35494, 35546, 35635 (W. Va. June 13, 2012), Slip Op. (“*Brown II*”), leave unaffected several points of law in this Court’s decision in *Brown v. Genesis Healthcare Corp.*, ___ W. Va. ___, 274 S.E.2d 250, Nos. 35494, 35546, 35635, 2011 WL 2611327 (W. Va. June 29, 2011), *vacated sub nom. Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. ___, 132 S. Ct. 1201, 182 L.Ed.2d 42, Nos. 11-391 and 11-394, 2012 WL 538286 (Feb. 21, 2012) (“*Brown I*”). Two of those are significant and critical to this appeal. First, *Brown I* made clear that a contractual arbitration provision is unenforceable if, and only if, it is *both* procedurally *and* substantively unconscionable. A circuit court must find

both procedural *and* substantive unconscionability, no matter how slight, to render a contractual provision unenforceable.

Second, *Brown I* confirmed the supremacy of the FAA over state laws that would frustrate the Congressional intent in enacting the FAA. The Supreme Court of the United States reiterated this supremacy in *AT&T Mobility, Inc. v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740, 1745, 179 L.Ed.2d 742 (2011), *CompuCredit Corp. v. Greenwood*, ___ U.S. ___, 132 S. Ct. 665, 181 L.Ed.2d 586, No. 10-948, 2012 WL 43514 (Jan. 10, 2012), and most recently in its *Marmet* decision. While agreements to arbitrate may be invalidated by common law defenses applicable to *all* contracts generally, states may not target agreements to arbitrate specifically. For example, to the extent a state invalidates an agreement to arbitrate in order to preserve a right to trial by judge or jury in a circuit court, that state's law must yield to the preemptive force of the FAA.

The Circuit Court has run afoul of *Marmet*, *Brown I*, the FAA, and the longstanding precedent of the Supreme Court of the United States, and in doing so committed clear errors of law. Although the Circuit Court articulated *Brown I*'s duality requirement, its conclusions of procedural and substantive unconscionability are both flawed. The Circuit Court's admission that the "contract in this matter is not procedurally unconscionable . . ." is correct. (A.R. 6.) Its analysis should have stopped there. Instead, the Circuit Court concentrated on events that occurred years after the formation of the contract. Despite the availability of the American Arbitration Association ("AAA"), the court incorrectly concluded that "there had been a material change in the terms of the contract" because the "specific arbitration forums have been eliminated[,] resulting in "no meeting of the minds to create the contract as it **exists today**." (A.R. 6 (emphasis added).) Underscoring this error is the fact that the Circuit Court relied on the same basis – the "elimination of arbitration forums" – for its finding of *substantive*

unconscionability. (A.R. 7.)

Further, the Circuit Court erroneously concluded that a waiver of a consumer's alleged right to file suit is subject to "every reasonable presumption against waiver" without fully analyzing how the arbitration forums at issue were each "eliminated" and how their "elimination" constituted a material change in the contract terms. (A.R. 7.) The Circuit Court failed to consider how section 5 of the FAA might apply to provide a substitute arbitrator. (A.R. 7.) Instead, the Circuit Court concluded that "public policy favors a plaintiff having his day in court should the terms of a contract be materially altered after the execution of the contract." (*Id.*) Yet, the Circuit Court adopted and applied this "public policy" at the expense of the well-established federal policy and precedent favoring the arbitration of claims. The Circuit Court's judicially crafted "public policy" stands as an obstacle to the objectives of the FAA and, as the Supreme Court of the United States recently said, is "both incorrect and inconsistent" with the supreme law of the land. *Marmet*, 132 S. Ct. at 1203, 2012 WL 538236.

If left uncorrected, the clear errors of law committed by the Circuit Court in its order of March 28, 2012 ("Order"), denying defendant Credit Acceptance Corporation's ("Credit Acceptance") motion to compel arbitration, will effectively ignore clear points of law articulated by this Court and the Supreme Court of the United States. The Circuit Court's Order should be reversed, the case remanded, and the claims of plaintiff Ocie Shrewsbury ("Shrewsbury") compelled to binding arbitration.

A. Factual Background.

On July 11, 2010, Shrewsbury and Virgil A. Shrewsbury executed a Retail Installment Contract and Security Agreement ("Contract") with Greg Lilly Auto Sales, Inc. ("Dealership") for the purchase of a 2000 Ford Expedition 4D Utility, VIN # 1FMRU1666YLB24146 (the

“Vehicle”). (A.R. 28-29.) The Dealership assigned all its rights, title, and interest in the Contract and the Vehicle to Credit Acceptance, which financed the purchase. (*Id.*)

The Contract contains a conspicuous notice on the **front** page of the agreement in the space directly between the first and second blank lines for a buyer’s signature.¹ (A.R. 28.) The notice emphasizes the existence of an arbitration agreement (“Arbitration Agreement”) and instructs Shrewsbury to read the entire Contract:

ARBITRATION NOTICE: PLEASE SEE THE REVERSE SIDE OF THIS CONTRACT FOR INFORMATION REGARDING THE ARBITRATION CLAUSE CONTAINED IN THIS CONTRACT.

ADDITIONAL TERMS AND CONDITIONS: THE ADDITIONAL TERMS AND CONDITIONS, INCLUDING THE ARBITRATION CLAUSE SET FORTH ON THE REVERSE SIDE HEREOF, ARE A PART OF THIS CONTRACT AND ARE INCORPORATED HEREIN BY REFERENCE.

(*Id.*) (emphasis in original). Shrewsbury does not dispute that this notice or the Arbitration Agreement were included in the Contract. The Arbitration Agreement states, in relevant part:²

You or we may elect to arbitrate under the rules and procedures of either the National Arbitration Forum or the American Arbitration Association; however in the event of a conflict between these rules and procedures and the provisions of this Arbitration Clause, You and we agree that this Arbitration Clause governs for that specific conflict. You may obtain the rules and procedures, information on fees and costs (including waiver of the fees), and other materials, and may file a claim by contacting the organization of your choice. The addresses and websites of the organizations are: National Arbitration Forum, P.O. Box 50191, Minneapolis, Minnesota, 55405, www.arb-forum.com; and American Arbitration Association, 335 Madison Avenue, Floor 10, New York, New York 10017-1605, www.adr.org. We agree for only the first day of arbitration to pay the following fees: (1) the arbitrator’s fee, plus (2) those reasonable arbitration expenses or costs (excluding attorney fees) assessed to You that You would not pay if You had brought a Dispute in court, plus (3) any other reasonable expense or cost unique to the arbitration process. We will also pay amounts that the arbitrator determines that we must pay in

¹ The first signature line pertains to the purchase of Gap Protection, which Shrewsbury chose to purchase. The second signature line pertains to Shrewsbury’s agreement that she has received a copy of the contract, read it, understood it, and agreed with its terms.

² The full text of the Arbitration Agreements can be found at (A.R. 29.)

order to assure the enforceability of this Arbitration Clause. Arbitration will take place near where You signed this Contract. Notice of the time, date and location shall be provided to the parties under the rules and procedures of the arbitration organization You select.

Your Right to Reject:³ If You don't want this Arbitration Clause to apply, You may reject it by mailing us at P.O. Box 5070, Southfield, Michigan 48088-5070 a written rejection notice which describes the Contract and tells us that You are rejecting this Arbitration Clause. A rejection notice is only effective if it is signed by all buyers and cosigners and the envelope that the rejection is sent in has a post mark of 14 days or less after the date of this Contract. If You reject this Arbitration Clause, that will not affect any other provision of this Contract or of the status of your Contract. If You don't reject this Arbitration Clause, it will be effective as of the date of this Contract.

(A.R. 29 (emphasis added).)

The Arbitration Agreement contains an “opt out” provision which gave Shrewsbury the ability to forego arbitration entirely without incurring a penalty under the Contract. (*See id.* (“If You reject this Arbitration Clause, that will not affect any other provision of this Contract or of the status of your Contract.”).) The Contract gave Shrewsbury 14 days after she signed and executed the Contract to reject the Arbitration Agreement and still obtain the loan. (*Id.*) Shrewsbury has not claimed that she did not understand the language used in that provision or suggested that she was unable to understand the Contract as a whole at the time it was signed.⁴ Despite having the opportunity to opt out of arbitration, Shrewsbury declined to do so.

³ “Your Right to Reject” was not underscored in the 2007 Contract. (A.R. 42.)

⁴ In addition to the opt out provision, other provisions of the Arbitration Agreement also favor Shrewsbury. For example, Credit Acceptance agreed to pay the fees for the arbitrator, expenses and costs (excluding attorneys' fees) incurred by Shrewsbury, and any other reasonable expense(s) or cost(s) unique to the arbitration process. (*See* A.R. 29.) Credit Acceptance further agreed to pay any and all amounts that an arbitrator determined must be paid to ensure the enforceability of the Arbitration Agreement. Finally, Credit Acceptance agreed that arbitration would take place “near where [Shrewsbury] signed th[e] Contract.” (*Id.*)

B. Procedural Background.

On May 17, 2011, Shrewsbury filed a civil action against Credit Acceptance in the Circuit Court of Raleigh County, West Virginia. The Complaint asserts four causes of action: (i) violations of the WVCCPA, (ii) negligence, (iii) intentional infliction of emotional distress, and (iv) invasion of privacy. (A.R. 12-16.) The causes of action all relate to communications Shrewsbury alleges she received from Credit Acceptance after she voluntarily stopped paying the debts she owed on the Contract. Shrewsbury never sought to arbitrate her claims.

On June 23, 2011, Credit Acceptance moved to compel Shrewsbury's claims to arbitration and dismiss or, in the alternative, stay her action pending arbitration ("Motion to Compel Arbitration"). Shrewsbury responded on October 20, 2011, and the Circuit Court heard oral argument on October 24, 2011. (A.R. 943.)

At the October 24, 2011 hearing, the Circuit Court requested additional briefing from the parties on section 5 of the FAA and clarification on AAA's moratorium on arbitrations filed to collect debts. (A.R. 949.) The Circuit Court also stated that it would "look at *Genesis* and . . . at *Concepcion* as well." (*Id.* (italics added).) Thereafter, Credit Acceptance filed three supplemental authority briefs in support of its Motion to Compel Arbitration.

In "Defendant Credit Acceptance Corporation's Supplemental Authority in Support of Its Motion to Dismiss This Proceeding and Compel Arbitration Or, in the Alternative, to Stay This Proceeding Pending Arbitration" ("First Supplement"), Credit Acceptance briefed *Brown I*, *Concepcion*, and the AAA moratorium on arbitrations filed by debt collectors. (A.R. 547-891.) In "Defendant Credit Acceptance Corporation's Second Supplemental Authority in Support of Its Motion to Dismiss This Proceeding and Compel Arbitration Or, in the Alternative, to Stay This Proceeding Pending Arbitration" ("Second Supplement"), Credit Acceptance updated the

Circuit Court on *CompuCredit Corp. v. Greenwood*, --- U.S. ---, 132 S. Ct. 665, 2012 WL 43514 (Jan. 10, 2012), and its support for the proposition that the FAA preempts section 5-101(1) of the WVCCPA. (A.R. 892-911.) Finally, in “Defendant Credit Acceptance Corporation’s Third Supplemental Authority in Support of Its Motion to Dismiss This Proceeding and Compel Arbitration Or, in the Alternative, to Stay This Proceeding Pending Arbitration” (“Third Supplement”), Credit Acceptance briefed *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. ___, 132 S. Ct. 1201, 182 L.Ed.2d 42, Nos. 11-391 and 11-394, 2012 WL 538286 (Feb. 21, 2012), also to support the proposition that the FAA preempts section 5-101(1) of the WVCCPA. (A.R. 912-918.)

The Circuit Court denied Credit Acceptance’s Motions to Compel Arbitration in its Order. (A.R. 3-8.) Credit Acceptance filed its Notice of Appeal of the Order on April 23, 2012. The same day, Credit Acceptance moved to consolidate this appeal with *Credit Acceptance Corporation v. Robert J. Front and Billye S. Front*, Docket No. 11-1646, pending in the West Virginia Supreme Court of Appeals (“Front Appeal”). This Court granted that motion on May 1, 2012. On May 14, 2012, Shrewsbury, Robert J. Front and Billye S. Front (collectively, “Respondents”) filed a “Motion to Dismiss for Lack of Appealable Orders” (“Motion to Dismiss”). This Court denied Respondents’ Motion to Dismiss on June 19, 2012. The Circuit Court entered an “Agreed Order Granting Defendant Credit Acceptance Corporation’s Motion to Stay Pending the Disposition of Its Appeal” on June 29, 2012.

C. The Circuit Court’s Order Denying Credit Acceptance’s Motions to Compel Arbitration.

The crux of the Circuit Court’s Order is the assertion that, despite the availability of the AAA, the “elimination of the arbitration forums” several years after the formation of the Contract “materially change[d] the terms of the contract[,]” thereby rendering the Arbitration

Agreement both procedurally and substantively unconscionable. (A.R. 6-7.) When the Circuit Court issued its Order, it cited *Brown I* for the proposition that “[a] contract term is unenforceable if it is **both procedurally and substantively unconscionable**[.]” (A.R. 5 (citing Syl. pt. 20, *Brown*, 274 S.E.2d 250, 2011 WL 2611327) (emphasis added).) The Circuit Court held that, at the time of the creation of the contract, there was no procedural unconscionability. (A.R. 6.) However, the Circuit Court then held the Arbitration Agreement subsequently became procedurally unconscionable because “the specific arbitration forums have been eliminated” thereby resulting in “no meeting of the minds to create the contract as it exists today.” (*Id.*) The court reached this conclusion, despite the continued availability of the AAA, as an arbitration forum. The Circuit Court also concluded that the Arbitration Agreement was substantively unconscionable on two grounds: (i) the elimination of the arbitration forums is a material change in the terms of the contract” (*id.*), and (ii) “[p]ublic policy favors a plaintiff having his day in court should the terms of a contract be materially altered after the execution of the contract.” (*Id.*) The Circuit Court was “reluctant to uphold an arbitration agreement which essentially eliminates a party’s constitutional right to file a lawsuit, especially when the agreement no longer exists in its original form.” (A.R. 7.)

Finally, the Circuit Court invalidated the Arbitration Agreement based on a “[p]ublic policy” that “favors a plaintiff having his day in court should the terms of a contract be materially altered after the execution of the contract.” (*Id.*)

III. SUMMARY OF ARGUMENT

Over the past decade, this Court, much like other courts in other jurisdictions (both state and federal), has devoted substantial attention to arbitration and the FAA. While the frequency of decisions from this Court addressing the arbitrability of consumer claims has increased, the

principles of law governing agreements to arbitrate remain unequivocally clear. Yet, circuit courts in this State have, at times, struggled with the application of governing federal arbitration law and state law contract defenses in a manner consistent with that contemplated by this Court. This case and the Circuit Court below are no exception.

This Court has repeatedly recognized that a circuit court's inquiry in ruling on a motion to compel arbitration is two-fold. Syl. pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 251, 692 S.E. 2d 293, 294 (2010). First, a circuit court must assess whether a valid arbitration agreement exists between the parties – that is, one that survives scrutiny when analyzed under common law defenses applicable to *all* contracts generally, not just “rules” of law targeting agreements to arbitrate. Pursuant to the FAA's Savings Clause, which expressly reserves “those grounds as exist at law or in equity for the revocation of any contract[,]” 9 U.S.C. § 2, the validity of an agreement to arbitrate is determined through the application of generally applicable state contract law. Second, a circuit court must determine whether the parties' dispute falls within the substantive scope of their agreement to arbitrate. Here, the Circuit Court erred as a matter of law in assessing the validity of the parties' Arbitration Agreement.

Specifically, the Circuit Court concluded that the Arbitration Agreement is unenforceable based on a misunderstanding of the required analysis of unconscionability. The precedent in *Brown* is clear: “[a] contract term is unenforceable if it is **both** procedurally **and** substantively unconscionable.” Syl. pt. 20 (in part), *Brown*, 274 S.E.2d 250, 2011 WL 2611327 (emphasis added). Although the Circuit Court analyzed procedural and substantive unconscionability separately, its findings are mistaken.

When the Circuit Court considered procedural unconscionability, it erred by considering “**the contract as it exists today.**” (A.R. 6 (emphasis added).) Procedural unconscionability is

concerned with “the real and voluntary meeting of the minds’ of the parties at the time that the contract was executed” *Brown*, 274 S.E.2d at 285, 2011 WL 2611327, at *22 (citing *High v. Capital Senior Living Properties 2-Heatherwood, Inc.*, 594 F. Supp. 2d 789, 799 (E.D. Mich. 2008)). When analyzing the contracts as they existed at the time they were executed, the Circuit Court determined the Arbitration Agreement was not procedurally unconscionable. (A.R. 6.) However, the Circuit Court then invalidated the Arbitration Agreement based on procedural unconscionability after improperly analyzing the agreement as it exists today.

The Circuit Court’s analysis regarding substantive unconscionability analysis also fails as a matter of law. The Circuit Court held that the Arbitration Agreement was substantively unconscionable because the arbitration forums are unavailable. The Order is silent as to why the Circuit Court found the arbitration forums to be unavailable. The contract stated that a party could file a complaint under the rules of either the AAA or the National Arbitration Forum (“NAF”). The AAA still accepts the type of claims that Shrewsbury alleges. Only NAF is “unavailable.” Regardless, even if *both* forums *were* unavailable, as the Circuit Court alleges, section 5 of the FAA provides a means for appointing an arbitrator.

The Circuit Court also erroneously based its decision on the unsupported proposition that “[p]ublic policy favors a plaintiff having his day in court should the terms of a contract be materially altered after the execution of the contract.” (A.R. 7.) Though the Circuit Court acknowledged that “the right to assert one’s claim in the court system” can be waived, it stated that “[c]ourts indulge every reasonable presumption against waiver” (A.R. 7 (citations omitted).) Moreover, it stated that “this Court is reluctant to uphold an arbitration agreement which essentially eliminates a party’s constitutional right to file suit, especially when the agreement no longer exists in its original form.” (*Id.*) Such “public policy” is only effective

when a contract, in fact, contains a waiver of one's right to file a lawsuit. Such a public policy is not applicable to contracts, generally. In fact, such a public policy targets arbitration in direct contravention of precedent from this Court and the Supreme Court of the United States.

It is the charge of this Court, as our State's court of last resort, to ensure that "arbitration agreements [are placed] on an equal footing with other contracts and enforce[d] . . . according to their terms." *Concepcion*, 131 S. Ct. at 1745 (citations omitted). This case is an opportunity to do just that. The Circuit Court's Order should be reversed, and this case remanded with instruction that Shrewsbury's claims be submitted to arbitration.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Revised Rule 18(a) of the West Virginia Rules of Appellate Procedure, Credit Acceptance respectfully requests that this Court grant oral argument under Revised Rules 20(a)(1), (a)(2), and (a)(3). This case involves two issues of first impression: (i) whether, under the precedent of the Supreme Court of the United States and Syllabus Point 20 of this Court's decision in *Brown I*, a valid agreement to arbitrate may be struck down based on a finding of procedural unconscionability that relies entirely on circumstances existing years after the Arbitration Agreement's formation; and (ii) whether, in light of section 5 of the FAA, the unavailability of one of two non-specialized arbitration forums named in the parties' Arbitration Agreements constitutes a "material change" rendering the Arbitration Agreement substantively unconscionable under Syllabus Point 20 of *Brown I*.

Further, the Circuit Court's Order implicates the constitutional right to "file suit." It also raises questions as to the existence and validity of a public policy affording plaintiffs their days in court when the terms of a contract are materially changed, even though some contracts never contemplate a non-court forum in the first place. The issues of law raised herein are of great

public importance to the residents of West Virginia. None of the criteria articulated in Revised Rule 18(a) that would obviate the need for oral argument is present, and oral argument, with a precedential decision, is appropriate under Revised Rule 20.

V. ARGUMENT

A. **Jurisdiction.**

“A party to a civil action may appeal to [this Court] . . . from an order of any circuit court constituting a final judgment as to one or more but fewer than all claims” W. Va. Code § 58-5-1. Pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure,

[w]hen more than one claim for relief is presented in an action . . . , the court may direct the entry of a final judgment as to one or more but fewer than all of the claims . . . only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all of the claims and the rights and liabilities of the parties.

W. Va. R. Civ. P. 54(b).

This Court has made clear that “[t]he key to determining if an order is final is not whether the language from Rule 54(b) of the West Virginia Rules of Civil Procedure is included in the order, but is whether the order approximates a final order in its nature and effect.” Syl. pt. 1, in part, *State ex rel. McGraw v. Scott Runyian Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995); see *Durm v. Heck’s, Inc.*, 184 W. Va. 562, 401 S.E.2d 908 (1991); Syl. pt. 1, *Sisson v. Seneca Mental Health/Mental Retardation Council, Inc.*, 185 W. Va. 33, 404 S.E.2d 425 (1991); see also *Hubbard v. State Farm Indem. Co.*, 213 W. Va. 542, 549, 584 S.E.2d 176, 183 (2003).

In *Durm*, this Court held that the absence of language “indicating that ‘no just reason for delay’ exists and ‘direct[ing] . . . entry of judgment’ will not render the order interlocutory and

bar appeal provided that this Court can determine from the order that the trial court's ruling approximates a final order in its nature and effect." *Id.* at Syl. pt. 2. "With the enactment of Rule 54(b), an order may be final prior to the ending of the entire litigation on its merits if the order resolves the litigation as to a claim or a party." *Id.* at 566, 401 S.E.2d at 912. "Claims are separable when there is more than one possible recovery . . . or if 'different sorts of relief' are sought" *Province v. Province*, 196 W. Va. 473, 478, 473 S.E.2d 894, 899 (1996) (citing *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 10, 100 S. Ct. 1460, 64 L.Ed.2d 1 (1980)).

In accepting an appeal of a summary judgment order that lacked certification under Rule 54(b) of the West Virginia Rules of Civil Procedure, the *Durm* Court provided two reasons for affording such flexibility. First, the *Durm* Court noted that appeal was discretionary and could therefore be denied. *Durm*, 184 W. Va. 566, 401 S.E.2d at 912. Second, and more importantly, the *Durm* Court explained that a party "armed with a [. . .] judgment, which may be of questionable value . . . does not gain by having to wait until the entire case is tried before the [. . .] judgment can be appealed." *Id.* Recent changes to West Virginia's appellate rules did not overrule *Durm* and its progeny.

Even where 54(b) certification exists, this Court "appl[ies] a two-prong test to review a circuit court's Rule 54(b) certification." *Province v. Province*, 196 W. Va. at 478, 473 S.E.2d at 899 (1996) (citing *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. at 10, 100 S. Ct. 1460, 64 L.Ed.2d 1 (1980)). First, this Court "scrutinize[s] the circuit court's evaluation of the interrelationship of the claims" *Id.* "Claims are separable when there is more than one possible recovery . . . or if 'different sorts of relief' are sought" *Id.* (citations omitted). Second, it determines "whether there is any just reason for delay" *Id.* at 479, 473 S.E.2d at 900. Certification "should be granted only if there exists some danger of hardship or injustice

through delay, that would be alleviated by immediate appeal.” *Id.*

The Order is final in both nature and effect and there is no just reason for delay. If the Order denying Credit Acceptance’s Motions to Compel is permitted to stand, without immediate appeal, the precise relief sought by Credit Acceptance – arbitration – will be lost by the time a judgment on Shrewsbury’s wholly separate common law and statutory claims is entered. That is surely why the Circuit Court granted a stay of this matter pending the resolution of this appeal. Moreover, the Order is properly considered “final” because Shrewsbury’s claims for statutory relief pursuant to the WVCCPA and compensatory relief for their common law claims are wholly separable from Credit Acceptance’s requested relief through arbitration. Certainly, “there is more than one possible recovery” and “different sorts of relief are sought . . .” in the cases below. *Id.* at 478, 473 S.E.2d at 899.

Finally, the order at issue in the Front Appeal (which has been consolidated with this case for appeal) was designated as “final” by a different judge in the same the Circuit Court, and it contains substantially the same findings of fact and conclusions of law as the Order at issue in this appeal. The similarity between the two orders, one of which contained the magic words of “final order,” further demonstrates that the Order in this matter is also final.

B. Standard of Review.

On appeal to this Court, “review of whether [an] [arbitration] [a]greement represents a valid and enforceable contract is *de novo*.” *Brown*, 274 S.E.2d at 267, n.12, 2011 WL 2611327, at *10, n.12 (quoting *State ex rel. Saylor v. Wilkes*, 216 W. Va. 766, 772, 613 S.E.2d 914, 920 (2005)). Likewise, “[i]nterpreting a statute . . . presents a purely legal question subject to *de novo* review.” Syl. pt. 1, *Fountain Place Cinema 8, LLC v. Morris*, 227 W. Va. 249, 707 S.E.2d 859 (2011).

“When it is argued that a state law is preempted by a federal law, the focus of analysis is upon congressional intent. Preemption is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.” Syl. pt. 4, *Morgan v. Ford Motor Co.*, 224 W. Va. 62, 680 S.E.2d 77 (2009). Because preemption is a question of law, it is reviewed *de novo*. *Id.* at Syl. pt. 1.

C. A Circuit Court’s Inquiry in Ruling on a Motion to Compel Arbitration is Two-Fold: Validity and Scope.

It is “beyond dispute that the FAA was designed to promote arbitration.” *Concepcion*, 131 S. Ct. at 1749. And, there is “. . . an emphatic federal policy in favor of arbitral dispute resolution.” *Marmet*, 132 S. Ct. at 1203, 2012 WL 538236 (citing *KPMG LLP v. Cocchi*, 565 U. S. ___, 132 S. Ct. 23, 181 L.Ed.2d 323 (2011) (*per curiam*) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 631 (1985))). This Court has repeatedly applied a two-part threshold inquiry for circuit courts to apply when ruling on a motion to compel arbitration: “(i) whether a valid arbitration agreement exists between the parties; and (ii) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement.” Syl. pt. 2 (in part), *TD Ameritrade*, 225 W. Va. 250, 692 S.E.2d 749.

The Circuit Court invalidated the Arbitration Agreement on the first prong of the *TD Ameritrade* test – whether or not the Arbitration Agreement is valid and enforceable. Its analysis of contractual defenses under the FAA’s Savings Clause was limited to one: unconscionability. That finding of unconscionability was flawed and reached the wrong result.

D. The “Validity” of an Agreement to Arbitrate is a Matter of State Contract Law Applicable to All Contracts Generally.

Section 2 of the FAA provides that an agreement 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.” 9 U.S.C. § 2; see Syl. pt. 6, *Brown*, 274 S.E.2d 250, 2011 WL 2611327 (emphasis added). Under the FAA’s Savings Clause, “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [Section] 2[.]” *Id.* at 276, 2011 WL 2611327, at * 17 (citing 9 U.S.C. § 2).

However, arbitration agreements cannot be targeted for suspect status or invalidated for reasons unique to arbitration, including notions of public policy unique to arbitration. See *Marmet*, 132 S. Ct. 1201, 2012 WL 538236; Syl. pt. 8, *Brown*, 274 S.E.2d 250, 2011 WL 2611327; *Rent-a-Center, W., Inc. v. Jackson*, ___ U.S. ___, 130 S. Ct. 2772, 2776, 177 L.E.2d 403 (2010) (“The FAA thereby places arbitration agreements on equal footing with other contracts”); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S. Ct. 1204, 1207, 163 L.Ed.2d 1038 (2006) (same); *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686, 116 S. Ct. 1652, 1655, 134 L.Ed.2d 902 (1996) (“What States may not do is decide that a contract is fair enough to enforce all its basic terms . . . , but not fair enough to enforce its arbitration clause.”); *Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265, 271, 115 S. Ct. 834, 838, 130 L.Ed.2d 753 (1995) (citing *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L.Ed.2d 1 (1984) (same)); *Volt Info. Sci., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474, 109 S. Ct. 1248, 1253, 103 L.Ed.2d 488 (1989) (same); *Perry v. Thomas*, 482 U.S. 483, 492, n.9, 107 S. Ct. 2520, 2527, n.9, 96 L.Ed.2d 426 (1987) (“Nor may a court reply on the uniqueness of an agreement to arbitrate as a basis for a state law holding that enforcement would be unconscionable”). A state law stands “as an obstacle to the purposes of the FAA if it targets arbitration provisions for disfavored treatment not applied to other contractual terms generally.” *Brown*, 274 S.E.2d at 276, 2011 WL 2611327, at *16 (quoting *Concepcion*, 131 S. Ct. at 1747); see *Marmet*, 132 S. Ct. at 1201, 2012 WL 538236. In that same vein, a state law

stands as “an obstacle to . . . the FAA if it takes its ‘meaning from the fact that a contract to arbitrate is at issue or frustrate[s] arbitration, or provide[s] a defense to it.’” *Id.* (quoting *Dobson*, 513 U.S. 265, 281, 115 S. Ct. 834, 843, 130 L.Ed.2d. 753 (1995)). With these bedrock principles of arbitration law in mind, the Circuit Court erred in its rulings in its Order.

1. The Circuit Court ignored the requirement that procedural unconscionability relate to the bargaining process and formation of a contract and not to any subsequent events.

“Procedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract.” Syl. pt. 17, *Brown*, 274 S.E.2d 250, 2011 WL 2611327. Specifically, “[p]rocedural unconscionability involves a variety of inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties, considering all the circumstances surrounding the transaction.” *Id.* The absence of “‘the ‘real and voluntary meeting of the minds’ of the parties **at the time that the contract was executed**”” requires the consideration of several factors. *Id.* at 285, 2011 WL 2611327, at *22 (quoting *High*, 594 F. Supp. 2d at 799) (emphasis added). These can include “the age, literacy, or lack of sophistication of a party; hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner and setting in which the contract was formed, including whether each party had a reasonable opportunity to understand the terms of the contract.” Syl. pt. 17, *Brown*, 274 S.E.2d 250, 2011 WL 2611327.

In considering whether the Arbitration Agreement was procedurally unconscionable, the Circuit Court correctly relied on *Brown I.* (A.R. 6.) However, it did not properly consider at what point in time a procedural unconscionability analysis must be focused: the time when the contract was executed. *See Brown*, 274 S.E.2d at 285, 2011 WL 2611327, at *22. After noting its approval of certain factors of the Arbitration Agreement, including (1) the opt-out provision,

(2) that the Arbitration Agreement was brought to Shrewsbury’s attention, and (3) that the Arbitration Agreement provided two arbitration forums, the Circuit Court concluded that the formation of the contracts was not procedurally unconscionable. (A.R. 6.) Yet, the Circuit Court then improperly turned its attention to the present and found, in error and without explanation, that both arbitration forums had been eliminated, years after the time when the contracts were executed, thereby resulting in “no meeting of the minds to create the contract as it exists today.” (*Id.*)

The Circuit Court’s conclusion of procedural unconscionability is premised on a misunderstanding of the concept’s temporal limits. Procedural unconscionability is a question of contract formation, and the Circuit Court correctly determined that the contract’s formation was not unconscionable. When the Circuit Court admitted that “the original contract is not procedurally unconscionable,” (*id.*), its procedural unconscionability analysis should have ended.

Because the Circuit Court erred in concluding that there was procedural unconscionability where there in fact – and by the Circuit Court’s own admission – was *not* unconscionability in the formation of the contract as it was executed, the Circuit Court erred as a matter of law when it concluded that the Arbitration Agreement was unconscionable. *Brown I* aligned West Virginia with “[t]he prevailing view . . . that procedural and substantive unconscionability **must both be present** in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.” *Brown*, 274 S.E.2d at 286, n.140, 2011 WL 2611327, at *23, n.140 (quoting *Armendariz v. Found. Health Psychare Serves., Inc.*, 6 P.3d 669, 690 (Cal. 2000)) (emphasis added). Both cannot be present here because the Circuit Court specifically determined that there was no procedural unconscionability in the way the contract was executed. Because the Circuit Court’s finding of procedural unconscionability

is incorrect, it cannot support a finding that the Arbitration Agreement is unconscionable and unenforceable.

2. The Circuit Court erred as a matter of law in finding that the Arbitration Agreement was substantively unconscionable.

The Circuit Court's determination of substantive unconscionability was also in error. In arriving at its conclusion, the Circuit Court considered the definition of substantive unconscionability set forth by this Court in *Brown*:

'Substantive unconscionability involves unfairness in the contract itself and whether the contract term is one-sided and will have an overly harsh effect on the disadvantaged party. The factors to be weighed in assessing substantive unconscionability vary with the content of the agreement. Generally, courts should consider the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns.'

(A.R. 6-7 (quoting Syl. pt. 19, *Brown*, 274 S.E.2d 250, 2011 WL 2611327).) In concluding that the Arbitration Agreement was substantively unconscionable, the Circuit Court relied on its analysis that "the elimination of the arbitration forums is a material change in the terms of the contract." (A.R. 7.) It further ruled that "[p]ublic policy favors a plaintiff having his day in court should the terms of a contract be materially altered after the execution of the contract." (*Id.*)

The contract was not altered at all. The only "material alteration" referred to in the Order was the Circuit Court's erroneous belief that neither the NAF nor AAA are still available to hear Shrewsbury's claims. That is incorrect. The AAA is still available to hear Shrewsbury's claims in this case. (A.R. 548-551.)

Shrewsbury's claims against Credit Acceptance do not fall within the scope of the moratorium by AAA at issue. The AAA moratorium is on "debt collection arbitrations," including "consumer debt collection programs" and "filings in which the company is the filing

party.” American Arbitration Association, Notice on Consumer Collection Arbitrations, available at <http://www.adr.org> (clicking “Consumer” and opening “Notice on Consumer Collection Arbitrations” under “Documents”) (last accessed on July 13, 2012) (hereinafter “Notice on Consumer Collection Arbitrations”); (A.R. 548-551.) Shrewsbury’s claims are neither.

AAA still accepts arbitration claims filed by consumers. The AAA’s website states, in pertinent part:

[T]he American Arbitration Association's previously announced moratorium on debt collection arbitrations remains in effect. That moratorium was instituted based on public discourse and an evaluation of the AAA's own experiences. Matters included in this moratorium are: consumer debt collections programs or bulk filings and 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 the case involves a credit card bill or, the case involves a telecom bill or the case involves a consumer finance matter.

The AAA will continue to administer all demands for arbitration filed by consumers against businesses, and all other types of consumer arbitrations.

See, supra, “Notice on Consumer Collection Arbitrations” (emphasis added). The arbitration claim in this case would be a “demand[] for arbitration by [a] consumer[]” because Shrewsbury (a consumer) would be filing a claim against Credit Acceptance (a business). *See, supra*, “Notice on Consumer Collection Arbitrations.” Shrewsbury’s claim for arbitration would be accepted and administered by the AAA.

Courts around this country have addressed the misconception that the AAA is an unavailable forum for consumer arbitrations and have agreed that, when the claims are filed by a consumer against a creditor or debt collector, the AAA still accepts those claims, and those claims must be compelled to arbitration. *Montgomery v. Applied Bank*, No. 5:11-cv-00698, 2012 WL 275404, at *3 (S.D.W. Va. Jan. 31, 2012); *Jezek v. Carecredit, LLC*, No. 10 C 7360, 2011

WL 2837492, at *4 (N.D. Ill. July 18, 2011) (citing *Estept v. World Fin. Corp. of Ill.*, 735 F. Supp. 2d 1028, 1029-30 (C.D. Ill. 2010)); *Pfeiffer v. Dominion Mgmt. of Del.*, Adv. No. 11-0421, 2011 WL 4005504, at *8-9 (Bkrtcy. E.D. Pa. Sept. 8, 2011) (finding consumer's argument to be irrelevant because the AAA remains available and able to administer the arbitration); *Clerk v. Ace Cash Express, Inc.*, No. 09-05117, 2010 WL 364450, at *10 (E.D. Pa. Jan. 29, 2010) ("Here, however, as Defendant correctly points out, the instant dispute is not one in which the *company* is the filing party. Instead, it is *Plaintiff* who is the filing party, as she seeks to prosecute her claims against Defendant ACE. Such an argument [to the contrary] is irrelevant where, as here, the AAA remains available and able to administer the arbitration."); *In re Cal. Title Ins. Antitrust Litig.*, No. 08-01341, 2011 WL 2566449, at *4 (N.D. Cal. 2011) (although the NAF was unavailable, the availability of the AAA as referenced in the arbitration agreement was enforceable); *Jones v. Green Tree Servicing, LLC*, No. 1:10CV119, Doc. No. 14 (N.D.W. Va. Oct. 04, 2010) (finding that the AAA will still accept and administer plaintiffs' WVCCPA claims).

Credit Acceptance does not contest that the NAF is no longer accepting consumer arbitration claims. However, the unavailability of the NAF does not make the Arbitration Agreement substantively unconscionable. *Khan v. Dell Inc.*, 669 F.3d 350, No. 10-3655, 2012 WL 163899 (3d Cir. Jan. 20, 2012) (overturning the district court and compelling the consumer's claims to arbitration despite the fact that the NAF was unavailable as an arbitration forum); *see cf.*, *CompuCredit Corp. v. Greenwood*, 556 U.S. ___, 132 S. Ct. 665, 181 L.Ed.2d 586, No. 10-948, 2012 WL 43514 (Jan. 10, 2012) (upholding an arbitration agreement contained in a consumer contract despite the fact that the arbitration agreement's selected arbitration forum, the NAF, "entered into a consent decree barring it from handling consumer arbitrations").

Moreover, courts are clear that the mere naming of a possible arbitration forum does not equate to an invalidation of the arbitration agreement if that forum later turns out to be unavailable. *Montgomery*, 2012 WL 275404, at *3 (“Even if AAA [or the NAF] is unable or unwilling to serve as an administrator, the Court is empowered to select a substitute arbitrator under § 5 of the FAA.”). Specifically, when an arbitration agreement provides a mechanism for the selection of an arbitrator but the mechanism cannot be implemented, “upon the application of either party to the controversy the court **shall** designate and appoint an arbitrator [. . .] who shall act under the . . . [A]greement with the same force and effect as if he or they had been specifically named therein” 9 U.S.C. § 5 (emphasis added). Relying on Section 5 of the FAA, a majority of jurisdictions have consistently held that the unavailability of the chosen arbitration forum (or arbitrator) does not affect the enforceability of an arbitration agreement. *See, e.g., Reddam v. KPMG LLP*, 457 F.3d 1054, 1060 (9th Cir. 2006) (*abrogated on other grounds by Atl. Nat’l Trust LLC v. Hawley Ins. Co.*, 621 F.3d 931 (9th Cir. 2010) (internal citations omitted)); *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000) (rejecting the plaintiff’s argument that the arbitration clause was void because the entity chosen to administer arbitration had dissolved where the choice of forum was not an integral part of the arbitration agreement, but was an “ancillary logistical concern”); *Estate of Eckstein ex rel. Luckey v. Life Care Cntrs. of Am., Inc.*, 623 F. Supp. 2d 1235 (E.D. Wash. 2009) (when faced with an unavailable arbitration forum, the court stated that “[a]nother arbitrator may easily be substituted.”). *See also Rivera v. Am. Gen. Fin. Servs., Inc.*, 259 P.3d 803, 812-14 (N.M. 2009) (whether a named arbitrator “is integral to the parties’ agreement to arbitrate is a matter of contract interpretation” and a court should consider whether the parties designated one or several arbitrators, whether the contractual language naming the arbitrator was mandatory or permissive,

and whether the clause named the arbitrator “exclusively throughout.”); *ITT Consumer Fin. Corp.*, 211 F.3d at 1222 (same); *In re Checking Account Overdraft Litig. MDL No. 2036*, No. 11-14318, ___ F.3d ___, 2012 WL 2617585, at *9, n.20 (11th Cir. July 6, 2012) (“We reject Barras’s alternative ground for affirmance, that a purported moratorium on conducting consumer-related disputes by the AAA renders her arbitration clause unenforceable, because 9 U.S.C. § 5 establishes a procedure for appointing a replacement arbitrator ‘if for any . . . reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire.’”).

In order to “ensure[] that private agreements to arbitrate are enforced according to their terms[,]” Syl. pt. 8, *Brown*, 274 S.E.2d 250, 2011 WL 2611327, a court may refuse to enforce an otherwise valid agreement to arbitrate *only* when there is “evidence that the naming of the [arbitrator] was so central to the arbitration agreement that the unavailability of the arbitrator brought the agreement to an end.” *Reddam*, 457 F.3d at 1060 (internal citations omitted)); *see also Marmet*, 132 S. Ct. at 1203, 2012 WL 538236 (The FAA “requires courts to enforce the bargain of the parties to arbitrate.”) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985)). Absent such a compelling showing, courts should not “annihilate [an] arbitration agreement.” *Id.* In this case, the naming of the NAF was not so central to the Arbitration Agreement to render it unenforceable.

The Circuit Court’s Order is incorrect in its analysis of substantive unconscionability. It does not “place[] arbitration agreements on an equal footing with other contracts” *Brown*, 274 S.E.2d at 275, 2011 WL 2611327, at *16 (quoting *Rent-a-Center, W., Inc. v. Jackson*, ___ U.S. ___, 130 S. Ct. 2722, 2774, 177 L.Ed.2d 403 (2010)). Instead, the Order makes clear: “this Court is reluctant to uphold an arbitration agreement which essentially eliminates a party’s constitutional right to file suit” (A.R. 7.) Practically speaking, arbitration agreements will

not be enforced in the Tenth Judicial Circuit. It is inescapable that the Circuit Court's Order relegates arbitration to the type of disfavored status that the Supreme Court of the United States made clear is forbidden and this Court in *Brown I* declared cannot, and will not, be tolerated in this State. *Marmet*, 132 S. Ct. at 1201, 2012 WL 538236; Syl. pt. 8, *Brown*, 274 S.E.2d 250, 2011 WL 2611327. This Court has the opportunity to assuage the Tenth Circuit's hesitation, as well as place the parties' Arbitration Agreement on "an equal footing with other contracts and enforce[d] . . . according to . . . [its] terms." *Concepcion*, 131 S. Ct. at 1745 (citations omitted).

3. The Circuit Court erred in refusing to enforce an arbitration agreement for reasons applying only to arbitration.

The Circuit Court erred as a matter of law when it refused to enforce the parties' Arbitration Agreement based on its belief that "[p]ublic policy favors a plaintiff having his day in court should the terms of a contract be materially altered after the execution of the contract." (A.R. 7.) The Circuit Court's explanation of "public policy" is not a ground that "exist[s] at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Contracts do not necessarily preclude a plaintiff from having his day in court; contracts may contemplate litigation or be silent as to the form of dispute resolution. Therefore the "public policy" espoused is ineffective *unless* it is applied only to those contracts containing agreements for arbitration and other alternative dispute resolutions. In other words, it is a policy specifically targeting arbitration. The Circuit Court confirmed its intention when it stated that "**this Court is reluctant to uphold an arbitration agreement which essentially eliminates a party's constitutional right to file suit, especially when the agreement no longer exists in its original form.**" (A.R. 7 (emphasis added).) The clause starting with "especially" merely emphasizes an additional reason for the baseline principle. The Circuit Court is reluctant to uphold arbitration agreements, which *by their very nature* eliminate trial courts as the forum to litigate claims.

“While access to courts is a recognized fundamental right [in West Virginia], it is also a commonly recognized principle that such right of access is not without limitations.” *Mathena v. Haines*, 219 W. Va. 417, 422, 633 S.E. 2d 771, 777 (2006).⁵ One of those limitations to the West Virginia Constitution and other conflicting state laws is the Supremacy Clause of the United States Constitution. U.S. Const. art. VI. Pursuant to the Supremacy Clause of the United States Constitution, the FAA preempts all otherwise applicable inconsistent state laws. *See Marmet*, 132 S. Ct. at 1201, 2012 WL 538236 (“When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established.” (citing U. S. Const., Art. VI, cl. 2); *Allied–Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 272, 115 S. Ct. 834, 838, 130 L.Ed.2d 753 (1995). Over the past decade, the Supreme Court of the United States has reaffirmed, time and again, that “[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.”⁶ *Concepcion*, 131 S. Ct. at 1747 (citing *Preston v. Ferrer*, 552 U.S. 346, 353, 128 S. Ct. 978, 169 L.Ed.2d 917 (2008) (“when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another

⁵ If that right were not without limitations, every decision of this Court on arbitration would begin and end with a simple statement that the West Virginia Constitution prohibits arbitration. That has never been the law of this State.

⁶ Courts have held that this principle is even clearer under *Concepcion*. *Arellano v. T-Mobile USA, Inc.*, No. 10-05663, 2011 WL 1842712, *2 (N.D. Cal. May 16, 2011) (rejecting argument that state law injunctive claims exempt from arbitration); *Nelson v. AT&T Mobility, LLC*, No. 10-4802, 2011 WL 3651153, *4 (N.D. Cal. Aug. 18, 2011) (holding that the Supreme Court has made clear that a state “cannot require a procedure that is inconsistent with the FAA’ regardless of how desirable that procedure may be.”); *Kaltwasser v. AT & T Mobility LLC*, 812 F. Supp. 2d 1042, 1051-51, No. 07-00411, 2011 WL 4381748, *7 (N.D. Cal. Sept. 20, 2011) (compelling arbitration of statutory claims where the state statutes prohibited arbitration); *In re Gateway LX6810 Computer Prods. Litig.*, No. SACV 10-1563, 2011 WL 3099862, *3 (C.D. Cal. July 21, 2011) (same); *In re Apple & AT & T iPad Unlimited Data Plan Litig.*, No. C10-2553, 2011 WL 2886407, at *4 (N.D. Cal. July 19, 2011) (FAA under reasoning announced in *Concepcion* preempts state laws prohibiting the arbitration of claims seeking injunctive relief); *Zarandi v. Alliance Data Sys. Corp.*, No. CV 10-8309, 2011 WL 1827228, at *2 (C.D. Cal. May 9, 2011) (“FAA preempts state law to the extent it prohibits arbitration of a particular type of claim”).

forum, whether judicial or administrative, are superseded by the FAA”). “[I]t is well-settled that waivers of jury trial are fully enforceable under the FAA.” *Harrington v. Atlantic Sounding Co., Inc.*, 602 F.3d 113, 126 (2d Cir. 2010) (citing *Gilmer v. Interstate / Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S. Ct. 1647, 114 L.Ed.2d 26 (1991); *Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 480-81, 109 S. Ct. 1917, 104 L.Ed.2d 526 (1989); *Mitsubishi Motors*, 473 U.S. at 628, 105 S. Ct. 3346).

Along those lines, this Court recently held that “[a] state statute, rule, or common-law doctrine, which targets arbitration provisions for disfavored treatment and which is not usually applied to other types of contract provisions, stands as an obstacle to the accomplishment and execution of the purposes and objectives of the Federal Arbitration Act, 9 U.S.C. § 2, and is preempted.” Syl. pt. 8, *Brown*, 274 S.E.2d 250, 2011 WL 2611327. And, “[s]ection 2 of the FAA applies to a written arbitration provision in ‘a contract,’ and preempts any state law, regulation or other action that would interfere with the arbitration portion of ‘a contract’ freely entered into by all parties.” *Brown*, 274 S.E.2d at 282, n.97, 2011 WL 2611327, at *20, n.97. Applying these principles to an anti-waiver provision in the West Virginia Nursing Home Act prohibiting the waiver of the right to an in-court proceeding, this Court in *Brown I* held that

[t]o the extent that the West Virginia Nursing Home Act, *W.Va. Code*, 16-5C-15(c) [1997], attempts to nullify and void any arbitration clause in a written contract, which evidences a transaction affecting interstate commerce, between a nursing home and a nursing home resident or the resident’s legal representative, the statute is preempted by the Federal Arbitration Act, 9 U.S.C. § 2.

Id. at Syl. pt. 11.

In *Brown I*, the plaintiffs argued that an arbitration clause was unenforceable because it violated Section 15(c) of the West Virginia Nursing Home Act, which “creates a cause of action for violations of the Act’s requirements, and prohibits waivers of the right to bring an action.”

Id. at 264, 2011 WL 2611327, at *6. “The disputed portion of Section 15(c) says: Any waiver by a resident or his or her legal representative of the right to commence an action under this section, whether oral or in writing, shall be null and void as contrary to public policy.” *Id.* “The plaintiffs assert[ed] that the arbitration clauses at issue are nothing more than a written contractual requirement that a nursing home resident (or his or her legal representative) waive the resident’s right to commence an action in circuit court, and therefore under Section 15(c) of the Nursing Home Act are null and void as contrary to public policy.” *Id.* at 271, 2011 WL 2611327, at *13.

This Court rejected that argument as Section 15(c) of the West Virginia Nursing Home Act specifically targets arbitration clauses and, therefore, is preempted by the FAA. *See id.* at 281-82, 2011 WL 2611327, at *20-21. Specifically this Court ruled as follows:

[W]e believe that Section 15(c) of the Nursing Home Act conflicts with the FAA's intended purpose of putting arbitration clauses on an equal footing with other contractual clauses. By adopting Section 15(c), the West Virginia Legislature clearly intended for the right of a nursing home resident to pursue a civil action in court to be unwaivable, a right that the resident (or the resident's representative) could not be compelled to relinquish as a condition of admission to a nursing home. The Nursing Home Act is a comprehensive statutory scheme of public oversight of nursing homes, designed to ensure that the rights and dignity of nursing home residents are protected. Although arbitration may be an expeditious way of resolving some disputes, it is also a way for the nursing home industry to resolve violations of the Act out of the public's eye. The Constitution, however, preserves inviolate the right of any person to air their grievances in a public courtroom. In adopting Section 15(c), the Legislature intended that any suit to resolve subversions of a nursing home resident's rights and dignity would occur in a public forum. Arbitration clauses in nursing home admission agreements are clearly contrary to the Legislature's goal of full protection of the rights of nursing home residents.

Still, Section 15(c) singles out for nullification written arbitration agreements with nursing home residents, and does not apply to any other type of contractual agreements. It therefore is not a defense that exists at law or equity “for the revocation of any contract” under Section 2 of the FAA. There may be other types of agreements that Section 15(c) may operate to nullify, but the FAA preempts Section 15(c) from nullifying an existing, written, arms-length

agreement reflecting a transaction in interstate commerce between a nursing home and a resident to arbitrate any dispute. ‘State laws that are applicable to arbitration contracts and some other types of contracts, but not all contracts, are not grounds for the revocation of any contract.’

In conclusion, we hold that to the extent that Section 15(c) of the Nursing Home Act attempts to nullify and void any arbitration clause in a written contract, which evidences a transaction affecting interstate commerce, between a nursing home and a nursing home resident or the resident’s legal representative, the statute is preempted by Section 2 of the Federal Arbitration Act.

Id.

The defendants appealed to the Supreme Court of the United States, which vacated that part of *Brown I* that held that a pre-injury arbitration agreement violated public policy. *Marmet*, 132 S. Ct. 1201, 2012 WL 538236. The Supreme Court of the United States held that this portion of the *Brown I* decision by this Court was “both incorrect and inconsistent with clear instruction in the precedents of” the Supreme Court of the United States in its interpretation of the FAA. *Id.* at 1203. The “. . . emphatic federal policy in favor of arbitral dispute resolution” is to be upheld and cannot be disregarded based on reasons that only apply to arbitration. *Id.* at 1203 (citing *KPMG LLP v. Cocchi*, 565 U. S. ___, 132 S. Ct. 23, 181 L.Ed.2d 323 (2011) (*per curiam*) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 631 (1985))).

Here, the Circuit Court erred when it relied on a “public policy” specific to arbitration. The Circuit Court’s “public policy” is nothing more than a disguised version of the type of “disfavored treatment” of agreements to arbitrate that this Court sought to abolish in *Brown I*. *Id.* This “public policy,” if it in fact exists, is preempted by the FAA.

VI. CONCLUSION

The Circuit Court struck down the parties’ Arbitration Agreement based on an incorrect analysis of procedural and substantive unconscionability with a misunderstanding of the

arbitration forums available to Shrewsbury. It further erroneously concluded that public policy requires a plaintiff “to have his day in court” if the terms of a contract are materially changed. The Circuit Court has effectively announced that the Tenth Judicial Circuit will never uphold arbitration agreements under any circumstance.

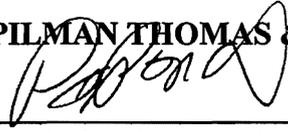
Neither the courts within Tenth Judicial Circuit, nor any other Judicial Circuit in this State for that matter, can unilaterally strike down the Syllabus Points articulated by this Court, or ignore the clear holdings of law announced by the Supreme Court of the United States. As the Supreme Court of the United States articulated in *Marmet*, decisions finding “the FAA’s coverage to be more limited than mandated by the Court’s previous cases” cannot stand. *Marmet*, 132 S. Ct. 1201, 2012 WL 538236. The Tenth Judicial Circuit – as well as the other Judicial Circuits in this State – must understand that the FAA and state and federal decisions advancing the Congressional intent in enacting the FAA cannot go ignored. Valid, enforceable agreements to arbitrate, such as the Arbitration Agreement in this case, must be enforced according to their terms.

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

1. reverse the decision of the Circuit Court;
2. dismiss Shrewsbury’s lawsuit;
3. compel to arbitration Shrewsbury’s claims; and
4. grant such other and further relief as this Court deems just and proper.

CREDIT ACCEPTANCE CORPORATION

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CREDIT ACCEPTANCE CORPORATION,

Defendant Below, Petitioner,

v.

DOCKET NO. 11-1646

ROBERT J. FRONT AND BILLYE S. FRONT,

Plaintiffs Below, Respondents,

CREDIT ACCEPTANCE CORPORATION,

Defendant Below, Petitioner,

v.

DOCKET NO. 12-0545

OCIE SHREWSBURY,

Plaintiff Below, Respondent.

CERTIFICATE OF SERVICE

I, Don C. A. Parker, hereby certify that service of the foregoing **Petitioner Credit Acceptance Corporation's Brief and Appendix** thereto, has been made via U.S. Mail, on this 30th day of July, 2012, addressed as follows:

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