

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CREDIT ACCEPTANCE CORPORATION,

Defendant Below, Petitioner,

v.

ROBERT J. FRONT AND BILLYE S. FRONT,

Plaintiffs Below, Respondents,

CREDIT ACCEPTANCE CORPORATION,

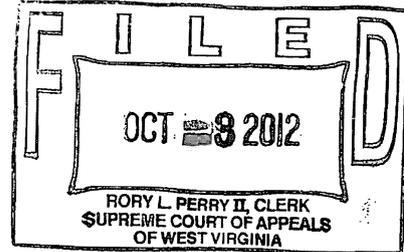
Defendant Below, Petitioner,

v.

OCIE SHREWSBURY,

Plaintiff Below, Respondent.

DOCKET NO. 11-1646



DOCKET NO. 12-0545

PETITIONER CREDIT ACCEPTANCE CORPORATION'S REPLY 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 REGARDING ORAL ARGUMENT AND DECISION

By filing a summary response, Respondent Ocie Shrewsbury ("Shrewsbury") is "deemed to have consented to the waiver of oral argument." Rev. W. Va. R. App. P. 10(e). Notwithstanding Shrewsbury's waiver, oral argument remains appropriate for the following reasons:

Credit Acceptance raises several issues of fundamental public importance. The first issue is whether, under the precedent of the Supreme Court of the United States and Syllabus Point 20 of this Court’s decision in *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011), *vacated sub nom. Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. ___, 132 S. Ct. 1201, 182 L.Ed.2d 42 (2012) (“*Brown I*”), a valid agreement may be struck down based on a finding of procedural unconscionability that relies on circumstances existing years after the arbitration agreement’s formation. The second issue is whether, in light of section 5 of the FAA, the unavailability of one of two non-specialized arbitration forums named in the parties’ arbitration agreement constitutes a “material change” rendering the arbitration agreement substantively unconscionable under Syllabus Point 20 of *Brown I*. A third issue is whether a public policy exists in West Virginia that requires Shrewsbury or any other party to a contract to be given the opportunity to bring claims in court if a contract is changed after its formation. Such a public policy, if one were to exist, improperly targets arbitration provisions and would not apply to contracts that do not include those provisions.

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.

III. ARGUMENT

A. Shrewsbury has failed to respond to all of Credit Acceptance’s assignments of error.

By electing to file a Summary Response pursuant to Revised Rule 10(e) of the Revised West Virginia Rules of Appellate Procedure, Shrewsbury was not constrained by all of the formalities of a traditional response brief filed pursuant to Revised Rule 10(d) of the Revised

West Virginia Rules of Appellate Procedure. Nonetheless, Shrewsbury's Summary Response was required to "contain an argument responsive to the assignments of error" Rev. W. Va. R. App. P. 10(e).

Shrewsbury's Summary Response fails to respond to Credit Acceptance Corporation's ("Credit Acceptance") second assignment of error. In its second assignment of error, Credit Acceptance questions the Circuit Court's articulation of a "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.

Shrewsbury also dodges the legal arguments underpinning Credit Acceptance's first assignment of error with respect to procedural unconscionability. Credit Acceptance's first assignment of error showed that "[p]rocedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract." Syl. pt. 17, *Brown*, 228 W. Va. 646, 274 S.E.2d 250. It necessarily looks only to the facts as they existed at the time of the making of the contract. Shrewsbury emphasizes a timeline of events related to the named arbitration forums, but that timeline was not contemplated by the Circuit Court in its findings of fact. Indeed, the Circuit Court relied on the fact that "neither of the specified forums **currently** accepts creditor arbitration requests" to find that "forums have been **eliminated**" and "there has been a material **change** in the terms of the contract." (A.R. 7 (emphasis added).) Although the National Arbitration Forum ("NAF") was unavailable at the time Shrewsbury entered into the contract, both parties operated under a mutual mistake of fact that it only became unavailable after the contract was formed. The Circuit Court operated under that mistake, as well.

The Circuit Court did not base its ruling on the unavailability of the NAF at the time Shrewsbury entered into the contract. Likewise, it did not base its decision on the rules of the American Arbitration Association (“AAA”) – rules that still permit Shrewsbury to initiate arbitration today – that existed when she entered into the contract. The Circuit Court did not say there was no meeting of the minds to create the contract that existed when Shrewsbury entered into it. Instead, the Circuit Court concluded that “there was no meeting of the minds to create the contract as it exists today.” (A.R. 7 (emphasis added).) The Circuit Court looked at the present circumstances, regardless of whether they were the same on the day Shrewsbury executed her contract. Whether procedural unconscionability can be based on events occurring after the formation of the contract, which the Circuit Court found possible, is the legal error assigned. Shrewsbury has argued new facts not contemplated by the Circuit Court, but she has failed to respond to Credit Acceptance’s assignment of error as those facts were actually understood and applied by the Circuit Court.

Under Revised Rule 10(d) of the Revised West Virginia Rules of Appellate Procedure, “[i]f the respondent’s brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner’s view of the issue.” Rev. W. Va. R. App. P. 10(d). Credit Acceptance respectfully requests that this Court find this principle equally applicable to Summary Responses filed under Revised Rule 10(e) and find that, to the extent that Shrewsbury has failed to respond to Credit Acceptance’s assignments of error, Shrewsbury agrees with Credit Acceptance’s position on the issues.

B. Shrewsbury’s summary response improperly asks the Court to affirm the Circuit Court’s conclusion that the parties’ arbitration agreement is unenforceable based on facts not found by the Circuit Court and on legal theories not disclosed by the record.

Shrewsbury correctly states the *de novo* standard of review for questions of law on

appeal. Shrewsbury also correctly states that this Court may “affirm [the circuit court’s judgment] on any legal ground disclosed by the record regardless of the theory that the circuit court employed.” (Summ. Resp., at 5-6 (citing Syl. pt. 3, *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965)).) However, *Barnett* applies when a circuit court arrives at the right conclusion based on its finding of facts, but applies the wrong legal theory. On appeal, the Supreme Court of Appeals can supply the correct legal theory. This is not what Shrewsbury argues that this Court should do.

Shrewsbury urges this Court to “independently review” the parties’ contract “and determine for itself whether the terms are clearly disclosed and simple enough to give Shrewsbury a reasonable opportunity to understand them.” (*Id.* 6.) That issue was not an assignment of error in Credit Acceptance’s appellate brief. Shrewsbury has not cross-assigned error to the Circuit Court’s June 29, 2011 order (“Order”). Thus, that issue is not an issue that is on appeal. Shrewsbury nonetheless asks this Court to ignore the findings of fact contained in the Order and to make new **findings of fact** to fit the same legal theory –unconscionability – purportedly relied on by the Circuit Court. (A.R. 7.) *Barnett* does not support Shrewsbury’s suggestion.

“The factual findings of a trial court sitting in lieu of a jury will not be disturbed on appeal unless they are plainly wrong. This rule is so well settled that it requires no detailed discussion.” *Peoples Bank of Point Pleasant v. Pied Piper Retreat, Inc.*, 158 W. Va. 170, 181, 209 S.E.2d 573, 579 (1974). One of the findings on which the Circuit Court based its decision was that “the arbitration agreement was clearly brought to the attention of the Plaintiff in the contract” (A.R. 7.) The Circuit Court relied on this finding to support its procedural

unconscionability analysis. This factual finding contained in the Circuit Court's Order is not "plainly wrong" and should not be disturbed.

Shrewsbury also argues that this Court should affirm the decision of the Circuit Court an alternate theory of impracticability. Impracticability is a legal theory, but this Court cannot affirm on that basis because impracticability is not "disclosed in the record." *Barnett* only allows this Court to affirm on a different legal theory **disclosed in the record**. Shrewsbury did not argue impracticability before the Circuit Court. The Circuit Court did not decide on that basis in its Order. Neither the Circuit Court nor Credit Acceptance has previously had the opportunity to analyze the impracticability doctrine Shrewsbury raises for the first time in her Summary Response.¹

Finally, Shrewsbury contends that this Court can affirm the Circuit Court's decision because Shrewsbury "did not assent to arbitrate illegalities." (Summ Resp., at 13.) Shrewsbury claims that she did not agree to arbitrate violations of the West Virginia Consumer Credit and Protection Act, §§ 46A-1-101, *et seq.* ("WVCCPA") that were "willful" or "intended to harass" (Summ. Resp., 13.) Shrewsbury did not brief this argument for the Circuit Court and only mentioned it briefly at oral argument on Credit Acceptance's motion to compel arbitration. (A.R. 8:15-9:19.) Both at oral argument below and in her Summary Response, Shrewsbury

¹ Impracticability is a contract doctrine, in which

a party to a contract who claims that a supervening event has prevented, and thus excused, a promised performance must demonstrate each of the following: (1) the event made the performance impracticable; (2) the nonoccurrence of the event was a basic assumption on which the contract was made; (3) the impracticability resulted without the fault of the party seeking to be excused; and (4) the party has not agreed, either expressly or impliedly, to perform in spite of impracticability that would otherwise justify his nonperformance.

Syl. pt. 2, in part, *Waddy v. Riggleman*, 216 W. Va. 250, 606 S.E.2d 222 (2004). Unconscionability, on the other hand, is two-pronged and requires both procedural and substantive unconscionability. Unconscionability is different from impracticability. The Circuit Court did not apply impracticability when ruling on Credit Acceptance's motion to compel arbitration.

conceded that only “willful” violations or those made with the intent to harass are considered illegal under the WVCCPA. (Summ. Resp., 13; A.R. 8:15-9:19.) In its Order, the Circuit Court properly avoided making any conclusions on the merits of these contentions. It made no findings as to whether violations of the WVCCPA occurred, or whether any potential violations were “willful” or “made with an intent” to harass. In fact, the Circuit Court made no findings of fact that even mention the WVCCPA. Shrewsbury did not plead any facts that might evidence willfulness or an intent to harass. Shrewsbury merely claims that “[i]nsofar as . . .” Credit Acceptance has committed specified violations with the requisite intent, the conduct is criminal. (Compl. ¶¶ 18(c)-(f). Although Shrewsbury’s challenge to the arbitration agreement’s (“Arbitration Agreement”) scope is technically “disclosed” by the record, the facts alleged are insufficient to permit a court to say, with positive assurance, that Shrewsbury did not agree to arbitrate her claims for violations of the WVCCPA.

C. The parties’ Arbitration Agreement is not procedurally unconscionable.

On appeal, Credit Acceptance asserts that the Circuit Court erred, in part, by determining that, even though the arbitration agreement was not procedurally unconscionable when it was executed, circumstances subsequent to its execution rendered it procedurally unconscionable. “Procedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract.” Syl. pt. 17, *Brown I*, 228 W. Va. 646, 274 S.E.2d 250. 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.*

In her Summary Response, Shrewsbury contends that the Circuit Court “concluded that the contract was not procedurally unconscionable but that there was no meeting of the minds to

create the contract.” (Summ. Resp., 4.) She focuses on the fact that the NAF stopped accepting consumer claims in 2009 and the AAA stopped accepting debt collection actions by creditors (a type of claim **not** at issue in this case) in 2009. (*Id.*) Shrewsbury then relies on *Barnett*, 149 W. Va. 246, 140 S.E.2d 466, to urge this Court to find her Arbitration Agreement with Credit Acceptance is procedurally unconscionable for three reasons.

First, Shrewsbury claims that it is “densely-worded” and located on the back of the contract. Second, she notes that the parties did not conduct discovery, so the Circuit Court’s findings on procedural unconscionability are necessarily limited. Third, she alleges that pre-contract changes to the two arbitration forums listed in the Arbitration Agreement render her ability to arbitrate “one-sided” and “meaningless.” (Summ. Resp., 4-5.)

Shrewsbury’s argument is unavailing. Shrewsbury dismisses the power of the opt-out provision in the Arbitration Agreement as curative (*id.* at 5), but she admits that she was aware of the Arbitration Agreement, did not consider opting out, and did not familiarize herself with the forums (even though the Arbitration Agreement provided contact information where she could obtain the forums’ rules) (*id.*, 4-5). Just as one who fails to even read her contract is nonetheless held to its terms, Shrewsbury must be held to the Arbitration Agreement that she had the opportunity to consider and reject, but chose to accept. The Arbitration Agreement is not procedurally unconscionable.

i. The Arbitration Agreement is conspicuous within the parties’ contract.

Shrewsbury’s Summary Response is rife with references to a “densely-worded” agreement “buried” on the back page. Despite Shrewsbury’s attempt to present the Arbitration Agreement as inconspicuous, the Circuit Court below said that “the arbitration agreement was clearly brought to the attention of the Plaintiff.” (A.R. 6.) Indeed, Shrewsbury found the

Arbitration Agreement on the one page, double-sided “Retail Installment and Security Contract” because she is, after all, contesting its validity – though notably not the contract’s validity (A.R. 945). Finding the Arbitration Agreement is not the arduous task that Shrewsbury describes. Before even reaching the back side of the contract, Shrewsbury had two conspicuous guideposts on the front side of the contract. On the front side, immediately below the line on which Shrewsbury signed her name, is the following notice:

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

(A.R. 28.) Immediately below the “**ARBITRATION NOTICE**” is a second notice referring to the Arbitration Agreement:

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.*) With each notice containing all capital letters and bold typeface, the eye is immediately drawn down to the notices when looking at the signature line on the contract. Also near the signature block is the affirmation that, by signing the contract, the signer has **read** and **understands** the contract. (*Id.*)

The Arbitration Agreement on the back of the one page, double-sided contract is conspicuous in its own right. It covers over one-third of the back side of the contract. It falls under a heading in bold, underlined, capitalized typeface: “**AGREEMENT TO ARBITRATE**[.]” (A.R. 29.) It contains separate paragraphs. It is written in plain English. Not only is arbitration explained, but the Arbitration Agreement explicitly provides, in underlined typeface, that “**You and we voluntarily and knowingly waive any right to a jury trial.**” (*Id.*) The opt-out provision is introduced in underlined typeface at the end of the arbitration clause, rather

than in the middle, and reads: “YOUR RIGHT TO REJECT”. (*Id.*) The opt-out provision provided Shrewsbury 14 days to reject the Arbitration Agreement. Shrewsbury did not elect to reject the Arbitration Agreement.

Nothing about the Arbitration Agreement’s placement, typeface, language, or opt-out provision renders it opaque or inconspicuous. To the contrary, the contract’s well-placed notices on the front page and the sizable Arbitration Agreement, itself, on the back page render the Arbitration Agreement difficult to miss. The Arbitration Agreement’s plain language makes it understandable. The Arbitration Agreement’s opt-out provision makes it avoidable. Shrewsbury simply chose to accept the Arbitration Agreement.

ii. Discovery on the contract’s formation is unnecessary because Shrewsbury does not contest the validity of her contract.

Shrewsbury alludes to an alleged need for more discovery on the formation of the contract by mentioning this Court’s recent decision in *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011), *vacated sub nom. Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. ___, 132 S. Ct. 1201, 182 L.Ed.2d 42 (2012), *remanded to* ___ W. Va. ___, ___ S.E.2d ___, Nos. 35494, 35546, 35635 (W. Va. June 13, 2012), Slip Op. (“*Brown II*”). (Summ. Resp., 5.) The Arbitration Agreement between Shrewsbury and Credit Acceptance was executed contemporaneously with (and as part of) the parties’ contract. There is no need for discovery on the formation of the contract because Shrewsbury does not dispute the validity of the contract. At the hearing on “Defendant Credit Acceptance Corporation’s Motion to Dismiss This Proceeding and Compel Arbitration Or, in the Alternative, to Stay this Proceeding Pending Arbitration,” counsel for Shrewsbury admitted that “[o]ur clients bought the car; they owe the money; there’s absolutely no dispute” (A.R. 945.) Counsel clarified that “[t]here is no dispute over the contract language, we’re bound by it, etcetera.” (*Id.*) Because there is no

allegation that the validity of the contract is disputed, discovery on the formation of the contract would waste this Court's and the parties' time and resources.

- iii. **The American Arbitration Association (“AAA”) was and is available to Shrewsbury, and, though unavailable, the inclusion of the National Arbitration Forum (“NAF”) was not material such that it results in a lack of meeting of the minds.**

In her Summary Response, Shrewsbury argues that the Circuit Court “concluded that the contract was not procedurally unconscionable but that there was no meeting of the minds to create the contract.” (Summ. Resp., 4.) Shrewsbury contends – and Credit Acceptance does not dispute – that Shrewsbury entered into her contract after the NAF stopped all consumer arbitrations and after the AAA began declining to administer creditor's debt collection claims absent consent from the consumer at the time of the dispute. She argues that because of this sequence of events, the contract was “illusory” and “one-sided.” (Summ. Resp., 5.)

Shrewsbury's Summary Response misapprehends the Circuit Court's conclusions on procedural unconscionability. In its Order, the Circuit Court determined that the specified arbitration forums had been eliminated, thereby changing the contract, as opposed to being non-existent from the contract's inception. (A.R. 6.) Shrewsbury's Summary Response further dismisses that the AAA was – and is – willing and able to accept the type of claims Shrewsbury has presented in this lawsuit. Shrewsbury attempts to make the NAF and AAA material terms in the Arbitration Agreement even though they were – and are – not.

The fact that the NAF was unavailable at the time Shrewsbury entered into her contract and the AAA would not accept a type of claim that is not at issue here did not create a lack of meeting of the minds to create the contract. This mutual mistake of fact is specifically contemplated by the FAA and is correctable through section 5 of the FAA, which provides for the appointment of substitute arbitrators. 9 U.S.C. § 5.

Notwithstanding that the AAA remains willing and available to arbitrate Shrewsbury's claims, which is the only live controversy before this Court, Shrewsbury is mistaken in claiming that there is no bilaterality in the contract.² In the event that Credit Acceptance ever brings a debt collection claim against Shrewsbury (to date, it has not), either Credit Acceptance or Shrewsbury could still elect to arbitrate the claim. Section 5 of the FAA supplies the mechanism for appointing an arbitrator. *Id.*

Credit Acceptance agrees with Shrewsbury that courts differ in their standards for applying section 5 of the FAA. This Court has never adopted a standard for applying section 5 of the FAA. A minority of courts refuse to employ section 5 of the FAA when the only specifically named arbitrator is unavailable. *See In re Salomon Inc. Shareholders' Derivative Litig.*, 68 F.3d 554, 560 (2d Cir. 1995). The majority considers whether the named arbitrator is "integral" or "material" to the parties' agreement.³ In order to "ensure[] that private agreements

² There are essentially four instances in which the arbitration clause may come into play, and they show that the arbitration provision is bilateral. First, Shrewsbury might initiate a claim in arbitration against Credit Acceptance. Second, Shrewsbury might initiate a claim in the courts, and Credit Acceptance is entitled to compel that claim to arbitration. Third, Credit Acceptance might initiate a claim in court and Shrewsbury can compel that claim to arbitration. In that instance, the AAA will still accept that claim and administer it. (*See* Pet.'s Br., 21, citing (American Arbitration Association, Notice on Consumer Collection Arbitrations, available at <http://www.adr.org> (clicking "Areas of Expertise," then "Consumer" and opening "Notice on Consumer Collection Arbitrations" under "Documents") (last accessed on October 2, 2012)). Fourth, Credit Acceptance might initiate a claim in arbitration. It is only in the last instance that the AAA will not administer the claim. *Id.* (including in the moratorium "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 consumer finance matter.") Even in that instance, section 5 of the FAA would still apply to allow the court to appoint a substitute arbitrator.

³ *See, e.g., Montgomery v. Applied Bank*, 848 F. Supp. 2d 609, 614 (S.D.W. Va. 2012) ("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."); *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)) (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."); *Brown v. IIT 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

to arbitrate are enforced according to their terms[.]” Syl. pt. 8, *Brown I*, 228 W. Va. 646, 274 S.E.2d 250, 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 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)); *see Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. ___, 132 S. Ct. 1201, 1203, 182 L.Ed.2d 42 (Feb. 21, 2012) (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.” *Reddam*, 457 F.3d at 1061.

In this case, inclusion of both the NAF and the AAA in the Arbitration Agreement was not material. The forums are referred to in one paragraph, after the contract sets forth and emphasizes the importance of arbitrating disputes. Shrewsbury admits that she did not investigate the rules. She was unfamiliar with them. The specifics of the rules could not have, in her mind, been a basis of the bargain. Nor are the AAA or the NAF the type of specialized arbitration forums that the absence of which requires the contract to be stricken. Neither the NAF nor the AAA were “material” terms to the contract. Although AAA remains available to

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.”); *In re: Checking Account Overdraft Litig. MDL No. 2036*, 685 F.3d 1269, 1283, 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.’”).

Shrewsbury, to the extent Credit Acceptance were to pursue debt collection claims for which the parties would seek arbitration, the contract retains bilaterality through section 5 of the FAA. The Arbitration Agreement is not procedurally unconscionable.

D. The parties' Arbitration Agreement is not substantively unconscionable.

The Circuit Court found that the “elimination of the arbitration forums is a material change in the terms of the contract.” (A.R. 7.) Credit Acceptance alleges that the Circuit Court erred in basing substantive unconscionability on this finding because the AAA remains available to administer Shrewsbury’s claims and, even if it were not available, section 5 of the FAA provides a method for appointing a substitute arbitrator.

In her Summary Response, Shrewsbury argues that the contract is substantively unconscionable and also incorrectly suggests that performance of the Arbitration Agreement with Credit Acceptance is impracticable because the NAF is not available and the AAA would not accept claims brought without Shrewsbury’s present-day consent. (Summary Response, 6-7.) Shrewsbury’s contention fails for two reasons. First, as noted above, this Court cannot affirm the Circuit Court’s decision based on the legal theory of impracticability because it was not “disclosed by the record.” *See* Syl. pt. 3, *Barnett*, 149 W. Va. 246, 140 S.E.2d 466. Second, even if impracticability were a legal theory disclosed by the record, it does not support a determination that the Arbitration Agreement is unenforceable.

This Court has set forth the doctrine of impracticability as follows:

a party to a contract who claims that a supervening event has prevented, and thus excused, a promised performance must demonstrate each of the following: (1) the event made the performance impracticable; (2) the nonoccurrence of the event was a basic assumption on which the contract was made; (3) the impracticability resulted without the fault of the party seeking to be excused; and (4) the party has not agreed, either expressly or impliedly, to perform in spite of impracticability that would otherwise justify his nonperformance.

Syl. pt. 2, in part, *Waddy v. Riggleman*, 216 W. Va. 250, 606 S.E.2d 222 (2004). “Although the present rule is less strict than its inflexible ancestor [impossibility], it, nevertheless, *remains a difficult standard to meet.*” *Id.* at 258, 606 S.E.2d at 238 (emphasis added). In fact, “[w]hile impracticability embraces situations short of absolute impossibility, mere increase in difficulty is not enough.” *Id.* (quoting 30 Williston on Contracts § 77:1, at 277-78).

In this case, Shrewsbury’s argument is unavailing for two reasons. First, the AAA remains **available** to take **Shrewsbury’s claims** and is therefore not an “impracticable” option under the *Waddy* test.⁴ Second, section 5 of the FAA vests the Court with the power to appoint an arbitrator upon either party’s petition, thereby removing any impracticability associated with an unavailable arbitrator, such as the NAF. That the Circuit Court refused to appoint a substitute arbitrator (to the extent one is even necessary, which it is not) in lieu of invalidating the parties’ Arbitration Agreement constitutes clear error of law. *See* 9 U.S.C. § 5. As discussed, *supra*, section 5 is a safeguard to ensure that parties’ intent to arbitrate is realized. In this case, section 5 is curative of any alleged defect in naming of the arbitrators.

E. Shrewsbury’s claims fall within the scope of the Arbitration Agreement and any ambiguity should be resolved in favor of arbitration.

By asserting that her claims do not fall within the scope of the Arbitration Agreement, Shrewsbury raises an entirely new point that was not a theory on which the Circuit Court made any findings of fact or conclusions of law. Moreover, in support of her argument, Shrewsbury improperly attaches, without a motion and leave of this Court, an unpublished circuit court opinion that was not included in the appendix record and was not part of the record of this case. *See* Rev. W. Va. R. Civ. P. 6(a)-(b). Shrewsbury contends that her WVCCPA claims do not fall

⁴ The purported decision by the AAA not to take creditor debt collection claims in no way implicates or affects the availability of the AAA to be a forum where the claims are brought by the consumer.

within the scope of the Arbitration Agreement because they might be criminal. This Court has established a 2-prong 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 293 (2010). It is well-settled that ambiguities involving the scope of an arbitration agreement are to be resolved in favor of arbitration. *Volt Info. Sciences, Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 475 (1989) (“in applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the Act, . . . due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.”).

Shrewsbury cites to *Chassereau v. Global-Sun Pools, Inc.*, 644 S.E.2d 718 (S.C. 2007), a case from the Supreme Court of South Carolina, to argue that a plaintiff’s claims for debt collection violations do not fall within the scope of even a broad arbitration provision. In *Chassereau*, the plaintiff alleged that she received repeated telephone calls to her workplace, had private information disclosed, and was the alleged target of false and defamatory statements. The Supreme Court of South Carolina concluded in *Chassereau* that the alleged conduct was outrageous. In denying arbitration, the Supreme Court of South Carolina reasoned that Chassereau, the debtor, should have expected that she would receive contact requesting payment of her debt, but that employees of the collectors “committed acts historically associated with the common law tort of outrage in seeking to collect an overdue debt.” *Id.* at 171.

The claims in *Chassereau* are preempted by the FAA for the same reasons as in *Marmet*, and *Chassereau* was incorrectly decided. The FAA preempts any attempt by the Nursing Home

Act to single out nursing home injuries from the application of arbitration agreements. *Marmet*, 565 U.S. ___, 132 S. Ct. at 1204. The same rationale holds true for *Chassereau*; claims based on collection calls, even where those claims are founded on an allegation of outrageous conduct, would be preempted by the FAA. Any attempt to single those claims out from the application of arbitration agreements is contrary to the express purpose of the FAA and the Supreme Court’s interpretation of the FAA.

Moreover, to the extent that claims of outrageous conduct may be considered outside the scope of an arbitration agreement and therefore not subject to its terms, those claims are not at issue in this appeal. When faced with a motion to compel arbitration of claims alleging, *inter alia*, violations of the WVCCPA, the same claims at issue in this case, the United States District Court for the Southern District of West Virginia (“Southern District”) granted the motion to compel. *Montgomery v. Applied Bank*, 848 F. Supp. 2d 609, 611 (S.D.W. Va. 2012). In doing so, it held that that “[q]uestions concerning the scope of an arbitration clause are to be left to the arbitrator, ‘unless it can be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute.’” *Id.* at 618 (quoting *Winston Salem Mailers Union 133, CWA v. Media Gen. Operations, Inc.*, 55 Fed. Appx. 128, 133 (4th Cir. 2003) (citations omitted)). The Southern District concluded that it could not say with “positive assurance” that the plaintiff’s WVCCPA claims were outside the scope of the arbitration clause. *Id.* at 619.

Shrewsbury’s reliance on *Chassereau* is misplaced. Unlike *Chassereau*, who pursued tort claims associated with the common law tort of outrage, Shrewsbury’s claims all arise under the WVCCPA. Shrewsbury stipulated at the hearing on the motion to compel arbitration to dismiss all causes of action other than her WVCCPA claims. (A.R. 943.) Even if she had not so-

stipulated, Shrewsbury's Complaint alleged no specific fact or incident alleging outrageous behavior by Credit Acceptance. Shrewsbury merely restated her WVCCPA claims and alleged that, if violations of the WVCCPA were willfully committed, they were criminal and in turn would support a claim for intentional infliction of emotional distress.

Shrewsbury improperly attempts to bolster her argument that she did not agree to arbitrate potential violations of the WVCCPA by directing this Court to a recent, unpublished decision from the Circuit Court of Berkeley County, West Virginia, *David M. Long and Phyllis M. Long v. Juniper Bank, d/b/a Barclays Bank Delaware*, Civ. Action No. 11-C-787, Order Denying Motion to Compel Arbitration (Apr. 27, 2012). In *Long*, the Circuit Court of Berkeley County considered a motion to compel arbitration based on a broad arbitration clause. (Summ. Resp., *Long*, 2.) The plaintiffs challenged the clause on several grounds, including that the plaintiffs' claims under the WVCCPA were outside the scope of the arbitration clause. The *Long* court based its conclusion that the WVCCPA claims were not arbitrable on the "tangential[]" relationship between WVCCPA claims and the contract, and the parties' inability to contract for illegal activity. (*Id.* at 6.)

The arguments in *Long* are unavailing. The arbitration clause at issue in *Long* did not specifically contemplate disputes arising from debt collection actions. It is not surprising, then, that claims resulting from debt collection calls were found to be beyond the scope of the arbitration provision in *Long*. Here, the opposite is true. The Arbitration Agreement at issue does specifically address claims arising from debt collection calls. All of Shrewsbury's WVCCPA claims stem from Credit Acceptance's debt collection efforts, and the Arbitration Agreement specifically covers claims "arising out of or in any way related to . . . the collection of amounts due under this Contract" (A.R. 29.)

In short, *Long* does not affect *Montgomery*'s persuasiveness. *Long* relies on the same standard as *Montgomery*, namely that claims should proceed to an arbitrator unless there is "positive assurance" that claims fall outside the scope of the arbitration agreement. See *Montgomery*, 848 F. Supp. 2d at 618; (Summ. Resp., *Long*, 4.) *Montgomery* considered alleged debt collection violations of the WVCCPA, just like in Shrewsbury's case. *Montgomery* involved no allegations of "outrageous" conduct, just like in Shrewsbury's case. *Montgomery* concluded that there was no positive assurance that the WVCCPA claims did not fall within the scope of the arbitration provision and sent those claims to arbitration. This Court should reach the same conclusion and find that Shrewsbury's claims fall within the scope of the Arbitration Agreement.

IV. CONCLUSION

The parties entered into an agreement to arbitrate that included, among other things, an opt-out provision for Shrewsbury. The agreement advised Shrewsbury how to obtain more information about the forums listed, which should have aided her in her decision of whether to opt-out or not. Shrewsbury accepted the Arbitration Agreement.

No one contests that the contract was formed after changes were made to the NAF and the AAA. The NAF was unavailable to both parties. The AAA is available to Shrewsbury, who has actually brought claims. Credit Acceptance would admittedly need to find a forum for any future, hypothetical debt collection claims. Credit Acceptance would nonetheless be required to arbitrate those claims. Section 5 of the FAA provides a method to substitute an arbitrator. If the parties could not agree on an arbitrator, a court would ultimately decide. Credit Acceptance would not simply avoid arbitration if Shrewsbury compelled it (or it elected to arbitrate). Credit

Acceptance would be bound to the bargain it struck with Shrewsbury, premised on a desire to arbitrate claims. Shrewsbury should be held to the same bargain.

Further, Shrewsbury's claims against Credit Acceptance result from its debt collection efforts and necessarily arise from or relate to "the collection of amounts due in the Contract." (A.R. 29.) As such, those claims are clearly within the scope of the contract.

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 Reply Brief** has been made via U.S. Mail, on this 3rd day of October, 2012, addressed as follows:

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