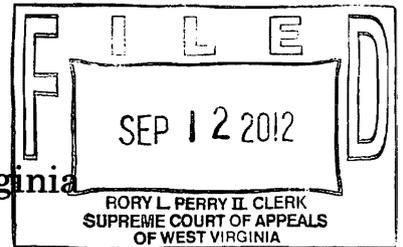


In the Supreme Court of Appeals of West Virginia



Credit Acceptance Corporation.
Defendant Below, Petitioner,

vs.

Docket No. 11-1646

Robert J. Front and Billye S. Front,
Plaintiffs Below, Respondents,

Credit Acceptance Corporation,
Defendant Below, Petitioner,

vs.

Docket No. 12-0545

Ocie Shrewsbury,
Plaintiff Below, Respondent

**Respondent Ocie Shrewsbury's Summary Response to
Credit Acceptance's Brief**

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Questions Presented

1. A densely-printed arbitration clause on the back of a pre-printed form contract gave Shrewsbury the right to arbitrate before the National Arbitration Forum (NAF) or the American Arbitration Association (AAA). It did not disclose that the NAF would not arbitrate the claims or that the AAA allows creditors to avoid arbitrating their debt collection claims against consumers. Is this procedurally unconscionable?

2. The boiler-plate arbitration clause gave Shrewsbury the right to elect to arbitrate in either the NAF or AAA. At the time of contracting, the NAF did not arbitrate such claims and the AAA allowed creditors to by-pass arbitration unless the consumer – at the time of the dispute – subsequently agreed to arbitrate. Is this substantively unconscionable or impracticable?

3. Shrewsbury contracted for the right to elect his arbitrator and the rules governing the arbitration. May the judiciary force him into binding arbitration by another arbitrator under another set of undisclosed rules?

4. Shrewsbury alleges violations of the West Virginia Consumer Credit Protection Act that, if wilful or intended to harass, are crimes. Did Shrewsbury contemplate that arbitration would cover future illegalities?

Statement of the Case

In July 2009, the State of Minnesota sued the NAF, alleging that it worked behind the scenes with debt collectors against the consumers' interests.¹ The NAF within days entered into a consent decree forbidding it from handling any new consumer arbitrations. App. 525-528.

Also in July 2009, the AAA issued a moratorium on administering debt collection arbitrations. App. 530. It explained to Congress that consumers had "legitimate concerns" about arbitrating their claims and admitted that it needed to "substantially boost the orientation and training of consumer debt collection arbitrators" in certain areas, including the "substantive law regarding consumer protection statutes." App. 530, 536. It later clarified that it would not participate in arbitrating consumer debt collections unless the consumer – at the time of the dispute – agrees to arbitrate. The AAA continues to handle consumer cases where the consumer agrees to arbitrate at the time of the dispute, such as where the consumer demands arbitration. Petitioner's Brief, p. 21 (citing the on-going moratorium).

Almost a year later, Ocie Shrewsbury on June 11, 2010 entered into a contract to purchase an automobile. App. 28-29. The contract is a pre-printed

¹This complaint is available at www.ag.state.mn.us/PDF/PressReleases/SignedFiledComplaintArbitrationCompany.pdf (accessed September 5, 2012).

form, printed on the front and back, in what appears to be 10-point type. App. 28-29, 945 (Tr. p. 10 ll.14-15). An arbitration clause appears on the back of the form and provides, "You or we may elect to arbitrate under the rules and procedures of either the National Arbitration Forum or the American Arbitration Association." App. 29. The clause does not disclose the NAF decree or AAA moratorium, and does not identify another arbitral forum or set of rules on selecting an arbitrator or conducting the arbitration. App. 29.

On May 11, 2011, Shrewsbury filed suit against Credit Acceptance in the Circuit Court for Raleigh County. He claims that Credit Acceptance injured him by engaging in multiple unfair, oppressive, and unconscionable methods to collect the debt. App. 11-17. He also alleges that this misconduct, if deemed willful or intended to harass, is criminal. App. 15.

Credit Acceptance moved to compel arbitration. Shrewsbury responded that the NAF does not accept consumer cases and that Credit Assurance could not use either of the chosen forums to arbitrate its debt collection claims against consumers. App. 515-522. Credit Acceptance later agreed that the AAA is the only forum available under the contract and that it may not file a claim with the AAA for the debts due it. App. 946 (Tr. p. 15 ll.4-15).

The circuit court denied arbitration because neither of the two specified forums accepts creditor arbitration requests. App. 6-7, §§ 6 and 8. Credit

Acceptance appealed and consolidated this appeal with its appeal of a similar order entered in Robert J. Front and Billye S. Front v. Credit Acceptance Corporation, Docket No. 11-1646.

Argument

The arbitration clause is void for unconscionability, impracticability of performance, or both. When the contract was formed, it specified a forum that did not arbitrate consumer claims and another that had rules too one-sided to enforce.² And Credit Assurance's proposed cure is for the court to improperly re-write the contract without Shewsbury's assent. This Court should affirm the denial of arbitration.

1. Burying illusory and one-sided promises on the back of a densely-printed form is procedurally unconscionable.

The circuit court concluded that the contract was not procedurally unconscionable but that there was no meeting of the minds to create the contract. App. 6 § 6. Credit Acceptance wrongly argues that this relies on changes occurring after the contract's formation.

This confuses the sequence of events: the NAF consent decree and the

²Credit Acceptance wrongly argues that order is also based on reasons peculiar to arbitration. The order reflects that the circuit court was well aware of *Marmet Health Care Center, Inc. v. Brown*, 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012), and based the decision on the lack of assent and unconscionability. App. 5 n. 1, 6-7.

AAA moratorium both issued in July 2009; Shrewsbury did not contract for the right to elect the NAF or AAA forum until June 2010. App. 28, 525-528, 530. This sequence confirms that it is procedurally unconscionable to grant Shrewsbury what was even then illusory and one-sided rights on the back of a densely-worded, standardized form.

Credit Acceptance nevertheless emphasizes the opt-out provision, and will likely argue that it cures any procedural impropriety. App. 29. Yet nothing within the densely-worded clause disclosed the NAF decree or AAA moratorium, and there is no evidence that Shrewsbury was sophisticated enough to suspect that he needed to opt-out because the forums that he contracted for did not exist or imposed rules that are too unfair to enforce.

The circuit court's further view on procedural unconscionability is also based only on the face of the contract. There was no discovery on the contract's formation. This Court recently remanded similar orders to permit the parties to fully develop evidence on whether the contract's formation was procedurally unconscionable. *Brown v. Genesis Healthcare Corp.*, ___ W.Va. ___, ___, 729 S.E.2d 217, 229-231 (2012).

Besides, this Court's review of the agreement's validity and enforceability is *de novo*. Petitioner's Brief, p. 15 (properly stating the standard of review). It may likewise affirm on any legal ground disclosed by the record regardless of the

theory that the circuit court employed. Syl.Pt. 3, *Barnett v. Wolfolk*, 149 W.Va. 246, 140 S.E.2d 466 (1965). Under these broad standards, the Court may independently review the boiler-plate form at App. 28-29 and determine for itself whether the terms are clearly disclosed and simple enough to give Shrewsbury a reasonable opportunity to understand them. Syl.Pt. 10, *Brown*, 729 S.E.2d at 221 (listing factors on procedural unconscionability).

2. Incorporating illusory and one-sided promises into an arbitration clause renders it substantively unconscionable or impracticable.

Procedural unconscionability must also be gauged by how substantively unconscionable the terms are. A “sliding scale” approach is required in which more oppressive terms require less evidence of procedural impropriety. Syl.Pt. 9, *Brown*, 729 S.E.2d at 221. Here, very little evidence of procedural problems is necessary because the contract grants Shrewsbury illusory rights and imposes lop-sided terms.

a. The right to elect the NAF is illusory.

Shewsbury’s promised ability to elect the NAF to arbitrate never existed. “Credit Acceptance does not contest that the NAF is no longer accepting consumer arbitration claims.” Petitioner’s Brief, p. 22. This illusory right renders the contract substantively unconscionable in that it is neither commercially reasonable nor fair to make promises that are impossible to keep. Syl.Pt. 12,

Brown, 729 S.E.2d at 221 (listing factors on substantive unconscionability).

Credit Acceptance cites two inapt decisions to argue that this does not render the contract unconscionable. In *Compucredit Corp. v. Greenwood*, 132 S.Ct. 665, 181 L.Ed.2d 586 (2012), the Court dealt with whether a federal statute precluded arbitration. It did not address – at all – the impact of the NAF’s unavailability. In the other decision, the Third Circuit compelled arbitration of a contract that was executed before, and not after, the NAF became unavailable. It too failed to address unconscionability, apparently because the parties never raised the issue. *Khan v. Dell, Inc.*, 669 F.3d 350 (3d Cir. 2012).

Unconscionability is also not the only contract doctrine in play. Impracticability of performance fits too. *See Sly.Pt. 2, Waddy v. Riggleman*, 216 W.Va. 250, 606 S.E.2d 222 (2004)(listing impracticability factors). The NAF consent decree means that there never were any NAF rules in effect. *Rivera v. American General Financial Services, Inc.*, 150 N.M.398, 259 P.3d 803, 815 (2011). NAF’s availability and its rules were also a basic assumption on which the agreement was made in that the explicit right to use NAF and its rules is meaningless unless the NAF handles such claims. Shrewsbury also had nothing to do with the NAF shenanigans that prompted the State of Minnesota to shut down its consumer business in 2009, and has not agreed to arbitrate despite the NAF’s on-going unavailability.

The record thus allows the Court to affirm based on impracticability of performance. *See* Syl.Pt. 3, *Barnett*, 149 W.Va. at 246, 140 S.E.2d at 466 (holding that the Court may affirm on any ground found in the record).

b. The right to elect the AAA renders the contract too one-sided to enforce.

Credit Assurance will seek to minimize the illusory promise by arguing that Shrewsbury still has the right to file for arbitration with the AAA. On this point, it criticizes the circuit court for concluding that the AAA will not hear Shrewsbury's claims.

This misapprehends the circuit court's ruling. The circuit court focused on the fact that neither the NAF or the AAA accepts "creditor arbitration requests." App. 6 § 6. And Credit Assurance frankly admitted below, and does not dispute here, that it may not file its debt collection claims against Shrewsbury and its other consumers in the AAA. App. 946 (Tr. p. 15 ll.4-15). Yet it wants to force Shrewsbury to file his claims there.

"Agreements to arbitrate must contain at least of modicum of bilaterality to avoid unconscionability." *Brown*, 729 S.E.2d at 228; Syl.Pt. 5, *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229, 511 S.E.2d 854 (1998). This one lacks any bilaterality. Under Credit Acceptance's view, the contract requires Shrewsbury to file his claims with the AAA even though the contract does not

require it to arbitrate its debt collection claims there.

Credit Acceptance may retort that the AAA will still hear its debt collection claims if Shrewsbury again agrees to arbitrate. While true, this fix does not enforce the existing agreement. It requires a new one.

Credit Acceptance has also string cited several decisions that have compelled debtors to arbitrate claims in the AAA, and will likely argue that these decisions show that the lop-sidedness is not unfair. Petitioner's Brief at pp. 20-21. None of these decisions address the lack of mutuality.

The closest case misapprehended the point. In *Montgomery v. Applied Bank*, 848 F.Supp.2d 609, 614 (S.D.W.Va. 2012), Judge Berger concluded that the concern over one-sidedness did not apply because the moratorium only affects consumer debt collection claims and not a consumer's claims. But that is precisely the point. The moratorium does indeed affect a creditor's debt collection claims – by leaving the creditor free to pursue its claims in court. Credit Acceptance nevertheless wants Shrewsbury to file his claims in the AAA. By selecting AAA as a forum – almost a year after the moratorium issued – the contract created an agreement between foxes and hares.

The AAA rules are also unconscionable a second way. The AAA issued its moratorium precisely because consumers have “legitimate concerns” about arbitrating consumer claims, including concerns over the arbitrator's orientation

and training on consumer protection statutes. App. 530, 536 The AAA rules that Credit Assurance points to are so flawed that the AAA itself considers them unfair.

This Court dealt with all of this last November. The Court then reviewed and denied a petition for a writ of prohibition for an order that denied arbitration in part because of the AAA moratorium. *State of West Virginia ex rel. Green Tree Servicing, LLC v. Honorable Judge Robert A. Burnside, Jr., Judge of the Circuit Court of Raleigh County*, No. 11-1378 (W.Va.Sup.Ct. Nov. 14, 2011). The same law firms that represented the parties there represent the parties here. Nothing has changed.

In sum, Credit Acceptance wants to force Shrewsbury to arbitrate his claims in the AAA even though it can take its claims against him into court. *Brown and Arnold* outlaw such contracts.

3. The Court should not rewrite the parties' contract.

Credit Assurance lastly says that § 5 of the Federal Arbitration Act requires that the court appoint an arbitrator. From there, arbitration would proceed under rules and procedures that remain unidentified. This argument was also raised last year in counsel's petition for a writ of prohibition against Judge Burnside. It too has not grown better with age.

For background, courts generally take one of three approaches in

construing § 5 of the Act. The Second Circuit holds that the statute does not apply when a named arbitrator becomes unavailable. *In re Salomon Inc. Shareholders' Derivative Litigation*, 68 F.3d 554, 560 (2nd Cir. 1995). Under this view, § 5 of the Act never saves an agreement.

At the other extreme, some courts scour an arbitration clause for any ambiguity which could allow a court to sever the agreement to arbitrate out from the defunct agreement on how an arbitrator is selected and how the proceeding is conducted. The parties are then compelled to arbitrate under terms that they never agreed to. A Third Circuit panel recently split over this approach. *Khan v. Dell, Inc.*, 669 F.3d 350 (3rd Cir. 2012).

The middle approach applies ordinary contract principles to determine whether the agreements on selecting the arbitrator and the governing arbitration rules are integral or material. Courts look at a number of factors, including whether the specified rules may substantially affect the substantive outcome of the resolution. *See, e.g., Rivera*, 259 P.3d at 813; *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 678 S.E.2d 435 (2009); *Carr v. Gateway, Inc.*, 395 Ill.App.3d 1079, 918 N.E.2d 598 (Ill.App. 2009); *Geneva-Roth Capital, Inc. v. Edwards*, 956 N.E.2d 1195 (Ind.App. 2011).

The decisions that Credit Acceptance cites on § 5 apply this middle approach and ask whether the forums and rules selected are material.

Petitioner's Brief, p. 23-24. This also best comports with this Court's view. In West Virginia, arbitration clauses are construed like any other contract – no worse, but also no better. Syl.Pts. 2-3, *State ex. Rel. Richmond American Homes of West Virginia, Inc.*, 228 W.Va. 125, 717 S.E.2d 909 (2011).

In this case, applying ordinary contract principles demonstrates that the NAF or AAA rules and procedures are an integral part of the agreement. When the NAF rules were in effect, they provided that they could not be used by anyone other than the NAF or those contracting with the NAF. *Rivera*, 259 P.3d at 815. The face of the AAA rules show that they are likewise copyrighted. And this shows that a Court cannot simply appoint an arbitrator and have him or her apply the NAF or AAA rules. Assuming that there are NAF rules to apply (there are not), the parties' contract would require a court-appointed arbitrator to violate the NAF's or AAA's prohibition against their rules' unauthorized use.

Credit Acceptance will assuredly respond that the contract provides that Shrewsbury “may” chose between alternate forums, showing that this is just an ancillary logistical concern. But the word “may” was used to give Shrewsbury a choice between the two specified forums and rules. The boiler-plate arbitration clause does not identify a third way to select an arbitrator or the rules that the arbitrator will apply. The NAF and AAA rules and procedures are it. They are integral by default.

Besides, Credit Acceptance's argument over materiality ignores the drafting history. Shrewsbury was not the one who drafted the boiler-plate form, specified the forums, or explained in detail how to obtain a copy of the governing rules. Petitioner's Brief, p. 5 (quoting clause). The creditor did. This shows that the creditor considered all of this integral and material enough to include it within its standardized contract. It is no less important now.

4. Shrewsbury did not assent to arbitrate illegalities.

The Court should lastly affirm the denial of arbitration because the arbitration clause does not cover Shrewsbury's dispute. This too is a ground in the record on which the Court may affirm. Syl.Pt. 3, *Barnett*, 149 W.Va. at 246, 140 S.E.2d at 466.

Shrewsbury alleges that Credit Acceptance's debt collection practices violated the West Virginia Consumer Credit and Protection Act in that its attempts to collect the debt were oppressive, abusive, and unconscionable. App. 12-13. He further noted that these acts, if wilful or intended to harass, are also criminal. App. 15, ¶ 18(c-d), citing W.Va. Code § 46A-5-103(4) and § 61-8-16(a)(3). Shrewsbury did not assent to arbitrate these claims because an ordinary consumer could not reasonably expect such misbehavior.

Chassereau v. Global-Sun Pools, Inc., 373 S.C. 168, 644 S.E.2d 718 (2007), is on point. The consumer there signed an arbitration clause that broadly

covered “any disputes arising in any manner relating to this agreement . . .” She alleged that a debt collector later began systematically harassing her about her debt, including engaging in communications that were crimes. The South Carolina Supreme Court held that the arbitration clause did not cover these claims. In rendering this holding, the Court began by noting that arbitration should generally be ordered unless a court can say with positive assurance that the clause is not susceptible to any interpretation that covers the dispute. Even so, the Court concluded that the consumer did not assent to arbitrate her claims because no reasonable person would have foreseen, and ought not to expect, such misbehavior. *Id.* at 171-173, 644 S.E.2d at 720-721. So too here.

Credit Acceptance may respond that Judge Berger distinguished *Chassereau* where the crimes alleged are making illegal telephone calls. In Judge Berger’s view, debt collection calls may be crimes yet not outrageous enough for the Court to say that the arbitration clause is inapplicable. *Montgomery*, 848 F.Supp.2d at 617-619.

But Judge Wilkes recently disagreed and ruled that illegal debt collection calls do fall outside a broadly worded arbitration clause. Judge Wilkes concluded that a Court could say with positive assurance that the agreement did not cover the dispute because no one at the time of contracting could reasonably expect such illegalities. Otherwise, the Court reasoned, the contract would be

unenforceable for contracting for an illegal purpose. *Long v. Juniper Bank*, Civil Action No. 11-C-787 (Cir.Ct., Berkeley County, W.Va. April 27, 2012)[attached as Addendum].

Judge Wilkes' view is the better one. A reasonable consumer does not expect – and ought not have to contemplate – that their automobile dealership would engage in illegal or criminal misconduct. At the very least, a remand is necessary for discovery on this point. *See Brown*, 729 S.E.2d at 229-231 (remanding for discovery on unconscionability).

Conclusion

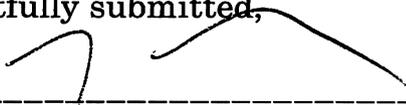
Credit Acceptance wants to force Shrewsbury to arbitrate its alleged illegalities and crimes based on a densely-packed, pre-printed form that gave Shrewsbury the right to arbitrate in a forum that did not exist or in one whose rules are too one-sided and unfair to enforce. Shrewsbury's claims fall outside the arbitration clause's scope and the clause is any event unconscionable, impracticable, or both.

Credit Acceptance's cure for these problems – problems that Shrewsbury had no hand in creating – violate basic contract law. Basic contract law requires assent. Absent his assent, Shrewsbury cannot be forced to arbitrate claims that he did not and ought not have to foresee, modify a contract that he did not draft, face arbitral rules that he did not select, or be bound by an arbitrator that he did

not pick.

The order denying arbitration should be affirmed.

Respectfully submitted,



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IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
Division II

DAVID M. LONG and
PHYLLIS M. LONG

Plaintiffs,

v.

CIVIL ACTION NO. 11-C-787
JUDGE WILKES

JUNIPER BANK, d/b/a
BARCLAYS BANK DELAWARE

Defendant.

Order Denying Motion to Compel Arbitration

This matter came before the Court this 27 day of April 2012, pursuant
Defendant's Motion to Dismiss or in the Alternative, Stay Proceedings and Compel Arbitration.

Upon the written appearance of Plaintiffs, David Long and Phyllis Long, by counsel Sarah L. Hinkle and David J. Hinkle; and Defendant, Juniper Bank d/b/a Barclays Bank Delaware, by counsel Joshua D. Verdi; and upon the record and the pertinent legal authorities the Court rules as follows.

FINDINGS OF FACT

1. Plaintiffs filed this suit, with the filing of the complaint, on September 22, 2011.
2. The complaint contains one "count" of multiple violations of the West Virginia Consumer Credit Protection Act, W. Va. Code §§ 46A-1-101, *et seq.* (hereinafter WVCCPA).

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3. The complaint alleges, among other allegations, that Defendants placed or caused to be placed over one hundred and fifty telephone calls to Plaintiffs after Defendant had been made aware that Plaintiff had retained counsel, in violation of the WVCCPA.

4. Defendant has tendered a document entitled:

Credit Card Cardmember Agreement
Cardmember Bill of Rights
Privacy Policy
Terms and Conditions

5. This document contains an "Arbitration" section which is approximately seven paragraphs long and contains the following provisions:

"Any claim, dispute, or controversy by either you or us against the other ... arising from or relating in any way to this Agreement or your Account, or any transaction on your Account including (without limitation) claims based on contract, tort (including intentional torts), fraud, agency, negligence, statutory or regulatory provisions or any other source of law and claims regarding the applicability of this arbitration clause or the validity of the entire Agreement, shall be resolved exclusively and finally by binding arbitration under the rules and procedures of the arbitration administrator selected at the time the Claim is filed."

...

ARBITRATION WITH RESPECT TO A CLAIM IS BINDING AND NEITHER YOU NOR WE WILL HAVE THE RIGHT TO LITIGATE THAT CLAIM THROUGH A COURT. IN ARBITRATION YOU AND WE WILL NOT HAVE THE RIGHTS THAT ARE PROVIDED IN COURT ... ALL OF THESE RIGHTS ARE WAIVED AND ALL CLAIMS MUST BE RESOLVED THROUGH ARBITRATION.

6. The "Arbitration" section, in a way that appears to contradict to the bold language above, contains certain exceptions to arbitration, including litigation in small claims courts, or against a third party to whom ownership of the account has been assigned.

7. Defendant filed a Motion to Dismiss, or in the Alternative, Stay Proceedings and Compel Arbitration; with supporting memorandum. The parties have briefed the issue.

CONCLUSIONS OF LAW

This matter comes before the Court upon a Motion to Dismiss or in the Alternative, Stay Proceedings and Compel Arbitration pursuant to an arbitration clause and the Federal Arbitration Act, 9 U.S.C. § 2, *et al.* (hereinafter “FAA”).

“Congress enacted the FAA to replace judicial indisposition to arbitration with a national policy favoring it and placing arbitration agreements on equal footing with all other contracts.” *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S.Ct. 1396 (2008) (internal citations and quotations omitted). “Under the Federal Arbitration Act, 9 U.S.C. § 2, a written provision to settle by arbitration a controversy arising out of a contract that evidences a transaction affecting interstate commerce is valid, irrevocable, and enforceable, unless the provision is found to be invalid, revocable or unenforceable upon a ground that exists at law or in equity for the revocation of any contract.” Syl. Pt. 6, *Brown v. Genesis Healthcare Corp.*, --- S.E.2d ----, 2011 WL 2611327 (W.Va. 2011) (overturned by *Marmet Health Care Center v. Brown*, 565 U. S. ____ (2012) on other grounds).¹ “The Act does not favor or elevate arbitration agreements to a level of importance above all other contracts; it simply ensures that private agreements to arbitrate are enforced according to their terms.” *Board of Education of Berkeley County v. W. Harley Miller, Inc.*, 160 W.Va. 473 (1977). Further, “Nothing in the Federal

¹ The United States Supreme Court’s ruling which overturned this West Virginia Supreme Court Case, did so because of the “categorical rule prohibiting arbitration of a particular type of claim.” That rule was one that barred “predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes.” Accordingly, this Court finds remainder of the case, including the points recited herein, to continue to be a valid statement of law.

Arbitration Act, 9 U.S.C. § 2, overrides normal rules of contract interpretation. Generally applicable contract defenses—such as laches, estoppel, waiver, fraud, duress, or unconscionability—may be applied to invalidate an arbitration agreement.” *Brown*,--- S.E.2d ---- at Syl. Pt. 9.

Questions 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 of an interpretation that covers the asserted dispute.” *Winston–Salem Mailers Union 133, CWA v. Media Gen. Operations, Inc.*, 55 Fed. Appx. 128, 133 (4th Cir.2003) (quoting *AT & T Technologies, Inc. v. CWA*, 475 U.S. 643, 649–50, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)). However, “Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.” *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960).

Accordingly, the Court must “engage in a limited review to ensure that the dispute is arbitrable-i.e., that a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of that agreement.” *Glass v. Kidder Peabody & Co.*, 114 F.3d 446, 453 (4th Cir.1997). *See also, State ex rel. Dunlap v. Berger*, 211 W.Va. 549 (2002).

Turning to the instant case, Plaintiffs argue against Defendant’s motion on the basis of unconscionability, a material altering of the agreement after it was drafted rendering it unenforceable, the non-waivability of rights under the WVCCPA, the claims in the complaint being outside the scope of the agreement, enforcement of the agreement would impede Plaintiffs’ W.Va. Constitutional rights, and a lack of evidence that the contract was formed.

The Court finds it most appropriate to determine whether this claim is within the scope of the arbitration agreement prior to any other analysis, because this determination would render the other issues moot. After analysis, the Court finds that the causes of action in the complaint are outside the scope of the arbitration agreement and so the Defendant's motion should be denied. With this finding the parties' other contentions are moot.

As noted above, the Complaint is for violations of the WVCCPA. The WVCCPA provides that debt collectors may not engage in certain oppression, abuse, deception, or unfair or unconscionable means of debt collection, among other provisions. *See* W. Va. Code §§ 46A-2-125, 126, 127, and 128. "Debt collection," in this context, means "any action, conduct or practice of soliciting claims for collection or in the collection of claims owed or due or alleged to be owed or due by a consumer." § 46A-2-122(c). The Act further prohibits West Virginia consumers from waiving any rights under it. § 46A-1-107.

Under general contract principles, the violations alleged in this complaint cannot have been contemplated by the parties, and so the claims are outside the scope of the agreement. The Court notes that this arbitration clause is rather broadly worded – appearing to attempt to cover any dispute between the parties that relates to the account. However, the alleged, material facts that form this complaint do not relate to the contract or the credit account, rather the complaint is for violations of the WVCCPA. The complaint is for alleged harassing phone calls and other violations, which only tangentially relate to the relationship created by the proffered contract. The Defendants could have just the same made harassing phone calls not about a debt or other issues, and the acts would still be illegal. The fact that the phone calls regarded the debt which Plaintiffs owed as a result of the credit card does not mean the statutory claim for these harassing

phone calls is a dispute “arising out of” or “related to” the agreement or account. These alleged violations amount to illegal conduct for which there is a statutory civil remedy.

Most importantly, at the time of the creation of a contract for a credit card, no person could reasonably expect the other party to engage in illegal conduct of this type. In fact, if the parties *did* contemplate illegal activities by the other and arbitration thereof under the contract, then this would be a contract partially for an illegal purpose, which has long been established as unenforceable. See, *Ben Lomond Co. v. McNabb*, 109 W.Va. 142, 153 S.E. 905 (1930); *Jones v. Evans*, 123 W.Va. 394, 15 S.E.2d 166 (1941); *State v. Konchesky*, 166 W.Va. 57, 272 S.E.2d 452 (1980).

It would be extremely farfetched to believe that the parties contemplated illegal conduct by the other at the time of the creation of this contract – such that it “can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *Winston–Salem Mailers Union 133*, 55 Fed. Appx. 128, 133 (4th Cir. 2003). Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court cannot interpret the arbitration agreement as applying to illegal conduct that would be unforeseeable to any reasonable consumer at the time of creation of the contract. The alleged illegal conduct must be outside of the substantive scope of the agreement, otherwise it would be an invalid agreement as one for a partially illegal purpose. So, Plaintiffs cannot be required to submit this dispute to arbitration, which they have not agreed to submit. *United Steelworkers of Am.*, 363 U.S. 574. Therefore, the Defendant’s motion to compel arbitration must be denied.

The parties make several other arguments regarding the motion, but consideration of those is unnecessary with the Court’s ruling herein.

Accordingly, the Court DENIES Defendant's Motion to Dismiss or in the Alternative, Stay Proceedings and Compel Arbitration. The Court notes the objections and exceptions of the parties to any adverse ruling herein.

Therefore, it is hereby ADJUDGED and ORDERED that Motion is DENIED, and the parties shall proceed with this case pursuant to the West Virginia Rules of Civil Procedure, all other applicable law, and any subsequent scheduling orders entered by this Court.

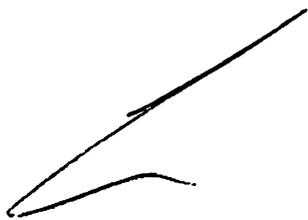
The Court directs the Circuit Clerk to distribute attested copies of this order to the following counsels of record:

Counsel for Plaintiff:

Sarah L. Hinkle, Esq.
David J. Hinkle, Esq.
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Martinsburg, WV 25401

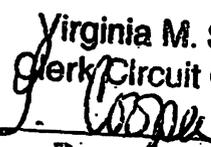
Counsel for Defendant:

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Pittsburg, PA 15222



CHRISTOPHER C. WILKES, JUDGE
TWENTY-THIRD JUDICIAL CIRCUIT
BERKELEY COUNTY, WEST VIRGINIA

A TRUE COPY
ATTEST

By:  Virginia M. Sine
Clerk Circuit Court
Deputy Clerk

In the Supreme Court of Appeals of West Virginia

Credit Acceptance Corporation,
Defendant Below, Petitioner

vs.

Docket No. 11-1646

Robert J. Front and Billye S. Front,
Plaintiffs Below, Respondents

Credit Acceptance Corporation.
Defendant Below, Petitioner

vs.

Docket No. 12-0545

Ocie Shrewsbury, Plaintiff Below,
Respondent

CERTIFICATE OF SERVICE

I, **CHRISTOPHER B. FROST**, counsel for the Respondents, Robert J. Front, Billye S. Front and Ocie Shrewsbury, do hereby certify that a copy of the **RESPONDENT OCIE SHREWSBURY'S SUMMARY RESPONSE TO CREDIT ACCEPTANCE'S BRIEF** was served upon counsel of record in the above cause by enclosing the same in an envelope addressed to said attorney at the business address as disclosed in the pleadings of record herein as follows:

Don C. A. Parker, Esq.
Bruce M. Jacobs, Esq.
Nicholas P. Mooney II, Esq.
SPILMAN THOMAS & BATTLE, PLLC
P. O. Box 273
Charleston, WV 25321

the same being the last known address with postage fully paid and depositing said envelope in the United States Mail on the 12th day of September, 2012.



CHRISTOPHER B. FROST