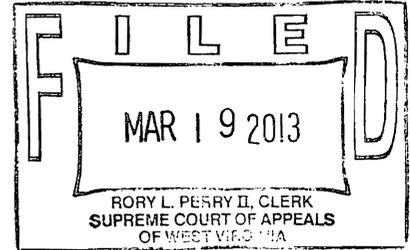


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 13-0151



**STATE OF WEST VIRGINIA *ex rel.*,
OCWEN LOAN SERVICING, LLC,**

Petitioner,

v.

**HONORABLE CARRIE WEBSTER, Judge
of the Circuit Court of Kanawha County;
ROBERT L. CURRY and TINA CURRY,
individually and on behalf of a similarly
situated class,**

Respondents.

**Brief of Respondents Robert L. Curry and Tina Curry
in Response to Petition for Writ of Prohibition**

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Questions Presented

1. Whether the Circuit Court properly ruled that certain provisions of the federal Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act”), which ban mandatory arbitration clauses in residential home loans, are currently in effect.
2. Whether the Circuit Court properly ruled that the Dodd–Frank Act applies to this case, because the Dodd–Frank Act’s ban on mandatory arbitration clauses in this context is a jurisdictional or procedural provision that does not upend the parties’ substantive rights.
3. Whether the Circuit Court properly found that the arbitration agreement in this case is both procedurally and substantively unconscionable.
4. Whether the Circuit Court properly determined that its state-law unconscionability analysis, as applied to the particular circumstances of this case, was not preempted by federal law.

Statement of the Case

Respondents Robert and Tina Curry brought this putative class action in the Circuit Court of Kanawha County based on unlawful charges that Defendant Ocwen Loan Servicing, LLC, assessed to their home loan account. In October 2006, Respondents Robert and Tina Curry obtained an adjustable rate home loan from Saxon Mortgage, Inc., in the amount of \$78,000. *See* App. 4. They were required to make monthly principal and interest payments of \$784.35. *Id.* At some point thereafter, Ocwen Loan Servicing, LLC (“Ocwen”), began “servicing” the Respondents’ home loan, meaning that Ocwen assumed responsibility for collecting the payments due on the loan and assessing fees to Respondents’ account. *Id.*

After the Respondents allegedly fell behind in their home loan payments, Ocwen responded by assessing them a number of unlawful charges. *Id.* Included among the unlawful charges were those for “statutory mailings” (\$210.94 per charge); “skip trace/search” (\$50.00 per charge); “FC thru service,” apparently representing attorney

charges for commencing foreclosure (\$550.00), despite the fact that Ocwen did not foreclose; and a “title report fee” (\$300.00). *Id.*

On November 23, 2011, the Respondents filed this action in their individual capacities and on behalf of a class of similarly situated individuals who had their loans serviced by Ocwen. App. 3. The Respondents assert three claims under the West Virginia Consumer Credit and Protection Act (“WVCCPA”). First, the charges assessed by Ocwen constitute the collection or threatened collection of expenses of collection from the Respondents and putative class members in violation of West Virginia Code §§ 46A-2-115(a), 127(g), and 128(c). App. 5. Second, by attempting to collect or collecting fees it had no right to assess, Ocwen misrepresented the amount of a claim in violation of West Virginia Code § 46A-2-127(d). *Id.* Third, certain fees charged by Ocwen, including the title report fee and the foreclosure fees, represented charges for attorneys’ fees in violation of the parties’ contract and West Virginia Code § 127(g). App. 6. The Respondents seek damages, statutory penalties under the WVCCPA, reasonable attorney’s fees and costs under the WVCCPA, and pre- and post-judgment interest. *Id.*

The Respondents and Saxon Mortgage executed a number of documents in connection with their home loan. In addition to a five-page Adjustable Rate Note, the Respondents executed an eighteen-page Deed of Trust. *See* App. 34-38 (Adjustable Rate Note); App. 40-57 (Deed of Trust). The Respondents also executed two riders to the Deed of Trust: an Adjustable Rate Rider and an Arbitration Rider. App. 58-62. The three-page, form Arbitration Rider states that the term “Lender” includes “the company servicing the Note” on Saxon’s behalf. App. 60.

The Arbitration Rider provides for binding arbitration in lieu of a court action for “[a]ll disputes, claims, or controversies arising from or related to the loan evidenced by the Note (the ‘Loan’), including statutory claims.” App. 60. The agreement excludes from arbitration, however, many of the Lender’s most important rights, including the right to accelerate payments and to foreclose the property. App. 61. The arbitration agreement requires that the arbitration be conducted by and pursuant to the procedural rules of either the National Arbitration Forum or the American Arbitration Association.¹ App. 60. With respect to any arbitration that “pertains solely to the Loan,” the arbitration agreement provides for the borrower to pay \$125 in initial filing fees to the arbitrator, with the Lender paying the balance of the initial filing fees and the other fees and costs of the arbitration. App. 61. In addition, form language above the signature block describes the Arbitration Rider as “voluntary,” and states that Respondents’ lender would have entered the loan had Respondents not signed the arbitration agreement. App. 62.

The arbitration agreement also contains provisions that significantly limit the ability of consumers such as Respondents to vindicate their statutory rights. First, the arbitration agreement expressly prohibits claimants from bringing class-wide or representative claims. App. 60. Instead, the arbitration agreement dictates that all disputes must be “arbitrated individually, and shall not be subject to being joined or combined in any proceedings with any claims of any persons or class of persons other

¹ One of the forums mentioned in the arbitration agreement, the National Arbitration Forum, has been forced out of the consumer arbitration business. The NAF agreed to stop accepting consumer arbitration cases after it was sued by the Minnesota Attorney General for failing to disclose its financial ties to the debt-collection industry. *See* App. 118-26. In addition, the other forum referred to in the arbitration, the American Arbitration Association, has announced a moratorium on consumer finance matters, casting doubt on whether either of the forums mentioned in the agreement would entertain the Respondents’ claims. *See* App. 127-29.

than Borrower or Lender.” *Id.* Second, the arbitration agreement takes away important rights conferred on consumers by the WVCCPA insofar as it limits liability for attorney’s fees. The agreement provides that “in no event shall either party be responsible for any fees or expenses of the other party’s attorneys, witnesses, or consultants, or any other expenses, for which such other party reasonably would have been expected to be liable had such other party initiated a suit.” App. 61. Finally, the agreement provides that “[d]iscovery in arbitration proceedings may be limited.” App. 62.

Ocwen responded to the Complaint by filing a Motion to Compel Individual Arbitration and Dismiss, or Alternatively, Stay Matter on January 5, 2012. App. 9-10. The Circuit Court took up the motion, and Respondents’ written response, at a hearing on February 28, 2012, and then again at a status conference on November 2, 2012. Then, on January 7, 2013, the Circuit Court entered its Order denying Ocwen’s motion. App. 320-332. The Circuit Court concluded that the Arbitration Rider invoked by Ocwen was unenforceable for two independent reasons: it is invalid under the Dodd–Frank Act, and it is unconscionable under state law. App. 324.

Summary of Argument

The arbitration agreement invoked by Ocwen in this case is unenforceable for two separate reasons. First, in the Dodd–Frank Act, Congress expressly prohibited mandatory arbitration agreements in the context of residential home loans. The Circuit Court properly recognized that, by Ocwen’s own admission, the portion of the Dodd–Frank Act in question is currently in effect. Moreover, the Circuit Court properly applied the Dodd–Frank Act to this case because it ruled—in an approach that is consistent with two published federal court opinions and the order of another West Virginia Circuit Court—that the Dodd–Frank Act’s ban on mandatory arbitration clauses

is a jurisdictional or procedural provision that does not upend the parties' substantive rights. Thus, the arbitration clause invoked by Ocwen is unenforceable on the basis of the Dodd–Frank Act alone.

Second, the arbitration agreement is also unenforceable under state law because it is unconscionable. In addition to lacking mutuality, the arbitration agreement prohibits class or representative claims, waives Respondents' right to claim attorney's fees, and limits the Respondents' ability to conduct meaningful discovery. Ocwen is simply mistaken in asserting that the unconscionability analysis applied by the Circuit Court to the particular facts of this case is preempted by the Federal Arbitration Act. Instead, the Circuit Court properly applied state contract law principles of general applicability, which are preserved under the Federal Arbitration Act, to the particular facts of this case. Accordingly, Ocwen's petition for a writ of prohibition should be refused.

Statement Regarding Oral Argument and Decision

Oral argument is unnecessary because the petition lacks merit, there is no known dispute among West Virginia Courts regarding the provisions of the Dodd–Frank Act at issue in this case, and further proceedings would only delay the prosecution of the case. Should the Court issue a rule to show cause, however, Respondents request oral argument.

Argument

- 1. The Circuit Court correctly ruled that the Dodd–Frank Act provisions invalidating mandatory arbitration in this context are currently in effect.**

In response to the financial crisis, Congress passed the Dodd–Frank Act, in part to “protect consumers from abusive financial services practices.” Pub. L. No. 111-203,

124 Stat. 1376. Among its many important initiatives, the Dodd–Frank Act offers a “refinement and restriction” of existing federal law governing arbitration agreements. *Pezza v. Investors Capital Corp.*, 767 F. Supp. 2d 225, 226 (D. Mass. 2011). Of particular importance is Section 1414 of the Act, 15 U.S.C. § 1639c(e), which plainly states that:

No residential mortgage loan and no extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer **may include terms which require arbitration or any other nonjudicial procedure** as the method for resolving any controversy or settling any claims arising out of the transaction.

15 U.S.C. § 1639c(e)(1) (emphasis added).

Pursuant to this statutory provision, the Respondents’ loan may not include any term requiring arbitration of claims arising out of the loan transaction. The Arbitration Rider thus stands in irreconcilable conflict with federal law.

Ocwen’s first response to this clear federal invalidation of its arbitration clause is to argue that the provision of the Dodd–Frank Act in question had not taken effect at the time the Circuit Court ruled on its motion to compel arbitration. To be clear, Ocwen does not dispute that the provision of the Dodd–Frank Act in question is *currently* in effect. Indeed, Ocwen admits that the provision took effect no later than January 21, 2013. Pet. 17. Rather, Ocwen disputes whether the provision was in effect *at the time of the Circuit Court’s order* (on January 7, 2013). In other words, Ocwen basically admits that this entire question is moot.

Even if this Court were to unpeel Ocwen’s theoretical effective date argument, however, it will see—as the Circuit Court did—that it lacks merit. As the Circuit Court recognized, the Dodd–Frank Act took effect on July 22, 2010. App. 321 (citing Pub. L. No. 111-203, 124 Stat. 1390, § 4 (general effective date)). The provision at issue in this

case (§ 1414) was part of Title XIV of the Act, containing several amendments to the Truth in Lending Act. Title XIV has a separate effective date provision, § 1400(c), that only applies to those portions of Title XIV that require administrative regulations to be implemented. This special effective date provision reflects the fact that Title XIV envisions a broad new swath of regulations, including regulations issued by a new agency created by the Dodd–Frank Act, the Consumer Finance Protection Bureau (“CFPB”). *See* Congressional Research Service, *Rulemaking Requirements and Authorities in the Dodd-Frank Wall Street Reform and Consumer Protection Act* at 54-57, 85-87 (Nov. 30, 2010). The provision at issue in this case, however, is a notable exception in that it does not require *any* regulations to be promulgated. Thus, the Circuit Court concluded “that § 1414’s effective date is governed by the Dodd–Frank Act’s general effective date, not § 1400(c). Section 1414 thus took effect on July 22, 2010.” App. 321-22.

The Circuit Court also observed that § 1414 was in effect even under the argument that Ocwen presented to the Court. App. 322. Ocwen argued that § 1414 took effect upon the earlier of (1) the promulgation of a “final rule” implementing § 1414, or (2) January 21, 2013. App. 146. The Court concluded, however, that the first condition was satisfied: “Ocwen admits that the CFPB issued an interim final rule last year in connection with the Dodd–Frank Act’s Truth in Lending Act amendments.” App. 322.² That interim final rule was effective December 30, 2011. *Id.* Thus, even accepting Ocwen’s argument, the Circuit Court concluded that § 1414 took effect on December 30,

² As the Court explained, “[a]n ‘interim final rule’ is still a final rule. The ‘interim’ label, which is often coupled with a request for public comments, simply refers to an exception to the Administrative Procedure Act by ‘which an agency issues a *final rule* without a [notice of proposed rulemaking] that is often effective immediately, but with a post-promulgation opportunity for the public to comment.’” App. 322 (citations omitted).

2011. App. 322. And, once again, there is no dispute that § 1414 is *currently* in effect, as Ocwen explained to the Circuit Court that the provision would take effect no later than January 21, 2013. Accordingly, Ocwen has not demonstrated that it is entitled to the extraordinary remedy of prohibition based on the effectiveness of the Dodd–Frank Act.

2. The Circuit Court correctly applied the law currently in effect—the Dodd–Frank Act’s ban on mandatory arbitration in this context—to the loan agreement in this case.

The Circuit Court also properly applied the law currently in effect—the provision of the Dodd–Frank Act declaring the arbitration agreement in this case unenforceable—even though it was enacted after Respondents entered into the agreement with their lender. That is because “a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.” *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 711 (1974).

Thus, a statute is not considered impermissibly retroactive simply because it draws, as every statute does, upon “antecedent facts” for its operation. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 n.24 (1994) (internal quotation marks omitted). The inquiry is whether the new enactment is “substantive,” as opposed to “jurisdictional” or “procedural.” *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37-38 (2006). Courts only apply a presumption against retroactivity or require a clear expression of retroactive intent when a new enactment is substantive, meaning that it affects the rights, liabilities, or duties of the parties. *See id.* at 37. Procedural statutes, and statutes that confer or oust jurisdiction, however, “speak to the power of the court rather than the rights and obligations of the parties.” *Landgraf*, 511 U.S. at 274 (internal quotation marks omitted); *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 577 (2006) (“[A] jurisdiction-

conferring or jurisdiction-stripping statute usually takes away no substantive right but simply changes the tribunal that is to hear the case.” (internal quotation marks omitted)).

The U.S. Supreme Court has consistently held that arbitration agreements do not alter the parties’ substantive rights, but instead dictate the tribunal and procedure by which disputes are to be resolved. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (“By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”). Indeed, Ocwen emphasized this very point in the Circuit Court, quoting U.S. Supreme Court precedent in its brief in support of arbitration for the proposition that an agreement to arbitrate does not forego substantive rights, but rather only governs the forum for the resolution of those rights. *See App. 21* (citing *Mitsubishi Motors Corp. v. Soler ChryslerPlymouth, Inc.*, 473 U.S. 614, 628 (1985)).

In *Pezza v. Investors Capitol Corp.*, the District of Massachusetts applied this framework to the Dodd–Frank Act’s new ban on mandatory arbitration agreements covering Sarbanes–Oxley whistleblower claims. *See* 767 F. Supp. 2d 225, 227 (D. Mass. 2011). The plaintiff’s employer sought to compel arbitration based on an arbitration agreement entered into before the Dodd–Frank Act’s enactment. After the plaintiff invoked the Act, the Court applied the analysis above and concluded that the new section was “the type of jurisdictional statute envisioned in *Landgraf*.” *Pezza*, 767 F. Supp. 2d at 233. Because the new provision merely changed the tribunal that would entertain the claim and not the parties’ substantive rights, there was no impediment to applying the provision to “conduct that arose *prior* to its enactment.” *Id.* at 233–34

(following *Gilmer*, 500 U.S. at 26, in ruling that an agreement to arbitrate is a choice of forum rather than a change in substantive rights).

Put simply, Ocwen cannot claim “that a different substantive result will obtain” merely because the Respondents’ claims will be heard by the Circuit Court rather than in arbitration. *See Pezza*, 767 F. Supp. 2d at 234; *see also Wong v. CKX, Inc.*, ___ F. Supp. 2d ___, 2012 WL 3893609, at *10 (S.D.N.Y. Sept. 10, 2012) (following *Pezza* and applying Dodd–Frank Act to invalidate arbitration clause).³ That is because, as the Circuit Court of Lincoln County recently ruled in applying *Pezza* to invalidate mandatory arbitration agreements in the context of residential home loans, “federal arbitration law makes clear that arbitration agreements merely dictate the procedural means through which disputes are resolved.” *See App. 232-51 (Dunlap v. Wells Fargo Fin. W. Va., No. 04-C-101, Circuit Court of Lincoln County (Sept. 18, 2012), at 18).*⁴

Thus, because the Dodd–Frank Act is simply a jurisdictional or procedural provision that does not alter the parties’ substantive rights, there is no bar to applying the law currently in effect in this case. Consistent with two published federal court opinions, and the ruling of a fellow West Virginia court, the Circuit Court correctly applied the Dodd–Frank Act to this case. Because Ocwen’s motion to compel arbitration was properly denied on that basis alone, this Court need not consider the Circuit Court’s unconscionability analysis in refusing Ocwen’s petition. Even if this

³ The cursory analysis contained in the decisions disagreeing with the result in *Pezza* and *Wong* offers no retort whatsoever to the conclusion that the U.S. Supreme Court has treated arbitration agreements as jurisdictional or procedural provisions that do not alter the parties’ substantive rights. *See, e.g., Taylor v. Fannie Mae*, 839 F. Supp. 2d 259, 263 (D.D.C. 2012); *Holmes v. Air Liquide USA LLC*, No. H-11-2580, 2012 WL 267194, at *6 (S.D. Tex. Jan. 30, 2012); *Henderson v. Masco Framing Corp.*, No. 3:11-cv-00088, 2011 WL 3022535, at *4 (D. Nev. July 22, 2011).

⁴ In a letter dated September 20, 2012, Respondents brought Judge Hoke’s Order in *Dunlap* to the Circuit Court’s attention. App. 231.

Court elects to examine the Circuit Court’s unconscionability analysis, however, Ocwen is still not entitled to relief.

3. The Circuit Court’s finding that the arbitration agreement in this case is both procedurally and substantively unconscionable was not erroneous.

Section 2 of the Federal Arbitration Act (FAA) provides that arbitration agreements are enforceable, “save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. The FAA places arbitration agreements on par with other contracts, rendering “arbitration agreements as enforceable as other contracts, but not more so.” *Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395, 404 n.12 (1967). The FAA does not override normal state-law rules of contract interpretation. *State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders*, 228 W. Va. 125, 717 S.E.2d 909, 918 (2011). Thus, the “savings clause” in Section 2 of the FAA preserves the importance of generally applicable state contract law defenses, “such as laches, estoppel, waiver, fraud, duress, or unconscionability.” *Id.* (internal quotation marks omitted).

The doctrine of unconscionability focuses on the “relative positions of the parties, ... the adequacy of the bargaining position, the meaningful alternatives available to the [plaintiff] and the existence of unfair terms in the contract.” *Art’s Flower Shop, Inc. v. Chesapeake & Potomac Tel. Co. of West Virginia, Inc.*, syll. pt. 4, 186 W. Va. 613, 614, 413 S.E.2d 670, 671 (1991). “[G]ross inadequacy in bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion or may show that the weaker party had no meaningful, no real alternative, ... to the unfair terms.” 186 W. Va. at 617-18, 413 S.E. 2d at 674–75 (internal quotation marks omitted). The doctrine of

unconscionability is applied flexibly, “taking into consideration *all of the facts and circumstances of a particular case.*” *Richmond Am. Homes*, 717 S.E.2d at 919 (internal quotation marks omitted). When a court concludes that any contract or term therein is unconscionable, the court may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable clause, or limit application of the unconscionable clause. *Id.* at 920; *see* W. Va. Code § 46A-2-121.

“A court in its equity powers is charged with the discretion to determine, on a case-by-case basis, whether a contract provision is so harsh and overly unfair that it should not be enforced under the doctrine of unconscionability.” *Dan Ryan Builders, Inc. v. Nelson*, Syl. Pt. 9, ___ W.Va. ___, 737 S.E.2d 550, 552 (W. Va. 2012). The unconscionability inquiry has both a procedural and a substantive component. *Richmond Am. Homes*, at 920. Procedural unconscionability focuses on inadequacies in the bargaining process and in contract formation. *Id.* It requires an examination “of all the circumstances surrounding the transaction,” including the parties’ age, literacy, or sophistication; “hidden or unduly complex contract terms”; and the general manner and setting of contract formation, including “whether each party had a reasonable opportunity to understand the terms of the contract” and “whether the important terms were hidden in a maze of fine print.” *Id.* (internal quotation marks and alterations omitted). The presence of a “contract of adhesion”—“one drafted and imposed by a party of superior strength that leaves the subscribing party little or no opportunity to alter the substantive terms”—is also relevant. *Id.* at 921 (internal quotation marks omitted). Given the relevant factors, procedural unconscionability is more often found in consumer transactions, as opposed to commercial contracts between sophisticated business entities. *See Richmond Am. Homes*, 717 S.E.2d at 920-21.

Substantive unconscionability, by contrast, focuses on any unfairness in the contract itself, including “whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party.” *Id.* at 921 (internal quotation marks omitted). The factors vary with the contents of the agreement, but generally include “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.” *Id.* (internal quotation marks omitted). In analyzing the interplay between procedural and substantive unconscionability, this Court has also observed that both types of unconscionability “need not be present to the same degree.” *Id.* at 920 (internal quotation marks omitted). Thus, a “sliding scale” applies to the unconscionability determination: “[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa.” *Brown v. Genesis Healthcare Corp.*, Syl. Pt. 9, 229 W.Va. 382, 729 S.E. 2d 217, 227 (2012) (“*Brown II*”).

In this case, Circuit Court correctly determined that the Arbitration Rider is both procedurally and substantively unconscionable. App. 325. As to procedural unconscionability, the Circuit Court found that:

the Plaintiffs are unsophisticated consumers, with little knowledge of financial matters and who were not represented by counsel when they signed several pages of legal documents in connection with their loan transaction. Ocwen, in contrast, is a large national corporate loan servicer. This situation is nearly identical to the circumstances deemed procedurally unconscionable in *Arnold v. United Cos. Lending Corp.*, 511 S.E.2d 854 (1998), where the court found that the relative position of the parties, a national corporate lender on one side and an unsophisticated consumer on the other, were “grossly unequal.” *Id.* at 861.

App. 325. Nor was the Circuit Court persuaded otherwise by the inclusion of boilerplate form language in the arbitration agreement classifying the agreement as “voluntary.”

App. 326. A contract need not be presented on a “take it or leave it basis” to be considered adhesive; instead, a contract of adhesion is one drafted by the party of superior strength and that leaves the other party “*little or no opportunity* to alter the substantive terms.” *Richmond Am. Homes*, 717 S.E.2d at 921 (internal quotation marks omitted and emphasis added).

The Circuit Court also found the Arbitration Rider to be substantively unconscionable. App. 326. To begin, the agreement lacks mutuality, which is the “paramount consideration” in assessing substantive unconscionability. *Id.* (quoting *Richmond Am. Homes*, 717 S.E.2d at 921). Although separate consideration is not required for every clause in a multi-clause contract, “[i]n assessing whether a contract provision is substantively unconscionable, a court may consider whether the provision lacks mutuality.” *Dan Ryan Builders*, Syl. Pt. 10, 737 S.E.2d at 552. “If a provision creates a disparity in the rights of the contracting parties such that it is one-sided and unreasonably favorable to one party, then a court may find the provision is substantively unconscionable.” *Id.* In this case, the Respondents’ lender carved out its most important remedies from arbitration, including the right to accelerate payments and foreclose, while confining the Respondents’ claims to arbitration. *See* App. 61.

In addition, the Circuit Court found the Arbitration Rider substantively unconscionable because “it takes away from the Plaintiffs important rights conferred on them by West Virginia law—the right to pursue class-wide claims and to recover reasonable attorney’s fees.” App. 326. Moreover, the agreement “also informs the Plaintiffs that the rules of procedure applicable to arbitration may prevent them from conducting meaningful and full discovery.” *Id.*

As to the Arbitration Rider's class-action waiver, the Circuit Court noted this Court's analysis of both the "high costs that might deter a litigant from pursuing a claim" as well as "the *risk* that the claimant may have to bear substantial costs," thus deterring litigants from vindicating their rights in the arbitral forum. App. 327 (quoting *Richmond Am. Homes*, 717 S.E.2d at 921). In assessing those costs and risks, "it is impossible to overstate the importance of class-action relief, which lies at the 'core of the effective prosecution of consumer ... cases.'" App. 327 (quoting *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 562, 567 S.E.2d 265, 278 (2002) (invalidating arbitration agreement as unconscionable)). Class action relief is often "a *sine qua non* to permit the adequate vindication of consumer rights." *Dunlap*, 211 W.Va. at 562, 567 S.E.2d at 278. In consumer cases, relatively small recoveries will often deter any individual claimant from bringing a stand-alone claim. *Id.* By aggregating claims, class actions offer the only effective mechanism for vindicating allegations of "small-dollar/high volume" illegality. *Id.* On the converse, removing the opportunity for class-wide relief from the equation goes "a long way toward allowing those who commit illegal activity to go unpunished, undeterred, and unaccountable." *Dunlap*, 211 W.Va. at 562-63, 717 S.E.2d at 278-79.

As to attorney's fees, the Arbitration Rider provides that "in no event" will Ocwen be responsible for the Respondent's attorney's fees, App. 61, which Respondents are entitled to seek under the WVCCPA. *See* W. Va. Code § 46A-5-104. Attorney's fees provision such as those found in the WVCCPA encourage "private attorney generals" to enforce laws protecting the general welfare. *See Dunlap*, 211 W.Va. at 283 n.15, 567 S.E.2d at 283 n.15. Recognizing the importance of such provisions, this Court has indicated that "a provision in a contract of adhesion that would operate to restrict the

availability of an award of attorney fees to less than that provided for in applicable law would ... be presumptively unconscionable.” *Id.*⁵

The Circuit Court properly analyzed the twin effect of the class-action waiver and the exclusion of attorney’s fees as follows:

The Plaintiffs allege that Ocwen assessed them just over \$1,100 in unlawful charges. Even with the Plaintiffs’ request for statutory penalties factored in, the Plaintiffs’ claimed recovery is still relatively small. Ocwen, however, is a large, repeat player, servicing over a half million mortgage loans nationwide and many loans in West Virginia. The putative class action described in the Complaint would allow the Plaintiffs to vindicate their important statutory rights under the WVCCPA by aggregating their relatively small claims with similarly situated consumers. Without that avenue of relief, the costs and risks to the Plaintiffs in pursuing their claims will serve as a powerful deterrent against righting the wrongs alleged in the Complaint. Indeed, consumers faced with those circumstances will often be unable to obtain individual counsel and prosecute claims such as these.

....

Because the arbitration agreement in this case provides that Ocwen will “in no event” be responsible for the Plaintiffs’ attorney’s fees, the agreement is presumptively unconscionable under West Virginia law. Ocwen cannot overcome that presumption in this case because the dual effect of the arbitration agreement’s class-action waiver and its disclaimer of any liability for attorney’s fees is to prevent consumers such as the Plaintiffs from effectively vindicating their statutory rights.

App. 327-29 (internal citations omitted).⁶

⁵ Relying on cases from other jurisdictions, Ocwen argues that the provision of the Arbitration Rider disclaiming liability for attorney’s fees can be severed from the remainder of the contract. Pet. 36–37. That argument is squarely foreclosed by this Court’s precedent. *See Dunlap*, 211 W.Va. at 568, 567 S.E.2d at 285 (“[W]e think a court doing equity should not undertake to sanitize any aspect of the unconscionable contract attempt.”).

⁶ The Circuit Court also rejected Ocwen’s attempt to draw parallels to this Court’s decision in *State ex rel. AT&T Mobility, LLC v. Wilson*, 226 W.Va. 572, 703 S.E.2d 543 (2010), finding that the Arbitration Rider in this case “does not remotely resemble the consumer-friendly aspects of the arbitration agreement in *Wilson*.” App. 328.

In sum, the Circuit Court properly determined that the Arbitration Rider is both procedurally and substantively unconscionable under generally applicable state contract law. Accordingly, Ocwen's challenge to the Circuit Court's finding lacks merit.

4. The Circuit Court's unconscionability analysis, which was tailored to the particular facts of this case, is not preempted by the Federal Arbitration Act.

Finally, the Circuit Court also rejected Ocwen's attempt to invoke federal preemption under the FAA in order to avoid the multitude of decisions from this Court that have applied generally applicable state contract law to declare arbitration agreements unenforceable. As the Circuit Court properly recognized, Ocwen's preemption argument lacks merit. Ocwen's preemption theory stems almost entirely from the U.S. Supreme Court's decision in *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011). The Circuit Court properly determined, however, that the reasoning of *Concepcion* does not change the result in this case.⁷ Most importantly, the FAA does not prevent courts from invalidating arbitration clauses pursuant to generally applicable state contract defenses, such as the unconscionability doctrine that invalidates the arbitration agreement in this case.

⁷ As an initial matter, the Circuit Court recognized the difficulty in applying *Concepcion*, which arose in federal court, to cases in state court. App. 329. Justice Thomas, who provided the critical fifth vote to form a majority in *Concepcion*, has consistently and steadfastly maintained that the FAA does not apply to cases in state court. See, e.g., *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 285 (1995) (Thomas, J., dissenting). Thus, had *Concepcion* arisen from state court, there could not have been five votes for applying preemption under the FAA. The point is not whether Section 2 of the FAA applies to state courts, given that a majority of the U.S. Supreme Court has declared it does (although never in any opinion joined by Justice Thomas). The point is that, because Justice Thomas provided the crucial fifth vote in *Concepcion*, there is no way to apply that holding to state courts. See, e.g., *United States v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011) (“[W]e have looked to the votes of dissenting Justices if they, combined with votes from plurality or concurring opinions, establish a majority view on the relevant issue.”).

The Circuit Court properly recognized that the U.S. Supreme Court’s holding in *Concepcion* does not change the analysis in this case. App. 330. The Supreme Court in *Concepcion* ruled that the FAA preempted a California common-law rule deeming almost all class-action waivers in consumer arbitration agreements unconscionable. *See* 131 S. Ct. at 1740. Thus, *Concepcion* concerned a state law of broad and mechanical application that interfered with the FAA’s purposes and objectives. *See id.* at 1749–50. The Circuit Court in this case recognized the distinction between its approach and the rule in *Concepcion*:

The rationale in *Concepcion* corresponds with the view taken by the West Virginia Supreme Court of Appeals—unconscionability doctrine must be assessed on a case-by-case basis, rather than by applying mechanically rigid rules. *See Wilson*, 703 S.E.2d at 548. Moreover, the linchpin of the analysis in *Concepcion*, as in *Wilson*, was that the arbitration agreement did not prevent consumers from effectively vindicating their statutory rights. *See Concepcion*, 131 S. Ct. at 1753. Accordingly, California’s broad rule invalidating arbitration agreement frustrated the purposes and objectives of the FAA and was preempted. *Id.* This case is different. The arbitration agreement’s ban on class-wide relief and its exclusion of reasonable attorney’s fees precludes consumers such as the Plaintiffs from effectively vindicating their statutory rights. Where that is true, applying West Virginia’s generally applicable unconscionability doctrine does not trigger preemption under the FAA.

App. 330.

Once again, this Court need not take up the Circuit Court’s unconscionability analysis or the question of federal preemption because the Circuit Court properly applied the Dodd–Frank Act to declare the Arbitration Rider in this case unenforceable. Even if the Court does so, however, Ocwen’s challenge lacks merit in both respects. The Circuit Court did not err in applying West Virginia’s generally applicable unconscionability doctrine to the facts of this case. And because there is no

inconsistency between the Circuit Court's application of that doctrine and the holding in *Concepcion*, preemption under the FAA has no work to do in this case.

Conclusion

For the reasons stated above, the Court should refuse the Petition.

Respectfully submitted,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 13-0151

STATE OF WEST VIRGINIA *ex rel.*,
OCWEN LOAN SERVICING, LLC,

Petitioner,

v.

HONORABLE CARRIE WEBSTER, Judge
of the Circuit Court of Kanawha County;
ROBERT L. CURRY and TINA CURRY,
individually and on behalf of a similarly
situated class,

Respondents.

Certificate of Service

The undersigned hereby certifies that a true copy of the foregoing ***Brief of Respondents Robert L. Curry and Tina Curry in Response to Petition for Writ of Prohibition*** was served upon counsel of record, via hand delivery, this 19th day of March, 2013, addressed as follows:

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