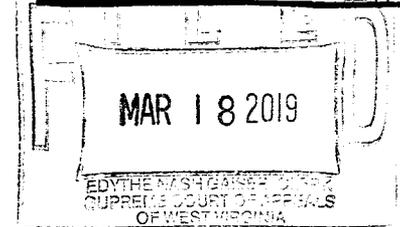
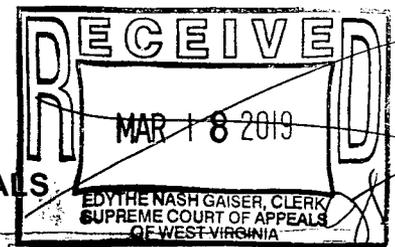


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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



DEBRA K. BAYLES
Plaintiff Below,

Petitioner,

v.

No. 18-0871

**JEFFREY N. EVANS and
AMERIPRISE FINANCIAL SERVICES, INC., and
KRISTINA NICHOLLS and STEPHEN BAYLES,**
Defendants Below,

Respondents.

RESPONDENTS' BRIEF

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I. STATEMENT OF THE CASE

Petitioner Debra K. Bayles ("Plaintiff") is the widow of William N. Bayles and serves as the Administratrix of the Estate of William N. Bayles, pursuant to an Order of Appointment entered on April 8, 2013, by the Marshall County Commission.¹ She is the step-mother of Respondents Kristina Nicholls ("Kristina") and Stephen Bayles ("Bayles").²

William N. Bayles ("Decedent") died on March 26, 2013.³

Plaintiff and Decedent were married, but lived apart since 2005.⁴

During the first half of 2012, Decedent became interested in talking with a professional financial advisor about his financial options. He met with financial advisor Respondent Jeffrey N. Evans ("Evans") in the presence of his daughter, Kristina, to obtain information and options.⁵

On June 20, 2012, Decedent met with Evans at his office, at which time he decided to roll out his NiSource 401(k) retirement into an Individual Retirement Account ("IRA") with Ameriprise.⁶ Plaintiff was present for this meeting.⁷ At this time, Decedent had not executed an authorization form for NiSource to roll out his 401(k) retirement.

¹ *Appendix at 917.*

² *Appendix at 906.*

³ *Appendix at 960.*

⁴ *Appendix at 534 and 548.*

⁵ *Id. at 550-551 and 561.*

⁶ *Id. at 586-587.*

⁷ *Id. at 588.*

During the meeting, Decedent completed an Ameriprise Brokerage Individual Retirement Account Application (“Brokerage Application”) to receive his 401(k) rollover.⁸ Evans discussed the Brokerage Application with him.

He advised Decedent that the application made a specific reference to a predispute arbitration clause appearing in the corresponding Ameriprise Brokerage Client Agreement (“Brokerage Agreement”).⁹ Evans handed Decedent a complete copy of the agreement, which contained the full text of the arbitration clause.¹⁰

He then described arbitration as a venue for him to express any disagreement relating to his Ameriprise account, in which the parties involved appear before a neutral third party, explain their positions, and obtain a decision which resolves the disagreement.¹¹

Evans discussed arbitration in the presence of Plaintiff. Neither Decedent nor Plaintiff expressed any concern, problem, or difficulty with arbitration.¹²

The Brokerage Application was assigned an account number ending in 264133. Part 9 of it states in pertinent part:

You acknowledge that you have received and read the Ameriprise Brokerage Client Agreement (“Agreement”) and agree to abide by its terms and conditions as currently in effect or as they may be amended from time to time. You hereby consent to all these terms and conditions with full knowledge and understanding of the information contained in the Agreement. This brokerage account is governed by a predispute arbitration clause which is found on Section 26, page 3

⁸ *Id.* at 615-621.

⁹ *Id.* at 623.

¹⁰ *Id.* at 624.

¹¹ *Id.*

¹² *Id.* at 604.

of the Agreement. You acknowledge receipt of the predispute arbitration clause.¹³

The Ameriprise Brokerage Client Agreement (“Brokerage Agreement”) contains the predispute arbitration clause mentioned in Part 9 of the Brokerage Application. The clause appears at Paragraph 26 and states as follows:

This agreement contains a predispute arbitration clause. By signing this Agreement the parties agree as follows:

- (A) All parties to this agreement are giving up the right to sue each other in court, including the right to a trial by jury, except as provided by the rules of the arbitration forum in which a claim is filed.**
- (B) Arbitration awards are generally final and binding; a party’s ability to have a court reverse or modify an arbitration award is very limited.**
- (C) The ability of the parties to obtain documents, witness statements and other discovery is generally more limited in arbitration than in court proceedings.**
- (D) The arbitrators do not have to explain the reason(s) for their award unless, in an eligible case, a joint request for an explained decision has been submitted by all parties to the panel at least 20 days prior to the first scheduled hearing date.**
- (E) The panel of arbitrators may include a minority of arbitrators who were or are affiliated with the securities industry.**
- (F) The rules of some arbitration forums may impose time limits for bringing a claim in arbitration. In some cases, a claim that is ineligible for arbitration may be brought in court.**
- (G) The rules of the arbitration forum in which the claim is filed, and any amendments thereto, shall be incorporated into this Agreement.**

¹³ *Id.* at 619 (emphasis added).

By reading and accepting the terms of this Agreement, you acknowledge that, in accordance with this Arbitration section, you agree in advance to arbitrate any controversies that may arise with Ameriprise Financial or AEIS. You agree that all controversies that arise between us (including but not limited to those related to your brokerage account and any service or advice provided by a broker or representative), whether arising before, on or after the date you opened your Account shall be determined by arbitration in accordance with the terms of this Agreement and the rules then prevailing of the Financial Industry Regulatory Authority.

Federal and state statutes of limitation, repose, and/or other rules, laws, or regulations impose time limits for bringing claims in federal and state court actions and proceedings. The parties agree that all federal or state statutes of limitation, repose, and/or other rules, laws, or regulations imposing time limits that would apply in federal or state court, apply to any dispute, claim or controversy brought under this Agreement, and such time limits are hereby incorporated by reference. Therefore, to the extent that a dispute, claim, or controversy arises under this Agreement and would be barred by a statute of limitation, repose or other time limit, if brought in a federal or state court action or proceeding, the parties agree that such dispute, claim, or controversy shall be barred in an arbitration proceeding. You understand that judgment upon any arbitration award may be entered in any court of competent jurisdiction. The parties agree that venue and personal jurisdiction is proper in Minneapolis, Minnesota.

No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action; or who is member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until: (i) the class certification is denied; (ii) the class is decertified; or (iii) the customer is excluded from the class by the court. Such forbearance to enforce any agreement to arbitrate shall not constitute a waiver of any rights under this agreement except to the extent stated herein.¹⁴

¹⁴ *Id.* at 629 (emphasis added).

Decedent signed the Brokerage Application on June 20, 2012, thereby acknowledging the Brokerage Agreement and its terms.¹⁵

During the June 20, 2012, meeting, Plaintiff heard for herself that her husband could change his beneficiary as the account owner.¹⁶

Shortly after the June 20th meeting with Evans, Decedent executed a NiSource Pension Election Authorization Form ("NiSource Form").¹⁷ In so doing, he certified his election to receive a lump sum of \$132,660.86, along with receipt of a rights notice, a special tax notice, and descriptions of his pension options, values, financial affect, and amounts payable.¹⁸ Decedent signed the NiSource Form on June 26, 2012, in order to fund the Brokerage Account opened with Evans six days earlier.

The second page of the NiSource Form contains a spousal consent signed by Plaintiff on the same date. In providing her written consent, Plaintiff consented to the Decedent's election to receive a lump sum. She also certified her review of a rights notice, special tax notice, descriptions of pension options, values, financial effect, and amounts payable, and the first page showing the Decedent's signature. Per the NiSource Form, Plaintiff's signature was required in order for the Decedent to roll out his elected lump sum to fund the Brokerage Account.¹⁹

Later, on September 5, 2012, the Decedent opened another IRA Account with Ameriprise through Evans. He completed and signed an Active Portfolios Account Application ("Portfolios Application") for this account, which was assigned the account

¹⁵ *Id. at 620.*

¹⁶ *Id. at 603.*

¹⁷ *Id. at 637.*

¹⁸ *Id.*

¹⁹ *Id. at 638.*

number ending in 961133.²⁰ He indicated an investment objective of “growth with income” and a risk tolerance of “moderate.” The second IRA Account, known as the Active Portfolios Account (“Portfolios Account”), received the sum of \$100,000.00 from the Brokerage Account to begin.²¹

Decedent’s Portfolios Application reflected his decision for Plaintiff to be the beneficiary.²² That same day, he changed his beneficiary on the Brokerage Account to his children, Kristina and Stephen.²³

Like the June meeting, Evans presented the Ameriprise Active Portfolios Client Agreement (“Portfolios Agreement”) to Decedent and advised him of the predispute arbitration clause contained therein.²⁴ Evans also reiterated his description of arbitration as a mechanism to resolve account related disputes.²⁵ Evans told Decedent to read the document.²⁶ He looked at the Portfolios Agreement containing the arbitration clause, but did not read every page and took it home with him.²⁷ Decedent did not ask any questions or express any concerns with the Portfolios Agreement or the attendant arbitration clause.²⁸

In his Portfolios Application, Decedent acknowledged the following:

You acknowledge that you have received and read the

²⁰ *Id.* at 640-647.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 596.

²⁴ *Id.* at 604-605.

²⁵ *Id.*

²⁶ *Id.* at 609.

²⁷ *Id.* at 610.

²⁸ *Id.* at 611.

Ameriprise Portfolios Client Agreement (version K, dated 03/12), the Ameriprise Managed Accounts Client Disclosure Brochure and the Ameriprise Brokerage Client Agreement, which is hereby incorporated by reference, and agree to abide by the terms and conditions as currently in effect or as they may be amended from time to time. You hereby consent to all these terms and conditions with full knowledge and understanding of the information contained in them. This account is governed by a predispute arbitration provision which is found in Section 25, Page 9 of the Active Portfolios Client Agreement and Section 26, Page 3 of the Brokerage Client Agreement. You acknowledge receipt of the predispute arbitration provision.²⁹

The Portfolios Agreement contains the following predispute arbitration provision at Paragraph 25:

Arbitration

This agreement contains a predispute arbitration clause. By signing this Agreement the parties agree as follows:

(A) All parties to this agreement are giving up the right to sue each other in court, including the right to a trial by jury, except as provided by the rules of the arbitration forum in which a claim is filed.

(B) Arbitration awards are generally final and binding; a party's ability to have a court reverse or modify an arbitration award is very limited.

(C) The ability of the parties to obtain documents, witness statements and other discovery is generally more limited in arbitration than in court proceedings.

(D) The arbitrators do not have to explain the reason(s) for their award unless, in an eligible case, a joint request for an explained decision has been submitted by all parties to the panel at least 20 days prior to the first scheduled hearing date.

(E) The panel of arbitrators may include a minority of

²⁹ *Id. at 646* (emphasis added).

arbitrators who were or are affiliated with the securities industry.

(F) The rules of some arbitration forums may impose time limits for bringing a claim in arbitration. In some cases, a claim that is ineligible for arbitration may be brought in court.

(G) The rules of the arbitration forum in which the claim is filed, and any amendments thereto, shall be incorporated into this Agreement.

By reading and accepting the terms of this Agreement, you acknowledge that, in accordance with this Arbitration section, you agree in advance to arbitrate any controversies that may arise with the Sponsor or AEIS. You agree that all controversies that arise between us (including but not limited to those related to your brokerage account and any service or advice provided by a broker or representative), whether arising before, on or after the date you opened your Account shall be determined by arbitration in accordance with the terms of this Agreement and the rules then prevailing of the Financial Industry Regulatory Authority.

Federal and state statutes of limitation, repose, and/or other rules, laws, or regulations impose time limits for bringing claims in federal and state court actions and proceedings. The parties agree that all federal or state statutes of limitation, repose, and/or other rules, laws, or regulations imposing time limits that would apply in federal or state court, apply to any dispute, claim or controversy brought under this Agreement, and such time limits are hereby incorporated by reference.

Therefore, to the extent that a dispute, claim, or controversy arises under this Agreement and would be barred by a statute of limitation, repose or other time limit, if brought in a federal or state court action or proceeding, the parties agree that such dispute, claim, or controversy shall be barred in an arbitration proceeding.

You understand that judgment upon any arbitration award may be entered in any court of competent jurisdiction. The parties agree that venue and personal jurisdiction is proper in Minneapolis, Minnesota.

No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action; or who is member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until: (i) the class certification is denied; (ii) the class is decertified; or (iii) the customer is excluded from the class by the court. Such forbearance to enforce any agreement to arbitrate shall not constitute a waiver of any rights under this agreement except to the extent stated herein. This paragraph does not constitute a waiver of any right of private claim or cause of action provided by the Advisers Act.³⁰

Decedent signed the Portfolios Application on September 5, 2012, thereby acknowledging the Portfolios Agreement and its terms.³¹

On September 24, 2012, Ameriprise mailed a beneficiary confirmation letter (“Letter”) to the Decedent at his home address.³² The Letter showed that his two children, Kristina and Stephen, were the beneficiaries of both of his IRA accounts. Decedent gave the Letter to Kristina for safekeeping.³³ The Letter instructed him to inform Ameriprise of any discrepancy or error in the beneficiary designations. Decedent elected not to do so.³⁴ Consequently, the account proceeds from both accounts were paid to Kristina and Stephen following Decedent’s passing on March 26, 2013.

Plaintiff prepared her own Will and executed it in 2011 or 2012. Her wishes were to leave everything to Decedent if she predeceased him. Alternatively, in the event her husband died before her, only Plaintiff’s natural children would take under her Will. In other words, Plaintiff did not include Kristina and Stephen in her Will. Notably, Plaintiff

³⁰ *Id.* at 657 (emphasis added).

³¹ *Id.* at 647.

³² *Id.* at 660.

³³ *Id.* at 556 and 561.

³⁴ *Id.* at 605-606.

shared her executed Will with her husband, such that Decedent was aware of her intentions with respect to his children.³⁵

Decedent never contacted Evans after either of the two meetings to ask questions or express concerns with the arbitration clauses attendant to the IRA accounts.³⁶

Plaintiff filed her Complaint in the Circuit Court of Marshall County on September 5, 2014, naming Evans, Ameriprise, Nicholls, and Bayles as Defendants.³⁷ The predicate for each of her claims is the IRA accounts. In response, Defendants filed a Motion to Dismiss and Compel Mandatory Arbitration on November 17, 2014.³⁸

The Circuit Court heard oral argument on the Defendants' motion on February 27, 2015. Focusing on the Brokerage Application and Brokerage Agreement, the Circuit Court found that the signed Brokerage Application incorporated the predispute arbitration clause found in the Brokerage Agreement by reference.³⁹ The Circuit Court also found that there was no signature of Decedent in the Brokerage Agreement.⁴⁰ Therefore, the Circuit Court denied the motion under the rule of *contra proferentem*.⁴¹

³⁵ *Id.* at 677-678.

³⁶ *Id.* at 611.

³⁷ *Id.* at 959.

³⁸ *Id.* at 905-958.

³⁹ *Id.* at 823 – Transcript of February 27, 2015 Hearing at Page 22.

⁴⁰ *Id.* at 824.

⁴¹ *Id.*

On May 19, 2015, the Circuit Court entered an Order denying the Motion to Dismiss and to Compel Mandatory Arbitration.⁴² The Order does not contain its finding of incorporation by reference. An appeal followed.

On June 1, 2016, this Court issued a Memorandum Opinion finding the arbitration clause in the Brokerage Agreement to be clear and unambiguous, and remanded this matter to the Circuit Court to determine the validity and scope of the Brokerage and Portfolios account arbitration agreements.⁴³

In response, on June 14, 2016, Plaintiff filed a Motion to Amend Complaint to allege fraud.⁴⁴

Defendants responded to the motion on procedural grounds on June 22, 2016, and later opposed the motion on substantive grounds on July 15, 2016.⁴⁵

Counsel appeared for oral argument on the motion to amend on August 3, 2016. The Court granted Plaintiff's motion with the specific directive to plead fraud satisfactorily. The Court entered an Order for the hearing on October 25, 2016, specifying that leave was granted to include a fraud count "provided that the new count is pled satisfactorily."⁴⁶

⁴² *Id.* at 790-794.

⁴³ *Id.* at 757-772; *Evans v. Bayles*, 237 W.Va. 269, 787 S.E.2d 549 (2016).

⁴⁴ *Id.* at 969.

⁴⁵ *Id.* at 974-983.

⁴⁶ *Id.* at 726-727.

The Amended Complaint sought to allege fraud in Count IV against Evans and Nicholls **without setting forth a factual basis**. The operative pleading does not allege facts or circumstances with particularity as required by WVRCP 9.⁴⁷

Consequently, Defendants moved to dismiss the Amended Complaint on November 14, 2016. The motion sought dismissal of the fraud claim as deficient, and reiterated that this matter is subject to mandatory arbitration.⁴⁸ Plaintiff did not file an opposition to the motion.

On January 19, 2017, the Circuit Court heard oral argument on the dismissal motion for the Amended Complaint. The Circuit Court denied the motion from the bench, held the rest of the motion concerning arbitration in abeyance, and established a discovery schedule and a briefing schedule. The Court entered an Order on January 25, 2017, for its rulings.⁴⁹ The parties then proceeded with written and deposition discovery limited to the arbitration issue.

On June 16, 2017, Defendants filed their Renewed Motion to Compel Mandatory Arbitration.⁵⁰ Plaintiff filed her response brief on July 20, 2017.⁵¹ Defendants filed their reply brief on August 7, 2017.⁵²

On August 18, 2017, the Circuit Court heard oral argument on the renewed arbitration motion and took the same under consideration per the hearing transcript.⁵³

⁴⁷ *Id.* at 728-739. The pleading merely adds the words “fraud” and “fraudulently” in selective places without setting forth new facts supporting the use of such words.

⁴⁸ *Id.* at 704-718.

⁴⁹ *Id.* at 700-701.

⁵⁰ *Id.* at 522-691.

⁵¹ *Id.* at 96.

⁵² *Id.* at 80-95.

⁵³ *Id.* at 20-32 –*Transcript of August 18, 2017 Hearing.*

On September 15, 2018, the Circuit Court entered an Order relative to Defendants' Renewed Motion to Compel Mandatory Arbitration ("Order") finding the arbitration clauses in the Brokerage Agreement and Portfolios Agreement to be valid and enforceable. The Circuit Court also found the Plaintiff's claims for the assets under both agreements to be within the substantive scope of both arbitration clauses.⁵⁴

The Circuit Court went beyond its authority under *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 692 S.E.2d 293 (2010), however, and allowed Plaintiff to pursue a fraud or concealment claim against Defendants following the March 26, 2013, death of the Decedent. Likewise, the Circuit Court went beyond its *TD Ameritrade* authority in making findings relative to the beneficiary of the Portfolios Account and a beneficiary confirmation letter.⁵⁵ These portions of the latest Order serve to deny the renewed arbitration motion in pertinent part, precipitating this appeal.

⁵⁴ *Id.* at 74-76.

⁵⁵ *Id.* at 875-877.

II. SUMMARY OF ARGUMENT

The subject arbitration clauses are clear and unambiguous. Plaintiff's claims for account proceeds are well within the substantive scope of the arbitration agreements. There is no evidence of procedural or substantive unconscionability. And Debra Bayles is required to arbitrate her claims as a matter of law.

The Circuit Court properly held that valid arbitration agreements exist and that the claims against Evans, Ameriprise, Nicholls and Bayles are within their scope. Further, there is simply no evidence of fraud at any time during the events in question. Any purported fraud or concealment claim is subject to arbitration.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents submit that oral argument is necessary under Rule 20 given the pled assignments of error, the prior appeal below, and the clear language appearing in the predispute arbitration clauses.

Respondents submit that a Rule 20 argument and resulting decision will best serve not only the parties herein and the Circuit Court, but other litigants, circuit court judges and members of the bar.

IV. ARGUMENT

A. STANDARD OF REVIEW

An Order ruling on a motion to compel arbitration is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine.⁵⁶ As the Circuit

⁵⁶ *Credit Acceptance Corp. v. Front*, 231 W.Va. 518, 745 S.E.2d 556 (2013).

Court's Order effectively grants in part and denies in part the Renewed Motion to Compel Mandatory Arbitration below, this Court shall review said Order *do novo*.⁵⁷

B. WEST VIRGINIA LAW PRECLUDES DEBRA BAYLES FROM AVOIDING ARBITRATION OF HER CLAIMS FOR ACCOUNT PROCEEDS

Debra Bayles avers that she cannot be required to arbitrate this matter as she did not sign any of the documents related to the Brokerage Account and Portfolios Account. Yet, West Virginia law is clear that a non-signatory may be required to arbitrate when bound to do so under a traditional theory of contract and agency law. A non-signatory may be required to arbitrate where there is incorporation by reference, assumption, agency, veil piercing/alter ego, or estoppel.⁵⁸

Under a *Hickman* analysis, there are multiple theories of contract and agency law, which compel Debra Bayles to arbitrate her claims. Both the Brokerage Application and Portfolios Application incorporate the subject arbitration clause by reference, as held previously by this Court. Debra Bayles is the designated beneficiary under both accounts, such that she is subject to the terms of the accounts, including those related to arbitration. In this respect, she assumed the incorporated arbitration clauses. Surely, she cannot be a designated beneficiary without being subject to the terms of the accounts, which are the predicate of her claims.

While Plaintiff insists that her claims are personal, her alter ego is her beneficiary status on the accounts. Crucially, the predicate of her claims are the accounts and their

⁵⁷ *West Virginia CVS Pharmacy, LLC v. McDowell Pharmacy, Inc.*, 238 W. Va. 465, 796 S.E.2d 574 (2017).

⁵⁸ *Chesapeake Appalachian, L.L.C., et al. v. Hickman*, 236 W. Va. 421, 781 S.E.2d 198 (2015).

proceeds. Thus, her claims for account proceeds are subject to the account agreements and the incorporated arbitration clauses.

Further, Plaintiff's beneficiary status estops her from avoiding arbitration of her claims for account proceeds. This is particularly case given the absence of fraud below, as confirmed by the Circuit Court's conclusion that such evidence "falls short." Critically, there is no dispute that Mr. Bayles designated her as the beneficiary of the Brokerage Account in June 2012. There is also no dispute that Mr. Bayles designated her as the beneficiary of the Portfolios Account in September 2012. Plaintiff seeks a direct benefit from the accounts as a beneficiary. She cannot enjoy the account proceeds she seeks while avoiding the governing terms for an account. Plaintiff can only receive proceeds from these accounts per their terms, which are set forth in the account agreements. Plainly, her claims for proceeds from these accounts are subject to the arbitration clauses appearing in the account agreements. To allow Debra Bayles on these facts to claim account proceeds as a beneficiary, and simultaneously avoid the arbitration clauses in the account agreements, would contravene *Hickman* and established federal and state policy supporting arbitration of disputes as contemplated.

C. THERE IS NO CREDIBLE EVIDENCE OF FRAUD OR MISREPRESENTATION TO INVALIDATE THE ACCOUNT AGREEMENTS AND THE INCORPORATED ARBITRATION CLAUSES. SUCH CLAIMS DO NOT AVOID ARBITRATION.

Plaintiff seeks to avoid arbitration at all costs. To this end, she alleged fraud below *after* this Court's June 1, 2016, decision. As the Circuit Court later concluded, her evidence of fraud falls short. Undaunted, Debra still relies on her mere allegations of fraud and misrepresentation by Evans, without credible evidentiary support, in pursuit of her appeal.

The facts below do not begin to establish fraud by clear and convincing evidence. Moreover, West Virginia law does not permit Mrs. Bayles to avoid arbitration by casting a fraud claim in tort.⁵⁹ Our arbitration jurisprudence recognizes and upholds federal policy favoring arbitration of disputes reasonably contemplated by the text of an arbitration clause.⁶⁰ The plain text at bar – “any controversies that may arise” - captures any claim for account proceeds regardless of how labeled or framed.

Only fraud in inducing a party to enter into a contract containing an arbitration provision is relevant to a challenge of an arbitration provision.⁶¹ The Circuit Court held correctly that the plaintiff’s evidence of fraud to invalidate the arbitration clause “falls short.”⁶² The Amended Complaint is void of any fraud or concealment claim following the death of the Decedent. Regardless, any claim of fraud or concealment occurring after the passing of the Decedent is subject to arbitration, as such a claim relates to the IRA accounts. Critically, under *Bates, supra*, the Circuit Court’s fraud or concealment label does not escape the reach of the arbitration clauses.⁶³

D. THERE IS NO EVIDENCE OF PROCEDURAL OR SUBSTANTIVE UNCONSCIONABILITY TO INVALIDATE THE ARBITRATION AGREEMENTS AND INCORPORATED ARBITRATION CLAUSES

⁵⁹ See *Salem Int’l University, LLC v. Bates*, 238 W. Va. 229, 793 S.E.2d 879 (2016).

⁶⁰ *Id.*

⁶¹ See *West Virginia Investment Management Board v. Variable Annuity Life Insurance Company*, 241 W. Va. 148, 155, 820 S.E.2d 416, 423 (2018) (“Petitioners do not dispute that they agreed to arbitrate, nor do they claim fraud or any other untoward inducement to enter into the agreement.”); Syl. Pt. 2, in part, *State ex rel. Johnson Controls, Inc. v. Tucker*, 229 W. Va. 486, 729 S.E.2d 808 (2012) (“Nothing in the Federal Arbitration Act, 9 U.S.C. § 2, overrides normal rules of contract interpretation. Generally applicable contract defenses – such as laches, estoppels, waiver, fraud, duress, or unconscionability – may be applied to invalidate an arbitration agreement.”).

⁶² *Appendix at 75.*

⁶³ See *Salem Int’l University, LLC v. Bates*, 238 W. Va. 229, 793 S.E.2d 879 (2016).

There is no evidence below of procedural or substantive unconscionability to avert arbitration of Debra Bayles' claims. In any event, the burden of proving unconscionability rests with the party attacking the agreement which contains the arbitration clause.⁶⁴

Beginning with the underlying documents, the Brokerage Application referenced the Brokerage Agreement and contained the arbitration clause. In addition, the Brokerage Application expressly referenced where the arbitration clause could be found within the Brokerage Agreement. Likewise, the Portfolios Application not only referenced the Portfolios Agreement, but also expressly referenced where the arbitration clause could be found within the Portfolios Agreement. **The arbitration clause in each agreement is in bold type and refers to a “predispute arbitration clause” in the first sentence.**

Evans discussed the Brokerage Application with Decedent during their June 2012 meeting. Crucially, he advised Mr. Bayles that the Brokerage Application made a specific reference to a predispute arbitration clause appearing in the Brokerage Agreement. Evans handed Decedent a complete copy of the agreement, which contained the full text of the arbitration clause. Evans described arbitration as a venue for Mr. Bayles to express any disagreement relating to his Ameriprise account. Evans further described arbitration as a process in which the parties involved in an account related disagreement appear before a neutral third party to explain their positions and obtain a decision which resolves the disagreement. All of this transpired in the presence of Plaintiff.

⁶⁴ *Nationstar Mortgage, LLC v. West*, 237 W. Va. 84, 785 S.E.2d 634 (2016).

Moreover, Decedent understood Evans' words regarding arbitration.⁶⁵ The decedent had an opportunity to read the arbitration clause appearing in the Brokerage Agreement. Mr. Bayles did not ask any questions of Evans about arbitration. Nor did he express any confusion over arbitration. There is no evidence that Mr. Bayles complained at any time that he was denied the right to read the agreement containing the arbitration clause, or that he lacked the capacity to understand the arbitration clause.

Evans followed the same course with Decedent on arbitration during their September 2012 meeting. He advised the decedent that the Portfolios Application gave reference to a predispute arbitration clause appearing in the Portfolios Agreement. Evans again presented Mr. Bayles a complete copy of the account agreement, which contained the full text of the arbitration clause. He again described arbitration as a venue for the decedent to express any disagreement relating to the account, and the process in which the parties involved in an account related disagreement appear before a neutral third party for resolution. Mr. Bayles received this information from Evans. The decedent looked at the Portfolios Agreement, which contained the arbitration clause, but did not read every page and took it home. Mr. Bayles did not ask any questions or express any concern or confusion with the arbitration clause.

Critically, Mr. Bayles never contacted Evans after either of the two meetings to ask questions or express concerns with the arbitration clauses attendant to the IRA accounts.⁶⁶

⁶⁵ *Appendix at 841.*

⁶⁶ *Id. at 611.*

The fact that Mr. Bayles signed the account applications without reading every page of the corresponding account agreements does not relieve him and his estate from the binding effect of the arbitration clauses.⁶⁷ Mr. Bayles signed both account applications freely and voluntarily. And at the time of the September 5, 2012, meeting, he was already familiar with a predispute arbitration clause from the June meeting. Therefore, there was no surprise or coercion during the second meeting. Overall, the arbitration clauses contained in both agreements are proper with respect to any procedural concerns.

Substantively, the arbitration clauses herein are commercially reasonable and are routine in the financial services industry. The arbitration clauses are also mutual, as they apply to all parties equally. Importantly, the arbitration clauses do not create a disparity in the rights of the parties. The arbitration clauses do not contain penalty provisions to the detriment of the account owner. Nor do they shift fees or other monetary obligations onto the account owner to their detriment.

Clearly, the purpose and effect of the arbitration clauses is to provide a forum to resolve “any controversies that may arise.” Such controversies may arise before, on, or after the date an account was opened. As is common throughout the financial services industry, arbitration herein is governed by the prevailing rules of the Financial Industry Regulatory Authority (“FINRA”). This Court recognizes that both federal and state laws reflect a strong public policy recognizing arbitration as an expeditious and relatively

⁶⁷ See *Nationstar Mortgage, supra* (duty of person of mature years to read contents of written contract affecting his pecuniary interests in which contents of contract will be imputed to him or her for failure to read) (citations omitted).

inexpensive forum for dispute resolution.⁶⁸ And this Court is familiar with the workings of FINRA.⁶⁹

Plaintiff complains about the costs associated with FINRA Arbitration. Such costs are reasonable. And she can afford them, as she has bank accounts and an investment account with Hazlett, Burt and Watson in Wheeling.⁷⁰ There is no showing by the petitioner that she is destitute and unable to afford FINRA Arbitrations proceedings. Consequently, any financial related claim for substantive unconscionability rings hollow.

The absence of procedural and substantive unconscionability is fatal to the petitioner's efforts to derail arbitration of her money claims.

E. THE CLAIMS FOR ACCOUNT PROCEEDS FALL WELL WITHIN THE SCOPE OF THE INCORPORATED ARBITRATION CLAUSES

The Circuit Court correctly held that the arbitration clauses are "valid and without any meritorious legal challenge," and that Debra Bayles' claim for account proceeds is within the substantive scope of the arbitration clause.⁷¹ In this respect, the Circuit Court exercised its *TD Ameritrade* authority properly as it determined the threshold issues of (1) whether a valid arbitration agreement exists between the parties and (2) whether the claims averred by the plaintiff fall within the substantive scope of the arbitration agreement.⁷²

In determining whether the language of an agreement to arbitrate covers a particular controversy, federal policy favoring arbitration requires a court to construe

⁶⁸ *Parsons v. Haliburton Energy Services, Inc.*, 237 W.Va. 138, 785 S.E. 2d 844 (2016).

⁶⁹ See generally *Williams v. Tucker*, No. 16-0657 (W. Va. June 13, 2017).

⁷⁰ *Appendix at 681.*

⁷¹ *Id. at 75-76.*

⁷² *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 692 S.E.2d 293 (2010).

arbitration clauses liberally, to find that the covered dispute reasonably contemplated by the language, and to resolve doubts in favor of arbitration.⁷³

Leaving labels aside, Debra Bayles' ultimate claims for account proceeds flow directly from the Brokerage Agreement and the Portfolios Agreement, which govern the accounts and contain valid and incorporated arbitration clauses. Clearly, the plain text of the arbitration clauses more than encompasses this dispute. By executing the account applications, Mr. Bayles agreed in advance to arbitrate any controversy that may arise, including but not limited to those related to his account and any service or advice provided by a broker or representative, whether arising before, on, or after the date on which the account was opened, under the prevailing rules of FINRA. Petitioner, as the account beneficiary, assumed the valid and incorporated clauses and is estopped from avoiding their application and enforcement. Moreover, her purported fraud claim and absence of evidentiary support do not serve as an end run around the arbitration clauses.

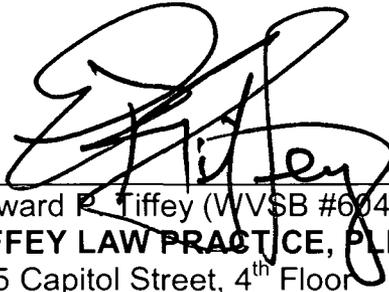
Accordingly, on the issue of scope, it is clear that the arbitration clauses capture what the Plaintiff complains about. Debra Bayles' challenge on the scope issue fails remarkably.⁷⁴

⁷³ See *Employee Resource Group, LLC, et al. v. Harless*, No. 16-0493 (W. Va. April 13, 2017) (citations omitted).

⁷⁴ Enforcement of the arbitration clauses by this Court warrants a reversal of the September 15, 2018 Order relative to the finding that the September 23, 2012 beneficiary confirmation letter "DID NOTHING" to modify or affect Debra Bayles' designation as the sole beneficiary of the Portfolios Account. Clearly, such a finding goes beyond the *TD Ameritrade* authority of the Circuit Court and usurps the role and authority of a FINRA arbitrator.

VI. CONCLUSION

WHEREFORE, for reasons heretofore stated, Respondents respectfully request entry of an Order upholding the portions of the Circuit Court's September 15, 2018, Order enforcing the predispute arbitration clauses appearing in the Brokerage and Portfolios Accounts.



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