

NO. 34865

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

HALLIBURTON ENERGY SERVICES, INC.,

Appellant,

v.

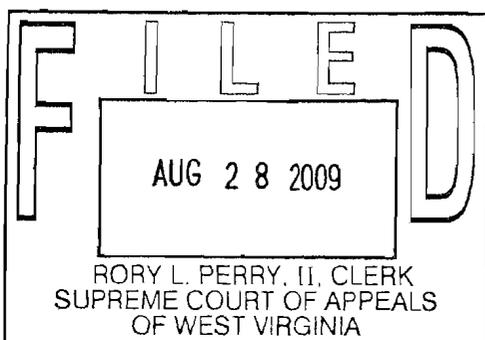
Civil Action No. 07-C-49M
Judge John T. Madden

TEXAS KEYSTONE, INC.,

Appellee.

FROM THE CIRCUIT COURT OF TYLER COUNTY, WEST VIRGINIA
THE HONORABLE JOHN T. MADDEN

**APPEAL ON BEHALF OF
APPELLANT, HALLIBURTON ENERGY SERVICES, INC.**



James A. Varner, Sr. (WV State Bar #3853)
Debra Tedeschi Herron (WV State Bar #6501)
Jeffrey D. Van Volkenburg (WV State Bar #10227)

McNeer, Highland, McMunn and Varner, L.C.
Empire Building - 400 West Main Street
P. O. Drawer 2040
Clarksburg, WV 26302-2040
Telephone: (304) 626-1100
Facsimile: (304) 623-3035

*Counsel for Defendant
Halliburton Energy Services, Inc.*

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 II. The circuit court committed reversible error by dismissing Halliburton’s claim for contractual indemnification against Texas Keystone, as settled contract law requires that Halliburton is entitled to express indemnification without arbitrating the issue. 11

 III. The circuit court committed reversible error when it improperly expanded the scope of an arbitration clause, which required arbitration for “all disputes arising out of performance of the contract” to require Halliburton’s claim for contractual indemnification stemming from the filing of a wrongful death claim by a non-party to the subject contract be arbitrated. 14

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**STATEMENT OF THE KIND OF PROCEEDING AND
NATURE OF THE RULING BELOW¹**

The civil action, styled *Heather Ruckdeschel and Thomas G. Miller, Sr., as Co-Administrators of the Estate of Thomas G. Miller, Jr., deceased, Plaintiff, v. Falcon Drilling, L.L.C., Texas Keystone, Inc., and Halliburton Energy Services, Defendants*, was filed in the Circuit Court of Tyler County, West Virginia, on or about August 20, 2007. That civil action remains active, as of the date of the filing of this appeal.² The Complaint sought recovery for the death of Thomas G. Miller, Jr., an employee of Falcon Drilling, L.L.C. (“Falcon”), who was killed while working on the Wiley Number 8 well site, owned by Texas Keystone, Inc., (“Texas Keystone”) on or about October 19, 2005. Falcon was on-site as the driller of Wiley Number Eight (8) well. Halliburton Energy Services (“Halliburton”) was contracted by Texas Keystone to perform certain functions to place the well into an operating state. Halliburton, as a named Defendant, filed a cross-claim against Texas Keystone with its Answer to Plaintiffs’ Amended Complaint. This cross-claim asserted claims of contractual indemnification and common law contribution against Texas Keystone, which form the basis of this appeal. Halliburton also asserted claims for common law contribution and indemnification against Falcon.

This is an appeal from Texas Keystone’s Motion to Dismiss Halliburton’s cross-claim for contractual indemnification and common law contribution, granted by the Honorable John T. Madden, Judge of the Circuit Court of Tyler County, West Virginia. Halliburton’s appeal of the Motion to Dismiss is premised upon the circuit court’s clear error and due to the lower court’s rulings, which exceeded its legitimate authority. More specifically, Halliburton appeals the findings in the circuit court’s October 29, 2008 *Memorandum Order* and subsequent *Supplemental Order*

¹ W. Va. R. App. Proc., Rule 3(c)(1) (2008).

² Since the filing of the Petition for this appeal, the Circuit Court has entered a default on Halliburton’s cross-claim against Falcon Drilling. As of the submission of this brief, Falcon’s Motion to Vacate the Default Judgment remains pending before the Circuit Court of Tyler County, WV.

which granted *Texas Keystone, Inc.'s Motion to Dismiss the Cross-Claim of Halliburton Energy Services, Inc.* (See, "Memorandum Order" and "Supplemental Order").³

The Supplemental Order was entered after Halliburton filed a Motion for Clarification of the Circuit Court's October 29, 2008 Order and Motion to Make the October 29, 2008 Order Final for Purposes of Appeal. A hearing held January 16, 2009, resulted in a supplemental order, which held that Halliburton's claim for common law contribution against Texas Keystone was included within the Motion to Dismiss Halliburton's cross-claim against Texas Keystone. The Court further found that the October 29, 2008 *Memorandum Order*, and subsequent *Supplemental Order*, were to be considered final orders, pursuant to Rule 54 of the West Virginia Rules of Civil Procedure, for purposes of appeal. Halliburton submitted a timely Petition for Appeal, which was accepted by this Honorable Court.

STATEMENT OF FACTS

Plaintiffs' Complaint was filed on or about August 20, 2007 in the Circuit Court of Tyler County, West Virginia. The Complaint and subsequent Amended Complaint requested damages from the above named Defendants, following the death of Thomas G. Miller, Jr.⁴ Mr. Miller was working at the Wiley Number Eight (8) well site in Tyler County, West Virginia, on or about October 19, 2005, as an employee of Falcon Drilling. He was killed as a result of a fire at the well-site. Texas Keystone was the owner of the well-site. Falcon was responsible for the drilling operations at the Wiley Number 8 well site. Halliburton was the service company hired by Texas Keystone to provide services at the well site. Plaintiffs' Complaint sought damages from the three

³ The Honorable John T. Madden retired effective January 1, 2009. The parties engaged in a hearing on January 16, 2009, resulting in a Supplemental Order, entered by the Honorable Judge David Hummel on February 6, 2009.

⁴ The original complaint in this civil action named only Heather Ruckdeschel as a Plaintiff. The Amended Complaint filed with the Circuit Court of Tyler County, West Virginia on or about September 13, 2007, named Thomas G. Miller, Sr., as Plaintiff and co-administrator of the estate of Thomas G. Miller, Jr. The respective claims in Complaint and Amended Complaint varied slightly and are not material for purposes of this appeal.

named Defendants for their alleged, respective negligence, which Plaintiffs assert culminated in the death of Mr. Miller.

Each of the three Defendants filed their respective answers to Plaintiffs' *Amended Complaint*. In its *Answer*, filed September 14, 2007, Halliburton asserted cross-claims against Texas Keystone and Falcon, requesting indemnification and contribution. After the filing of its *Answer*, with included cross-claims, Halliburton entered into negotiations with the Plaintiffs to settle their claims against Halliburton and a settlement was ultimately reached. The Plaintiffs petitioned the Court to approve a settlement and distribution with Halliburton on February 7, 2008. The Court, by Order, approved the settlement between Plaintiffs and Halliburton on February 29, 2008. Texas Keystone and Falcon were present at the settlement conference and did not object to Halliburton's settlement with Plaintiffs, nor did Texas Keystone object to language in the Settlement Agreement, which expressly permitted Halliburton to pursue its cross-claim for indemnification against Texas Keystone. See, *Order Approving Wrongful Death Settlement Between The Plaintiffs and Halliburton Energy Services*, at p. 7. Texas Keystone and Falcon continue to actively defend Plaintiffs' claims against them.

Halliburton's claim for indemnification against Texas Keystone was based upon the clear language of the written contract entered into between Halliburton and Texas Keystone, whereby Halliburton was to provide services for Texas Keystone at the Wiley Number 8 well site. The contract contained both an arbitration provision and an indemnification provision more fully described below, which clearly and unequivocally assigned responsibility to Texas Keystone for any damages or potential liabilities incurred by Halliburton as a result of the work completed at the Wiley Number 8 site.

Texas Keystone filed a "*Motion to Dismiss Pursuant to West Virginia Code § 56-1-1a and Rule 12(b) of the West Virginia Rules of Civil Procedure*," on September 13, 2007, in response to Plaintiff's Amended Complaint. Also on September 13, 2007, Falcon filed a "*Motion to Dismiss*"

and “*Memorandum of Law in Support of Motion to Dismiss Filed on Behalf of Defendant Falcon Drilling Company, L.L.C.*”

On September 20, 2007, Texas Keystone filed a “*Motion to Dismiss Cross-Claim of Halliburton Energy Services, Inc., Pursuant to West Virginia Code § 56-1-1a and Rule 12(b) of the West Virginia Rules of Civil Procedure.*” Halliburton subsequently filed “*Halliburton Energy Services’ Response In Opposition to Defendant Texas Keystone, Inc’s Motion to Dismiss the Cross-Claim Of Halliburton Energy Services,*” on October 12, 2007. On November 1, 2007, Texas Keystone filed its “*Reply of Texas Keystone, Inc., in Support of Motion to Dismiss Cross-Claim of Halliburton Energy Services, Inc.*”

A hearing was held on January 4, 2008, at which time oral arguments were presented on Falcon Drilling’s and Texas Keystones’ motions to dismiss Plaintiffs’ Amended Complaint. The Court denied the respective motions asserted by Texas Keystone and Falcon, which were memorialized, by Order, entered on February 8, 2008. The Court also heard arguments on Texas Keystone’s motion to dismiss Halliburton’s cross-claim. The Court deferred ruling on this motion, directing Halliburton to supplement its brief in opposition to the motion to dismiss.⁵ The Court requested that Halliburton file its Supplemental Brief by February 15, 2008. Texas Keystone was permitted to file a Reply Brief on or before March 7, 2008. Both parties submitted their briefings accordingly.

The Court, by Memorandum Order, dated October 29, 2008, dismissed Halliburton’s claim for contractual indemnification against Texas Keystone. Halliburton subsequently filed a *Motion for Clarification* of the October 29, 2008 Order. Specifically, Halliburton’s Motion for Clarification requested entry of an Order clarifying the Court’s October 29, 2008 Memorandum Order, concerning its lack of any mention of Halliburton’s claim for common law contribution against Texas Keystone.⁶

⁵ See, “*Order,*” entered by the Circuit Court on February 8, 2008.

⁶ The October 29, 2008 “*Memorandum Order*” did not contain any mention of the issue of Halliburton’s common law contribution claim, but rather, solely addressed Halliburton’s contractual indemnification claim.

The issue of Halliburton's contribution claim had not been addressed by any of the parties during the pendency of the Motions to Dismiss, as only indemnity was briefed and argued. Texas Keystone filed a response to Halliburton's Motion for Clarification and for the first time, raised novel, substantive arguments pertaining to Halliburton's common law contribution claim against it.⁷ Halliburton responded with a reply brief, addressing the new issues contained in Texas Keystone's response brief. A Supplemental Order was entered after the January 16, 2009 hearing. The Court's Supplemental Order, clarified the Circuit Court's October 29, 2008 Order as a Rule 54 Order for purposes of appeal, and further dismissed Halliburton's common law contribution claim. This Court, subsequently accepted Halliburton's Petition for Appeal. Halliburton requests this Honorable Court to reverse the circuit court's dismissal of Halliburton's claim for contractual indemnification against Texas Keystone, based on a written contract, arising out of the incident more fully described in Plaintiffs' Amended Complaint. Halliburton further requests that this Court overturn the dismissal of Halliburton's common law contribution claim against Texas Keystone and remand this claim with a finding that Halliburton's settlement with Plaintiffs did not eliminate the contribution claims.⁸

ASSIGNMENTS OF ERROR

- I. The circuit court committed reversible error by dismissing Halliburton's cross-claim for contractual indemnification and common law contribution, pursuant to Texas Keystone's Motion to Dismiss, because it misapplied the relevant legal standard for a motion to dismiss in West Virginia.
- II. The circuit court committed reversible error by dismissing Halliburton's claim for contractual indemnification against Texas Keystone, as settled contract law requires that Halliburton is entitled to express indemnification without arbitrating the issue.
- III. The circuit court committed reversible error when it improperly expanded the scope of an arbitration clause, which required

⁷ Texas Keystone's response to Halliburton's motion was not timely filed with the Court pursuant to Rule 6(d) of the West Virginia Rules of Civil Procedure. Halliburton asserted this argument in its reply brief, but it was not addressed by the Court at the hearing. To the extent that Rule 6(d) can be read to prohibit the filing of Texas Keystone's brief because of its untimely nature, Halliburton reasserts that the arguments contained in Texas Keystone's response brief should be summarily denied and the Motion to Dismiss Halliburton's common law contribution claims, denied as a matter of law.

⁸ Halliburton's Petition for Appeal referenced the cross-claims for contribution against Texas Keystone and Falcon Drilling, however only the cross-claim for contribution against Texas Keystone is under consideration at this time.

arbitration for “all disputes arising out of performance of the contract” to require Halliburton’s claim for contractual indemnification stemming from the filing of a wrongful death claim by a non-party to the subject contract be arbitrated.

- IV. The circuit court committed reversible error by ruling that Texas Keystone did not waive its right to assert the affirmative defense of arbitration when it failed to include this affirmative defense in its Motion to Dismiss Halliburton’s cross-claim.
- V. The circuit court committed reversible error when it dismissed Halliburton’s common law contribution claim against Texas Keystone based upon a misplaced reliance on Charleston Area Medical Center, et al. v. Parke-Davis, et al.,⁹ and Sydenstricker, et al. v. Unipunch Products, et al.,¹⁰ which are factually distinct from the matter at bar. The circuit court’s dismissal of Halliburton’s common law contribution claims also deprives Halliburton of its due process rights, as it prevents Halliburton from obtaining complete relief because Falcon Drilling cannot be joined in arbitration.

STANDARD OF REVIEW

The rulings by the circuit court were made pursuant to Texas Keystone’s Motion to Dismiss Halliburton’s cross-claim. A motion to dismiss involves a question of law. Where this Court is presented with a question of law, the proper standard of review is *de novo*. (“Where the issues on appeal from a circuit court is clearly a question of law or involving the interpretation of a statute, we apply a *de novo* standard of review.”) Syl. Pt. 1, Crystal R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995).¹¹

⁹ 217 W. Va. 15, 614 S.E.2d 15 (2005).

¹⁰ 169 W. Va. 440, 288 S.E.2d 511 (1982).

¹¹ The Petition for Appeal in this matter was submitted before the Court announced its recent decision in McGraw v. American Tobacco Company, 2009 W. Va. LEXIS 73. The McGraw decision set forth the requirement, at Syl. Pt. 1 that:

A circuit court order compelling arbitration is not subject to direct appellate review unless the order compelling arbitration otherwise complies with the requirements of W. Va. Code § 58-5-1 (1998) and Rule 54(b) of the West Virginia Rules of Civil Procedure. A party seeking this Court’s review of a circuit court’s order compelling arbitration prior the entry of a final order which complies with the requirements of W. Va. Code § 58-5-1 (1998) and Rule 54(b) of the West Virginia Rules of Civil Procedure must do so in an original jurisdictional proceeding seeking a writ of prohibition.

See, Syl. Pt. 1, McGraw v. American Tobacco Company, 2009 W. Va. LEXIS 73 (2009). Upon entry of the October 29, 2008 Order dismissing Halliburton’s cross-claim against Falcon and ordering arbitration, Halliburton filed a Motion for Clarification, which included a request to make the Order final for purposes of appeal, pursuant to Rule 54(b). Thus, Halliburton has complied with requirements of McGraw, irrespective of the fact that the decision was announced after the instant petition was filed. The appropriate standard of review for this appeal is thus a *de novo* standard.

POINTS AND AUTHORITIES

- I. The circuit court committed reversible error by dismissing Halliburton’s cross-claim for contractual indemnification and common law contribution, pursuant to Texas Keystone’s Motion to Dismiss, because it misapplied the relevant legal standard for a motion to dismiss in West Virginia.**

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18 Am.Jur.2d *Contribution* § 1, *et seq.* (1965) 41

¹² 217 W. Va. 15, 614 S.E.2d 15 (2005).

¹³ 169 W. Va. 440, 288 S.E.2d 511 (1982).

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<u>Hardin v. New York Central Railroad Company,</u> 145 W. Va. 676, 116 S.E.2d 697 (1960)	41
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LEGAL ARGUMENT

- I. The circuit court committed reversible error by dismissing Halliburton’s cross-claim for contractual indemnification and common law contribution, pursuant to Texas Keystone’s Motion to Dismiss, because it misapplied the relevant legal standard for a motion to dismiss in West Virginia.**

This Court has established a liberal standard for a party attempting to overcome a motion to dismiss. “The policy of the rule is to decide cases upon their merits, and if the complaint states a claim upon which relief can be granted under any legal theory, a motion to dismiss must be denied.” John W. Lodge Distrib. Co. v. Texaco, Inc., 161 W. Va. 603, 245 S.E.2d 157 (1978). Accordingly, the dismissal of Halliburton’s cross-claim against Texas Keystone was clear error by the circuit court. Halliburton asserted a valid claim for contractual indemnification and common law contribution, pursuant to a written contract between Texas Keystone and Halliburton. The circuit court’s October 29, 2008 Memorandum Order found that a valid contract existed between Texas Keystone and Halliburton. Included within the valid contract, as held by the Court, are the indemnity and arbitration provisions at issue. Accordingly, Halliburton’s contractual indemnity claim against Texas Keystone should have survived Texas Keystone’s Motion to Dismiss. The circuit court’s dismissal of the cross-claim, premised upon said contract, was clear error and must be overruled and

remanded for further proceedings, as pursuant to settled West Virginia law, Halliburton may receive the relief requested in its cross-claim against Texas Keystone.¹⁴

II. The circuit court committed reversible error by dismissing Halliburton's claim for contractual indemnification against Texas Keystone, as settled contract law requires that Halliburton is entitled to express indemnification without arbitrating the issue.

This Court has upheld the validity of express indemnity clauses, based upon a written agreement, as the same are governed by contract principals. See, Sydenstricker, et al. v. Unipunch Products, et al., 169 W. Va. 440, 445, 288 S.E.2d 511, 515 (1982). In this case *sub judice*, the lower court erred both procedurally and substantively in dismissing Halliburton's cross-claim for contractual indemnification against Texas Keystone. Procedurally, the Court's ruling which granted Texas Keystone's Motion to Dismiss Halliburton's cross-claim is erroneous, as the Court also found that the contract, which contained the indemnification provision, was valid.

Pursuant to the terms of the contract, Texas Keystone is *contractually* required to indemnify Halliburton for its settlement with Plaintiffs and fees incurred herein:

Customer also agrees to DEFEND, INDEMNIFY AND HOLD Halliburton Group HARMLESS from and against any and all liability, claims, costs, expenses attorney fees and damages whatsoever for personal injury, illness, death, property damages and loss . . .

¹⁴ For a complete discussion of the implications of the specifics of the contract between Halliburton and Texas Keystone, *see infra* § II. Irrespective of validity of Texas Keystone's desire to arbitrate Halliburton's claims against it, a Motion to Dismiss is not the appropriate method to pursue arbitration, as the matter may later need to be remanded to the circuit court for further proceedings, irrespective of whether the matter is sent to arbitration.

It is entirely plausible that an arbitration panel would remand this matter back to the circuit court for an appropriation of damages between Texas Keystone and Falcon, based on Halliburton's cross-claim against both Texas Keystone and Falcon. The circuit court would be bound by its previous holding, thus resulting in inconsistent awards on Halliburton's respective cross-claims. At this stage in the litigation, to Halliburton's knowledge, Texas Keystone has not formally submitted any notice concerning its desire to arbitrate Halliburton's cross-claim against it to an arbitration panel. In situations where a party attempts to invoke its purported right to arbitration in the context of a motion to dismiss or motion for summary judgment, a circuit court cannot grant said motion, on the guise of providing for the arbitration of a dispute, which potentially eliminates another party's right to substantive relief. The proper method for invoking a right to arbitration is through a motion to stay the underlying proceeding, thereby preserving the ability for the matter to be remanded to the circuit court.

See, Halliburton Work Order. “Courts have traditionally enforced indemnity contract rights so long as they are not unlawful.” *Id., referencing Sellers v. Owens-Illinois Glass Company*, 156 W. Va. 87, 191 S.E.2d 166 (1972); *see also Eastern Gas and Fuel Associates v. Midwest-Raleigh, Inc.*, 374 F.2d 451 (4th Cir. 1967), *cert. denied* 389 U.S. 951, 88 S.Ct. 333, 19 L.Ed.2d 360; *Eley v. Brunner-Lay Southern Corporation, Inc.*, 289 Ala. 120, 266 So.2d 276 (1972); *City and Borough of Juneau v. Alaska Electric Light & Power Company*, 622 P.2d 954 (Alaska 1981); *Christy v. Menasha Corporation*, 297 Minn. 334, 211 N.W.2d 773 (1973); *Waggoner v. Oregon Automobile Insurance Co.*, 270 Or. 93, 526 P.2d 578 (1974); *Di Lonardo v. Gilbane Building Company*, 114 R.I. 469, 334 A.2d 422 (1975); *Herchelroth v. Mahar*, 36 Wis.2d 140, 153 N.W.2d 6 (1967).

The contract between Texas Keystone and Halliburton was a “Work Order,” drafted by Halliburton and signed by a representative of Texas Keystone.¹⁵ In its October 29, 2008 *Memorandum Order* dismissing Halliburton’s cross-claim Against Texas Keystone, the circuit court framed the issue for resolution as “whether the Motion of Texas to Dismiss the Halliburton Cross-claim on the basis that the work order construction and application to this case should be decided by arbitration should be granted or denied.” *See, Memorandum Order*, at p. 5. The indemnification clause in the contract states as follows:

Customer (Texas Keystone) agrees to RELEASE Halliburton Group from any and all liability for any and all damages whatsoever to property of any kind owned by, in the possession of, or leased by Customer and those persons and entities Customer has the ability to bind by contract or which are co-interest owners or joint venturers with Customer. [Customer also agrees to DEFEND, INDEMNIFY AND HOLD Halliburton Group HARMLESS from and against any and all liability, claims, costs, expenses attorney fees and damages whatsoever for personal injury, illness, death, property damages and loss] resulting from: loss of well control, services to control wild well, whether underground or above the surface, reservoir or

¹⁵ An employee of Falcon Drilling, Paul Gelles signed the Halliburton Work Order, on behalf of Texas Keystone. The issue of whether a binding contract was formed, due the signature of a Falcon employee being placed on the work order was fully briefed by the parties. The Court, in the *Memorandum Order*, subject of this appeal, found that “[a]pplying the facts provided in the respective briefs by the parties concerning the execution of the work order, the Court feels the work order is valid.” The Court then goes on to state, “[h]owever, perhaps more discovery would be needed on this issue for the Court to decide that issue upon summary judgment. It may be the case that even after discovery is concluded, certain issues of fact remain for jury determination before the Court could find as a matter of law that the work order constituted a binding agreement between Texas and Halliburton.” *See, Memorandum Order*, at p. 8.

underground damage, including loss of oil, gas, other mineral substances or water, surface damage arising from underground damage, damage to or loss of the well bore; subsurface trespass or any action in the nature thereof; fire; explosion; subsurface pressure, radioactivity; and pollution and contamination and its cleanup and control. (Parenthetical information added.) (Emphasis in original.)

As the indemnity provision above indicates, Texas Keystone was to “DEFEND, INDEMNIFY AND HOLD Halliburton Group HARMLESS” from and against any and all liability, claims, costs, expenses, attorney fees and damages whatsoever for personal injury, illness, death, property damages and loss . . .” See, *Work Order*, ¶C. A review of the pertinent contract does not find any qualification on the right to indemnification, nor is indemnification predicated upon first proceeding to arbitration. “A valid, written instrument, which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.” Syl. Pt. 3, Estate of Tawney v. Columbia Natural Resources, LLC, 219 W. Va. 266, 633 S.E.2d 22 (2006); Syl. Pt. 1, Cotiga Development Company v. United Fuel Gas Company, 147 W. Va. 484, 128 S.E.2d 626 (1962); “[I]t is the province of the circuit court, and not the jury to interpret a written contract.” Croft v. TRB, Inc., 664 S.E.2d 109, 112 (W. Va. 2008). Texas Keystone is a sophisticated commercial entity, continuously engaged in natural gas and oil well business. Texas Keystone could have requested the insertion of a provision in the contract at issue that would have predicated Halliburton’s right to indemnification upon first proceeding to arbitration. Texas Keystone did not do so, however. Given the clear language of the Work Order, as well as controlling West Virginia law, the indemnity agreement between the parties is valid and Halliburton should be entitled to proceed with its claim against Texas Keystone in the Circuit Court of Tyler County, West Virginia. As such, Halliburton respectfully requests that this Court reverse the dismissal of Halliburton’s contractual indemnification claim.

III. The circuit court committed reversible error when it improperly expanded the scope of an arbitration clause, which required arbitration for “all disputes arising out of performance of the contract” to require Halliburton’s claim for contractual indemnification stemming from the filing of a wrongful death claim by a non-party to the subject contract be arbitrated.

Halliburton’s third and fourth assignments of error in this appeal are closely related, both in fact and law. As the analysis below will demonstrate: (1) the specific language of the contract at issue mandates the Halliburton be granted indemnification from Texas Keystone without arbitrating the issue; (2) the specific language of the arbitration provision clearly provides that it is not applicable to an indemnification claim by Halliburton stemming from a wrongful death claim by a third-party, not in privity to the original contract. This position is supported by United States Supreme Court decision in Howsam v. Dean Witter Reynolds, Inc., 537 U. S. 79, 123 S. Ct. 588 (2002), and; (3) Texas Keystone waived its right to assert the affirmative defense of arbitration under the West Virginia Rules of Civil Procedure.

The specific, relevant language of the arbitration provision in the Work Order, in the contract between Texas Keystone and Halliburton is as follows:

G. Dispute Resolution - Customer and Halliburton agree that *any dispute that may arise out of the performance of this Contract* shall be resolved by binding arbitration by a panel of three arbitrators under the rules of the American Arbitrators Association. The arbitration will take place in Houston, TX. (Emphasis added).

See, Work Order, ¶G. The specific language requiring arbitration of all disputes that “arise out of the performance” of the contract is inapplicable to Halliburton’s claim for contractual indemnification. Neither the decedent, Thomas G. Miller, Jr., nor the administrators of his estate, Heather Ruckdeschel and Thomas G. Miller, Sr. were a party to the contract between Texas Keystone and Halliburton. Thomas G. Miller, Jr.’s employer, Falcon Drilling, L.L.C., was not a party to the contract between Texas Keystone and Halliburton. Consequently, Halliburton’s claim for contractual indemnification cannot be said to have emerged “out of performance” of the contract. Rather, Halliburton’s claim for indemnification was triggered by the filing of a suit by a third party for personal injury. There has not been a “dispute” related to the “performance” of the contract

between Halliburton and Texas Keystone. Texas Keystone must acknowledge that Halliburton's claim for indemnification did not arise from any act, error or omission sounding in contract, but rather a tort claim, asserted by a party not in any manner involved in the underlying contract.

The underlying civil action was brought against Texas Keystone, Falcon and Halliburton, collectively, as Defendants. Under no reasonable interpretation of the arbitration provision could a claim for indemnification, arising from settlement of a wrongful death claim, brought by a third party, not part of the original contract, fall within those disputes "arising out of performance" of the contract between Texas Keystone and Halliburton.

This Court has held that, "where parties to a contract agree to arbitrate . . . *all disputes* . . . arising under the contract, and where the parties bargained for the arbitration provision, such provision is binding, and specifically enforceable." Syl. Pt. 1, Board of Educ. of Berkeley County v. W. Harley Miller, Inc., 160 W. Va. 473, 236 S.E.2d 439 (1977) (emphasis added). Additionally, it is clear in West Virginia that, "arbitration agreements are [as much] enforceable as other contracts, but not more so." State ex rel. The Barden and Robeson Corp. v. Hill, 208 W. Va. 163, 168, 539 S.E.2d 106, 111 (2000), [*citing* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12, 87 S. Ct. 1801, 1806 n. 12 (1967)]. It is also true that an arbitration agreement may be waived through the conduct of the parties. *See*, Earl T. Browder, Inc. v. County Court of Webster County, 143 W. Va. 406, 412, 102 S.E.2d 425, 430 (1958).

While this Court has announced a general policy favoring arbitration, a review of this Court's previous holdings addressing the scope afforded particular arbitration clauses, finds several differences with the matter at bar. First, the Court's decisions, discussed below, contemplate factual predicates involving a breach of the contract between two parties, whereby one party to the contract attempts to apply the arbitration provision against the other.¹⁶ The only two parties involved were the original parties to the contract. This differs from the instant matter because of the Plaintiffs'

¹⁶ *See*, State ex rel. Center Designs, Inc. v. Henning, 201 W. Va. 42, 491 S.E.2d 42 (1997); State ex rel. The Barden and Robeson Corp. v. Hill, 208 W. Va. 163, 539 S.E.2d 106 (2000); Earl T. Browder, Inc. v. County Court of Webster County, 143 W. Va. 406, 102 S.E.2d 425 (1958).

initiation of the suit was as a third party, not considered in the original contract, and therefore not falling within the “arising out of performance” limitations of the arbitration clause. If not for the filing of the wrongful death claim by the Plaintiffs, there is no dispute present between Texas Keystone and Halliburton.

In addition to the factual differences between this matter and previous decisions by the Court, the specific language of the arbitration clauses previously analyzed differs from the arbitration clause *sub judice*. This difference in the language utilized differentiates the arbitration clause at issue and requires a finding that it should not have been applied to Halliburton’s claim for indemnification.

In State ex rel. Wells v. Matish, 215 W. Va. 686, 600 S.E.2d 583 (2004), this Court considered the validity of an arbitration clause in the context of an employment contract and subsequent dispute.¹⁷ Id., 215 W. Va. at 691, 600 S.E.2d at 588 (2004). The action involved a breach of contract action between an employer and its former employee. The employee was asked to take an unpaid leave of absence after his wife, who also worked for the employer, took an unpaid leave of absence to run for public office. Id., 215 W. Va. at 690, 600 S.E.2d at 587. The Court in Wells found that the arbitration provision was valid because it was a negotiated component of the employment contract and was not unconscionable. Id., 215 W. Va. 686, 694, 600 S.E.2d 583, 591.

In the matter currently before the Court, the dispute between Halliburton and Texas Keystone was not a breach of contract action, nor any cause of action that stemmed from the “performance” of the contract between the parties. Where the Court in Wells upheld the application of an arbitration clause that naturally applied to the issue that emerged from the contract, the same situation is not present in this litigation. This Court is being asked to make an extenuated jump in logic, extending the scope and breadth of arbitration clauses well beyond settled state and federal case law. In the matter of Wachovia Bank, N.A., v. Schmidt, 445 F.3d 762, 2006 U.S. App. LEXIS

¹⁷ The arbitration clause at issue in Wells stated, “Any dispute between the parties arising out of or with respect to this Agreement or any of its provisions or Employee’s employment with Employer shall be resolved by the sole and exclusive remedy of binding arbitration. . . . Any decision issued by an arbitrator in accordance with this provision shall be final and binding on the parties thereto and not subject to appeal or civil litigation.”

10227 (2006), the United States Court of Appeals for the Fourth Circuit, on remand from the United States Supreme Court, considered the scope to be given to an arbitration clause, which was to compel arbitration of “any claim or controversy arising out of, or relating to’ a Note or other documents executed in connection” with a loan provided by Wachovia to the Defendant below, Daniel D. Schmidt (hereafter “Schmidt”). Wachovia Bank, at 766. Schmidt filed a civil action in the Court of Common Pleas of Greenville County, South Carolina, alleging that Wachovia had wrongfully induced him to participate in a illegitimate tax shelter. Id., at 764. Wachovia responded by filing a separate petition in the Federal District Court of South Carolina in an attempt to compel Schmidt and others to arbitrate their state court claims. Id., at 765. The basis for the assertion of arbitration was the arbitration clauses found in two separate agreements in which Schmidt was a party. Id.

The federal district court denied Wachovia’s petition to compel arbitration. *See, Wachovia Bank, N.A. v. Schmidt*, CA-03-2005-6-20 (D.S.C. Aug. 1, 2003). Wachovia appealed the district court’s dismissal of its claim for arbitration, which was remanded by a divided panel of the Fourth Circuit Court of Appeals, with instructions to dismiss Wachovia’s petition for lack of subject matter jurisdiction. *See, Wachovia Bank, N.A., v. Schmidt*, 388 F.3d 414, 432 (4th Cir. 2004). Wachovia petitioned the United States Supreme Court for *certiorari*. The Supreme Court subsequently reversed the Fourth Circuit’s jurisdictional ruling and remanded the matter back to the Fourth Circuit for further proceedings. Wachovia Bank, N.A., v. Schmidt, 546 U.S. 303, 126 S. Ct. 941, 952, 163 L. Ed.2d 797 (2006).

The relationship between Schmidt and Wachovia started in May of 1998, when Schmidt sold his physical therapy business. Representatives of Wachovia approached Schmidt and advised him that there was an investment opportunity with KPMG LLP, and QA Investments, LLC, to assist with the substantial capital gain that he incurred as a result of the sale of his business. Wachovia Bank, 445 F.3d at 765. Schmidt entered into an agreement whereby KPMG LLP and QA Investments, LLC would invest in stock of the United Bank of Switzerland, which was supposed to provide profits as

well as provide a “basis-shift.” This would shelter Schmidt’s capital gains and be compliant with all Internal Revenue Service regulations. Id., at 765. Wachovia subsequently loaned Schmidt \$3.5 million for the investment, in exchange for a promissory note executed by Schmidt to Wachovia. Id.

The Note provided that either party could compel arbitration of “any claim or controversy arising out of, or relating to” the Note and related documents.¹⁸ Id., at 766. The investment was a failure and the IRS investigated, finding that “Basis Shifting Tax Shelters” would be subject to disallowance for tax purposes, interest on unpaid taxes and potential penalties. Id.

After the initial state court filing by the Schmidt Defendants and subsequent federal court petition by Wachovia, the federal district court found that the Schmidt Defendant’s state court claims bore no significant relationship to the Note, and that Wachovia, as a non-signatory to the Warrant, had failed to establish that it was entitled to enforce the arbitration clause in the Warrant.¹⁹ Id., at 767.

The Court began its analysis of the applicability of the arbitration clause in dispute by referencing its previous holding that, “an arbitration clause encompassing all disputes ‘arising out of or relating to’ a contract embraces ‘every dispute between the parties having a significant relationship to the contract regardless of the label attached to a dispute.’” Id., at 767, *citing* Am. Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 93 (4th Cir. 1996) (*quoting* J.J. Ryan & Sons v. Rhone Poulenc Textile, S. A., 863 F.2d 315, 321 (4th Cir. 1988)). The Court also cited to Long v. Silver, 248 F.3d 309, 316-317 (4th Cir. 2001) “ruling that, where agreement required arbitration of any dispute ‘arising out or relating to’ agreement, the ‘governing standard’ is whether claims have ‘significant relationship’ thereto.” Id. at 767. The Court framed its initial question as “whether the

¹⁸ The second arbitration clause, not important for the matters before this court, encompassed “any dispute, controversy or claim arising out of or relating to” the Warrant, which Schmidt purchased from Sandpiper for 85% of Sandpiper’s stock.

¹⁹ Wachovia’s argument for federal court jurisdiction was premised on diversity jurisdiction under 28 U.S.C. § 1332. Wachovia also based their petition for arbitration on the federal arbitration act, which is not applicable to the matters now before this Court.

Schmidt Defendants' state-court claims are significantly related to the Note." Id. The Court, in footnote 5 of its Opinion, stated that the requirement of a "significant relationship" in order to compel arbitration appeared to be odds with the language of the Note's arbitration clause, which required only Schmidt Defendants' claims "relate to" the Loan Documents. The Court stated that it was constrained to adhere to its precedent in Long and American Recovery. Id.

Those decisions construed arbitration provisions that were materially indistinguishable to the one in Wachovia and they required a "significant relationship" between the claims asserted and the contract containing the arbitration clause. Id., *referencing Long*, 248 F.3d at 316-317; Am. Recovery, 96 F.3d at 93.

The Court proceeded to examine the Schmidt Defendant's state court claims against Wachovia, which derived exclusively from the adviser-advisee relationship between Wachovia and Schmidt. The basis of the state court claims were that they shared a single factual premise, which was that Wachovia wrongfully induced Schmidt to participate in aforementioned investment plan. Id., at 768. The Court found that its resolution of the state court claims would "require no inquiry into the Note's terms, nor even knowledge of the Note's existence." Id.

Similarly, a court's inquiry into the arbitration clause in the matter *sub judice* requires no examination of the actual terms of the contract between the parties, as there has been no allegation by either Halliburton, nor Texas Keystone, that the contract was not performed. To the contrary, there was a specific finding by the circuit court that there exists a valid contract between Halliburton and Texas Keystone. The Court in Wachovia supported its ruling that the arbitration clause did not encompass the state court claims, by pointing out that, "[i]ndeed, Schmidt satisfied the Note in full in 1999, more than three years before the Schmidt Defendants filed suit against Wachovia in the South Carolina state court." Id. In the instant civil action, the contract between Halliburton and Texas Keystone was extinguished for almost two years, prior to the Plaintiff instituting suit against the respective Defendants. Texas Keystone's invocation of the arbitration clause only occurred after

Plaintiffs filed suit.²⁰ The analysis contained in the Wachovia opinion provides the framework which this Court should incorporate to reverse the circuit's ruling on the issue of whether Halliburton's claim for indemnification is subject to arbitration. Simply stated, the lower court erred because the arbitration clause at issue cannot be invoked, two years after a contract has been completed, only after Plaintiff filed suit naming the two parties as respective Defendants, when the claims asserted bear no relationship to the performance of the contract.

While the decision of the Fourth Circuit Court of Appeals is only persuasive authority, the opinion discusses the same inequalities that Halliburton would be subjected to if it was forced to arbitrate an issue never contemplated when the contract was initiated and performed. This proposition lends further credence to the position that the indemnification clause at issue is a stand alone provision, not subject to the arbitration clause.²¹

Halliburton's Answer to Plaintiffs' Amended Complaint also contained a claim for indemnification and contribution against Falcon Drilling, L.L.C. The contract with Texas Keystone contained no reference to Falcon Drilling, nor could it have. As such, if the dismissal of Halliburton's cross-claim is upheld, Halliburton's due process rights are eliminated, because Halliburton cannot get complete relief from Falcon because Falcon cannot be joined as a party in arbitration. West Virginia Constitution Article III, Section 17 provides that the Courts of this State shall be open and every individual injured shall have a remedy. This Court is presented with the conflicting aims of the West Virginia Constitution and this Court's announcement of its policy favoring arbitration. Examining

²⁰ Wachovia argued that the Fourth Circuit's previous decisions in J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315 (4th Cir. 1988); Cara's Notions, Inc., v. Hallmark Cards, Inc., 140 F.2d 566 (4th Cir. 1998), and Long v. Silver, 248 F.3d 309 (4th Cir. 2001), supported its position that the subject arbitration clause encompassed Schmidt's state court claims. The Court held, "[a]lthough in both Long and J.J. Ryan, we interpreted arbitration clauses materially identical to the one in the Note to encompass claims that did not arise directly from the agreement containing the clauses, each of those decisions involved claims that derived from the specific relationship created by the relevant agreement." In the matter at bar, Halliburton's cross-claim against Texas Keystone and Halliburton did not involve "claims that derived from the specific relationship created by the relevant agreement" but rather resulted from the filing of a complaint by a third party, claiming damages resulting from wrongful death from all three defendants.

²¹ On pages 6 and 7 of the Memorandum Order, the circuit court states the following: "The Court keeps coming back to the question of how does Halliburton disavow all the provisions in the work order with the exception of the indemnification provision." Contrary to the Circuit Court's query, Halliburton does not "disavow" any of the contract provisions, but only disagrees with the scope of the arbitration clause.

this appeal and its attendant circumstances, this Court should adhere to the strictness of the West Virginia Constitution by not prohibiting Halliburton from obtaining the relief requested in its cross-claim because one party has attempted to utilize the litigation machinery to thwart the swift, prompt and proper distribution of justice and resolution of disputes.

In State ex rel. City Holding Co. v. Kaufman, 216 W. Va. 594, 609 S.E.2d 855 (2004), the Court considered whether a binding arbitration clause of the parties' severance agreement applied to their dispute over the employee's attempted exercise of his stock options. Id., 216 W. Va. 594, 596, 609 S.E.2d 855, 857 (2004). The Kaufman decision analyzed the dispute applying the Federal Arbitration Act, 9 U.S.C. § 2 (1947).²² The Court noted that "the applicable law makes clear that the Federal Arbitration Act applies to agreements to arbitrate and does not apply to any contract or provision of a contract that excludes arbitration." Id.; *See also*, Choice Hotels Int'l, Inc., v. BSR Tropicana Resort, Inc., 252 F.3d 707 (4th Cir. 2001) (determining collection action exemption to arbitration agreements to be valid). The Court acknowledged that "where parties have bargained for arbitration, the arbitration provision is binding and enforceable on all causes of action arising under the contract that, by the contract terms are arbitrable," *see generally*, Board of Educ. Of the County of Berkeley v. W. Harley Miller, Inc., 160 W. Va. 473, 236 S.E.2d 439 (1977). The Court has also upheld the position that, "[p]arties are only bound to arbitrate those issues that by *clear language they have agreed to arbitrate; arbitration agreements will not be extended by construction or implication.*" State ex rel. City Holding Co. v. Kaufman, *supra*. Under Kaufman, the extension of the arbitration provision at issue beyond "performance" related issues is prohibited by this Court's well-reasoned holding Kaufman, limiting the scope of arbitration provisions.

²² The language of the Federal Arbitration Act, cited by the Court in Kaufman, was as follows:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The Court, in Board of Educ. of the County of Berkeley v. W. Harley Miller, Inc., cited to its previous holding where “the mere fact that parties do not agree to the construction of a contract does not render it ambiguous. The question as to whether a contract is ambiguous is a question of law to be determined by the court.” Syl. pt. 1, Berkeley County Public Serv. Dist. v. Vitro Corp. of America, 152 W. Va. 252, 162 S.E.2d 189 (1968). This Court’s resolution of Kaufman, *supra*, articulated a clear policy that arbitration provisions were not to be read so broad that they become “all encompassing.” The Court in Kaufman found that the former employee of the Plaintiff placed a “carve out” provision in his severance agreement that left his stock options outside the arbitration provision. Kaufman, 216 W. Va. at 599, 609 S.E.2d at 860. Similarly, the arbitration clause at issue here is similar in that it did not provide an all-encompassing scope, but was rather limited to those incidents which arose out of the performance of the Contract. The language of the arbitration clause at issue contains a “carve out” provision, inasmuch as indemnification does not fall under the “performance” of the contract. There is no language in the contract which pre-conditions Halliburton’s right to indemnification on first proceeding to arbitration. If the parties had desired all-encompassing language, a drafting that utilized such language could have been required by Texas Keystone. Texas Keystone, like Halliburton, is a sophisticated business entity, capable of drafting or requiring specific language in the performance of contracts.

In West Virginia, “[p]arties are only bound to arbitrate those issues that by clear language they have agreed to arbitrate; arbitration agreements will not be extended by construction or implication.” *See, State ex rel City Holding Co. v. Kaufman*, *supra*. Applying this standard, Halliburton should not be forced to arbitrate the issue of indemnification, under the specific facts of this civil action.

Halliburton’s settlement of its obligations under the wrongful death claims came about as a result of actions that occurred after the contract at issue was performed. It is well-settled in West Virginia that, “specific words or clauses of an agreement are not to be treated as meaningless, or to be discarded, if any reasonable meaning can be given them consistent with the whole contract.” Dunbar Fraternal Order of Police v. City of Dunbar, 218 W. Va. 239, 244, 624 S.E.2d 586, 591

(2005); Syl. Pt. 3, in part, Moore v. Johnson Service Co., 158 W. Va. 808, 219 S.E.2d 315 (1975). Consistent with this principle, the language stating that arbitration was to be enforced only for disputes arising out of the “performance” of the contract must preclude arbitration for the issue of indemnification.

A. **The United States Supreme Court’s decision in Howsam v. Dean Witter limits the broad scope of arbitration provisions, previously articulated in Prima Paint v. Flood & Conklin Mfg., thereby supporting Halliburton’s position that the arbitration clause at issue cannot be read so broad as to encompass contractual indemnification.**

Commentators have thoroughly examined the language used for arbitration provisions, with some finding the broad use of alternative dispute resolution has had the unintended effect of constraining access of litigants to America’s Courts. *See, First Opinions, Consent to Arbitration, and the Demise of Separability, Restoring Access to Justice for Contracts with Arbitration Provisions*, Reuben, Richard C., 56 SMU L. Rev. 819 (2003).

The United States Supreme Court has addressed the issue of scope to be given to arbitration clauses. As the analysis of the pertinent cases below will demonstrate, the Supreme Court initially supported a broad reading of arbitration provisions. *See, Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S. Ct. 1801, 18 L.Ed.2d 1270 (1967). More recently, the Court has retreated to a more narrow reading of arbitration clauses in Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 123 S. Ct. 588 (2002). The Howsam opinion stands for a more limited scope for arbitration provisions. Pursuant to the Howsam decision, this Court must reverse the circuit court’s ruling, which required that Halliburton’s indemnification claim to be arbitrated.

In Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S. Ct. 1801, 18 L.Ed.2d 1270 (1967), the Supreme Court considered the proper scope of an arbitration provision that stated “any controversy . . . arising out of this agreement, or the breach thereof, shall be settled by arbitration in the City of New York in accordance with the rules . . . of the American Arbitration Association.” Id., at 395. The issue was framed by the Court as “whether the federal court or the arbitrator is to resolve a claim of ‘fraud in the inducement,’ under the contract governed by the United States

Arbitration Act of 1925, where there is no evidence that the contracting parties intended to withhold that issue from arbitration.” *Id.*, at 396. The characterization of the issue by Justice Fortas indicated the Court intended to apply an expansive reading to arbitration clauses.

Flood & Conklin Mfg. Co. (F&C) cross-moved to have the action before the federal district court stayed pending arbitration. F&C contended that the issue for consideration was whether there was fraud in the inducement of the consulting agreement. F&C believed this was an issue that should be decided by the arbitrator and not by the court. *Id.* The district court granted F&C’s motion to stay the suit before it, pending arbitration. The district court’s formal holding found that a charge of fraud in the inducement of a contract which contained a broad arbitration clause involved a question for the arbitrator and not the court. *Id.* Prima Paint’s appeal to the Second Circuit Court of Appeals was dismissed. Both the lower court and the Court of Appeals relied on the holding in Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (C. A. 2d Cir. 1959), *cert. granted*, 362 U.S. 909, dismissed under Rule 60, 364 U.S. 801 (1960). The Robert Lawrence decision held that the contract then at issue involved interstate commerce, and as such, a claim of fraud in the inducement generally, is for the arbitrators to decide. The Court in Prima Paint also cited to the Robert Lawrence opinion which held that the arbitration interpretation provision was one of “national substantive law” which would take precedent over a contrary state law. *See, Prima Paint*, at 400. The Supreme Court held that it agreed with the 2nd Circuit’s holding in Robert Lawrence, “albeit for somewhat different reasons . . .” *Id.*

The Court cited to §§ 2, 3, and 4 of the United States Arbitration Act of 1925 for support of its holding. The language of Section 2, cited in the Court’s opinion, stated, “in any maritime transaction or a contract evidencing a transaction involving commerce . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist as law or in equity for the revocation of a contract.” Section 3 was deemed important for the Court’s consideration because of its requirement that a federal court in which suit has been brought “upon any issue referable to arbitration under an agreement in writing for such arbitration” to stay the court action until arbitration has been completed,

once the Court is satisfied that the issue is arbitrable. Also important from the Act was its provision for a federal remedy for a party “aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration.” *See*, United States Arbitration Act of 1925, § 4. The federal court was directed under Section 4 to order arbitration once it was satisfied that an agreement for arbitration was made and not honored. *Id.*, at 400.

The Court’s primary analysis centered on the proper scope to be given to the subject arbitration clause. The Court recited the view of the Court of Appeals for the Second Circuit, that except where the parties otherwise intend, arbitration clauses as a matter of federal law are “separable” from the contracts in which they are embedded. Further the Court stated that, “where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud.” *Id.*, at 404. The Court, in footnote nine (9), acknowledged that the rules of contract interpretation were not to be completely disregarded by stating that, “[t]he Court of Appeals has been careful to honor evidence that the parties intended to withhold such issues from the arbitrators and to reserve them for judicial resolution. *See*, El Hoss Engineer & Transport Co. v. American Ind. Oil Co., 289 F.2d 346 (C.A. 2d Cir. 1961).” *Id.*, at 404.

The Court upheld the decision by the 2nd Circuit, finding the arbitration language at issue was broad enough to encompass the issue. Most tellingly, the Court found that, “[i]ndeed, no claim is made that Prima Paint ever intended that ‘legal’ issues relating to the contract be excluded from arbitration, or that it was not entirely free so to contract.” *Id.*, at 406.

The United States Supreme Court again examined the scope of arbitration provisions in its 2002 decision, Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 123 S. Ct. 588, 154 L.Ed.2d 491 (2002). The Court announced a new policy of court interpretation of arbitration provisions:

[w]hile the United States Supreme Court has long recognized and enforced a liberal federal policy favoring arbitration agreements, there is a policy exception, pursuant to which there is a presumption, or interpretative rule, that the question of whether the parties have submitted a particular dispute to arbitration—that is, a question of arbitrability—is an issue for judicial determination, unless the parties

clearly and unmistakably provide otherwise. For such purposes, the phrase ‘question of arbitrability’ has far more limited scope than encompassing any potentially dispositive gateway question. In regard to particular issues, a gateway dispute about whether the parties are bound by a given arbitrability clause raises such a question of arbitrability for a court to decide. *Similarly, a disagreement about whether a n arbitration clause in a concededly binding contract applies to a particular type of controversy is for a court to decide.* However, procedural questions which grow out of a dispute and bear on its final disposition are presumptively not for a judge, but for an arbitrator, to decide. Moreover, the presumption is that an arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability.

Howsam, at 80. (Emphasis added).

The Howsam decision emerged from investment advice that Dean Witter Reynolds had provided to one of its clients. A controversy emerged and a clause in the investment contract was invoked. It provided that any controversy would be decided by arbitration before any self-regulatory organization or exchange of which the company was a member. Id., at 79. Pursuant to the contract, the client selected the arbitration organization. The client selected the National Association of Securities Dealers (NASD). Id., The NASD code set a six (6) year statute of limitations for submitting controversies to arbitration. Id., The company filed suit in United States District Court for the District of Colorado and requested that the Court to declare that parties’ controversy was ineligible for arbitration because the controversy was more than six (6) years old. Id. The district court dismissed the suit, finding that a NASD arbitrator was the entity responsible for interpreting and applying the NASD time-limit rule, not the Court. Id.

The United States Court of Appeals for the Tenth Circuit reversed and remanded. It found that the application of the NASD time-limit rule presented a question of the underlying controversy’s arbitrability that was reserved for a court determination, not an arbitrator. Id. The Court further found that the service agreement, which contained the arbitration provision, did not “clearly and unmistakably” demonstrate the parties intent to have the time-limit issue decided by an arbitrator. Finally, the Tenth Circuit held that the despite the fact that the agreement stated that it was to be

decided under New York law, the “federal law of arbitrability,” rather than New York law, governed the issue before the Court. Id.

Examining the holding in Howsam, it is clearly appropriate for the circuit court to decide the “gateway” issue of “whether an arbitration clause in a concededly binding contract applies to a particular type of controversy,” in this instance, whether the issue of indemnification should have been arbitrated. *See, Howsam, supra.* As the analysis from the Wachovia opinion demonstrates, arbitration is not appropriate for all disputes simply because an arbitration clause is present.

The United States Supreme Court, while finding that the issue of “time limits” was not an issue involving a “question of arbitrability,” however the Court reinforced that issues involving “questions of arbitrability” were for a Court to decide. Id., at 84.

Bringing Halliburton’s claim for indemnification together with the analysis of arbitration clauses above, it is clear that the issue of the enforceability of the indemnification provision in the contract at issue must be considered in *pari material* with the arbitration issue. Preliminarily, this Honorable Court has previously stated that “[a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.” Syl. Pt. 1, Cotiga Development Co. v. United Fuel Gas Company, 147 W. Va. 484, 128 S.E.2d 626 (1962); Syl. Pt. 1, Wellington Power Corp., v. CNA Surety Corp., 217 W. Va. 33, 614 S.E.2d 680 (2005).

As the Court will note, the work order does not place any pre-conditions upon Halliburton’s right to request indemnity. Rather, the work order provides for express indemnity. The lower court’s rationale for dismissal of Halliburton’s cross-claim, contained in the *Memorandum Order*, stated the following: “[t]he Court keeps coming back to the question of how does Halliburton disavow all the provisions in the work order with the exception of the indemnification provision.”²³ *Memorandum Order*, at 7. This statement misses the actual analysis required under the facts of this case.

²³ The Court included the following language following the cited quotation: “The Court is mindful of Halliburton’s contention that there is no language in the work order included in the indemnification agreement that conditions Halliburton’s right to indemnification on first proceeding to arbitration.” *Memorandum Order*, at 7.

Halliburton has not disavowed, nor attempted to disavow, any of the provisions of the work order. If the situation *sub judice* was simply the dispute over performance of a contract between Texas Keystone and Halliburton, the arbitration provision would control, and the matter would most likely be before an arbitration panel in Houston, Texas. However, the filing of the underlying civil action was not contemplated by the parties when they entered into the pertinent contract, nor was such an issue included by reference in the arbitration clause.

The indemnification provision, cited above, specifically references the obligations of Texas Keystone and specifically provides that Texas Keystone is responsible to indemnify Halliburton “from and against any and all liability, claims, costs, expenses attorney fees and damages whatsoever for personal injury, illness, death, property damages and loss resulting from fire; explosion.” *See, Work Order*, ¶C. The holding above from Syl. Pt. 1, Cotiga Development Co. v. United Fuel Gas Company, (citations omitted) and Syl. Pt. 1, Wellington Power Corp., v. CNA Surety Corp., 217 W. Va. 33, 614 S.E.2d 680 (2005), combined with the specific nature of Halliburton’s indemnification claim against Texas Keystone mandates that this Court reverse the lower court’s ruling which required the issue of indemnification to be arbitrated. The court below committed clear error by subjugating the right of Halliburton to indemnity from Texas Keystone, by first requiring the matter of indemnification be subject to arbitration.²⁴

As it currently stands, the lower court’s ruling has disemboweled the very specific language of the indemnity clause, while at the same time, giving an expansive, interpretative scope to an arbitration clause, which is not supported by the contract, nor by West Virginia or United States Supreme Court law.

²⁴ The ruling from the circuit court permits a sophisticated, out of state business entity to enter into a contract with a West Virginia corporation, small business, or individual. If the parties use a form contract similar to the one at issue, the West Virginia entity may view the indemnity provision as providing a degree of safety from the harsh consequences that it could face if liability was found for some action of the business. If the arbitration provision was permitted to supercede the indemnity provision, the West Virginia corporation or business would be looking at the prospect of arbitrating the dispute in some far away venue, potentially more favorable to the opposing party, while at the same time litigating in West Virginia Courts against another adverse party.

Finally, in multi-party litigation, the Court's ruling forces Halliburton to litigate a single matter in multiple tribunals at the same time. Halliburton's cross-claim against Falcon is still pending in the Circuit Court of Tyler County, West Virginia, against Falcon.²⁵ If Halliburton is required to arbitrate in Houston, Texas, as well as litigate in Tyler County, an unjust result will likely occur. West Virginia Constitution Article III, Section 17, provides that: "The Courts of this State Shall Be Open, and every person for an injury done to him, in his person, property or reputation, shall have remedy by due course of law, and justice shall be administered without sale, denial or delay." Where a contract contains an express provision, such as the indemnification clause here, a party should not be permitted to invoke the purported right to arbitration as a means to obfuscate another party's contractually mandated right to relief.

The discovery process in this matter has revealed that Texas Keystone and Falcon are two closely related companies, with overlapping ownership.²⁶ If Halliburton is forced to proceed with arbitration on its claims against Texas Keystone and proceed in the Circuit Court of Tyler County, West Virginia, a dangerous precedent is set whereby, in a world of ever increasing interrelated corporate entities, Texas Keystone and Falcon may proceed in an attempt to thwart the recovery due and owing to Halliburton, by denying them critical access to the courts of this state through the use of arbitration to divide and splinter this litigation. Furthermore, as more fully discussed in the section of this brief addressing the lower court's ruling on the issues of contribution, the lower court's rulings make Halliburton's pursuit of its contribution claims *vis-a-vis* Texas Keystone and Falcon problematic because of the likelihood of inconsistent verdicts. This result frustrates the foundation of the West Virginia Rules of Civil Procedure, which were to be "construed and administered to secure the just, speedy, and inexpensive determination of every action." See, W. Va. R. Civ. P. 1.

²⁵ The Circuit Court of Tyler County, West Virginia, granted a default against Falcon on or about April 10, 2009, pursuant to Halliburton's cross-claim. Falcon has filed a Motion to Vacate, which remains pending as of the filing of this brief.

²⁶ During the deposition of Dave Sweeley, CEO of Falcon Drilling, he was asked about the ownership of Falcon Drilling and Texas Keystone. He verified that the same individuals, all members of the same family, owned both organizations. See, Deposition of Dave Sweeley, at pg. 6, lines 18-24 and pg. 7, lines 1-5.

IV. The circuit court committed reversible error by ruling that Texas Keystone did not waive its right to assert the affirmative defense of arbitration when it failed to include this affirmative defense in its Motion to Dismiss Halliburton's cross-claim.

The following is an issue of first impression in West Virginia. The question that this Court must answer is, what constitutes a sufficient delay in the assertion of a party's right to arbitration, after a claim has been asserted against it, to warrant a finding that it has been waived?

The time line of the initial pleadings and motions in this civil action has been recited earlier in this brief and is reincorporated for this portion of the argument.²⁷ Of particular importance for this Court's consideration is the fact that Texas Keystone's September 20, 2007 filing made no mention of Texas Keystone's desire to arbitrate the issue. Rule 8(c) of the West Virginia Rules of Civil Procedure requires that "[i]n pleading to a preceding pleading, a party *shall* set forth affirmatively accord and satisfaction, *arbitration* and award . . ." W. Va. R. Civ. P. 8(c) (emphasis added).

Texas Keystone's Motion to Dismiss Halliburton's Cross-Claim contains no express or implied mention of the affirmative defense of arbitration. Pursuant to Rule 8(c), which requires that a party "shall" set forth the affirmative defense of arbitration, Halliburton requests that this Court find Texas Keystone's ability to assert the defense of arbitration was waived, and reverse the lower Court's ruling.

There is little West Virginia case law directly addressing the issue of waiver of the affirmative defense of arbitration. Persuasive authority supports the position proposed by Halliburton. "[A]rbitration must be asserted in the answer or it may be, under appropriate circumstances, be deemed waived pursuant to W. Va. R. Civ. P. 8(c)." See, American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 96 (4th Cir. 1996) (affirmative defense of arbitration must be pled in the answer); McDonnell v. Dean Witter Reynolds, Inc., 620 F. Supp. 152, 155-156 (D. Conn. 1985)

²⁷ Plaintiffs filed their Amended Complaint on September 12, 2007; Texas Keystone's Motion to Dismiss Plaintiff's Complaint was filed on September 13, 2007; Halliburton filed its Answer and Cross-Claim Against Texas Keystone on September 14, 2007. On September 20, 2007, Texas Keystone filed its Motion to Dismiss the Cross-Claim of Halliburton. Halliburton's Response in Opposition to Texas Keystone's Motion to Dismiss was filed on October 12, 2007. On November 1, 2007, Texas Keystone filed its Reply in Support of Motion to Dismiss the Cross-Claim of Halliburton.

(“the affirmative defense of arbitration must appear in the answer, and ‘a party’s failure to plead an affirmative defense bars its invocation at later stages of the litigation.’”) (citation omitted).

The circuit court found support for its holding that arbitration was not waived in American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 96 (4th Cir. 1996). Halliburton agrees that this case is relevant to the issue of whether Texas Keystone waived its right to assert the arbitration. However, American Recovery Corp. actually supports Halliburton’s position that arbitration was waived in this instance. The circuit court stated the following in its Memorandum Order:

However, the cite to the language of American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 96 (4th Cir. 1996) on page 8 of the Texas Reply convinces this Court the better approach is not to invoke waiver upon mere delay in assertion without anything more.

Memorandum Order, at p. 7-8.²⁸

The Court’s cite to page 8 of Texas Keystone’s Reply references the following passage:

In its supplemental brief, Halliburton cited to the Fourth Circuit of Appeals’ decision in American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88. The holding in American Recovery case actual supports a ruling in favor of Texas Keystone. Although speaking to the ‘strong federal policy favoring arbitration,’ the Court, in American Recovery stated, (footnote omitted) ‘we will not lightly infer the circumstances constituting waiver. Our key injury is whether the party opposing the stay has suffered any actual prejudice.’ ‘[M]ere delay, without more, will not suffice to constitute waiver.’

Reply of Texas Keystone, Inc. to Supplemental Brief of Halliburton Energy Services Regarding Texas Keystone, Inc.’s Previously Filed Motion to Dismiss Cross-Claim, at p. 8. Texas Keystone initially referenced the possibility of arbitration in its November 1, 2007 brief. A review of this brief finds

²⁸ The Court cited to the “Texas Reply” in its *Memorandum Order* for support of the position finding that the affirmative defense of arbitration was not waived. Texas Keystone filed a “*Reply of Texas Keystone, Inc. In Support of Motion to Dismiss Cross-Claim of Halliburton Energy Services, Inc.*” There is no mention of the American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 96 (4th Cir. 1996), in this filing. This brief was filed on November 1, 2007. Halliburton believes that the Court was referencing the “*Reply of Texas Keystone, Inc. To Supplemental Brief of Halliburton Energy Services Regarding Texas Keystone, Inc.’s Previously Filed Motion to Dismiss Cross-claim.*” This brief does cite to the aforementioned federal case law on page 8. It should be noted that this brief was filed on March 7, 2008. This was approximately six months after the filing of the initial Complaint. This was further approximately two months after the Notice of Hearing was filed for Approval of Settlement between Halliburton and Plaintiffs.

that the reference to arbitration was premised as an alternative theory of defense, after the assertion that there was no legal contract between Texas Keystone and Halliburton.

At that stage of the proceeding, Texas Keystone had asserted identical motions to dismiss against the Plaintiffs' Complaint and Halliburton' Cross-Claim. Texas Keystone was able to fully litigate the circumstances surrounding the motion to dismiss, which were extensive.²⁹ The Court held a hearing on January 4, 2008 concerning the respective motions to dismiss. While permitting further briefing on the issue of the motion to dismiss Halliburton's cross-claim, the Court ruled that the Motion to Dismiss Plaintiff's Complaint was denied. The arguments then asserted against Halliburton and the Plaintiff were nearly identical, and Texas Keystone was therefore permitted to shift tactics and aggressively pursue its assertion that the claims asserted by Halliburton against Texas Keystone were subject to arbitration. Texas Keystone's March 7, 2008 brief clarified its basis for the purported right to arbitration. This was subsequent to Appellant's settlement with Plaintiffs. Keeping in mind that Texas Keystone previously argued that there was no contract between Appellant and Texas Keystone, its March 7, 2008 brief, started with the following:

At the outset, it is important to note that Texas Keystone, Inc. is not asking the Court to determine whether there exists an enforceable contract between Texas Keystone, Inc. and Halliburton Energy Services vis-a-vis the work order. Instead, Texas Keystone is asking the Court to enforce the arbitration provision contained in the work order. Whether the indemnification provision is enforceable is the issue that must be determined through arbitration.³⁰

Reply of Texas Keystone, Inc. to Supplemental Brief of Halliburton Energy Services Regarding Texas Keystone, Inc.'s Previously Filed Motion to Dismiss Cross-Claim, at pp. 1-2. Through this argument, Texas Keystone attempted to push Halliburton's claims to arbitration while at the same time maintaining the ability to argue there was no contract if the matter went to arbitration.

²⁹ Texas Keystone's Motion to Dismiss Halliburton's cross-claim argued that the Circuit Court of Tyler County, West Virginia was the inappropriate forum to hear the case under the doctrine of *forum non conveniens*.

³⁰ Halliburton also brings to this Court's attention the faulty circular logic employed by Texas Keystone in their Motion to Dismiss. Texas Keystone has argued that no contract existed between Texas Keystone and Halliburton. Texas Keystone at the same time argued that the arbitration clause within the subject contract should take precedent over the indemnification clause, while still disavowing the existence of the contract.

This Court has stated that “. . . in denying the performance of arbitration as a condition precedent, the proponent of arbitration must make such an allegation ‘specifically and with particularity.’” State ex rel. The Barden and Robeson Corp. v. Hill, 208 W. Va. 163, 168, 539 S.E.2d 106, 111 (2000) (referencing W. Va. R. Civ. P. 8(c)). If Texas Keystone had wished to assert arbitration as a possible defense, it would have been required to assert such a defense “specifically and with particularity.” State ex rel. The Barden and Robeson Corp. v. Hill, *supra*. Texas Keystone has been neither specific, particular, nor timely. In their “*Motion to Dismiss Cross-Claim of Halliburton Energy Services, Inc. Pursuant to West Virginia Code § 56-1-1a and Rule 12(b) of the West Virginia Rules of Civil Procedure*,” Texas Keystone did not even include the word “arbitration,” let alone the specific, particular assertion of the defense. While Texas Keystone did raise the defense in their Reply to a subsequent Halliburton filing, this contradicts the Rules of Civil Procedure which seek to allow the development of the claims, defenses and litigation strategies premised on the early disclosure of the respective positions of the parties.³¹

Pursuant to Rule 8(c) of the West Virginia Rules of Civil Procedure, Halliburton requests that arbitration be stricken as an affirmative defense to Halliburton’s indemnity claim against Texas Keystone. From a strategic perspective, by waiting to assert the defense of arbitration in its “Reply” brief, Texas Keystone essentially eliminated any defense or brief on the issue of arbitration until such time as the Court granted Halliburton the opportunity to file a supplemental brief. This Court has previously stated that, “[t]he word ‘shall’, in the absence of language in the statute showing a contrary intent on the part of the legislature, should be afforded a mandatory connotation.” Ara v. Erie Insurance Co., 182 W. Va. 266, 269, 387 S.E.2d 320 (1989); Syl. pt. 2., Terry v. Sencindiver, 153 W. Va. 651, 171 S.E.2d 480 (1969). Texas Keystone’s strategy runs contrary to the purpose of arbitration, which is to take issues out of court based litigation. Texas Keystone has attempted to

³¹ Texas Keystone’s first assertion of “arbitration” as a possible defense to the claim for indemnification was in its “*Reply of Texas Keystone, Inc. in Support of Motion to Dismiss Cross-Claim of Halliburton Energy Services, Inc.*” This was filed on November 1, 2007. If Texas Keystone wished to assert arbitration, it should have been pled in its September 20, 2007 pleading which was titled, “*Motion to Dismiss Cross-Claim of Halliburton Energy Services, Inc. Pursuant to West Virginia Code § 56-1-1a and Rule 12(b) of the West Virginia Rules of Civil Procedure.*”

engage in limited court based litigation, and then proceed to arbitration when the result is unfavorable.

The circuit court's ruling in this civil action, finding that Texas Keystone did not waive its right to assert arbitration, permitted Texas Keystone to explore two divergent paths of defense of the cross-claim in this civil action, permitting full litigation of its *forum non conveniens* claim, before moving to its fall back position of arbitration. Texas Keystone's initial Motion to Dismiss Halliburton's cross-claim was encompassed in a brief, two page Motion which stated in pertinent part:

In response to the cross-claim of Halliburton, Texas Keystone hereby realleges and incorporates by reference all of the facts, evidence, exhibits, and arguments set forth in its 'Motion to Dismiss Pursuant to West Virginia Code § 56-1-1a and Rule 12(b) of the West Virginia Rules of Civil Procedure' as if set forth in their entirety herein. Consequently, Texas Keystone does hereby move to dismiss the cross-claim of Halliburton pursuant to the doctrine of *forum non conveniens* for the reasons stated in the above referenced motion.

See, Texas Keystone's Motion to Dismiss Cross-Claim, at p. 2. On or about October 12, 2007, Halliburton filed, *Halliburton Energy Services' Response in Opposition to Defendant Texas Keystone, Inc.'s Motion to Dismiss the Cross-Claim of Halliburton Energy Services*. Halliburton's Response included a detailed argument as to why dismissal on the grounds of *forum non conveniens* was inappropriate under the facts of the case. Texas Keystone then filed its "*Reply to Plaintiffs' Memorandum in Opposition to Dismiss on the Basis of Forum Non Conveniens*," on or about November 1, 2007. While addressing the Plaintiffs' arguments against dismissal of the lawsuit, Texas Keystone's Reply brief did briefly address the cross-claim asserted by Halliburton.

The plaintiffs further contend that a purported work order between Halliburton and Texas Keystone provides another West Virginia connection so as to defeat the motion to dismiss on *forum non conveniens* grounds. This argument is not convincing for several reasons. First, the work order upon which Halliburton relies to seek defense and indemnity from Texas Keystone does not constitute a valid contract. Halliburton presented the work order to an employee of Falcon Drilling, not Texas Keystone, for execution. See, Exhibit A. That employee did not have any authority to execute any contract on behalf of Texas Keystone whatsoever. Id.

Reply to Plaintiffs' Memorandum in Opposition to Dismiss on the Basis of Forum Non Conveniens, p. 6. (Emphasis in original) (citations in original). Texas Keystone then proceeded to argue that if

the Court were to find that the work order at issue was a valid contract, resolution of any disputes thereunder must be decided by arbitration. *Id.*, at 6-7. This assertion of potential arbitration was not made in a pleading in response to Halliburton's cross-claim. This assertion of potential arbitration was made in response to Plaintiffs' Memorandum in Opposition to Dismiss.

Also filed on or about November 1, 2007 was *Reply of Texas Keystone, Inc., in Support of Motion to Dismiss Cross-Claim of Halliburton Energy Services, Inc.* Texas Keystone's Reply contained eleven (11) sections, each encompassing a separate argument as to why Halliburton's cross-claim should be dismissed.³² As the captioned sections of Texas Keystone's argument, listed below in footnote eight (8) demonstrate, the primary thrust of Texas Keystone's argument was one of dismissal based upon *forum non conveniens* grounds. A review of the entire Reply brief finds only the following reference to arbitration, contained in subsection three (3), which is restated below for the Court's benefit:

Texas Keystone surmises that Halliburton, and the position which it has taken in connection with this motion, stem from its anger against Texas Keystone because it will not agree to defend and indemnify it. In fact, in Halliburton's very first argument, it references a work order purportedly executed between the respective defendants and then argues that the Circuit Court of Tyler County, West Virginia is the appropriate forum to address the work order and the provisions for defense and indemnity. However, Halliburton's reliance on this work order is unavailing for several reasons.

First, without attempting to litigate the full circumstances surrounding the work order, it is sufficient to advise the Court that the work order does not constitute a binding agreement between Halliburton and Texas Keystone. Simply, Halliburton presented this work order to an individual for execution who was not even employed by Texas Keystone and had no authority whatsoever to bind Texas Keystone to anything. See, Exhibit A. It is well-established under contract law in

³² The 11 sections were titled as follows: (1) Jurisdictional Arguments are Irrelevant; (2) The Plaintiffs' Constitutional Rights to File Suit In Tyler County are Irrelevant; (3) Halliburton's Alleged Contractual Indemnity Claim Adds Nothing to the Court's Analysis; (4) Halliburton's Concern for the Plaintiff's Day in Court is Not Well-Founded; (5) Halliburton's Argument Concerning Other Potential Forums is Illogical; (6) The Critical Witnesses Reside in Pennsylvania; (7) The Location of Counsel Does Not Support Halliburton's Position; (8) Halliburton's 'Home Court Advantage' Argument Lacks Merit and Substance; (9) Halliburton's Public Interest Argument is Not Compelling; (10) Halliburton's Proliferation of Litigation Argument is Not Compelling; and (11) Halliburton's Concessions Reveal that this Motion Should be Granted.

West Virginia that no legal contract exists if the minds of the party are not in agreement with the essential elements or contract fundamentals which include competent parties, legal subject matter, valuable consideration, and mutual assent. Saylor v. Wilkes, 216 W. Va. 766, 613 S.E.2d 914 (W. Va. 2005). In this case, it is quite obvious that many of these essential elements are missing. Consequently, Halliburton's reliance on this work order as giving some rights of defense and indemnification, as well as a connection to the Circuit Court of Tyler County, West Virginia, is not convincing.

In addition, assuming, *arguendo*, that the work order is a valid contract, the work order does not provide the West Virginia connection which Halliburton seeks. While Halliburton argues that the terms of the work order will be governed by West Virginia law, it neglects to mention that the work order, which it drafted, requires that any disputes be resolved before a panel of arbitrators in Houston, Texas. Specifically, the work order provides, in part, that:

G. DISPUTE RESOLUTION - Customer and Halliburton agree that any dispute that may arise out of the performance of this contract shall be resolved by binding arbitration by a panel of three arbitrators under the rules of the American Arbitration Association. The arbitration will take place in Houston, TX.

Under West Virginia law, it is presumed that an arbitration provision in a written contract was bargained for and that arbitration was intended to be the exclusive means of resolving disputes under the contract. Board of Education, County of Berkeley v. Miller, 160 W. Va. 473, 236 S.E.2d 439 (W. Va. 1977). As a result, assuming, *arguendo*, that the work order constitutes a valid contract, the arbitration provision, which was drafted by Halliburton, will be enforceable and the disputes which arise out of the performance of the contract which are involved in this case will be resolved not by this Court, but by an arbitration panel in Houston, Texas.

Therefore, Halliburton's argument that this case must remain in Tyler County because it will be necessary for this Court to address and resolve the duties and responsibilities under this purported work order is simply wrong. Any such disputes will be held and resolved in Houston, Texas before an arbitration panel.

Texas Keystone's brief demonstrates that it has taken two entirely inconsistent positions addressing Halliburton's claim for indemnification from Texas Keystone. After the denial of Texas Keystone's Motion to Dismiss Plaintiff's Complaint, it switched its entire strategy, as applied to Halliburton's cross-claim, realizing that its previous position was untenable. Arbitration, thus became the defense theory *de jour* for Texas Keystone. This was after both parties had submitted multiple

pleadings and briefings to the Court. While the pleading of alternative defenses is permitted, such a radical deviation from the Texas Keystone's initial Motion to Dismiss falls well beyond permissive alternative pleadings, especially in consideration of the requirements placed on a party asserting arbitration.

The doctrine of judicial estoppel would also prevent the assertion of arbitration at such a late stage. "It has been correctly observed that '[t]he circumstances under which judicial estoppel may appropriately be invoked are not reducible to any general formulation of principle.'" Riggs v. West Virginia Hospitals, 221 W. Va. 646, 674, 656 S.E.2d 91, 119 (2007), *citing* Barringer v. Baptist Healthcare of Oklahoma, 2001 OK 29, 22 P.3d 695, 699 (Okla. 2001). The Court in Riggs further stated that "[j]udicial estoppel bars a party from re-litigating an issue when: (1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process." Syl. Pt. 3, Riggs v. West Virginia Hospitals, 221 W. Va. 646, 656 S.E.2d 91, 119 (2007), *citing* Syl. Pt. 2, West Virginia Department of Transportation, Division of Highways v. Robertson, 217 W. Va. 497, 618 S.E.2d 506 (2005).

In the instant matter, Texas Keystone initially asserted that Halliburton's cross-claim should be dismissed due to *forum non conveniens*, in addition to substantively challenging the validity of the contract, either of which would have eliminated the cross-claim in its entirety. This permitted Texas Keystone to gain a benefit by forcing Halliburton to fully litigate the validity of the contract issue and *forum non conveniens* defense. Texas Keystone then later asserted the defense of arbitration, pled in the alternative. When the Court denied *Texas Keystone's Motion to Dismiss Plaintiff's Complaint*, containing the same jurisdictional arguments in *Texas Keystone's Motion to Dismiss Halliburton's Cross-Claim*, Appellee fully shifted its primary defense to one of arbitration, all but abandoning its

motion to dismiss based on procedural grounds, and on the validity of the contract. Texas Keystone was thereby permitted to argue three (3) separate grounds for its Motion to Dismiss Halliburton's cross-claim, finally reaching its intended result with the arbitration argument, through the Court's October 29, 2008 Order. The factual backdrop of this issue is unique and the extension of it to a broad holding of law may not be appropriate, but under the facts of this case, Halliburton has been prejudiced by the procedural development of Texas Keystone's defense of the cross-claim, thus this Court should reverse the lower court's ruling which held that Texas Keystone did not waive its ability to assert arbitration.

The "integrity of the judicial process" has been harmed by the assertion of these contradictory defenses to Halliburton's cross-claim. Halliburton is now faced with litigation in two forums, stemming from one civil action.

- V. The circuit court committed reversible error when it dismissed Halliburton's common law contribution claim against Texas Keystone and Falcon based upon on a misplaced reliance on Charleston Area Medical Center, et al. v. Parke-Davis, et al.,³³ and Sydenstricker, et al. v. Unipunch Products, et al.,³⁴ which are factually distinct from the matter at bar. The circuit court's dismissal of Halliburton's common law contribution claims also deprives Halliburton of its due process rights, as it prevents Halliburton from obtaining complete relief because Falcon Drilling cannot be joined in arbitration.**

The issue of whether the Sydenstricker, et al. v. Unipunch Products, et al., 169 W. Va. 440, 445, 288 S.E.2d 511, 515 (1982) (hereafter, "Sydenstricker") and Charleston Area Medical Center, Inc., et al. v. Parke Davis, et al., 217 W. Va. 15, 614 S.E.2d 15 (2005) (hereafter, "CAMC") opinions were properly applied by the lower court is yet another issue of first impression for this Honorable Court. The circuit court, in a hearing following its October 29, 2008 Order, found that Halliburton's common law contribution claims against Texas Keystone were dismissed, along with Halliburton's claims for contractual indemnity from Texas Keystone. While the October 29, 2008 Order does not

³³ 217 W. Va. 15, 614 S.E.2d 15 (2005).

³⁴ 169 W. Va. 440, 288 S.E.2d 511 (1982).

make any mention of Halliburton's contribution claims against Texas Keystone, the Supplemental Order, entered by the Court found that the rationale for the Court's dismissal of the contribution claim was founded on this Court's holdings in two seminal decisions which analyzed the issue of common law contribution. As the review below demonstrates, the lower court's holding deprives Halliburton of its due process rights, and misinterpreted Sydenstricker and CAMC.

After the October 29, 2008 hearing, Halliburton filed its Motion for Clarification of the aforementioned Order. Texas Keystone responded, in brief, with its invocation of the principals articulated in Sydenstricker and CAMC to support its position that Halliburton's claim for common law contribution was dismissed, pursuant to the circuit court's previous Order. The facts before this Court cannot be applied to the analysis utilized in Sydenstricker and in CAMC.

In Sydenstricker, a certified question was accepted by this Court from the United District Court for the Southern District of West Virginia. The underlying action was for the recovery of damages for personal injuries by plaintiff. Id., at 443. Plaintiff asserted that products used by him during his employment were negligently designed, manufactured and delivered. Id. Plaintiff, husband and wife, sued the maker of a punch press, Unipunch Products, Inc. (hereafter, "Unipunch") and various parts suppliers for the presses. Unipunch and Niagra Machine & Tool Works (hereafter, "Niagra") filed separate third-party complaints, by which they asserted claims against third-party defendant, Terrell Tool and Die Corporation (hereinafter "Terrell"), which was the employer of the plaintiff, John C. Sydenstricker. Niagra asserted that Terrell was liable on grounds of contribution and indemnity to it, as a result Terrell's "'negligence and carelessness' in failing to provide a safe place to work, in failing to adopt and furnish adequate safety devices, each of which is required by W. Va. Code, Chapter 21, Article 3, §2, and 29 U.S.C. §651, *et seq.* and regulations thereunder, and in further failing to take certain specified steps to protect its employee. . ." Id., at 444. Niagra further asserted that Terrell willfully, wantonly, and wrongfully engaged in misconduct, coupled with statutory and regulatory breaches. Id. Unipunch's specific allegations comprised three claims of indemnity against Terrell in its third-party complaint.

The Court answered the certified question in the affirmative, after re-phrasing the question:

[W]hether an employer under our Workmen's Compensation Act may be held liable as a third-party defendant to such defendant manufacturers as third-party plaintiffs, upon the theory of contribution and/or implied indemnity based upon allegations in the third-party complaint that such employer was guilty of willful, wanton and reckless misconduct or intentional tort toward the plaintiff employee resulting in plaintiff employee's personal injuries? Id., at 444-445.

In the instant matter, the lower court dismissed Halliburton's contribution claim because the Court found that Halliburton had relinquished its right to pursue contribution because of its settlement of Plaintiffs' claims. The Court in Sydenstricker analyzed the history of contribution in West Virginia. Initially, and important for this Court's consideration, is the settled position that "[t]he doctrine of contribution also has its roots in equitable principles. The right to contribution arises when persons having a common obligation, either in contract or tort, are sued on that obligation and one party is forced to pay more than his pro tanto share of the obligation." Id., at 447-448, *citing* Tenant v. Craig, 156 W. Va. 632, 195 S.E.2d 727 (1973); Hardin v. New York Central Railroad Company, 145 W. Va. 676, 116 S.E.2d 697 (1960); Brewer v. Appalachian Construction, Inc., 135 W. Va. 739, 65 S.E.2d 87 (1951); 18 Am.Jur.2d *Contribution* § 1, *et seq.* (1965). Texas Keystone argued that because Halliburton settled with the Plaintiffs, rather than litigating the matter through trial, it is not permitted to pursue contribution from the other defendants.

With respect to Texas Keystone's claim that the Sydenstricker opinion forecloses Halliburton's right to seek contribution from Texas Keystone, a thorough review of the Sydenstricker decision unequivocally negates this position. While discussing the potential for recovery for a contribution claim, while also considering the effect of the workers' compensation statute, the Court stated,

[o]ur right to contribution before judgement is derivative in the sense that it may be brought by a joint tortfeasor on any theory of liability that could have been asserted by the injured Plaintiff. However, it is clear that the amount of recovery in a third-party action based on contribution is controlled by the amount recovered by the plaintiff in the main action.

Id., at 452 (emphasis added). Taking into account that Sydenstricker involved a separate third party suit, it is clear that the opinion announced a strong policy favoring a party's ability to recover on a theory of contribution from another responsible tortfeasor. To deny Halliburton's right to assert a claim for contribution would be to place an onerous burden on those defendants named in multi-defendant litigation. Specifically, if the lower court's ruling is upheld, future defendants will be forced to seriously reconsider early settlement in litigation in that they would be foreclosed from asserting a right to contribution against other defendants who remain in the litigation. In this instance, the strong policy favoring resolution of disputes through settlement is upended in favor of aggressive defensive litigation. These are results that this Court cannot and should not support by upholding the Tyler County Circuit Court's late dismissal of Halliburton's claim for contribution.

In CAMC, CAMC settled with the estate of a young patient that died after an employee of CAMC administered ten (10) times the intended amount of a prescription seizure drug due to confusing labeling. Prior to the filing of any suit, CAMC settled with the young boy's estate, releasing CAMC from any claims. CAMC then filed a contribution suit against Parke-Davis and others, in the Circuit Court of Marshall County, West Virginia, alleging that the drug Cerebyx label was misleading and defective. CAMC, 217 W. Va. at 18. The defendants removed the case to federal court, where at trial, a jury returned a verdict in CAMC's favor on December 3, 2001. Parke-Davis was found to be 70% at fault for the child's death and CAMC was found to be 30% at fault. The jury awarded CAMC \$1.75 million.³⁵ Id. The respective defendants appealed the district court's judgment to the United States Fourth Circuit Court of Appeals. The Fourth Circuit subsequently certified the following question to this Court:

Does the law of West Virginia allow a tortfeasor to negotiate and consummate a settlement with the injured party on behalf of itself, before any lawsuit is filed, which would benefit another party claimed to be a second joint tortfeasor, and thereafter obtain a judgment against

³⁵ The West Virginia Supreme Court decision in CAMC, at footnote 5, states: The Defendants unsuccessfully sought to have the contribution claim dismissed by arguing that this Court's decision in Howell v. Luckey, 205 W. Va. 445, 518 S.E.2d 873 (1999) barred such a claim.

the second joint tortfeasor in an action for contribution, although the second joint tortfeasor was not a party to, not aware of, and had no notice of the settlement.

Id., at 18. The defendants in CAMC argued that West Virginia law only permits a separate action by a joint tortfeasor for contribution where there has been a judgment of fault against the joint tortfeasors in an action initiated by the injured party or his representative. Id., at 19. Defendants further asserted that CAMC could only pursue its claim for contribution if the court were to overrule precedent and “create a new cause of action which would permit the assertion of an inchoate right of contribution by a settling tortfeasor against another tortfeasor who was not involved in the settlement agreement and not a party to any action initiated by the injured party.” Id. In footnote 6 of the CAMC opinion, the Court referenced Syl. Pt. 5 of Howell v. Lucky, 205 W. Va. 445, 518 S.E.2d 873 (1999): “Defendant may not pursue a separate cause of action against a joint tortfeasor for contribution after judgment has been rendered in the underlying case, when that joint tortfeasor was not a party in the underlying case and the defendant did not file a third-party claim pursuant to Rule 14(a) of the West Virginia Rules of Civil Procedure.” CAMC, at 19, *citing* Syl. Pt. 5, Howell v. Lucky, 205 W. Va. 445, 518 S.E.2d 873 (1999).³⁶ The Court proceeded to provide an analysis of the historical development of the law of contribution in West Virginia. The Court’s analysis evinces clear intent that contribution may be asserted by a settling party against a non-settling party, where both are named as separate defendants by the same Plaintiff, who requested relief stemming from the same set of operative facts.

This Court acknowledged in the CAMC decision that “[f]ollowing an examination of the historical underpinnings of contribution in Haynes, we proceeded to determine that an inchoate right of contribution exists as between joint tortfeasors.” CAMC, at 20, *citing* Haynes v. City of Nitro, 161 W. Va. 230, 240 S.E.2d 544 (1972). The Court further stated, “[b]ased on that inchoate right, we

³⁶ The Court engaged in a brief discussion on the potential merits of statutory indemnification under W. Va. Code § 55-7-13 (1923). Halliburton does not assert an entitlement to statutory indemnification, but rather solely upon a common-law theory of contribution only.

allowed a co-defendant to seek contribution against a dismissed defendant where ‘trial court error’ prevented entry of a joint judgment.” *Id.*, citing Haynes, at 240. Finally, and most importantly for the discussion now before this Court, the CAMC decision stated “[t]he significance of the Haynes decision is our recognition that the statutory right of contribution, which arises pursuant to W. Va. Code §55-7-13 upon entry of a joint judgment, did not extinguish the general right of contribution among joint tortfeasors that preexisted the statutory enactment.” See, CAMC, at 20, citing Haynes, 161 W. Va. at 238-239, referencing Hutcherson v. Slate and general law of contribution pre-statutory enactment.

In support of the proposition that Halliburton correctly invoked its right to seek contribution from Texas Keystone, which continued to exist after settlement with the Plaintiffs in the instant action, the Court in CAMC utilized the following analysis:

Expounding on the right of a joint tortfeasor to seek contribution either in advance of judgment during the pleading stage or post judgment, we explained:

In Haynes . . . we traced our prior cases in this area and concluded that a defendant in a negligence action has a right in advance of judgment to join a joint tortfeasor based on a cause of action for contribution. We termed this an ‘inchoate right to contribution’ in order to distinguish it from the statutory right of contribution after a joint judgment conferred by W. Va. Code, 55-7-13 (1923). Board of Educ. V. Zando, Martin & Milstead, 182 W. Va. 597, 602, 390 S.E.2d 796, 801 (1990) (citation and footnote omitted). As we articulated in Zando, while there is a clear statutory right to seek contribution upon the rendering of a joint judgment, there is also an inchoate right of contribution that exists independent of that statutory right. See *id.* The procedural mechanism for invoking this non-statutory right of contribution, as we identified in Sydenstriker v. Unipunch Products, Inc., 169 W. Va. 440, 288 S.E.2d 511 (1982), is by means of third-party joinder: ‘In Haynes . . . we extended a right of contribution to a tortfeasor to bring in as a third-party defendant a fellow joint tortfeasor to share by way of contribution on the verdict recovered by the plaintiff.’ Syl Pt. 5, 169 W. Va. at 441, 288 S.E.2d at 513 (citation omitted).

Whether the inchoate right of contribution can be asserted in a given case will generally be determined based upon compliance with the procedural requirements necessary to invoke such right. In Howell v. Lucky, 205 W. Va. 445, 518 S.E.2d 873 (1999), we addressed whether the failure of a tortfeasor to implead a third party for purposes of

asserting a claim of contribution foreclosed a separate suit following judgment in the primary suit.

(Emphasis added.) The Court, in Howell, after referencing its earlier decision in Zando, restated the following:

The fundamental purpose of inchoate contribution is to enable all parties who have contributed to the plaintiffs injuries to be brought into one suit. Not only is judicial economy served, but such a procedure also furthers one of the primary goals of any system of justice – to avoid piecemeal litigation which cultivates a multiplicity of suits and often results in disparate and unjust verdicts. Moreover, as we have already indicated, joinder of contribution claims serves to ensure that those who have contributed to the plaintiffs damages share in that responsibility . . . Finally, while the right of contribution is designed to promote equality among defendants, it is not automatic and must be properly preserved.

CAMC, at 21, *citing Howell*, 205 W. Va. at 449, 518 S.E.2d at 877 (*quoting Zando*, 182 W. Va. at 603-604, 390 S.E.2d at 802-803.) While the factual basis of the aforementioned decisions is slightly different from the matter at bar, the Court's rationale for its holdings in Howell, Zando, and CAMC logically support the position that this Court requires all parties be joined in a suit, in order for one tortfeasor to assert a right of contribution against another tortfeasor, for recovery when each of the parties are or may be liable to a Plaintiff, from acts or omissions, which caused the Plaintiff to file suit.

Texas Keystone, Falcon and Halliburton were all named as defendants in suit brought by Plaintiffs. Halliburton asserted its right to contribution against Texas Keystone and Falcon in its answer to Plaintiffs' Amended Complaint. Texas Keystone and Falcon were present for the settlement conference whereby Halliburton settled Plaintiffs claims against it. Texas Keystone raised no objection to the settlement, with full knowledge that Halliburton's cross-claim remained pending. Additionally, Texas Keystone may continue to defend the cross-claim for contribution on the merits.

If Halliburton had not asserted its right to contribution when it filed its Answer to Plaintiffs' Complaint and instead waited until a judgment was rendered after trial, Halliburton would not have been able to assert its right to contribution under the guidelines of the Howell opinion. *See, CAMC*,

at 21, *citing Howell*, 205 W. Va. at 446, 518 S.E.2d at 874. This analysis is inopposite to the matter before the Court insomuch as there is no separate cause of action. Although not explicitly stated in the *Howell* and *CAMC* decisions, the Court appears to have recognized that a tortfeasor would suffer prejudice if it was not involved in an actual civil action, when a second tortfeasor is permitted to settle with the Plaintiffs and then proceed against the first tortfeasor. This is not the case in the matter before this Court.

In its response brief, filed on January 14, 2009, Texas Keystone referenced what appears to be dicta in the *CAMC* opinion for the proposition that Halliburton should not be permitted to continue its claim for contribution, in light of the fact that it settled with Plaintiffs. The *CAMC* opinion references the decision of *Merchants Bank of New York v. Credit Suisse Bank*, 585 F. Supp. 304, 309-310 (S.D. N.Y. 1984). The specific provision of the decision cited by this Court in *CAMC* was that a settling party cannot seek contribution from other tortfeasors on rationale that no debt can be implied from a voluntary payment. As applied to this case, the *Merchants Bank* decision is non-controlling due to its emergence from the Federal District Court for the Southern District of New York. Secondly, a review of the *Merchants Bank* decision finds the Court there relied on NY CLS Gen. Obl. § 15-108. This New York statute states: "(c) Waiver of contribution. A tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person from any other person." NY CLS Gen. Obl. § 15-108. There is no such legislative prohibition in West Virginia. The West Virginia legislature has not chosen to deny a right to inchoate contribution from a settling tortfeasor, as Halliburton has asserted, and as such, Halliburton's claim should be able to proceed on the merits.

From a policy perspective, the position asserted by Texas Keystone would promote a chilling effect on settlements between Plaintiff and putative tortfeasor in a situation where there is more than one potentially liable tortfeasor. It has long been held that "the law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation." Syl. Pt. 1, *in part, Sanders v. Roselawn Memorial Guardians, Inc.*, 152 W. Va. 91, 159 S.E.2d 784 (1968).

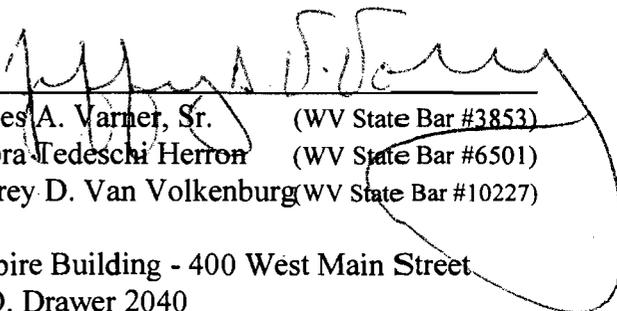
Therefore, this Court should reverse the dismissal of Halliburton's claim for common law contribution against Texas Keystone, as the Court committed clear error by dismissing it.

CONCLUSION

WHEREFORE, based upon the foregoing and for all the reasons set forth above, the Appellant herein, Halliburton Energy Services, Inc., requests this Honorable Court enter an Order granting the relief requested in this Appeal. The Appellant specifically requests this Honorable Court enter an Order reversing the Circuit Court's October 29, 2008 Memorandum Order and Supplemental Order, which collectively dismissed Halliburton's cross-claim against Texas Keystone. Halliburton has produced ample evidence to overcome the light standard on a motion to dismiss. Appellant Halliburton further requests that this Court find that Halliburton is entitled to express indemnification pursuant to the contract between Texas Keystone and Halliburton and that this Court find that Appellant is not required to arbitrate the issue of its indemnification claim against Texas Keystone. Halliburton also requests that this Court find that Texas Keystone waived its right to assert the affirmative defense of arbitration for the reasons more fully explained above. Finally, it is requested that this Honorable Court reverse the circuit court's ruling which dismissed Halliburton's cross-claim for common law contribution, as the same was not supported in fact or law and remand this proceeding to the Circuit Court of Tyler County, West Virginia for further proceedings.

Respectfully submitted this the 27th day of August, 2009.

Appellant, HALLIBURTON ENERGY SERVICES, INC., By Counsel:



James A. Varner, Sr. (WV State Bar #3853)
Debra Tedeschi Herron (WV State Bar #6501)
Jeffrey D. Van Volkenburg (WV State Bar #10227)

Empire Building - 400 West Main Street
P. O. Drawer 2040
Clarksburg, WV 26302-2040
Tel: (304) 626-1100 / Fax: (304) 623-3035

McNeer, Highland, McMunn & Varner, L.C.
Of Counsel

CERTIFICATE OF SERVICE

This is to certify that on the 27th day of August, 2009, I served the foregoing "*Appeal on Behalf of Appellant, Halliburton Energy Services, Inc.*" upon all counsel of record by depositing true copies in the United States Mail, postage prepaid, in envelopes addressed as follows:

M. Eric Frankovitch, Esquire
Mark A. Colantonio, Esquire
Frankovitch, Anetakis, Colantonio & Simon
337 Penco Road
Weirton, WV 26062
Co-Counsel for Plaintiffs

Jason E. Matzus, Esquire
Raizman, Frischman & Matzus
7300 Penn Avenue
Pittsburgh, PA 15208
Co-Counsel for Plaintiffs

Scott L. Summers, Esquire
Offutt, Fisher & Nord
812 Quarrier Street, Suite 600
P. O. Box 2833
Charleston, WV 25530-2833
Counsel for Texas Keystone, Inc.

Michael G. Gallaway, Esquire
Elba Gillenwater, Jr., Esquire
Spilman, Thomas & Battle, PLLC
1217 Chapline Street
P.O. Box 831
Wheeling, WV 26330
Co-Counsel for Falcon Drilling Company, LLC

Don C. A. Parker, Esquire
Spilman, Thomas & Battle, PLLC
300 Kanawha Blvd., East
P.O. Box 273
Charleston, WV 25321-0273
Co-Counsel for Falcon Drilling Company, LLC

J. Eric Barchiesi, Esquire
Eisenberg & Torisky
2925 One Oxford Centre
301 Grant Street
Pittsburgh, PA 15219
Counsel for Falcon Drilling Company


James A. Varner, Sr. (WV State Bar #3853)
Debra Tedeschi Herron (WV State Bar #6501)
Jeffrey D. Van Volkenburg (WV State Bar #10227)

McNeer, Highland, McMunn and Varner, L.C.
Empire Building - 400 West Main Street
P. O. Drawer 2040
Clarksburg, WV 26302-2040
Telephone: (304) 626-1100
Facsimile: (304) 623-3035