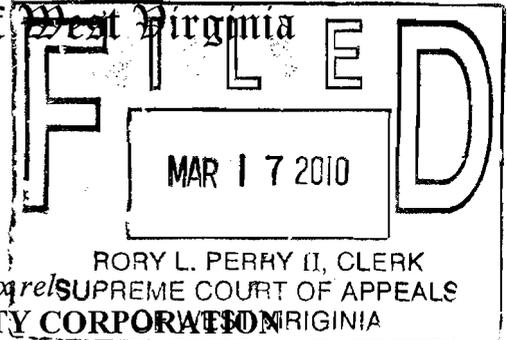


In the Supreme Court of Appeals of West Virginia

No. 100191



STATE OF WEST VIRGINIA, *ex rel.* AT&T MOBILITY, LLC, AND AT&T MOBILITY CORPORATION  
Petitioners,

v.

THE HONORABLE RONALD E. WILSON, *Judge of the Circuit Court of Brooke County,*  
and CHARLENE A. SHORTS,

*Respondents.*

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RESPONSE OF  
PALISADES COLLECTIONS LLC

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## I. INTRODUCTION

Believing that it was constrained by this Court's opinion in *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 567 S.E.2d 265 (2002), the Circuit Court of Brooke County, the Honorable Ronald E. Wilson presiding, invalidated an agreement between Respondent Charlene Shorts and her cellular phone company, Petitioners (collectively "ATTM"), to submit certain claims to individualized arbitration. But the circuit court did not find that the agreement was procedurally unconscionable, nor did the circuit court find that the agreement was, under the circumstances of this case—including the entire contract—substantively unconscionable. Thus, the circuit court erred in refusing to enforce the parties' agreement to individual arbitration and to grant ATTM's motion to compel.

## II. STATEMENT OF FACTS<sup>1</sup>

In February 2003, Respondent Shorts signed a wireless service agreement with AT&T Wireless ("AWS"). That agreement included the parties' mutual promises to arbitrate disputes on an individual basis. Order at 2. In May 2003, Respondent failed to make the required monthly payments, so AWS terminated her wireless account and assessed the early termination fees that Shorts had promised to pay. Order at 2. Thereafter, AWS sold Shorts's debt to Palisades Collections LLC ("Palisades").

In 2005, Shorts signed a wireless service agreement with Cingular (who a year earlier had merged with AWS, subsequently forming Petitioner). In her agreement with Cingular, Shorts again promised to arbitrate all disputes with ATTM on an individual basis. Order at 5. On June 23, 2006, Palisades brought suit against Respondent in the Magistrate Court of Brooke County, West Virginia, seeking to recover Respondent's debt to AWS. *See* Civil

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<sup>1</sup> Palisades hereby incorporates ATTM's brief herein by reference and confines its brief to the further illumination of two salient points, as discussed *infra*.

Compl. (attached to Petitioner's Mem. In Supp. of Pet'n for Writ of Prohibition as Ex. E). Shorts denied liability and filed a counterclaim under the West Virginia Consumer Credit and Protection Act ("WVCCPA"), W. VA. CODE §§ 46A-1-101, *et seq.* Order at 2. Palisades then removed the action to the Circuit Court of Brooke County, West Virginia.

Respondent then amended her counterclaim to include class action claims against Petitioner. *See* Def.'s First Am. Countercl. (attached to Petitioner's Mem. as Ex. F). Petitioner moved the circuit court to compel Respondent to pursue her claims in accordance with her arbitration agreements previously entered into with Petitioner and its predecessors. Order at 3. ATTM pointed out that it had revised its arbitration clause in 2006 and that the revised provision was available to all present and former customers—including Respondent. When ATTM again revised the provision in 2009, making it even more consumer friendly, it notified Shorts and the circuit court that this most recent version was also available to all present and former customers—including Respondent.

On December 1, 2009, the circuit court denied Petitioner's motion, relying exclusively on this Court's opinion in *Dunlap*. The circuit court determined that ATTM's agreement was "not enforceable under West Virginia law" because the agreement was unconscionable.

### III. ASSIGNMENT OF ERROR

The Circuit Court erred by concluding that the agreement in question was procedurally unconscionable.

The Circuit Court erred by concluding that the agreement in question was substantively unconscionable.

The Circuit Court erred by failing to compel arbitration.

#### IV. DISCUSSION OF LAW

**A. This Court will review the decision below *de novo*.**

"Unconscionability is an equitable principle, and the determination of whether a contract or a provision therein is unconscionable should be made by the court." Syl. pt. 1, *Troy Mining Corp. v. Itmann Coal Co.*, 176 W. Va. 599, 346 S.E.2d 749 (1986). "[I]n addressing a motion to compel arbitration in the context of a civil action, it is for the court where the action is pending to decide in the first instance as a matter of law whether a valid and enforceable arbitration agreement exists between the parties." *Dunlap*, 211 W. Va. at 555, 567 S.E.2d at 271 (emphasis added) (citing syl. pts. 1 & 2, *Art's Flower Shop, Inc. v. Chesapeake & Potomac Telephone Co. of W. Va., Inc.*, 186 W. Va. 613, 413 S.E.2d 670 (1991)).

As questions of law, the circuit court's decisions are entitled to no deference, and this Court's review thereof will be *de novo*.<sup>2</sup>

**B. The arbitration agreement is not unconscionable under West Virginia law because it was not procedurally unconscionable.**

In order to invalidate a provision of a contract on the grounds that it is unconscionable, a court must find *both* that the contract was "procedurally" unconscionable—*i.e.*, that "gross inadequacy" existed between the respective parties' bargaining power—and "substantively" unconscionable—*i.e.*, that the resulting terms are "unreasonably favorable to the stronger party." *State ex rel. Saylor v. Wilkes*, 216 W. Va. 766, 774, 613 S.E.2d 914, 922 (2005).

The existence of one or the other alone does not justify judicial intervention:

A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in allocation of risks to the weaker party. But gross inadequacy in bargaining power, *together with* terms unreasonably

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<sup>2</sup> See *Keese v. Gen. Refuse Serv., Inc.*, 216 W. Va. 199, 204, 604 S.E.2d 449, 454 (2004) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.") (internal quotations and citation omitted).

favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion or may show that the weaker party had no meaningful, no real alternative, or did not in fact assent or appear to assent to the unfair terms.

*Troy Mining*, 176 W. Va. at 604, 346 S.E.2d at 753 (emphasis altered) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 208 comment d). Without a finding of procedural unconscionability, therefore, an arbitration agreement must be enforced. And while the circuit court found that the contract here was "subject to the legal standards set forth in [*Dunlap*]" (Order at 6), the court never held that it suffered from procedural unconscionability. In fact, as is shown below, the circuit court specifically found that procedural unconscionability did *not* exist.

ATTM undoubtedly has more commercial transaction experience than Ms. Shorts. But disparity of bargaining power exists in virtually every commercial transaction. *Ashland Oil Co. v. Donahue*, 159 W. Va. 463, 473, 223 S.E.2d 433, 440 (1976). Although a difference in the size, experience, or sophistication of the parties is one factor in the analysis, "[i]n most commercial transactions it may be assumed that there is some inequality of bargaining power, and this Court cannot undertake to write a special rule of such general application as to bargaining advantages or disadvantages in the commercial area, nor do we think it necessary that we undertake to do so." 159 W. Va. at 474, 223 S.E.2d at 440. Indeed, "[t]his Court has noted before that it is not the province of the judiciary to try to eliminate the inequities inevitable in a capitalist society . . . ." *Troy Mining*, 176 W. Va. at 604, 346 S.E.2d at 753-54 (citation and indentation omitted).<sup>3</sup>

To properly ascertain whether the arbitration provision at issue is procedurally unconscionable, the circuit court's analysis "must focus on the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and

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<sup>3</sup> See also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) ("[m]ere inequality in bargaining power" is not a basis for declining to enforce arbitration agreements).

'the existence of unfair terms in the contract.' " Syl. pt. 4, *Art's Flower*; syl. pt. 3, *Bd. of Educ. of Berkeley County v. W. Harley Miller, Inc.*, 160 W. Va. 473, 236 S.E.2d 439 (1977).

And while form contracts are contracts of adhesion under West Virginia law, a blanket rule invalidating all form contracts would bring commerce to a screeching halt:

"Adhesion contracts" include all "form contracts " submitted by one party on the basis of this or nothing . . . . Since the bulk of contracts signed in this country, if not every major Western nation, are adhesion contracts, a rule automatically invalidating adhesion contracts would be completely unworkable. Instead courts engage in a process of judicial review . . . . Finding that there is an adhesion contract is the beginning point for analysis, not the end of it; what courts aim at doing is distinguishing good adhesion contracts which should be enforced from bad adhesion contracts which should not.

*Dunlap*, 211 W. Va. at 557, 567 S.E.2d at 273 (quoting *Am. Food Mgmt., Inc. v. Henson*, 434 N.E.2d 59, 62-63 (Ill. Ct. App. 1982) (referring to Professor Corbin's clarification of the nature of contracts of adhesion). Indeed, the *Dunlap* decision, relied on by the circuit court to invalidate the arbitration provision here, recognizes that "the fact that [an agreement] is a contract of adhesion does not necessarily mean that it is also invalid." 211 W. Va. At 557, 567 S.E.2d at 273. And the circuit court echoed this language, stating that "[t]he fact that the AWS and Cingular terms and conditions at issue here are in standardized, pre-printed form contracts with no individualized terms relating to individual consumers does not invalidate the arbitration agreement." Order at 6.

Nevertheless, the circuit court's order did not venture beyond its identification of the contract at issue as one of adhesion, to the analysis of the nature of the contract itself (much less the complete relationship between the parties). Only adhesion contracts representing a gross inadequacy of bargaining power, however, are "bad adhesion contracts"—those subject to being held invalid. Such contracts arise from the "traditional" situation envisioned by the *Miller*

court—wherein one party "holds either a monopolistic or oligopolistic position in some particular line of commerce." *Miller*, 160 W. Va. at 486, 236 S.E.2d at 447. These situations can exist even in the absence of an adhesion contract. The proper test for bargaining inequality is whether the weaker party had meaningful, real alternatives. *Troy Mining*, 176 W. Va. at 604, 346 S.E.2d at 753.

In *Art's Flower Shop*, for example, Chesapeake and Potomac telephone company ("C&P") sought to enforce the liability limitation provision of its contract with Art's, after C&P failed to include Art's advertisement in its Yellow Pages directory, and Art's brought suit. 186 W. Va. at 615, 413 S.E.2d at 672. This Court invalidated the clause because C&P published the only Yellow Pages directory in the area, leaving Art's with no meaningful alternative:

The positions of C & P and Art's Flower Shop were grossly unequal: C & P had the only Yellow Pages directory in the area. As a monopoly, C & P had the right to make the Yellow Pages an integral part of their regular white pages directory and the name recognition to make it successful. No evidence was presented of a comparable, meaningful alternative to a Yellow Pages advertisement. In fact, Art's Flower Shop's efforts to mitigate its damages resulting from the omission by use of radio and television advertisements, stickers, personal letters, and the distribution of flyers, resulted in no significant increase in business. Since Art's Flower Shop had no meaningful alternative to purchasing the advertisement from C & P, it obviously was in no position to bargain for the contract.

186 W. Va. at 618, 413 S.E.2d at 675 (internal citations omitted).

The most confusing aspect of the circuit court's opinion here is that it recognized the plain fact that Petitioner does not hold a monopoly on cell phone service, finding that "there were other meaningful alternatives for obtaining wireless phone services from other wireless phone providers available to [Respondent] Shorts." Order at 6. Indeed, it is undisputed that when Respondent signed her contract with Cingular in 2005, she could have signed with at least three other cellular service providers that did not include an arbitration provision in their terms of

service. (See Aff. of Ihuoma N. Onyeali ¶¶ 2–7 & Exs. 1–6 (attached to Petitioner's Mem. as Ex. G).) And courts across the country routinely recognize that form contracts between a cellular service provider and a consumer are not procedurally unconscionable.<sup>4</sup>

Here, the circuit court misapplied the procedural unconscionability analysis. The circuit court correctly found that procedural unconscionability was lacking due to the availability to Ms. Shorts of meaningful alternatives:

The fact that the [contract] terms and conditions at issue here are in standardized, pre-printed form contracts with no individualized terms relating to individual consumers does not invalidate the arbitration agreement. Neither does the fact that [Petitioner] did not offer customers an opportunity to negotiate terms of the agreements. If a consumer wanted [Petitioner's] phone and service the consumer had to agree to the standardized contracts. ***However, there were other meaningful alternatives for obtaining wireless phone service from other wireless phone providers available to [Respondent] Shorts.***

Order at 6 (emphasis added). But the circuit court confusingly went on to hold that the contract was "subject to the legal standards set forth in [*Dunlap*]." *Id.*

Despite this leap, nowhere in its opinion did the circuit court hold that the arbitration agreement suffered from procedural unconscionability. To find an arbitration provision unconscionable, a circuit court must find two essential elements—procedural *and* substantive unconscionability. *Saylor*, 216 W. Va. at 774, 613 S.E.2d at 922. But a circuit court cannot find that meaningful alternatives were available to the "weaker" party and then go on to hold that procedural unconscionability exists. *Troy Mining*, 176 W. Va. at 604, 346 S.E.2d at 753. Because that is precisely what the circuit court held here, that holding must be reversed.

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<sup>4</sup> See, e.g., *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1094 (9th Cir. 2009) (finding the "take-it-or-leave-it nature" of T-Mobile's service agreement "insufficient to render it unenforceable"); *Chandler v. AT&T Wireless Servs., Inc.*, 358 F. Supp. 2d 701, 705 (S.D. Ill. 2005) (finding that a wireless service provider's refusal to negotiate the terms of its contract did not render it unenforceable because the customer was "free to make other choices").

**C. A party's demand that a court invalidate an agreement to arbitrate as unconscionable must be analyzed on *all* of the particular facts of the case.**

West Virginia contract law neither requires nor allows drawing categorical conclusions about the validity of an agreement to arbitrate. And to the extent that West Virginia contract law does purport to draw such conclusions, the FAA preempts it. Under *all* of the circumstances presented by the facts of *this case*, the circuit court was wrong to conclude that the agreement in question was unconscionable on the basis that it contained an agreement to submit disputes to individualized, rather than class, arbitration. *See* Order at 5-6.

**1. A party's demand that a court invalidate an agreement to arbitrate as unconscionable must be analyzed on the particular facts of the case in order to comport with state contract law.**

Even though the circuit court found that the agreement in question was impressively fair to consumers like Respondent when examined as a whole (and, as discussed above, was *not* obtained under circumstances evincing procedural unconscionability), the circuit court nevertheless concluded that it was foreclosed by *Dunlap* from looking at the totality of the circumstances, believing that *Dunlap* required holding that an agreement to submit to individualized arbitration is *per se* unenforceable under West Virginia law. Order at 8-10. This conclusion, however, was unnecessary, as West Virginia law neither requires nor permits such categorical invalidation of agreements (to arbitrate or otherwise).

This Court's jurisprudence has consistently made clear that West Virginia law requires examination not only of the entire contract in order to properly analyze a claim that any part of the contract is unconscionable, but of the entire *circumstances* of the contract:

[W]here a party alleges that the arbitration provision was unconscionable, or was thrust upon him because he was unwary and taken advantage of, or that the contract was one of adhesion, the question of whether an arbitration provision was bargained for and valid is a matter of law for the court to determine *by reference*

*to the entire contract, the nature of the contracting parties, and the nature of the undertakings covered by the contract.*

Syl. pt. 1, *Art's Flower Shop* (emphasis added). The drafters of the Uniform Consumer Credit Code explained this, as discussed in *Orlando v. Fin. One of W. Va., Inc.*, 179 W. Va. 447, 369 S.E.2d 882 (1988):

The basic test is whether, *in the light of the background and setting of the market, the needs of the particular trade or case, and the condition of the particular parties to the conduct or contract*, the conduct involved is, or the contract or clauses involved are so one sided as to be unconscionable under the circumstances existing at the time the conduct occurs or is threatened or at the time of the making of the contract.

The drafters explained further that "[t]he particular facts involved in each case are of utmost importance *since certain conduct, contracts or contractual provisions may be unconscionable in some situations but not in others.*" Similarly, in syllabus point 3 of [*Troy Mining Corp.*], this Court stated that "[a]n analysis of whether a contract term is unconscionable necessarily involves an inquiry into the circumstances surrounding the execution of the contract and the fairness of the contract as a whole."

179 W. Va. at 450, 369 S.E.2d at 885 (emphasis added) (citations and footnote omitted).

Rather than confining the analysis to a few particular terms of an agreement, proper determination of unconscionability must look to the entire relationship between the parties, including:

the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and "the existence of unfair terms in the contract."

Syl. pt. 4, *id.* See, e.g., *State ex rel. Clites v. Clawges*, 224 W. Va. 299, 685 S.E.2d 693, 701 n.3 (2009) ("While we find this *particular* agreement to be enforceable, we limit the application of our holding to the facts of this case.") (emphasis in original); *Schultz v. AT & T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 689 (N.D. W. Va. 2005) ("First, this Court notes that the Fourth

Circuit has not found that class action waivers render an arbitration clause unconscionable *per se*, and instead has considered the surrounding circumstances in each case.").

In this case, as was thoroughly discussed and demonstrated by ATTM, the totality of the circumstances neither require nor allow finding that the parties' agreement to submit disputes to individualized arbitration violated substantive West Virginia public policy. To the extent that access to class arbitration procedures are properly characterized as a "right" at all, no court has ever suggested that such a "right" is an inviolate or unwaivable right that cannot be traded. Indeed, in the far more obvious context of an express statutory right to access to a judicial forum, the United States Court of Appeals for the Fourth Circuit joined the Third Circuit and others, holding that "'simply because judicial remedies are part of a law does not mean that Congress meant to preclude parties from bargaining around their availability.'" *Johnson v. West Suburban Bank*, 225 F.3d 366, 377 (3d Cir. 2000) (Truth in Lending Act claims are arbitrable even if class action mechanism is unavailable); *see also Randolph v. Green Tree Fin. Corp.-Alabama*, 244 F.3d 814 (11th Cir. 2001) (same). . . . [Adkins's] inability to bring a class action . . . cannot by itself suffice to defeat the strong congressional preference for an arbitral forum." *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002).

Especially where, as here, any public policy that underpins the typical need for class actions<sup>5</sup> is adequately preserved by the terms of the agreement as a whole, such a categorical invalidation of a promise to individualized arbitration is inconsistent with West Virginia contract law—both generally and specifically.<sup>6</sup>

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<sup>5</sup> *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.") (internal quotation omitted).

<sup>6</sup> *See, e.g., Pleasants v. Am. Exp. Co.*, 541 F.3d 853, 858-59 (8th Cir. 2008) (refusing to invalidate class arbitration waiver where, under the circumstances present in the specific case, the plaintiff's claims

**2. A party's demand that a court invalidate an agreement to arbitrate as unconscionable must be analyzed on the particular facts of the case in order to comport with federal arbitration law.**

Two narrowing forces constrain the claim of a party seeking to judicially avoid an arbitration clause in an agreement governed by the FAA.

First, the Supreme Court of the United States has made it clear that such a party may not avoid (nor may any state's law allow or assist her to avoid) a promise to arbitrate in an agreement by challenging the enforceability of the agreement as a whole, because arbitration clauses are severable as a matter of federal law. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006). *See also Adkins*, 303 F.3d at 502 ("There is thus a clear federal command that courts cannot treat arbitration in general as an inferior or less reliable means of vindicating important substantive rights. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985).").

Instead, such challenges must be brought, if at all, to the attention of the arbitrator and made in that forum, not in court. *Buckeye Check Cashing*, 546 U.S. at 445-46 ("[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance."). The FAA preempts any state law that allows the agreement to be attacked in a court on such grounds. To allow otherwise would eviscerate the FAA's power to accomplish its purpose. Rather, under the FAA, courts may only hear claims that the arbitration clause *itself* is somehow independently unenforceable.<sup>7</sup>

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made economic sense as individual claims); *Strawn v. AT & T Mobility, Inc.*, 593 F. Supp. 2d 894 (S.D. W. Va. 2009) (distinguishing *Dunlap* where plaintiff also made WVCCPA claims and thus did not have a "high volume / low dollar" claim); *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 877-78 (11th Cir. 2005) (noting importance to unconscionability analysis of the fact that as a practical matter the agreement preserved access to an impartial forum).

<sup>7</sup> *See also Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 637 (4th Cir. 2002) ("The law is well settled in this circuit that, if a party seeks to avoid arbitration and/or a stay of federal court proceedings pending the outcome of arbitration by challenging the validity or enforceability of an

Second, by the express text of the FAA, a party seeking to avoid an arbitration clause in an agreement governed by the FAA may only attack that clause "upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added); *see, e.g., Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("*generally applicable* contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements") (emphasis added). Thus, states are not free to make rules of law under the rubric of "public policy" that apply only, specifically, or especially to arbitration clauses, because to allow otherwise would also eviscerate the FAA's recognized purpose of ending "hostility of American courts to the enforcement of arbitration agreements . . . ." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001). "The FAA reflects 'a liberal federal policy favoring arbitration agreements'," *Adkins*, 303 F.3d at 500, requiring courts to "resolve 'any doubts concerning the scope of arbitrable issues . . . in favor of arbitration'," *Hill v. PeopleSoft USA, Inc.*, 412 F.3d 540, 543 (4th Cir. 2005) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

The intersection of these two federal-law requirements is exceedingly slender, requiring that a party who seeks judicial annulment of an arbitration clause in an agreement governed (as here) by the FAA on the grounds that that arbitration clause is unconscionable must identify a public policy basis that applies generally to all agreements, but in the case in question applies specifically only to the arbitration clause.

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arbitration provision on any grounds that 'exist at law or in equity for the revocation of any contract,' 9 U.S.C. § 2, the grounds 'must relate specifically to the arbitration clause and not just to the contract as a whole.' *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999). *See also Jeske v. Brooks*, 875 F.2d 71, 75 (4th Cir. 1989) (refusing to consider party's arguments that arbitration clause must be declared invalid on grounds that customer's agreement as a whole was invalid due to overreaching, unconscionability, fraud, and lack of consideration, because the alleged defects pertained to the entire contract, rather than specifically to the arbitration clause.)" (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967)).

Shorts has failed to do this—indeed the circuit court did not even purport to reach that conclusion. Shorts asserts that her promise in the governing agreement to arbitrate disputes individually, as opposed to by class arbitration, violates public policy. But that is an attack that does not apply to agreements generally, and so it falls outside of the allowable bases for avoiding an arbitration clause under § 2 of the FAA.

As demonstrated *supra*, West Virginia law does not even purport to require or allow the categorical disapproval of an individual-arbitration requirement. But even if this were not so, the FAA required reading any post-*Dunlap* doubt in favor of enforcement—not annulment—of arbitration clauses under the circumstances:

Many of Adkins' claims invite us to push the parameters of state law so as to frustrate the intent of the FAA. This in turn implicates the Supremacy Clause at its core. The FAA's "liberal federal policy favoring arbitration agreements," *Moses Cone*, 460 U.S. at 24, means that states cannot single out arbitration agreements for disparate treatment under their laws. If we were to stretch West Virginia contract law to invalidate this arbitration agreement, we would be doubly guilty of overstepping our bounds: not only in expanding state precedent, but by doing so in pursuit of an outcome that the state itself is not permitted to authorize.

*Adkins*, 303 F.3d at 505 (parallel citation omitted). The circuit court should have therefore applied *Dunlap* in light of the FAA's requirements:

The preemptive force of the FAA, as combined with the Supremacy Clause, therefore operates to cabin state-created rights that frustrate arbitration. . . .

West Virginia precedent generally barring state claims from arbitration must be necessarily circumscribed in light of [*Perry v. Thomas*, 482 U.S. 483 (1987)], [*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).] and [*Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001)]. In *Dunlap*, the Supreme Court of Appeals of West Virginia declared that "constitutional rights-of open access to the courts to seek justice, and to trial by jury-are fundamental in the State of West Virginia." However, the court explicitly declined to reach the issue of whether this right could "permissibly factor into judicial scrutiny

of the conscionability of a provision in a contract of adhesion purporting to waive that entitlement" because of the "complex issues of federalism" implicated. To the extent that *Dunlap* intends to fashion a broad prohibition against the arbitrability of state-law claims, such a ruling, whether dicta or otherwise, cannot contravene the FAA.

*Am. Gen. Life & Acc. Ins. Co. v. Wood*, 429 F.3d 83, 90-91 (4th Cir. 2005). *See, e.g., Schultz*, 376 F. Supp. 2d at 691 ]("Further, even if the holding in *Dunlap* was applicable in this case, this Court agrees with AT&T's argument that *Dunlap* is preempted by the FAA."); *Cochran v. Coffman*, No. 2:09-CV-00204, 2010 WL 417422, at \*4 n.4 (S.D. W. Va. Jan. 28, 2010) ("Furthermore, the Coffmans' citation to [*Dunlap*] is unhelpful. The FAA preempts West Virginia law to the extent that the latter would impose heightened requirements on the enforcement of arbitration agreements.") (citations omitted).<sup>8</sup>

Here, as ATTM has thoroughly shown in its brief, "[a]pplying this analysis to the instant case," *Wince v. Easterbrooke Cellular Corp.*, No. 2:09-CV-00135, 2010 WL 392975, at \*4-\*5 (N.D. W. Va. Feb. 2, 2010), "a broad reading of *Dunlap* that sweepingly invalidates arbitration provisions containing class waivers, no matter the remaining incentives to arbitrate, would 'stand[] as an obstacle to the accomplishment and execution of the full purposes and objective of Congress' in enacting the FAA and would be preempted under the doctrine of conflict preemption. *United States v. Locke*, 529 U.S. 89 (2000) (internal quotations and

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<sup>8</sup> To the extent that West Virginia law requires an arbitration clause in a form contract to be "bargained for," the FAA also preempts that requirement. *See, e.g., Wilson v. Dell Fin. Servs., L.L.C.*, No. 5:09-CV-00483, 2009 WL 2160775, at \*3 (S.D. W. Va. July 16, 2009) ("Arbitration clauses in adhesion contracts traditionally have been met with hostility by state courts in West Virginia. West Virginia requires that arbitration clauses be 'bargained for' in order to be enforceable. Rarely, if ever, could an adhesion contract be characterized as 'bargained for.' However, the FAA preempts 'state rules of contract formation which single out arbitration clauses and unreasonably burden the ability to form arbitration agreements.' *Saturn Distrib. Corp. v. Williams*, 905 F.2d 719, 723 (4th Cir. 1990). West Virginia's 'bargained for' requirement unreasonably burdens the ability to form arbitration agreements and is therefore preempted by the FAA.") (citations omitted); *see also Schultz v. AT & T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 689 (N.D. W. Va. 2005) ("Accordingly, pursuant to *Saturn Distrib.*, this Court finds that the 'bargained for' doctrine is preempted by the FAA.").

citations omitted). Thus, the plaintiffs' argument that the arbitration clause is unconscionable due to its foreclosure of class action relief lacks merit." *Id.* (footnote and parallel citations omitted) (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Coe*, 313 F. Supp. 2d 603 (S.D. W. Va. 2004)). *See, e.g., Snowden, supra* (refusing to invalidate waiver of class arbitration).

For the circuit court to have held otherwise here constitutes reversible error.

## V. CONCLUSION

The FAA demonstrated Congress's "awareness of the widespread unwillingness of state courts to enforce arbitration agreements," and its disapproval thereof. *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984); *see also Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989). Section 2 of the act announces "a liberal federal policy favoring arbitration agreements." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quotations omitted). As a result, "arbitration is a matter of contract" in which courts have a limited role. *Id.* "What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The [FAA] makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the [FAA's] language and Congress's intent." *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 686 (1996) (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995)).

In light of the FAA's mandate, the circuit court should have read *Dunlap* to require an examination of the totality of the circumstances of the parties' relationship, and should not have focused on one or two provisions of their agreement:

The cry of "unconscionable!" just repackages the tired assertion that arbitration should be disparaged as second-class adjudication. It is precisely to still such cries that the Federal Arbitration Act equates arbitration with other contractual terms. *See [Allied-Bruce Terminix Cos., 513 U.S. at 270-71]*. People are free to opt for

bargain-basement adjudication—or, for that matter, bargain-basement tax preparation services; air carriers that pack passengers like sardines but charge less; and black-and-white television. In competition, prices adjust and both sides gain. "Nothing but the best" may be the motto of a particular consumer but is not something the legal system foists on all consumers.

As for the contention that portions of this clause are incompatible with [substantive law], there are two problems. First, the arbitrator rather than the court determines the validity of these ancillary provisions. Second, no general doctrine of . . . law prevents people from waiving statutory rights (whether substantive or procedural) in exchange for other things they value more, such as lower prices or reduced disputation. Whether any particular [legal provision] overrides the parties' autonomy and makes a given entitlement non-waivable is a question for the arbitrator.

*Carbajal v. H&R Block Tax Servs., Inc.*, 372 F.3d 903, 906-07 (7th Cir. 2004) (Easterbrook, J.).

In order for a court to hold that an arbitration clause is unconscionable, the party seeking to avoid it must demonstrate, *inter alia*, "that arbitration would 'prohibit or substantially limit a person from enforcing and vindicating rights and protection or from seeking and obtaining statutory or common-law relief and remedies.'" *Am. Gen. Life & Accident Ins. Co.*, 429 F.3d at 91 (citing *Dunlap*, 567 S.E.2d at 275). Here, the agreement in question neither prohibited nor substantially limited Shorts from enforcing or vindicating rights or protection, or from seeking or obtaining relief or remedies. Neither West Virginia contract law nor the FAA, therefore, required or allowed the circuit court to deny ATTM's motion to compel arbitration: "The Arbitration Agreement at issue here explicitly precludes the Livingstons from bringing class claims or pursuing 'class action arbitration,' so we are therefore 'obliged to enforce the type of arbitration to which these parties agreed, which does not include arbitration on a class basis.'" *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 559 (7th Cir. 2003). Here, after examining the totality of the relationship between ATTM and Ms. Shorts, the circuit court should then have found that the parties' agreement was enforceable and granted ATTM's motion.

Palisades therefore respectfully request the Court to **GRANT** ATTM's Petition in order to **REVERSE** the circuit court's denial of ATTM's motion to compel.

Dated this 17th day of March 2010.

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 17, 2010, I served the foregoing *Palisades Collections LLC's Response to Petition for Writ of Prohibition* on all counsel of record, by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

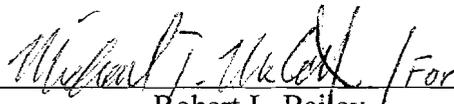
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