

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, ex rel.
AT&T MOBILITY LLC, and
AT&T MOBILITY CORPORATION,

Petitioners,

v.

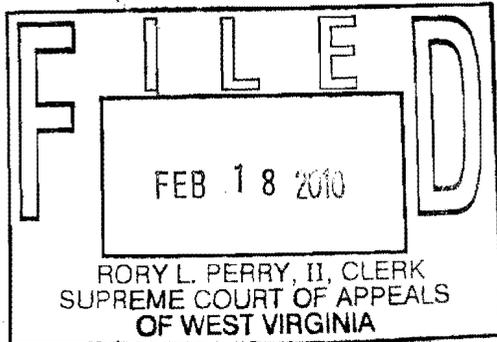
Upon Original Jurisdiction
in Prohibition,

No. _____

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

Respondents.

PETITION FOR WRIT OF PROHIBITION



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AT&T MOBILITY CORPORATION,

By counsel,

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INTRODUCTION

The Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1 et seq., mandates that arbitration agreements be enforced according to their terms. The sole exception is that courts may decline to enforce arbitration provisions “upon such grounds as exist at law or in equity for the revocation of any contract” (*id.* § 2), which the U.S. Supreme Court has interpreted to include such “generally applicable contract defenses” as “fraud, duress, or unconscionability” (*Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996)). In this case, petitioner AT&T Mobility LLC (“ATTM”) and respondent Charlene Shorts have agreed to resolve their disputes through arbitration on an individual basis. ATTM’s arbitration provision both makes arbitration cost-free and affords affirmative incentives for consumers to pursue arbitration. The questions presented by this writ petition are (i) whether this extraordinarily pro-consumer arbitration provision is enforceable under West Virginia law; and (ii) if not, whether the FAA preempts West Virginia law.

As we discuss below, this Court’s review is warranted to address these important questions of law. Indeed, the circuit court recognized as much: Although denying ATTM’s arbitration motion, the court took the extraordinary steps of not only recommending that ATTM seek a writ of prohibition from this Court but also staying the case *sua sponte* to allow ATTM time to prepare and file a petition. Subsequent events have confirmed the circuit court’s belief that review is warranted. Earlier this month, the federal district court for the Northern District of West Virginia enforced the *same* arbitration clause that is at issue here and compelled plaintiffs to arbitrate substantially similar claims. In so doing, it expressly rejected the reading of West Virginia law that caused the court below to reach the opposite result. See *Wince v. Easterbrooke Cellular Corp.*, 2010 WL 392975 (N.D. W. Va. Feb. 2, 2010).

Accordingly, pursuant to Article 1, Chapter 53 of the West Virginia Code and Article VIII, Section 3 of the Constitution of West Virginia, petitioners AT&T Mobility LLC and AT&T Mobility Corporation, by and through counsel, hereby petition this Honorable Court to issue a Writ of Prohibition against the respondents, the Honorable Ronald E. Wilson (the “circuit court”), in his official capacity as Judge of the Circuit Court of Brooke County, West Virginia, and Charlene A. Shorts (“Shorts”). Petitioners request a writ prohibiting the circuit court from refusing to enforce Shorts’s arbitration agreement and from continuing to exercise jurisdiction over the dispute.

STATEMENT OF JURISDICTION

1. This Petition for Writ of Prohibition is filed pursuant to Article VIII, § 3 of the West Virginia Constitution, granting this Court original jurisdiction in prohibition, and W. Va. Code § 53-1-1. This petition is also filed pursuant to Rule 14(a) of the West Virginia Rules of Appellate Procedure.

2. Pursuant to the original jurisdiction of this Court, ATTM seeks relief in the form of a writ of prohibition, so that this Court may review the circuit court’s order refusing to enforce Shorts’s arbitration agreement with ATTM. *See* Mem. Opinion and Order Denying AT&T’s Mot. to Compel Arbitration (Dec. 1, 2009) (“Circuit Op.”) (attached as Exhibit A).

3. “[A] petition for a writ of prohibition is an appropriate method by which to obtain review by this Court of a circuit court’s decision to compel arbitration.” *State ex rel. Saylor v. Wilkes*, 216 W. Va. 766, 772, 613 S.E.2d 914, 920 (2005); *see also McGraw v. Am. Tobacco Co.*, 224 W. Va. 211, 681 S.E.2d 96, 104 (2009) (“[T]his Court has traditionally addressed challenges to orders compelling arbitration in proceedings seeking writs of prohibition.”); *State ex rel. City Holding Co. v. Kaufman*, 216 W. Va. 594, 597, 609 S.E.2d 855, 858 (2004) (per

curiam) (circuit court's denial of motion to compel arbitration subject to review through a writ of prohibition); *State ex rel. Wells v. Matish*, 215 W. Va. 686, 690, 600 S.E.2d 583, 587 (2004) (per curiam); *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 555, 567 S.E.2d 265, 271 (2002).

4. This is an extraordinarily compelling case for review. Indeed, the circuit court itself invited ATTM to file a petition for a writ of prohibition and strongly implied that review is warranted. In denying ATTM's motion to compel arbitration, the court acknowledged its doubts as to the ultimate correctness of its holding. Specifically, the court concluded that it was compelled—erroneously, we believe—by this Court's earlier holding in *Dunlap* to hold that all arbitration clauses that require individual rather than class-wide arbitration are unenforceable under West Virginia law. Although recognizing the strength of ATTM's competing argument that *Dunlap* did not erect an across-the-board rule banning agreements to arbitrate on an individual basis, it nonetheless held that the "interpretation of *Dunlap*" is a question "reserved for our highest Court and not a state court judge." Circuit Op. 10. The circuit court went so far as to say that "*when the Supreme Court considers* this Court's opinion as to what law should be applied to the facts in this case, the trial court's opinion will be of no importance" because this Court's review is *de novo*. *Id.* (emphasis added). To that end, the circuit court *sua sponte* entered a stay "to give ATTM the opportunity to seek a writ from the Supreme Court of Appeals." *Id.* at 10-11 (capitalization omitted). In sum, the circuit court has effectively asked this Court to provide much needed guidance through a writ of prohibition.

PARTIES

5. Petitioner AT&T Mobility LLC is a Delaware limited liability company authorized to do business in West Virginia. Petitioner AT&T Mobility Corporation is a

Delaware corporation.¹ Petitioners are counter-claim defendants in the civil action pending in the Circuit Court of Brooke County, West Virginia, Civil Action No. 06-C-127.

6. Respondent Honorable Ronald L. Wilson is a duly elected circuit court Judge in the First Judicial Circuit, and is the presiding Judge in Civil Action No. 06-C-127.

7. Respondent Charlene A. Shorts is a defendant and counterclaim plaintiff in Civil Action No. 06-C-127.

FACTUAL BACKGROUND

8. In February 2003, Shorts activated an account for wireless service with AT&T Wireless (“AWS”), which merged with Cingular (ATTM’s predecessor) in October 2004. Her service agreement with AWS contained an arbitration provision requiring the parties to arbitrate disputes on an individual rather than class-wide basis. In 2005, Shorts entered into another wireless service agreement with Cingular (now ATTM). Circuit Op. 3; Decl. of Audrey Crafton ¶ 4. That agreement also required her to arbitrate any disputes with ATTM or its predecessors on an individual basis. Circuit Op. 3, 5.

9. When Shorts failed to make timely payments in connection with her wireless service from AWS, her service was terminated and, in accordance with her contract, termination fees were assessed. AWS sold the resulting debt to Palisades Collections LLC (“Palisades”). In June 2006, Palisades filed a complaint against Shorts in the Magistrate Court of Brooke County, West Virginia, seeking to recover on the debt. Shorts filed an answer denying liability and asserted a counterclaim against Palisades under the West Virginia Consumer Credit and Protection Act (“WVCCPA”), W. Va. Code §§ 46A-1-101 *et seq.* Palisades then removed the

¹ Petitioner AT&T Mobility Corporation is a member of AT&T Mobility LLC, which is the real party in interest. AT&T Mobility was previously known as Cingular Wireless LLC. In 2007, the company changed its name to AT&T Mobility LLC. Thus, “AT&T Mobility LLC” and “Cingular” refer to the same entity. We refer to the company as “ATTM” throughout.

action to the Circuit Court of Brooke County, West Virginia, and thereafter amended her counterclaim to add class-action claims against ATTM. *See* Def.'s First Amended Counterclaim (attached as Exhibit B). Her amended counterclaim includes three claims under the WVCCPA and seeks actual damages, statutory damages, statutory attorneys' fees (*see* W. Va. Code § 46A-5-104), and cancellation of her debt (*see id.* § 46A-5-105). Circuit Op. 2.

10. ATTM removed the case to the U.S. District Court for the Northern District of West Virginia pursuant to the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d)(2)(A). The district court remanded the case to the circuit court, the Fourth Circuit affirmed, and the Supreme Court denied certiorari. Circuit Op. 3.

11. ATTM thereafter requested that the circuit court compel Shorts to pursue her claims in accordance with her arbitration agreements. Circuit Op. 3. ATTM contended that Shorts' obligation to arbitrate arose from her 2003 service agreement with AWS and 2005 service agreement with ATTM. ATTM also noted that it had revised its arbitration clauses to include a number of additional features that make arbitration more favorable to consumers, and that the revised version of the arbitration agreement was available to Shorts, as well as all other present and former customers. *Id.* at 5.

12. This revised arbitration provision is extraordinarily consumer-friendly. To begin with, like the prior provisions, the revised provision permits both parties to bring claims in the Magistrate Court in lieu of arbitration. Also like the prior Cingular arbitration provision, the revised provision generally requires ATTM to pay the full cost of arbitration—allowing Shorts to arbitrate for free. In addition, like the earlier provisions, the revised provision imposes no restrictions on the remedies that can be awarded by an arbitrator. In other words, an arbitrator may award punitive and statutory damages, injunctions, and attorneys' fees to the same extent as

a court. All versions of the arbitration provision also ensure that arbitration is convenient for the customer by specifying that arbitration will take place in the county of the customer's billing address. Finally, and most uniquely, as an additional inducement for customers to pursue even small claims through individual arbitration, the revised provision specifies that if the arbitrator awards the customer more than ATTM's last settlement offer, ATTM must pay the customer either the amount of the award or \$10,000, whichever is higher, plus *double* attorney's fees. Circuit Op. 6-7; *see also* Letter from Jeffrey Wakefield to the Honorable Ronald E. Wilson, June 29, 2009 (attached as Exhibit C) (2009 ATTM Arbitration Agreement).

13. On December 1, 2009, Judge Wilson entered an order denying ATTM's motion to compel arbitration. Circuit Op. 10. Judge Wilson reviewed this Court's opinion in *Dunlap* and believed himself "obligated to follow its mandates" (*id.* at 8)—which he construed as prohibiting all arbitration agreements that require individual rather than class-wide arbitration. Judge Wilson expressly noted, however, that "[i]f [he] had the right to rule upon a clean slate, this decision might be different." *Id.* Indeed, he explained that "[t]he facts in *Dunlap*, as they applied to the plaintiff in *Dunlap*, were a lot more inexcusable than the claims of wrongdoing by Shorts in this case." *Id.* at 9.

14. Judge Wilson, acting *sua sponte*, also ordered a stay of this matter until March 30, 2010, in order to permit this Court to review the matter through a petition for a writ of prohibition.

REASONS FOR GRANTING THE WRIT OF PROHIBITION

15. This Court should grant the writ of prohibition and should preclude the circuit court from refusing to enforce ATTM's motion to compel arbitration.

16. Pursuant to Article 1, Chapter 53 of the West Virginia Code and Article VIII, Section 3 of the Constitution of West Virginia, ATTM seeks a writ of prohibition because the circuit court "exceed[ed] its legitimate powers" in declining to enforce Shorts' arbitration agreement. In such cases:

[T]his Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 14-15, 483 S.E.2d 12, 14-5 (1996).

Here, all five factors favor the issuance of a writ.

17. ***Only available means of relief.*** A writ of prohibition is the only means by which ATTM may obtain the relief it desires, that is, an order compelling Shorts to arbitrate her claims. If the Court does not review the circuit court's order, ATTM will be required to litigate Shorts's claims. Because this is not a final decision, a petition for appeal will not lie. *See McGraw*, 224 W. Va. 211, 681 S.E.2d at 104.

18. ***Irreparable harm.*** The harm from the order denying the motion to compel arbitration is not correctable after an appeal from a final judgment. Arbitration is a cost-efficient alternative to litigation. The time and expense involved with a trial is the precise harm that the motion to compel arbitration seeks to avoid. These expenses cannot be recouped following a final judgment. Moreover, once the merits of Shorts's claims are adjudicated in litigation, it will be too late to compel arbitration. Indeed, it is for these reasons that Section 16 of the FAA

permits interlocutory appeals of denials of a motion to compel arbitration in federal court. *See* 9 U.S.C. § 16(a); *Humphrey v. Prudential Secs. Inc.*, 4 F.3d 313, 315-17 (4th Cir. 1993).

19. ***Clear error of law.*** As we explain further in the accompanying memorandum, the circuit court's opinion is a legally erroneous interpretation of West Virginia law, including this Court's decision in *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 567 S.E.2d 265 (2002). *Dunlap* does not invalidate *all* agreements to arbitrate on an individual basis. It instead holds only that an arbitration provision is unconscionable if it "would prohibit or substantially limit" a consumer's ability to vindicate his or her rights. Syl. Pt. 2, *Dunlap*, 211 W. Va. at 550, 567 S.E.2d at 266. For this reason, federal courts in this State consistently have construed *Dunlap* to require enforcement of agreements to arbitrate on an individual basis, so long as the agreements neither imposed undue costs on consumers nor limited the remedies that the arbitrator could award. *See Wince*, 2010 WL 392975, at *3-5; *Strawn v. AT&T Mobility, Inc.*, 593 F. Supp. 2d 894, 898-900 (S.D. W. Va. 2009); *Miller v. Equifirst Corp.*, 2006 WL 2571634, at *17 (S.D. W. Va. Sept. 5, 2006); *Schultz v. AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 691-92 (N.D. W. Va. 2005). Unlike the arbitration provision in *Dunlap*, the agreement at issue here imposes no costs on the customer and limits no remedies. Indeed, it goes beyond that by creating affirmative incentives for customers to pursue claims on an individual basis.

20. Moreover, in construing *Dunlap* to create an across-the-board rule barring provisions requiring that disputes be arbitrated on an individual basis, the circuit court ran afoul of the FAA. As the U.S. Supreme Court has stated, the FAA establishes "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive *or procedural* policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (emphasis added). The circuit court's interpretation of *Dunlap* to condition the enforcement of

arbitration provisions on the availability of class-wide arbitration—even when, as in the case of ATTM’s arbitration provision, that procedure is not necessary for customers to vindicate their claims—will cause companies to abandon arbitration entirely. The reason is that class-wide arbitration eliminates all of the benefits of individual arbitration (simplicity, speed, lower costs, and reduced adversarialness), while increasing the risks exponentially (because review is so limited). Hence, a rule banning provisions that require arbitration to proceed on an individual basis is the functional equivalent of a ban on consumer arbitration provisions. Nothing could more directly conflict with the FAA. See *Wince*, 2010 WL 392975, at *5.

21. ***Frequent recurrence.*** The enforceability of consumer arbitration agreements that require *individual rather than class arbitration* is a question that frequently recurs and thus is of great importance. See, e.g., Kathleen M. Scanlon, *Class Arbitration Waivers: The “Severability” Doctrine and Its Consequences*, 62 Disp. Resol. J. 40, 44 (2007) (the enforceability of such agreements is “an extremely important issue in the consumer and employment contexts”).² This Court’s guidance on the proper interpretation of West Virginia law is greatly needed, because in the nearly eight years since *Dunlap* was decided, many companies—including ATTM and its predecessors—have substantially revised their consumer

² Accord Alan S. Kaplinsky & Mark J. Levin, *Consensus or Conflict? Most (But Not All) Courts Enforce Express Class Action Waivers in Consumer Arbitration Agreements*, 60 Bus. Law. 775, 775 (2005) (“the enforceability of an express class action waiver in a consumer arbitration agreement” is “[o]ne of the most important arbitration questions that has yet to be definitively resolved by the U.S. Supreme Court”); F. Paul Bland, Jr. & Claire Prestel, *Challenging Class Action Bans in Mandatory Arbitration Clauses*, 10 Cardozo J. Conflict Resol. 369, 393 (2009) (describing this issue as “one of the most hotly contested issues in all of consumer and employee litigation”); Erin Holmes, *Ross v. Bank of America*, 24 Ohio St. J. Disp. Resol. 387, 387-388 (2009) (enforceability of agreements to arbitrate on an individual basis is “an important issue in consumer litigation”); Marc J. Goldstein, *The Federal Arbitration Act and Class Waivers in Consumer Contracts: Are These Waivers Unenforceable?*, 63 Disp. Resol. J. 54, 55-56 (2008) (enforceability of such agreements is “[o]ne of the most important issues facing” companies); Angela C. Zambrano & Rob Velevis, *Wavering Over Consumer Class Actions*, 27 No. 12 Banking & Fin. Servs. Pol’y Rep. 4, 4 (2008) (this issue has become “one of the most important—and controversial—issues in modern day class action litigation”).

arbitration agreements. The circuit court itself recognized both that many years have passed since *Dunlap* and that arbitration provisions like ATTM's are substantially different from the clause at issue in that case.

22. Indeed, the Court need look no further than the decisions by the federal district courts in *Wince* and *Strawn* for proof that the issue here is a recurring one. Those cases involved precisely the same arbitration provision that is at issue here—and the federal courts interpreted West Virginia law in a way that is diametrically opposed to that of the court below. See *Wince*, 2010 WL 392975, at *3-4; *Strawn*, 593 F. Supp. 2d at 900; see also *Schultz*, 376 F. Supp. 2d at 691-92 (holding that requirement that arbitration proceed on an individual basis in arbitration provision used by ATTM's predecessor, AT&T Wireless, was not unconscionable under West Virginia law). Indeed, *Wince* involved not only the exact same arbitration agreement that is at issue here, but also materially identical claims—specifically that early termination fees in cellular agreements violate the West Virginia Consumer Credit & Protection Act. Moreover, the *Wince* court was fully aware of the circuit court's decision in this case at the time it issued its decision.³ Accordingly, that decision constitutes an informed rejection of the circuit court's reading of West Virginia law. Only this Court can resolve the conflict over the proper interpretation of West Virginia law between the circuit court in this case and the federal courts in *Wince*, *Strawn*, and *Schultz*.

23. *Novel question of law.* This Court has not considered the enforceability of modern consumer arbitration provisions that (unlike the clause at issue in *Dunlap*) are designed to make arbitration inexpensive, accessible, and fair to consumers. In light of decisions like

³ ATTM brought the circuit court's decision to the district court's attention in its motion to compel arbitration, and the court requested a copy of the decision from counsel for ATTM.

Dunlap, many companies have developed new consumer arbitration agreements that offer consumers far more favorable arbitration procedures.

24. ATTM's arbitration clause is a prime example of such a consumer-friendly agreement. As noted above and explained more fully in the accompanying memorandum, the arbitration clause at issue here has a number of features that place it in stark contrast to the agreement that this Court ruled unconscionable in *Dunlap*. This Court has never considered whether such an agreement is enforceable under West Virginia law.

25. Accordingly, this Court should review the circuit court's ruling on the motion to compel arbitration through a writ of prohibition, just as it has done in a variety of other important arbitration cases. *See, e.g., Saylor*, 216 W. Va. at 772, 613 S.E.2d at 920; *Wells*, 215 W. Va. at 690, 600 S.E.2d at 587; *Dunlap*, 211 W. Va. at 555, 567 S.E.2d at 271.

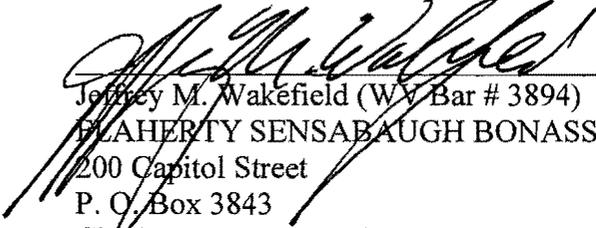
PRAYER FOR RELIEF

WHEREFORE, petitioners AT&T Mobility LLC and AT&T Mobility Corporation pray as follows:

- a. That the Petition for Writ of Prohibition be accepted for filing;
- b. That this Court issue a rule directing the Respondents to show cause, if any they can, as to why a Writ of Prohibition should not be awarded;
- c. That the case be stayed until resolution of the issues raised in this Petition;
- d. That the Court award a Writ of Prohibition against the Respondents, instructing the circuit court to compel Shorts to arbitrate her claims or pursue her claims in Magistrate Court; and
- e. That the Court award such other and further relief as the Court may deem proper.

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

Respondents.

VERIFICATION

STATE OF GEORGIA
COUNTY OF FULTON, to-wit:

Michael Cross, being first duly sworn, deposes and says that he is representative of AT&T Mobility LLC and AT&T Mobility Corporation, the Petitioners herein; that he is duly empowered and appointed to verify pleadings and other papers in actions and proceedings brought by or against AT&T Mobility LLC and AT&T Mobility Corporation; that he has read the Petition for Writ of Prohibition and that he has personal knowledge of the facts alleged therein or, to the extent he does not have personal knowledge, he believes, based upon information made known to him, the same to be true.



Michael Cross

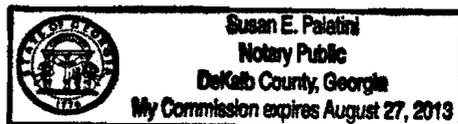
Taken, subscribed and sworn to before the undersigned Notary Public this 17th day of February, 2010.

My commission expires August 27, 2013.



Notary Public

(seal)



CERTIFICATE OF SERVICE

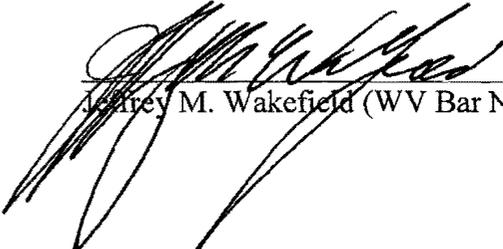
I, Jeffrey M. Wakefield, counsel for AT&T Mobility LLC and AT&T Mobility Corporation, do hereby certify that the foregoing “**Petition for Writ of Prohibition**” was served upon the following counsel of record via e-mail and by depositing true copies thereof in the United States Mail, first class, postage prepaid, this 18th day of February, 2010:

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