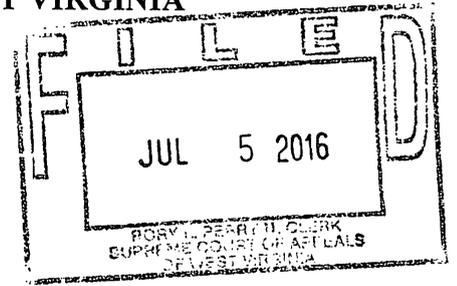


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**NO. 16-0209**



**WEST VIRGINIA CVS PHARMACY, L.L.C.,  
a West Virginia Limited Liability Company, et al.,**

**PETITIONERS,**

**v.**

**McDOWELL PHARMACY, INC.,  
a West Virginia Corporation, et al.,**

**RESPONDENTS.**

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**WEST VIRGINIA PHARMACISTS ASSOCIATION'S  
AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

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**WEST VIRGINIA PHARMACISTS ASSOCIATION**

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## TABLE OF CONTENTS

I.	STATEMENT OF INTEREST .....	1
II.	ARGUMENT .....	5
A.	STANDARD OF REVIEW .....	5
B.	THE CIRCUIT COURT CORRECTLY HELD THAT THE PRESENT DISPUTE DID NOT ARISE OUT OF THE PROVIDER AGREEMENT .....	5
1.	The Circuit Court did not err in holding that Plaintiffs' claims fell outside the scope of the arbitration clause .....	6
2.	The Circuit Court did not err in refusing to delegate the question of scope of the arbitration clause to an arbitrator .....	11
3.	The Circuit Court did not err in applying West Virginia law and disregarding Arizona law .....	14
C.	THE CIRCUIT COURT DID NOT ERR IN HOLDING THAT A VALID ARBITRATION AGREEMENT DOES NOT EXIST BETWEEN CAREMARK AND THE RESPONDENT PHARMACIES .....	14
1.	The Circuit Court did not err in holding that the arbitration agreements were procedurally and substantively unconscionable .....	15
2.	The Circuit Court made no errors in holding that the parties did not validly incorporate the arbitration clause into the Provider Agreements .....	18
III.	CONCLUSION .....	21

## TABLE OF AUTHORITIES

### Cases

<i>Bernhardt v. Polygraphic Co. of America</i> , 350 U.S. 198, 76 S.Ct. 273 (1956).....	14
<i>Brown v. Genesis Healthcare Corp.</i> , 229 W. Va. 382, 392, 729 S.E.2d 217, 227 (2012).....	15, 16, 18
<i>Burton's Pharmacy, Inc. v. CVS Caremark Corp.</i> , No. 11-2, 2015 U.S. Dist. LEXIS 122596 (M.D.N.C. 2015).....	10
<i>Caperton v. A.T. Massey Coal Co., Inc.</i> , 225 W. Va. 128, 147, 690 S.E.2d 322, 341 (2009).....	8
<i>Cotiga Development Co. v. United Fuel Gas Co.</i> , 147 W. Va. 484, 493, 128 S.E.2d 626, 633 (1962).....	11, 12
<i>Cox ex rel. Michigan v. Caremark Ex, LLC</i> , No. 08-187-CP (Mich. Cir. Ct., Ingham Cnty. Feb. 13, 2008).....	3
<i>Crawford Prof'l Drugs v. CVS Caremark Corp.</i> , 748 F.3d 249 (5th Cir. 2014) .....	10
<i>Credit Acceptance Corp. v. Front</i> , 231 W. Va. 518, 745 S.E.2d 556 (2013).....	5
<i>Drews Distributing, Inc. v. Silicon Gaming, Inc.</i> , 245 F.3d 347, 350 (4th Cir. 2001) .....	7
<i>Ewing v. Bd. of Educ. of Summers</i> , 202 W. Va. 228, 503 S.E.2d 541 (1998).....	5
<i>First Options of Chicago, Inc. v. Kaplan</i> , 514 U.S. 938, 944, 115 S.Ct. 1920, 1924 (1995).....	13
<i>Fraternal Order of Police, Lodge No. 69 v. City of Fairmont</i> , 196 W. Va. 97, 101, 468 S.E.2d 712, 716 (1996).....	13
<i>Grasso Enters v. CVS Health Corp.</i> , No. 15-427, 2015 U.S. Dist. LEXIS 145975 (W.D. Tex. Oct. 28, 2015).....	10

<i>Kvaerner ASA v. Bank of Tokyo-Mitsubishi, Ltd.</i> , 210 F.3d 262, 265 (4th Cir. 2000) .....	9
<i>Lovey v. Regence BlueShield of Idaho</i> , 139 Idaho 37, 47, 72 P.3d 877, 887 (2003).....	9
<i>Schumacher Homes of Circleville v. Spencer</i> , 2016 WL 3475631, --- S.E.2d --- (W. Va. 2016).....	12, 13
<i>State ex rel. Johnson Controls, Inc. v. Tucker</i> , 229 W. Va. 486, 493, 729 S.E.2d 808, 815 (2012).....	6, 7
<i>State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders</i> , 228 W. Va. 125, 129, 717 S.E.2d 909, 913 (2011).....	20
<i>State ex rel. U-Haul Co. of W. Va. v. Zakaib</i> , 232 W. Va. 432, 752 S.E.2d 586 (2013).....	18, 19, 20
<i>State ex rel. TD Ameritrade, Inc. v. Kaufman</i> , 225 W. Va. 250, 692 S.E.2d 293 (2010).....	13
<i>The Muecke Co. Inc. v. CVS Caremark Corp.</i> , No. 6:10-cv-00078 (S.D. Tex. Mem. Feb. 22, 2012).....	11
<i>United Steelworkers of America v. Warrior Gulf Nav. Co.</i> , 363 U.S. 574, 582, 80 S.Ct. 1347, 1354 (1960).....	6, 9
<i>Uptown Drug Company, Inc. v. CVS Caremark Corporation</i> , 962 F.Supp. 1172 (N.D. Cal. 2013) .....	7, 8, 9, 10, 12

**Statutes**

West Virginia Code § 30-5-7 .....	3, 9
West Virginia Code § 32A-1-2 .....	3, 9
West Virginia Code § 33-11-4 .....	3, 9
West Virginia Code § 33-16-3q .....	3, 9
West Virginia Code § 46A-6-102(7) .....	3, 9
West Virginia Code § 47-18-3 .....	3, 9

**Other Authorities**

6 C.J.S. Arbitration § 48 ..... 8, 9

AAA Commercial Arbitration Rule R-7(a) ..... 11, 12, 13

Christopher David Gray, The Lund Report, *Small Pharmacies Getting Squeeze from Goliath PBMs*, 2013, available at <https://www.thelundreport.org/content/small-pharmacies-getting-squeeze-goliath-pbms>. ..... 17

Joseph C. Bourne & Ellen M. Ahrens, *Healthcare’s Invisible Giants: Pharmacy Benefit Managers*, 60 Fed. Law. 50 (May 2013)..... 17

Katie H. Gamble, *Legislation Sharpens Divide Between PBMs and Pharmacies*, 2011, available at <http://www.pharmacytimes.com/news/epharmacytimespbmhr1409> ..... 17

Mark Meador, *Squeezing the Middleman: Ending the Underhanded Dealing in the Pharmacy Benefit Management Industry Through Regulation*, *Annals of Health Law* (2011)..... 3

National Community Pharmacists Association, *Stifling Pharmacy Competition for Consumers*, available at <http://www.ncpanet.org/advocacy/pbm-resources/stifling-pharmacy-competition-for-consumers> ..... 17

West Virginia House Bill 4545 (2016) ..... 4

West Virginia Senate Bill 322 (2016)..... 4

West Virginia Senate Bill 84 (2015)..... 3

## I. STATEMENT OF INTEREST

The West Virginia Pharmacists Association (“WVPA”) is a West Virginia professional organization comprised of pharmacists, pharmacy technicians, and pharmacy students.<sup>1</sup> The WVPA operates to enhance professional skills and knowledge of its members and aids in assuring the citizens of West Virginia receive appropriate and quality pharmaceutical care. The WVPA’s members serve a vital role in communities around West Virginia by ensuring access to healthcare, particularly in small towns and underserved communities.

Petitioners (Defendants-below) appeal the Circuit Court of McDowell County’s (“circuit court”) *Order Denying Defendants’ Renewed Motion to Dismiss and Compel Arbitration*. JA 0001-0026. The underlying action involves claims made by six pharmacies – McDowell Pharmacy, Inc., Johnston and Johnson, Inc., T & J Enterprises, Inc., Griffith & Feil Drug, Inc., Waterfront Family Pharmacy, LLC, and McCloud Family Pharmacy (“Respondent pharmacies”) – and six individual plaintiffs who are licensed pharmacists and affiliates of the Respondent pharmacies. JA 0003-5. Petitioners include Caremark LLC (“Caremark”) and several of its CVS affiliates: West Virginia CVS Pharmacy, LLC; CVS Caremark Corporation; CVS Pharmacy, Inc.; Caremark Rx, LLC; Dennis Canaday; Robert Taylor; Allison Dinger; and Aaron Stone (collectively referred to as “remaining Petitioners”).<sup>2</sup> JA 0003.

In 2007, CVS Corporation and Caremark Rx, Inc. merged to create CVS Caremark, an “integrated pharmacy services provider.” JA 1488. The circuit court found that Caremark offers pharmacy benefit management (“PBM”) services to insurers, third party

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<sup>1</sup> Pursuant to Rule 30(e)(5) of the West Virginia Rules of Appellate Procedure, the WVPA represents that no counsel for any party to the appeal authored this brief, in whole or in part and, further, that no counsel or party made a monetary contribution specifically intended to fund the preparation or submission of this brief. The WVPA funded the costs and expenses associated with the preparation and submission of this brief, in whole.

<sup>2</sup> The “[i]ndividually named Defendants are pharmacists-in-charge at CVS Pharmacy stores in proximity to the Plaintiff Pharmacies.” JA 0003.

administrators, business coalitions, and employer sponsors of group health plans, which include the services of administration and maintenance of pharmacy networks. JA 0003. CVS Corporation operates a retail pharmacy chain. JA 1488. The merger created an incentive for Caremark to drive its PBM clients into CVS retail pharmacies to the detriment of local, independent pharmacies throughout the State.

Caremark also included in its pharmacy network retail pharmacies with which it was not related, including the Respondent pharmacies. JA 0003. Each Respondent pharmacy entered into respective Provider Agreements with Caremark to fill prescriptions for participants in Caremark's PBM plans. *Id.* The process by which the Respondent pharmacies and Caremark arrived at the current versions of the respective Provider Agreements is convoluted. JA 0003-6. Of particular concern, Caremark asserted that the 2009 Provider Manual, which includes the arbitration clause at issue, had been incorporated by reference into each Provider Agreement. For the reasons further discussed herein, *supra*, the circuit court found that "each Plaintiff was never put on proper notice that specifically Caremark intended to form a binding contract as to arbitration through the language found in the 2009 version of the Provider Manual." JA 0019.

Petitioners do not claim arbitration is invoked by any agreement between any Respondent pharmacy and any of the remaining Petitioners. Rather, Petitioners solely rely on the arbitration clause in the Provider Agreements between the Respondent pharmacies and Caremark. *See Petitioner's Brief*, at 1.

Petitioners further assert that each of the claims in the complaint must be resolved through arbitration in accordance with the arbitration clause contained in the 2009 Provider Manual because the claims arise out of the Caremark Provider Agreement and the 2009 Provider Manual. However, careful examination of the complaint reveals that the allegations asserted

against the Petitioners do not involve or arise out of any agreement between the parties. In contrast to Petitioners' assertions, the Respondent pharmacies alleged tort claims are based solely on alleged statutory violations of West Virginia Code §§ 30-5-7, 33-16-3q, 46A-6-102(7), 32A-1-2, 33-11-4, and 47-18-3. JA 1408-51.

Amicus Curiae WVPA is concerned with the deceptive and anticompetitive conduct of pharmacy benefit managers ("PBMs"). Although in theory, PBMs can lower the cost of drugs, because of the lack of competition and transparency, PBMs have caused significant harm to consumers, which was most prominently on display in recent cases brought by a coalition of over 28 state attorney generals against each of the three major PBMs – Express Scripts, Medco, and CVS Caremark – for fraud, misrepresentation, kickback schemes, and failures to meet ethical and safety standards, resulting in over \$370 million in damages. Mark Meador, *Squeezing the Middleman: Ending the Underhanded Dealing in the Pharmacy Benefit Management Industry Through Regulation*, *Annals of Health Law* (2011); *see e.g., Cox ex rel. Michigan v. Caremark Ex, LLC*, No. 08-187-CP (Mich. Cir. Ct., Ingham Cnty. Feb. 13, 2008) (representative of cases filed by 28 states and the District of Columbia alleging illegal drug switching practices in violation of the states' consumer protection acts). The suits followed an investigation that began in 2004, stemming from accusations that PBMs were engaging in deceptive trade practices by encouraging doctors to switch parties to preferred drugs and by concealing and retaining profits from these switches. The concerns have also been recognized by legislation proposed during the 2015 and 2016 sessions to increase regulation of pharmacy benefit managers which was strongly supported by the WVPA. West Virginia Senate Bill 84 (2015) (redefining "third-party administrator" to include pharmacy benefits managers); West

Virginia House Bill 4545 (2016) (relating to the regulation of pharmacy benefit managers); and West Virginia Senate Bill 322 (2016) (regulating pharmacy benefits managers).

This case raises issues directly relevant to retail pharmacies throughout West Virginia. Because an estimated 95% of Americans with prescription drug coverage receive benefits through a private or employer-sponsored pharmacy benefit plan administered by a PBM, independent retail pharmacies are compelled to join PBM networks to remain economically viable. *PBM Fiduciary Duty and Transparency*, available at <http://www.amcp.org/WorkArea/DownloadAsset.aspx?id=12062> (last visited June 28, 2016). In fact, the overwhelming majority of the 203 independent retail pharmacists located in West Virginia currently have agreements with a PBM, and most have entered into Provider Agreements with Caremark.

Respondents have asserted that the Petitioners have engaged in fraud and tortious interference by violating numerous West Virginia Code provisions. If true, these violations would have caused and would continue to cause significant financial harm to all West Virginia retail pharmacies operating within the same market area as a CVS pharmacy. Additionally, independent retail pharmacies which have entered into a Provider Agreement with Caremark are especially susceptible to harm that a reversal would cause, as they would potentially be forced to arbitrate any dispute with Caremark – including disputes caused by tortious actions of Caremark – in Scottsdale, Arizona. It is unfathomable that any rural, independent retail pharmacy, engaged in serving the communities of West Virginia, could afford to arbitrate a claim against Caremark by traveling across the country to do so.

Moreover, the Provider Agreement at issue – and similarly worded Provider Agreements which a high number of pharmacies are parties to – contain arbitration clauses that are unconscionable. These arbitration clauses were not subject to negotiation between the

parties. Instead, they were imposed on pharmacies inexperienced in negotiating or drafting contracts and lacking any bargaining power. As such, the clauses were unilaterally amendable at the PBM's sole discretion. Furthermore, the contracts included only a brief mention of the Provider Manual, a separate document that contained the arbitration clause. Therefore, out of concern for the needed protection of the independent retail pharmacies throughout the State, the WVPA submits this brief urging this Court to affirm the circuit court's order denying arbitration in this matter.<sup>3</sup>

For these reasons, WVPA files this brief in support of the Respondent pharmacies.

## II. ARGUMENT

### A. STANDARD OF REVIEW

Under West Virginia law, “[a]n order denying a motion to compel is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine.” Syl. Pt. 1, *Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 745 S.E.2d 556 (2013). “When a party . . . assigns as error a circuit court’s denial of a motion to dismiss, the circuit court’s disposition of the motion to dismiss will be reviewed *de novo*.” Syl. Pt. 4, *Ewing v. Bd. of Educ. of Summers*, 202 W. Va. 228, 503 S.E.2d 541 (1998).

### B. THE CIRCUIT COURT CORRECTLY HELD THAT THE PRESENT DISPUTE DID NOT ARISE OUT OF THE PROVIDER AGREEMENT

The circuit court held that the “claims in Plaintiffs’ complaint are predominantly tort-based claims unrelated to any of the Provider Agreements or reimbursements between the Plaintiffs and Caremark.” JA 0013 (emphasis added). The circuit court further held that because

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<sup>3</sup> Rule 30(e)(4) of the West Virginia Rules of Appellate Procedure requires the Amicus to state “the source of its authority to file.” Filed contemporaneously with this brief, the WVPA filed a Motion for Leave, which if granted, will serve as its authority to file.

these claims “are not directly related to the Provider Agreements/Provider Manuals governing the relationship and reimbursements between Plaintiffs and Caremark[,]” both “the choice of law clause is inapplicable . . . and the arbitration clause would not be at issue in said case.” The circuit court correctly gave no credence to an arbitration clause contained in a contract that is wholly unrelated to the allegations in the complaint, and this Court should affirm that holding.

**1. The Circuit Court did not err in holding that Plaintiffs’ claims fell outside the scope of the arbitration clause.**

As noted, each Respondent pharmacy entered into a respective Provider Agreement with Caremark, which incorporated by reference the 2009 Provider Manual containing the following provision: “[a]ny and all disputes in connection with or arising out of the Provider Agreement by the parties will be exclusively settled by arbitration before a single arbitrator in accordance with the Rules of the American Arbitration Association . . . .” JA 0425 (emphasis added). As the clause indicates, parties will not be subject to arbitration for claims not connected with or not arising out of the Provider Agreement.

As is well-settled, “arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *United Steelworkers of America v. Warrior Gulf Nav. Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 1354 (1960). This Court has confirmed that arbitration clauses are subject to the “normal rules of contract interpretation.” *State ex rel. Johnson Controls, Inc. v. Tucker*, 229 W. Va. 486, 493, 729 S.E.2d 808, 815 (2012) (affirming the “fundamental principle that arbitration is a matter of contract”). Further noted, the Federal Arbitration Act “has no talismanic effect; it does not elevate arbitration clauses to a level of importance above all other contract terms.” *Id.* Moreover, “[t]here is no federal policy favoring arbitration under a certain set of rules; the federal policy is simply to ensure the enforceability, according to their terms, of private

agreements to arbitrate.” *Id.*; see also, *Drews Distributing, Inc. v. Silicon Gaming, Inc.*, 245 F.3d 347, 350 (4th Cir. 2001) (restricting the reach of the arbitration clause to those causes of action brought under the contract when “the parties draft a clause so restrictive in scope.”)

The United States District Court for the Northern District of California addressed the precise issue facing this Court. In *Uptown Drug Company, Inc. v. CVS Caremark Corporation*, the Northern District of California analyzed an arbitration clause identical to the clause in the present case.<sup>4</sup> *Uptown Drug Company, Inc. v. CVS Caremark Corporation*, 962 F.Supp. 1172 (N.D. Cal. 2013). In that case, Uptown Drug Company, Inc. (“Uptown”) had asserted the following: (1) violations of the California Uniform Trade Secrets Act; (2) violations of the California Unfair Competition Law; (3) interference with prospective economic advantage; and (4) violations of the unfair prong of the Unfair Competition Law. *Id.* at 1176. The first three claims centered on Caremark’s alleged disclosure of confidential customer information. *Id.*

In determining whether the dispute was “in connection with or [arose] out of the Provider Agreement[,]” the District Court examined whether the particular claims were “founded and intertwined with the Caremark Provider Agreement.” *Id.* at 1184. The court found that three<sup>5</sup> out of four claims were “predicated on Defendants’ alleged misappropriation of the customer information that Uptown disclosed Caremark by virtue of Uptown’s inclusion in Caremark’s PBM networks[,]” which is, “in turn, . . . governed by the Caremark Provider Agreement.” *Id.* In further support that these three claims arose out of the Provider Agreement,

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<sup>4</sup> The *Uptown* case involved the 2011 version of Caremark’s Provider Manual instead of the 2009 version. The language from the arbitration clause contained in the 2011 Provider Manual quoted by the District Court mirrors the pertinent language in the 2009 version.

<sup>5</sup> The three claims relating to misappropriation of customer information were: (1) violations of the California Uniform Trade Secrets Act; (2) violations of the California Unfair Competition Law; and (3) interference with prospective economic advantage.

the court stated that “the terms of the Caremark Provider Agreement expressly addresses the use, dissemination, and ownership of the customer information that Defendants allegedly misappropriated.” *Id.* (emphasis added). Most compelling, the court stated that “the dependent relationship between Uptown’s misappropriation claims and the Provider Agreement is evident from the simple fact that, absent the Provider Agreement, Uptown would have no claims against Defendants with respect to the customer information at issue. . . .” *Id.* at 1185-86.

In contrast, the *Uptown* court held that the claim for violations of the unfair prong of the Unfair Competition Law was “not founded or intimately intertwined with the Caremark Provider Agreement.” *Id.* at 1186. Unlike the other claims, this claim was premised on Defendants’ alleged exclusion of Uptown from certain Maintenance Choice networks that Caremark’s PBM branch established with third-party insurers and plan sponsors. *Id.* The court reasoned that “[b]ecause [no provision created] any rights or duties with respect to the Maintenance Choice networks, the Court cannot conclude that Uptown’s claim has any significant foundation . . . in the Agreement as a whole.” *Id.* Consequently, the claim “does not touch on matters covered by the Provider Agreement and therefore falls outside of the arbitration clause.” *Id.*

West Virginia law has defined “arise out of” to be limited in scope. When interpreting a forum-selection clause, this Court stated that “[w]e do not understand the words ‘arise out of’ as encompassing all claims that have some possible relationship with the contract.” *Caperton v. A.T. Massey Coal Co., Inc.*, 225 W. Va. 128, 147, 690 S.E.2d 322, 341 (2009); *see also*, 6 C.J.S. Arbitration § 48 (stating “[f]or a tort claim to be considered as arising out of or relating to a contract, it must raise some issue that requires reference to or the construction of some portion of the contract”); *Lovey v. Regence BlueShield of Idaho*, 139 Idaho 37, 47, 72 P.3d

877, 887 (2003) (explaining that “the dispute is not one arising out of the contract if the duty alleged to be breached is one imposed by law in recognition of public policy and is generally owed to others besides the contracting parties”).

Here, the Respondent pharmacies “cannot be required to submit to arbitration any dispute” which does not arise out of the Provider Agreement because they have not agreed to arbitrate matters exceeding that scope. *United Steelworkers*, 363 U.S. at 582. As in *Uptown*, the allegations in the present matter are not connected with and do not arise out of any agreement between the parties; the claims arise out of Respondents’ alleged violations of West Virginia law. Most compelling, Respondents would still have claims against the Petitioners even “absent the Provider Agreement.” *See supra, Uptown*, 962 F.Supp. at 1185-86.

The Respondent pharmacies alleged tort claims based on alleged statutory violations of West Virginia Code §§ 30-5-7, 33-16-3q, 46A-6-102(7), 32A-1-2, 33-11-4, and 47-18-3. JA 1408-51. As a basis for their claims, Respondents alleged that the Petitioners “engaged in a design and scheme to force business to defendants’ pharmacies” by unlawfully coercing customers of the Respondent pharmacies into purchasing their drugs exclusively from “CVS and defendants’ own pharmacy and drug stores or retail pharmacies[,]” which Respondents allege violate the above-listed statutes. JA 1408-51. These claims exist extrinsic to the contractual relationships between the parties. These statutory duties are “generally owed to others besides the contracting parties.” *See, supra, Lovey*, 72 P.3d at 887. Moreover, they neither involve any rights or remedies that exist under the Provider Agreement, nor do these claims “raise some issue that requires reference to or the construction of some portion of the contract.” *See e.g., Kvaerner ASA v. Bank of Tokyo-Mitsubishi, Ltd.*, 210 F.3d 262, 265 (4th Cir. 2000); 6 C.J.S. Arbitration § 48.

In contrast to the present claims, the *Uptown* court held that the allegations of trade secret misappropriation and intentional interference with business relations against the CVS defendants directly related to the Provider Agreement because the contract expressly addressed the use, dissemination, and ownership of the customer information that Defendants allegedly misappropriated. *See supra, Uptown*, 962 F.Supp. at 1184. Importantly, unlike the causes of action alleged in the underlying matter, the *Uptown* plaintiffs had alleged that the CVS defendants unlawfully misappropriated patient prescription information that was confidentially disclosed by the plaintiffs as part of their provider agreements.

Similarly, the cases cited by Petitioners involving claims brought against CVS in other jurisdictions are factually inapposite. JA 1269-1405. For example, the plaintiffs in *Crawford Professional Drugs v. CVS Caremark Corp.* alleged that “Defendants collect[ed] proprietary patient information from local pharmacies participating in Defendants’ networks and use[d] that information for the financial benefit of CVS pharmacies.” JA 1270; *Crawford Prof’l Drugs v. CVS Caremark Corp.*, 748 F.3d 249 (5th Cir. 2014). In its analysis, the Fifth Circuit cited language from the contract that governed the “use, reproduce[tion], and adapt[at]ion [of] information or data obtained from Provider.” JA 1306. Accordingly, the Court held that “Plaintiffs’ claims are ‘in connection with’ the provider Agreements and Provider Manual.” JA 1307.

The remaining cases involving claims brought against CVS in other jurisdictions contain substantially the same allegations and analysis as *Crawford*. *See e.g., Grasso Enters v. CVS Health Corp.*, No. 15-427, 2015 U.S. Dist. LEXIS 145975 (W.D. Tex. Oct. 28, 2015); *Burton’s Pharmacy, Inc. v. CVS Caremark Corp.*, No. 11-2, 2015 U.S. Dist. LEXIS 122596 (M.D.N.C. 2015); *The Muecke Co. Inc. v. CVS Caremark Corp.*, No. 6:10-cv-00078 (S.D. Tex.

Mem. Feb. 22, 2012). Each of those cases involves allegations pertaining to the misappropriation of information that was confidentially disclosed by the Respondent pharmacies as part of their Provider Agreements, and thus, the disputes “arose out of” the Provider Agreements.

However, because the allegations in the present matter are “not founded or intimately intertwined with the Caremark Provider Agreement” – that is, they would exist even in the absence of the Provider Agreement – the WVPA urges this Court to affirm the circuit court’s order.

**2. The Circuit Court did not err in refusing to delegate the question of scope of the arbitration clause to an arbitrator.**

While the circuit court properly declined to delegate the question of scope of the arbitration clause to an arbitrator, Petitioners assert that it erred in doing so by “failing to give effect to the parties’ incorporation of the AAA Commercial Rules” which provide: “The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement. . . .” *See Petitioner’s Brief*, at 26 (quoting AAA Commercial Arbitration Rule R-7(a), available at <http://www.adr.org/aaa/faces/rules>). Petitioners’ arguments fail because the plain and unambiguous language of the agreement provides that the AAA Commercial Rules only apply in disputes in connection with or arising from the Provider Agreement.

“It is not the right or province of the court to alter, pervert or destroy the clear meaning and intent of the parties as plainly expressed in their written contract or to make a new and different contract for them.” *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 493, 128 S.E.2d 626, 633 (1962). As explained above, under the plain language of the Provider Agreement, the arbitration clause only applies to “disputes in connection with or arising

out of the Provider Agreement.” JA 0425. The parties plainly expressed their intention that only in those instances will the dispute “be exclusively settled by arbitration before a single arbitrator in accordance with the Rules of the American Arbitration Association.” *Id.* Because the claims in the complaint do not constitute a dispute “in connection with or arising out of” the Provider Agreement (*see* Argument (B)(1)), the Rules of the AAA are not to be utilized and do not govern. JA 0425. Thus, Rule R-7(a) does not apply to the claims in the case at hand. *See supra, Uptown*, 962 F.Supp. 1172 (analyzing precisely the same language in the 2011 Caremark Provider Agreement and refusing to apply the arbitration provision to the claims unrelated to the Provider Agreement). In arguing otherwise, Petitioners are putting the cart before the horse.

Notably, this Court’s recent decision in *Schumacher Homes of Circleville v. Spencer*, 2016 WL 3475631, --- S.E.2d --- (W. Va. 2016) does not change the above analysis. *Schumacher* involved an arbitration agreement between a home buyer and home builder containing a delegation provision which stated that “[t]he arbitrator shall determine all issues regarding the arbitrability of the dispute.” *Id.* at \*10. In such cases, when the parties “clearly and unmistakably . . . give to the arbitrator the power to decide the validity, revocability or enforceability of the arbitration agreement[,]” a trial court “is precluded from deciding a party’s challenge to the arbitration agreement.” *Id.* at \*9-10. In reversing the circuit court’s order denying arbitration, the *Schumacher* Court determined that the language in the arbitration provision “clearly and unmistakably” delegated the question of arbitrability to the arbitrator. *Id.* Importantly, the disputes subject to the arbitrator’s determination in *Schumacher* were not limited to those “in connection with or arising out of” the agreement between the parties, unlike in the case at hand.

Here, the clear and unmistakable evidence demands the opposite result as *Schumacher* – the parties have not agreed to a broad “delegation” provision. As the *Schumacher* court stated, “arbitration is purely a matter of contract” and “[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clea[r] and unmistakabl[e]’ evidence that they did so.” *Id.* at \*9 (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 1924 (1995)). As shown, the Respondent pharmacies and Caremark agreed that Rule R-7(a) applies only if the dispute is “in connection with or arises out of” the Provider Agreement. Therefore, because the provision lacks a clear and unmistakable intent to have an arbitrator decide the question of arbitrability – and indeed, indicates the opposite intent – “the trial court is [to determine] the threshold issue[] of . . . whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement.” Syl. Pt. 3, *Schumacher Homes of Circleville v. Spencer*, 2016 WL 3475631, --- S.E.2d --- (W. Va. 2016) (quoting Syl. Pt. 2, *State ex. rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 692 S.E.2d 293 (2010)).

Further, the Court should restrict its analysis to the language contained in the contract. Whether Caremark *intended* a clear and unmistakable delegation provision is irrelevant, as the plain and unambiguous language must be applied. *Fraternal Order of Police, Lodge No. 69 v. City of Fairmont*, 196 W. Va. 97, 101, 468 S.E.2d 712, 716 (1996) (“If language in a contract is found to be plain and unambiguous, such language should be applied according to such meaning.”) Moreover, to the extent that the Petitioners argue either a different interpretation or the ambiguity of the arbitration clause, any such arguments illuminate the lack of “clear and unmistakable” evidence that the parties intended to have an arbitrator decide arbitrability.

For these reasons, the circuit court properly decided the threshold issue that “claims averred by the plaintiff [do not] fall within the substantive scope of that arbitration agreement” contained within the Provider Agreements. Caremark should not be permitted to compel arbitration – even on threshold issues – in matters unrelated to the Provider Agreement.

**3. The Circuit Court did not err in applying West Virginia law and disregarding Arizona law.**

As the Petitioners indicate, the Provider Agreement contains a choice-of-law provision which states that the agreements are to be “construed, governed and enforced in accordance with the laws of the State of Arizona.” As stated above, the present dispute does not involve the Provider Agreement; rather, the Respondent pharmacies have asserted tort claims which exist extrinsic to the parties’ relationship under the Provider Agreements. The analysis need not be repeated here, and thus, the Amicus incorporates by reference, as if fully set forth herein Argument (B)(1), showing that the pharmacies’ claims are not connected with or arising from the Provider Agreements. This dispute does not concern the construction, governance, or enforcement of the Provider Agreement, and thus, the choice-of-law provision is inapplicable. *See also, Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 76 S.Ct. 273 (1956) (resolving the question of arbitrability without any reference the choice-of-law clause).

**C. THE CIRCUIT COURT DID NOT ERR IN HOLDING THAT A VALID ARBITRATION AGREEMENT DOES NOT EXIST BETWEEN CAREMARK AND THE RESPONDENT PHARMACIES**

The circuit court enumerated several bases for holding that a valid arbitration agreement does not exist between Caremark and the Respondent pharmacies. Addressed here, it correctly found that: (1) the arbitration provision is both procedurally and substantively unconscionable, and therefore, unenforceable; and (2) the arbitration clause contained within the Provider Manual was not properly incorporated by reference in the Provider Agreements.

**1. The Circuit Court did not err in holding that the arbitration agreements were procedurally and substantively unconscionable.**

“If a court, as a matter of law, finds a contract or any clause of a contract to be unconscionable, the court may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable clause, or limit the application of any unconscionable clause to avoid any unconscionable result.” *Brown v. Genesis Healthcare Corp.*, 229 W. Va. 382, 392, 729 S.E.2d 217, 227 (2012). Here, the circuit court correctly held that the arbitration clause was unconscionable, while enforcing the remainder of the contract to avoid the unconscionable result of imposing the unfair burden of an arbitration in Arizona onto rural, independent West Virginia pharmacies.

Under West Virginia law, courts “analyze unconscionability in terms of two component parts: procedural unconscionability and substantive unconscionability.” *Id.* Because both components “need not be present to the same degree,” courts should apply a “sliding scale in making this determination: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa.” *Id.*

First, procedural unconscionability should be analyzed as follows:

Procedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract. Procedural unconscionability involves a variety of inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties, considering all the circumstances surrounding the transaction. These inadequacies include, but are not limited to, the age, literacy, or lack of sophistication of a party; hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner and setting in which the contract was formed, including whether each party had a reasonable opportunity to understand the terms of the contract.

*Id.*

The circuit court's finding of procedural unconscionability should not be disturbed. Specifically, the court found that there was a "lack of meeting of the minds." JA 0025. Plaintiffs McDowell, McCloud, and Waterfront initially entered into Provider Agreements that incorporated the 2004 Caremark Provider Manual, and these parties "did not even have to sign new Provider Agreements when the Provider Manual was modified in 2007 and 2009." JA 0018. The circuit court found no mutual assent "as to the acceptance of the modifications/arbitration provision made in the newer versions of the Provider Manual." *Id.* In addition, the circuit court correctly found that "[h]aving an arbitration clause in a distinctly separate and lengthy document and not having to agree specifically to the terms of the arbitration provision, there was no mutual assent among the parties." *Id.* For Respondents T&J, Johnston & Johnston, and Griffith and Feil, the lack of mutual assent is even more compelling, as "there are no direct agreements signed between them and Caremark." *Id.*

Moreover, the unfairness in the bargaining process further evinces substantial procedural unconscionability. As set forth in the affidavits by T&J Enterprises, Johnston & Johnston, and Patricia Johnston, small independent retail pharmacies rely upon contracts with PBMs, such as Caremark, to compete and avoid closure. JA 1768. Because an estimated 95% of Americans with prescription drug coverage receive benefits through a private or employer-sponsored pharmacy benefit plan administered by a PBM, independent retail pharmacies are compelled to join PBM networks to remain economically viable. The Provider Agreement was not negotiated, and the pharmacies "had no reasonable opportunity to understand the terms of the agreement[s]." *Id.* The affiants indicated that they "did not understand that legal rights were being given away by signing the agreement." As the circuit court found, the "agreement and manual seemed lengthy and complex." JA 0026.

Petitioners have massive operations compared to the Respondent pharmacies, which evince the pharmacies' lack of bargaining power. Petitioners have agreements with 26,000 to 28,000 independent pharmacies in the United States, and they manage approximately 8,000 CVS pharmacies. JA 1478. PBMs like Caremark manage two-thirds of all prescriptions in the United States with annual revenues in the tens of billions. Joseph C. Bourne & Ellen M. Ahrens, *Healthcare's Invisible Giants: Pharmacy Benefit Managers*, 60 Fed. Law. 50 (May 2013). In contrast, the Respondent independent pharmacies direct their efforts locally, earning relatively modest revenues.

As further evidence of the disparity in bargaining power, during an Oregon Senate Health Committee hearing in 2013, representatives from CVS and Express Scripts testified that each organization had about 100 million customers. Christopher David Gray, *The Lund Report, Small Pharmacies Getting Squeeze from Goliath PBMs*, 2013, available at <https://www.thelundreport.org/content/small-pharmacies-getting-squeeze-goliath-pbms>. The Lund Report observed that the two companies control the majority of the prescription drug market, "towering over little pharmacies . . . that have no choice but to accept their terms." *Id.* In the absence of protection for independent pharmacies, "the playing field is woefully unbalanced." Katie H. Gamble, *Legislation Sharpens Divide Between PBMs and Pharmacies*, 2011, available at <http://www.pharmacytimes.com/news/eparmacytimespbmhr1409>. As a further consequence, "the uneven playing field shortchanges local pharmacists and denies patients and health plans the benefit of true pharmacy competition." National Community Pharmacists Association, *Stifling Pharmacy Competition for Consumers*, available at <http://www.ncpanet.org/advocacy/pbm-resources/stifling-pharmacy-competition-for-consumers>.

The arbitration clause is also substantively unconscionable. In West Virginia, “[s]ubstantive unconscionability involves unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party.” *Brown*, 229 W. Va. at 393. Here, the arbitration clause one-sidedly benefits the Petitioners by purporting to mandate arbitration in Scottsdale, Arizona, a significant distance from the locations of the Respondent pharmacies, which would place a substantial financial burden on the pharmacies each time a dispute arose. As the circuit court noted, Plaintiffs would be compelled to bear: (1) the costs in filing the cases for arbitration; (2) travel expenses for the parties and their attorneys; (3) potential cost of hiring local counsel in Arizona; (4) the burden of making witnesses available in Arizona; and (5) mediation expenses prior to arbitration. JA 0026. The one-sided arbitration clause has a significant deterrent effect on potential claims of independent pharmacies. It is unreasonable to believe that the Respondent pharmacies – or other similarly situated pharmacies around the State – could bear these costs, thus causing a high likelihood that pharmacies may be left without an avenue to redress disputes against Caremark.

To avoid an unconscionable result, the circuit court correctly held that the arbitration clause was procedurally and substantively unconscionable, while “enforce[ing] the remainder of the contract without the unconscionable clause.”

**2. The Circuit Court made no errors in holding that the parties did not validly incorporate the arbitration clause into the Provider Agreements.**

Central to the circuit court’s invalidation of the arbitration agreement, it concluded that the arbitration clause was not properly incorporated into the respective Provider Agreements, finding that the purported incorporation failed to meet the three-part test articulated in *State ex rel. U-Haul Co. of W. Va. v. Zakaib*, 232 W. Va. 432, 752 S.E.2d 586 (2013) (“*U-Haul*”).

In *U-Haul*, after examining an arbitration clause contained within a “separate writing,” this Court held that “a general reference in one writing to another document is not sufficient to incorporate that other document into a final agreement.” *Id.* at 444. Rather:

[t]o uphold the validity of terms in a document incorporated by reference, (1) the writing must make a clear reference to the other document so that the parties’ assent to the reference is unmistakable; (2) the writing must describe the other document in such terms that its identity may be ascertained beyond doubt; and (3) it must be certain that the parties to the agreement had knowledge of and assented to the incorporated document so that the incorporation will not result in surprise or hardship.

*Id.*

Regarding the first element, based on the affidavits submitted by the Respondent pharmacies, the parties “were not aware of all the terms that bound them in the Provider Manual including the arbitration clause.” JA 0019-20. Moreover, the Provider Agreements, signed by some of the Respondent pharmacies, did not directly mention the arbitration clause or critical language from the arbitration clause, which would “be necessary for all Plaintiffs to comprehend prior to entering into an [arbitration] agreement with Caremark.” JA 0020. The “clear reference” requirement is not met.

Moreover, while “some of the Plaintiffs may have had knowledge of the incorporated document entitled ‘Provider Manual,’ these Plaintiffs were not made aware of the ramifications of the of the arbitration clause.” *Id.* Accordingly, it is not “certain that the parties to the agreement had knowledge of and assented to the incorporated document,” particularly the arbitration clause. In contrast, according to affidavits, the “agreement and documents/manuals referred to in the agreement were lengthy and appeared to be complex in nature.” JA 1768. The pharmacies “had no opportunity to understand the terms of the agreement[s].” *Id.*

Fundamental to the *U-Haul* holding, this Court stated that a “brief mention of the other document simply is not a sufficient reference to the [contract] to fulfill the proper standard.” *U-Haul*, 232 W. Va. at 444. In this case, like in the *U-Haul* case, the “brief mention” of the Provider Manual, in conjunction with the absence of any reference to arbitration, is not sufficient to incorporate the arbitration clause into the Provider Agreement. As the circuit court found, “using the terminology ‘Provider Manual’ several times in [the] Provider Agreements without any further description as to the contents of the Provider Manual is consistent with *U-Haul*’s ‘brief mention’” analysis.

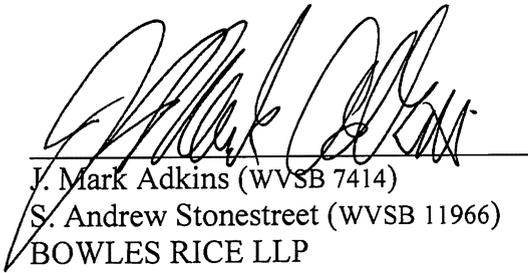
In rebutting the notion that “courts of this State are . . . hostile to arbitration or to adhesion contracts[,]” this Court explained that, in reality, West Virginia courts “are hostile toward contracts of adhesion that are unconscionable and rely upon arbitration as an artifice to defraud a weaker party of rights clearly provided by the common law or statute.” *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 228 W. Va. 125, 129, 717 S.E.2d 909, 913 (2011). Here, by affirming the circuit court’s order, this Court would prevent Caremark’s attempted reliance upon arbitration as an artifice to defraud the Respondent pharmacies, thus protecting all independent retail pharmacies across this State.

### III. CONCLUSION

For all of these reasons, WVPA asks this Court to affirm the Circuit Court's *Order Denying Defendants' Renewed Motion to Dismiss and Compel Arbitration*.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 16-0209

**WEST VIRGINIA CVS PHARMACY, L.L.C.,  
a West Virginia Limited Liability Company, et al.,**

**PETITIONERS,**

**v.**

**McDOWELL PHARMACY, INC.,  
a West Virginia Corporation, et al.,**

**RESPONDENTS.**

**CERTIFICATE OF SERVICE**

I, J. Mark Adkins, hereby certify that on the 5th day of July 2016, copies of the foregoing **West Virginia Pharmacists Association's Motion for Leave to File Brief as Amicus Curiae in Support of Respondents** were served upon the following by placing the same in the regular United States Mail, postage prepaid:

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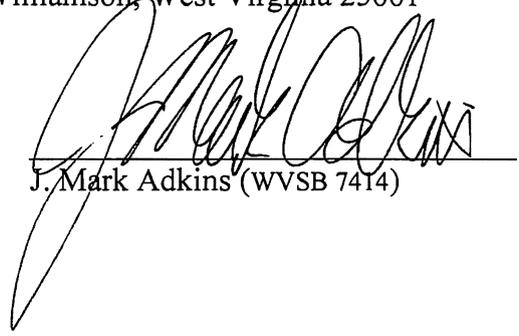
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A handwritten signature in black ink, appearing to read 'J. Mark Adkins', is written over a horizontal line. The signature is stylized and cursive.

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