NO. 14-2126

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

PHILIP MCFARLAND,

Plaintiff/Appellant,

v.

WELLS FARGO BANK, N.A., and
U.S. BANK NATIONAL ASSOCIATION

Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF APPELLEES ON BEHALF OF THE WEST VIRGINIA BANKERS ASSOCIATION, INC., AND THE COMMUNITY BANKERS OF WEST VIRGINIA, INC.

Stuart McMillan
Floyd E. Boone Jr.
Sandra M. Murphy
James Scott
Bowles Rice LLP
600 Quarrier Street
Charleston, WV 25301
304-347-1100
Counsel for Amici

Pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, the West Virginia Bankers Association, Inc. ("WVBA"), and the Community Bankers of West Virginia, Inc. ("CBWV") (collectively, the "Associations"), respectfully move this Court for leave to file the accompanying proposed *amici curiae* brief. In support of their motion, the Associations state as follows:

The Associations represent the interests of approximately 80 federally-insured financial institutions in West Virginia. The Associations are generally comprised of financial institutions headquartered within the State of West Virginia, and most of their members' business comes from West Virginia residents.

All the members of the WVBA and the CBWV engage in the business of making loans, which make them subject to the West Virginia Consumer Credit and Protection Act ("WVCCPA"). Accordingly, this Court's rulings on the matters at issue in the above-captioned appeal will significantly impact the business practices and expenses of the Associations' members.

The WVBA and the CBWV believe that their perspectives will be of assistance in the resolution of the matters before this Court. The Associations will refute Appellant Phillip McFarland's principal assertion, to wit: that an unconscionability claim under West Virginia Code § 46A-2-121(1)(a) does not require a finding of substantive unconscionability.

Accordingly, the Associations' position with respect to the doctrine of unconscionability is highly relevant and will aid in this Court's decisional process.

Local Rule 27(a) Statement

The undersigned consulted with all counsel as to their position on whether they consent to, or oppose, the relief requested in the present motion. Counsel for the Defendants-Appellees consents to the granting of this motion. Counsel for the Plaintiff-Appellant neither consents to, nor opposes, the granting of this motion.

Respectfully submitted,

/s/ James E. Scott
Stuart McMillan
Floyd E. Boone Jr.
Sandra M. Murphy
James Scott
BOWLES RICE LLP
600 Quarrier Street
Charleston, West Virginia 25301
(304) 347-1100
Counsel for Amici

CERTIFICATE OF SERVICE

I certify that on March 31, 2015, the foregoing document was served upon all parties or their counsel of record through CM/ECF system if they are registered users or, if they are not, by serving a true copy at the addresses listed below:

/s/ James E. Scott

Date: March 31, 2015

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304-347-1100
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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

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Pursuant to FRAP 26.1 and Local Rule 26.1,

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(name of party/amicus)

_____

who is _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: _____ Date: _____

Counsel for: _____

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I certify that on _____ the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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(name of party/amicus)

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1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

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3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
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Signature: _____ Date: _____

Counsel for: _____

CERTIFICATE OF SERVICE

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I certify that on _____ the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

_____ _____
(signature) (date)

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I. Statement of Interest

The West Virginia Bankers Association, Inc. ("WVBA") and the Community Bankers of West Virginia, Inc. ("CBWV") (collectively the "Associations") each represent the interests of approximately 80 federally-insured financial institutions in West Virginia. The Associations are generally comprised of financial institutions headquartered in West Virginia, and most of the Associations' members' business comes from West Virginia residents.

All the members of the WVBA and the CBWV engage in the business of making loans to consumers, which make them subject to the West Virginia Consumer Credit and Protection Act ("WVCCPA"). Accordingly, this Court's rulings on the matters before it will significantly impact the business practices and expenses of the Associations' members. The members of the WVBA and the CBWV have a vital interest in the issues presented on appeal, and accordingly, they wish to identify important precedent of the West Virginia Supreme Court of Appeals and important policy concerns. The WVBA and the CBWV believe their perspectives will assist in the resolution of the matters before the Court.[1]

[1] All costs of filing this brief have been paid by the WVBA and the CBWV and no other party to this proceeding made a monetary contribution to fund the preparation or submission of this Brief *Amici Curiae.* Neither Appellees nor counsel for Appellees authored this brief.

Although the WVBA and the CBWV support all of the arguments made by the Appellees, they will address only one of the four issues raised by Plaintiff-Appellant Philip McFarland. In that regard, the *Amici* urge this Court to answer "no" to Appellant's first Stated Issue:

> Did the district court err by holding as a matter of law that it was not required to consider evidence of procedural unconscionability when deciding whether a contract is unconscionable pursuant to section 46A-2-121 of the West Virginia Code, in light of West Virginia law stating that summary judgment must be denied if evidence is presented that "the bargaining power was grossly unequal" or that the contract was "induced by unconscionable conduct"? *See* W. Va. Code §§ 46A-2-121(1)(a), (2), Syl. Pt. 4, *Herrod v. First Republic Mortg. Corp., Inc.*, 625 S.E.2d 373 (W. Va. 2005).

[App. Br. Doc. 21 at 11.][2] Although it is not entirely clear from Appellant's Statement of the Issue, he argues that under W. Va. Code § 46A-2-121(1)(a), a court may refuse to enforce a contract based on nothing more than procedural unconscionability, which he equates with "unconscionable inducement." [*See id.* at 25 ("a claim may succeed if there is evidence of unconscionable inducement*or* if any term of a contract or the contract as a whole is unconscionable.").] Based on Appellant's erroneous construction of W. Va. Code § 46A-2-121(1)(a) and his

[2] Given that the Federal Rules of Civil Procedure apply to litigation of cases in federal courts, and displace inconsistent state procedural rules, the Associations do not address Appellant's assertions with respect to West Virginia law regarding summary judgment. *See, e.g., Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010).

erroneous characterization of the District Court's analysis below, he argues that the District Court should be reversed.

II. Summary of Argument

This Court should reject Appellant's assertion that an unconscionability claim under W. Va. Code § 46A-2-121(1)(a) does not require a finding of substantive unconscionability and may be based solely on procedural unconscionability, because it has no support in West Virginia law. Moreover, Appellant's argument is foreclosed by West Virginia precedent, which requires both procedural and substantive unconscionability to prevail on a W. Va. Code § 46A-2-121(1)(a) claim. Lastly, Appellant's interpretation of W. Va. Code § 46A-2-121(1)(a) must be rejected because it is contrary to West Virginia public policy.

III. Argument

A. The West Virginia Supreme Court of Appeals has squarely rejected Appellant's assertion that an unconscionability claim under West Virginia Code § 46A-2-121(1)(a) may succeed based solely on procedural unconscionability.

Importantly, the West Virginia Supreme Court long ago rejected the notion that an unconscionability claim under W. Va. Code § 46A-2-121(1) may be based on *either* procedural or substantive unconscionability in *Arnold v. United*

Companies Lending Corporation, 511 S.E.2d 854 (W. Va. 1998).[3] The *Arnold* Court noted that it:

> want[ed] to dispel the notion, which appears to have arisen in this case, that there are two distinct issues termed "procedural unconscionability" and "substantive unconscionability," either one of which can invalidate a contract. This Court addressed the same misperception in *Troy Mining Corp.*, *supra*, stating:
>
> . . . [T]he question of "procedural unconscionability" is an essential part of any determination of whether a particular clause or contract is unconscionable. *A finding that the transaction was flawed, however, still depends on the existence of unfair terms in the contract*. A litigant who complains that he was forced to enter into a fair agreement will find no relief on grounds of unconscionability.

511 S.E.2d at 861 n. 6 (emphasis added) (quoting *Troy Mining Corp. v. Itmann Coal Co.*, 346 S.E.2d 749, 753 (W. Va. 1986)). Moreover, based on the WVCCPA's purpose and preexisting West Virginia unconscionability precedent, the *Arnold* Court prescribed the following standard with respect to unconscionability claims under W. Va. Code § 46A-2-121(1):

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[3] In 2012, the West Virginia Supreme Court partially overruled a portion of its decision in *Arnold* that is inapplicable to this appeal. *See Dan Ryan Builders, Inc. v. Nelson*, 737 S.E.2d 550, 560 (W. Va. 2012) (overruling Syllabus Point 5 of *Arnold*, which had provided that "[w]here an arbitration agreement entered into as part of a consumer loan transaction contains a substantial waiver of the borrower's rights, including access to the courts, while preserving the lender's right to a judicial forum, the agreement is unconscionable and, therefore, void and unenforceable as a matter of law.").

> A determination of unconscionability must focus on 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, *Arnold*, 511 S.E.2d at 861 (emphasis added).

Although the "relative positions of the parties," the parties' bargaining position, and the plaintiff's alternatives are clearly synonymous with procedural unconscionability, "the existence of unfair terms in the contract" is indistinguishable from substantive unconscionability. *Compare* Syl. Pt. 8, *Pingley v. Perfection Plus Turbo-Dry, LLC*, 746 S.E.2d 544 (W. Va. 2013) ("Procedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract. . . . ."), *with* Syl. Pt. 9, *id.* ("Substantive 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. . . . ."). Thus, the standard prescribed by the West Virginia Supreme Court requires evidence of both procedural and substantive unconscionability. Significantly, the West Virginia Supreme Court has continued to cite Syllabus Point 4 of *Arnold* as providing the standard applicable to a W. Va. Code § 46A-2-121(1)(a) claim, even where the alleged conduct was based upon "unconscionable inducement." *See* Syl. Pt. 4, *Quicken Loans, Inc. v. Brown*, 737 S.E.2d 640 (W. Va. 2012) (applying Syl. Pt. 4 of *Arnold*).

Moreover, no syllabus point of any decision of the West Virginia Supreme Court construing or interpreting W. Va. Code § 46A-2-121(1)(a) has ever held that an unconscionability claim can succeed without a finding of substantive unconscionability. The lack of such a syllabus point is supremely important given the uniqueness of West Virginia jurisprudence. Although the West Virginia Supreme Court – like any court of last resort – "speaks only through its written decisions," it is also constitutionally required "to prepare a syllabus of the points adjudicated in each case in which an opinion is written and in which a majority of the justices thereof concurred, which shall be prefixed to the published report of the case." *State v. McKinley*, 764 S.E.2d 303, 309 (W. Va. 2014) (quoting W. Va. Const. art. VIII, § 4). "The consequence of this provision is that the Court itself—not the reporter of decisions or the publisher—drafts the syllabus in a published opinion. As a result, the syllabus in every published opinion is an integral part of the decision itself." *Id.* Consequently, the absence of any syllabus points in any published decisions of the West Virginia Supreme Court supporting Appellant's interpretation of W. Va. Code § 46A-2-121(1)(a) is of singular importance. *See id.*, Syl. Pt. 1 ("Signed opinions containing original syllabus points have the highest precedential value because the Court uses original syllabus points to announce new points of law or to change established patterns of practice by the Court.").

In sum, this Court should find that the West Virginia Supreme Court has authoritatively prescribed the standard with respect to proving a claim under W. Va. Code § 46A-2-121(1)(a) and that the standard requires proof of both procedural and substantive unconscionability.

B. Appellant's arguments that West Virginia law does not require evidence of both procedural and substantive unconscionability lack merit as a matter of law.

Appellant argues that his interpretation of W. Va. Code § 46A-2-121(1)(a) is supported by the statute itself, three decisions of the West Virginia Supreme Court, an unpublished federal district court opinion, and an interpretative comment to the Uniform Consumer Credit Code. [App. Br., Doc 21 at 38.] In fact, none of these authorities supports a finding that a successful W. Va. Code § 46A-2-121(1)(a) claim does not require some measure of substantive unconscionability.

Beginning with the statute itself, even though it was originally enacted in 1974, the West Virginia Supreme Court has never held that it authorizes a claim in the absence of substantive unconscionability. From the beginning, W. Va. Code § 46A-2-121(1)(a) was understood to "confirm[] a court's power to refuse to enforce any contract or contract term that the court finds as a matter of law to be unconscionable." Vincent Paul Cardi, The West Virginia Consumer Credit and

Protection Act, 77 W. Va. L. Rev. 401, 421 (1975).[4] Likewise, the West Virginia Supreme Court has consistently recognized that the primary focus of the WVCCPA in general and W. Va. Code § 46A-2-121 in particular is the elimination of unconscionable contract terms:

> The legislature in enacting the West Virginia Consumer Credit and Protection Act, W. Va. Code, 46A-1-101, et seq., in 1974, sought to eliminate the practice of including unconscionable terms in consumer agreements covered by the Act. To further this purpose the legislature, by the express language of W. Va. Code, 46A-5-101(1), created a cause of action for consumers and imposed civil liability on creditors who include unconscionable terms that violate W. Va. Code, 46A-2-121 in consumer agreements. Syl. Pt. 2, *U.S. Life Credit Corp. v. Wilson*, 171 W. Va. 538, 301 S.E.2d 169 (1982); Syl. Pt. 1, *Orlando v. Finance One of West Virginia, Inc*., 179 W. Va. 447, 369 S.E.2d 882 (1988).

Syl. Pt. 3, *Arnold v. United Companies Lending Corp*., 511 S.E.2d 854 (1998); *accord* Syl. Pt. 3, *Quicken Loans, Inc. v. Brown*, 737 S.E.2d 640 (W. Va. 2012) (citing, quoting, and applying Syl. Pt. 3 of *Arnold*). Although W. Va. Code § 46A-2-121(1)(a) refers to unconscionable inducement, Appellant admits, as he must, that procedural and substantive unconscionability are inexorably linked. [App. Br., Doc 21 at 42 ("The district court's decision not to consider this evidence

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[4] Prof. Cardi and his 1975 law review article have been cited as authoritative resources with respect to the WVCCPA by the West Virginia Supreme Court. *See, e.g., State ex rel. McGraw v. Bear, Stearns & Co., Inc*., 618 S.E.2d 582, 586 (W. Va. 2005); *Harless v. First Nat. Bank*, 246 S.E.2d 270, 276 n. 6 (W. Va. 1978).

dramatically impacted its understanding of whether the terms of the transaction were substantively unfair. As the courts have cautioned, although a contract term may be innocuous in one circumstance, it may be one-sided or unfair if, for instance, it was induced by deception. . . . These facts relating to the circumstances of the transaction are critically important to understanding whether the terms themselves are one-sided or unfair.").]

Likewise, the West Virginia Supreme Court cases cited by Appellant do not support his assertion that a W. Va. Code § 46A-2-121(1)(a) claim may be established without evidence of substantive unconscionability. Starting with *Quicken Loans*, the West Virginia Supreme Court expressly noted that it "must focus on the relative positions of the parties, the adequacy of the bargaining positions, the meaningful alternatives available to the Plaintiff,*and the existence of unfair terms in the contract*." *Quicken Loans, Inc. v. Brown*, 737 S.E.2d 640, 658-59 (W. Va. 2012) (emphasis added) (internal quotation marks omitted) (quoting *Arnold*, Syl. Pt. 4). Based on this standard, the *Quicken Loans* Court decided that the case before it was "not a close case." *Id.* The other two West Virginia Supreme Court opinions cited by Appellant were not the opinions of the court, but the separate opinions of concurring justices.

Although the unpublished *Diloreti* opinion issued by the U.S. District Court for the Northern District of West Virginia appears to accept Appellant's

interpretation of W. Va. Code § 46A-2-121(1)(a), it is unpersuasive for at least three reasons. First, the *Diloreti* Court provided no detailed analysis in support of its conclusion. Second, based upon the fact that the *Diloreti* opinion arose out of a motion to dismiss and the relatively light burden associated with such a motion, the court had little incentive to examine whether W. Va. Code § 46A-2-121(1)(a) requires proof of substantive unconscionability at that procedural posture. Third, the *Diloreti* Court cited the West Virginia Supreme Court's *Quicken Loans* decision in support of its conclusion that W. Va. Code § 46A-2-121(1)(a) does not require proof of substantive unconscionability, but, as noted above, the rule of law applied by the *Quicken Loans* Court *required* proof of procedural and substantive unconscionability.

Finally, the interpretative comment to the Uniform Consumer Credit Code quoted by Appellant does not support his interpretation of W. Va. Code § 46A-2-121(1)(a). Critically, the sentence immediately preceding the excerpt quoted by Appellant states that: "Subsection (1), as does UCC Section 2-302, provides that a court can refuse to enforce or can adjust an agreement or part of an agreement that was unconscionable on its face at the time it was made." Unif. Consumer Credit Code 1974 § 5.108 cmt. 1. Read together, this sentence and the

passage quoted by Appellant are consistent with the notion that a contract induced by unconscionable conduct will invariably result in a substantively unfair contract.[5]

In sum, none of the authorities cited by Appellant supports the assertion that a claim under W. Va. Code § 46A-2-121(1)(a) may be proven without evidence of substantive unconscionability or substantive unfairness.

C. Appellant's interpretation of W. Va. Code § 46A-2-121(1)(a) is contrary to West Virginia public policy, would be inequitable as a matter of law, and conflicts with related West Virginia case law.

1. The West Virginia Supreme Court of Appeals has consistently held that the WVCCPA was enacted to police the use of unconscionable terms in contracts governed by it.

As noted above, the West Virginia Legislature enacted the WVCCPA in general, and W. Va. Code § 46A-2-121(1)(a) in particular, "to eliminate the practice of including unconscionable terms in consumer agreements[.]" Syl. Pt. 2, in part, *U.S. Life Credit Corp. v. Wilson*, 301 S.E.2d 169, 170 (W. Va. 1982). Accordingly, the Legislature passed the Act which, in part, "impose[s] civil liability on creditors who include unconscionable terms that violate W.Va. Code, 46A-2-121 in consumer agreements." *Id.* Likewise, as noted above, the *Arnold*

[5] In addition, because the West Virginia Supreme Court has cited to other interpretative comments in its past construction of W. Va. Code § 46-2-121(1)(a), including in the *Arnold* case, there is no reason to believe that it would be swayed by the interpretative comment relied upon by Appellant. *See Arnold*, 511 S.E.2d at 860 (quoting cmt. 3).

Court made clear that the touchstone of unconscionability is substantive unfairness: *"A finding that the transaction was flawed, however, still depends on the existence of unfair terms in the contract*. A litigant who complains that he was forced to enter into a fair agreement will find no relief on grounds of unconscionability." *Arnold*, 511 S.E.2d at 861 n. 6 (emphasis added) (quoting *Troy Mining Corp. v. Itmann Coal Co.*, 346 S.E.2d 749, 753 (W. Va. 1986)). Similarly, the West Virginia Supreme Court has noted that facts consistent with procedural unconscionability will not result in a finding of unconscionability:

> *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 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, not real alternative, or did not in fact assent or appear to assent to the unfair terms.

Arnold, 511 S.E.2d at 860 (emphasis added) (quoting *Troy Mining Corp.*, 346 S.E.2d at 753).

Relatedly, the West Virginia Supreme Court has recognized that most contracts in use today can be described as contracts of adhesion that are the products of unequal bargaining power. Nevertheless, recognizing the realities of modern life, the West Virginia Supreme Court has steadfastly refused to presume that such contracts are inherently suspect. *See, e.g., State ex rel. Clites v. Clawges*,

685 S.E.2d 693, 700 (W. Va. 2009). Appellant's interpretation of W. Va. Code § 46A-2-121(1)(a) would allow a court to invalidate any consumer contract based upon indicia of procedural unconscionability present in practically every consumer contract. Based on modern realities and practical necessities, the West Virginia Supreme Court has rejected such a standard. For the same reasons, this Court should reject the approach advanced by Appellant.

2. The Appellant's interpretation of W. Va. Code § 46A-2-121(1)(a) is contrary to the equitable origins of the unconscionability doctrine and would be akin to forfeiture.

The West Virginia Supreme Court has repeatedly recognized that "[u]nconscionability is a general contract law principle, based in equity." *Arnold*, 511 S.E.2d at 859. Consistent with this equitable underpinning, W. Va. Code § 46A-2-121(1)(a) only provides that a "court *may* refuse to enforce" an unconscionable contract. Moreover, the West Virginia Supreme Court's interpretation of W. Va. Code § 46A-2-121(1)(a) in a manner requiring both procedural and substantive unconscionability is consistent with the influence of equity. The West Virginia Supreme Court has also recognized that "[i]t is an elementary principle of equity jurisprudence that equity looks with disfavor upon forfeitures, and that equity never enforces a penalty or forfeiture if such can be avoided." *Quicken Loans, Inc. v. Brown*, 737 S.E.2d 640, 662 (W. Va. 2012) (quoting *Sun Lumber Co. v. Thompson Land & Coal Co*, 76 S.E.2d 105, 109

(1953)). Given that practically every consumer contract will unavoidably suffer from some element of procedural unconscionability, a rule of law allowing a court to avoid a contract based on nothing more than procedural unconscionability arguably converts the unconscionability doctrine into a rule of forfeiture. As a result, this Court should recognize that Appellant's interpretation of W. Va. Code § 46A-2-121(1)(a) is not an interpretation that would be favored by the West Virginia Supreme Court.

3. The Appellant's interpretation of W. Va. Code § 46A-2-121(1)(a) is irreconcilable with the West Virginia Supreme Court's holdings with respect to unconscionability as a contract defense.

As Appellant acknowledges, the unconscionability claim provided by W. Va. Code § 46A-2-121(1)(a) has its roots in the unconscionability defense to contract enforcement. [App. Br., Doc. No. 21 at 34.] Notably, in the context of unconscionability as a contract defense, the West Virginia Supreme Court has required proof of both procedural and substantive unfairness before allowing a litigant to invalidate a contract or a contractual term. *See Kirby v. Lion Enterprises, Inc.*, 756 S.E.2d 493, 500 (W. Va. 2014) ("The circuit court correctly stated in its order the law concerning unconscionability insofar as a contract term must be both 'procedurally and substantively unconscionable[,]' *see* Syl. Pt. 9, *Brown ex rel. Brown v. Genesis Healthcare Corp*, 229 W.Va. 382, 729 S.E.2d 217 (2012) (footnote added), to be found unenforceable.");*New v. GameStop, Inc.*, 753

S.E.2d 62, 74 (W. Va. 2013) ("Our analysis of whether the arbitration agreement at issue is unconscionable necessarily involves an inquiry into the circumstances surrounding [its] execution and the fairness of [it] as a whole.") (internal quotations and citation omitted); *Pingley*, 746 S.E.2d at 550 ("A determination of unconscionability requires a two-part analysis: whether the contract is procedurally unconscionable, and whether it is substantively unconscionable."). Based upon the West Virginia Supreme Court's binding precedent with unconscionability with respect to W. Va. Code § 46A-2-121(1)(a), which requires both procedural and substantive unconscionability, there is no reason to believe that it is likely to deviate from the contours of its well-established jurisprudence governing unconscionability in general.

IV. Conclusion

For the foregoing reasons, this Court should affirm the District Court's opinion below.

Respectfully submitted,

/s/ James E. Scott
Floyd E. Boone Jr.
Stuart A. McMillan
Sandra M. Murphy
James E. Scott
BOWLES RICE LLP
600 Quarrier Street
Charleston, West Virginia 25301
(304) 347-1100
Counsel for Amici

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. _____ **Caption:** _____

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)
Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. **Type-Volume Limitation:** Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 16,500 words or 1,500 lines. Any Reply or Amicus Brief may not exceed 7,000 words or 650 lines. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include footnotes in the count. Line count is used only with monospaced type.

   This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

   [ ] this brief contains _____ [*state number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

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(s)_____

Attorney for_____

Dated:_____

CERTIFICATE OF SERVICE

I certify that on March 31, 2015, the foregoing document was served upon all parties or their counsel of record through CM/ECF system if they are registered users or, if they are not, by serving a true copy at the addresses listed below:

Bren J. Pomponio
Mountain State Justice, Inc.
1031 Quarrier Street
Suite 200
Charleston, WV 25301

Jennifer S. Wagner
Mountain State Justice, Inc.
321 West Main Street
Suite 401
Clarksburg, WV 26301

Counsel for Appellant

John C. Lynch
Jason Manning
Megan Burns
Troutman Sanders LLP
222 Central Park Avenue
Suite 2000
Virginia Beach, VA 23462

Counsel for Appellees

/s/ James E. Scott

Date: March 31, 2015