THE DECLINE OF DUNLAP:
ENFORCEMENT OF ARBITRATION PROVISIONS IN CONSUMER CONTRACTS ARE GAINING GROUND IN WEST VIRGINIA

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Since 1977, when the Supreme Court of Appeals of West Virginia issued its decision in *Board of Education of Berkeley County v. W. Harley Miller, Inc.*,[1] courts in West Virginia have analyzed the validity of arbitration provisions in consumer contracts under the Federal Arbitration Act ("FAA")[2] by examining the totality of the underlying contract between the parties.[3] The *Miller* decision established that when a party claims an "arbitration provision was unconscionable or was thrust upon him because he was unwary and taken advantage of, or that the contract was one of adhesion," a court must determine the validity of the challenged provision by analyzing "the entire contract, the nature of the contracting parties, and the nature of the undertakings covered by the contract."[4] Following *Miller*, the West Virginia Supreme Court of Appeals consistently held that, in conducting the validity analysis, a finding of unconscionability depends upon "the relative positions of the parties, the nature of the entire contract, the adequacy of bargaining position, the meaningful alternatives available to the appellant, and the existence of unfair terms in the contract."[5]

In 2002, the Supreme Court of Appeals, relying upon the precedent in cases decided since 1977, expanded its jurisprudence for arbitration provisions in consumer contracts, ironically, by *significantly restricting* the enforceability of those provisions. In *State ex rel.*

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[1] 160 W. Va. 473, 473-74, 236 S.E. 2d 439, 440-41 (1977).
[2] 9 U.S.C. § 1, *et seq.* (2006).
[3] *See* syl. pt. 3, *Bd. of Educ. of the County of Berkley v. W. Harley Miller, Inc.*, 160 W. Va. at 473-74, 236 S.E. 2d at 440-41 ("the question of whether an arbitration provision was bargained for and valid is a matter of law for the court to determine by reference to the entire contract").
[4] *Miller*, 236 S.E. 2d at syl pt. 3.
[5] *Art's Flower Shop, Inc. v. Chesapeake and Potomac Tel. Co. of W. Va., Inc., et al.*, 186 W.Va. 613, 413 S.E.2d 670 (1992) (*citing* syl. pt. 3, *Troy Mining Corp. v. Itmann Coal Co.*, 176 W.Va. 599, 346 S.E. 2d 749 (1986); *Miller*, 160 W. Va. at syl pt. 3, 236 S.E. 2d at syl pt. 3).

Dunlap v. Berger,[6] the Court ruled that in "every case [where] the issue of an unconscionable adhesion contract is raised," a court must examine the language of that particular contract for unconscionability, as well as the particular facts of that case, notwithstanding the presence of an arbitration provision in the contract.[7] If the court found unconscionability, the court could void the entire contract, including the arbitration provision in the contract.[8] In essence, the West Virginia Supreme Court of Appeals announced that it would analyze the validity of a contract *any time* a party challenged *any aspect* of that contract, notwithstanding the inclusion of an arbitration provision.[9]

Additionally, the *Dunlap* decision expanded upon the validity analysis previously set forth in *Miller*, adding two broad grounds – not previously outlined in prior precedent – upon which a contract provision could be declared unconscionable.[10] The West Virginia Supreme Court of Appeals stated, for the first time, that a provision is unconscionable if (1) it would "impose unreasonably burdensome costs" upon the consumer, or (2) it "would have a substantial deterrent effect upon a person seeking to enforce or vindicate rights."[11] Under either of those circumstances, the Court held that the provisions would be unconscionable, absent "exceptional circumstances" making the provisions otherwise enforceable.[12]

In recent years, however, the West Virginia Supreme Court of Appeals has issued various decisions that, arguably, are slowly chipping away at the effect of the *Dunlap* decision on the enforceability of arbitration provisions. The West Virginia Supreme Court of Appeals appears to

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[6] 211 W. Va. 549, 567 S.E.2d 265 (2002).
[7] *See State ex rel. AT & T Mobility, LLC v. Wilson*, 703 S.E.2d 543, 549 (W. Va. 2010) (interpreting *Dunlap*, 211 W. Va. 549, 567 S.E.2d 265).
[8] *Dunlap*, 211 W. Va. at syl. pt. 2, 567 S.E. 2d at syl. pt. 2.
[9] *See Id.*
[10] *Dunlap*, 567 S.E.2d at 266.
[11] *Id.*
[12] *Id.*

be transitioning, trading its former opposition to arbitration provisions in favor of a more liberal, almost accepting, approach.

In 2009, in *State ex rel. Clites v. Clawges*,[13] the West Virginia Supreme Court of Appeals returned to the phraseology that appeared in *Miller*, emphasizing a presumption in favor of arbitration.[14] The Court specifically noted that an arbitration provision in a written contract is *presumed to be bargained for* and "that arbitration [i]s intended to be the exclusive means of resolving disputes arising under the contract."[15] In *Clites*, having determined that a court has jurisdiction to review whether an arbitration agreement is a valid contract,[16] the West Virginia Supreme Court of Appeals placed its focus on the four considerations enumerated in *Art's Flower Shop*.[17] In *Clites*, the West Virginia Supreme Court of Appeals cited *Dunlap only* for its proposition that the mere "fact that [a contract] is a contract of adhesion does not necessarily mean that it is also invalid"; thus, the Court must determine the validity of the arbitration agreement by considering "other factors."[18] In proceeding with its analysis of those "factors," the *Clites* decision notably *omitted* the two additional considerations established by the Court in *Dunlap*.[19]

Then, in March of 2010, the West Virginia Supreme Court of Appeals set definitive limits on a trial court's authority when ruling upon a motion to compel arbitration under the

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[13] 224 W. Va. 299, 685 S.E. 2d 693, 695 (2009).
[14] *Clites*, 685 S.E. 2d at syl. pt. 3 (citing *Miller*, 236 S.E. 2d at syl pt. 3).
[15] Syl. pt. 3, *Clites*, 685 S.E. 2d at 695 (citing *Bd. of Educ. of the County of Berkeley v. W. Harley Miller, Inc.*, 160 W. Va. 473, 236 S.E. 2d 439 (1977)).
[16] In *Clites*, the Court considered an arbitration agreement that was a stand-alone agreement rather than a divisible provision in a larger contract, that is, the arbitration agreement was the entire contract. The Court acknowledged that "it is clear that the FAA preempts state law that would invalidate 'or undercut the enforceability of arbitration agreements.'" *Clites*, 685 S.E. 2d at 699 (internal citations omitted). The Court found that the determination of whether an "arbitration agreement" was a valid contract" was a matter appropriate for the trial court's review. *Id.*
[17] *Clites*, 685 S.E. 2d at 700; *See Art's Flower Shop*, 413 S.E. 2d at 675.
[18] 685 S.E. 2d at 700 (citing *Dunlap*, 567 S.E. 2d at 273).
[19] 685 S.E. 2d at 700-01; *See* syl. pt. 2, *Dunlap*, 211 W. Va. at 550, 567 S.E.2d at 266.

FAA.[20] In *State ex rel. TD Ameritrade, Inc. v. Kaufman*, the West Virginia Supreme Court of Appeals confronted the issue of whether a trial court has "the authority to address any matters in addition to the threshold issue of arbitrability."[21] Relying upon federal precedent, the Court answered this inquiry in the negative, noting that "if a party seeks to avoid arbitration . . . by challenging the validity or enforceability of an arbitration provision . . . the grounds 'must relate specifically to the arbitration clause and not just to the contract as a whole.'"[22] In that case, the Court detected the plaintiff's attempt to "circumvent the limits imposed on trial courts" by framing his challenge to the *entire contract* as apparent challenges to the arbitration provisions in that contract.[23] The court rejected the plaintiff's attempt, however, and ruled that the trial court had no authority to decide any issue other than whether the claims were subject to arbitration under the applicable contract.[24] The Court specifically explained that matters other than the narrow determination of whether claims are subject to arbitration are "reserved for arbitral resolution," and the trial court's "foray" into those matters was "clearly improper."[25] *Id.*

In reversing the trial court, the West Virginia Supreme Court of Appeals announced new precedent, limiting a trial court's authority when deciding issues of arbitrability under the FAA. The Court stated, "[w]hen a trial court is required to rule upon a motion to compel arbitration pursuant to the [FAA,] the authority of the trial court is limited to determining the threshold

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[20] Syl. pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 251, 692 S.E.2d 293, 294 (2010).
[21] *TD Ameritrade*, 692 S.E.2d at 297. Unlike in *Clites*, the arbitration provisions in *TD Ameritrade* were divisible provisions of a larger contract, which governed the entirety of the relationship and agreement between the parties.
[22] *Id.* at 298 (quoting *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 636 (4th Cir. 2002)) (emphasis added). The court in *TD Ameritrade* also cited *United Steelworkers v. American Mgf. Co.*, 363 U.S. 564, 568, 80 S. Ct. 1343 (1960), for the "general rule that courts are to decide the threshold issue of arbitrability (i.e., whether there is an enforceable agreement to arbitrate)" in a "limited nature." *TD Ameritrade*, 692 S.E. 2d at 296.
[23] *TD Ameritrade*, 692 S.E. 2d at 298 (internal citations omitted).
[24] *Id.* at 298.
[25] *Id.*

issues of (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement."[26]

A month after *TD Ameritrade* was decided, in April of 2010, the Supreme Court of Appeals was again faced with an arbitration provision in *Ruckdeschel v. Falcon Drilling Co., L.L.C.*[27] In *Ruckdeschel*, the Court restated the holding in *TD Ameritrade*, limiting the authority of a trial court when ruling on a motion to compel arbitration to two narrow determinations.[28] The Court, "in an effort to bring uniformity to [West Virginia] arbitration law," extended the holding in *TD Ameritrade* "to all actions involving arbitration agreements."[29] The Court in *Ruckdeschel* wrote, "when a circuit court is presented with the issue of whether any arbitration agreement is applicable, the court must determine the threshold issues of (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred fall within the substantive scope of that arbitration agreement."[30] In remanding the case, the Court directed the circuit court to determine the validity of the arbitration provision by considering the factors set forth in *Miller*, and more recently in *Clites*. Notably, the Court *did not* direct the circuit court to consider the two additional considerations established in *Dunlap*.[31]

The current jurisprudence indicates that the Supreme Court of Appeals of West Virginia is prepared to take a more moderate approach to analyzing arbitration provisions; indeed, the Court appears more willing to enforce arbitration provisions, rather than to strike them down. The recent decisions of *Clites, TD Ameritrade,* and *Ruckdeschel*, individually, and collectively,

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[26] Syl. pt. 2, *TD Ameritrade*, 692 S.E.2d at 294.
[27] 225 W. Va. 450, 693 S.E.2d 815 (2010).
[28] *Ruckdeschel*, 693 S.E.2d at 822.
[29] *Id.*
[30] *Id.*
[31] *Id.*

reflect the Court's steady departure from *Dunlap*, in favor of a less restrictive analysis. The practical effect has been to increasingly uphold arbitration provisions in consumer contracts.