NO. 15-1439

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

THOMAS H. FLUHARTY, Trustee of
the Bankruptcy Estate of D. Kevin Coleman and Diane M. Coleman, and
D. KEVIN COLEMAN and DIANE M. COLEMAN

Plaintiffs – Appellants,

v.

QUICKEN LOANS, INC., TITLE SOURCE, INC., and
M&T BANK, successor in interest to Bank of America, N.A., and
BANK OF AMERICA, N.A

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA AT WHEELING

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.

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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' members (and some of their affiliates) are engaged in the business of lending in general and mortgage lending in particular, and, as a result, are subject to the West Virginia Consumer Credit and Protection Act ("WVCCPA"), and, to a varying extent, certain provisions of the West Virginia Residential Mortgage Lender, Broker, and Servicer Act ("RMLBSA"). Thus, the construction and application of these statutes are of vital importance to the Associations and their members. Accordingly, rulings on the questions before this Court will significantly impact the Associations' members. Given the interest of the Associations' members in the issues presented in this case, they wish to identify controlling precedent of the Supreme Court of Appeals of West Virginia and important policy concerns. The WVBA and the CBWV believe their perspectives will assist this Court.

Local Rule 27(a) Statement

The undersigned corresponded with counsel for the Appellants and counsel for the Appellees as to their positions on whether they consent to, or

oppose, the relief requested in the present motion. The undersigned has not received a response from any counsel as of today, July 14, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 14, 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:

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Date: July 14, 2015

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

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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.

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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:
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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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_____
(name of party/amicus)

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who is _____, makes the following disclosure:
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Counsel for: _____

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(signature) (date)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

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.

The Associations' members (and some of their affiliates) are engaged in the business of lending in general and mortgage lending in particular, and, as a result, are subject to the West Virginia Consumer Credit and Protection Act ("WVCCPA"), and, to a varying extent, certain provisions of the West Virginia Residential Mortgage Lender, Broker, and Servicer Act ("RMLBSA"). Thus, the construction and application of these statutes are of vital importance to the Associations and their members. Accordingly, rulings on the questions before this Court will significantly impact the Associations' members. Given the vital interest of the Associations' members in the issues presented in this case, they wish to identify controlling precedent of the Supreme Court of Appeals of West Virginia

and important policy concerns. The WVBA and the CBWV believe their perspectives will assist this Court.[1]

II. Summary of Argument

The Appellants' opening brief presents three questions. These questions are:

> [1] Did the District Court err . . . when it dismissed claims . . . after concluding that the case [sic] of action under the [RMLBSA] had accrued and had expired?
>
> [2] Did the District Court err . . . when it granted summary judgment on the issue of unconscionability under the [WVCCPA]?
>
> [3] Should this Court certify the foregoing issues, both undecided issues of state law, to the West Virginia Supreme Court of Appeals for its views of state law?

[Op. Br., Doc. 23 at 9.] This brief focuses upon the second and third questions, and, as discussed below, this Court's answer to those questions should be "no."[2]

With respect to unconscionability under the WVCCPA, this Court should find that the District Court applied well-established West Virginia precedent as intended by the Supreme Court of Appeals of West Virginia when it

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[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.

[2] Nevertheless, the Associations believe that the District Court's decisions with respect to the RMLBSA were correct and they support the Appellees' arguments regarding the RMLBSA.

entered summary judgment for the Appellees. As to certification, this Court should refuse to certify any questions of law to the Supreme Court of Appeals of West Virginia based on the well-established nature of West Virginia law.

III. Argument

A. This Court should find that Appellants' characterization of unconscionability under the WVCCPA cannot be reconciled with the precedent of the Supreme Court of Appeals of West Virginia.

In seeking reversal of the District Court's conclusions regarding their unconscionability claim, the Appellants imply that unconscionability may be established based upon *either* procedural or substantive unfairness.[3] In doing so, the Appellants misstate the governing standards and the burdens associated with them. Likewise, the Appellants also fail to recognize the standards and burdens associated with unconscionability under the WVCCPA in asserting that a violation of the RMLBSA's documentation requirement is unconscionable*per se.*

---

[3] *See, e.g.*, Op. Br., Doc. 23 at 23-24 (noting that "Justice Davis questioned whether unconscionability in a contract setting needed to rest on both procedural and substantive components. . . . She identified contract formation on unconscionability grounds as implicating formation of the contract. Justice Ketchum concurred and indicated that this point of West Virginia law should be clarified so as to permit a wholly procedural violation to be sufficient.");*see also id.* at 15 ("Appellants contend that proof of violation of a consumer protection statute is adequate under West Virginia law to establish unconscionability. Two of the five Justices on the West Virginia Supreme Court have expressed the view that procedural issues alone may establish unconscionability. These Justices have called for clarification of this issue.").

1. The Appellants' assertions regarding unconscionability under the WVCCPA fail because they are contrary to the standards prescribed by the Supreme Court of Appeals of West Virginia.

At most, the Appellants gloss over the legal standards that apply to unconscionability under the WVCCPA by implying uncertainty as to whether it is still necessary to establish both procedural and substantive unconscionability. In fact, it is well-established that both are required and that the applicable standards are not easily satisfied. The West Virginia Supreme Court long ago rejected the notion that an unconscionability claim under W. Va. Code § 46A-2-121 may be based on *either* procedural or substantive unconscionability. In *Arnold v. United Companies Lending Corporation*, 511 S.E.2d 854 (W. Va. 1998),[4] the Court

> dispel[ed] 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

[4] In 2012, the West Virginia Supreme Court of Appeals 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.").

> 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:

> 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 a consumer'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 of Appeals requires evidence of both procedural and substantive unconscionability.

Significantly, the West Virginia Supreme Court of Appeals has continued to cite Syllabus Point 4 of *Arnold* as the standard applicable to a W. Va. Code § 46A-2-121 claim. *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 of Appeals construing or interpreting W. Va. Code § 46A-2-121 has ever held that an unconscionability claim can succeed without a finding of both procedural and substantive unconscionability.

The lack of such a syllabus point is supremely important given West Virginia jurisprudence. Although the West Virginia Supreme Court of Appeals "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 the Appellants' interpretation of W. Va. Code § 46A-2-121 is singularly important. *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 of Appeals has authoritatively prescribed the standard with respect to proving a claim under W. Va. Code § 46A-2-121 and that the standard requires proof of both procedural and substantive unconscionability.

2. The failure to provide copies of documents signed at a closing as required by the RMLBSA cannot as a matter of law equate to unconscionability under the WVCCPA.

a. 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 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, the *Arnold* 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)).

Here, the Appellants argue that a failure to provide a borrower with "a copy of every signed document executed by the borrower at the time of closing," in accordance with W. Va. Code § 31-17-8(j)(6), is unconscionable *per se.* Importantly, this requirement regulates neither the substance nor the procedure of entering into mortgage loans. That is, it does not declare that certain contractual terms are substantively unfair as a matter of law. Nor does it establish the process that must be observed before a mortgage loan agreement may become effective. Rather, it merely provides that "[a] borrower must be given a copy of every signed document executed by the borrower at the time of closing[,]" which will invariably occur once there *is* an agreement (i.e., after every party has "executed" every document). W. Va. Code § 31-17-8(j)(6). To the extent the unconscionability

claim supplied by W. Va. Code § 46A-2-121 is intended to "to eliminate the practice of including unconscionable terms in consumer agreements," there should be no doubt that a violation of W. Va. Code § 31-17-8(j)(6) is immaterial to whether a contract's terms are substantively fair.

b. The Appellants' assertion that a violation of W. Va. Code § 31-17-8(j)(6) is a *per se* violation of W. Va. Code § 46A-2-121 is contrary to the equitable origins of the unconscionability doctrine and would be akin to forfeiture.

The West Virginia Supreme Court of Appeals 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 only provides that a "court *may* refuse to enforce" an unconscionable contract.[5] Moreover, the West Virginia Supreme Court of Appeals' interpretation of W. Va. Code § 46A-2-121 in a manner requiring both procedural and substantive unconscionability is consistent with the influence of equity. The West Virginia Supreme Court of Appeals 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

[5] Similarly, the RMLBSA provides that "[i]f any primary or subordinate mortgage loan is made in willful violation of the provisions of this article, except as a result of a bona fide error, such loan *may be canceled* by a court of competent jurisdiction." *See* W. Va. Code § 31-17-17(a) (emphasis added).

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)). Allowing a party to avoid a mortgage loan contract based on a violation of W. Va. Code § 31-17-8(j)(6), especially where the contract's terms are fair and were not procured by surprise, would convert the unconscionability doctrine into a rule of forfeiture. As a result, this Court should recognize that Appellants' interpretation of W. Va. Code § 46A-2-121 is not an interpretation that would be favored by the West Virginia Supreme Court of Appeals.

B. This Court should refuse to certify any questions to the Supreme Court of Appeals of West Virginia.

Based on the settled nature of West Virginia law with respect to unconscionability under the WVCCPA, this Court should find that there is no need to certify any question to the Supreme Court of Appeals of West Virginia. As mentioned above, the West Virginia Supreme Court of Appeals has continuously recognized the standards that govern unconscionability under the WVCCPA. Although two members of that court expressed a willingness to reassess unconscionability in *Credit Acceptance Corp. v. Front*, 745 S.E.2d 518 (W. Va. 2013), the fact remains that there *are* "controlling appellate decision[s]" issued by the Supreme Court of Appeals of West Virginia governing unconscionability under the WVCCPA. *See* W. Va. Code § 51-1A-3 (emphasis added) ("The Supreme

Court of Appeals of West Virginia may answer a question of law certified to it . . . if the answer may be determinative of an issue in a pending case . . . and *if there is no controlling appellate decision*, constitutional provision or statute *of this State*."). Moreover, *Front* did not deal with what is required to prove unconscionability as a cause of action under the WVCCPA. Rather, unconscionability was raised in *Front* as a *defense* to the enforcement of an arbitration agreement. The fact that two justices of the West Virginia Supreme Court of Appeals have expressed a willingness to reexamine the parameters of unconscionability as a common law defense to contract does not mean that the Court will do the same in the context of the WVCCPA, especially given that the stakes with respect to unconscionability under the WVCCPA are generally much higher than those encountered where a contractual provision is avoided. *See, e.g.*, W. Va. Code § 46A-5-101 (establishing a right to damages and statutory penalties based upon unconscionability).

In sum, the Court should find that there is no basis to certify any question to the Supreme Court of Appeals of West Virginia.

IV. Conclusion

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

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. _____ **Caption:** _____

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(s) _____

Attorney for _____

Dated: _____

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I certify that on July 14, 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:

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Date: July 14, 2015