IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

NO. 011984

MARGARET TOPPINGS and
ROGER D. TOPPINGS,

Plaintiffs,

UPON CERTIFIED QUESTION FROM THE CIRCUIT COURT OF LINCOLN COUNTY
CIVIL ACTION NO. 00-C-146

v.

MERITECH MORTGAGE SERVICES, INC., a corporation, and division of SAXON MORTGAGE, INC., a corporation, PLATINUM CAPITAL GROUP, a corporation, CHASE MANHATTAN BANK, formerly CHASE BANK OF TEXAS, NA, and SALMONS AGENCY, INC., a West Virginia corporation,

Defendants.

PETITION OF PLAINTIFFS AND OF DEFENDANT SALMONS AGENCY, INC. TO DOCKET CERTIFIED QUESTIONS

I. KIND OF PROCEEDING AND RULING BELOW

Roger and Margaret Toppings, an unsophisticated elderly couple living on a very modest fixed income, were victimized by a predatory loan. Because the loan included an undisclosed balloon payment they could not possibly pay and other misrepresented elements, they face the loss of their home. To protect themselves against this injustice, they filed this case against several large corporate lenders and the closing agency, Salmons Agency, Inc. ("Salmons"), presenting a number of state law claims.

The defendants, Meritech Mortgage Services, Inc. ("Meritech"), Saxon Mortgage, Inc. ("Saxon Mortgage"), and Chase Manhattan Bank ("Chase") (hereinafter referred to collectively as "lenders") moved to dismiss on the basis that the court lacked subject matter jurisdiction over the plaintiffs' claims until the plaintiffs participated in compulsory arbitration before a forum selected

by the lenders: the National Arbitration Forum ("NAF"). It is no surprise the lenders sought to compel arbitration before NAF – the arbitration forum promises the financial service industry that arbitration before NAF will "make a positive impact on [their] bottom line." (Plfs.' Response to Defs' Mot. to Reconsider at Ex. 9.) NAF achieves what it promises in its advertisements through a decision making system that has an inherent bias for lenders. Because NAF's business is dependent upon continued referrals from the defendants and other lenders, there is a strong incentive for NAF to favor lenders over consumers and other parties in disputes referred to arbitration before it. The not so surprising result is the outcome of NAF arbitration nearly always provides a favorable result for lenders.

Under the threat of arbitration before NAF, the plaintiffs have encountered an unlikely ally. The defendant, Salmons, also is skeptical about arbitrating before a forum selected by the lenders. Salmons therefore joined the Toppings in opposing arbitration, expressing identical concerns with NAF. The Toppings and Salmons both argue the defendants' arbitration clause, because it compels arbitration before the lenders-designated NAF, is unconscionable.

Faced with a question regarding its subject matter jurisdiction over the plaintiffs' claims, the trial court agreed with the petitioners, declared the arbitration clause unenforceable, and certified to this Court the question of whether it is unconscionable for a forced arbitration system to be structured in such a way that it gives the arbitrator an incentive to favor the lender over the other parties to the litigation. The petitioners submit this Court should accept the question certified and declare it is unconscionable for one party to a dispute to deprive the remaining parties of their right to access a court of law and compel the parties to an arbitration system that has an inherent bias in favor of the party that has designated it.

Summary of Issues Certified

This case poses a question of great significance to the plaintiffs in this case, to the non-lender party to this litigation, and to many other consumers in West Virginia: whether an arbitration clause that designates arbitration before an arbitrator with a strong incentive to favor one side of the controversy – here the corporate lenders over the consumers and the non-lender party – is the sort of arbitration clause that is so unfair, one-sided, and over-reaching as to be unconscionable and unenforceable under the West Virginia Consumer and Credit Protection Act. While this question is one of first impression in this Court and involves only an interpretation of a state statute, it nonetheless stands at the intersection of three important and long-standing precedents of this Court and of the United States Supreme Court. See Arnold v. United Cos. Lending Corp., 204 W. Va. 229, 236-37, 511 S.E.2d 854, 861-62 (1994); State ex rel. Shrewsbury v. Poteet, 157 W. Va. 540, 545, 202 S.E.2d 628, 631 (1974); see also Ward v. Village of Monroeville, 409 U.S. 57, 60-62 (1972). The resolution of this question requires a new application of important principles from these decisions.

In Arnold v. United Cos. Lending Corp., this Court held a one-sided, substantively unfair arbitration clause imposed by a large corporate lender upon an unsophisticated consumer in a contract of adhesion is unconscionable and unenforceable under the West Virginia Consumer and Credit Protection Act. See 204 W. Va. at 236-37, 511 S.E.2d at 861-62. Though many of the circumstances of Arnold exist in this case, the instant question involves charges of inherent bias in an arbitration system, an issue not addressed in Arnold. Currently, it is unclear under West Virginia law whether a clause compelling arbitration before an arbitration system with an inherent incentive to favor large lenders renders that clause unconscionable and unenforceable. The petitioners submit that a clause designating arbitration to such a system is indeed unconscionable under the West Virginia act.

The answer to the certified question is informed by two landmark cases addressing incentives and the behavior of decision makers. In State ex rel. Shrewsbury v. Poteet, this Court held the justice of the peace system unconstitutional because it gave justices of the peace a financial incentive to favor creditors over consumers. See 157 W. Va. at 545, 202 S.E.2d at 631. And in Ward v. Village of Monroeville, the United States Supreme Court adopted a similar position, finding it unconstitutional for the mayor of a village to exercise the power to levy fines against traffic violators where the mayor had an inherent incentive to act in a particular manner due to his general supervision of the village's finances. See 409 U.S. at 61-62. The Court should apply this body of constitutional law, previously recognized by this Court and confirmed by the United States Supreme Court, to the common law doctrine of unconscionability. Just as the State may not constitutionally subject an individual to an adjudicative system where the decision maker has a strong incentive to favor one party, it is unconscionable for a company to immunize itself from legal liability by drafting an arbitration clause that subjects the remaining parties to a forum that has an inherent bias in favor of the company, while at the same time depriving other parties the right to access a court of law.

An arbitration system like the one at issue here – in which arbitrators are compensated through a fee-per-case system and one party selects the decision maker forum – is inherently biased on its face, making the facts concerning any individual such system unnecessary to the ultimate question. But the practical importance of this legal question becomes clear from the factual record, which contains substantial evidence that the arbitration service provider at issue in this case – the for-profit NAF – has been profoundly influenced by the market reality that its business depends upon referrals from and the good favor of lenders. NAF has written a series of inappropriate letters soliciting business from lenders, promising to conduct arbitrations under a variety of rules that differ

from the practice in court and from those of other arbitration service providers. A number of these promises sharply favor the lenders' interests and place consumers at an obvious disadvantage. Promising that it is "the alternative to the million dollar lawsuit," (Plfs. Response to Defs' Mot. to Reconsider at Ex. 10.), NAF promises to help lenders improve their bottom line and defeat plaintiffs in what NAF considers a war waged against the consumer. (See id. at Exs. 9 & 11.) NAF's solicitation letters treat lenders as its ally and consumers as its enemy and counsel lenders how to defeat their consumers in this battle. NAF has made good on its promises in solicitations by repeatedly entering into litigation between lenders and against consumers as an *amicus*, always making arguments in support of the position of the defendant lenders against individual consumers. See, e.g., Brief of *Amicus Curiae* National Arbitration Forum, Marsh v. First USA Bank, N.A., No. 00-10648 (5th Cir Dec. 12, 2000).

NAF has extremely close ties with lenders and this lender in particular. NAF lists the general counsel of the defendant, Saxon Mortgage, as a reference in its promotional materials sent to other lenders. A principal of NAF, Edward C. Anderson, came to the arbitration business directly from a position as in-house litigation counsel at ITT Financial Services, a lender beset with consumer lawsuits for financial wrongdoing. NAF also routinely offers legal advice to lenders on the issue of how best to defeat consumers' challenges to mandatory arbitration clauses. An analysis of the results of NAF arbitrations between one of NAF's clients, a credit card company, and its consumers provides the tangible evidence for what would appear to be inevitable in NAF arbitration: out of a sample of nearly 20,000 arbitrations, NAF prevailed an astonishing 99.6% of the time. (See Plfs.' Response to Defs.' Mot. to Reconsider, Ex. 14.)[1]

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[1] Exhibit fourteen contains excerpts from Answers and Objections to Plaintiffs' Second Set of Interrogatories filed in Bownes v. First USA Bank, N.A., Civil Action No. 99-2479-PR (Cir. Ct. (continued...)

NAF's performance exemplifies the wisdom and foresight of the concerns expressed by this Court in Shrewsbury and by the United States Supreme Court in Ward, and establishes that the lender defendants' arbitration clause falls within the category of unconscionable clauses identified by this Court in Arnold.

II. STATEMENT OF FACTS

A. Stipulated Facts

The circuit court adopted the following stipulated facts:

The plaintiffs, Margaret Toppings and Roger D. Toppings, allege in their complaint that they are residents of Lincoln County, West Virginia and unsophisticated consumers with little experience in financial matters. They further allege their total household income consists of approximately $849/month in social security benefits. The complaint alleges that Margaret Toppings is 65 years old with a fifth grade education and Roger Toppings has a seventh grade education and cannot read, write, or understand written documents. (See Compl. ¶ 2.)

On November 12, 1999 the defendant Salmons Agency Inc. ("Salmons") presented loan papers for plaintiffs to sign in West Hamlin, Lincoln County, West Virginia. The plaintiffs asked to have someone read and explain the papers to them but were told by Salmons' employee serving as the closing agent, a young woman who knew nothing about the papers, that she did not know why they were sent to her, that she did not have time to read the papers to them, and that they could look at the papers when they got home. (See Compl. ¶¶ 8, 18; and admission in Answer of Salmons Agency, Inc. ¶ ¶ 8, 18.)

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[1](...continued)
Montgomery Cty. Feb. 8, 2000).

The contract documents set forth the following details of the transaction: a payment of $378.38 a month for 179 months (fifteen years), and at the end of 179 months, a balloon payment of $36,615.80; to pay off indebtedness of approximately $37,280.63, the plaintiffs became obligated to pay $104,345.82 including the balloon payment of $36,615.80, due after making monthly payments of approximately $378.38 for fifteen years.

One of the many form documents the plaintiffs signed was a form labeled "Arbitration Rider." Said arbitration rider requires all disputes, claims or controversies arising from the loan to be resolved by a binding arbitration by an arbitrator designated by the National Arbitration Forum and the procedures of the National Arbitration Forum, ("NAF") Post Office Box 50191, Minneapolis, Minnesota 55405. (See id., Ex. B; Jt. Mot. of Defs. to Compel Arb. and Dismiss or Stay Proceedings at 3; Resp. of Defs. to Pls.' Mot. for Partial Summ. J. at 2-3, 6, ¶ 4.) The judges are paid on a fee basis, receiving payment for their services based solely on the number of cases they handle. (See Resp. of Defs. to Pls' Mot. for Partial Summ. J., Ex. 3.)

B. Background.

1. Circumstances surrounding loan transaction.

Margaret Toppings went to school through the fifth grade, and cannot understand legal papers without someone reading and explaining them to her. (See Dep. of Margaret Toppings at 44.)[2] Roger Toppings went to school through the seventh grade, but did not have books; he can read "little" words but not "big ones." (See Dep. of Roger D. Toppings at 23-30.)

[2] All depositions cited in this brief may be located in the record as an exhibit to the Plaintiff's Response to the Defendants' Motion to Reconsider, filed in the circuit court on August 17, 2001. For the sake of convenience, hereinafter deposition cites only include the name of the deponent and the page reference.

The loan agent who solicited the Toppings had promised them a loan at a 6.9% interest rate; but the loan turned out to include a 10% interest rate. (See id. at 46.) The Toppings were never told about the balloon payment included in the loan. (See id.) The Toppings would never have agreed to such a payment because they recognize they could never afford it. (See id. at 46-47.)

The Toppings were completely unaware that the contract contained an arbitration clause. (See Dep. of Margaret Toppings at 47.) To be sure, they do not even understand the term "arbitration." (See id.) Margaret Toppings testified she would certainly rather have her case decided in a court of law than by an arbitrator picked by the defendants. (See id. at 43.) Roger Toppings echoed that sentiment and explained that permitting the defendant lenders to pick the arbitrator "wouldn't be right" because the arbitrator "would be picking sides. [It would b]e like me picking you [counsel for the plaintiffs]" to be the arbitrator. (Dep. of Roger Toppings at 29.)

2. Background on NAF

Though unnecessary to the determination of the legal issue presented to the Court, background on the arbitration forum at issue here, NAF, is worth consideration. There is a great deal of evidence in the record about NAF.[3] The for-profit organization operates with twenty-six

[3] Although not technically stipulated facts, all the information concerning NAF comes directly from either (1) documents prepared and generated by NAF, (2) the deposition testimony of executive director Edward C. Anderson, and/or (3) the deposition testimony of Matthew Grey, assistant general counsel for the defendant, Saxon Mortgage. NAF is not a party to the proceedings, and therefore could not stipulate to this evidence.

The plaintiffs note that obtaining this evidence was not inexpensive. Notwithstanding the fact that the plaintiffs were forced to hire counsel in Minnesota to file a proceeding in order to subpoena Mr. Anderson to a deposition, Anderson would only appear in response to this mandatory subpoena if the plaintiffs paid his fee of $300.00 per hour. (See Dep. of Anderson at 6-7.) Yet NAF voluntarily provided information to counsel for Saxon Mortgage and Meritech in this case in hopes of demonstrating NAF was a neutral arbitration forum and therefore that arbitration should be compelled. (See Aff. of Edward C. Anderson, Defs. Supplemental Authority in Response to Plfs' Mot. for Summ. J for Certain Declaratory Relief (hereinafter "Defs.' Supp. Authority").) Some of this information, particularly NAF's claims of arbitrators from West Virginia, turned out to be

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employees all employed out of a small office in Minnesota. (See Dep. of Edward C. Anderson at 16-17.)

a. NAF rules.

Pursuant to NAF rules, arbitrators are paid on a fee-per-case basis. That is to say, arbitrators only get paid if they hear a case, and they get paid more if they handle more cases. (See id. at 19-20.) Under the NAF Code of Procedure, parties must select an arbitrator from a list of individuals approved and pre-selected by NAF.[4] (See id. at 24.)

NAF distinguishes itself from a court of law to lenders by announcing, quite astonishingly, that decisions by its arbitrators are not based on "equity." (See Plfs.' Response to Defs.' Mot. to Reconsider at Ex. 9.) NAF rules also limit awards to "the amount of the claim," (see NAF Code of Procedure, Rule 37.B.), prohibiting the recovery of damages based on new evidence discovered during the litigation. By forcing claimants to place a dollar figure on their claim, not only must a consumer sacrifice her or his right to access the courts, the consumer also waives relief he or she would be entitled to under the law. NAF only permits consolidation with the agreement of all parties, making it impossible for consumers to band together to bring common claims. (See id. at

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[3](...continued)
patently false. (Compare Defs' Supp. Authority at Ex. 11 (last page) with Plfs.' Response to Defs.' Mot to Reconsider at Exs. 14-16.)

[4] The mechanics of selecting an arbitrator involve a system of strikes that inevitably results in an arbitrator who ultimately is selected solely by the NAF Director. (See NAF Code of Procedure, Rule 21, Defs' Response to Plfs.' Mot. for Summ. J. at Ex 3.).) "The parties are provided with a list of names that is one more than the number of parties." (See Dep. of Anderson at 78). Each party then gets to make one strike. In cases such as this where there are four lender defendants and one pair of plaintiffs, the plaintiffs would strike one arbitrator from the list and each of the four lender defendants would strike one. Left after the strikes would be the one extra arbitrator selected by the NAF. If NAF were to submit a list of arbitrators in which even two had strong ties to corporate lenders, let alone all of them, one of those two would almost certainly end up as the decision maker replacing the courts and the jury system for the case.

Rule 19.A.) NAF also promotes the fact that under its rules, it is much easier to garner a default. (See id. at 13.C.) NAF touts that these specific rules – limiting awards to amount of the claim, prohibiting consolidation of claims, and procedures that facilitate default – all make NAF arbitration more advantageous to lenders than competing arbitration provider services. (See Plfs.' Response to Defs.' Mot. to Reconsider at Ex. 3.)

Finally, NAF rules provide for "[v]ery little, if any, discovery." (Id. at Ex. 18.) The consequence of this rule for consumers is obvious. All pertinent paper and loan documents are typically held by the lender. By denying the consumer access to discovery, NAF rules effectively prohibit consumers from proving their case. NAF also professes to save lenders money under the same rules by limiting "any pre-hearing maneuvering." (See id.)[5]

b. Appearance of impropriety.

There is an inherent bias in the fee-per-case system, creating an incentive for NAF arbitrators to rule for lenders in order to garner repeat business. In addition to employing a system with this general structural defect, NAF itself engages in questionable conduct that creates an appearance of impropriety. First, in solicitations and advertisements, NAF has overtly suggested to lenders that

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[5] One other rule that disadvantages many consumers on a fixed income, like the plaintiffs here, is in question. In his deposition, Mr. Anderson testified that NAF's rules institute a "loser pays" system, unless the state's substantive law prohibits it. (See Dep. of Anderson at 35-37; see also Plfs.' Response to Defs.' Mot. to Reconsider at Ex. 18.) Under NAF's loser pays system, "[t]he prevailing party may be awarded costs, including any arbitration filing fee."(Plfs.' Response to Defs.' Mot. to Reconsider at Ex. 18.) In addition, NAF provides that the loser to an arbitration proceeding may be forced to pay the opposing parties' attorney's fees. (See id. Ex.19.) NAF knows that the loser pays rule works to lenders' favor in many instances, and has promoted it in brochures sent to in-house counsel for the defendant, Saxon Mortgage. Notwithstanding the *caveat* expressed by Anderson in his deposition, solicitations from NAF do not mention that the loser pays rule is superceded by state substantive law. (See id. at Ex. 18.) Based on representations in NAF's solicitations, either (1) the loser pays rule is instituted in every case, regardless of state law, or (2) NAF misrepresents to lenders that it will institute a loser pays system in an effort to garner future business from the industry.

NAF arbitration will provide them with a favorable result. Second, NAF has engaged in improper contacts with lenders, including the defendant lenders in this case, and has aided them in litigation and provided them assistance to facilitate NAF arbitration over other parties' objections. And finally, NAF has created an appearance of impropriety by flaunting its close ties to the financial service industry and lawyers that routinely represent the industry.

Individual solicitations and advertisements generated by NAF demonstrate its relationship with the financial industry.[6] For example, correspondence from NAF 's Director of Development, Curtis D. Brown, to in-house counsel for the defendant, Saxon Mortgage, initiates the relationship with the defendant lender, stating, "By adding arbitration language to your contracts, the [NAF's] national system of arbitration lets you minimize lawsuits, and the threat of lender liability jury verdicts."[7] (Dep. of Grey at Ex. 2.) On January 29, 1997, Leif Stennes, a policy analyst for NAF, wrote Saxon Mortgage's in-house counsel and plainly surmised, "There is no reason for Saxon

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[6] One NAF advertisement labeled "Professionals and the National Arbitration Forum," consists of a list of favorable quotes, all of which come from attorneys or officials affiliated with lenders. (See Plfs.' Resp. to Defs.' Mot. to Reconsider, Ex. 12.) An NAF News Release dated August 1, 1998 lists "Lenders Adopting Forum Agreements," and also provides the names of twenty-one individuals who specialize in representing financial institutions and banks as "Information Resources." (See Plfs.' Response to Defs.' Mot. to Reconsider at Ex. 7; see also Dep. of Anderson at Ex. 1.)

[7] This letter contradicts Mr. Anderson's sworn testimony denying that NAF had sent solicitations to lenders stating the use of NAF would improve their bottom line. (See Dep. of Anderson at 69.) More direct contradiction of Mr. Anderson's testimony can be found in another letter from Curtis D. Brown to Robert S. Banks, dated January 14, 1999. (See Plfs' Response to Defs.' Mot. to Reconsider at Ex. 9.) This letter, which was responsive to plaintiffs' subpoena to NAF but inexplicably not produced, states, "We have a number of information resources on arbitration law and how arbitration will make a positive impact on the bottom line." (See id.) Mr. Anderson also testified NAF had not represented to lenders that it would reduce their collection costs, (see Dep. of Anderson at 69), although an NAF full page advertisement with a large bold heading asserts, "Arbitration can save up to 66% of your collection costs." (Id. at Ex. 13.) Like all of NAF's advertising, and in keeping with its patent orientation, these ads plainly targets lenders and their interests.

Mortgage, Inc. to be exposed to the costs and the risks of the jury system." (Plfs.' Response to Defs.' Mot. to Reconsider at Ex. 3.)

In discovery, the plaintiffs sought documents from NAF itself. One document obtained, which was specifically responsive to the plaintiffs' requests yet not produced by NAF, is a letter to a lawyer who regularly represents corporate lenders.[8] The letter warns that the "class action bar" is threatening to bring lawsuits involving the Y2K issue, and states that the "*only* thing" that will "prevent" such suits is the adoption of an NAF arbitration clause "in every contract, note and security agreement." (Id. at Ex. 11.) Another solicitation from NAF sent generically to multiple lenders describes in huge print the NAF as "The alternative to the million dollar lawsuit." (Id. at Ex. 10.) These solicitations are typical of the marketing strategy of NAF: suggest to lenders that NAF will give them a better result than the judicial system and lenders will designate NAF as the sole arbitration forum.

c. NAF's relationship with the defendants, Saxon Mortgage and Meritech, and other lenders.

As noted, NAF solicited the defendant, Saxon Mortgage, by letter dated September 1996, representing that it could minimize the lender's liability. (See id. at Ex. 2.) The correspondence also included a "starter kit." (See id. at Ex. 3.) This was then followed by another solicitation from Ed Anderson promising to limit arbitration awards to the amount claimed. (See id. at Ex. 4.)

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[8] The letter is dated April 16, 1998, from Roger Haydock, Director of Arbitration at NAF, to Alan Kaplinsky, the "Partner-in-charge" of the Consumer Financial Services Group with the law firm Ballard, Spahr, Andrews & Ingersoll. (See Plfs.' Response to Defs.' Mot. to Reconsider at Ex. 11.) According to this firm's website, its "Consumer Financial Services Group has developed one of the pre-eminent and largest consumer financial services litigation defense practices in the country, defending banks and other financial institutions throughout the United States in class actions and other complex litigation." <http://www.ballardspahr.com/home.htm> (visited Aug. 14, 2001).

NAF works closely with lenders to fight opposition to NAF arbitration and to ensure NAF is the arbitration forum designated rather than any other forum.[9] NAF is engaged in an intense competition with other arbitration service providers for the business of lenders such as the defendants. As Meritech and Saxon Mortgage's designated representative, Matthew Grey testified the defendant lenders ran a draft of their arbitration clause by NAF's Ed Anderson before incorporating it into loan agreements. (See Dep. of Grey at 49-50.) In correspondence to Saxon Mortgage, Anderson then expressed disappointment that the early draft of the defendant's arbitration clause designated American Arbitration Association ("AAA") as the arbitration service provider. (See id. at Ex. 4.) Anderson persisted, stressing in another correspondence that not having "a claim 'capped' could have drastic consequences" and that his "team can deliver better service." (Id. at Ex. 4.) A later letter again emphasized NAF "awards have upper amounts." (Id. at Ex. 5.) Eventually the defendants rewrote their clause to specifically designate NAF rather than rival AAA. (See id. at 53.) By August1, 1998, NAF had begun including Mr. Shepherd, general counsel for Saxon Mortgage, among its list of "Information Resources" in its solicitations to other lenders. (See id. at Ex. 7.) Assistant general counsel for Saxon Mortgage conceded he "wouldn't think" NAF would list Saxon Mortgage as an Information Resource unless it considered it one of its better clients. (Dep. of Grey at 7.)

NAF has filed affidavits and briefs as *amicus curie*, supporting the lender's arguments in this and other cases. See e.g., Brief of National Arbitration Forum as *Amicus Curiae*, Green Tree

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[9] In addition to aiding lenders in litigation and its inappropriate contacts with the defendants in this case as is set forth below, NAF directors maintain a close relationship to lenders. For example, prior to beginning his relationship with NAF and NAF's former corporate parent Equilaw, Mr. Anderson was litigation counsel for ITT Consumer Financial Corporation, a lender beset with consumer lawsuits for illegal loan practices. See, e.g., Patterson v. ITT Consumer Financial Corp., 18 Cal. Rptr. 2d 563 (Cal. Ct. App. 1993).

Financial Corp. v. Randolph, 531 U.S. 79 (2000); Brief of *Amicus Curiae* National Arbitration Forum, Baron v. Best Buy Co., Inc., No-14028-E (11th Cir. Dec. 15, 1999); Brief of *Amicus Curiae* National Arbitration Forum, Marsh v. First USA Bank, N.A., No. 00-10648 (5th Cir Dec. 12, 2000). On November 11, 1998, NAF's "Forum Counsel" wrote a memo to in-house counsel for the defendant, Saxon Mortgage, offering him legal advice as to the most effective means of drafting an arbitration clause. (See Plfs.' Response to Defs.' Mot. to Reconsider at Ex. 6.) NAF came to aid of the defendants in this case when the plaintiffs and the defendant, Salmons, all resisted arbitration before NAF. However, the information NAF provided to trial counsel for Saxon Mortgage and Meritech proved to false and misleading. Among other materials provided to the defendants in aid of their motion to compel arbitration, NAF provided defense counsel in this case with a list of names of people whom it claimed were available as NAF arbitrators. (See Defs.' Supp. Authority at Ex. 11.) The defendant lenders in turn submitted this document to the circuit court in support of their motion and relied on the document when orally arguing the fairness of NAF arbitrators to the circuit judge. However, every individual included on the list who was contacted by plaintiff's counsel stated they had not agreed to serve as an arbitrator for NAF and their inclusion on the list at that time was false. (See Plfs.' Response to Defs.' Mot. to Reconsider at Exs. 14-16.) Professor Charles DiSalvo of the West Virginia University College of Law, after learning his name had been falsely included on the list, wrote Mr. Anderson a letter on June 5, 2001 stating he was not "an arbitrator available through the Forum" and asking NAF to "immediately cease the misrepresentation that I am associated with the Forum. . . ." (See id. at Ex. 14.) Likewise, the Honorable Thomas McHugh, former Justice of the Supreme Court of Appeals of West Virginia, and Charleston lawyer Martin Glasser were included on the list, but neither had any knowledge that they were being designated as NAF arbitrators and both declared their inclusion on the list was false. (See id. at Exs. 15 & 16.)

NAF's fee-per-case system, taken together with its appearance of impropriety, forecasts the outcome of arbitration before NAF as a foregone conclusion. NAF has obvious incentive to favor the lenders in arbitrations, and analysis of the outcomes of NAF arbitration bear this out. In a civil action filed in Alabama state court, one of NAF's clients, the credit card company First USA, indicated it had prevailed in 19,618 cases, and the card member had prevailed in 87 cases in arbitration cases before NAF. (See id. at Ex. 17.) That works out to a success rate for the lender of 99.6%.[10] In the end, NAF has completely fulfilled on its promises. It has employed a system with an inherent bias for lenders, promised results to lenders, aided them in getting the results, and then ultimately delivered results favorable to the lender.

[10] NAF takes the position that the lender's success rate is actually *lower* than what it would be in court. NAF has asserted that most of the nearly 20,000 First USA cases involved collections matters, and that creditors are expected to win 99.69% of such cases even if the cases were in court. The petitioners know of no statistical or empirical support for this proposition, however, and greatly doubt its truth.

III. QUESTION CERTIFIED

Whether a lender's form compulsory arbitration clause or rider, which mandates that all disputes arising out of a consumer transaction be submitted to a lender-designated decision maker compensated through a case-volume fee system whereby the decision maker's income as an arbitrator is dependent on continued referrals from the creditor, so impinges on neutrality and fundamental fairness that it is unconscionable and unenforceable under West Virginia law.

The Circuit Court answered the question in the affirmative.

IV. POINTS AND AUTHORITIES

Cases

Armendariz v. Foundation Health Psychare Servs., Inc., 6 P.3d 669, 699 (Cal. 2000)

Arnold v. United Cos. Lending Corp., 204 W. Va. 229, 236-37, 511 S.E.2d 854, 861-62 (1994)

Art's Flower Shop, Inc. v. Chesapeake & Potomac Tel. Co., 186 W. Va. 613, 617, 413 S.E.2d 670, 674 (1991)

Ballard v. Southwest Detroit Hosp., 327 N.W. 2d 370, 372 (Mich Ct. App. 1982)

Bownes v. First USA Bank, N.A., Civil Action No. 99-2479-PR (Cir. Ct. Montgomery Cty. Feb. 8, 2000)

Cheng-Canindan v. Renaissance Hotel Assocs., 57 Cal. Rptr. 2d 867, 874-77 (Cal. Dist. Ct. App. 1996)

City of Grafton v. Holt, 58 W. Va. 182, 187, 52 S. E. 21, 22, 6 Ann. Cas. 403 (1906)

Cole v. Burns Int'l Security Services, 105 F.3d 1465, 1482 (D.C. Cir. 1997)

Cross & Brown Co. v. Nelson (In re Cross & Brown Co.), 167 N.Y.S.2d 573, 575 (N.Y. App. Div. 1957)

Ditto v. Re/Max Preferred Properties, Inc., 861 P.2d 1000, 1004 (Okla. Ct. App. 1993)

Findley v. Smith, 42 W. Va. 299, 305, 26 S. E. 370, 372 (1896)

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991)

Graham v. Scissor-Tail, 623 P.2d 165, 177 (Cal. 1990)

Hooters of America, 173 F.3d 933, 940 (4th Cir. 1999)

Hudson v. Chicago Teachers Union Local No. 1, 743 F.2d 1187, 1195 (7th Cir. 1984), aff'd, 475 U.S. 292 (1986)

In re Knepp, 229 B.R. 821, 850 (Bankr. N.D. Ala. 1999).

In re Turner Bros. Trucking Co., Inc., 8 S.W.3d 370, 377 (Tex. Ct. App. 1999)

Iwen v. U.S. West Direct, 977 P.2d 989, 996 (Mont. 1999)

Keith v. Gerber, 156 W. Va. 787, 790, 197 S.E.2d 310, 312 (1973)

Knapp v. American Gen. Fin., Inc., 111 F. Supp. 2d 758, 764 (S.D.W. Va. 2000)

Lozada v. Dale Baker Oldsmobile, Inc., 91 F. Supp. 2d 1087, 1100-01 (W.D. Mich. 2000)

Nicholson v. Labor Ready, Inc., No. C 97-0518 FMS, *available in* 1997 WL 294393, *5-6 (N.D. Cal. 1997)

Patterson v. ITT Consumer Financial Corp, 18 Cal. Rptr. 2d 563 (Cal. Ct. App. 1993)

Powertel, Inc. v. Bexley, 743 So. 2d 570, 577 (Fla. Dist. Ct. App. 1999)

Prevot v. Phillips Petroleum Co., 133 F. Supp. 2d 937, 940-41 (S.D. Tex. 2001)

Shankle v. B-G Maintenance Management of Colorado, 163 F.3d 1230, 1235 (10th Cir. 1999)

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Tumey v. Ohio, 273 U.S. 510, 524 (1927)).

U.S. Life Credit Corp. v. Wilson, 171 W. Va.538, 541-42, 301 S.E.2d 169, 172-73 (1982)

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V. ARGUMENT

A. An Arbitration Clause Designating Arbitration Before a Partial Arbitrator is Unconscionable and Unenforceable Under West Virginia Law.

In the context of consumer loans, the West Virginia Consumer and Credit Protection Act provides unconscionable agreements are unenforceable:

> (1) With respect to a transaction which is or gives rise to a consumer credit sale, consumer lease or consumer loan, if the court as a matter of law finds: . . . (b) Any term of part of the agreement or transaction to have been unconscionable at the time it was made, the court may refuse to enforce the agreement, or may enforce the agreement, or may enforce the remainder of the agreement without the unconscionable term or part as to avoid any unconscionable result.

W. VA. CODE § 46A-2-121 (1999). By enacting the above provision, the Legislature "sought to eliminate the practice of including unconscionable terms in consumer agreements covered by the Act." U.S. Life Credit Corp. v. Wilson, 171 W. Va. 538, 541-42, 301 S.E.2d 169, 172-73 (1982). "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.'" Art's Flower Shop, Inc. v. Chesapeake & Potomac Tel. Co., 186 W. Va. 613, 617, 413 S.E.2d 670, 674 (1991) (quoting Troy Mining Corp. v. Itman Coal Co., 176 W. Va. 599, Syl. Pt. 1, 346 S.E.2d 749, Syl. Pt. 1 (1986)).[11]

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[11] Relevant to the unconscionability inquiry, but not necessarily the issue before this Court on the certified question is the question about procedural unconscionability. "Gross inadequacy in bargaining power may exist where consumers are totally ignorant of the implications of what they are signing or where the parties involved in the transaction include a national corporate lender on one side and unsophisticated, uneducated consumers on the other." See Art's Flower Shop, 186 W. Va. at 617-18, 413 S.E.2d at 674-75 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 234); see also Knapp v. American Gen. Fin., Inc., 111 F. Supp. 2d 758, 764 (S.D.W. Va. 2000). Procedural unconscionability refers to the relative unequal bargaining power of the parties and inequity in the bargaining process, and substantive unconscionability refers to the unfairness in the terms of the contract. See Troy Mining Corp., 176 W. Va. at 604, 346 S.E.2d at 753. The statute incorporates (continued...)

This Court has already recognized that unreasonably one-sided arbitration clauses are unenforceable under the West Virginia Consumer Credit and Protection Act in Arnold. See 204 W. Va. at 234-37, 511 S.E.2d at 859-62. Numerous other state courts around the country have also refused to enforce particularly egregious arbitration clauses.[12]

In particular, it is well established that arbitration clauses which require arbitration by non-neutral arbitrators are unconscionable. In Graham v. Scissor-Tail, for example, the California Supreme Court held a person cannot serve as an arbitrator if "his interests are so allied with those

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[11](...continued)
this concept by providing that a contract "induced by unconscionable conduct" is unenforceable. W. VA. CODE § 46A-2-121(a)(1).

In this case, the arbitration clause itself was executed in a manner that was procedurally unconscionable. It is undisputed the plaintiffs are elderly, unsophisticated consumers, with little knowledge of financial matters and the defendants are large national corporate lenders. It is also been stipulated that at closing, the plaintiffs asked to have someone read and explain the papers to them, but were told by a young woman who knew nothing about the papers that she did not know why they were sent to her, she did not have time to read the papers to them, and the Toppings could look at the papers when they got home. This situation is nearly identical to the circumstances found to be unconscionable in the inducement in Arnold. See 511 S.E.2d at 862 ("The relative position of the parties, a national corporate lender on one side, and elderly, unsophisticated consumers on the other were 'grossly unequal.'"). Accordingly, while not encompassed by the certified question, undisputed evidence in the record demonstrates the arbitration clause was executed under circumstances that were induced by unconscionable conduct.

[12] See, e.g., Armendariz v. Foundation Health Psychare Servs., Inc., 6 P.3d 669, 699 (Ca. 2000); Iwen v. U.S. West Direct, 977 P.2d 989, 996 (Mont. 1999); Williams v. Aetna Fin. Co., 700 N.E.2d 859, 867 (Ohio 1998); Sosa v. Paulos, 924 P.2d 357, 361-62 (Utah 1996); Powertel, Inc. v. Bexley, 743 So. 2d 570, 577 (Fla. Dist. Ct. App. 1999); In re Turner Bros. Trucking Co., Inc., 8 S.W.3d 370, 377 (Tex. Ct. App. 1999); Teleserve Systems, Inc. v. MCI Telecommunications Corp., 659 N.Y.S.2d 659, 665 (N.Y. App. Div. 1997); Worldwide Ins., Group v. Klopp, 603 A.2d 788, 791-92 (Del. 1992); Zak v. Prudential Property & Cas. Ins. Co., 713 A.2d 681, 684 (Penn. Super. Ct. 1998); Ballard v. Southwest Detroit Hosp., 327 N.W. 2d 370, 372 (Mich Ct. App. 1982); see also Shankle v. B-G Maintenance Management of Colorado, 163 F.3d 1230, 1235 (10th Cir. 1999); Prevot v. Phillips Petroleum Co., 133 F. Supp. 2d 937, 940-41 (S.D. Tex. 2001); Lozada v. Dale Baker Oldsmobile, Inc., 91 F. Supp. 2d 1087, 1100-01 (W.D. Mich. 2000); Nicholson v. Labor Ready, Inc., No. C 97-0518 FMS, *available in* 1997 WL 294393, *5-6 (N.D. Cal. 1997); In re Knepp, 229 B.R. 821, 850 (Bankr. N.D. Ala. 1999).

of [a] party that, for all practical purposes, he is subject to the same disabilities which prevent the party [to the contract] himself from serving." 623 P.2d 165, 177 (Cal. 1990). The court concluded the designated arbitrator in that case could not be expected to arbitrate with the required degree of "disinterestedness and impartiality," and refused to enforce the arbitration clause before it. Id. at 178.[13]

Where, as here, the neutrality of an arbitration service provider is likely compromised because of the incentive inherent in a system whereby one party designates an arbitrator who is paid on a fee-per-case basis, arbitration does not operate as a fair substitute to a judicial forum. An

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[13] The United States Court of Appeals for the Fourth Circuit has also refused to enforce an arbitration clause where it appeared that the rules "were crafted to ensure a biased decision maker." Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 940 (4th Cir. 1999). The court explained, "sham system[s], . . . whereby one party to the proceeding so controls the arbitral panel" are not arbitration at all. Id. at 940. In particular, the Hooters court held arbitration systems structured in such a way that arbitrators have a pecuniary interest in ruling in favor of one party are particularly onerous. See id. The court noted an arbitration clause is unenforceable when it suffers from the "most serious flaw, . . . [when] the 'mechanism [for selecting arbitrators] violates the most fundamental aspect of justice, namely an impartial decision maker.'" Id.

Other courts around the country have also refused to enforce arbitration clauses where there was strong evidence to suggest the arbitrators were likely to be non-neutral. See, e.g., Hudson v. Chicago Teachers Union Local No. 1, 743 F.2d 1187, 1195 (7th Cir. 1984), aff'd, 475 U.S. 292 (1986); Cheng-Canindan v. Renaissance Hotel Assocs., 57 Cal. Rptr. 2d 867, 874-77 (Cal. Dist. Ct. App. 1996) (finding procedure dominated by employer does not qualify as arbitration); Ditto v. Re/Max Preferred Properties, Inc., 861 P.2d 1000, 1004 (Okla. Ct. App. 1993) ("[A]rbitration clause as would exclude one of the parties from any voice in the selection of arbitrators cannot be enforced."); Cross & Brown Co. v. Nelson (In re Cross & Brown Co.), 167 N.Y.S.2d 573, 575 (N.Y. App. Div. 1957) (A well-recognized principle of 'natural justice' is that a man may not be a judge in his own cause.").

Ensuring that arbitrators be truly neutral is consistent with the principle that arbitration offers remedies that are equal to those available in court. See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."); Cole v. Burns Int'l Security Services, 105 F.3d 1465, 1482 (D.C. Cir. 1997) (recognizing Gilmer allows that "an employee cannot be required as a condition of employment to waive access to a neutral forum in which statutory employment discrimination claims may be heard").

arbitration clause that compels arbitration before an arbitrator who is designated by one party and who is paid by a fee-per-case system is substantively unfair and therefore unconscionable under West Virginia law.

B. An Arbitration System Whereby One Party Selects the Arbitrator and the Arbitrator's Income Is Dependent upon a Fee-Per-Case System Is Fundamentally Unfair and Biased on its Face.

In West Virginia, fee-per-case systems for judicial decision makers violate due process. In State ex rel. Shrewsbury v. Poteet, this Court recognized the fundamental concept that the guarantee of due process under the state constitution "requires that a defendant in a judicial proceeding be afforded a trial before a fair and impartial tribunal." 157 W. Va. at 545, 202 S.E.2d at 631. Consistent with this fundamental right, the Court held unconstitutional a statute that gave judicial officials a pecuniary interest in the cases they heard:

> In view of the foregoing, we are of the firm opinion that Code, 1931, 50-17-1, as amended, providing the $5.00 fee to Justices of the Peace, creates a pecuniary interest in such judicial officers and is therefore in violation of Article III, Section 10 of the Constitution of West Virginia and of the Fourteenth Amendment to the Constitution of the United States; also, inasmuch as such statute encourages justice for sale it violates Article III, Section 17 of our constitution.

Id. at 547, 202 S.E.2d at 632. This Court explained, "It is essential to the fair and proper administration of justice that courts, whether the highest in the land or the most minor, be completely independent, absolutely free from influence and wholly without any pecuniary interest, however remote, in any matter before them." Id. at 545-46, 202 S.E.2d at 631.

The due process mandate of an impartial tribunal is enshrined in the ancient Latin maxim, *nemo debet esse judex in propria causa* – no man may be a judge in his own case. This principle extends not only to those cases in which the decision maker is an actual party to the litigation, it has been applied to any case in which the decision maker has an interest, including cases in which the

method of compensating decision makers could create a bias towards a particular class of litigants. It has been a long-standing policy of this Court to zealously preserve this unsullied principle:

> The maxim was specifically recognized by this court in Findley v. Smith, 42 W. Va. 299, 305, 26 S. E. 370, and in City of Grafton v. Holt, 58 W. Va. 182, 187, 52 S. E. 21, 22, 6 Ann. Cas. 403. In the Findley case the court said the maxim was "a fundamental rule" and that it "must be held sacred." In the Grafton Case the court said: "Suitors are entitled to a fair and impartial judgment upon the matters in litigation, and to have that judgment pronounced by a fair and impartial tribunal. Otherwise, courts of justice are but mockeries, and their judgments are without credit or respect. The maxim of the common law, 'Nemo debet esse judex in propria causa,' remains inviolate in this state." The Grafton Case was decided in 1905, but the maxim is just as firmly embedded in the jurisprudence of the state now as then.

Williams v. Brannen, 116 W. Va. 1, 4, 178 S.E. 67, 68-69 (1935). Alexander Hamilton recognized this fundamental principle during the formative stages of the drafting of the United States Constitution.[14] In *The Federalist No. 79*, Hamilton explains that for the judiciary to be independent, decision makers must be dependent on no one for the means of their support: "a power over a man's subsistence amounts to a power over his will." Id. at 512. Thus, those who have power over a decision maker's income, also have the power to shape her or his decisions.

This maxim merely represents one aspect of the even more fundamental principle that a decision maker shall be independent. The importance of an independent decision maker is

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[14] Indeed, it is without question that the principle of an independent judiciary forms a basic tenet of the American system of government; its establishment was one of the basic goals of the founding fathers in drafting the Constitution. Writing in *The Federalist Papers*, Alexander Hamilton stated, "The complete independence of the courts of justice is peculiarly essential in a limited constitution." THE FEDERALIST PAPERS 505 (M.L. Ed. 1965). The rights and privileges guaranteed by such a constitution would amount to nothing unless preserved by an independent judiciary. An independent judiciary was seen as so important to the government of free men that in the Declaration of Independence, a judiciary dependent on the King of England "for the tenure of their offices, and the amount and payment of their salaries" was cited as one of the reasons justifying the American Revolution. See THE DECLARATION OF INDEPENDENCE para. 10 (U.S. 1776).

eloquently summarized by Henry T. Lummus, a distinguished member of the Massachusetts Supreme Court from 1932 to 1955:

> The independence of the judiciary is imperatively necessary for the liberty of every citizen. When judges are not free, no man can be said to have rights, for the forms of justice can be twisted to serve the tyranny of the numerous, the wealthy, the powerful, or the demagogues and schemers who are enabled to govern in their names. Woodrow Wilson said: "So far as the individual is concerned, a constitutional government is as good as its courts; no better, no worse. Its laws are only its professions. It keeps its promises, or does not keep them, in its courts." John Marshall told the Virginia constitutional convention in 1829, "I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflected upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent judiciary."

HENRY T. LUMMUS, THE TRIAL COURT 15 (1937).

The holding of Shrewsbury was informed by decades of precedent from this Court giving the principle, no man shall be a judge in his own case, its full meaning. As early as 1896, this Court declared an execution on a judgment entered by a judge who had previously owned it, but had assigned the judgment to another, void:

> [i]t is a fundamental rule in the administration of justice that a person can not be a judge in a cause wherein he is interested . . . . And where there is a direct necessary interest, it matters not how remote the interest may be, or how small or insignificant in amount; the maxim must be held sacred, and even the appearance of evil be avoided.

Findley v. Smith, 42 W. Va. 299, 305, 26 S.E.370, 372 (1896). Again, the fundamental rule was invoked in a civil proceeding in City of Grafton v. Holt to prohibit a judge from hearing a case concerning the water rates of that city, where the judge was a consumer of the water supplied by the city water works. See 58 W. Va. 182, 186-87, 52 S.E. 21, 22-23 (1905) This Court used the strongest language in its declaration:

> Suitors are entitled to a fair and impartial judgment upon the matters in litigation, and to have that judgment pronounced by a fair and impartial tribunal. Otherwise

> courts of justice are but mockeries, and their judgments are without credit or respect. The maxim of the common law, '*Nemo debit esse judex in propria causa*', remains inviolate in this State.

58 W. Va. at 187, 52 S.E. at 22-23. In Williams v. Brannen this Court struck down as unconstitutional a fee system which compensated justices of the peace only from costs paid by the convicted parties or from fines obtained by the justices of the peace and accumulated in the hands of the sheriffs. See 116 W. Va. at 6, 178 S.E. at 69 ("The prospect of the fees arising from [the] arrest may have influenced the issuance of the warrant. The stream from the fountain of justice should be pure at its very source."). Because a justice had to convict in an appreciable number of cases to ensure he would always secure payment of his fees, the Court found that the system of compensation produced an inherent bias against defendants. Such a system was held to violate the ancient Latin maxim as it was explicated by the United States Supreme Court. Id. at 4-5, 178 S.E. at 69 ("'Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' We concur in that pronouncement.") (citing Tumey v. Ohio, 273 U.S. 510, 524 (1927)).

The next occasion this Court had to interpret the maxim came in State ex rel. Osborne v. Chinn, 146 W. Va. 610, 121 S.E.2d 610 (1961), which challenged the constitutionality of the Kanawha County Justice of the Peace Salary Act. That act provided salaries for the justices, which were to be paid only from a special fund consisting of all fines and costs collected by the Kanawha County Justices of the Peace. This case differed from Williams in that in Williams each justice was paid from an individual fund created by fines levied in his own court while here, one fund was created, from which all justices in the county would be paid. The court found this distinction

immaterial and, applying the "possible temptation" standard, found the fee system to be in violation of both state and federal due process guarantees because it created a pecuniary interest in the justices of the peace. Because the act made it necessary for the justice to build up a fund out of which not only his salary, but the salaries of all other justices in Kanawha County were to be paid, the Court feared the act "might create a tendency for the justices to find an accused guilty in order to obtain a fine to be placed in the fund, without giving the proper weight to the burden of proof in finding individuals who may be tried before said justices guilty beyond all reasonable doubt." Osborne, 146 W. Va. at 612, 121 S.E.2d at 612. Because any pecuniary interest by a justice of the peace in a case tried before him, however remote, offends due process, the principle extends to condemn any system that would create any possible temptation or tendency to rule for one side of the dispute.

In modern times this Court in this Court in State ex rel. Moats v. Janco invalidated two fees charged by justices of the peace contingent on finding against the defendant. See 154 W. Va. 887, 900, 180 S.E.2d 74, 83 (1971). Because the justice could collect these fees only by finding against the defendant, the Court held they "may, therefore, properly be considered a pecuniary interest, although manifestly slight in each case, and if charged or earned, results in his disqualification to try and convict the accused." Id. at 893, 180 S.E. 2d. at 79. In Keith v. Gerber, the Court held a municipal judge who received five dollars ($5.00) for each conviction obtained in his court had a pecuniary interest disqualifying him from hearing such cases. See 156 W. Va. 787, 790, 197 S.E.2d 310, 312 (1973). After reviewing the authorities, the Court reaffirmed the principle that "where a judge has a pecuniary interest in any case to be tried by him, he is disqualified from trying the case." Id. at 788, 197 S.E.2d at 311.

Moats and Keith arose in the context of criminal cases. In State ex rel. Reece v. Gies, the Court considered the constitutionality of fees that could be earned by the justice only after rendering judgment for the plaintiff in civil cases. See 156 W.Va. 729, 736-39, 198 S.E.2d 211, 215-16 (1973). The Court held "the same principle applies to civil cases as well as criminal cases." Id. at 737, 198 S.E.2d at 216. Once again, this Court vindicated the principle that where a decision maker "has any pecuniary interest in the decision of any case, he is disqualified from trying such case." Id. at 736, 198 S.E.2d at 215.

The United States Supreme Court has embraced this fundamental principle long recognized by this Court under similar circumstances in Ward v. Village of Monroeville, 409 U.S. 57 (1972). In that case, the Court explained the mayor "has general supervision of village affairs. A major part of village income is derived from the fines, forfeitures, costs and fees imposed by him in his mayor's court." 409 U.S. at 58. Even though the mayor did not personally profit from fines levied against alleged violators (unlike the decision makers in NAF), the Court found, "Plainly that 'possible temptation' may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." Id. at 60. In this case, the defendants' arbitration system makes the officials running the NAF (who select the arbitrators and operate the system), and the arbitrators themselves, dependent upon the defendants' continued good will for continued income.

A significant body of evidence indicates these generally applicable principles are equally true with respect to arbitrators.[15] As noted above, NAF vigorously competed for defendants' business.

[15] A recent study of the results of arbitration in California HMOs by the California Research Bureau for a state legislative committee supports this concern. The study found that with respect (continued...)

In this competitive market place, an obvious implication hangs over NAF's business like a cloud: were it to rule against the lenders too often (from the lenders's viewpoint), or in too great an amount, then lenders could easily take their business to other arbitration service providers. As one commentator has written:

> [A]rbitrators may be consciously or unconsciously influenced by the fact that the company, rather than the consumer, is a potential source of repeat business. An arbitrator who issues a large punitive damages award against a company may not get chosen again by that company or others who hear of the award.

Jean Sternlight, Panacea or Corporation Tool? Debunking the Supreme Court's Preference for Binding Arbitration, 74 WASH. U.L.Q. 637, 685 (1996) (footnote omitted). The Equal Employment Opportunity Commission, similarly has stated in the employment context, "results cannot but be influenced by the fact that the employer, and not the employee, is a potential source of future business for the arbitration." Gilbert F. Caselias, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment, 11 EEOC COMPLIANCE MANUAL at 8 (July 10, 1997); see also Richard C. Rueben, The Dark Side of ADR, CAL. LAW. 53, 54 (Feb. 1994) (quoting an attorney experienced in litigating arbitration claims as stating, "Anytime you are paying someone by the hour to decide the rights and liabilities of litigants, and that person is dependent for future business on maintaining good will with those who will bring him business, you've got a system that is corrupt at its core"); David Schwartz, Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled

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[15](...continued)
to "repeat player" bias issue, in every instance where an arbitrator awarded a plaintiff (generally raising medical malpractice claims) over $1 million "the arbitrator was only employed in that case." MARCUS NIETO AND MARGARET HOSEL, ARBITRATION IN CALIFORNIA MANAGED HEALTH CARE SYSTEMS at 22-23 (2000).

Arbitration, 1997 WISC. L. REV. 33, 61 ("[T]he independent arbitration companies have an economic interest in being looked on kindly by large institutional corporate defendants who can bring repeat business.").

The principle that the petitioners ask this Court to uphold today, *nemo debet esse judex in propria causa* – no man may be a judge in his own case – is one that is firmly rooted in the jurisprudence of the State of West Virginia. Under the defendants' arbitration clause the arbitration forum is designated by only one party, and arbitrators get paid if they hear cases referred to them by lenders such as defendants, and they vigorously compete with arbitration providers for such lenders to select their services. This context is precisely that posed in Shrewsbury and the many cases that came before it: NAF and its arbitrators have a pecuniary interest in the cases they hear – if they rule against the lenders very often, they will lose that business. Indeed, the defendant lenders testified that if they were dissatisfied with the result with NAF, they would consider switching to another arbitration forum. (See Dep. of Grey at 60-61.) In short, defendants' arbitration system encourages arbitrators to rule in favor of creditors, rather than "bite the hand that feeds them." Shrewsbury commands the finding that arbitration pursuant to NAF rules violates the guarantee that parties have an impartial tribunal in which to settle their legal disputes. Accordingly, such a system is inherently unfair and therefore unconscionable under West Virginia law.

C. NAF's Conduct Demonstrates the Pitfalls Inherent in a Biased Arbitration System that Has a Built-in Incentive to Favor One Party.

NAF's behavior exemplifies the concerns highlighted by this Court in Shrewsbury. In a series of improper communications, NAF has repeatedly made clear that it sees its role as one of helping corporate lenders reduce and resist claims brought by their consumers.

In this case, NAF rushed to provide the defendant lenders with the names of well-regarded members of the State Bar, including a respected former Justice of the Supreme Court of Appeals of West Virginia, a Professor from West Virginia University College of Law, and well respected local attorneys it claimed would be arbitrators for arbitration proceedings in West Virginia. (See Defs.' Supp. Authority at Ex. 11 (last page).) The problem is, NAF's representations were completely false: not one of the arbitrators listed who was contacted had agreed to serve as an arbitrator for NAF at that time. (See Plfs.' Response to Defs.' Mot. to Reconsider at Exs. 14-16.) NAF evidently attempted to bolster the defendant lenders' argument that NAF was a neutral forum, and arbitration ought to be compelled by falsely including the names of respected attorneys from this state. The Toppings and other parties to this litigation have a right to a neutral decision maker, not one who will say anything, regardless of the truth, to a court in order to ensure arbitration occurs and its financial interests are protected.

NAF's solicitations to the defendants suggest that it is likely to favor the lender in their disputes with their consumers. One letter, for example, urges would-be clients, "don't be exposed to the costs and risks of the jury system." (Plfs.' Response to Defs.' Mot. to Reconsider at Ex. 3.) The attachment to that letter offers free legal advice on how lenders can defeat class actions where common questions predominate and the class representatives' claims are typical. (See id.) The approach of the letter is not that of an entity committed to even-handed judging of disputes, but instead that of a for-profit vendor soliciting lucrative work by advising lenders how it can help them reduce their liabilities (*i.e.*, avoid the "risks of the jury system"). (See id.) This suggestion is consistent with another letter's promise to "minimize lawsuits" and "the threat of lender liability jury verdicts," (see id. at Ex. 2), and with the handout promising "the alternative to the mission dollar

lawsuit." (See id.)[16] Offering arbitration as a means to reduce the cost of procedure to litigate in court is one thing, but it a far different matter to suggest arbitration as a means to reduce the ultimate amount or frequency of awards against a party.

NAF's pro-lender litigation activities also support an inference as to its bias. In a series of cases before the United States Supreme Court and other courts, NAF has filed supposedly "neutral" *amicus* briefs that purport to support neither party.[17] In each case, despite NAF's claims of neutrality, NAF's *amicus* briefs set forth legal and/or factual arguments in support of the lenders' position and opposed by the individual consumer. It is scarcely a coincidence that dozens of lenders would endorse NAF, or that lenders and their counsel (including general counsel for the defendant, Saxon Mortgage) would line up to give testimonials of NAF for use in its solicitations to still other lenders. What lender would not? It is apparent that NAF's rules are structured in a manner not to provide a fair and equitable forum to resolve legal disputes without the expense of a lawsuit, but rather in a manner that serves as a thinly veiled attempt to ensure an end result favorable to NAF's clients, the financial service industry. NAF features its rules – and results – prominently in its literature soliciting business from the financial industry, creating an appearance of impropriety so blatant that it undermines any confidence a consumer would have in the fairness of NAF arbitration. This appearance of impropriety is backed by system that has resulted in a 99.6% success rate for its lender client. (See Plfs.' Response to Defs.' Mot to Reconsider at Ex. 17.)

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[16] Yet another letter characterizes the prospect of Y2K lawsuits as a battle between "the class action bar" and lenders. (See Plfs.' Resp. to Defs.' Mot. to Reconsider at Ex. 11.) The letter suggests NAF takes the lenders' side in that battle, urging defense counsel for lenders to use the NAF as a means of foiling "the class action bar." (Id.)

[17] In each of these cases, a corporate defendant was attempting to compel an individual claimant to arbitrate his or her claims, and the individual claimant was seeking to pursue his or her constitutional right to have his or her day in court and right to trial by jury.

To be sure, NAF's track record – its misrepresentations to the circuit court in this case; its promises to lenders; its willingness to go to any lengths to aid lenders in litigation and minimizing their liability; and its history of providing wildly favorable results for its clients – is not at issue in this case. What is at issue is the unconscionably of an arbitration system such as the one utilized by NAF, a fee-per-case system whereby one party designates the arbitrator. Such a system is inherently biased and flawed. NAF is simply the inevitable product of a system that substitutes incentive for impartiality, and capitalism for justice.

D. Petitioners' Claims Are Not Generalized Attacks on Arbitration, but Are Unique to the Particular System Imposed by These Lenders on Their Customers.

The petitioners' argument here is not a generalized attack on arbitration, or an attack that is inherent to all arbitration. The petitioners do not seek to challenge all arbitrators or arbitration in the abstract. Rather the petitioners argue that a specific arbitration system – one that operates on a fee-per-case compensation system and where one party designates the arbitrator – is inherently biased and unconscionable under West Virginia law.

It would have been easy for the lender defendants to draft an arbitration clause that did not give the arbitrators a strong incentive to rule for the lender defendants. The agreement could simply provide that the parties would jointly agree on an arbitrator.[18] With clauses of this sort, the arbitration service provider has no incentive to entirely structure its operations to favor the corporation, because providers doing so will not be selected by consumers.

[18] The plaintiffs suggested arbitration before either an arbitrator designated by the plaintiffs, or even jointly selected by all the parties. In-house counsel for Saxon Mortgage balked at such an invitation, insisting instead on its own arbitrator from NAF. (See Dep. of Grey at 61-63.)

The defendant lenders here seek to have NAF replace the civil justice system for any disputes involving the lender defendants. But while NAF would supplant the publicly accountable system of courts and juries, it has not held itself to the same ethical standards imposed upon courts and juries. Defendants could readily have drafted an arbitration clause that would have avoided all of the problems identified the Shrewsbury. Instead, the defendant lenders spurned the idea of giving consumers such as the Toppings any choice of provider, and instead insisted upon one that is designed to favor the lender to the exclusion of others, whether it be the consumer or other defendants. It is not an attack upon the institution of arbitration in general to challenge the fairness of this practice.

IV. CONCLUSION

The lender defendants' arbitration clause makes the arbitrators' income dependent on continued referrals from defendant lenders. As this Court has recognized in similar contexts, this situation creates strong incentives for the arbitrators to favor the defendant lenders. The record in this case strongly suggests that these incentives to bias have had their effect, as the NAF has (a) ruled for one creditor 99.6% of the time; (b) consistently supported the litigation efforts of lenders against their customers and maintained a close relationship with these particular lenders; and (c) made a variety of inappropriate contacts with defendants, promising them favorable treatment such as a cap on damages even when new evidence is discovered, limitations on discovery and a ban on class actions. NAF's fawning behavior demonstrates the foresight of this Court in condemning a similar "justice-for-sale" scheme in Shrewsbury. This Court should answer the certified question in the affirmative, and declare defendants' arbitration clause to be unconscionable.

Respectfully submitted,

MARGARET TOPPINGS and
ROGER D. TOPPINGS,

By counsel, and

SALMONS AGENCY, INC.,

By counsel.

Bren J. Pomponio (State Bar ID No. 7774)
Daniel F. Hedges (State Bar ID No. 1660)
Mountain State Justice, Inc.
922 Quarrier Street, Suite 525
Charleston, WV 25301
(304) 344-3144

W. Jack Stevens (State Bar ID No. 3606)
Stevens & Stevens
8137 Court Avenue
P.O. Box 635
Hamlin, WV 25523
(304) 824-5253