COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2012-SC-000687-D

BRITTANY DIXON, ET AL. APPELLANTS

v. On Discretionary Review from the Kentucky Court of Appeals
Case No. 2010-CA-002039-MR

Appeal from McCracken Circuit Court
Case No. 10-CI-0132

DAYMAR COLLEGES GROUP, LLC, ET AL. APPELLEES

BRIEF ON BEHALF OF *AMICUS CURIAE* KENTUCKY JUSTICE ASSOCIATION

Submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 2013, ten (10) originals of this brief and the $150 filing fee were served via Federal Express upon Susan Stokley Clary, Clerk of the Supreme Court, State Capitol, Room 209, 700 Capitol Ave., Frankfort, KY 40601, with one (1) copy of the brief served upin: Sam Givens, Clerk of the Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601; Hon. Tim Kaltenbach, McCracken Circuit Court, 301 S. 6th Street, Paducah, KY 42003; R. Kenyon Meyer, Dinsmore & Shohl, LLP, 101 S. 5th Street, Suite 2500, Louisville, KY 40202; Kenneth Sales, Bubalo, Goode, Sales & Bliss, 9300 Shelbyville Road, Suite 215, Louisville, KY 40222; Mark P. Bryant, Bryant Law Center, 601 Washington Street, Paducah, KY 42002-1876.

KEVIN C. BURKE

STATEMENT OF POINTS AND AUTHORITIES

PURPOSE AND INTEREST OF *AMICUS CURIAE*

In one sense, this case is about holding a for-profit college accountable for its unfair, false, misleading, and deceptive business practices—an interest shared by the Kentucky Attorney General.[1] In another sense, this case is about the manipulation of contract principles to enforce unconscionable terms against vulnerable student consumers.

Both aspects profoundly affect thousands of Kentuckians, including but certainly not limited to the many deceived students bilked out of tens of thousands of dollars in tuition payments in this case. For these reasons, *Amicus Curiae* Kentucky Justice Association submits this brief.

Here, the McCracken Circuit Court made findings as to procedural and substantive unconscionability. The record supports the findings. They should not be disturbed on appeal. The Court of Appeals erred in doing so. However, even if the Court of Appeals appropriately set aside the Circuit Court's findings, the terms on the reverse side of the Daymar "Student Enrollment Agreement," including the arbitration provision, are unenforceable for other reasons.

THE DAYMAR STUDENT ENROLLMENT PROCESS AND AGREEMENT

Daymar is a for-profit college. It offers Bachelors and Associates degrees in fields such as Medical Assisting, Paralegal Studies, and Billing and Coding. Daymar has campuses in Paducah, Clinton, Madisonville, Russellville, Owensboro, Louisville, Bowling Green, Scottsville, Bellevue and Albany, as well as campuses in other states.

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[1] The Complaint filed by the Attorney General against Daymar is available here: http://ag.ky.gov/pdf_news/daymar-complaint.pdf (last visited November 6, 2013).

Daymar recruits through false and misleading representations. More to the point, Daymar induces students to enroll and attend based on promises of full transferability of credits and the promise that students will obtain jobs in their fields of study upon graduation. In reality, almost no Daymar credits are transferrable—and few students obtain any sort of job in their fields of study after graduation.

The Appellants attended Daymar's Paducah campus. The Students were induced to enroll based on Daymar's false representations of credit transferability and job placement. Several testified they went to Daymar simply to acquire information and left the campus shortly after having just enrolled.[2] One testified she did not understand she had enrolled until she received a letter from Daymar alerting her that classes were to start soon.[3]

And the Students felt pressure to sign documents presented by Daymar. The Students met with Daymar representatives from between 30 minutes to one hour.[4] During this initial 30-60 minute meeting, they were required to take at least one twelve minute test (many took the test multiple times), fill out a questionnaire, attend an interview, view a presentation, and fill out financial aid paperwork.[5] Many also took a tour of the Daymar campus. They spent only a few minutes with an enrollment counselor, during which time the Students were expected to read and sign a packet of documents.[6] The Students were not given an opportunity to read the documents, ask questions, or even look at what they

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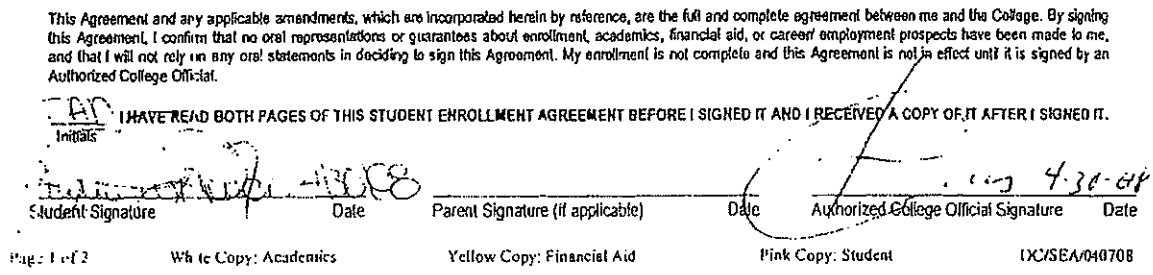
[2] 8/27/10 Hearing, at 09:05:10-07:02; 10:06:26-07:02; 10:38:50-39:18; 11:53:50-54:15.
[3] 8/27/10 Hearing, at 11:56:1-26.
[4] 8/27/10 Hearing, at 09:05:57-06:18; 10:06:45-49; 10:08:28-35; 10:39:53-55; 11:29:34-47; 11:55:50-58.
[5] Findings of Fact, ¶16.
[6] 8/27/10 Hearing, at 09:06:24-07:44; 10:08:33-09:25; 10:40:48-41:25; 11:30:16-25.

were signing.[7] At no time did Daymar representatives ask the Students if they had any questions. There was certainly was no negotiation. The Students testified that they were simply told to sign now and read when they got home.[8] Daymar admits that the Students were not able to negotiate any terms even if the Students knew what they were signing.[9]

Among the indistinguishable documents was a "Student Enrollment Agreement." The Agreement is one page, to be signed by the Student, and then counter-signed by a Daymar representative.[10] Following progressively smaller font on the pre-printed form, the Students were directed to sign and initial on the bottom front side. This is what the Students saw:[11]


This Agreement and any applicable amendments, which are incorporated herein by reference, are the full and complete agreement between me and the College. By signing this Agreement, I confirm that no oral representations or guarantees about enrollment, academics, financial aid, or career employment prospects have been made to me, and that I will not rely on any oral statements in deciding to sign this Agreement. My enrollment is not complete and this Agreement is not in effect until it is signed by an Authorized College Official.

Initials I HAVE READ BOTH PAGES OF THIS STUDENT ENROLLMENT AGREEMENT BEFORE I SIGNED IT AND I RECEIVED A COPY OF IT AFTER I SIGNED IT.

Student Signature Date Parent Signature (if applicable) Date Authorized College Official Signature Date 4-30-08

Page 1 of 2 White Copy: Academics Yellow Copy: Financial Aid Pink Copy: Student DC/SEA/040708

For the Court's benefit, the above section is reprinted here in larger 12-point font:

> This Agreement and any applicable amendments, which are incorporated herein by reference, are the full and complete agreement between me and the College. By signing this Agreement, I confirm that no oral representations or guarantees about enrollment, academics, financial aid, or career employment prospects have been made to me, and that I will not rely on any oral statements in deciding to sign this Agreement. My

[7] 8/27/10 Hearing, at 09:08:35-42; 09:12:20-27; 09:44:08-20; 10:09:34-42; 10:41:30-37; 10:42:44-50; 10:43:13-24; 11:32:07-10; 11:34:10-30; 12:00:54-01:00; 12:03:43-03:50.
[8] 8/27/10 Hearing, at 09:08:24-35; 09:11:25-35; 10:10:25-42; 10:42:52-54
[9] Daymar Court of Appeals Brief, p. 5.
[10] Findings of Fact, ¶ 17, R. 403-404.
[11] The Student Enrollment Agreement is a pre-printed form signed by all studnets. This is a copy of the bottom portion of the Student Enrollment Agreement attached to Daymar's Court of Appeals Brief, Exhibit C.

> enrollment is not complete and this Agreement is not in effect until it is signed by an Authorized College Official.

The Students then had to initial a blank space before the following language (again reprinted below in larger 12-point font):

> I HAVE READ BOTH PAGES OF THE STUDENT ENROLLMENT AGREEMENT BEFORE I SIGNED IT AND I RECEIVED A COPY OF IT AFTER I SIGNED IT.

Importantly, nothing refers to terms on the ***reverse side***. The first paragraph refers to the "Agreement" and "any applicable amendments." The Agreement gives no hint where "any applicable amendments" might be found, and nothing alerts the student to any additional terms—not even the last sentence in all capital letters. The last sentence instead refers to "both pages" while the lower left corner below the signature identifies "Page 1 of 2." However, the Agreement is on a ***single page*** followed by additional sheets: "White Copy: Academics," "Yellow Copy: Financial Aid," and "Pink Copy: Student."

The Daymar Students in fact were not aware of any writing on the reverse side of the Agreement. No one from Daymar told them about it. Most importantly, Daymar representatives knew Students did not read the reverse side before signing or initialing on the front side.

Had Daymar alerted the Students to the reverse side before signing, this is what the Students would have seen before waiving valuable constitutional rights:

STUDENT ENROLLMENT AGREEMENT

All institutions participating in the U.S. Department of Education Student Financial Aid Programs (SFA) are required to use a statutory schedule to determine the amount of SFA Program funds a student has earned when he or she ceases attendance based on the period the student was in attendance. The Higher Education Act of 1998, as amended, in general, requires that if a recipient of SFA Program assistance withdraws from the College during a payment period or a period of enrollment in which the recipient began attendance, the College must calculate the amount of SFA Program assistance the student did not earn and those funds must be returned. Up through the 60% point in each payment period or period of enrollment, a pro rata schedule is used to determine how much SFA Program funds the student has earned at the time of withdrawal from the College. After the 60% point in the payment period or period of enrollment, a student has earned 100% of the SFA Program funds. The percentage of the payment period or period of enrollment completed is determined by the total number of calendar days in the payment period or period of enrollment (denominator) for which the assistance is awarded, divided into the number of calendar days completed in that period as of the day the student withdrew (numerator). Scheduled breaks of at least five consecutive days are excluded from the total number of calendar days in a payment period or period of enrollment and the number of calendar days completed in that period. The College must return the lesser of the amount of SFA Program funds that the student does not earn, or the amount of institutional costs that the student incurred for the payment period or period of enrollment multiplied by the percentage of funds that was not earned. The student (or parent, if a Federal PLUS loan) must return or repay, as appropriate, any SFA loan funds in accordance with the terms of the loan as well as the remaining unearned SFA Program grant (not to exceed 50% of the grant) as an overpayment of the grant.

Refunds on all non-Title IV funding will be determined by the schedules below. No refund will be given upon withdrawal from individual courses after the drop/add period.

Percentage of tuition owed by a withdrawing student for a Student beginning at the start of a full term.

First Week	10%	Fifth Week	75%
Second Week	50%	Sixth Week	75%
Third Week	50%	Seventh Week	
Fourth Week	75%	and thereafter	100%

Percentage of tuition owed by a withdrawing student for a Student beginning at the start of a mid term.

First Week	50%
Second Week	75%
Third Week	75%
Fourth Week and thereafter	100%

The College reserves the right to update the curriculum for any program. It is further agreed that I will abide by all policies of the College as outlined in the College's catalog. In the event of violations of these policies, I may be asked to withdraw from school. The College reserves the right to suspend or dismiss from class or school any student, whose conduct is deemed unsatisfactory, including but not limited to, disorderly, disruptive, or undesirable conduct, failure to maintain satisfactory academic progress as defined in the College's catalog, failure to meet financial obligations, or excessive absenteeism. I have been provided with the College's course requirements and policies on absences, conduct and refunds and I am willing to comply with them. I have received a copy of the College's catalog and any applicable supplement with a listing of tuition, book and fee charges. See the College's catalog for the specifics of these and other policies.

I give the College permission to contact me, directly or indirectly, when I am absent from class. I understand that the assistance of the Career Services Department of the College is available to me at no additional cost. I further acknowledge that no representative of the College has guaranteed placement upon graduation. I give the College permission to send my resume to potential employers. I give the College permission to verify my employment. I agree to provide placement information to the College, including, but not limited to, the name, address and phone number of my employer, my compensation and my benefits. I authorize the use for public relations purposes of any photograph in which I may appear, and the release of any information pertinent to my grades, attendance, or participation in class, etc. to a prospective employer or any agency requesting such information.

Any dispute, controversy, or claim arising out of or relating to my enrollment at the College, this Agreement, or the breach thereof, shall be resolved by arbitration in the city in which the campus I attend is located in accordance with the commercial rules of the American Arbitration Association then in effect, and judgment upon the award rendered by the arbitrator may be entered in any court of competent jurisdiction. All determinations as to the scope or enforceability of this arbitration provision shall be determined by the arbitrator, and not by a court. The expenses of the arbitration shall be born equally by the parties to the arbitration, and each party shall pay for and bear the cost of its own experts, evidence, and legal counsel. The validity, interpretation, and performance of this Agreement shall be controlled by and construed under the laws of the Commonwealth of Kentucky and the Accreditation Criteria of the Accrediting Council for Independent Colleges and Schools (ACICS), as the latter are not inconsistent with the former. Students residing in Ohio have the ability to file a complaint by contacting the State Board of Career Colleges and Schools, 35 East Gay Street, Suite 403, Columbus, OH 43215 or by calling (614) 466-2752; however, students are required to submit their concerns, complaints, or grievances to the College prior to submitting them to the State of Ohio Board of Career Colleges and Schools.

We Change Lives...One Person At A Time.

The arbitration provision lacks any conspicuity. Unlike other cases decided by this Court—where a heading, bold type, larger font, or capital letters alerts the reader to a waiver of important constitutional rights—nothing distinguishes the arbitration provision from other boilerplate. To the hypothetical reader alerted to the reverse side, who then navigates to the inconspicuous last paragraph, this is what he or she finds (again reprinted here in larger 12-point font):

> Any dispute, controversy, or claim arising out of or relating to my enrollment at the College, this Agreement, or the breach thereof, shall be resolved by arbitration in the city in which the campus I attend is located in accordance with the commercial rules of the American Arbitration Association then in effect, and judgment upon the award rendered by the arbitrator may be entered in any court of competent jurisdiction. All determinations as to the scope or enforceability of this arbitration provision shall be determined by the arbitrator, and not by a court.
> ...
>
> The expenses of the arbitration shall be born equally by the parties to the arbitration, and each party shall pay for and bear the cost of its own experts, evidence, and legal counsel.
> ...
>
> The validity, interpretation, and performance of this Agreement shall be controlled by and construed under the laws of the Commonwealth of Kentucky and the Accreditation Criteria of the Accrediting Council for Independent Colleges and Schools (ACICS), as the latter are not inconsistent with the former.

Even this language fails to alert the reader of a waiver of constitutional rights, including the right to trial by jury. As for arbitration itself, the provision requires application of "the commercial rules" of the American Arbitration Association (AAA), not the consumer rules, an odd choice imposed on an unsophisticated student consumer. Moreover, the applicable AAA rules must be determined ***at the time of arbitration***, not when the Students sign. The Students have no advance notice of the applicable rules, let alone rules governing cost. The provision also requires that the arbitration expenses be

shared "equally by the parties"—expenses governed by as-yet-unknown commercial arbitration rules (in addition to a party's normal expenses for experts, evidence, and attorney's fees). Finally, while Daymar will argue that the Federal Arbitration Act (FAA) applies, Daymar elected only Kentucky law as its choice to govern "[t]he validity, interpretation, and performance of this Agreement"—not the FAA.

CIRCUIT COURT UNCONSCIONABILITY FINDINGS

The Circuit Court conducted an extensive evidentiary hearing. David Kelly, an expert witness, offered undisputed testimony regarding cost. Based on the testimony, the Circuit Court found that the typical arbitrator charges between $300 and $350 per hour.[12] Should the Students' claims end up in front of a three-arbitrator panel, the cost could be as high as $1,050 per hour. A three or four day arbitration with only one arbitrator could cost tens of thousands of dollars.[13]

During the evidentiary hearing, Daymar for the first time offered to "front" all the costs of arbitration.[14] However, if the Students were not successful at arbitration Daymar required the Students to reimburse Daymar.[15] After the Circuit Court denied Daymar's motion to compel arbitration, Daymar changed its offer.[16]

The Circuit Court made specific findings on substantive unconscionability. The Court found that the Daymar Students could not afford the costs of arbitration. The Students were unemployed or had very low paying jobs.[17] Each owed between $17,000 and $34,000 in student loans—an amount similar to what Students might expect to pay

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[12] Findings of Fact, ¶ 22, R. 405
[13] 8/27/10 Hearing, at 14:30:13-14:30:18.
[14] 8/27/10 Hearing, at 15:12:20-15:13:15.
[15] 8/27/10 Hearing, at 14:58:03-14:58:07; 15:04:46-15:05:09.
[16] Daymar Motion to Alter, Amend or Vacate, p. 5, R. 418; Order of Dec. 2, 2010, p. 2, R. 514.
[17] 8/27/10 Hearing at 09:03:37-57; 10:05:24-30; 10:37:13-15; 11:27:42-28:42; 11:48:40-58; Findings Of Fact And Conclusions of Law 3-14.

just in arbitration fees.[18] The Students were also unable to repay if Daymar fronted the arbitration expenses and the Students lost. In any event, the Circuit Court appropriately disregarded Daymar's offer as to the fees.[19]

The Circuit Court also made specific findings as to procedural unconscionability:

> The signed arbitration agreements were imposed as a condition of enrollment and were non-negotiable. Plaintiffs had a limited opportunity to read the agreements in an enrollment process that lasted less than ninety minutes. The enrollment process required that they sign numerous other documents in that period. While all of the Plaintiffs could read, many had only a GED, and none had earned a degree beyond high school. None knew, or reasonably could have known, what arbitration was. The agreement was contained in the last paragraph on the back page of a two page contract. The two page contract did not require the students' signature or initials on the second page. The arbitration provisions were not in bold type. Though admissions counselors were present when the enrollment agreements were signed, none explained the significance of the arbitration agreement to the students.[20]

The Court of Appeals agreed that the Circuit Court appropriately considered enforceability of the arbitration provision.[21] The Court also agreed that the Circuit Court appropriately disregarded Daymar's offer to cover the expenses of arbitration.[22] Although the Court of Appeals could have affirmed based on either the substantive **or** procedural unconscionability findings, the Court substituted its own findings and reversed in a 2-1 decision. The Majority did not consider *Schnuerle v. Insight Communications Co., L.P.*[23]

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[18] Findings of Fact, ¶ 23, R. 406.
[19] It is also far from clear whether Daymar's offer would be binding on Daymar or the AAA in arbitration.
[20] Findings of Fact, ¶ 37. R. 411.
[21] See Court of Appeals Opinion, pp. 17-19. By not filing a cross motion for discretionary review regarding the "delegation provision," Daymar has waived any argument that a court is an improper forum to determine enforceability of the arbitration provision—an argument that, if successful, would have afforded Daymar broader relief because it would have prevented any court from even considering the validity of the agreement. *See Fischer v. Fischer*, 348 S.W.3d 582, 596 (Ky. 2011).
[22] See Court of Appeals Opinion, pp. 7, 13.
[23] *Schnuerle v. Insight Communications Co., L.P.*, 376 S.W.3d 561, 577 (Ky. 2012).

ARGUMENT

I. THE ARBITRATION PROVISION IS SUBJECT TO KENTUCKY LAW AND ORDINARY CONTRACT PRINCIPLES

Ordinary contract principles govern arbitration agreements. Under the Federal Arbitration Act (FAA), arbitration provisions are unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract."[24] Kentucky prohibits enforcement "upon such grounds as exist at law for the revocation of any contract."[25]

Although Daymar will argue that the FAA eliminates cost-based substantive unconscionability as a contractual defense, this Court need not reach that issue. Daymar ***elected solely*** Kentucky law to govern "[t]he validity, interpretation, and performance of this Agreement [including the arbitration provision]."[26] While it is debatable whether the Student Enrollment Agreement even evidences "a transaction involving commerce" subject to the FAA,[27] the parties are free to forego FAA protections through a choice-of-law provision. The parties may choose state law, federal law, or both. A choice-of-law provision is binding.[28] Unlike other cases, Daymar's arbitration provision selects only Kentucky law.[29] The validity of the arbitration provision is therefore governed by the Kentucky Uniform Arbitration Act (KUAA) and ordinary contract principles.[30]

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[24] 9 U.S.C.§ 2; see also *Volt Information Sciences, Inc. v. Board of Trustees*, 488 U.S. 468 (1989).
[25] KRS 417.050.
[26] See Daymar Court of Appeals Brief, Exhibit C: Student Enrollment Agreement.
[27] 9 U.S.C. § 2. "Commerce" is defined as "commerce among several States." 9 U.S.C. § 1.
[28] *See Volt Information Sciences, Inc, supra* (choice of law provisions in arbitration agreements are generally upheld); *see also Hathaway v. Eckerle*, 336 S.W.3d 83, 87 (Ky. 2011)("the agreement now before this Court includes a 'choice of law' provision selecting the Federal Arbitration Act as the law governing any dispute between the parties").
[29] See, e.g. *Ernst & Young, LLP v. Clark*, 323 S.W.3d 682 (Ky. 2010); *Hathaway v. Eckerle, supra*; *Schnuerle v. Insight Communications Co., L.P.*, 376 S.W.3d 561 (Ky. 2012); *MHC Kenworth-Knoxville/Nashville v. M & H Trucking, LLC*, 392 S.W.3d 903 (Ky. 2013).
[30] The Court will note that the arbitration provision does not specifically designate Kentucky as the location for arbitration as required by KRS 417.200 and *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451 (Ky.2009). This is a jurisdictional requirement. *Id.* at 455. Accordingly, if the Court

II. THE ARBITRATION PROVISION IS UNENFORCEABLE BECAUSE IT IS NOT INCORPORATED BY REFERENCE

KRS 446.060 states: "[w]hen a law requires a writing to be signed by a party thereto, it shall not be deemed to be signed unless the signature is subscribed at the end or close of the writing." The reason is plain: "a signature so placed raises the logical inference that the document expresses all which the signer desires to authenticate and to which he intends to be bound."[31] Although KRS 446.060 does not eliminate the doctrine of incorporation by reference,[32] any such incorporation must be "in plain and direct language" above the signature.[33] More specifically, "it must be clear that the parties to the agreement had ***knowledge of*** and ***assented to*** the incorporated terms."[34] Language that simply "direct[s] attention" to the reverse side is insufficient.[35]

Compliance would have been easy, too. Daymar only had to look to Kentucky case law.[36] For example, Daymar could have used this approved language:

> See terms and conditions on the reverse side hereof which constitutes a part of this contract and which are incorporated herein by reference.[37]

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finds the arbitration provision is otherwise valid and enforceable, the Court may wish to confirm whether our courts have jurisdiction to enforce it.

[31] *R.C. Durr Co., Inc. v. Bennett Industries, Inc.*, 590 S.W.2d 338, 339 (Ky. App. 1979), *citing Gentry's Guardian v. Gentry*, 219 Ky. 569, 293 S.W. 1094 (1927).

[32] *Childers & Venters, Inc. v. Sowards*, 460 S.W.2d 343, 345 (Ky. 1970).

[33] *Home Lumber Co. v. Appalachian Regional Hospitals, Inc.*, 722 S.W.2d 912, 915 (Ky. App. 1987).

[34] *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1201 (2d Cir.1996)(emphasis added); *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 447 (3d Cir.2003); *Hertz Corp. v. Zurich American Ins. Co.*, 496 F.Supp.2d 668, 675 (E.D. Va. 2007); *see also Temple Emanu-El of Greater Fort Lauderdale v. Tremarco Industries, Inc.*, 705 So.2d 983, 984 (Fla. App. 1998)(arbitration provision unenforceable for lack of incorporation by reference).

[35] *Massey-Ferguson, Inc. v. Utley*, 439 S.W.2d 57, 59 (Ky. 1969)(insufficient incorporation by reference of reverse-side terms); *see also Consolidated Aluminum Corp. v. Krieger*, 710 S.W.2d 869 (Ky. App. 1986)(insufficient incorporation by reference of reverse side terms); *Home Lumber Co. v. Appalachian Regional Hospitals, Inc.*, 722 S.W.2d 912 (Ky. App. 1987)(insufficient incorporation by reference); *R. C. Durr Co., Inc. v. Bennett Industries, Inc., supra* (same).

[36] The Court will recall that Daymar specifically chose Kentucky law to control the "validity, interpretation, and performance of this Agreement."

[37] *Bartelt Aviation, Inc. v. Dry Lake Coal Co., Inc.*, 682 S.W.2d 796 (Ky. App. 1985).

Or Daymar could have slightly modified this language:

> The undersigned seller hereby sells, and the undersigned buyer or buyers, jointly and severally, hereby purchase(s), subject to the terms and conditions set forth below and upon the reverse side hereof...[38]

Daymar, instead, chose to omit any mention of the reverse side. Daymar vaguely references "any applicable amendments," but fails to identify where the amendments are located. Nothing alerts the student to the reverse-side terms—not even the sentence in all capital letters. That sentence refers to "both pages" and the lower left corner (below the signature) identifies "Page 1 of 2." But the Agreement is on a ***single page*** followed by multiple sheets: "White Copy: Academics," "Yellow Copy: Financial Aid," and "Pink Copy: Student." Even if the "both pages" reference gives sufficient notice of the reverse side, the sentence fails to confirm ***assent*** to the terms on the reverse side. It only confirms that the student has "***read*** both pages." The front side of the Agreement not only fails to provide notice and require assent to the reverse-side terms as a matter of law, the record is clear that Appellants did not know about the reverse-side terms as a matter of fact.

In dispensing with the Students' arguments, the Court of Appeals relied solely on another Court of Appeals opinion, *Hertz Commercial Leasing Corp. v. Joseph.*[39] In that case, the signature line appeared after this incorporating language:

> If Hertz accepts, Lessee agrees to hire from Hertz, and Hertz agrees to lease to Lessee, the equipment, on all the terms hereof, including the **Terms and Conditions** set forth below.

Immediately after the signature line—and on the same page—the document lists the incorporated "Terms and Conditions" and continues on the back. A comparison of the

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[38] *Childers & Venters, Inc. v. Sowards, supra.*

[39] See Court of Appeals Opinion, p. 21, citing *Hertz Commercial Leasing Corp. v. Joseph*, 641 S.W.2d 753 (Ky. App. 1982).

circumstances in this case and *Joseph* reveals why the Court of Appeals was in error. First, the incorporating language in *Joseph* gives notice of the incorporated terms and conditions ("set forth below"). Here, the language chosen by Daymar ("any applicable amendments" and "both pages") fails to do that. Indeed, Daymar's language is patently misleading—Daymar suggests that the terms are found on a second page when, in fact, they are on the reverse side of a single page. Second, the language in *Joseph* confirms assent to incorporated terms and conditions. Here, no language confirms assent. Accordingly, Daymar's incorporating language does not bind the parties to any terms on the reverse side of the Student Enrollment Agreement.

III. THE ARBITRATION PROVISION IS UNCONSCIONABLE

The doctrine of unconscionability is directed toward "one-sided, oppressive and unfairly surprising contracts."[40] The doctrine has both a procedural and substantive element. The procedural element focuses on oppression or surprise, and the substantive element focuses on overly harsh or one-sided results. The Court need only find one or the other to hold a contract unenforceable—not both.[41] Here, the Circuit Court made findings as to both procedural and substantive unconscionability that are not clearly erroneous.[42]

A. Procedural Unconscionability

According to *Schnuerle*, procedural, or "unfair surprise," unconscionability "pertains to the process by which an agreement is reached and the form of an agreement, including the use therein of fine print and convoluted or unclear language.... [It] involves, for example, 'material, risk-shifting' contractual terms which are not typically expected

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[40] *Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335, 341-42 (Ky. App. 2001).
[41] *Schnuerle v. Insight Communications Co., L.P.*, 376 S.W.3d 561, 577 (Ky. 2012).
[42] See CR 52.01.

by the party who is being asked to 'assent' to them and often appear [ ] in the boilerplate of a printed form."[43] Relevant factors include the bargaining power of the parties, "the conspicuousness and comprehensibility of the contract language, the oppressiveness of the terms, and the presence or absence of a meaningful choice."[44]

Unlike the arbitration clause in *Schnuerle*—found to be clear and concise, in bold print, and not concealed or disguised in any way—the Daymar arbitration provision is not even referenced on the front-side of a pre-printed form. Then, on the reverse side, the provision is lost in a sea of small, dense, single-spaced boilerplate. There are no headings, capital letters, or bold print to highlight it. In any event, the arbitration provision does not clearly waive the right to trial by jury or court resolution of disputes by its terms. Moreover, the provision requires application of the more expensive "commercial rules" of AAA instead of the consumer rules.[45] Worse, the applicable AAA commercial rules must be determined ***at the time of arbitration***, not when the Students sign. The Students receive no notice of the applicable rules (including rules governing cost) because the rules are determined at some unknown point in the future.[46] These circumstances, coupled with the Students' lack of bargaining power, the Students' education level and vulnerability, and the pressure exerted by Daymar, make the arbitration provision procedurally unconscionable under *Schnuerle*. The Circuit Court's findings as to procedural unconscionability are therefore not clearly erroneous.

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[43] *Schnuerle*, 376 S.W.2d at 577, quoting *Conseco*, 47 S.W.3d at 343 n. 22; *Harris v. Green Tree Financial Corp.*, 183 F.3d 173, 181 (3rd Cir.1999).
[44] *Schnuerle*, 376 S.W.2d at 577, quoting *Jenkins v. First American Cash Advance of Georgia, LLC*, 400 F.3d 868, 875–876 (11th Cir.2005).
[45] The American Arbitration Act has over forty sets of rules. There is one set for consumer disputes and another for commercial disputes. The AAA rules can be found here: www.adr.org.
[46] For example, the AAA recently amended the commercial rules in October 2013. Presumably, the Students would be subject to these rules, including the new fee schedule, if arbitration took place today.

B. Substantive Unconscionability

Substantive unconscionability "refers to contractual terms that are unreasonably or grossly favorable to one side and to which the disfavored party does not assent."[47] Courts consider "the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and similar public policy concerns."[48]

Unlike the arbitration clause in *Schnuerle* (and like the confidentiality provision in *Schnuerle*), the arbitration provision here is substantively unconscionable. In fact, *Schnuerle* anticipated substantive unconscionability "***because, for example, the arbitration costs on the plaintiff are prohibitively high***."[49] Other Courts to consider the issue recently have held arbitration provisions substantively unconscionable for this same reason.[50] Here, the Students had to post substantial sums of money at the outset of arbitration.[51] At best, the Students had to convince an arbitrator to relieve them of this burden reimburse them for the monies already paid for arbitration—money they do not have. At worst, Students would have to pay all costs. The Circuit Court again made specific findings. It found that the Daymar Students could not afford the costs of arbitration—perhaps tens of thousands of dollars under as-yet-unknown commercial

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[47] *Schnuerle* 376 S.W.3d at 572, citing *Conseco,* 47 S.W.3d at 343 n. 22 (citation omitted).
[48] *Schnuerle* 376 S.W.3d at 572, citing *Jenkins,* 400 F.3d at 876.
[49] *Schnuerle* 376 S.W.3d at 573 (emphasis added).
[50] For a similar case from a border state finding a student enrollment agreement's arbitration provision substantively and procedurally unconscionable, see *Rude v. NUCO Edn. Corp.*, 2011 WL 6931516 (Ohio App. Dec. 11, 2011)*; see also Hill v. Garda CL Northwest, Inc.*, 308 P.3d 635 (Wash. 2013)(fee provision held substantively unconscionable for prohibitively high costs and not severable from remainder of arbitration provision).
[51] See AAA Commercial Arbitration Rules. Again, the applicable Rules are those in effect at the time of arbitration, so Students would not be able to gauge the cost/risk associated with arbitration had the Students known about the arbitration provision in the first place.

rules. The Students either were unemployed or had very low paying jobs.[52] Each owed between $17,000 and $34,000 in student loans. That is the same dollar range Students might expect to pay—just in arbitration fees—to find out whether the Students were saddled with debt due to unfair, false, misleading, and deceptive business practices in the first place.[53] The Students would likewise be unable to repay if Daymar fronted the arbitration expenses and the Students lost. The Circuit Court did not clearly err in finding substantive unconscionability based on the prohibitively high costs of arbitration and other factors.

CONCLUSION

WHEREFORE, *Amicus Curiae* Kentucky Justice Association requests that the Court reverse the Court of Appeals and reinstate the Circuit Court's findings.

Respectfully submitted,

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[52] 8/27/10 Hearing at 09:03:37-57; 10:05:24-30; 10:37:13-15; 11:27:42-28:42; 11:48:40-58. Findings of Fact and Conclusions of Law, 3-14.
[53] Findings of Fact, ¶ 23, R. 406.