

No. 05-

In the Supreme Court of the United States

CINGULAR WIRELESS LLC,

Petitioner,

v.

ASTRID MENDOZA, JAMES BETHEA, GERRY ROBERTSON,
RAMZY AYYAD, AND WENDY LOWINGER,

Respondents.

**On Petition for a Writ of Certiorari to
the Court of Appeal of the State of California,
First Appellate District, Division Five**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Arbitration Act preempts a state-law rule conditioning the enforcement of an arbitration provision on the defendant's amenability to class arbitration.
2. Whether the Federal Arbitration Act preempts a state-law rule that claims seeking injunctions on behalf of the general public are non-arbitrable.

RULE 14.1(b) STATEMENT

In addition to the parties listed in the caption, Rita Parrish was a party to the proceedings in the Court of Appeal. Although she is not now and never has been a customer of Cingular, Parrish filed a complaint against Cingular seeking relief on behalf of Cingular customers. Cingular moved to compel her to arbitrate on the ground that the customers whom she purports to represent are subject to binding arbitration provisions. The Court of Appeal held that she is not required to arbitrate because she never personally entered into an arbitration agreement with Cingular. Cingular has elected not to seek review of that decision, and accordingly Parrish is not a party to this petition.

Pacific Bell Wireless, LLC also was a party during an earlier phase of this case. The original complaints named as defendants both Cingular and Pacific Bell Wireless, LLC, whose assets had been acquired by Cingular. On January 5, 2005, Cingular sold Pacific Bell Wireless, LLC to Omnipoint Communications, Inc. (an indirect subsidiary of T-Mobile USA, Inc.) but retained Pacific Bell Wireless's liabilities arising out of this case. In August 2005, Omnipoint changed the name of Pacific Bell Wireless, LLC to TMO CA/NV Holdings, LLC.

CORPORATE DISCLOSURE STATEMENT

Petitioner Cingular Wireless LLC has no parent company. Cingular Wireless LLC is indirectly owned by AT&T Inc. (the result of the acquisition of AT&T Corp. by SBC Communications, Inc.) and BellSouth Corporation, which are the only publicly held corporations with a 10% or more ownership interest in Cingular Wireless LLC.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Cingular Wireless LLC respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal of the State of California.

OPINIONS BELOW

The Court of Appeal's opinion after transfer, as amended on November 2, 2005 (App., *infra*, 1a-14a), is unreported. The order of the California Supreme Court denying review (App., *infra*, 15a) is unreported. The order of the Superior Court denying Cingular's motion to compel arbitration (App., *infra*, 16a-28a) is unreported. The original decision of the Court of Appeal affirming in part and reversing in part the Superior Court's order (App., *infra*, 29a-49a) is reported at 28 Cal. Rptr. 3d 802. The order of the California Supreme Court granting review of the Court of Appeal's original decision and instructing the Court of Appeal to reconsider its decision (App., *infra*, 50a) is reported at 118 P.3d 1017.

JURISDICTION

The judgment of the Court of Appeal was entered on October 3, 2005. The California Supreme Court denied Cingular's timely filed petition for review on December 14, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. Although the Court of Appeal's judgment affirming the denial of Cingular's motion to compel arbitration is interlocutory, this Court has jurisdiction to review such judgments. See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984); *Perry v. Thomas*, 482 U.S. 483, 489 n.7 (1987); see also *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (granting certiorari and reversing interlocutory ruling refusing to enforce arbitration provision without addressing jurisdiction); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (same); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (same).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, clause 2 (the Supremacy Clause) of the United States Constitution provides in pertinent part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides in pertinent part:

A written provision in any * * * contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract.

INTRODUCTION

This petition presents two recurring issues of extraordinary importance to the continued viability of arbitration provisions in the State of California (and possibly elsewhere in the country). First, the petition raises the question left open by this Court in *Southland Corp. v. Keating*, 465 U.S. 1 (1984): whether the Federal Arbitration Act (“FAA”) preempts a state-law rule conditioning the enforcement of an arbitration provision on the defendant’s amenability to class arbitration. Second, the petition presents the question whether the FAA preempts a state-law rule that claims for injunctions that would benefit the general public are non-arbitrable.

Both of these questions were answered in the negative by the courts of California. Together, these two holdings threaten to be the death knell for tens of millions of arbitra-

tion agreements in California. Consumers who have entered into otherwise valid arbitration provisions may now escape the obligation to arbitrate merely by demonstrating that the arbitration provision at issue forecloses them from being part of a class action. And consumers, employees, tenants, and other individuals can evade valid arbitration provisions by bringing claims for “public” injunctive relief.

Because both issues presented here are of great importance, and because California’s approach to these issues deviates markedly from the established precedents of this Court and conflicts with decisions of courts elsewhere, this Court’s review is not simply warranted, but essential.

STATEMENT

Cingular is the Nation’s largest wireless service provider, with over 50 million customers, several million of whom are California residents. When Cingular’s customers obtain wireless service, they enter into standard wireless service agreements that contain arbitration provisions.

Notwithstanding their agreements to arbitrate, respondents, who are current or former Cingular customers, collectively filed three lawsuits against Cingular seeking relief on behalf of a class and/or the general public. All three lawsuits, which are among several coordinated actions now pending in the Alameda County Superior Court, challenge the termination-fee provisions of Cingular’s wireless service agreements. In addition, one of the complaints attacks Cingular’s alleged practice of programming its handsets so that they will work only on Cingular’s network. Because respondents had breached the provision in their contracts requiring them to arbitrate disputes (or to proceed in small claims court), Cingular moved to compel arbitration.

During the course of the proceedings relating to the motion to compel arbitration, Cingular offered to make available to respondents (and all other members of the class they purport to represent) the features of the arbitration provision it

began including in contracts with new California customers in Spring 2003 and sent as a bill insert to then-current customers in July 2003.¹ This revised provision was designed to make arbitration as inexpensive and convenient for Cingular's customers as possible. Among other things, the revised provision (i) obliges Cingular to pay the full cost of arbitration unless the arbitrator finds the claim to violate the standards of Rule 11 of the Federal Rules of Civil Procedure, in which event payment of costs is governed by the American Arbitration Association ("AAA") rules for consumer arbitration (which limit the costs payable by consumers to \$125); (ii) requires Cingular to pay the customer's reasonable attorneys' fees whenever the customer is awarded the amount of his or her claim or more, even if the claim would not otherwise support an award of attorneys' fees; (iii) specifies that arbitration will take place in the county of the customer's billing address; (iv) does not purport to limit the remedies that an arbitrator may award; (v) does not require that the results of arbitration be kept confidential; (vi) specifies that the arbitration will be conducted under the AAA's consumer-friendly "Commercial Dispute Resolution Procedures and the Supplementary Procedures for Consumer Related Disputes"; and (vii) authorizes customers to reject any future changes in the arbitration provision (other than a change in the address at which Cingular is to be notified of any claim).

The Superior Court nonetheless denied the motion to compel arbitration, holding that under controlling California precedent Cingular's arbitration provision (even as revised) is unconscionable because it prohibits class and representative actions. App., *infra*, 25a-28a. The court also concluded that respondents' claims for public injunctive relief are non-

¹ Although not pertinent here, Cingular has never taken the position that the bill insert imposes an obligation to arbitrate on customers who had never previously entered into a wireless service agreement containing an arbitration provision.

arbitrable under *Broughton v. Cigna Healthplans of California*, 988 P.2d 67 (Cal. 1999), and *Cruz v. PacifiCare Health Systems, Inc.*, 66 P.3d 1157 (Cal. 2003). App., *infra*, 16a-21a. In *Broughton*, the California Supreme Court held that claims for public injunctive relief under California’s Consumer Legal Remedies Act (“CLRA”) are non-arbitrable because an “inherent conflict” exists between the purposes of such claims and arbitration. 988 P.2d at 74, 78-79. In *Cruz*, that court extended the holding in *Broughton* to California’s Unfair Competition Law (“UCL”) and rejected the contention that doing so violated this Court’s precedents. 66 P.3d at 1159, 1163-1164.

The Court of Appeal reversed in part and affirmed in part, holding that the prohibition of class-wide arbitration is not unconscionable, but that respondents’ claims for public injunctive relief are non-arbitrable. App., *infra*, 29a-49a. Both sides petitioned for review. The California Supreme Court then granted review and transferred the case back to the Court of Appeal with instructions to vacate its opinion and reconsider in light of *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005). App., *infra*, 50a.

In *Discover Bank*, the California Supreme Court, deviating from California’s traditional unconscionability standard, held that class-action waivers are substantively unconscionable “when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.” 113 P.3d at 1110.² The court also rejected several

² Under traditional standards, a contract is substantively unconscionable only if it is one that “no man in his senses, and not under delusion, would make on the one hand, and [that] no honest and fair man would accept on the other.” *Herbert v. Lankershim*, 71 P.2d 220, 257 (Cal. 1937) (quoting *Odell v. Moss*, 62 P. 555, 557

preemption arguments raised by Discover Bank and its amici. First, the court held that its newly declared rule did not run afoul of Section 2 of the FAA because it “applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements.” *Id.* at 1112. Next it held that neither *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), nor *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), supported a conclusion “that a state law rule against class arbitration waivers is preempted by the FAA.” 113 P.3d at 1113-1116. Finally, it rejected the argument that “the imposition of classwide arbitration undermines the purpose of the FAA by drastically altering the rules by which the parties agreed to arbitrate, transforming arbitration into a less efficient and less desirable mechanism of dispute resolution.” The court reasoned that, “although *Bazzle* could have been disposed of easily if a majority had decided that arbitrations and class actions were inherently incompatible,” “[t]he fact that a majority of the [*Bazzle*] court looked to state law rules to determine whether class arbitration is authorized indicates its view that there is no such incompatibility.” *Id.* at 1116.

After receiving supplemental briefs, the Court of Appeal filed a new opinion on October 3, 2005. As in its initial opinion, the court held that, under *Broughton* and *Cruz*, respondents’ claims for public injunctive relief are non-

(Cal. 1900) (quoting in turn 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 244 (1836)); *Cal. Grocers Ass’n v. Bank of Am.*, 27 Cal. Rptr. 2d 396, 402 (Ct. App. 1994). Stated another way, the contractual term must “shock the conscience” in order to be deemed substantively unconscionable. *Morris v. Redwood Empire Bancorp*, 27 Cal. Rptr. 3d 797, 809 (Ct. App. 2005); *Marin Storage & Trucking, Inc. v. Benco Contracting & Eng’g, Inc.*, 107 Cal. Rptr. 2d 645, 655-656 (Ct. App. 2001); *Coast Plaza Doctors Hosp. v. Blue Cross of Cal.*, 99 Cal. Rptr. 2d 809, 818 (Ct. App. 2000); *American Software, Inc. v. Ali*, 54 Cal. Rptr. 2d 477, 480 (Ct. App. 1996).

arbitrable. App., *infra*, 4a-5a. Over Cingular’s preemption arguments, the court then proceeded to hold that, under *Discover Bank*, the prohibition against class arbitration in Cingular’s arbitration provision is substantively unconscionable because (i) it is found in a contract of adhesion, (ii) respondents’ claims are small, and (iii) respondents allege that Cingular engaged in unlawful practices. *Id.* at 12a-13a.

Cingular filed a petition for review in the California Supreme Court arguing that (i) the Court of Appeal had misconstrued *Discover Bank*; (ii) the FAA preempts the Court of Appeal’s holding that Cingular’s prohibition against class arbitration is unconscionable; and (iii) *Broughton* and *Cruz* cannot be squared with this Court’s precedents and should be overruled. The California Supreme Court denied review on December 14, 2005, without comment. App., *infra*, 15a.³

REASONS FOR GRANTING THE PETITION

The California Supreme Court’s decisions in *Broughton*, *Cruz*, and *Discover Bank* establish beyond serious question that the California courts remain hostile to arbitration. This Court twice before has had to reverse California’s efforts to exalt state-law policies over the powerful federal policy favoring arbitration. See *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Perry v. Thomas*, 482 U.S. 483 (1987).⁴ This case,

³ The court also denied review in three companion cases. See *Meoli v. AT&T Wireless Servs., Inc.* (Cal. Dec. 14, 2005); *Bucy v. AT&T Wireless Servs., Inc.* (Cal. Dec. 14, 2005); *Wing v. Cingular Wireless LLC* (Cal. Dec. 14, 2005). Cingular, which is successor in interest to AT&T Wireless Services, Inc., will be filing protective petitions for certiorari in each of those cases.

⁴ Other California cases reflecting hostility to arbitration include *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669, 690, 694 (Cal. 2000) (asserting that arbitration disproportionately advantages employers and holding, *inter alia*, that an arbitration agreement is unconscionable when it “requires one contracting party, but not the other, to arbitrate all claims arising out of the same transaction or occurrence or series of transactions or occur-

implicating two additional means of rendering arbitration provisions ineffective, requires similar treatment.

Indeed, this case has broader significance than *Perry* and *Southland*. Each of those cases involved a limited, industry-specific incursion on the federal policy dictating enforcement of arbitration agreements. By contrast, the present case (and the three California Supreme Court decisions upon which it rests), if not overturned, will result in the wholesale invalidation of tens of millions of arbitration agreements in a State that accounts for one-eighth of this Nation's population. The importance of this case to the administration of the FAA—and the need for review and reversal of the decision below—thus cannot be overstated.

I. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE FAA PREEMPTS A STATE-LAW RULE REQUIRING CLASS-ACTION PROCEDURES TO BE SUPERIMPOSED ON ARBITRATION

More than 22 years ago, this Court ordered briefing and argument on the question whether, “if state law required” “superimposing class-action procedures on a contract arbitration,” “it would conflict with the [FAA] and thus violate the Supremacy Clause.” *Southland*, 465 U.S. at 8. The Court ultimately concluded that it lacked jurisdiction to decide the issue because the appellant “did not contend in the California courts that, and the state courts did not decide whether, state-law imposing class-action procedures was pre-empted by federal law.” *Id.*

The present case is an appropriate one in which to definitively answer that long-simmering and extraordinarily impor-

rences”); *Fitz v. NCR Corp.*, 13 Cal. Rptr. 3d 88, 97-101 (Ct. App. 2004) (limitations on discovery rendered arbitration agreement unenforceable). See also *Ting v. AT&T*, 319 F.3d 1126, 1151-1152 (9th Cir. 2003) (holding confidentiality provision in arbitration agreement unconscionable under California law).

tant question on which the lower courts are now divided. There can be no question that Cingular raised the preemption argument at every step in the proceedings, that the California Supreme Court expressly rejected that argument in *Discover Bank*, and that, in declaring Cingular's arbitration provision to be unconscionable merely because it requires individual arbitration, the Court of Appeal rejected the preemption argument in this case (as it was required to by *Discover Bank*). Because the issue is properly before the Court, the California courts have staked out a decidedly minority position, and the decisions in *Discover Bank* and this case already are impeding the enforceability of tens of millions of consumer contracts, it is both appropriate and critically important that this Court grant review.

A. The FAA Preempts California's Requirement That Consumer Arbitration Provisions Allow For Class Arbitration.

In declaring that consumer arbitration provisions must allow for class arbitration in order to be enforceable (and invalidating Cingular's arbitration provision because it does not (see App., *infra*, 13a-14a)), the California courts exalted their policy preference for class actions over the policy preference of Congress: to ensure enforcement of arbitration provisions as written. See, e.g., *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-221 (1985). Needless to say, however, when the policies of a state and Congress clash, it is the latter that must prevail. *Perry*, 482 U.S. at 491.

Moreover, this Court also has made clear that state law is preempted whenever it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (internal quotation marks omitted); see also *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869-

874 (2000); *United States v. Locke*, 529 U.S. 89, 109 (2000). California's rule conditioning enforcement of arbitration provisions on the defendant's amenability to class arbitration creates precisely such an obstacle to the accomplishment of Congress's objectives in enacting the FAA and therefore is preempted, for two interrelated reasons. First, this rule essentially converts arbitration into litigation, thereby eliminating all of the virtues of the former. Second, by dramatically altering the risk-benefit calculus, this rule inevitably will lead to the wholesale abandonment of arbitration by companies that contract with consumers.

Section 2 of the FAA declares pre-dispute arbitration agreements "valid, irrevocable, and enforceable" because "arbitration saves time, saves trouble, saves money." *Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong., 1st Sess. 7 (1924) (statement of Charles Bernheimer, N.Y. Chamber of Commerce); see also H.R. REP. NO. 68-96, at 2 (1924) ("the costliness and delays of litigation * * * can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable"). As Congress later explained, arbitration usually is "cheaper and faster than litigation," has "simpler procedural and evidentiary rules," "minimizes hostility," and is "more flexible in regard to scheduling." H.R. REP. NO. 97-542, at 13 (1982). This Court, too, has recognized the superior "simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); see also *Dean Witter*, 470 U.S. at 221 (recognizing that twin goals of FAA are "enforcement of private agreements [to arbitrate] and encouragement of efficient and speedy dispute resolution").

Class-action procedures, by contrast, are antithetical to the low-cost and efficient resolution of disputes that is the hallmark of arbitration. Class actions invariably begin with a lengthy proceeding to resolve the propriety of class certification, which generally entails (i) substantial discovery, includ-

ing depositions of all class representatives (and often other witnesses) for purposes of determining such statutory prerequisites as typicality and adequacy of the class representatives and commonality of the claims across class members; (ii) plenary briefing of the class certification issue; (iii) an evidentiary hearing; (iv) a written ruling; and very often (v) a request for interlocutory review initiated by the losing party.

If, after all of that, a class is certified, there would have to be full and adequate notice to class members and an opportunity to opt out. Discovery commensurate with the now-increased stakes of the litigation would begin and likely continue for years. Should the defendant then yield to the hydraulic pressure to settle that class certification creates, there would need to be another round of notice followed by a fairness hearing, complete with extensive briefing by both sides and by any objectors. And if the defendant chooses not to settle, there would need to be a class-wide trial—one in which the plaintiffs are required to establish any individualized elements of their claims and the defendant is afforded the opportunity to put on any individualized defenses.

The California Supreme Court recognized that class-action procedures are inherently incompatible with the arbitration process. That is why the court created a “hybrid procedure of classwide arbitration” in which *a court* not only “make[s] initial determinations regarding certification and notice to the class,” but also “may be called upon to exercise a measure of external supervision” in later stages of the case. *Discover Bank*, 113 P.3d at 1106 (quoting *Keating v. Superior Court*, 645 P.2d 1192, 1209 (Cal. 1982), rev’d on other grounds sub nom. *Southland Corp. v. Keating*, 465 U.S. 1 (1984)). Of course, this “hybrid procedure” entails disregarding the parties’ contractual agreement to pursue disputes *outside of* the judicial arena and therefore violates the FAA’s core purpose of ensuring the enforcement of arbitration provisions as written. See page 9, *supra*.

But whether conducted by a court or by an arbitrator, all of the procedures necessary to the fair administration of a class action make arbitration much more expensive and time consuming—and, in the process, eradicate the distinction between arbitration and litigation.⁵ In fact, some commentators believe that “class arbitration may actually prove *more* burdensome than class litigation.” Jack Wilson, “*No-Class-Action Arbitration Clauses*,” *State-Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 QUINNIPIAC L. REV. 737, 774 (2004) (emphasis added);⁶ see also Lindsay R. An-

⁵ See Jonathan R. Bunch, *To Be Announced: Silence From The United States Supreme Court And Disagreement Among Lower Courts Suggest An Uncertain Future For Class-Wide Arbitration*, 2004 J. DISP. RESOL. 259, 272 (“[W]hen class-wide arbitration is chosen as the means to resolve many similar claims, the many benefits of the arbitration process are lost in favor of a procedural device which brings the burdens of litigation into the arbitral forum. It is somewhat ironic that the greatest advantages of arbitration are in many instances the greatest disadvantages of litigation, yet class-wide arbitration * * * lessens the distinction between the two processes.”); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets The Class Action, Will The Class Action Survive?*, 42 WM. & MARY L. REV. 1, 44-45 (2000) (“[S]everal attorneys who have actually participated in classwide arbitrations have found that the procedure, at least as used to date, differs very little from litigation and thus offers few, if any, advantages.”); Elizabeth P. Allor, Note, *Keating v. Superior Court: Oppressive Arbitration Clauses in Adhesion Contracts*, 71 CAL. L. REV. 1239, 1253 (1983) (“[W]hen conducted on a classwide basis, arbitration is unlikely to remain inexpensive and efficient.”).

⁶ Although this author ultimately concludes that the FAA does not preempt a state-law rule deeming class waivers to be unconscionable, his conclusion is based on the premise that there can be no conflict preemption when a statute contains an express-preemption provision. 23 QUINNIPIAC L. REV. at 804-805. As this Court has explained, however, that premise is mistaken: Neither an express preemption provision nor a savings clause “bar[s] the

droski, Comment, *A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses*, 2003 U. CHI. LEGAL F. 631, 649 (hybrid class arbitration “subjects arbitration to the very judicial burden that the contracting parties sought to avoid through arbitration”).

The procedures for class arbitrations promulgated by the AAA bear this out. Those rules require the arbitrator to make a written “class determination award” addressing a lengthy list of criteria equivalent to those identified in Federal Rule of Civil Procedure 23, provide for a proceeding in court to confirm or vacate that award, provide for the arbitrator to preside over the notification of class members, and then anticipate full-blown proceedings on the merits and a carefully reasoned “final award” once the class determination award becomes final and class members have been given notice and an opportunity to opt out. Like a federal court, the arbitrator also is given strict standards for reviewing and approving any settlement once a class has been certified. See AAA, *American Arbitration Association Policy on Class Arbitrations* (July 14, 2005), at <http://www.adr.org/Classarbitrationpolicy>. In short, the process is every bit as burdensome as a judicial class action.

Engrafting time-consuming and expensive class-action procedures onto an arbitral proceeding not only would effectively eliminate the distinction between arbitration and litigation, but also would present businesses with a “worst-of-all-worlds” scenario. While class arbitration would increase the stakes exponentially over an individual arbitration, any class-wide arbitral award would remain reviewable only for fraud,

ordinary working of conflict pre-emption principles.” *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000). In any event, as we discuss below, the rule announced in *Discover Bank*, though putatively neutral, in fact disproportionately burdens arbitration agreements and hence is expressly preempted under Section 2 of the FAA.

corruption, bias, and the like (9 U.S.C. § 10) or “manifest disregard” of the law (*Wilko v. Swan*, 346 U.S. 427, 436-437 (1953), overruled on other grounds by *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989)).

This standard of review often will be insufficient to avoid an erroneous, yet potentially massive, class-wide judgment.⁷ It also will be insufficient to counteract the financial incentive that arbitrators have to certify classes because their fees (unlike the salaries of state and federal judges) increase with the complexity of the case. With only limited substantive review, defendants can have little assurance that the critical class-certification determination will not be infected by the arbitrator’s subtle, yet very real, financial incentive to err on the side of certifying a class.

Under these circumstances, few businesses would be willing to roll the dice by including an arbitration provision in their consumer contracts. “Class arbitration just seems to present too many risks.” Wilson, *supra*, 23 QUINNIPIAC L. REV. at 778. Indeed, for precisely these reasons, Cingular’s arbitration provision provides that the prohibition of class arbitration is non-severable. App., *infra*, 14a.

It is thus no exaggeration to say that California has created a poison pill that will end the use of arbitration provi-

⁷ Consider, for example, whether a court employing the “manifest disregard” standard could have overturned the \$1.2 billion class judgment in *Avery v. State Farm Mutual Automobile Insurance Co.*, 835 N.E.2d 801 (Ill. 2005), pet. for cert. pending, No. 05-842 (filed Dec. 27, 2005), or the \$10.1 billion class judgment in *Price v. Philip Morris, Inc.*, __ N.E.2d __, 2005 WL 3434368 (Ill. Dec. 15, 2005). The Eighth Circuit’s recent decision refusing to overturn a massively disproportionate punitive award imposed by an arbitrator notwithstanding *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), suggests that the answer is no. See *Stark v. Sandberg, Phoenix & Von Gontard, P.C.*, 381 F.3d 793 (8th Cir. 2004), cert. denied, 125 S. Ct. 1943 (2005).

sions in consumer contracts as effectively as an outright ban and require businesses and consumers alike to suffer the higher costs and greater delay associated with litigation.⁸ The California Supreme Court acknowledged that “arbitration becomes a less desirable forum from [the defendant’s] viewpoint if the arbitration must be conducted in a classwide manner,” but allowed that the defendant could always “waive the arbitration agreement and have the matter brought in court.” *Discover Bank*, 113 P.3d at 1117 & n.8. Nothing could more clearly “frustrate the purpose” (*Livadas v. Bradshaw*, 512 U.S. 107, 116 (1994)) of the FAA, which “embodies the national policy favoring arbitration” (*Buckeye Check Cashing, Inc. v. Cardegna*, No. 04-1264, slip op. at 3 (Feb. 21, 2006)). As Justice Thomas has explained, a rule that “discourages the use of arbitration agreements” is “completely inconsistent with the policies underlying the FAA.” *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 310 (2002) (Thomas, J., dissenting); see also *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175-176 (5th Cir. 2004) (for parties to demand “all of the procedural accoutrements that accompany a judicial proceeding” would undermine “the point of arbitration”).

Indeed, although the California Supreme Court claimed that its policy against class-action waivers is a neutral rule that “applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements” (113 P.3d at 1112), in practical effect it is nothing of the sort. Because class procedures destroy the benefits of arbitration while unacceptably increasing the risks, virtually all consumer arbitra-

⁸ Indeed, at least one lender has ceased doing business in California because of *Discover Bank* and its progeny. See Plaintiff/Appellant’s Brief on the Merits at 6-7, *Muhammad v. County Bank of Rehoboth Beach, Del.*, No. 58,430 (N.J. filed Nov. 23, 2005).

tion agreements either expressly or implicitly prohibit class arbitration. With a stroke of the pen, the California Supreme Court has nullified tens of millions of arbitration provisions. By contrast, very few contracts that do not require arbitration prohibit judicial class actions. In substance then, California's rule disproportionately burdens arbitration and hence violates Section 2 of the FAA. Cf. *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940) ("The commerce clause forbids discrimination, whether forthright or ingenious.")⁹

⁹ Although we do not here challenge the Court's recognition of unconscionability as a potentially valid state-law basis for refusing to enforce an arbitration provision, this case demonstrates the need to provide guidance as to when a court's invocation of this extraordinarily malleable doctrine truly is arbitration-neutral as opposed to being a subterfuge for engaging in anti-arbitration animus. Unless review is granted and the decision below is reversed, the enforceability of form contracts containing arbitration provisions will vary from state to state based on the ad hoc policy judgments of the various states' courts as to whether the arbitration provision (or some feature of it) shocks the conscience. The very arbitration provision struck down by the California courts in this case has been upheld over unconscionability attacks by courts in Illinois, Missouri, and Washington. See *Franczyk v. Cingular Wireless, LLC*, No. 03 CH 14203 (Ill. Cir. Ct. June 13, 2005); *Blitz v. AT&T Wireless Servs., Inc.*, No. 054-00281 (Mo. Cir. Ct. Nov. 28, 2005); *Scott v. Cingular Wireless*, No. 04-2-04205-4KNT (Wash. Super. Ct. Sept. 10, 2004), review denied, No. 55028-4 I (Wash. Ct. App. June 21, 2005), review granted, No. 77406-4 (Wash. Nov. 29, 2005). Meanwhile, the predecessor of this provision was found unconscionable by an Illinois appellate court (*Kinkel v. Cingular Wireless, LLC*, 828 N.E.2d 812 (Ill. App. Ct. 2005), review granted, 839 N.E.2d 1025 (Ill. 2005)), but upheld by the Fifth Circuit over an unconscionability attack under Louisiana law (*Iberia Credit Bureau*, 379 F.3d at 171-176). The uncertainty that Cingular and other businesses experience as a result of this kind of ad hoc, state-by-state approach is a burden not just on arbitration, but also on interstate commerce. Cf. *Southland*, 465 U.S. at 15 ("We are unwilling to attribute to Congress the intent, in

B. *Discover Bank* Conflicts With The Decisions Of Courts Elsewhere In The Country.

The California Supreme Court’s holding in *Discover Bank*—that the FAA does not preclude it from “superimposing class-action procedures” (*Southland*, 465 U.S. at 8) as a precondition to enforcing an arbitration provision (see 113 P.3d at 1113-1116)—conflicts with decisions of several courts outside of California. For example, the Tennessee Court of Appeals has expressly held that, regardless of any state-law concern about “the unavailability of class action relief,” “the Supremacy Clause of the Federal Constitution * * * preclude[s] [a court] from invalidating an arbitration agreement otherwise enforceable under the FAA simply because a plaintiff cannot maintain a class action.” *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 365 (Tenn. Ct. App. 2001).¹⁰

Similarly, a federal district court in West Virginia recently rejected the state supreme court’s holding that arbitration provisions that contain class waivers are unconscionable when the damages sought are small, finding that holding to be preempted by the FAA. *Schultz v. AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 691 (N.D. W. Va. 2005).

Moreover, two federal courts of appeals, while not using the term “preemption,” have expressed the view that a state-

drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted.”).

¹⁰ The Tennessee Supreme Court denied the plaintiff’s petition for review in that case and ordered the court of appeals’ decision published (63 S.W.3d at 351), which means that the decision “may be relied upon by the bench and bar of [Tennessee] as representing the present state of the law with the same confidence and reliability as the published opinions of [the Tennessee Supreme] Court.” *Meadows v. State*, 849 S.W.2d 748, 752 (Tenn. 1993).

law rule conditioning the enforceability of an arbitration provision on the availability of class-wide arbitration is incompatible with the objectives of arbitration. Most significantly, the Fifth Circuit rejected a claim that the class-arbitration prohibition in Cingular's original arbitration provision was unconscionable, explaining that "the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition,' characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims." *Iberia Credit Bureau*, 379 F.3d at 174 (quoting *Gilmer*, 500 U.S. at 31).

More recently, the Eleventh Circuit explained that a prohibition of class arbitration is "consistent with the goals of 'simplicity, informality, and expedition' touted by the Supreme Court in *Gilmer*." *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (quoting *Gilmer*, 500 U.S. at 31), pet. for cert. pending, No. 05-959 (filed Jan. 30, 2006). To say that a prohibition of class arbitration is consistent with the goals of the FAA is the same thing as saying that a state-law rule that bans such provisions, despite the parties' agreement to them, is inconsistent with the goals of the FAA and hence is preempted.

These cases expressly or implicitly holding that the FAA preempts state-law rules superimposing class actions on arbitration greatly understate the extent to which the California Supreme Court's contrary position puts it at odds with the rest of the country. The overwhelming majority of courts have not needed to (and never will need to) reach the preemption issue because they have concluded that requiring individual arbitration is not unconscionable under applicable state-law contract principles—at least when, as here, the cost

of arbitrating is no more than the cost of litigating and a prevailing plaintiff can obtain an award of attorneys' fees.¹¹

¹¹ See, e.g., *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 877-878 (11th Cir. 2005) (Georgia law), cert. denied, ___ U.S. ___ (Feb. 27, 2006); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (Maryland law); *Lloyd v. MBNA Am. Bank, N.A.*, 27 Fed. Appx. 82, 84 (3d Cir. 2002) (Delaware law); *Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196, 1204-1206 (C.D. Cal. 2006) (Texas law); *Dambrosio v. Comcast Corp.*, 2005 WL 3543794, at *14-*16 (E.D. Pa. Dec. 27, 2005) (Pennsylvania and Illinois law); *Copeland v. Katz*, 2005 WL 3163296, at *4 (E.D. Mich. Nov. 28, 2005) (Michigan law); *Edwards v. Blockbuster, Inc.*, 400 F. Supp. 2d 1305, 1309 (E.D. Okla. 2005) (Oklahoma law); *Lux v. Good Guys*, 2005 WL 1713421 (C.D. Cal. July 11, 2005) (Nevada law), reconsideration denied, 2006 WL 357820 (C.D. Cal. Feb. 8, 2006); *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 259 & n.11 (S.D.N.Y. 2005) (Arizona, Delaware, Nevada, New Hampshire, and South Dakota law); *Jones v. Genus Credit Mgmt. Corp.*, 353 F. Supp. 2d 598, 603 (D. Md. 2005) (Maryland law); *Lawrence v. Household Bank (SB), N.A.*, 343 F. Supp. 2d 1101, 1112 (M.D. Ala. 2004) (Alabama law); *Billups v. Bankfirst*, 294 F. Supp. 2d 1265, 1273-1277 (M.D. Ala. 2003) (Alabama law); *Taylor v. First N. Am. Nat'l Bank*, 325 F. Supp. 2d 1304, 1319-1322 (M.D. Ala. 2004) (Alabama law); *O'Quin v. Verizon Wireless*, 256 F. Supp. 2d 512, 517 (M.D. La. 2003) (Louisiana law); *Lomax v. Woodmen of the World Life Ins. Soc'y*, 228 F. Supp. 2d 1360, 1365 (N.D. Ga. 2002) (Georgia law); *Vigil v. Sears Nat'l Bank*, 205 F. Supp. 2d 566, 572 (E.D. La. 2002) (Arizona law); *Pick v. Discover Fin. Servs., Inc.*, 2001 U.S. Dist. LEXIS 15777, at *15 (D. Del. Sept. 28, 2001) (Delaware law); *Zawikowski v. Beneficial Nat'l Bank*, 1999 U.S. Dist. LEXIS 514, at *5 (N.D. Ill. Jan. 11, 1999) (Illinois law); *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1253 (Colo. Ct. App. 2001) (Colorado law); *Brown v. KFC Nat'l Mgmt. Co.*, 921 P.2d 146, 166-167 & n.23 (Haw. 1996) (Hawaii law); *Rosen v. SCIL, LLC*, 799 N.E.2d 488, 494-495 (Ill. App. Ct. 2003) (Illinois law); *Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886, 894-896 (Ill. App. Ct. 2003) (Arizona law); *Hubbert v. Dell Corp.*, 835 N.E.2d 113, 125-126 (Ill. App. Ct. 2005) (Texas law); *Wilson v. Mike Ste-*

C. This Issue Is Of Great Practical Importance.

There can be no doubt that this issue is of great practical importance. Cingular alone is confronting at least 22 putative class or representative actions in which plaintiffs have claimed (or can be expected to claim) that *Discover Bank* entitles them to repudiate their arbitration agreements.¹² In one

ven Motors, Inc., 111 P.3d 1076 (table), 2005 WL 1277948, at *7 (Kan. Ct. App. May 27, 2005) (Kansas law); *Stenzel v. Dell, Inc.*, 870 A.2d 133, 144 (Me. 2005) (Texas law); *Walther v. Sovereign Bank*, 872 A.2d 735, 742-743 (Md. 2005) (Maryland law); *Gras v. Assocs. First Capital Corp.*, 786 A.2d 886 (N.J. App. Div. 2001) (New Jersey law); *Tsadilas v. Providian Nat'l Bank*, 786 N.Y.S.2d 478, 480 (N.Y. App. Div. 2004) (New York law); *Strand v. U.S. Bank Nat'l Ass'n ND*, 693 N.W.2d 918, 926-927 (N.D. 2005) (North Dakota law); *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 200 (Tex. Ct. App. 2003) (Texas law). But see *Kinkel, supra* (refusing to follow *Rosen* and *Hutcherson*); *West Virginia ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W.Va. 2002) (rejected by *Schultz*, 376 F.Supp.2d at 691).

¹² See *Campbell v. Pacific Bell Wireless, LLC (In re Cingular Cases)* (Cal. Ct. App., No. D047603); *Deffenbaugh v. Mobile Sys. Wireless, Inc.* (Cal. Ct. App., No. D047597); *Dias v. New Cingular Wireless Servs., Inc.* (Cal. Ct. App., No. B187030); *Lee v. AT&T Wireless Servs., Inc.* (Cal. Ct. App., No. B186240); *Merritt v. Cingular Wireless LLC* (Cal. Ct. App., No. B178747); *Paton v. Cingular Wireless* (Cal. Ct. App., No. A108816); *Randolph v. AT&T Wireless Servs., Inc.* (Cal. Ct. App., No. A112342); *Rel v. Cingular Wireless LLC* (Cal. Ct. App., No. A112893); *Selby v. Cingular Wireless LLC* (Cal. Ct. App., No. G036158); *Spielholz v. Los Angeles Tel. Cellular Co.* (Cal. Ct. App., No. B183954); *Morgan v. AT&T Wireless Servs., Inc.* (Cal. Ct. App., No. B188150); *Lo v. Nokia Corp.* (Cal. Super. Ct., No. BC322751); *Utility Consumers' Action Network v. Cingular Wireless* (Cal. Super. Ct., Nos. GIC838040 and GIC851562), notice of appeal filed Feb. 24, 2006; *Clinkscales v. AT&T Wireless Servs., Inc.* (Cal. Super. Ct., No. RG03111973); *Wright v. AT&T Wireless Servs., Inc.* (Cal. Super. Ct., No. BC301663); *Fallah v. Cingular Wireless LLC* (Cal. Super. Ct. No. 05CC00267); *Lozano v. AT&T Wireless Servs., Inc.* (9th

of those cases, moreover, the plaintiff has asserted that Cingular is collaterally estopped by the decision in this case and has asked the California Court of Appeal to order Cingular to discontinue including an arbitration provision with a class waiver in its California contracts and to notify existing California customers that the class waiver is unenforceable. See Appellant's Opening Brief, *Lee v. AT&T Wireless Servs., Inc.*, No. B186240 (Cal. Ct. App., 2d Dist. filed Dec. 27, 2005).

Unsurprisingly, Cingular is not alone. The California Court of Appeal has struck down the arbitration provisions of an Internet provider, credit card issuer, and a franchisor under *Discover Bank*. See *Aral v. Earthlink, Inc.*, 36 Cal. Rptr. 3d 229 (Ct. App. 2005); *Klussman v. Cross Country Bank*, 36 Cal. Rptr. 3d 728 (Ct. App. 2005); *Indep. Ass'n of Mailbox Ctr. Owners, Inc. v. Super. Ct.*, 34 Cal. Rptr. 3d 659 (Ct. App. 2005). The Ninth Circuit has invalidated a bank's arbitration provision under *Discover Bank*. See *Tamayo v. Brainstorm USA*, 154 Fed. Appx. 564 (9th Cir. 2005). And the federal district courts and state trial courts in California have struck down the arbitration provisions of both Cingular and other cellular companies. See, e.g., *Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181 (S.D. Cal. 2005) (Cingular and T-Mobile), appeal pending (9th Cir., No. 06-55086); *Ford v. Verisign, Inc.*, No. 05 CV 0819 JM (RBB) (S.D. Cal. Dec. 19, 2005) (Cingular and T-Mobile), appeal pending sub nom. *Ford v. AT&T Wireless* (9th Cir., No. 06-55086);

Cir., No. 03-56677); *Laster v. T-Mobile USA, Inc.* (9th Cir., No. 06-55008); *Ford v. AT&T Wireless* (9th Cir., No. 06-55086); *Cervantes v. Pacific Bell Wireless* (9th Cir., No. 06-55162); *Sasik v. AT&T Wireless Servs., Inc.* (C.D. Cal., No. CV 05-2346 ABC (CWx)); *Waldmann v. Cingular Wireless LLC* (Fla. Cir. Ct., No. 2004 CA 004577) (putative nationwide class action in which the three named plaintiffs who reside in California contend that the instant case collaterally estops Cingular from enforcing its arbitration provision against them).

Nguyen v. T-Mobile USA, Inc., Nos. JCCP 4332 and RG04139536 (Cal. Super. Ct. Sept. 7, 2005), appeal pending (Cal. Ct. App. No. A112084); *Gatton v. T-Mobile USA, Inc.*, Nos. JCCP 4332 and RG03108118 (Cal. Super. Ct. Sept. 7, 2005), appeal pending (Cal. Ct. App. No. A112082).

After this spate of decisions, it is unlikely that any class waiver in a consumer arbitration provision governed by California law will survive *Discover Bank*—at least when “disputes between the contracting parties predictably involve small amounts of damages” (*Discover Bank*, 113 P.3d at 1110), which is to say in the vast majority of cases. Tens of millions of contracts are threatened as a result. The importance of this issue is thus undeniable.

II. THE COURT SHOULD GRANT CERTIORARI TO CORRECT THE CALIFORNIA SUPREME COURT’S MISTAKEN VIEW THAT IT IS ENTITLED TO EXEMPT “PUBLIC-INJUNCTION” CLAIMS FROM ARBITRATION

Certiorari also is warranted to review the California Supreme Court’s holding that the FAA is no impediment to declaring state-law claims seeking injunctive relief on behalf of the general public non-arbitrable. That holding is directly at odds with numerous decisions of this Court (including three arising out of California) and conflicts with the decisions of virtually every other court that has considered a similar effort to declare state-law claims off limits to arbitration. The issue, moreover, is of enormous practical importance because it has supplied plaintiffs’ class-action lawyers with a ready means of escaping arbitration provisions (and extracting lucrative settlements) in any case that can be brought under the affected statutes.

A. The California Supreme Court’s Effort To Declare “Public-Injunction” Claims Non-Arbitrable Is Squarely Precluded By This Court’s Precedents.

This Court recognized in *Gilmer* that *Congress* will be deemed to have rendered a *federal* statutory claim non-arbitrable if there is an “inherent conflict” between the “underlying purposes” of that claim and arbitration. 500 U.S. at 26. That observation, in turn, rested on the familiar principle that the existence of a federal statute does not preclude Congress from enacting an exception to the statute’s scope or, indeed, repealing the statute altogether. As the Court has explained, “[l]ike any statutory directive, the [Federal] Arbitration Act’s mandate may be overridden by a contrary congressional command.” *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987).

The California Supreme Court’s holding in *Broughton* and *Cruz* that *state* legislatures (or courts) may declare *state-law* claims to be non-arbitrable finds no support in *Gilmer* and overlooks the fundamental difference in the relationships between two federal statutes on the one hand and a federal statute and a state statute on the other. While a federal statute may validly carve out an exception to the FAA, when a state statute attempts to do the same thing, “under the Supremacy Clause, the state statute must give way.” *Perry*, 482 U.S. at 491; see also *Gonzales v. Raich*, 125 S. Ct. 2195, 2212 (2005) (“The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is superior to that of the States to provide for the welfare or necessities of their inhabitants, however legitimate or dire those necessities may be.”) (internal quotation marks omitted).

This Court frequently has rejected the argument that state legislatures have a free hand in cutting back the scope of the FAA. For example, after the California Supreme Court con-

strued the California Franchise Investment Law to render claims under that law non-arbitrable (*Keating*, 645 P.2d at 1198-1203), this Court reversed, declaring that “[s]o interpreted the California Franchise Investment Law directly conflicts with § 2 of the Federal Arbitration Act and violates the Supremacy Clause.” *Southland*, 465 U.S. at 10.

Shortly thereafter, this Court again reversed a decision of the California Supreme Court holding that the California legislature has the power to declare a claim non-arbitrable—this time one to collect wages under the California Labor Code. See *Perry*, 482 U.S. 483. Explaining that California’s “requirement that litigants be provided a judicial forum for resolving wage disputes” was in “unmistakable conflict” with Section 2 of the FAA and its underlying policy, the Court held that, “under the Supremacy Clause, the state statute must give way.” *Id.* at 491.

More recently, the Court explained that the arbitrability of claims depends on “whether *Congress* has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.” *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000) (emphasis added). The following year, the Court refused to apply *Gilmer*’s “inherent conflict” exception to California’s Fair Employment and Housing Act, thus rejecting the very reasoning applied by the California Supreme Court in *Broughton*. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123-124 (2001) (“[T]he argument here is that a state statute ought not be denied state judicial enforcement while awaiting the outcome of arbitration. That matter, though, was addressed in *Southland* and *Allied-Bruce*, and we do not revisit the question here.”); see also *Buckeye Check Cashing*, slip op. at 6 (*Southland* “rejected the proposition that the enforceability of the arbitration agreement turned on the state legislature’s judgment concerning the forum for enforcement of the state-law cause of action”); *Mitsubishi Motors*, 473 U.S. at 623 n.10 (“any contention that the local antitrust claims [arising under Puerto Rico law] are

nonarbitrable would be foreclosed by this Court's decision in *Southland* * * *, where we held that the Federal Arbitration Act 'withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration'' (citation omitted).

In short, *Broughton* and *Cruz* cannot be squared with this Court's precedent. As one commentator has explained, "*Broughton* and its progeny exhibit the exact same hostility to arbitration that the U.S. Supreme Court has found objectionable in its FAA preemption cases to date. The difference between the federal and state source of rights is not mere happenstance, but is the centerpiece of federal preemption doctrine under the Supremacy Clause." Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 416 (2004); see also Thomas A. Manakides, Note, *Arbitration of "Public Injunctions": Clash Between State Statutory Remedies and the Federal Arbitration Act*, 76 S. CAL. L. REV. 433, 481 (2003) ("A state legislature cannot prevent a valid arbitration clause from being enforced, even if this results in the arbitration of a 'public injunction.' The U.S. Supreme Court has held that only Congress and not state legislatures can prevent the enforcement of arbitration clauses.").

The California Supreme Court felt free to carve out an exception for public-injunction claims because this Court "has never directly decided whether a [state] legislature may restrict a private arbitration agreement when it inherently conflicts with a public statutory purpose that transcends private interests." *Broughton*, 988 P.2d at 78. We would have thought that this Court's prior decisions had clearly answered that question.¹³ Review is thus necessary to correct the Cali-

¹³ The California Supreme Court believed there to be an "inherent conflict' between arbitration and the underlying purpose of the CLRA's injunctive relief remedy" and that "it would be perverse to extend the policy [favoring enforcement of arbitration provisions] so far as to preclude states from passing legislation the pur-

ifornia Supreme Court's patent failure to adhere to this Court's FAA precedents.

B. The California Supreme Court's Holding That The FAA Does Not Preclude Declaring State-Law Claims Non-Arbitrable Conflicts With The Decisions Of Numerous Other Courts.

Not surprisingly, in light of the incompatibility of *Broughton* and *Cruz* with this Court's precedents, those cases also conflict with numerous decisions of state and federal courts around the country. Indeed, a federal district court in California has expressly rejected *Broughton*, explaining:

[T]he Supreme Court's message has been clear, unequivocal and consistent each time: state legislatures may not attempt to limit the enforceability of arbitration agreements governed by the FAA. * * * If it were enough for a state legislature to declare, through the nature of the remedies it offers in a statute, that it did not wish to have certain claims subjected to arbitration, states would essentially be allowed to undercut the FAA in an area in which Congress is supreme (*i.e.*, interstate commerce).

Arriaga v. Cross Country Bank, 163 F. Supp. 2d 1189, 1198-1199 (S.D. Cal. 2001), overruled on other grounds by *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003).¹⁴

poses of which make it incompatible with arbitration, or to compel states to permit the vitiation through arbitration of the substantive rights afforded by such legislation." 988 P.2d at 78, 79. But the very same thing could have been said of the statutes at issue in *Southland* and *Perry*. Indeed, if this rationale were a valid basis for exempting the CLRA and UCL from the FAA, it is difficult to see why any other state declaration of "inherent conflict" would not warrant a similar exemption. The fact remains that, when, as here, there is an "inherent conflict," it is state law that must give way.

¹⁴ One unreported federal case from a different district has followed *Broughton*. See *Gray v. Conseco, Inc.*, 2000 U.S. Dist.

This district court is hardly alone. For example, the Michigan Court of Appeals has held that the FAA preempts the no-waiver provision in Michigan's lemon-law statute to the extent that provision is construed to prohibit arbitration of lemon-law claims. *Abela v. General Motors Corp.*, 669 N.W.2d 271, 278 (Mich. Ct. App. 2003), aff'd, 677 N.W.2d 325 (Mich. 2004). The court explained: "Because the FAA surmounts any state law, to the extent that that law prohibits a binding arbitration agreement, the trial court erred in granting summary disposition in favor of plaintiffs on the basis that the lemon law forbids agreements to submit to binding arbitration." *Id.*

Even more recently, the Kansas Court of Appeals rejected the contention that the state legislature had the power to declare claims under the state's consumer protection law non-arbitrable, stating in no uncertain terms: "[W]e see no way in which a judicially declared public policy prohibition could withstand federal preemption." *Wilson v. Mike Steven Motors, Inc.*, 2005 WL 1277948, at *7 (Kan. Ct. App. May 27, 2005).

Similarly, the Texas Court of Appeals compelled arbitration of a claim under the Texas Debt Collections Act even though the Act prohibited resolution of claims by binding arbitration. *In re Conseco Fin. Servicing Corp.*, 19 S.W.3d 562, 571 (Tex. App. 2000). Rejecting the assumption underlying *Broughton*, the court explained that, "although a federal statutory claim may escape an arbitration clause that is subject to the FAA, depending upon Congress's intent, a state statutory cause of action, such as [the plaintiff's] claim for violations of the [TDCA] may not." *Id.*

LEXIS 14821, at *23-*26 (C.D. Cal. Sept. 29, 2000). A few months later, however, another case from that district "part[ed] company with *Broughton*." *Stuart v. Household Retail Servs., Inc.*, 2000 U.S. Dist. LEXIS 22509, at *18 (C.D. Cal. Dec. 14, 2000).

Other state and federal decisions reaching the same conclusion abound. See, e.g., *S+L+H S.p.A. v. Miller-St. Nazianz, Inc.*, 988 F.2d 1518, 1525-1526 (7th Cir. 1993) (“[t]he Supreme Court has rejected the argument that a state statute can void the choice of private parties to arbitrate a dispute”); *Sec. Indus. Ass’n v. Connolly*, 883 F.2d 1114, 1121-1124 (1st Cir. 1989) (FAA preempts Massachusetts regulations prohibiting arbitration of securities claims because “only Congress, not the states, may create exceptions to [the FAA]”); *Commerce Park at DFW Freeport v. Mardian Constr. Co.*, 729 F.2d 334, 337 (5th Cir. 1984) (FAA preempts no-waiver provision in Texas Deceptive Trade Practices-Consumer Protection Act); *Reed v. Bear, Stearns & Co.*, 698 F. Supp. 835, 839 (D. Kan. 1988) (“[T]he Kansas statute, if interpreted to disallow arbitration of Kansas securities laws claims, is preempted by the supremacy clause of the Constitution.”); *In re David’s Supermarkets, Inc.*, 43 S.W.3d 94, 98 (Tex. App. 2001) (“a contention that federally-mandated arbitration runs afoul of a state statutory scheme is generally irrelevant”); *Pyburn*, 63 S.W.3d at 362 (state statute is preempted by the FAA to extent that it prohibits arbitration); *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 341 (Ky. Ct. App. 2001) (“Even if the [Kentucky Consumer Protection Act] did create an exception to Kentucky’s Arbitration Act, * * * that exception would have no bearing on Conseco’s federally established rights, for when the FAA applies as we believe it does here, it supersedes incompatible state laws.”) (footnote omitted); *Bleumer v. Parkway Ins. Co.*, 649 A.2d 913, 923 (N.J. Super. Ct. Law Div. 1994) (“[T]he public policy grounds for declining to compel arbitration of [New Jersey Conscientious Employee Protection Act] claims under state law, no matter how compelling, cannot dictate a similar result in cases arising under the FAA. That is so because the FAA has been held under the Supremacy Clause to preempt any state law or policy which would restrict arbitrability.”); *DeSapio v. Josephthal & Co.*, 540 N.Y.S.2d 932, 935 (N.Y. Sup. Ct. 1989) (“The rigorous enforcement of arbitration

agreements mandated by the Act is not to be limited or constrained by state law. Therefore, it is federal and not state law which must provide the ‘legal constraints,’ if any, to enforcement of [the] arbitration agreement.”) (citations omitted); cf. *Saturn Distrib. Corp. v. Paramount Saturn, Ltd.*, 326 F.3d 684, 687 (5th Cir. 2003) (because state legislatures may not remove claims from arbitration, state statute would be preempted by the FAA if construed to give state motor vehicle board exclusive jurisdiction over disputes between franchisors and franchisees and thereby limit availability of arbitration).

Given the deep chasm separating California from the other jurisdictions that have addressed the issue, certiorari and reversal are plainly warranted.

C. This Issue Is Of Great Practical Importance.

The question whether California may declare public-injunction claims to be non-arbitrable is of considerable real-world significance. Even before *Broughton* and *Cruz*, plaintiffs’ lawyers routinely included claims under the CLRA and/or the UCL in part because those statutes provide for an award of attorneys’ fees. See *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086, 1106 (Cal. 1998) (“Since 1972, litigation under the so-called unfair competition law * * * has been a growth industry.”) (Brown, J., dissenting); see also *id.* at 1115 (describing the “judicial gloss given the UCL” as leading to the “creation of a standardless, limitless, attorney fees machine”). After *Broughton* and *Cruz*, the pace has only quickened. In fact, *every* case brought against Cingular in California state or federal court (in contravention of its arbitration provision) in the past four years has included a public-injunction claim under one or both of these statutes.¹⁵

¹⁵ In addition to the cases cited in notes 3 and 12, *supra*, see *Ball v. Cingular Wireless LLC* (Cal. Ct. App., No. G035574); *Banales v. AT&T Wireless Servs., Inc.* (Cal. Ct. App., No. B184031); *Tucker v. Cingular Wireless* (Cal. Super. Ct., No. CIV436164).

Here again, Cingular is by no means alone. There are literally dozens of published and unpublished decisions holding public-injunction claims to be non-arbitrable under *Broughton* and *Cruz*.¹⁶ And that is only the tip of the iceberg because most defendants no longer even seek arbitration of public-injunction claims, knowing that doing so is a futile gesture in light of *Broughton* and *Cruz*.¹⁷

In short, the California Supreme Court has ripped a gaping hole in the FAA by arrogating to itself the power to exempt claims from arbitration. Because the ramifications of that deviation from this Court's precedents are so substantial, review is both appropriate and necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

¹⁶ A representative sample of such cases includes *Aral*, 36 Cal. Rptr. 3d at 233-235; *Latterell v. Cross Country Bank*, 2004 WL 928246, at *4-*8 (Cal. Ct. App. Apr. 30, 2004); *Yun v. uBid, Inc.*, 2003 WL 21268053, at *1-*2 (Cal. Ct. App. June 3, 2003); *Coast Plaza Doctors Hosp. v. Blue Cross of California*, 99 Cal. Rptr. 2d 809, 819 (Ct. App. 2000); *Groom v. Health Net*, 98 Cal. Rptr. 2d 836, 843-844 (Ct. App. 2000); *Ramirez v. Cintas Corp.*, 2005 WL 2894628, at *4 (N.D. Cal. Nov. 2, 2005).

¹⁷ See generally Laura K. Christa & Holly O. Whatley, *Defending Against California Business & Professions Code Section 17200 Claims: A Discussion Of Defenses And Procedural Challenges*, in UNFAIR COMPETITION CLAIMS 2004: CALIFORNIA SECTION 17200 — ITS IMPACT ON CONSUMERS & BUSINESSES EVERYWHERE 67 (PLI Litig. & Admin. Practice Course, Handbook Series No. 3327, 2004), available at 711 PLI/Lit 55 (recommending that “in UCL claims otherwise subject to arbitration, a defendant should file a motion to compel arbitration and stay the injunctive relief proceedings pending resolution of the arbitrable claims”).

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MARCH 2006

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Court of Appeal,
First District, Division 5, California

RITA PARRISH, ET AL.,
Plaintiffs and Respondents,

v.

CINGULAR WIRELESS, LLC, ET AL.,
Defendants and Appellants.

No. A105518

(Alameda County Super. Ct. –
No. JCCP 4332)

Oct. 3, 2005

As Modified on
Denial of Rehearing Nov. 2, 2005

JONES, P.J.

The Supreme Court has remanded this matter to us for reconsideration in light of its recent decision in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (*Discover Bank*). Upon reconsideration, we conclude that the arbitration clause at issue here prohibiting class-wide arbitration is unconscionable and unenforceable. We affirm the trial court's order denying the petition to compel arbitration.

FACTUAL AND PROCEDURAL BACKGROUND

Three separate lawsuits were brought against defendant Cingular Wireless, LLC, and other providers of wireless telephone service, challenging the "early termination fee" charged to customers who end their wireless telephone service before the expiration of the term of the service agreement.

Rita Parrish sued in Orange County as a private attorney general under the Unfair Competition Law (UCL) (Bus. &

Prof.Code, § 17200 et seq.), alleging that the early termination fee constituted an unlawful liquidated damages provision in an unconscionable contract. Jerilyn Marlowe and seven other named plaintiffs brought a class action in Alameda County alleging violations of the UCL and the Consumers' Legal Remedies Act (CLRA) (Civ.Code, § 1750 et seq.). In the third lawsuit, Astrid Mendoza sued in Alameda County as a private attorney general and as a class representative to challenge both the early termination fee and Cingular's locked headsets that preclude the use of competitors' networks. These three lawsuits were consolidated and coordinated with other lawsuits pending against other wireless service providers.

The wireless telephone service agreement at issue in all three lawsuits provides for arbitration of all disputes and claims arising out of or related to the agreement. The original arbitration clause was superceded in July 2003 by Cingular's modified arbitration clause making it more advantageous to the customers, and Cingular notified its customers of the change by way of an insert included with the customers' monthly bill. Both the original and the modified versions which superceded it provide that either party may bring an individual action in small claims court, notwithstanding the agreement to arbitrate all disputes. The modified arbitration clause provides that the arbitration will be governed by the commercial dispute resolution procedures and the supplementary procedures for consumer-related disputes of the American Arbitration Association (AAA).¹ The modified version significantly changed the procedure for payment of fees: If the customer initiates arbitration, Cingular will promptly reimburse the customer for the filing fee. Moreover, Cingular will pay all filing, administration, and arbitra-

¹ The original version called for using the wireless industry arbitration rules.

tor fees unless the arbitrator finds that the customer's claim is frivolous, in which case payment of fees will be governed by the AAA rules and thereby apportioned by the arbitrator.² And if the arbitration award is equal to or greater than the customer's demand, Cingular will pay the customer's attorney fees and expenses.

Most significantly, both the original and the modified version of the arbitration clause allow only individual claims to be heard in arbitration. The modified version reads as follows: "The arbitrator may award injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim. . . . YOU AND CINGULAR MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, and not as a plaintiff or class member in any purported class or representative proceeding. Further, you agree that the arbitrator may not consolidate proceedings or more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding, and that [if] this specific proviso is found to be unenforceable, then the entirety of this arbitration clause shall be null and void." (Capitalization in original.)³

² The modified arbitration clause states that Cingular will pay all costs unless the arbitrator finds the customer's claim or the relief sought "improper or not warranted, as measured by the standards set forth in Federal Rule of Civil Procedure 11(b)." Rule 11(b) of the Federal Rules of Civil Procedure pertains to frivolous claims.

Under the AAA rules, the arbitrator may apportion fees, expenses, and the compensation of the arbitrator. (Rule R-43.) Under California's arbitration statute, costs are apportioned by the arbitrator pro rata. (Code Civ. Proc., § 1284.2.)

³ The original version provided that the arbitrator had no authority to order consolidation or class arbitration.

Cingular petitioned to compel arbitration of plaintiffs' disputes.⁴ Although Cingular did not make a specific request to the court for individual arbitration, Cingular took the position that any arbitration conducted would be limited to arbitration of individual claims. Plaintiffs opposed the petition, arguing, *inter alia*, that the arbitration clause was unconscionable (1) in precluding class-wide relief, and (2) in requiring plaintiffs to pay the costs of arbitration if they should lose. The trial court agreed with plaintiffs that the ban on class-wide arbitration is unconscionable and invalid under the Court of Appeal decision in *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 118 Cal.Rptr.2d 862 (*Szetela*). The court denied Cingular's petition to compel arbitration. By way of dictum, the court noted that if the arbitration clause were enforceable, the arbitration would be on an individual basis and not as a class or representative claim. Cingular now appeals from the order denying arbitration.

DISCUSSION

I. Injunctive Relief

Plaintiffs seek, in addition to monetary recovery of the early termination fees, injunctive relief to benefit the general public. However, the California Supreme Court has held that such claims for injunctive relief are not arbitrable. (*Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 315-316, 133 Cal.Rptr.2d 58, 66 P.3d 1157[UCL]; *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1079-1082, 90 Cal.Rptr.2d 334, 988 P.2d 67 [CLRA].) Cingular acknowl-

⁴ Within the Marlowe lawsuit, plaintiff Marlowe is actually a customer of Verizon, not Cingular. Cingular seeks arbitration only as to the named plaintiffs in that lawsuit who are Cingular customers – James Bethea, Gerry Robertson, Ramzy Ayyad, and Wendy Lowinger. Apparently only one named plaintiff – James Bethea – has actually paid an early termination fee.

edged below that the claims for injunctive relief were not arbitrable under *Cruz* and *Broughton*, and on appeal Cingular again recognizes that this court is bound to follow existing precedent from the California Supreme Court. The trial court correctly denied Cingular's petition to compel arbitration of the claims for injunctive relief.

II. Monetary Claims

A. Nonsignatory Parrish

With one exception, the plaintiffs who are subject to Cingular's petition to compel arbitration are parties to the arbitration clause in Cingular's wireless service agreement. The one exception is plaintiff Rita Parrish, who is not and never has been a subscriber to Cingular's wireless service. She brought suit only as a private attorney general under the UCL for the benefit of the general public.⁵ We conclude that plaintiff Parrish cannot be compelled to arbitrate.

⁵ At the time of the proceedings below, section 17204 of the Business and Professions Code provided in relevant part: "Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or any [authorized] county counsel . . . or any [qualified] city attorney . . . or by *any person acting for the interests of itself, its members or the general public.*" (Bus. & Prof.Code, § 17204, italics added.)

While this appeal was pending, on November 2, 2004, the electorate amended the UCL by Proposition 64 to delete the provision for a private attorney general. (2004 West's Cal. Legis. Service, Prop. 64.) We find it unnecessary to examine the effect of Proposition 64 upon the present appeal.

Whether Rita Parrish is entitled to pursue her claims under the UCL is not an issue that is cognizable on Cingular's petition to compel arbitration. Cingular's assertions in its supplemental brief that Rita Parrish now lacks standing and that her claims should be

By statute, an order compelling arbitration is warranted when “an agreement to arbitrate the controversy exists” and “a party thereto refuses to arbitrate such controversy.” (Code Civ. Proc., § 1281.2.) The fundamental assumption of arbitration is that the parties have consented to resolving their disputes outside the judicial process. The strong policy favoring arbitration as a means of resolving disputes does not extend to persons who are not parties to the arbitration agreement and have not elected to submit to arbitration. (*County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237, 244-245, 54 Cal.Rptr.2d 628; accord *Benasra v. Marciano* (2001) 92 Cal.App.4th 987, 990, 112 Cal.Rptr.2d 358.) A proceeding to compel arbitration is essentially a suit in equity for specific performance of an arbitration agreement. A court in equity has no power to compel third party nonsignatories to arbitrate absent some implied authority by the signatory to bind the nonsignatory. (47 Cal.App.4th at pp. 242-245, 54 Cal.Rptr.2d 628; see also *Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co.* (1998) 68 Cal.App.4th 83, 88-89, 80 Cal.Rptr.2d 147.)⁶

As discussed at length in *County of Contra Costa v. Kaiser Foundation Health Plans, Inc.*, *supra*, 47 Cal.App.4th at pages 242-245, 54 Cal.Rptr.2d 628, a nonsignatory has been held bound by an arbitration agreement in limited cases involving a preexisting relationship between the nonsignatory

entirely dismissed may be raised in the trial court by an appropriate motion.

⁶ A nonsignatory third party may invoke an arbitration clause against a signatory based upon equitable estoppel. (E.g., *Alliance Title Co., Inc. v. Boucher* (2005) 127 Cal.App.4th 262, 25 Cal.Rptr.3d 440; *Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705, 1 Cal.Rptr.3d 328.)

and a party to the agreement.⁷ (E.g., *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 702, 704, 709, 131 Cal.Rptr. 882, 552 P.2d 1178 [insured employee bound by arbitration clause in medical services contract entered into by employer]; *Mormile v. Sinclair* (1994) 21 Cal.App.4th 1508, 1511, 26 Cal.Rptr.2d 725 [wife bound by arbitration clause in husband's physician-patient agreement]; *Keller Construction Co. v. Kashani* (1990) 220 Cal.App.3d 222, 269 Cal.Rptr. 259 [general partner of the signatory limited partnership bound by arbitration clause in construction agreement].) Here, no preexisting relationship exists between plaintiff Parrish and the wireless telephone subscribers she purports to represent; there is no basis for finding that the wireless subscribers had authority to bind plaintiff Parrish to the arbitration agreement.

Net2Phone, Inc. v. Superior Court (2003) 109 Cal.App.4th 583, 135 Cal.Rptr.2d 149, upon which Cingular relies, is not on point. The question in that case was whether a forum selection clause could be enforced against a plaintiff who was not a party to the telephone service contract but who brought the action as a private attorney general under the UCL. We draw a distinction between a forum selection clause and an arbitration clause. A forum selection clause may be enforced against a nonparty who is "closely related to the contractual relationship." (*Id.* at pp. 587, 588, 135 Cal.Rptr.2d 149; *Lu v. Dryclean-U.S.A. of California, Inc.*,

⁷ Another theory for binding a nonsignatory is the doctrine of incorporation by reference. (E.g., *Slaughter v. Bencomo Roofing Co.* (1994) 25 Cal.App.4th 744, 748-749, 30 Cal.Rptr.2d 618 [arbitration clause in construction contract between property owner and general contractor incorporated into subcontracts]; *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.* (1992) 6 Cal.App.4th 1266, 1271-1274, 8 Cal.Rptr.2d 587 [arbitration clause in construction agreement incorporated into surety bond].)

(1992) 11 Cal.App.4th 1490, 1493, 14 Cal.Rptr.2d 906.) Enforcement of an arbitration clause, in contrast, requires more than the nonparty's connection to the contract. (E.g., *Buckner v. Tamarin* (2002) 98 Cal.App.4th 140, 143, 119 Cal.Rptr.2d 489 [father's arbitration agreement with medical providers did not bind his adult daughters on their wrongful death claims]; *Benasra v. Marciano*, *supra*, 92 Cal.App.4th at p. 990, 112 Cal.Rptr.2d 358 [arbitration agreement signed by corporation's president not binding on the individual in his claim for libel]; *Kaneko Ford Design v. Citipark, Inc.* (1988) 202 Cal.App.3d 1220, 1229, 249 Cal.Rptr. 544 [arbitration clause in contract between designer and third party not binding on property owner].)

Our Supreme Court has left unresolved the question whether a plaintiff seeking restitution as a private attorney general under the UCL can be compelled to arbitrate when the plaintiff is not a party to the arbitration agreement but is acting on behalf of injured consumers who are parties to the arbitration agreement. (*Cruz v. PacifiCare Health Systems, Inc.*, *supra*, 30 Cal.4th at p. 320, fn. 7, 133 Cal.Rptr.2d 58, 66 P.3d 1157.) We observe that the question has little practical significance, because the same factors that preclude a private attorney general from being compelled to arbitrate also serve to limit the plaintiff's relief in court. While civil penalties may be assessed when the action is initiated by a governmental prosecutor (Bus. & Prof.Code, § 17206), monetary damages are not recoverable under the UCL. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1266, 10 Cal.Rptr.2d 538, 833 P.2d 545.) A private plaintiff is limited to injunctive relief or restitution, i.e., the return of money obtained through an unfair business practice (Bus. & Prof.Code, § 17203). And restitution requires an ownership or vested interest in the money; nonrestitutionary disgorgement of profits is not available to an individual acting as a private attorney general under the UCL. (*Korea Supply Co. v. Lockheed Martin Corp.*

(2003) 29 Cal.4th 1134, 1149-1152, 131 Cal.Rptr.2d 29, 63 P.3d 937.) As the Supreme Court explained, “The breadth of standing under this act allows any consumer to combat unfair competition by seeking an injunction against unfair business practices. *Actual direct victims of unfair competition may obtain restitution* as well.” (*Id.* at p. 1152, 131 Cal.Rptr.2d 29, 63 P.3d 937; italics added.) In the present case, plaintiff Parrish is not an actual direct victim of Cingular’s early termination fee and is acting only as a private attorney general. She has no monetary remedies under the UCL, even assuming arguendo that her claims remain viable. (See fn. 5, *ante.*) At most, her remedy is injunctive relief, and, as we have said, the claims for injunctive relief are not arbitrable.

B. The Ban on Class Arbitration

An agreement to arbitrate is valid, irrevocable, and enforceable except when grounds exist for the revocation of any contract. (Code Civ. Proc., §§ 1281, 1281.2, subd. (b).)⁸ Unconscionability is one ground upon which a court may refuse to enforce a contract (Civ.Code, § 1670.5), and the burden is on the party opposing arbitration to prove the defense. (*Engalla v. Permanente Medical Group, Inc.*, *supra*, 15 Cal.4th at p. 972, 64 Cal.Rptr.2d 843, 938 P.2d 903.) The determination of unconscionability is a question of law for the court. (Civ.Code, § 1670.5, subd. (a); *Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 851, 113 Cal.Rptr.2d 376.) On appeal, when the extrinsic evidence is undisputed, as it is here, we review the contract de novo to determine unconscionability. (93 Cal.App.4th at p. 851, 113

⁸ The statutory reference to grounds for *revocation* of an agreement is a misnomer; the issue on a motion to compel arbitration is whether there are grounds to *rescind* the arbitration agreement. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973, 64 Cal.Rptr.2d 843, 938 P.2d 903.)

Cal.Rptr.2d 376; *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1527, 60 Cal.Rptr.2d 138.)

In determining whether a particular contractual provision is unconscionable, we examine both a procedural and a substantive element of unconscionability. The *procedural* element focuses on the way in which the disputed provision was presented – i.e., whether there was “oppression” or “surprise.” Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice. Surprise involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them. The *substantive* element of unconscionability has to do with the effects of the contractual provision and whether it is overly harsh or one-sided. (*Armendariz v. Foundation Health Psychcare Services, Inc* (2000) 24 Cal.4th 83, 114, 99 Cal.Rptr.2d 745, 6 P.3d 669 (*Armendariz*); *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486, 186 Cal.Rptr. 114.)⁹

Cingular concedes that the arbitration agreement is a form contract, and that some courts have equated adhesiveness with procedural unconscionability. (See *Discover Bank, supra*, 36 Cal.4th at p. 160, 30 Cal.Rptr.3d 76, 113 P.3d 1100 [contract amendment contained in bill stuffer was proce-

⁹ To be unenforceable, a contract must be both procedurally and substantively unconscionable, but the courts employ a “sliding scale” or a balancing relationship between the two elements of unconscionability, such that the greater the degree of unfair surprise or unequal bargaining power, the less the degree of substantive unconscionability required to annul the contract and vice versa. (*Armendariz, supra*, 24 Cal.4th at p. 114, 99 Cal.Rptr.2d 745, 6 P.3d 669; *Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.* (2001) 89 Cal.App.4th 1042, 1056, 107 Cal.Rptr.2d 645.)

durally unconscionable]; *Szetela, supra*, 97 Cal.App.4th at p. 1100, 118 Cal.Rptr.2d 862; see also *Flores v. Trans-america HomeFirst, Inc., supra*, 93 Cal.App.4th at p. 853, 113 Cal.Rptr.2d 376; *Stirlen v. Supercuts, Inc., supra*, 51 Cal.App.4th at pp. 1533-1534, 60 Cal.Rptr.2d 138.) Nevertheless, Cingular argues in its supplemental briefing that its arbitration agreement is at the low end of the spectrum of procedural unconscionability, if it is procedurally unconscionable at all. Cingular cites the fact that its form contract was contained in customer contracts at the outset of the contractual relationship, unlike the contract in *Discover Bank* which was contained in a bill stuffer. Moreover, in Cingular's view, market alternatives existed, including the choice of declining wireless service altogether. We disagree with Cingular's assessment. As in *Discover Bank*, this was a take-it-or-leave-it contract, to which there were no meaningful alternatives available in this market. Procedural unconscionability is shown.

While recognizing that class action and class arbitration waivers are not, in the abstract, exculpatory clauses, the court commented that such clauses are "indisputably one-sided." (*Discover Bank, supra*, 36 Cal.4th at p. 161, 30 Cal.Rptr.3d 76, 113 P.3d 1100.) The court expressly rejected the notion that provisions in the arbitration agreement allowing litigation in small claims court or recovery of attorney fees by the prevailing party are adequate substitutes for the important mechanism of class-wide arbitration. (*Id.* at p. 162, 30 Cal.Rptr.3d 76, 113 P.3d 1100.)¹⁰

¹⁰ Cingular argues in its supplemental briefing that plaintiffs here, unlike the plaintiff in *Discover Bank*, do not have any economic disincentive to bring individual arbitration of their claims. Cingular argues that its obligation under the arbitration agreement to pay the costs of arbitration upfront puts this case on a different plane and provides a basis for distinguishing *Discover Bank*. Cin-

The Supreme Court concluded as follows: “We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party ‘from responsibility for [its] own fraud, or willful injury to the person or property of another.’ (Civ.Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced.” (*Discover Bank, supra*, 36 Cal.4th at pp. 162-163, 30 Cal.Rptr.3d 76, 113 P.3d 1100.)

In the present case, the class arbitration ban appears in consumer contracts for wireless telephone service, a setting expected to involve small amounts of damages. Indeed, the

gular asserts that because it must pay the costs of arbitration, it is Cingular, not the consumers, who have the economic disincentive. It is Cingular who will be motivated to pay a claim rather than let it go to arbitration.

Cingular’s argument erroneously presupposes that the only disincentive for individual consumers to redress dubious business practices is economic. The Supreme Court has indicated otherwise – that the problem is a question of time and trouble: Quoting from a United States Supreme Court case, the court in *Discover Bank* explained: “[S]mall recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor. [Citation.]” (36 Cal.4th at p. 157, 30 Cal.Rptr.3d 76, 113 P.3d 1100.)

early termination fee charged by Cingular is alleged to be \$150. The issue we face is whether the complaints here allege “*a scheme to deliberately cheat* large numbers of consumers out of individually small sums of money.” We construe the Supreme Court’s word “cheat” in light of Civil Code section 1668, which prohibits clauses that exempt the contracting party from liability for *fraud or willful injury*.

Here, the complaints in all three consolidated cases allege that the termination fees constitute unlawful liquidated damages.¹¹ We have already concluded that the complaint by Rita Parrish is not subject to arbitration; our review is limited to the Marlowe and Mendoza complaints, which add allegations that the early termination fees are *intended* to lock in subscribers and prevent them from switching carriers, thereby generating enormous profits for the carriers. Pursuant to the rule of *Discover Bank*, we conclude that the class arbitration ban effectively operates to exculpate Cingular from responsibility for its own willful injury to a large class of consumers, and the class arbitration ban is thereby unconscionable.

It bears emphasizing that a finding of unconscionability in a contract clause does not necessarily mean that the contract cannot be enforced. The trial court has discretion to sever the unconscionable provision and enforce the remainder of the contract or to limit the application of the unconscionable clause so as to avoid an unconscionable result. (Civ.Code, § 1670.5, subd. (a); *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1074-1075, 130 Cal.Rptr.2d 892, 63 P.3d 979.) In the present case, however, the modified version

¹¹ Those allegations alone do not amount to allegations of fraud or willful injury, but they do allege a violation of section 1671 of the Civil Code. We note that the policy against exculpatory clauses extends not just to exculpation from fraud or willful injury but also to exculpation from “violation of law.” (Civ.Code, § 1668.)

of the arbitration clause precludes severance of the ban on class arbitration: “[T]he arbitrator may not consolidate proceedings or [*sic*, on] more than one person’s claims, and may not otherwise preside over any form of a representative or class proceeding, and ... *if this specific proviso is found to be unenforceable, then the entirety of this arbitration clause shall be null and void.*” (Italics added.) Because we conclude that the specific provision banning class arbitration is unenforceable, we must further conclude that the entire arbitration clause is void.¹²

DISPOSITION

The order denying the petition to compel arbitration is affirmed.

We concur: STEVENS and SIMONS, JJ.

¹² In light of our conclusion, we need not examine the separate issue whether the contractual ban on class arbitration constitutes an invalid waiver of the statutory right to class-wide relief under the CLRA (Civ.Code, §§ 1752, 1781). The Supreme Court in *Discover Bank* observed that the plaintiff in that case did not plead a cause of action under the CLRA and therefore did not invoke the statutory prohibition against a waiver of class actions (Civ.Code, § 1751). (*Discover Bank, supra*, 36 Cal.4th at p. 160, 30 Cal.Rptr.3d 76, 113 P.3d 1100.) In contrast, plaintiffs in the Marlowe action did plead a cause of action under the CLRA. The Marlowe complaint alleges that the termination fee provision is unconscionable and thereby violates the prohibition against insertion of unconscionable provisions in a contract (Civ.Code, § 1770, subd. (a)(19)).

15a

Court of Appeal,
First Appellate District, Division Five – No. A105518
S138530

IN THE SUPREME COURT OF CALIFORNIA

En Banc

RITA PARRISH,
Plaintiff and Respondent,

v.

CINGULAR WIRELESS LLC,
Defendant and Appellant.

Filed: December 14, 2005

Petition for review DENIED.

The request for an order directing publication of the opinion is denied.

/s/ GEORGE
Chief Justice

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

IN RE: CELLPHONE TERMINATION
FEE CASES

J.C.C.P. 4332

Filed: January 20, 2004

ORDER DENYING MOTIONS OF AT&T AND
CINGULAR TO COMPEL ARBITRATION.

The motions of Defendants came on for hearing on December 11, 2002, in Department 22 of this Court, the Honorable Ronald M. Sabraw presiding. Counsel appeared on behalf of Plaintiffs and on behalf of Defendants. After consideration of the points and authorities and the evidence, as well as the oral argument of counsel, IT IS ORDERED as follows: Motions of AT&T Wireless and Cingular to compel arbitration and stay proceedings are DENIED.

APPLICABILITY OF ARBITRATION PROVISIONS TO
CLAIMS IN THE INTEREST OF THE GENERAL PUBLIC.

Certain plaintiffs are subscribers to AT&T Wireless and Cingular and are parties to the arbitration agreement.

Other plaintiff's are not subscribers to AT&T Wireless and Cingular (non-subscribers) and are not parties to the arbitration agreement. In determining whether the non-subscribers must submit to arbitration, the Court must address the issue expressly not addressed in *Cruz v. PacificareHealth Systems, Inc.* (2003) 30 Ca1.4th 303, 320 fn 7 – whether a plaintiff who is not a party to a contract and is bringing a UCL claim in the interest of the general public for claims arising from that contract is required to follow a dispute resolution mechanism required by the contract.

In determining whether the non-subscribers must submit to arbitration, the Court will consider the following four factors:

1. Whether the plaintiff is the government or a private plaintiff acting in the interest of the general public. *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279 (EEOC not bound by arbitration clauses between employers and employees); *Cruz*, 30 Cal.4th at 319-320 n6 (“*Waffle House* suggests ... that a party acting *entirely* on behalf of the public ... acts beyond the scope of any arbitration agreement.”); *Payne v. National Collection Systems, Inc.* (2001) 91 Cal. App. 4th 1037, 1045 (“An action brought pursuant to [the UCL] by a prosecutor is fundamentally different from a class action or other representative litigation.”)
2. Whether the real party in interest is the general public as a whole or the injured members of the general public. Case law suggests that when a UCL claim is brought by a private plaintiff in the interest of the general public the claim might not be as “public” as a UCL claim brought by the government. *Cruz*, 30 Cal.4th at 316 and 318 (suggesting that monetary relief confers private benefits whereas injunctive relief is designed to prevent further harm to the public at large.); *Corbett v. Superior Court* (2002) 101 Cal.App.4th 649 (suggesting that a UCL claim by a private plaintiff can be brought on behalf of a class of injured members of the general public and not the public as a whole).
3. Whether the claim is a competitor or consumer claim. *Cruz*, 30 Cal.4th at 315 (addressing arbitration of consumer claims, but stating “We need not decide whether UCL injunctive relief actions brought by injured business competitors are arbitrable.”); *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tele-*

phone Co. (1999) 20 Cal. 4th 163, 187 n12 (definition of “unfairness” may depend on whether the subject matter of the litigation concerns the protection of competition among business entities or the protection of consumers from business entities).

4. Whether the relief at issue is monetary or injunctive. *Cruz*, 30 Cal.4th at 315-319 (private plaintiff is pursuing inarbitrable claims in the interest of the general public insofar as she seeks injunctive relief, but is pursuing arbitrable claims for her own benefit insofar as she seeks monetary relief).

These four factors are not found in the statute, but Courts of Appeal have indicated that the UCL should be applied differently depending on the identity of the plaintiff, the context of the claim, and the nature of the relief sought.

The Court reviews the arbitration clause in light of the above four factors.

- (1) The non-subscribers are private plaintiffs acting in the interest of the general public. If the plaintiffs were a government body, then arbitration would not be required. *Waffle House, supra*. As suggested by the trial court in *Net2phone, Inc. v. Superior Court* (2003) 109 Cal. App. 4th 583, 587, it is unlikely that the real Attorney General would be bound by the arbitration agreements of private parties.
- (2) The claims asserted by the non-subscribers are primarily in the interest of the injured members of the general public and not in the interest of the general public as a whole.

The Court first acknowledges that the Courts of Appeal have not clearly recognized a distinction between UCL claims in the interest of the general public as a whole and UCL claims on behalf of the injured members of the general

public. Where the plaintiff is a private person acting in the interest of the general public, the case law suggests that the real party in interest can be either (a) the general public as a whole or (b) the injured members of the general public. Where the real party in interest is the injured members of the general public, arbitration clauses can be enforceable. *Cruz*, 30 Cal.4th at 318 (representative UCL claims for monetary relief are primarily to obtain private benefits and therefore arbitrable).

The Court is reluctant to draw a bright line between UCL claims by government entities and UCL claims by private persons acting in the interest of the general public. Such a distinction is not supported by section 17204, which draws no distinction between governmental plaintiffs and private plaintiffs bringing claims on behalf of the general public. In other contexts the Court has made clear that the standards applicable to private plaintiffs also apply to government plaintiffs. *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal. 3d 197, 214 (noting that the effect of heightened pleading standards “would not be limited to discouraging private suits; it would also seriously hamper suits by public officials seeking to enjoin schemes of unfair competition and deceptive advertising.”) The Court is, however, required to draw a line between UCL claims by private plaintiffs that are in the public interest and UCL claims that advance private interests.

When a private plaintiff asserts a UCL claim in the interest of the general public the Court must engage in a case by case determination of whether the UCL claim is a “public” claim in the interest of the general public as a whole or a “private” claim in the interests of the injured members of the general public. In making the determination of whether a representative UCL claim serves a public or private purpose, the Court engages in an analysis similar to that for awarding fees for public interest litigation under C.C.P. 1021.5. See, e.g.,

Bradley v. Perrodin (2003) 106 Cal. App. 4th 1153, 1165 (the claimant's objective in the litigation must go beyond – 'transcend' – those things that concretely, specifically and significantly affect the litigant . . ., to affect the broader world or 'general public'); *Weeks v. Baker & McKenzie* (1998) 63 Cal. App. 4th 1128, 1170 (fees may not be awarded when the primary purpose of the lawsuit was the plaintiff's personal economic interest and the public interest was advanced coincidentally.)

The Court holds that the injured members of the general public are the real parties in interest for the claims asserted in this case (unlawfulness of ETFs, locked handsets, and AT&T's deposit policy). The subject matter of the lawsuit concerns private contracts for cell phone service and only cell phone subscribers have suffered any direct injury. The general public as a whole may have suffered some injury because the ETFs and the sale of locked handset may have stifled the market in cell phone services and dissuaded some persons from getting cell phones, but the predominant injury alleged has been to cell phone subscribers.

The Court notes that the non-subscribers are not injured members of the general public, are not parties to the contracts at issue, and are not personally bound by the arbitration agreements. The non-subscribers' personal rights and remedies are not, however, at issue. The non-subscribers are bringing UCL claims in the interest of the allegedly injured members of the public, so the non-subscribers stand in the shoes of the injured persons and the UCL claim must be pursued as though brought by those injured persons.

- (3) The UCL claim in this case is a consumer claim. Therefore, the *Cruz* analysis applies.
- (4) The relief at issue in the motion for arbitration is monetary and injunctive. Under *Cruz*, claims for

monetary relief are subject to the arbitration clause whereas claims for injunctive relief are not.

The Court holds that the claims of the general public for injunctive relief do not have to proceed through arbitration. The Court holds that the claims for monetary relief by the general public are really in the interest of the injured members of the general public and that those claims must be submitted to arbitration if the arbitration agreement is enforceable against those injured persons.

ARBITRATION CLAUSE OVERVIEW

Insofar as the UCL and CLRA claims concern injunctive relief, in *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, and *Broughton v. Cigna Healthplans* (1999) 21 Cal. 4th 1066 the Court expressly held that such claims are not subject to arbitration.

Insofar as the claims concern monetary relief, Defendants AT&T and Cingular assert that the arbitration provision is enforceable under the Federal Arbitration Act and under California Law. Plaintiffs assert that the arbitration provision is unconscionable and cannot be enforced.

The unconscionability analysis is framed by *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83. Under *Armendariz*, unconscionability has a procedural and a substantive component. In order for a finding of unconscionability to be made, both components must be present. However, the two components operate on a sliding scale; the greater the procedural showing, the less is required from a substantive perspective, and vice versa. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, at 114. Procedural unconscionability is found when a contract provision is the result of “surprise” or “oppression”. Surprise is present in a contract when the supposed agreed terms are hidden in a prolix agreement drafted by the party seeking to benefit from the disputed term. “Oppression” is

found when there is unequal bargaining power among the parties to the contract resulting in no real negotiation over the terms of the contract and no meaningful choice is available to the weaker party. “Substantive” unconscionability is found when a contract term is objectively excessive or unreasonable as in the case of excessive profits in relation to costs of goods or services. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, at 114; *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal. App. 3rd 473, at 489.

THE AT&T ARBITRATION CLAUSE IS NOT ENFORCEABLE.

As an initial procedural matter, before this coordinated proceeding commenced, the Court issued orders in *Meoli v. Viva Wireless*, Alameda County Case # RG03 – 086113, regarding the enforceability of the AT&T arbitration clause. Those orders dated July 1, 2003, and August 26, 2003, are VACATED and superceded by the orders in this coordinated proceeding.

The AT&T arbitration clause at issue is in the 2003 Wireless Service Agreement. (Haight Dec., Exh A.) The AT&T arbitration clause contains a waiver of the right to pursue a representative or class action. (Haight Dec., Exh A, para 28.) This clause is unconscionable under *Szetela v. Discover Bank* (2002) 97 Cal. App. 4th 1094, 1101. See also *Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165, 1175-1176 (applying California law and holding that a bar on class-wide arbitration is substantively unconscionable). The Court notes that the California Supreme Court may be addressing this issue in *Discover Bank v. Superior Court*, S113725. Under the present state of law, however, *Szetela* is controlling.

AT&T argues that the class waiver provision is an integral part of the agreement and cannot be severed. (AT&T Moving Papers at 9-12.) Therefore, the Court cannot sever the unconscionable clause and enforce the remainder of the

arbitration provision. As a result, the motion of AT&T to enforce the arbitration clause is DENIED because the arbitration clause is not enforceable.

The Court is aware that *Szetela's* holding regarding the enforceability of a waiver of the right to pursue a representative or class action is under review. If the California Supreme Court affirms *Szetela's* holding, then this order will remain unchanged. If, however, the California Supreme Court overrules *Szetela*, then the Court will invite a motion to reconsider this order. It would be a waste of resources to require Defendants to appeal from this order merely to preserve their rights.

By way of dicta, the Court observes that if the representative or class action waiver is enforceable, then plaintiffs will be precluded from pursuing UCL claims in the interest of the general public or class claims on behalf of similarly situated persons. Furthermore, they may be required to arbitrate their individual claims because the remainder of the arbitration clause appears to be enforceable.

Absent the representative and class action waiver, the AT&T arbitration clause does not appear to be substantively unconscionable. The clause is bilateral in its non-application to most billing disputes because it excludes claims by consumers that could be brought in small claims court and claims by Defendants for the collection of debts. (Haight Dec., Exh A, para 25.) Because most consumer billing disputes are within the jurisdiction of the small claims court, and it is doubtful that breach of an agreement for a telephone account would lead to consequential damages, personal injury damages, or emotional distress, virtually all disputes involving individual consumers could be resolved through the Courts. Therefore, the only claims that would be routinely subject to arbitration would be representative and class claims, which are expressly precluded.

For the few claims involving sums in excess of the small claims court jurisdiction that might proceed to arbitration, the fee-splitting arrangement does not appear to be unconscionable. (Haight Dec., Exh A, para 27.) For claims of less than \$1,000, consumers have to pay only \$25.00, which is equivalent to a small claims filing fee. For claims of between \$1,000 and \$75,000, consumers have to pay an amount equal to the equivalent court filing fee. Only for claims of over \$75,000 do consumers split the cost of arbitration 50/50, and such claims are likely to be few and brought by commercial enterprises.

The arbitrator selection clause would favor AT&T if there were a large amount of arbitrations and AT&T could acquire familiarity with the panel. (Haight Dec., Exh A, para 26.) This potential problem is minimal because consumer claims can be resolved in small claims court.

The limitations period of two years does not appear to be unconscionable. (Haight Dec., Exh A, para 29.) Although longer than California's four year statute of limitations for breaches of written contracts, C.C.P. 337, it is the same length as California's statute of limitations for personal injuries and breaches of oral contracts, C.C.P. 335.1 and 339. Therefore, the California legislature does not consider two years to be unconscionably short.

The limitation on liability is not at issue in this motion. (Haight Dec., Exh A, para 31.) This section concerns the substantive rights of consumers under their agreements with AT&T and does not concern the question of whether a court or an arbitrator will be responsible for applying that section to the complaints of consumers.

The context in which the AT&T arbitration clause was presented to consumers has some indications of procedural unconscionability, but these indications are not particularly strong. The clauses were not individually negotiated, but the

use of form contracts is not unusual or per se unconscionable. The existence of the clauses is noted on page 1 after a capitalized heading "ARBITRATION NOTICE," and the location of the clauses at paragraphs 25-29 must be considered in light of the fact that the Agreement contains a variety of terms and some must be up front and some must be later. The contract containing the clause is accepted by use of the phone, but the acceptance of a contract by using the product is not per se unconscionable.

Therefore, should the higher courts overrule *Szetela*, the Court will entertain a motion to reconsider this order and (based on the present record) would be likely to grant such a motion. The result of such an order would be that the claims against AT&T would not proceed in this Court on a class or representative basis and that the claims of the individual plaintiffs would be resolved in small claims court or in arbitration.

AT&T's motion to stay pending arbitration is DENIED. The motion to compel arbitration has been denied, so there is no basis to stay this action pending arbitration.

THE CINGULAR ARBITRATION CLAUSE IS NOT ENFORCEABLE.

There are three forms of the Cingular arbitration clause at issue: (1) the electronic version (Marlowe Complaint Exh D); (2) the written version (handed to Court at the hearing); and (3) the July 2003 billing insert version (Raglan Dec, Exh A). The Court has reviewed all three. Cingular has stated that any consumer who filed a claim could pursue arbitration under the terms of the July 2003 billing insert. (Cingular Moving Papers at 4:5-8.)

All three Cingular arbitration clauses contain a waiver of the right to pursue a representative or class action. These clauses are unconscionable under *Szetela v. Discover Bank* (2002) 97 Cal. App. 4th 1094, 1101. See also *Ingle v. Circuit*

City Stores, Inc. (9th Cir. 2003) 328 F.3d 1165, 1175-1176. As noted above, the California Supreme Court may be addressing whether to uphold or overrule the holding of *Szetela*. Under the present state of law, however, *Szetela* is controlling.

Cingular argues that the class waiver provisions are integral part of the agreements and cannot be severed. (Cingular Moving Papers at 12:27-28; Cingular Reply Papers at 7:21-22.) Therefore, the Court cannot sever the unconscionable clauses and enforce the remainder of the arbitration provisions. As a result, the motion of Cingular to enforce the arbitration clauses is DENIED because the arbitration clauses are not enforceable.

As noted above, the Court is aware that *Szetela*'s holding is under review. If the higher courts overrule *Szetela*, then the Court will invite a motion to reconsider this order. It would be a waste of resources to require Defendants to appeal from this order merely to preserve their rights.

By way of dicta, the Court observes that if the representative or class action waivers are enforceable, then plaintiffs will be precluded from pursuing representative UCL claims or class claims and may be required to arbitrate their individual claims.

Absent the representative and class action waiver, the Cingular arbitration clause in the July 2003 billing insert does not appear to be substantively unconscionable. The clause is bilateral in its non-application to most billing disputes because it permits actions in small claims court. Because most consumer billing disputes are within the jurisdiction of the small claims court, and it is doubtful that breach of an agreement for a telephone account would lead to consequential damages, personal injury damages, or emotional distress, virtually all disputes involving individual consumers could be resolved through the Courts. Therefore, the

only claims that would be routinely subject to arbitration would be representative and class claims, which are expressly precluded.

For the few claims involving over sums in excess of the small claims court jurisdiction that might proceed to arbitration, the July 2003 billing insert states that “Cingular will pay all AAA filing, administration and arbitrator fees” unless the consumer’s claim is improper or not warranted under the standards of F.R.C.P. 11 (frivolous motions and claims). This fee-splitting arrangement does not appear to be unconscionable. The July 2003 billing insert does not contain a confidentiality clause and permits the use of a large panel of arbitrators that would limit any “repeat player advantage” by Cingular.

The July 2003 billing insert does not appear to suffer from procedural unconscionability. The Court is not aware of any law stating the changes to standardized consumer agreements are unconscionable because they arrive in billing inserts.

It is unclear whether the Court must consider the electronic version and written version of the arbitration clauses in light of Cingular’s offer to resolve all arbitrations under the terms of the July 2003 billing insert. Cingular argues that the Court can simply substitute the terms of the July 2003 billing insert for the terms of the earlier versions. (Cingular Reply at 5:22-28.) Plaintiffs argue that if the earlier clauses were unconscionable, then the arbitration agreements are unenforceable. *Armendariz*, 24 Cal. 4th at 125 (a party cannot resuscitate a legally defective contract by offering to change it). The Court does not resolve this issue and does not share its thoughts on the electronic version and written version of the arbitration clauses.

Therefore, should the higher courts overrule *Szetela*, the Court will entertain a motion to reconsider this order and

(based on the present record) would be likely to grant such a motion insofar as it concerns the arbitration agreement in the July 2003 billing insert. The result of such an order would be that the claims against Cingular subject to the July 2003 billing insert would not proceed in this Court on a class or representative basis and that the claims of the individual plaintiffs would likely be resolved in small claims court or in arbitration.

Cingular's motion to stay pending arbitration is DENIED. The motion to compel arbitration has been denied, so there is no basis to stay this action pending arbitration.

DATED: JANUARY 20, 2004

/s/ RONALD M. SABRAW

Judge of the Superior Court

29a

Court of Appeal,
First District, Division 5, California.

RITA PARRISH ET AL.,
Plaintiffs and Respondents,

v.

CINGULAR WIRELESS, LLC, ET AL.,
Defendants and Appellants.

No. A105518.

May 18, 2005.

As Modified on Denial of Rehearing
June 17, 2005.

Review Granted and Cause Transferred
Aug. 24, 2005.

Background: Customers and a private attorney general filed actions against provider of wireless telephone service, and the Superior Court of Alameda County, No. JCCP4332, Ronald M. Sabraw, J., denied provider's petition to compel arbitration, finding the ban on class-wide arbitration in contracts was unconscionable and invalid. Provider appealed.

Holdings: The Court of Appeal, Jones, P.J., held that:

(1) private attorney general's claim for injunctive relief was not arbitrable, and

(2) arbitration clause was not so one-sided or unreasonable as to be substantively unconscionable, and hence unenforceable.

Affirmed in part and reversed in part.

Bramson, Plutzik, Mahler & Birkhaeuser, Alan R. Plutzik, Walnut Creek, Lawrence Timothy Fisher, Lerach Coughlin Stoia & Robbins, Reed R. Kathrein, Jacqueline E. Mottek, Shana E. Scarlett, San Francisco, Pamela M. Parker,

San Diego, Franklin & Franklin, John David Franklin, for Plaintiffs and Respondents.

Drinker Biddle & Reath, Seamus C. Duffy, William M. Connolly, Amor A. Esteban, Los Angeles, Mayer, Brown, Rowe & Maw, Evan M. Tager, David M. Gossett, Donald M. Falk, Palo Alto, for Defendants and Appellants.

JONES, P.J.

In *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 118 Cal.Rptr.2d 862 (*Szetela*), the Court of Appeal held an arbitration clause prohibiting class-wide arbitration to be unconscionable and unenforceable. The trial court in the present case relied upon *Szetela* to rule that the arbitration clause at issue here is likewise unconscionable. Recognizing that the issue is pending before our Supreme Court, we will not follow *Szetela* and will conclude instead that under the facts in the present case the contractual ban on class-wide arbitration is not unduly one-sided, harsh, or in violation of public policy.¹

FACTUAL AND PROCEDURAL BACKGROUND

Three separate lawsuits were brought against defendant Cingular Wireless, LLC, and other providers of wireless telephone service, challenging the “early termination fee” charged to customers who end their wireless telephone service before the expiration of the term of the service agreement.

Rita Parrish sued in Orange County as a private attorney general under the Unfair Competition Law (UCL) (Bus. & Prof.Code, § 17200 et seq.), alleging that the early termina-

¹ The issue is pending before the California Supreme Court in *Discover Bank v. Superior Court*, review granted April 9, 2003 (S113725), and *Mandel v. Household Bank*, review granted April 9, 2003 (S113699).

tion fee constituted an unlawful liquidated damages provision in an unconscionable contract. Jerilyn Marlowe and seven other named plaintiffs brought a class action in Alameda County alleging violations of the UCL and the Consumers' Legal Remedies Act (CLRA) (Civ.Code, § 1750 et seq.). In the third lawsuit, Astrid Mendoza sued in Alameda County as a private attorney general and as a class representative to challenge both the early termination fee and Cingular's locked headsets that preclude the use of competitors' networks. These three lawsuits were consolidated and coordinated with other lawsuits pending against other wireless service providers.

The wireless telephone service agreement at issue in all three lawsuits provides for arbitration of all disputes and claims arising out of or related to the agreement. In July 2003, Cingular modified the arbitration clause, making it more advantageous to the customers, and Cingular notified its customers of the change by way of an insert included with the customers' monthly bill. Both the original and the modified versions of the arbitration clause provide that either party may bring an individual action in small claims court, notwithstanding the agreement to arbitrate all disputes. The modified arbitration clause provides that the arbitration will be governed by the commercial dispute resolution procedures and the supplementary procedures for consumer-related disputes of the American Arbitration Association (AAA).² The modified version significantly changed the procedure for payment of fees: If the customer initiates arbitration, Cingular will promptly reimburse the customer for the filing fee. Moreover, Cingular will pay all filing, administration, and arbitrator fees unless the arbitrator finds that the customer's claim is frivolous, in which case payment of fees will be

² The original version called for using the wireless industry arbitration rules.

governed by the AAA rules and thereby apportioned by the arbitrator.³ And if the arbitration award is equal to or greater than the customer's demand, Cingular will pay the customer's attorney fees and expenses.

Most significantly, both the original and the modified version of the arbitration clause allow only individual claims to be heard in arbitration. The modified version reads as follows: "The arbitrator may award injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim.... YOU AND CINGULAR MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, and not as a plaintiff or class member in any purported class or representative proceeding. Further, you agree that the arbitrator may not consolidate proceedings or more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding, and that [if] this specific proviso is found to be unenforceable, then the entirety of this arbitration clause shall be null and void." (Capitalization in original.)⁴

³ The modified arbitration clause states that Cingular will pay all costs unless the arbitrator finds the customer's claim or the relief sought "improper or not warranted, as measured by the standards set forth in Federal Rule of Civil Procedure 11(b)." Rule 11(b) of the Federal Rules of Civil Procedure pertains to frivolous claims.

Under the AAA rules, the arbitrator may apportion fees, expenses, and the compensation of the arbitrator. (Rule R-43.) Under California's arbitration statute, costs are apportioned by the arbitrator pro rata. (Code Civ. Proc., § 1284.2.)

⁴ The original version provided that the arbitrator had no authority to order consolidation or class arbitration.

Cingular petitioned to compel arbitration of plaintiffs' disputes.⁵ Although Cingular did not make a specific request to the court for individual arbitration, Cingular took the position that any arbitration conducted would be limited to arbitration of individual claims. Plaintiffs opposed the petition, arguing, *inter alia*, that the arbitration clause was unconscionable (1) in precluding class-wide relief, and (2) in requiring plaintiffs to pay the costs of arbitration if they should lose. The trial court agreed with plaintiffs that the ban on class-wide arbitration is unconscionable and invalid under the Court of Appeal decision in *Szetela, supra*, 97 Cal.App.4th 1094, 118 Cal.Rptr.2d 862. The court denied Cingular's petition to compel arbitration. By way of dictum, the court noted that if the arbitration clause were enforceable, the arbitration would be on an individual basis and not as a class or representative claim. Cingular now appeals from the order denying arbitration.

DISCUSSION

I. Injunctive Relief

Plaintiffs seek, in addition to monetary recovery of the early termination fees, injunctive relief to benefit the general public. However, the California Supreme Court has held that such claims for injunctive relief are not arbitrable. (*Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 315-316, 133 Cal.Rptr.2d 58, 66 P.3d 1157[UCL]; *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1079-1082, 90 Cal.Rptr.2d 334, 988 P.2d 67 [CRLA].) Cingular acknowl-

⁵ Within the Marlowe lawsuit, plaintiff Marlowe is actually a customer of Verizon, not Cingular. Cingular seeks arbitration only as to the named plaintiffs in that lawsuit who are Cingular customers – James Bethea, Gerry Robertson, Ramzy Ayyad, and Wendy Lowinger. Apparently only one named plaintiff – James Bethea – has actually paid an early termination fee.

edged below that the claims for injunctive relief were not arbitrable under *Cruz* and *Broughton*, and on appeal Cingular again recognizes that this court is bound to follow existing precedent from the California Supreme Court. We will, therefore, affirm the trial court's denial of Cingular's petition to compel arbitration of the claims for injunctive relief.

II. Monetary Claims

A. Nonsignatory Parrish

With one exception, the plaintiffs who are subject to Cingular's petition to compel arbitration are parties to the arbitration clause in Cingular's wireless service agreement. The one exception is plaintiff Rita Parrish, who is not and never has been a subscriber to Cingular's wireless service. She brought suit only as a private attorney general under the UCL for the benefit of the general public.⁶ We conclude that plaintiff Parrish cannot be compelled to arbitrate.

⁶ At the time of the proceedings below, section 17204 of the Business and Professions Code provided in relevant part: "Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or any [authorized] county counsel ... or any [qualified] city attorney ... or by *any person acting for the interests of itself, its members or the general public.*" (Bus. & Prof.Code, § 17204, italics added.)

While this appeal was pending, on November 2, 2004, the electorate amended the UCL by Proposition 64 to delete the provision for a private attorney general. (2004 West's Cal. Legis. Service, Prop. 64.) Although we asked the parties for supplemental briefing, we find it unnecessary to examine the effect of Proposition 64 upon the present appeal.

Whether Rita Parrish is entitled to pursue her claims under the UCL is not an issue that is cognizable on Cingular's petition to compel arbitration. Cingular's assertions in its supplemental brief

By statute, an order compelling arbitration is warranted when “an agreement to arbitrate the controversy exists” and “a party thereto refuses to arbitrate such controversy.” (Code Civ. Proc., § 1281.2.) The fundamental assumption of arbitration is that the parties have consented to resolving their disputes outside the judicial process. The strong policy favoring arbitration as a means of resolving disputes does not extend to persons who are not parties to the arbitration agreement and have not elected to submit to arbitration. (*County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237, 244-245, 54 Cal.Rptr.2d 628; accord *Benasra v. Marciano* (2001) 92 Cal.App.4th 987, 990, 112 Cal.Rptr.2d 358.) A proceeding to compel arbitration is essentially a suit in equity for specific performance of an arbitration agreement. A court in equity has no power to compel third party nonsignatories to arbitrate absent some implied authority by the signatory to bind the nonsignatory. (47 Cal.App.4th at pp. 242-245, 54 Cal.Rptr.2d 628; see also *Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co.* (1998) 68 Cal.App.4th 83, 88-89, 80 Cal.Rptr.2d 147.)⁷

As discussed at length in *County of Contra Costa v. Kaiser Foundation Health Plan, Inc.*, *supra*, 47 Cal.App.4th at pages 242-245, 54 Cal.Rptr.2d 628, a nonsignatory has been held bound by an arbitration agreement in limited cases in-

that Rita Parrish now lacks standing and that her claims should be entirely dismissed may be raised in the trial court by an appropriate motion.

⁷ A nonsignatory third party may invoke an arbitration clause against a signatory based upon equitable estoppel. (E.g., *Alliance Title Co., Inc. v. Boucher* (2005) 127 Cal.App.4th 262, 25 Cal.Rptr.3d 440; *Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705, 1 Cal.Rptr.3d 328.)

volving a preexisting relationship between the nonsignatory and a party to the agreement.⁸ (E.g., *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 702, 704, 709, 131 Cal.Rptr. 882, 552 P.2d 1178 [insured employee bound by arbitration clause in medical services contract entered into by employer]; *Mormile v. Sinclair* (1994) 21 Cal.App.4th 1508, 1511, 26 Cal.Rptr.2d 725 [wife bound by arbitration clause in husband's physician-patient agreement]; *Keller Construction Co. v. Kashani* (1990) 220 Cal.App.3d 222, 269 Cal.Rptr. 259 [general partner of the signatory limited partnership bound by arbitration clause in construction agreement].) Here, no preexisting relationship exists between plaintiff Parrish and the wireless telephone subscribers she purports to represent; there is no basis for finding that the wireless subscribers had authority to bind plaintiff Parrish to the arbitration agreement.

Net2Phone, Inc. v. Superior Court (2003) 109 Cal.App.4th 583, 135 Cal.Rptr.2d 149, upon which Cingular relies, is not on point. The question in that case was whether a forum selection clause could be enforced against a plaintiff who was not a party to the telephone service contract but who brought the action as a private attorney general under the UCL. We draw a distinction between a forum selection clause and an arbitration clause. A forum selection clause may be enforced against a nonparty who is “closely related to the contractual relationship.” (*Id.* at pp. 587, 588, 135

⁸ Another theory for binding a nonsignatory is the doctrine of incorporation by reference. (E.g., *Slaught v. Bencomo Roofing Co.* (1994) 25 Cal.App.4th 744, 748-749, 30 Cal.Rptr.2d 618 [arbitration clause in construction contract between property owner and general contractor incorporated into subcontracts]; *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.* (1992) 6 Cal.App.4th 1266, 1271-1274, 8 Cal.Rptr.2d 587 [arbitration clause in construction agreement incorporated into surety bond].)

Cal.Rptr.2d 149; *Lu v. Dryclean-U.S.A. of California, Inc.*, (1992) 11 Cal.App.4th 1490, 1493, 14 Cal.Rptr.2d 906.) Enforcement of an arbitration clause, in contrast, requires more than the nonparty's connection to the contract. (E.g., *Buckner v. Tamarin* (2002) 98 Cal.App.4th 140, 143, 119 Cal.Rptr.2d 489 [father's arbitration agreement with medical providers did not bind his adult daughters on their wrongful death claims]; *Benasra v. Marciano, supra*, 92 Cal.App.4th at p. 990, 112 Cal.Rptr.2d 358 [arbitration agreement signed by corporation's president not binding on the individual in his claim for libel]; *Kaneko Ford Design v. Citipark, Inc.* (1988) 202 Cal.App.3d 1220, 1229, 249 Cal.Rptr. 544 [arbitration clause in contract between designer and third party not binding on property owner].)

Our Supreme Court has left unresolved the question whether a plaintiff seeking restitution as a private attorney general under the UCL can be compelled to arbitrate when the plaintiff is not a party to the arbitration agreement but is acting on behalf of injured consumers who are parties to the arbitration agreement. (*Cruz v. PacifiCare Health Systems, Inc., supra*, 30 Cal.4th at p. 320, fn. 7, 133 Cal.Rptr.2d 58, 66 P.3d 1157.) We observe that the question has little practical significance, because the same factors that preclude a private attorney general from being compelled to arbitrate also serve to limit the plaintiff's relief in court. While civil penalties may be assessed when the action is initiated by a governmental prosecutor (Bus. & Prof.Code, § 17206), monetary damages are not recoverable under the UCL. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1266, 10 Cal.Rptr.2d 538, 833 P.2d 545.) A private plaintiff is limited to injunctive relief or restitution, i.e., the return of money obtained through an unfair business practice (Bus. & Prof.Code, § 17203). And restitution requires an ownership or vested interest in the money; nonrestitutionary disgorgement of profits is not available to an individual acting as a private at-

torney general under the UCL. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1149-1152, 131 Cal.Rptr.2d 29, 63 P.3d 937.) As the Supreme Court explained, “The breadth of standing under this act allows any consumer to combat unfair competition by seeking an injunction against unfair business practices. *Actual direct victims of unfair competition may obtain restitution as well.*” (*Id.* at p. 1152, 131 Cal.Rptr.2d 29, 63 P.3d 937; italics added.) In the present case, plaintiff Parrish is not an actual direct victim of Cingular’s early termination fee and is acting only as a private attorney general. She has no monetary remedies under the UCL, even assuming arguendo that her claims remain viable. (See fn. 7, *ante.*) At most, her remedy is injunctive relief, and, as we have said, the claims for injunctive relief are not arbitrable.

B. The Ban on Class-wide Arbitration

(1) Unconscionability

At the outset, we observe that the parties and the trial court have mischaracterized the arbitration clause as a ban on “class actions.” In actuality, the disputed portion of the arbitration agreement prohibits class *arbitration*. Class actions through *litigation* are necessarily precluded by the agreement to arbitrate. The question we face here concerns only the manner of arbitration – whether plaintiffs can be denied class treatment of individual claims within the arbitral forum.

An agreement to arbitrate is valid, irrevocable, and enforceable except when grounds exist for the revocation of any contract. (Code Civ. Proc., §§ 1281, 1281.2, subd. (b).)⁹

⁹ The statutory reference to grounds for *revocation* of an agreement is a misnomer; the issue on a motion to compel arbitration is whether there are grounds to *rescind* the arbitration agreement. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973, 64 Cal.Rptr.2d 843, 938 P.2d 903.)

Unconscionability is one ground upon which a court may refuse to enforce a contract (Civ.Code, § 1670.5), and the burden is on the party opposing arbitration to prove the defense. (*Engalla v. Permanente Medical Group, Inc.*, *supra*, 15 Cal.4th at p. 972, 64 Cal.Rptr.2d 843, 938 P.2d 903.)

The determination of unconscionability is a question of law for the court. (Civ.Code, § 1670.5, subd. (a); *Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 851, 113 Cal.Rptr.2d 376.) On appeal, when the extrinsic evidence is undisputed, as it is here, we review the contract de novo to determine unconscionability. (93 Cal.App.4th at p. 851, 113 Cal.Rptr.2d 376; *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1527, 60 Cal.Rptr.2d 138.)

It bears emphasizing that a finding of unconscionability in a contract clause does not necessarily mean that the contract cannot be enforced. The trial court has discretion to sever the unconscionable provision and enforce the remainder of the contract or to limit the application of the unconscionable clause so as to avoid an unconscionable result. (Civ.Code, § 1670.5, subd. (a); *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1074-1075, 130 Cal.Rptr.2d 892, 63 P.3d 979.) In the present case, however, the modified version of the arbitration clause precludes severance of the ban on class arbitration: “[T]he arbitrator may not consolidate proceedings or [*sic*, on] more than one person’s claims, and may not otherwise preside over any form of a representative or class proceeding, and . . . if this specific proviso is found to be unenforceable, then the entirety of this arbitration clause shall be null and void.”

In determining whether a particular contractual provision is unconscionable, we examine both a procedural and a substantive element of unconscionability. The *procedural* element focuses on the way in which the disputed provision was presented – i.e., whether there was “oppression” or “surprise.” Oppression arises from an inequality of bargaining

power that results in no real negotiation and an absence of meaningful choice. Surprise involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them. The *substantive* element of unconscionability has to do with the effects of the contractual provision and whether it is overly harsh or one-sided. (*Armendariz v. Foundation Health Psychcare Services, Inc* (2000) 24 Cal.4th 83, 114, 99 Cal.Rptr.2d 745, 6 P.3d 669 (*Armendariz*); *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486, 186 Cal.Rptr. 114.)

To be unenforceable, a contract must be both procedurally and substantively unconscionable, but the courts employ a “sliding scale” or a balancing relationship between the two elements of unconscionability, such that the greater the degree of unfair surprise or unequal bargaining power, the less the degree of substantive unconscionability required to annul the contract and vice versa. (*Armendariz, supra*, 24 Cal.4th at p. 114, 99 Cal.Rptr.2d 745, 6 P.3d 669; *Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.* (2001) 89 Cal.App.4th 1042, 1056, 107 Cal.Rptr.2d 645.)

We agree with the trial court’s conclusion that the arbitration agreement, as amended through the bill insert, was a contract of adhesion and, hence, procedurally unconscionable. (See *Flores v. Transamerica HomeFirst, Inc., supra*, 93 Cal.App.4th at p. 853, 113 Cal.Rptr.2d 376; *Stirlen v. Supercuts, Inc., supra*, 51 Cal.App.4th at pp. 1533-1534, 60 Cal.Rptr.2d 138.) Cingular concedes the point. (See *Szetela, supra*, 97 Cal.App.4th at p. 1100, 118 Cal.Rptr.2d 862 [contract amendment contained in bill stuffer was procedurally unconscionable].) The more difficult question is whether the ban on class arbitration is substantively unconscionable.

That issue was addressed in *Szetela, supra*, 97 Cal.App.4th 1094, 118 Cal.Rptr.2d 862. There the plaintiff

was a credit card holder who alleged that the bank (credit card company) had improperly charged him a \$29 fee for exceeding his credit limit. The arbitration clause in the credit card agreement prohibited joining or consolidating claims in arbitration or arbitrating claims as a representative, as a member of a class, or as a private attorney general. When the plaintiff brought a class action, the bank successfully moved to compel arbitration on an individual basis. The appellate court held the ban on class treatment to be unconscionable, and the court directed the trial court to proceed to arbitration on a class basis.

The *Szetela* court reasoned that the ban on class arbitration was unfairly one-sided: “Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover, because credit card companies typically do not sue their customers in class action lawsuits. This provision is clearly meant to prevent customers ... from seeking redress for relatively small amounts of money, such as the \$29 sought by *Szetela*. Fully aware that few customers will go to the time and trouble of suing in small claims court, Discover has instead sought to create for itself virtual immunity from class or representative actions despite their potential merit, while suffering no similar detriment to its own rights.” (*Szetela, supra*, 97 Cal.App.4th at p. 1101, 118 Cal.Rptr.2d 862.)

The lack of mutuality is, of course, a basis for finding substantive unconscionability. (*Armendariz, supra*, 24 Cal.4th at pp. 117-121, 99 Cal.Rptr.2d 745, 6 P.3d 669.) The courts have found unconscionable a clause requiring arbitration for the weaker party while giving the stronger party a choice of forum. (*Id.* at pp. 120-121, 99 Cal.Rptr.2d 745, 6 P.3d 669 [only employee’s claims of wrongful termination subject to arbitration]; *Little v. Auto Stiegler, Inc., supra*, 29 Cal.4th at p. 1073, 130 Cal.Rptr.2d 892, 63 P.3d 979 [allow-

ing appeal of any award over \$50,000 effectively gave only employer right to appeal]; *Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1407-1408, 7 Cal.Rptr.3d 418 [personal injury damages not available without contractor's consent]; *Flores v. Transamerica HomeFirst, Inc.*, *supra*, 93 Cal.App.4th at p. 855, 113 Cal.Rptr.2d 376 [only borrower's claims subject to arbitration while lender had remedy of foreclosure].)¹⁰

Here, it is true that the ban on class-wide arbitration tends to favor Cingular; the obvious effect is to limit the scope of potential damages that Cingular would face in class arbitration without the ability to obtain judicial review. Yet, the ban on class arbitration does not affect the choice of forum. The limitation is only on the breadth of the arbitration proceeding – i.e., the *manner* in which the arbitration is to occur. And the limitation in the present case is materially different from the clause in *Szetela*. The arbitration clause here expressly permits the customers to obtain relief in small claims court.¹¹ Moreover, the costs of arbitration are paid by Cingular. Unlike the credit card customers in *Szetela*, Cingular's subscribers are not deterred from seeking redress for small amounts. Under these circumstances, we do not find the ar-

¹⁰ Not every instance of one-sidedness is invalid: “[A] contract can provide a ‘margin of safety’ that provides the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need without being unconscionable.” (*Stirlen v. Supercuts, Inc.*, *supra*, 51 Cal.App.4th at p. 1536, 60 Cal.Rptr.2d 138; accord, *Armendariz*, *supra*, 24 Cal.4th at p. 117, 99 Cal.Rptr.2d 745, 6 P.3d 669.)

¹¹ Oddly, the *Szetela* court seems to have presumed that the credit cardholders were free to go to small claims court but would be unlikely to do so. Yet, the arbitration clause in that case withdrew the right to litigate any claim in court. (*Szetela*, *supra*, 97 Cal.App.4th at p. 1096, 118 Cal.Rptr.2d 862.)

bitration clause so one-sided or unreasonable to be substantively unconscionable.

(2) *Impairment of Statutory Rights*

The Supreme Court has recognized two distinct defenses to a motion to compel arbitration: (1) the arbitration agreement is unconscionable and (2) arbitration would compel the claimant to forfeit certain statutory rights. (*Armendariz, supra*, 24 Cal.4th at p. 113, 99 Cal.Rptr.2d 745, 6 P.3d 669; *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 86, 7 Cal.Rptr.3d 267.) The parties here have not made a distinction between the two defenses but have treated the latter as a version of unconscionability. We treat the two defenses separately.

It is now well settled that even claims arising under a statute designed to further important social policies may be arbitrated. (*Green Tree Fin. Corp.-Ala. v. Randolph* (2000) 531 U.S. 79, 90, 121 S.Ct. 513, 148 L.Ed.2d 373; *Cruz v. PacifiCare Health Systems, Inc., supra*, 30 Cal.4th at p. 317, 133 Cal.Rptr.2d 58, 66 P.3d 1157 [UCL]; *Broughton v. Cigna Healthplans, supra*, 21 Cal.4th at p. 1084, 90 Cal.Rptr.2d 334, 988 P.2d 67 [CLRA].) But arbitration will be denied if the prospective litigant is precluded from fully vindicating the statutory cause of action in the arbitral forum. (531 U.S. at p. 90, 121 S.Ct. 513, *Armendariz, supra*, 24 Cal.4th at pp. 99-104, 99 Cal.Rptr.2d 745, 6 P.3d 669.) In *Armendariz*, the claimant/employees sued for sexual harassment under FEHA, but the arbitration clause in their employment contract confined the potential relief to back pay and precluded recovery of punitive damages and attorney fees – recovery that would otherwise have been available under FEHA. The Supreme Court held that the limitation on remedies was unlawful as it would prevent the employees’ full vindication of their rights under FEHA. (See also *Stirlen v. Supercuts, Inc., supra*, 51 Cal.App.4th at pp. 1539-1540, 60 Cal.Rptr.2d 138 [limit on remedies under several statutes]; *Graham Oil v. ARCO*

Products Co. (9th Cir.1994) 43 F.3d 1244, 1248 [limit on remedies that would be available under Petroleum Marketing Practices Act].)

Plaintiffs apparently rely upon this principle in emphasizing that consumer class actions are given statutory protection. Under the CLRA, class actions are specifically permitted (Civ.Code, §§ 1752, 1781), and any purported contractual waiver of rights granted by the CLRA is invalid (Civ.Code, § 1751). Also, at the time of the events here, the UCL allowed consumers to redress unfair business practices through private attorney general actions. (Bus. & Prof.Code, § 17204; see fn. 7, *ante*.)

The *Szetela* court apparently relied upon this principle, too, in finding that the contractual ban on class arbitration violates public policy. The *Szetela* court reasoned that the ban would undermine consumer protection statutes by eliminating the private attorney general mechanism: “[The clause] contradicts the California Legislature’s stated policy of discouraging unfair and unlawful business practices, and of creating a mechanism for a representative to seek relief on behalf of the general public as a private attorney general. (See, e.g., Bus. & Prof.Code, § 17200 et seq.) It provides the customer with no benefit whatsoever; to the contrary, it seriously jeopardizes customers’ consumer rights by prohibiting any effective means of litigating Discover [Bank’s] business practices. This is not only substantively unconscionable, it violates public policy by granting Discover [Bank] a ‘get out of jail free’ card while compromising important consumer rights.” (*Szetela, supra*, 97 Cal.App.4th at p. 1101, 118 Cal.Rptr.2d 862.)

We cannot agree that the ban on class arbitration immunizes businesses from consumer protection lawsuits. The arbitration clause has no effect on actions by the Attorney General or other governmental prosecutors to redress unfair business practices. (*EEOC v. Waffle House, Inc.* (2002) 534

U.S. 279, 122 S.Ct. 754, 151 L.Ed.2d 755; see *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 32, 111 S.Ct. 1647, 114 L.Ed.2d 26.) Nor does the ban on class arbitration do anything to limit litigation. The customer's right to litigate has already been curtailed by the arbitration agreement itself. As we have said, monetary claims under the UCL and CLRA are arbitrable even though such claims vindicate important statutory rights. What is restricted here is the breadth or manner of arbitration and the ability to pursue the claims of others within the arbitration.

There is no statutory right to class arbitration. Class arbitration has been held *permissible* when the trial court, in the exercise of its discretion, finds that the interests of justice require class-wide relief. (*Keating v. Superior Court* (1982) 31 Cal.3d 584, 609-614, 183 Cal.Rptr. 360, 645 P.2d 1192, reversed on other grounds *sub nom. Southland Corp. v. Keating* (1984) 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1; *Blue Cross of California v. Superior Court* (1998) 67 Cal.App.4th 42, 64, 78 Cal.Rptr.2d 779; see *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444, 123 S.Ct. 2402, 156 L.Ed.2d 414; *Cruz v. PacifiCare Health Systems, Inc.*, *supra*, 30 Cal.4th at pp. 318-319, 133 Cal.Rptr.2d 58, 66 P.3d 1157.) However, judicial recognition of a class-wide remedy in arbitration cannot be equated with a nonwaivable statutory right. Indeed, a nonwaivable right to class arbitration would undermine the purpose of arbitration. Arbitration is meant to resolve *private* disputes in an expeditious and efficient manner, not to remedy a public wrong. (*Broughton v. Cigna Healthplans*, *supra*, 21 Cal.4th at p. 1080, 90 Cal.Rptr.2d 334, 988 P.2d 67.) The fact that the procedural device of class treatment is not available in arbitration is "part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition' [citing *Gilmer v. Interstate/Johnson Lane Corp.*, *supra*, 500 U.S. at p. 31, 111 S.Ct. 1647], characteristics that generally make arbitration an attractive vehicle for

the resolution of low-value claims.” (*Iberia Credit Bureau, Inc. v. Cingular Wireless* (5th Cir.2004) 379 F.3d 159, 174.)

C. Cost Allocation

Plaintiffs further argue that the provisions for allocation of arbitration costs are unconscionable. Plaintiffs contend that the customer faces the risk that the arbitrator may ultimately find the customer’s claim to be “improper or not warranted” and hence may ultimately allocate costs to the customer. The argument is meritless.

We reject plaintiffs’ implicit assertion that a consumer cannot be required to pay any costs of arbitration. Plaintiffs rely on *Armendariz, supra*, 24 Cal.4th 83, 99 Cal.Rptr.2d 745, 6 P.3d 669, in which the Supreme Court held that when an employer imposes mandatory arbitration as a condition of employment, the employee cannot be required to bear any type of expense that is unique to arbitration and that the employee would not have to bear, were he free to bring his case to court. (*Id.* at pp. 107-113, 99 Cal.Rptr.2d 745, 6 P.3d 669.) Accordingly, the court interpreted the contract that was otherwise silent on the issue to mean that the employer must bear all costs of arbitration. (*Id.* at p. 113, 99 Cal.Rptr.2d 745, 6 P.3d 669.)

That “categorical” approach differs from the approach taken by the United States Supreme Court in a consumer arbitration case, *Green Tree Fin. Corp.-Ala. v. Randolph, supra*, 531 U.S. 79, 121 S.Ct. 513, 148 L.Ed.2d 373. In the face of a silent agreement, the court held that a party could seek to invalidate an arbitration agreement on the ground that the costs of arbitration would be “prohibitively expensive,” but the consumer in that case failed to prove the likelihood that the costs would be so. (*Id.* at pp. 90, 92, 121 S.Ct. 513.) Subsequent decisions have characterized the *Green Tree* approach as necessitating a case-by-case analysis. (*Gutierrez v.*

Autowest, Inc., supra, 114 Cal.App.4th at p. 96, 7 Cal.Rptr.3d 267.)¹²

The California Supreme Court has not yet ruled on the allocation of costs in a consumer arbitration, but we have concluded that the categorical approach is not appropriate for consumer cases. (*Gutierrez v. Autowest, Inc., supra*, 114 Cal.App.4th at pp. 96-98, 7 Cal.Rptr.3d 267.) In *Gutierrez*, the claimant established an inability to pay the up-front administrative fees, and we held the fee division provision unconscionable where the arbitration agreement provided no avenue for relief from unaffordable fees. (*Id.* at pp. 89-92, 7 Cal.Rptr.3d 267.) The present case is markedly different. The arbitration clause provides that Cingular will pay the filing fee up front and will pay all arbitration costs – unless the arbitrator ultimately decides that the claim was frivolous.

In complaining that the customer might be ordered to pay costs if the customer does not prevail in the arbitration, plaintiffs overlook a key phrase in the arbitration clause. The full text of the arbitration clause calls for an award of costs by the arbitrator if the claim is found improper or not warranted “as measured by the standards set forth in Federal Rule of Civil Procedure 11(b).” The reference to Federal Rule of Civil Procedure 11(b) means that costs will be allocated only when the claim is found to be frivolous.¹³ We find nothing overly

¹² In *Little v. Auto Stiegler, Inc., supra*, 29 Cal.4th at pages 1081-1085, 130 Cal.Rptr.2d 892, 63 P.3d 979, the California Supreme Court recognized the difference in the two approaches and affirmed its categorical approach in mandatory employment arbitration.

¹³ Rule 11(b) of the Federal Rules of Civil Procedure provides that by filing a document in court the party is deemed to certify that “(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal con-

harsh or unfair in the provision relating to costs in arbitration.¹⁴

tentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.” (Fed. Rules Civ. Proc., rule 11(b), 28 U.S.C.)

¹⁴ Plaintiffs complain that the original arbitration clause was silent on the allocation of costs and, under the wireless industry arbitration rules, all costs would have been allocated pro rata. That clause was, of course, superseded by the July 2003 contract modification.

Plaintiffs raise other claims of unconscionability that pertain only to the arbitration clause before its modification in July 2003. The original arbitration clause contained a provision requiring the parties to keep confidential the outcome of any arbitration proceeding. That confidentiality provision was entirely omitted from the July 2003 modification. Likewise, plaintiffs’ concern about the neutrality of the arbitrator selected under the wireless industry arbitration rules has been nullified by the July 2003 modification calling for a different set of arbitration procedures. We have no reason to examine these superseded provisions. This is not a case in which a defendant offered to change a defective provision in order to nullify an unconscionability claim. (Cf. *Armendariz*, *supra*, 24 Cal.4th at p. 125, 99 Cal.Rptr.2d 745, 6 P.3d 669.) Cingular made the modification in July 2003 to benefit all existing customers, and Cingular announced its plan to apply the July 2003 modification to past customers as well. Cingular would be estopped from taking a contrary position in any later proceeding. (See *Coleman v. Southern Pacific Co.* (1956) 141 Cal.App.2d 121, 128, 296 P.2d 386; cf. *Prilliman v. United Air Lines, Inc.* (1997)

DISPOSITION

The order denying the petition to compel arbitration is affirmed as to plaintiff Rita Parrish. As to the remaining plaintiffs, the order is reversed in part, and the trial court is directed to enter a new order compelling arbitration of the monetary claims on an individual basis. With respect to the claims for injunctive relief, the order denying arbitration is affirmed. The parties shall bear their own costs on appeal.

We concur: STEVENS and SIMONS, JJ.

53 Cal.App.4th 935, 960-963, 62 Cal.Rptr.2d 142.) Plaintiffs' objections to the original arbitration agreement are now moot.

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Supreme Court of California

PARRISH

v.

CINGULAR WIRELESS

No. S135072.

Aug. 24, 2005.

Prior report: Cal.App., 28 Cal.Rptr.3d 802.

Petition for review granted; transferred to Court of Appeal, First District, Division 5.

Petitions for review GRANTED.

The matter is transferred to the Court of Appeal, First Appellate District, Division Five, with directions to vacate its decision and to reconsider the matter in light of *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100.

GEORGE, C.J., KENNARD, BAXTER, WERDEGAR, CHIN, and MORENO, JJ., concur.