

No. 5-03-0774

IN THE APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

DONNA M. KINKEL,

Plaintiff-Appellee,

Appeal from the Circuit Court
of Madison County

v.

Hon. Phillip J. Kardas,
Circuit Judge

CINGULAR WIRELESS LLC,

No. 02-L-1087

Defendant-Appellant.

BRIEF OF APPELLANT CINGULAR WIRELESS LLC

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ORAL ARGUMENT REQUESTED

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INTRODUCTORY STATEMENT

This is a putative nationwide class action brought to challenge the “early termination fee” provision contained in the Wireless Service Agreement (“Agreement”) under which defendant Cingular Wireless LLC (“Cingular”) agreed to provide cellular telephone service to plaintiff and its other customers. The Order appealed from denied Cingular’s motion to compel arbitration of plaintiff’s claims pursuant to the arbitration provision contained in her Agreement and the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1-16. The case was not tried to a jury. No questions are raised on the pleadings.

ISSUE PRESENTED FOR REVIEW

Whether the circuit court erred by refusing to enforce the arbitration agreement between the parties.

JURISDICTION

As the Illinois Supreme Court recently explained, “[a]n order of the circuit court to compel or stay arbitration is injunctive in nature and subject to interlocutory appeal under [Supreme Court Rule 307(a)(1)].” *Salsitz v. Kreiss*, 198 Ill. 2d 1, 11, 761 N.E.2d 724, 730 (2001), *cert. denied*, 535 U.S. 1055 (2002) (citing *Notaro v. Nor-Evan Corp.*, 98 Ill. 2d 268, 271, 456 N.E.2d 93 (1983)). The circuit court denied Cingular’s motion to compel arbitration on November 10, 2003. *See* R. C140. Cingular timely filed its notice of appeal on December 9, 2003. *See* A.155.

STATUTES INVOLVED

Section 2 of the FAA, 9 U.S.C. § 2, provides:

Validity, irrevocability, and enforcement of agreements to arbitrate:

A written provision in any maritime transaction or a contract evidencing a

transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3 of the FAA, 9 U.S.C. § 3, specifies:

Stay of proceedings where issue therein referable to arbitration: If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

STATEMENT OF FACTS

On or about July 25, 2001, plaintiff Donna Kinkel entered into a “Wireless Service Agreement” (“the Agreement”) with Cingular, under which Cingular agreed to provide her with cellular telephone service. *See* R. C38, C38E. A true and correct copy of the Agreement is contained in the Record, at R. C38.

The Agreement includes an arbitration provision. That provision requires the parties to submit to arbitration “any and all disputes * * * arising out of or relating to” the contract. Specifically, it provides in relevant part:

INDEPENDENT ARBITRATION. * * * If Cingular and you do not reach agreement [on a dispute], instead of suing in court, CINGULAR and you agree to arbitrate any and all disputes and claims (including but not limited to claims based on or arising from an alleged tort) arising out of or relating to this Agreement * * *. CINGULAR and you acknowledge that this agreement evidences a transaction in interstate commerce and that the United States Arbitration Act and Federal Arbitration Law shall govern

the interpretation and enforcement of, and proceedings pursuant to, this
* * * agreement.

See R. C38 (back side).

On August 9, 2002, plaintiff filed a complaint in the Circuit Court of Madison County, asserting claims of breach of contract and statutory fraud. *See* R. C3. According to Plaintiff, the “Contract Termination Fee” contained in Cingular’s Agreements — under which Cingular is authorized to charge a customer \$150 if the customer cancels the contract before fulfilling her “service commitment” — is unlawful. *See id.* at C3-C4. Plaintiff submitted a First Amended Complaint on August 25, 2003, which the circuit court gave her leave to file on September 11, 2003. *See* A.21.¹ That complaint again raised claims of breach of contract and statutory fraud based on the “Contract Termination Fee.” Both of these claims arise out of and relate to the Agreement between Cingular and plaintiff.

Based on the arbitration provision contained in the Agreement, Cingular moved to compel Kinkel to arbitrate the dispute rather than to proceed in court. *See* R. C39. In connection with that motion, Cingular noted that, although the Agreement provides that “all fees and expenses of the arbitration shall be equally borne by [the customer] and CINGULAR,” Cingular was committing to reimburse plaintiff for all fees charged by the

¹ The copy of the First Amended Complaint contained in the Record prepared by the Clerk of the Circuit Court (*see* R. C. 38B) is incorrect; it was superseded by a revised “First Amended Complaint” submitted by plaintiff before the circuit court agreed to allow her to file it. We have included the correct version of the First Amended Complaint in the Appendix, and will move to correct or supplement the Record to include that correct version shortly, after consulting with plaintiff and the Clerk of the Circuit Court.

arbitration organization unless the arbitrator finds that the claims asserted would be subject to sanctions under the substantive standards articulated in Fed. R. Civ. P. 11(b) and Ill. Sup. Ct. R. 137. *See* R. C44. Cingular further committed to reimburse plaintiff for her reasonable attorneys' fees and costs if she recovers an amount equal to or greater than her monetary claim in the arbitral proceeding. *See id.* Finally, Cingular offered to waive the confidentiality requirement contained in the Agreement. *See* R. C106. As Cingular explained, these commitments were consistent with a revision to its arbitration provision, which was sent to all of Cingular's then-current customers in July 2003.² Cingular stipulated in open court to afford these same benefits to **all** current and former customers rather than merely to plaintiff (*see* R. 8), and provided the circuit court with a copy of the new arbitration provision (*see* R. C49-C50).

On November 10, 2003, after briefing and oral argument, the circuit court denied Cingular's motion to compel arbitration, adopting plaintiff's proposed order in its entirety. *See* R. C140. This appeal followed.

² In order to make arbitration even more convenient and inexpensive than under prior agreements, Cingular revised its arbitration provision to specify that Cingular will pay "all AAA filing, administration and arbitrator fees," unless the claim or the relief sought is found to be improper, as measured by the standards set forth in Fed. R. Civ. P. 11(b). *See* R. C50. The revised provision further specifies that, if a customer recovers the amount of his demand or more, "Cingular shall reimburse [him] for [his] reasonable attorneys' fees and expenses incurred for the arbitration." *Id.* In addition, the new arbitration provision provides that the arbitration shall take place "in the county * * * of [the customer's] billing address" (*id.*), making arbitration equally, if not more, convenient for customers than invocation of the judicial system. Finally, the arbitration provision does not include a requirement that proceedings be kept confidential. *See* R. C49-C50.

STANDARD OF REVIEW

Because the circuit court’s decision “was based on a purely legal analysis,” rather than on findings of disputed fact, this court “review[s] the trial court’s denial of the motions to stay the proceedings and compel arbitration *de novo*.” *Hutcherson v. Sears Roebuck & Co.*, 342 Ill. App. 3d 109, 115, 793 N.E.2d 886, 889-90 (1st Dist. 2003), *appeal denied*, __ N.E.2d __ (Ill. Oct. 7, 2003) (citing *Bass v. SMG, Inc.*, 328 Ill. App. 3d 492, 496, 765 N.E.2d 1079 (1st Dist. 2002)).

ARGUMENT

THE CIRCUIT COURT ERRED BY REFUSING TO ENFORCE THE PARTIES’ ARBITRATION AGREEMENT.

There is no dispute that the arbitration provision contained in plaintiff’s Agreement covers her claims. The circuit court nevertheless refused to compel arbitration, accepting plaintiff’s contentions that arbitration is inconsistent with the public policy underlying the Illinois Consumer Fraud and Deceptive Business Practices Act (“ICFA”), 815 ILCS 505/1-12, and, in any event, that Cingular’s arbitration provision is unconscionable. These rationales are inconsistent with the strong federal policy favoring arbitration embodied in the FAA and, therefore, have been roundly rejected by numerous courts both within Illinois and elsewhere.

A. Under The Federal Arbitration Act, Plaintiff’s Claims Must Be Arbitrated.

The FAA was enacted in 1925 to “reverse the longstanding judicial hostility to arbitration agreements * * * to place [these] agreements upon the same footing as other contracts * * * [and to] manifest a liberal federal policy favoring arbitration agreements.”

Equal Employment Opportunity Comm'n v. Waffle House, Inc., 534 U.S. 279, 289 (2002) (citations and internal quotation marks omitted). Thus, “[t]he United States Supreme Court has recognized an ‘emphatic federal policy in favor of arbitral dispute resolution.’” *Borowiec v. Gateway 2000, Inc.*, 331 Ill. App. 3d 842, 847, 772 N.E.2d 256, 260 (1st Dist.), *appeal granted*, 201 Ill.2d 561, 786 N.E.2d 181 (2002) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)). *See also Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (“questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitrations”); *Bd. of Mgrs. of Courtyards at Woodlands Condominium Ass’n v. IKO Chicago, Inc.* (“*Woodlands*”), 183 Ill. 2d 66, 71, 697 N.E.2d 727, 730 (1998) (“It is a well-established principle that arbitration is a favored alternative to litigation by state, federal and common law because it is a speedy, informal, and relatively inexpensive procedure for resolving controversies arising out of commercial transactions.”) (citation and internal quotation marks omitted); *Penn v. Ryan’s Family Steak Houses, Inc.*, 269 F.3d 753, 758 (7th Cir. 2001) (“The Supreme Court has repeatedly counseled that the FAA leaves no room for judicial hostility to arbitration proceedings and that courts should not presume, absent concrete proof to the contrary, that arbitration systems will be unfair or biased.”) (citations omitted).

An arbitration agreement must meet two basic conditions for the FAA to apply: (1) the agreement must be in writing; and (2) it must be in a contract “evidencing a transaction involving commerce.” *See* 9 U.S.C. § 2. Here, there is no question that both criteria have been met — and plaintiff never asserted otherwise. When, as here, the

agreement is governed by the FAA and the plaintiff's claims fall within the scope of the arbitration provision, the duty of the trial court is clear: it must compel arbitration and either stay the judicial proceedings or dismiss them with prejudice. *See, e.g., Bahuriak v. Bill Kay Chrysler Plymouth, Inc.*, 337 Ill. App. 3d 714, 717, 786 N.E.2d 1045, 1049 (2d Dist. 2003) ("Both the Federal [Arbitration] Act and the Illinois [Arbitration] Act provide that a party to an arbitration agreement may, upon an opposing party's refusal to arbitrate, seek an affirmative order from the circuit court to stay the proceedings and compel arbitration in accordance with the terms of the arbitration agreement."); *Simmen v. Lehman Bros., Inc.*, 278 Ill. App. 3d 573, 663 N.E.2d 71 (1st Dist. 1996) (affirming stay of complaint pending arbitration under the FAA); *Comdisco, Inc. v. Dun & Bradstreet Corp.*, 285 Ill. App. 3d 796, 801, 674 N.E.2d 902, 905 (1st Dist. 1996) (reversing denial of motion to compel arbitration under the FAA).

Accordingly, unless one of the circuit court's rationales for why plaintiff should not be compelled to arbitrate is sustainable — and, as we demonstrate below, none is — this Court must reverse the circuit court's ruling and remand with instructions to enter an order compelling arbitration of this dispute.³

³ The circuit court was mistaken in suggesting (Order at 1 (R. C184)) that the burden is on Cingular to show that plaintiff's claims should be arbitrated. Rather, the U.S. Supreme Court has held that "the party *resisting* arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp.—Ala. v. Randolph*, 531 U.S. 79, 91 (2000) (emphasis added; citations omitted).

B. None Of The Circuit Court’s Reasons For Refusing To Enforce The Arbitration Agreement Is Valid.

Before addressing the reasons why the circuit court refused to enforce the parties’ arbitration agreement, it is important to put that decision in context. Although a few courts recently have refused to enforce arbitration provisions in consumer agreements (*see, e.g., Szetela v. Discover Bank*, 97 Cal. App. 4th 1094 (2002), *cert. denied*, 537 U.S. 1226 (2003); *Ting v. AT&T*, 319 F.3d 1126 (9th Cir.), *cert. denied*, 124 S. Ct. 53 (2003)), the concern underlying the decisions in these cases has been that specific features of the arbitration agreements at issue in those cases would “seriously jeopardize[] customers’ consumer rights by prohibiting any effective means of litigating [an entity’s] business practices.” *Szetela*, 97 Cal. App. 4th at 1101.

As we have explained, however, last year Cingular revised its arbitration provision specifically to address these exact concerns, and made all of the features of that revised provision available to both plaintiff and all of its other former customers. *See* pages 11-12, *supra*. For example, Cingular has agreed to pay the full cost of arbitration, and to reimburse customers for their attorneys’ fees in the event the arbitrator awards them the amount they seek or more. *See id.* Similarly, Cingular has agreed to arbitrate any dispute in the counties in which its customers reside, and has removed the confidentiality clause from its arbitration provision. *See id.*

Thus, a decision that the arbitration agreement at issue here is unenforceable in essence means that *no* arbitration clause in a consumer agreement (or at least none that bars class actions) would be enforceable under Illinois law. However, as the Illinois Supreme Court has declared, “[t]he courts of this state favor arbitration” because it is “an

effective, expeditious, and cost-efficient method of dispute resolution.” *Salsitz*, 198 Ill. 2d at 13, 761 N.E.2d at 731; *see also, e.g., Woodlands*, 183 Ill. 2d at 71, 697 N.E.2d at 730. The circuit court’s multiple reasons for refusing to enforce plaintiff’s agreement to arbitrate with Cingular must be evaluated with this powerful policy favoring arbitration clearly in mind. As we now show, none of these justifications for voiding plaintiff’s contractual obligation to arbitrate can stand up to close scrutiny.⁴

1. A Plaintiff May Not Avoid Her Obligation To Arbitrate Merely By Alleging That The Arbitration Provision To Which She Freely Agreed Was Designed “To Promote And Protect Defendant’s Fraudulent Penalty Scheme.”

Seeking to secure the benefit of this Court’s decisions in *Hanke v. American International South Insurance Co.*, 335 Ill. App. 3d 1164, 782 N.E.2d 328 (5th Dist. 2002), *appeal denied*, 203 Ill. 2d 546, 788 N.E.2d 728 (2003), and *Travis v. American Manufacturers Mutual Insurance Co.*, 335 Ill. App. 3d 1171, 782 N.E.2d 322 (5th Dist. 2002), *appeal denied*, 203 Ill. 2d 571, 788 N.E.2d 735 (2003), plaintiff alleged in her Complaint — without the slightest factual basis — that Cingular “inserted” the arbitration provision in its wireless service agreements in order to insulate its early termination fee from judicial scrutiny. *See* A.26-27; Order at 4 (R. C187).⁵ In particular, she asserted

⁴ Even if the circuit court’s rationales were not barred by the FAA and the case law interpreting it, they are preempted by the federal telecommunications laws. *See Boomer v. AT&T Corp.*, 309 F.3d 404, 418-421 (7th Cir. 2002) (reversing denial of motion to compel arbitration of class action plaintiff’s claims and holding that the Federal Communications Act impliedly preempts state-law challenges to the validity of arbitration provisions in agreements for the provision of telecommunication services).

⁵ The circuit court inferred improper intent from the fact that Cingular had included a confidentiality provision in the arbitration agreement plaintiff signed. *See* Order at 4 n.1 (R. C187). That inference is invalid for several reasons. To begin with, the
(cont’d)

that the arbitration provision “exclude[s] liability for the acts complained of”; limits the arbitrator’s authority “such that the dispute cannot be resolved”; withdraws remedies necessary for the vindication of consumer rights; and compels arbitration under procedures that will make the cost of arbitration exceed the potential recovery. A. 26-27. Based on this allegation, she argued — and the circuit court held — that under *Hanke* and *Travis* the arbitration agreement cannot be enforced. Order at 2-5 (R. C185-C188). Arbitration cannot be so easily avoided.

In the first place, the kind of exception that the circuit court created here would entirely swallow up the rule that arbitration agreements must be enforced according to their terms. Just as plaintiff was able to add to her complaint a single (factually unfounded) paragraph alleging that the inclusion of an arbitration provision was part of a scheme to make the underlying conduct immune from judicial scrutiny, so too could anyone else who wishes to avoid arbitration. The result would be the wholesale

confidentiality provision is bilateral: it protects consumers whose indebtedness might otherwise come to the attention of creditors and potential lenders every bit as much as it protects Cingular. Moreover, the fact that customers are permitted to pursue claims in small claims court — which is subject to no confidentiality requirement — completely belies the suggestion that Cingular intended to “shield its penalty clause from scrutiny” (*id.*). Third, confidentiality is a common feature of arbitration. *See, e.g.,* Lucille M. Ponte & Erika M. Brown, *Resolving Information Technology Disputes After NAFTA: A Practical Comparison Of Domestic And International Arbitration*, 7 TUL. J. INT’L & COMP. L. 43, 60 n.77 (1999). To treat a confidentiality requirement as evidence of improper intent is therefore inconsistent with the strong federal and state policy favoring arbitration. Finally, the fact that Cingular eliminated its confidentiality requirement entirely for all customers in July further undercuts the court’s holding that the purpose of the arbitration provision was somehow improper.

evisceration of arbitration agreements, thereby frustrating the public policy favoring arbitration.

Second, the cases on which the lower court relied — *Hanke* and *Travis* — arise in the context of automobile **appraisal** clauses, not arbitration provisions. Unlike with arbitration, there is no legislative and judicial presumption favoring the enforceability of contractual agreements to submit valuation disputes to an independent appraiser for resolution.

Third, an appraiser is not an adjudicator. The function of an appraiser is “solely to resolve disputes over the amount of the loss.” *Hanke*, 335 Ill. App. 3d at 1168, 782 N.E.2d at 331 (quoting *Lundy v. Farmers Group, Inc.*, 322 Ill. App. 3d 214, 219, 750 N.E.2d 314, 319 (2d Dist. 2001)). An appraiser is neither qualified nor authorized to interpret contracts or apply statutory and decisional law to particular factual situations. *Id.* at 1168-69, 782 N.E.2d at 332 (quoting *Lundy*, 322 Ill. App. 3d at 219, 750 N.E.2d at 319). Accordingly, in holding that an insured is not obligated to pay for an independent appraisal as a prerequisite to contending in court that his insurer’s appraisal was fraudulently low, this Court merely removed what it perceived to be a **non-adjudicative** roadblock to resolution of the insured’s claims. By contrast, an arbitrator is both qualified and authorized to interpret contracts and apply statutory and decisional law. The circuit court’s ruling therefore thwarts the parties’ agreed-upon method of adjudication, rather than simply removing a non-adjudicative roadblock.

Fourth, the circuit court erred by citing *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), for the proposition that “when a party argues an

arbitration clause has been used as a means of effectuating a fraudulent scheme, the court must first determine whether the provision is enforceable.” *See* Order at 4 n.2 (R. C187). The holding of *Prima Paint* is that a claim of fraud in the inducement of an arbitration provision is generally for a court to resolve, while fraud in the inducement of the entire contract is for the arbitrator to resolve. *Prima Paint* does not hold that a claim that an arbitration provision was included in a contract to discourage litigation must be resolved by a court. Indeed, any such holding would be impossible to square with the powerful federal policy favoring the inclusion of arbitration agreements in contracts. *Engalla v. Permanente Medical Group, Inc.*, 15 Cal. 4th 951, 960 (1997), and *Szetela, supra*, 97 Cal. App. 4th 1094 — also cited in the Order (at 4 n.2 (R. C187)) — are similarly off point. *Engalla* in fact involved fraud in the inducement of an arbitration provision (*see* 15 Cal. 4th at 973), and thus falls plainly within the scope of *Prima Paint*; by contrast, *Szetela* does not discuss fraud at all, but instead addresses solely the question of the enforceability of class-action waivers under California law (*see* 97 Cal. App. 4th at 1101-02).

Finally, as we discuss in detail below, the factual assumptions underlying the circuit court’s holding are false: (i) under plaintiff’s agreement with Cingular, the arbitrator does have power to award her a refund of part or all of her early termination fee if the arbitrator concludes that the fee was unlawful; (ii) plaintiff will not have to pay any costs of arbitration; and (iii) plaintiff will be entitled to receive an award of attorneys’ fees in the event she prevails, just as she would in state-court litigation. *See* pages 25-28, 46, *infra*.

2. The Fact That Plaintiff Pled A Claim Under The ICFA Does Not Justify The Circuit Court’s Decision To Allow Her To Avoid Her Agreement To Arbitrate.

The circuit court was incorrect in holding (Order at 11-13 (R. C194-C196)) that, because plaintiff accuses Cingular of fraud and brings her claim under the ICFA, arbitration is inappropriate.

The arbitration agreement here provides that the parties will arbitrate disputes “arising out of or relating to” the Wireless Service Agreement. *See* R. C38. Illinois courts have designated this very phrase a “generic” arbitration clause (*see Bass*, 328 Ill. App. 3d at 498, 765 N.E.2d at 1085 (citations omitted)), and have “generally construed [such] ‘generic’ arbitration clauses broadly, concluding that the parties are obligated to arbitrate *any* dispute that arguably arises under an agreement containing a ‘generic’ provision” (*id.* (citing *J & K Cement Const., Inc. v. Montalbano Builders, Inc.*, 119 Ill. App. 3d 663, 670, 456 N.E.2d 889, 895 (2d Dist. 1983) (emphasis in original)). In particular, “*claim[s] of fraud* concerning the contract as a whole” fall within the scope of a generic arbitration provision. *J & K Cement*, 119 Ill. App. 3d at 671, 456 N.E.2d at 896 (emphasis added). Thus, the fact that plaintiff accuses Cingular of fraud does not relieve her of her obligation to arbitrate this dispute.

Similarly, it is well established that claims under the ICFA may be resolved through arbitration. For example, in *Father & Sons, Inc. v. Taylor*, the plaintiff contended “that an arbitrator is not statutorily enabled to make findings as to violations of [the ICFA].” 301 Ill. App. 3d 448, 454, 703 N.E.2d 532, 536 (1st Dist. 1998). The First District rejected that view out of hand, stating: “*The Act does not prohibit the resolution*

of a dispute by arbitration.” *Id.* (citing *Cruz v. N.W. Chrysler Plymouth Sales*, 179 Ill. 2d 271, 280, 688 N.E.2d 653 (1997)) (emphasis added); *see also Howells v. Hoffman*, 209 Ill. App. 3d 1004, 1005, 568 N.E.2d 934, 935 (3d Dist. 1991) (affirming trial court’s determination that plaintiffs were bound to arbitrate their claims “for common law fraud, violations of the Illinois Securities Law of 1953, and violations of the Consumer Fraud and Deceptive Business Practices Act”) (citations omitted); *Paul H. Schwendener, Inc. v. Larrabee Commons Partners*, 338 Ill. App. 3d 19, 34, 787 N.E.2d 192, 204 (1st Dist.) (opining that case involving ICFA claim “illustrates the utility of arbitration clauses,” because “[a]rbitrators could have resolved this dispute years ago by applying the remedies defined in [the contract] to the evidence”), *appeal denied*, 204 Ill. 2d 663, 792 N.E.2d 308 (2003). *Accord Rosen v. SCIL, LLC*, ___ Ill. App. 3d ___, 799 N.E.2d 488, 490 (1st Dist. 2003) (ordering a plaintiff to arbitrate his claims even though those claims were brought under the ICFA), *appeal pending* (Ill. Jan. Term 2004).

More broadly, the U.S. Supreme Court has stated in the context of requiring arbitration of a claim under the Age Discrimination in Employment Act that “[i]t is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA.” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). The Court has rejected arguments that statutory rights are less likely to be vindicated in individual arbitration than in court as being “far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.” *Id.* at 30 (internal quotation marks omitted). *See also, e.g., Mitsubishi Motors*, 473 U.S. at 634.

Moreover, regulatory agencies designated to protect consumers “possess sufficient sanctioning power to provide a meaningful deterrent.” *Johnson v. W. Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000); *see also Gilmer*, 500 U.S. at 32 (relying on EEOC’s broad authority to protect consumers); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 233 (1987) (same with respect to SEC). The Federal Communications Commission has made clear that it will vigorously protect consumers against unreasonable conduct by carriers. *In re Implementation of Sections 3(n) & 332 of the Communications Act Regulatory Treatment of Mobile Servs.*, 9 FCC Rcd. 1411, ¶ 176 (1994) (“Compliance with Sections 201, 202, and 208 is sufficient to protect consumers. In the event that a carrier violated Sections 201 or 202, the Section 208 complaint process would permit challenges to a carrier’s rates or practices and full compensation for any harm due to violations of the [Communications] Act.”); *In re Personal Communications Indus. Assn’s Broadband Personal Communications Servs. Alliance’s Pet. for Forbearance for Broadband Personal Communications Servs.*, 13 FCC Rcd. 16857, ¶ 15 (1998) (Sections 201 and 202 of the Communications Act “codify[] the bedrock consumer protection obligations of a common carrier” and thus “lie at the heart of consumer protection under the Act”); *id.* ¶ 16 (“Sections 201 and 202 are enforced through the formal complaint process established in section 208 of the Act. * * * Consumers and carriers are protected by this complaint process.”); *id.* ¶ 26 (“[S]ections 201 and 202, and the complaint process of section 208, constitute a vital safeguard for consumers.”). Indeed, consumers may submit complaints to the FCC’s Wireless Bureau online at fcc.gov/cgb/complaints.html.

In addition, assuming for present purposes that a challenge to early termination fees is not preempted by Section 332(c) of the Telecommunications Act (the core assumption underlying plaintiff's lawsuit), and assuming further that imposition of a flat termination fee is inconsistent with the ICFA, the ICFA authorizes the Illinois Attorney General to bring suit to force Cingular to modify the fee. *See* 815 ILCS 505/3, 505/7. Accordingly, there is no basis on which to argue that, if plaintiff is required to abide by her agreement to arbitrate, Cingular may never be made to alter policies that (allegedly) violate Illinois law.

Finally, the circuit court was mistaken in deeming the arbitration provision unenforceable on the ground that it requires plaintiff to waive certain rights she has under the ICFA — specifically, her rights to attorneys' fees, to punitive damages, and to proceed via class action (*see* Order at 11 (R. C194)). As we discuss below, Cingular has voluntarily agreed to pay plaintiff her attorneys' fees if the arbitrator awards her an amount equal to or greater than her monetary claim of \$150 (*see* pages 27-28, *infra*), which is essentially the same standard that a court would apply in resolving a request for attorneys' fees under the ICFA. *See* 815 ILCS 505/10a(c) (only "prevailing party" entitled to attorneys' fees); *Majcher v. Laurel Motors, Inc.* 287 Ill. App. 3d 719, 730, 680 N.E.2d 416, 424 (2d Dist. 1997) ("relative merits of the parties' positions" affects availability of attorneys' fees under the ICFA). As we also explain, the vast majority of courts have held that there is nothing unconscionable about waiving either the right to bring a class action or the right to pursue punitive damages. *See* pages 34-46, *infra*.

In any event, as to attorneys' fees and punitive damages, the Agreement expressly specifies that its limitations on remedies apply except where "prohibited by law." The First District has expressly held that such a provision precludes a holding that arbitration is being used to limit access to statutory remedies. In *Rosen*, the arbitration agreement barred the award of attorneys' fees "unless" such an arrangement were found to be "unlawful." *See* 799 N.E.2d at 495-96. The First District enforced that arbitration agreement in a lawsuit under the ICFA, explaining that, because the ICFA provides that prevailing plaintiffs are entitled to attorneys' fees, the agreement did not preclude the arbitrator from awarding them. *Id.* Similarly, plaintiff here is free to argue to the arbitrator that Illinois law prohibits waivers of punitive damages and/or attorneys' fees under the ICFA. *See* page 46, *infra*.

3. The Circuit Court Erred In Finding That The Arbitration Agreement Provides No Remedy For Plaintiff's Alleged Injury.

As indicated above, an important component of the circuit court's holding was its belief that, under plaintiff's agreement, an arbitrator may award only "credit for service interruption" (*see* Order at 5-6 (R. C188-C189)) and therefore is barred from awarding plaintiff a refund of the early termination fee she paid. That assumption is demonstrably false. The contract specifies that "credit for service interruption" is the sole remedy for "loss or damage arising out of mistakes, omissions, interruptions, errors or any other causes, INCLUDING THE NEGLIGENCE OF CINGULAR." *See* R. C38. It is clear from the context that the limitation applies to dropped calls and other losses of service, not disputes over charges and fees imposed under the contract. Nothing in the agreement purports to preclude arbitrators from ordering refunds of early termination fees, charges

resulting from inaccurate calculation of air time, inappropriate roaming charges, and the like.

In any event, to the extent the contract is not totally clear on this point, the proper course of action would be *to compel arbitration and to allow the arbitrator to interpret the arbitration provision in the first instance*. See *PacifiCare Health Sys., Inc. v. Book*, 123 S. Ct. 1531, 1535-36 (2003) (“since we do not know how the arbitrator will construe * * * remedial limitations [that might call an arbitration provision’s enforceability into doubt], the proper course is to compel arbitration”). Given Cingular’s judicial admission (made first in the trial court (*see* R. 6) and reiterated here) that the limitation to “credit for service interruption” does not apply to plaintiff’s claim, there can be no question how the arbitrator will resolve the interpretational issue — and the circuit court’s resolution otherwise is unsupportable. Beyond that, the purported limitation is *not contained within the arbitration provision*, but rather within a separate part of the Agreement denominated “Limitation of Liability,” and therefore would apply equally to arbitration or litigation. Accordingly, if it is construed in the manner suggested by plaintiff, that would be a reason to deem it unenforceable and sever it from the broader contract — but would be no justification for deeming the separate arbitration provision to be unenforceable. See *Abbott-Interfast Corp. v. Harkabus*, 250 Ill. App. 3d 13, 21, 619 N.E.2d 1337, 1343-44 (2d Dist. 1993).

Finally, even to the extent Cingular’s judicial admission as to the meaning of the contract is thought of as an “offer[] to waive some of the Arbitration Clause’s restrictions” (Order at 6 (R. C189)) — rather than merely as part of Cingular’s

explanation of the plain meaning of the contract — *Gelb v. Air Con Refrigeration & Heating, Inc.*, 326 Ill. App. 3d 809, 761 N.E.2d 265 (1st Dist. 2001), does not support the circuit court’s decision to “reject[] Defendant’s offer to rewrite its Arbitration Clause with in-court modifications” (Order at 6 (R. C189)). All the court held in *Gelb* was that when the named plaintiff in a putative class action rejects a full **settlement offer** of his **individual** damages, that settlement offer does not render the entire (class-wide) litigation **moot**. See *Gelb*, 326 Ill. App. 3d at 814, 761 N.E.2d at 269. The court did not imply that a defendant cannot waive some aspect of a contract; as we discuss below (at pages 28-30), numerous courts have allowed defendants to do just that by, for example, offering to pay the costs of arbitration.

4. The Costs Of Arbitration Do Not Warrant Finding The Arbitration Agreement Unenforceable.

The circuit court also erred in refusing to enforce the parties’ agreement to arbitrate this dispute because of the costs associated with arbitration. See Order § 1.C (R. C190-C194). The court focused on plaintiff’s contention that the costs of arbitration exceed the expected value of her claim, rendering it irrational to pursue it, and thus effectively immunizing the early termination fee from scrutiny. See Order at 8-10, 15 (R. C191-C193, C198). But as we explained to the court, (a) Cingular had offered to pay the costs of arbitration, so there was no need even to address plaintiff’s argument; (b) even if the court were to reach that argument, the allocation of costs in the Agreement was valid and did not render the arbitration provision unenforceable; and (c) even if that provision were unenforceable, the appropriate remedy would have been for the court to sever the

cost-allocation provision, rather than to refuse to enforce the arbitration provision as a whole. *See Abbott-Interfast*, 250 Ill. App. 3d at 21, 619 N.E.2d at 1343-44.

a. At the time it moved to compel arbitration, Cingular committed to reimburse plaintiff for all fees charged by the arbitration organization unless the arbitrator finds her claims to be frivolous. *See* pages 11-12, *supra*. In addition, Cingular **fur**ther committed to reimburse plaintiff for her reasonable **attorneys' fees and costs** if she recovers an amount equal to or greater than her monetary claim — something less than \$150 — in the arbitral proceeding. *See id.* These commitments mooted plaintiff's claim that arbitrating this dispute would be unconscionably expensive.⁶

Even if Cingular's commitment to pay plaintiff's costs of arbitration and attorneys' fees had been made solely for purposes of fending off an attack on the cost-splitting language in the arbitration provision plaintiff signed, the circuit court erred in refusing to recognize Cingular's commitment and instead adjudicating the propriety of the cost-splitting provision. The vast majority of courts confronted with the issue have held that a defendant's mid-litigation offer to pay arbitration costs obviates the need to determine whether such costs have the effect of making it economically impractical for the plaintiff to arbitrate. *See, e.g., Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th

⁶ As discussed above, these commitments were not an eleventh-hour litigation tactic, but rather are contained in the revised version of Cingular's arbitration provision and represent Cingular's nationwide policy. Although plaintiff no longer is a Cingular customer (and the new provision therefore does not technically apply to her), Cingular offered to allow her to avail herself of all aspects of the new provision, and stipulated in open court that it would afford these same benefits to **all** current and former customers. *See* page 12, *supra*.

Cir. 2003) (“the fact that [the defendant] agreed to pay *all* costs associated with arbitration forecloses the possibility that the [plaintiffs] could endure any prohibitive costs in the arbitration process”) (emphasis in original); *Large v. Conseco Fin. Servicing Corp.*, 292 F.3d 49, 56-57 (1st Cir. 2002) (“Conseco’s offer to pay the costs of arbitration and to hold the arbitration in the Larges’ home state of Rhode Island mooted the issue of arbitration costs.”); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 610 (3d Cir. 2002) (“Scott should also be given the opportunity to meet its burden to prove that arbitration will not be prohibitively expensive, or as has been suggested in other cases, offer to pay all of the arbitrator’s fees.”); *Phillips v. Assocs. Home Equity Servs., Inc.*, 179 F. Supp. 2d 840, 847 (N.D. Ill. 2001) (stating that the court would reconsider its conclusion that costs of arbitration rendered arbitration provision unconscionable if defendants agreed to pay those costs); *Nelson v. Insignia/ESG, Inc.*, 215 F. Supp. 2d 143, 157 (D.D.C. 2002) (“the defendant’s offer to pay all fees and expenses of arbitration effectively obviated any concerns the plaintiff may have raised regarding her ability to vindicate her claims in an arbitral forum because of the fee-splitting provision in the arbitration agreement”); *Nur v. K.F.C., USA, Inc.*, 142 F. Supp. 2d 48, 52 (D.D.C. 2001) (argument that failure to address costs of arbitration invalidated arbitration agreement deemed moot because defendant had offered to pay those costs); *Baughner v. Dekko Heating Techs.*, 202 F. Supp. 2d 847, 850 (N.D. Ind. 2002) (“the Defendant also has the option of avoiding additional discovery and possible nullification of the arbitration agreement by offering to pay the costs and fees associated with arbitration”); *First Family Fin. Servs., Inc. v. Sanford*, 203 F. Supp. 2d 662, 667 (N.D. Miss. 2002) (“[plaintiff’s] argument concerning arbitration costs is

without merit and does not provide a basis upon which he may avoid arbitration” where defendant was obliged to “pay any arbitration filing fee and the arbitrator’s fees and expenses in connection with the arbitration of [plaintiff’s] claims”).

The circuit court cited two cases in support of its holding that Cingular’s offer to pay the full costs of arbitration should be disregarded — *Ellman v. Ianni*, 21 Ill. App. 2d 353, 157 N.E.2d 807 (2d Dist. 1959), and *Gelb, supra*, 326 Ill. App. 3d 809, 761 N.E.2d 265. *See* Order at 6, 13 (R. C189, C196). Significantly, neither of these cases involved an offer to pay the costs of arbitration and hence neither implicated the powerful federal and state policy favoring enforcement of arbitration provisions. Moreover, neither supports even the general proposition that offers to waive contractual provisions are without legal force. To the contrary, *Ellman* rejects that view, stating that “***a condition or provision of a contract may, generally, be waived by the party thereto who is entitled to receive the benefit of the condition.***” *Id.* at 361, 157 N.E. 2d at 812 (emphasis added). And as we discussed above (at 27), *Gelb* addresses a completely different issue; it in no way holds, or even implies, that an offer to waive a contractual provision that is the subject of a dispute is of no legal consequence.⁷

b. Even if the circuit court were correct in disregarding Cingular’s offer to pay the full costs of arbitration, the contract as written — under which such costs would

⁷ The circuit court’s Order (at 9 (R. C192)) cross-references a non-existent “Section D” for the proposition that “Defendant’s attempt to unilaterally alter the parties’ agreement, by effectively removing the fee-splitting provision of the Arbitration Clause, is too little too late.” The two cases addressed in the text are the only two relevant cases discussed anywhere in the circuit court’s Order.

be shared equally — is not unconscionable. The Supreme Court has rejected the argument that imposing some of the costs of arbitration on the consumer makes individual consumer arbitration agreements inherently unconscionable. *Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79, 91-92 (2000). It instead has made clear that whether individual arbitration is prohibitively costly must be resolved on a case-by-case basis. *See id.* The answer to that question will vary depending on the claimant’s circumstances, the institutional rules governing the arbitration, and the provisions of the applicable agreement.

All the circuit court found in this case is that, because of the size of her claim, plaintiff would have to pay an attorney an hourly fee to handle her case and would be responsible for up to \$125 of arbitration costs. *See Order at 8-9 (R. C191-C192).* Neither of these costs is in addition to or different from the cost of litigating in a judicial forum. She would have to pay an attorney to handle her case in court, and the \$125 arbitration fee is commensurate with the fees in state court. In Madison County Circuit Court, the filing fee for cases in which the claim is under \$15,000 is \$111; and for cases in which the claim is over \$15,000, the filing fee is \$186. *See R. C131.* (Because plaintiff filed her case as a class action and claimed overall damages of over \$15,000, she paid a \$186 filing fee — \$61 *more* than she would have had to pay to arbitrate her claim.) Moreover, plaintiff could have her case decided even *less* expensively if she were to opt to bring her case in small claims court, as provided for in the Agreement. *See R. C135* (filing fee for small claims court where claim is under \$250 is \$36). And as discussed below, the fact that plaintiff cannot aggregate her claims with others through the class

action device in order to achieve economies of scale does not render the Agreement unenforceable. Rather, the vast majority of courts have held that the ability to bring a class action is waivable even when the claims are raised under statutes that otherwise provide for class relief. *See* pages 37-40, *infra*; *see also Gilmer*, 500 U.S. at 32 (“[E]ven if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [Age Discrimination in Employment Act (“ADEA”)] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.”) (internal quotation marks and citation omitted).

In fact, the First District recently rejected an argument indistinguishable from the one to which the circuit court here ascribed. In *Rosen*, the plaintiff argued that the costs of arbitration, which he claimed were “prohibitively high when compared to his expected recovery” (799 N.E.2d at 496), rendered his arbitration agreement unconscionable. Even though *Rosen* asserted claims totaling only **\$3.19** (*see id.* at 490), and sought to bring his case as a class action, the court noted that the appropriate comparison was between the \$125 filing fee for arbitration and the \$221 fee for filing a lawsuit in Cook County (*id.* at 496-97). Citing Justice Ginsburg’s concurring opinion in *Green Tree*, the court held that “a \$125 fee to arbitrate a claim [is] reasonable.” 799 N.E.2d at 497. If a \$125 filing fee is acceptable for a claim of \$3.19, *a fortiori* a filing fee of \$125 must be acceptable when, as here, the plaintiff asserts that she has suffered up to \$150 in damages. *Compare* Order at 8-9 (R. C191-C192).

c. Finally, even if the cost-splitting provision is determined to be unconscionable, the circuit court erred by voiding the entirety of the arbitration agreement. In order to preserve the intent of the parties, Illinois law requires a court to sever invalid provisions of a contract and enforce valid provisions. *See, e.g., Abbott-Interfast*, 250 Ill. App. 3d at 21, 619 N.E.2d at 1343-44. This agreement evidences such an intent because it contains a severability clause. *See* R. C38 (Agreement section entitled “Miscellaneous”). The court in *Abbott-Interfast* held that, when an agreement contains a severability clause, “the equities would seem to favor enforcing those provisions in the agreement which are valid unless they are so closely connected with unenforceable provisions that to do so would be tantamount to rewriting the Agreement.” 250 Ill. App. 3d at 21, 619 N.E.2d at 1344.⁸

This proposition applies with full force to cases governed by the FAA, where courts possess the authority to sever certain provisions and enforce others in order to effectuate the FAA’s strong preference for enforcing arbitration agreements. Indeed, the federal courts in the two principal cases on which plaintiff relied in the circuit court (see R. C64-C65) held that cost-splitting provisions are not integral to arbitration agreements and therefore should be severed in order to give force to the strong federal policy

⁸ The circuit court’s reliance upon *Gladstone v. McHenry Med. Group*, 197 Ill. App. 3d 194, 201, 553 N.E.2d 1174, 1179 (2d Dist. 1990), for the contrary proposition (see Order at 10 (R. C193)) is misplaced. In *Gladstone*, the Second District refused to sever the portion of a partnership agreement governing the allocation and payment of profits because doing so would require reformulating the entire agreement. No such reformation would be required by holding that the full costs of arbitration must be paid by Cingular.

favoring arbitration. *See Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 219 (3d Cir. 2003) (severing portion of agreement governing costs and holding that the FAA requires courts to enforce valid provisions of arbitration agreements); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 674-75, 677-78 (6th Cir. 2003) (en banc) (same). *Accord Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 681 (8th Cir. 2001); *Gooden v. Village Green Mgmt. Co.*, 2002 WL 31557689 (D. Minn. Nov. 15, 2002).

In the instant case, the cost-splitting provision could easily be severed from the remainder of the arbitration clause without requiring a court to rewrite the agreement. Therefore, even if the circuit court were correct in reaching the argument at all and in finding the cost-splitting provision to be unenforceable, it erred by refusing to strike only *that* portion of the agreement and then requiring plaintiff to arbitrate her claims against Cingular under the remaining terms of the agreement.

5. The Prohibition Against Class-Wide Arbitration Does Not Render The Arbitration Provision Substantively Unconscionable.

The circuit court also held the arbitration provision's prohibition against class actions to render the provision substantively unconscionable on the ground that, "[i]f [Cingular's] customers are required to individually arbitrate their claims, then they will be left with no effective means of recovery." Order at 14 (R. C197); *id.* at 14-15 (R. C197-C198). The circuit court's approach to resolving this question was inconsistent with the U.S. Supreme Court's interpretation of the FAA, and its rationale puts the court

at odds with the vast majority of courts that have addressed the point, including the First District Appellate Court.⁹

a. Section 2 of the FAA “embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate * * * is revocable ‘upon such grounds as exist at law or in equity for the revocation of *any* contract.’” *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (emphasis added) (quoting 9 U.S.C. § 2)). Unless that savings clause applies, “[a]n agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law.*” *Id.* at 492 n.9 (emphasis in original).

Thus, section 2 of the FAA carves out a *limited* role for the states in the regulation of contractual arbitration. An agreement to arbitrate may be invalidated on state-law grounds “*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.” *Perry*, 482 U.S. at 493 n.9 (emphasis in original). However, “[a] state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2.” *Id.* “Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what * * * the state legislature cannot.” *Id.*

⁹ Under Illinois law, “[b]efore a contract or clause will not be enforced, it must be found to be *both* procedurally *and* substantively unconscionable.” *Rosen*, 799 N.E.2d at 493 (emphasis added) (citing *Basselen v. General Motors Corp.*, 341 Ill. App. 3d 278, 288, 792 N.E.2d 498, 507 (2d Dist. 2003)). Thus, the circuit court was wrong to state that unconscionability “can be either procedural or substantive, or a combination of both.” Order at 13 (R. C196). Rather, unless this Court were to affirm the circuit court’s findings of both procedural and substantive unconscionability, the arbitration provision would have to be enforced.

In sum, as the Supreme Court has ruled:

What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal “footing,” directly contrary to the Act’s language and Congress’ intent.

Allied-Bruce Terminex Cos. v. Dobson, 513 U.S. 265, 281 (1995).

Thus, a decision that refuses to enforce an otherwise valid arbitration provision under the FAA must be based on a general, neutral principle that “arose to govern” all contractual terms, rather than one created on the spot as a pretext for defeating arbitration. *See Doctor’s Assocs. v. Casarotto*, 517 U.S. 681, 687 n.3 (1996). A court may not “train[] on and uphold[] a * * * precise, arbitration-specific limitation” that would not apply to other contractual terms under relevant state law. *Id.*

The circuit court’s decision that the class-action waiver is unenforceable fails under this principle. Plaintiff pointed to — and can point to — no authority for the proposition that class-action waivers are generally unenforceable under Illinois law outside the context of arbitration. Absent such case law or statutory authority, the circuit court erred in creating such a rule specifically in the context of arbitration. In essence, the circuit court declared a new principle of unconscionability and then applied it in the same case to strike down an arbitration provision. That kind of *ad hoc* creation of unconscionability doctrine is inconsistent with the Supreme Court’s admonition that state-law contract defenses may be used to void arbitration provisions only if they “*arose* to govern issues concerning the validity, revocability, and enforceability of contracts *generally*” (*Perry*, 482 U.S. at 493 n.9 (emphasis added)). Indeed, Congress’s rationale

for authorizing contract-law exceptions to the general rule that arbitration provisions are enforceable — that there can be no impermissible animosity toward arbitration when a court is merely applying an *extant*, generally applicable contract-law defense — loses all force when, as here, a court creates a new rule of unconscionability in the context of an attack on an arbitration provision.

b. Beyond the fact that Illinois law contains no general prohibition on class-action waivers, the overwhelming majority of courts to address the issue have affirmatively held that arbitration provisions containing such waivers are fully enforceable. To begin with, in *Gilmer*, the U.S. Supreme Court strongly suggested that it is not unconscionable to bar class actions in arbitration agreements governed by the FAA. The plaintiff in *Gilmer* argued that disputes under the ADEA should not be subject to arbitration because, *inter alia*, arbitration procedures “do not provide for * * * class actions.” 500 U.S. at 32. The Court rejected this challenge, explaining that “even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.” *Id.* (internal quotation marks and citation omitted) (brackets in original).

Since *Gilmer*, numerous courts have upheld arbitration provisions that included a prohibition on class actions. As the Seventh Circuit has explained, “[w]hen contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial. * * * One of those * * * is the possibility of pursuing a class action.” *Champ v. Siegel Trading Co.*, 55

F.3d 269, 276-77 (7th Cir. 1995). This is perfectly acceptable because the right to a class action is “merely a procedural one * * * that may be waived.” *Johnson*, 225 F.3d at 369.

In particular, the Illinois Appellate Court for the First District has in the past year *twice* rejected unconscionability challenges to class-action bans contained in arbitration agreements. The first case, *Hutcherson v. Sears Roebuck & Co.*, 342 Ill. App. 3d 109, 793 N.E.2d 886 (1st Dist. 2003), is on all fours with the present case because there, as here, the arbitration provision precluded class arbitrations but (i) the contract allowed either party to proceed in small claims court, and (ii) the defendant had offered to pay the costs of arbitration. *See id.* at 114, 122, 793 N.E.2d at 889, 895. The court explained that in that context a class-action waiver is fully enforceable: “Although we recognize the importance of class actions as a tool for protecting consumers, we cannot ignore the strong policy that favors enforcement of arbitration provisions.” *Id.* at 124, 793 N.E.2d at 896.¹⁰ And in *Rosen*, the court again rejected the argument that an arbitration provision was “unconscionable because it prohibit[ed] class actions” (799 N.E.2d at 494) — even though the arbitration provision in that case did not contain the same plaintiff-friendly features as the one at issue in *Hutcherson*. The court explained that class-action waivers are not unconscionable under Illinois law, and that any *policy* arguments against them “should be addressed by the legislature.” *Id.*

¹⁰ Although the *Hutcherson* court was applying Arizona law (*see* 793 N.E.2d at 890-91), the court based its decision on generally applicable principles of law because no Arizona court had addressed the question of a class-action waiver in an arbitration agreement. *See id.* at 894. Furthermore, in *Rosen* the First District relied on *Hutcherson* to analyze Illinois law. *See* 799 N.E.2d at 494.

The First District was hardly alone in holding that it is not unconscionable to include a prohibition of class actions in an arbitration provision. To the contrary, every federal appellate court to address the issue, except the Ninth Circuit, as well as the substantial majority of other federal and state courts, has held that arbitration provisions barring class arbitration are enforceable unless the legislature expressly intended to create a non-waivable right to bring a class action suit. *See, e.g., Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 559 (7th Cir. 2003); *Johnson*, 225 F.3d at 369; *Champ*, 55 F.3d at 276-277; *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 502 (4th Cir. 2002); *Lloyd v. MBNA Am. Bank, N.A.*, 27 Fed. Appx. 82, 84 (3d Cir. 2002); *Randolph v. Green Tree Fin. Corp.–Ala.*, 244 F.3d 814, 818-819 (11th Cir. 2001); *O’Quin v. Verizon Wireless*, 256 F. Supp. 2d 512, 517 (M.D. La. 2003); *Lomax v. Woodmen of the World Life Ins. Soc’y*, 228 F. Supp. 2d 1360, 1365 (N.D. Ga. 2002); *Vigil v. Sears Nat’l Bank*, 2002 WL 987412, at *4 (E.D. La. May 10, 2002); *Pick v. Discover Fin. Servs., Inc.*, 2001 WL 1180278, at *5 (D. Del. Sept. 28, 2001); *Zawikowski v. Beneficial Nat’l Bank*, 1999 WL 35304, at *2 (N.D. Ill. Jan. 11, 1999); *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1253 (Colo. Ct. App. 2001); *Brown v. KFC Nat’l Mgmt. Co.*, 921 P.2d 146, 166-167 n.23 (Haw. 1996); *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 200 (Tex. Ct. App. 2003); *Stein v. Geonerco, Inc.*, 17 P.3d 1266, 1270-1271 (Wash. Ct. App. 2001); *cf. Burden v. Check Into Cash of Ky., L.L.C.*, 267 F.3d 483, 492-93 (6th Cir. 2001) (remanding case to district court to decide unconscionability challenge to arbitration agreement, but noting that class action waiver was likely valid under existing law), *cert. denied*, 535 U.S. 970 (2002); *Cruz v. PacifiCare Health Sys., Inc.*, 66 P.3d 1157, 1166-67

& n.5 (Cal. 2003) (holding that restitution claims under California’s version of the ICFA are arbitrable and stating that “[t]he unavailability of classwide arbitration would not alter our conclusion in the present case. As the Supreme Court has stated in rejecting the argument that the unavailability of classwide relief is grounds for not enforcing an arbitration agreement: ‘[E]ven if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that [a statute] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.’”) (quoting *Gilmer*, 500 U.S. at 32).

c. That the right to bring a class action cannot be so fundamental as to make it unwaivable is clear from the history of this procedural device. The modern class action is “something out of the ordinary, an essentially new turn in legal events.” Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 866 (1977). As the Supreme Court has observed, “modern class action practice emerged in the 1966 revision of Rule 23” (*Ortiz v. Fiberboard Corp.*, 527 U.S. 815, 833 (1999)), which gave federal court class actions their “current shape” (*Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997)). Revised Rule 23’s “most adventuresome innovation” was its authorization of “class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded.” *Id.* at 614-15.

Class actions in Illinois state courts are of even more recent vintage. Until 1977 — when the legislature enacted the statutory provisions now codified at 735 ILCS 5/2-801-806 — class actions in Illinois were entirely creatures of common law, under which

“[t]here was substantial conflict in Illinois decisions as to the requisites of such actions” including even whether “there [could] *be* * * * such action[s].” *Steinberg v. Chicago Med. Sch.*, 69 Ill. 2d 320, 335, 371 N.E.2d 634, 642 (1977) (emphasis added) (quoting *Gaffney v. Shell Oil Co.*, 9 Ill. App. 3d 987, 989, 312 N.E.2d 753, 756 (1st Dist. 1974)).

For most of their histories, then, neither the American legal system in general, nor Illinois’s legal system in particular, provided for class-wide resolution of individual claims, and class actions for damages of the type so prevalent today took shape no more than 37 years ago. Such a recent innovation can hardly be deemed *essential* to prevent dispute resolution procedures from being unconscionable, even if it is a *desirable* litigation option in certain circumstances.

d. Furthermore, the class action device is inherently irreconcilable with the streamlined nature of arbitration. Section 2 of the FAA makes pre-dispute arbitration agreements “valid, irrevocable, and enforceable” because, as one of its framers explained, “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). Congress later elaborated, noting that 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). More recently, Congress reaffirmed its view that arbitration helps avoid the “delays, expense, uncertainties, loss of control, adverse publicity, and animosities that frequently accompany litigation.” Y2K Act of 1999, Pub. L. No. 106-37 § 2(a)(3)(B)(iv), 113 Stat. 186. The U.S. Supreme

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).

It cannot be inherently unfair or unconscionable to preclude use of a procedural device that would destroy these arbitral benefits. Yet that is precisely what would result from imposing class action procedures on arbitration.

Arbitration is “a less expensive alternative to litigation” (*Allied-Bruce*, 513 U.S. at 280-81), in large part because it resolves disputes more quickly. In contrast to the “law’s delay” (WILLIAM SHAKESPEARE, *HAMLET*, act 3, sc. 1), the average length of an AAA arbitration from filing to award is less than six months. *Allied-Bruce*, 513 U.S. at 280 (citing AAA Amicus Brief). Arbitration expedites dispute resolution and otherwise reduces costs by eliminating or significantly reducing pre-hearing motion practice and discovery, and by severely limiting the bases for appeal.

In contrast, class actions take years. Certification of a class requires notice to potential class members and inquiry into such issues as the adequacy of the purported representatives, conflicts within the proposed class, the commonality of issues of fact and law, and manageability. And if a class is certified, Illinois law now provides that the defendant may petition for leave to file an interlocutory appeal. *See Ill. S. Ct. R.* 306(a)(8). It is unclear how that right to appeal could be vindicated if certification is ordered by an arbitrator rather than a court, but, assuming that it can be, that would prolong the proceeding still further.

Moreover, the certification process would be far from the only source of costly delays. Confronted with the threat of an eight or nine-digit class-wide judgment, defendants would surely demand — and have a due process right to — the procedural safeguards attendant to traditional litigation, such as discovery, dispositive motions, and more expansive appellate review. All of these procedures, of course, make arbitration more expensive and more time consuming. And as arbitration becomes more like litigation, there ultimately will be little point to opting for arbitration in the first place. Thus, the consequence of refusing to enforce the class-action waiver would not be fairer or more efficient arbitration — but rather *more litigation* and *less arbitration*. Given the “national policy favoring arbitration” (*Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)), it is therefore unsurprising that so many courts have found there to be nothing unconscionable about a class-action waiver in an arbitration agreement.

e. In any event, the only basis for finding that a waiver of class actions is unconscionable would be a concern that the consumer would not otherwise be able to vindicate his or her rights. *See* Order at 14-15 (R. C197-C198); *Ting*, 319 F.3d at 1150. ***Here, however, Cingular has offered to pay the full cost of arbitration and to reimburse plaintiff for her attorneys’ fees in the event the arbitrator awards her the amount she seeks or more.*** *See* pages 11-12, *supra*. It is thus not in the slightest bit impractical for her to vindicate her rights in arbitration. In fact, if plaintiff prevails, arbitration will prove to be significantly less expensive for her than prosecuting a class action would have been.

Moreover, Cingular’s Wireless Service Agreement does not limit plaintiff or other customers only to arbitration; it also affords them the opportunity to pursue their claims in small claims court. *See* R. C38. Such a forum is speedy, simple, and inexpensive and therefore, like arbitration, is a fully adequate means for plaintiff to obtain a resolution of her dispute with Cingular. *See, e.g., San Francisco v. Small Claims Ct.*, 190 Cal. Rptr. 340, 342 (Cal. Ct. App. 1983) (purpose of small claims courts is “to make it possible for plaintiffs with meritorious claims for small amounts of money * * * to bring th[o]se claims to court without spending more money on attorney’s fees and court expenses than the claims were worth”); *Pulver v. 1st Lake Props., Inc.*, 681 So. 2d 965, 970 (La. Ct. App. 1996) (small claims court provided more efficient and economical means to resolve tenants’ suit against landlord than class action).¹¹ Therefore, plaintiff cannot justifiably claim that the fact that the arbitration provision precludes her from proceeding on a class-wide basis denies her a forum to obtain adequate relief for her claims.¹²

6. The Prohibition Against Punitive Damages Does Not Render The Arbitration Clause Invalid.

The circuit court’s suggestion that the arbitration provision’s bar on punitive damages renders the provision unenforceable (*see* Order at 11-12 (R. C194-C195)) is

¹¹ Given that there are filing fees in small claims court (albeit modest ones) and that Cingular has committed to paying the full costs of arbitration so long as the customer’s claim is not frivolous, proceeding via arbitration would be even cheaper than proceeding in small claims court.

¹² The circuit court’s observation that “the individual arbitration of thousands of individual cases is likely to result in inconsistent outcomes” (Order at 15 (R. C198)) is irrelevant. “As the Supreme Court has held, piecemeal resolution may be required ‘when necessary to give effect to an arbitration agreement.’” *We Care Hair Dev., Inc. v. Engen*, 180 F.3d 838, 842 (7th Cir. 1999) (*quoting Moses H. Cone*, 460 U.S. at 20).

likewise mistaken. It is well established in Illinois that a party may contract to waive its right to punitive damages by agreeing to arbitrate its claim. “Under Illinois law, punitive damages may be awarded by an arbitrator only where there is an *express provision* authorizing such relief *in the arbitration agreement.*” *Ryan v. Knotrick*, 304 Ill. App. 3d 852, 856, 710 N.E.2d 11, 14 (1st Dist. 1999) (emphasis in original) (citing *Edward Elec. Co. v. Automation, Inc.*, 229 Ill. App. 3d 89, 104, 59 N.E.2d 833 (1st Dist. 1992)); *see also Roubik v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 181 Ill. 2d 373, 380, 692 N.E.2d 1167, 1170 (1998) (applying New York law and holding that “the parties may limit the issues to be arbitrated by waiving any claim for punitive damages”).

The U.S. Supreme Court too has strongly implied that an agreement to waive punitive damages in arbitration is enforceable. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58 (1995) (noting with approval respondent’s argument that, under the FAA and the reasoning of *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989), “the parties to a contract may lawfully agree to limit the issues to be arbitrated by waiving any claim for punitive damages”). Consistent with that statement, the vast majority of federal and state courts to examine the question have held that arbitration agreements that preclude punitive damages are acceptable. *See, e.g., Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) (“parties can stipulate to whatever procedures they want to govern the arbitration of their disputes * * * and surely can stipulate that punitive damages will not be awarded”); *Inv. Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314, 318 n.1 (5th Cir. 2002) (“Provisions in arbitration agreements that prohibit

punitive damages are generally enforceable.”); *Long v. Silver*, 248 F.3d 309, 319 (4th Cir. 2001); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 939-940 (10th Cir. 2001); *Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1189 (11th Cir. 1995); *Raytheon Co. v. Automated Bus. Sys., Inc.*, 882 F.2d 6, 12 (1st Cir. 1989); *Surman v. Merrill Lynch, Pierce, Fenner & Smith*, 733 F.2d 59, 63 (8th Cir. 1984).

In any event, the Agreement expressly specifies that its limitations on remedies do not apply “where prohibited by law.” *See* R. C38. Accordingly, plaintiff is free to argue **to the arbitrator** that public policy prohibits waivers of punitive damages under the ICFA and hence that ICFA punitive damages may properly be awarded under the Agreement. *PacifiCare*, 123 S. Ct. at 1535-36; *Rosen*, 799 N.E.2d at 495-96. The existence of this provision, however, is not a valid reason to allow plaintiff to escape her agreement to arbitrate this dispute.

7. The Agreement Is Not Procedurally Unconscionable.

The circuit court held that the Terms and Conditions of the Agreement, including the arbitration provision, were procedurally unconscionable, because they were “on the back of form contracts.” *See* Order at 14 (R. C197). This holding is erroneous both factually and legally.

First, the implication that the arbitration provision was somehow hidden from plaintiff is unsupportable: (i) She had ready access to the clearly printed Terms and Conditions on the back of her single-sheet contract; (ii) she initialed her acknowledgement that those Terms and Conditions were on the back of the page (*See* R. C38), and signed her name directly beneath an all-capitalized statement acknowledging

that “I HAVE READ AND UNDERSTAND THIS AGREEMENT **AND THE TERMS AND CONDITIONS**, AND * * * **AGREE TO BE BOUND THEREBY**” (*id.* (emphasis added)); and (iii) the first paragraph of those Terms and Conditions specifically stressed that the Terms and Conditions contained an arbitration provision: “IMPORTANT NOTICE: THIS AGREEMENT CONTAINS MANDATORY ARBITRATION AND OTHER PROVISIONS LIMITING THE REMEDIES AVAILABLE TO YOU IN THE EVENT OF A DISPUTE. PLEASE REFER TO THE SECTION ENTITLED ‘ARBITRATION’ FOR DETAILS.” *Id.*

Second, the very case on which the circuit court principally relied, *Larned v. First Chicago Corp.*, 264 Ill. App. 3d 697, 636 N.E.2d 1004 (1st Dist. 1994), demonstrates that the arbitration provision in plaintiff’s Agreement is not procedurally unconscionable. In *Larned*, the plaintiff complained that his agreement with a credit card company was unconscionable because it was a form contract and only a few providers offered similar benefits. 264 Ill. App. 3d at 700, 636 N.E.2d at 1006. The court *rejected* that claim, stating that unconscionability could not be proven by “[t]he mere fact that one party to a contract enjoyed little relative bargaining strength * * * [or] the mere fact that a questioned clause is contained in a form agreement.” *Id.* Instead, “[a]n unconscionable bargain is one which no reasonable person would make and which no honest person would accept. * * * The term unconscionable encompasses the absence of meaningful choice by one of the parties as well as contract terms which are unreasonably favorable to the other party.” *Id.* Thus, the court concluded that “the fact other credit card companies do provide similar benefits demonstrates that [the plaintiff] did not lack meaningful

choice.” *Id.* Here, plaintiff has not demonstrated either that the arbitration provision is unreasonably favorable to Cingular or that other wireless companies would require her to arbitrate her claims were she to contract with them.

The other case on which the circuit court relied (*see* Order at 13 (R. C196)) — and the only one it discussed that actually found a contractual provision to be procedurally unconscionable — further undermines the court’s holding. In *Frank’s Maintenance & Engineering, Inc. v. C. A. Roberts Co.*, the First District found a clause printed on the back of an acknowledgment to be unconscionable because “the limiting clause was not conspicuous and was not known to the plaintiff at the time the contract was made. Indeed, the clause directing the plaintiff’s attention to conditions on the reverse side of the acknowledgment was stamped over, indicating that legend was irrelevant.” 86 Ill. App. 3d 980, 991-92, 408 N.E.2d 403, 411 (1st Dist. 1980) (footnote omitted). Here, by contrast, not only was the clause directing plaintiff to the reverse side not stamped over, but plaintiff specifically initialed that clause and thereby acknowledged the binding effect of the contractual provisions on the back of the form. Moreover, the arbitration provision was not carefully concealed on the back of the form. Instead, the very first paragraph alerted the reader to the existence of an arbitration provision lower down on the page. As the court in *Frank’s Maintenance* explained, a clause is “part of the bargain [if it was] brought to the purchaser’s attention [or was] conspicuous.” *Id.* at 990, 408 N.E.2d at 410. The arbitration clause here satisfies both of those requirements.

In sum, plaintiff cannot persuasively contend that she was “deprived of meaningful choice” when she held a simple single-sheet contract in her hands, initialed a

clause directing her to Terms and Conditions on the back side, and had the opportunity to turn the sheet over to read those Terms and Conditions and ascertain that they contained an arbitration provision. Thus, the arbitration clause is not procedurally unconscionable, and the circuit court's holding to the contrary is unsustainable.

8. The Provision In Plaintiff's Agreement That Authorizes Either Party To Proceed In "Small Claims Court" Cannot Be Transmuted Into Authorization To Bring Purported Small Claims In Courts Of General Jurisdiction.

Plaintiff's Agreement with Cingular authorizes "either party [to] bring an action *in small claims court*" as the one and only alternative to arbitration. *See* R. C38 (emphasis added). Based on this provision, the circuit court found that the Agreement authorizes the parties to bring "small claims" in courts of general jurisdiction. *See* Order at 16-18 (R. C199-C201). This holding was based on removing the modifier "small claims" from the noun it modifies — "court" — and treating it as if it were a freestanding noun. Because there is neither syntactical nor legal support for such an interpretation of the Agreement, the circuit court's decision cannot be upheld.

First, the circuit court's decision cannot be squared with the plain language of the Agreement, which states that claims may be brought in "small claims court," not that "small claims may be brought in court." The focus of the contractual language is on a tribunal — small claims court — rather than on the size of the claim. It therefore cannot fairly be construed to allow a party to bring a case in a court of general jurisdiction (and then to seek class treatment) merely because the claim meets the jurisdictional requirement for a court in which it was not brought — namely, small claims court. *See, e.g., Boomer v. AT&T Corp.*, 309 F.3d 404, 410 (7th Cir. 2002) (compelling arbitration

despite fact that arbitration agreement allowed the parties to proceed in small claims court).¹³

Second, the court erred in suggesting that this litigation entails a small claim or a claim for a small dollar amount. This class action seeks to recover not only up to \$150 *each* for an unspecified number of former customers, but also attorneys' fees and punitive damages. Thus, the case (a) is not for a "small dollar amount" and (b) is far beyond the scope of those that may be prosecuted in small claims court, the jurisdiction of which is limited under Supreme Court Rule 281 to claims for less than \$5,000.

Finally, the circuit court's emphasis on the fact that class actions can be an affordable means of adjudicating small claims (Order at 17 (R. C200)) is beside the point because arbitration likewise is designed to be an "effective, expeditious, cost-efficient method of dispute resolution." *Salsitz*, 198 Ill. 2d at 13, 761 N.E.2d at 731. An actual case in small claims court would similarly have afforded plaintiff an effective and cost-efficient resolution of her claim. *See* page 44, *supra*. But while either arbitration or litigation in small claims court is authorized under the arbitration clause, plaintiff

¹³ Relatedly, the circuit court was mistaken in stating (Order at 18 (R. C201)) that the provision specifying that Cingular is entitled to recover any attorneys' fees and court costs it incurs in collecting on debts indicates that Cingular anticipated bringing cases against its customers in court. That is a general provision that, under basic principles of contract interpretation, is limited by the specific statement in the Agreement that both Cingular and its customers may pursue claims only in arbitration or small claims court. *See Preuter v. State Officers Electoral Bd.*, 334 Ill. App. 3d 979, 991, 779 N.E.2d 322, 332 (1st Dist. 2002) ("It is well-established that 'where a document contains both general and specific provisions relating to the same subject, the specific provision is controlling.'") (quoting *Continental Cas. Co. v. Polk Bros.*, 120 Ill. App. 3d 395, 399, 457 N.E.2d 1271, 1274 (1983)).

contractually agreed to waive her right to bring suit outside of small claims court. As we have shown, that agreement is enforceable.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand with instructions to order plaintiff to arbitrate her dispute with Cingular and to stay the proceedings pending that arbitration.

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