

No. 100925

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IN THE SUPREME COURT OF ILLINOIS

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DONNA M. KINKEL,  
Plaintiff-Appellee,

On Appeal from the Illinois  
Appellate Court, Fifth District,  
No. 5-03-0774  
(Leave to Appeal granted  
Sept. 29, 2005)

v.

CINGULAR WIRELESS LLC,  
Defendant-Appellant.

There Heard on Appeal from the  
Circuit Court of the Third Judicial  
Circuit, Madison County, Illinois  
Hon. Phillip J. Kardis,  
Circuit Judge  
No. 02-L-1087

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BRIEF OF APPELLANT CINGULAR WIRELESS LLC

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DECEMBER 5, 2005

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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 (“WSA”) under which defendant Cingular Wireless LLC (“Cingular”) agreed to provide cellular telephone service to plaintiff Donna M. Kinkel (“Kinkel”) and its other customers. The circuit court denied Cingular’s motion to compel arbitration of Kinkel’s claims pursuant to the arbitration provision contained in her Agreement and the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1-16. On appeal, the Appellate Court held that, although the arbitration provision as a whole is enforceable, the class-arbitration waiver in that provision is unenforceable—despite Cingular’s offer to bear all of the costs of arbitration and to reimburse plaintiff for her attorneys’ fees in the event she were to prevail on her claim in arbitration. The case was not tried to a jury. No questions are raised on the pleadings.

## **ISSUE PRESENTED FOR REVIEW**

Whether the Illinois Appellate Court, Fifth District, erred by refusing to enforce the class-arbitration waiver contained in the arbitration agreement between the parties.

## **JURISDICTION**

This Court’s jurisdiction arises under Supreme Court Rule 315. On September 29, 2005, the Court granted Cingular’s Petition for Leave to Appeal from the Appellate Court’s May 2, 2005 decision in this matter. Following the Appellate Court’s May 18 and June 3, 2005 orders denying rehearing (A19, A20), Cingular filed a timely Petition for Leave to Appeal in this Court on July 8, 2005. The Appellate Court in turn had jurisdiction because, as this Court has 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) (citing *Notaro v. Nor-Evan Corp.*, 98 Ill. 2d 268, 271, 456 N.E.2d 93 (1983)).

### **CONSTITUTIONAL PROVISION AND STATUTES INVOLVED**

Article VI, Clause 2 of the United States Constitution provides:

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 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, Kinkel entered into a WSA with Cingular, pursuant to which Cingular agreed to provide her with cellular telephone service. *See* R. C38. That WSA includes an arbitration provision that specifies that the parties are required to sub-

mit to arbitration “any and all disputes \* \* \* arising out of or relating to” the contract (or to pursue such claims in small claims court). *See* R. C38. The arbitration provision further indicates that it is governed by the FAA (*see id.*) and specifies that the arbitrator may not order “consolidation or class arbitration” (*id.*; *see also* A2).

Despite her contractual commitment to arbitrate all disputes, on August 9, 2002, Kinkel filed a complaint in the Circuit Court of Madison County, asserting claims of breach of contract and statutory fraud. *See* R. C3. According to that complaint, the “Contract Termination Fee” contained in Cingular’s WSAs—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. Kinkel submitted an amended complaint on August 25, 2003, which the circuit court gave her leave to file on September 11, 2003. *See* R. C38B. That complaint again raised claims of breach of contract and statutory fraud based on the “Contract Termination Fee.” There is no dispute that both of these claims arise out of and relate to the WSA between Cingular and Kinkel.

Based on the arbitration provision contained in the WSA, Cingular moved to compel Kinkel to arbitrate the dispute. *See* R. C39. The WSA provides that “all fees and expenses of the arbitration shall be equally borne by [the customer] and CINGULAR,” subject to the limits set by the AAA rules—under which the customer would pay no more than \$125 to arbitrate claims of less than \$10,000, such as Kinkel’s (*see* R. C191). However, Cingular committed to pay the *full* cost of arbitrating (unless the arbitrator were to find Kinkel’s claim to be frivolous 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 reim-

burse Kinkel for her reasonable attorneys' fees and costs if the arbitrator were to award her an amount equal to or greater than her monetary claim. *See id.* Cingular explained that these commitments were consistent with a revision to its arbitration provision, which was sent to all of its then-current customers in July 2003.<sup>1</sup> When asked by the circuit court, Cingular's counsel represented that Cingular would make the features of the revised provision available to *all* current and former customers rather than merely to plaintiff (*see* R. 8)—a commitment that it has honored (*see* [www.cingular.com/disputeresolution](http://www.cingular.com/disputeresolution)).

On November 10, 2003, after briefing and oral argument, the circuit court denied Cingular's motion to compel arbitration, adopting plaintiff's 18-page proposed order in its entirety. *See* A42. Cingular thereafter appealed to the Fifth District.

The Appellate Court rejected a number of the grounds given by the circuit court for refusing to enforce the parties' arbitration provision. However, that court, too, found "that the prohibition on class arbitration [contained in the arbitration provision] is uncon-

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<sup>1</sup> The revised arbitration provision specifies 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), and 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." *See* R. C50. (Nothing in the provision precludes the arbitrator from awarding attorneys' fees to a customer who receives less than the full amount of her demand if state law requires such an award. *See* [www.cingular.com/disputeresolution](http://www.cingular.com/disputeresolution) (explaining this fact).) In addition, the revised 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 and does not limit the remedies that an arbitrator may award. *See* R. C49-C50.

scionable and therefore unenforceable.” A7. According to the Fifth District, the arbitration provision in general, and the class-arbitration waiver in particular, were procedurally unconscionable because they had not been adequately brought to Kinkel’s attention. *See* A9-A10. The court found the class-arbitration waiver to be substantively unconscionable on the ground that it effectively precludes consumers from seeking relief for small claims, rejecting Cingular’s contention that the availability of attorneys’ fees and the option of pursuing claims in small claims court make it fully feasible to obtain redress for such claims. *See* A10-A12. In so ruling, the Fifth District refused to give effect to Cingular’s offer to make the features of its revised arbitration provision available to Kinkel and accordingly refused to consider Cingular’s argument that, when arbitration is cost-free and prevailing plaintiffs are automatically entitled to an award of reasonable attorneys’ fees, it is not unconscionable to require that claims be arbitrated on an individual basis. The court also rejected Cingular’s argument that any state-law requirement conditioning enforcement of an arbitration provision on the availability of class-wide arbitration is preempted by the FAA. *See* A12, A15.

Both Cingular and Kinkel filed petitions for rehearing in the Fifth District. Among other things, both parties asserted that the appellate court had erred in holding that the class-arbitration waiver is severable from the remainder of the parties’ arbitration provision. *See* A33, A40-41. Despite the parties’ agreement on this issue, the Fifth District denied both petitions for rehearing without comment. *See* A19, A20. Thereafter, Cingular petitioned this Court for leave to appeal from the Fifth District’s decision. On September 29, 2005, the Court granted the petition.

## **STANDARD OF REVIEW**

Because the lower court's decision whether to grant Cingular's motion to compel arbitration was "based on a purely legal analysis," rather than on findings of disputed fact, review is *de novo*. See *Hutcherson v. Sears Roebuck & Co.*, 342 Ill. App. 3d 109, 115, 793 N.E.2d 886, 889-90 (1st Dist.), *appeal denied*, 205 Ill.2d 582, 803 N.E.2d 482 (2003) (citing *Bass v. SMG, Inc.*, 328 Ill. App. 3d 492, 496, 765 N.E.2d 1079 (1st Dist. 2002)); *see also Hobbs v. Hartford Ins. Co. of the Midwest*, 214 Ill.2d 11, 17, 823 N.E.2d 561, 564 (2005); *Salsitz*, 198 Ill.2d at 15, 761 N.E.2d at 732. "[T]he 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) (citations omitted).

## **ARGUMENT**

### **I. The Lower Courts Erred By Refusing To Enforce The Class-Arbitration Waiver Contained In The Parties' Arbitration Agreement.**

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." *Bd. of Managers of Courtyards at Woodlands Condo. Ass'n v. IKO Chicago, Inc.*, 183 Ill. 2d 66, 71, 697 N.E.2d 727, 730 (1998) (citation and internal quotation marks omitted); *see also, e.g., Salsitz*, 198 Ill. 2d at 13, 761 N.E.2d at 731 ("[t]he courts of this state favor arbitration" because it is "an effective, expeditious, and cost-efficient method of dispute resolution"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (recognizing the "emphatic federal policy in favor of arbitral dispute resolution"); *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”).

Despite this long-settled precept, the Fifth District—by holding that the class-arbitration waiver contained in the parties’ arbitration provision is unenforceable—created a poison pill that threatens to kill such provisions, for few businesses are likely to agree to a procedure (class arbitration) that affords none of the speed, simplicity, and economy of individual arbitration, multiplies the stakes exponentially, yet remains subject to the narrow “manifest disregard” standard of review that applies to all arbitrations. As we explain below, that decision is unsustainable.

**A. The Class-Arbitration Waiver In The Parties’ Arbitration Agreement Is Not Unconscionable.**

As the Fifth District acknowledged, “[i]n order to be unconscionable, a contract provision must be *both* procedurally *and* substantively unconscionable.” A7 (emphasis added); *see also, e.g., Rosen v. SCIL, LLC*, 343 Ill. App. 3d 1075, 1081, 799 N.E.2d 488, 493 (1st Dist. 2003), *appeal denied*, 207 Ill. 2d 627, 807 N.E.2d 982 (2004); *Basselen v. General Motors Corp.*, 341 Ill. App. 3d 278, 288, 792 N.E.2d 498, 507 (2d Dist. 2003). Thus, if this Court concludes that the Appellate Court was mistaken in its analysis of *either* procedural or substantive unconscionability, the ruling below must be reversed and Kinkel must be compelled to arbitrate on an individual basis. As we explain below, the Appellate Court erred with respect to *both* procedural *and* substantive unconscionability.<sup>2</sup>

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<sup>2</sup> The Appellate Court held that “claims of unconscionability should be analyzed using [a] sliding scale,” meaning that, “if a provision is extremely substantively unconscionable, it need only be slightly procedurally unconscionable, and vice versa.” A7 (cit-  
(*cont’d*)

**1. There is nothing procedurally unconscionable about the class-arbitration waiver in the parties' arbitration agreement.**

The Appellate Court's holding that the class-arbitration waiver in Kinkel's arbitration provision is procedurally unconscionable is unsupported. Under Illinois law, "[p]rocedural unconscionability consists of some impropriety during the process of forming the contract depriving a party of a meaningful choice." *Zobrist*, 354 Ill. App. 3d at 1147, 822 N.E.2d at 540 (quoting *Frank's Maint. & Eng'g, Inc. v. C.A. Roberts Co.*, 86 Ill. App. 3d 980, 989-90, 408 N.E.2d 403, 410 (1st Dist. 1980)); *see also* A7 (same). "Factors to be considered are all the circumstances surrounding the transaction including the manner in which the contract was entered into, whether each party had a reasonable opportunity to understand the terms of the contract, and whether important terms were hidden in a maze of fine print; both the conspicuousness of the clause and the negotiations relating to it are important, albeit not conclusive factors in determining the issue of unconscionability." *Zobrist*, 354 Ill. App. 3d at 1147, 822 N.E.2d at 540 (quoting *Frank's*, 86 Ill. App. 3d at 989-90, 408 N.E.2d at 410).

Importantly, "just because a contract is presented by a party in a superior bargaining position without allowing the other party to negotiate any contract terms does not necessarily mean that the included arbitration clause is unconscionable." *Id.* (citing *Kove-*  

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*ing Zobrist v. Verizon Wireless*, 354 Ill. App. 3d 1139, 1147, 822 N.E.2d 531, 540 (5th Dist. 2004); *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003)). We do not take issue with the use of a sliding-scale approach. However, in this instance the parties' arbitration provision is not procedurally or substantively unconscionable at all, and thus the sliding-scale approach is irrelevant. *See Zobrist*, 354 Ill. App. 3d at 1150, 822 N.E.2d at 542 ("Because we find error in the trial court's findings that Verizon's arbitration clause was both procedurally and substantively unconscionable, we do not need to apply the \* \* \* sliding scale.").

*leskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 367 (7th Cir. 1999), *Kewanee Production Credit Ass'n v. G. Larson & Sons Farms, Inc.*, 146 Ill. App. 3d 301, 305, 496 N.E.2d 531, 534 (1986)). “Fraud or other similar wrongdoing in the procurement of the agreement must be established in order to invalidate the clause as unconscionable.” *Id.* (citing *Koveleskie*, 167 F.3d at 367).

Under these standards, the Appellate Court’s finding of procedural unconscionability cannot be sustained. The Fifth District acknowledged that “the fact that a contract [term] is offered in a form contract on a take-it-or-leave-it basis does not automatically render a contract term procedurally unconscionable.” A8 (citing *Zobrist*, 354 Ill. App. 3d at 1148, 822 N.E.2d at 541). Nevertheless, the court held that the class-arbitration waiver in Cingular’s arbitration provision is procedurally unconscionable because it “was offered to the plaintiff on a take-it-or-leave-it basis hidden in a maze of fine print where it was unlikely to be noticed, much less read.” A9.

The Fifth District’s holding that the arbitration provision—or the class-arbitration waiver contained within it—was somehow hidden from Kinkel is simply wrong. First, Kinkel had ready access to the clearly printed Terms and Conditions on the back of her single-sheet contract. Second, 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)). Third, the first paragraph of those Terms and Conditions specifically stressed that the Terms and Condi-

tions 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.*

The Fifth District nonetheless found Cingular’s arbitration provision to be procedurally unconscionable because that provision “appears in the middle of a long paragraph at the bottom of the term-and-conditions page on the back of the service agreement” in “tiny single-spaced text.” A8-A9. But the only case upon which the Fifth District relied to support its holding—the First District’s decision in *Frank’s*—demonstrates that there was nothing procedurally unconscionable about the location and presentation of the arbitration provision.<sup>3</sup>

In *Frank’s*, the First District found a clause printed on the back of an acknowledgment to be procedurally unconscionable because “the limiting clause was not conspicuous and was not known to the plaintiff at the time the contract was made.” 86 Ill. App. 3d at 991, 408 N.E.2d at 411 (footnote omitted). But as the *Frank’s* court stressed, crucial to its holding was the fact that “*the clause directing the plaintiff’s attention to conditions on the reverse side of the acknowledgment was stamped over, indicating that legend was irrelevant.*” *Id.* at 991-92, 408 N.E.2d at 411 (emphasis added). Here, by

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<sup>3</sup> In her Answer to the petition for review (at 3), Kinkel reproduced the back of the WSA in what she asserted (at 9) is “its actual size.” In fact, the original WSA (which is contained in the record at R. C38) is a two-sided 8.5x14 inch piece of paper, almost four times larger than the illegible shrunken copy reproduced in Kinkel’s Answer.

contrast, not only was the clause directing Kinkel to the reverse side not stamped over, but Kinkel specifically initialed that clause, thereby acknowledging 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 Kinkel to the existence of an arbitration provision lower down on the page. *See* page 19, *supra*. As the court in *Frank's* 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 provision here satisfies both of those requirements. Thus, the Fifth District’s decision runs counter to the established rule of Illinois law.

The Fifth District’s finding of procedural unconscionability also runs afoul of Section 2 of the FAA. The U.S. Supreme Court has expressly held that under Section 2 states may not apply conspicuousness requirements to arbitration provisions that do not apply to other contractual provisions. *See Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-88 (1996). On the basis of that holding, the United States Court of Appeals for the Fifth Circuit recently rejected a claim that *the precise contract involved here* was procedurally unconscionable, explaining: “The companies’ arbitration clauses are not printed in type that is smaller than that generally used in the rest of the contract. ***The FAA prohibits states from passing statutes that require arbitration clauses to be displayed with special prominence, and courts cannot use unconscionability doctrines to achieve the same result.***” *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 172 (5th Cir. 2004) (emphasis added; citations and footnote omitted). The Fifth Circuit further noted, in contrast to the Fifth District’s conclusion, that Cingular’s contract in

fact went beyond what was necessary to immunize it from challenge on conspicuity grounds because “the first paragraph of the Cingular contract specifically adverts to the arbitration clause, the only provision given such prominent billing.” *Id.* at 172 n.14.

Thus, the Fifth District’s holding cannot be squared with the First District’s holding in *Frank’s*, the Fifth Circuit’s holding in *Iberia*, or the Supreme Court’s decision in *Casarotto*. Moreover, the Fifth District’s procedural-unconscionability analysis threatens to undermine the predictability that is a foundational element of contract law. As the Appellate Court noted, the arbitration provision was one of a number of clauses printed in identical type face on the back of the parties’ WSA. *See* A8-A9. Thus, either the Fifth District impermissibly subjected the arbitration provision to an idiosyncratic procedural-unconscionability analysis that does not apply to other contract terms or it created a new, untenable rule that *every* term in standard form contracts must be more prominent than surrounding terms—a logical impossibility. Such a rule would render form contracts—which account for 99 percent of all contracts in this country (*see* John J.A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 Seton Hall Legis. J. 285, 290 (2000))—voidable at will. Because the kind of havoc that would result is intolerable, the Fifth District’s finding of procedural unconscionability must be reversed.

**2. The class-arbitration waiver in the parties’ arbitration agreement is not substantively unconscionable.**

As Illinois courts have repeatedly explained, the standard for finding substantive unconscionability under Illinois law is a strict one. Under that test, a contract is substantively unconscionable only if it is “*grossly* one-sided.” *Basselen*, 341 Ill. App. 3d at 288, 792 N.E.2d at 507 (emphasis added). Stated another way, a contractual term is substan-

tively unconscionable only if “it is so one-sided that *only one under delusion* would make it and only one unfair and dishonest would accept it.” *In re Estate of Croake*, 218 Ill. App. 3d 124, 126, 578 N.E.2d 567, 569 (1st Dist. 1991) (emphasis added); *see also Guess v. Brophy*, 164 Ill. App. 3d 75, 83, 517 N.E.2d 693, 699 (4th Dist. 1987) (same); *Neal v. Lacob* 31 Ill. App. 3d 137, 142, 334 N.E.2d 435, 439 (1st Dist. 1975) (same).

Under this demanding standard, the class-arbitration waiver in plaintiff’s contract is not substantively unconscionable. As we discuss below (*see* Part I.A.2.a), in deeming the class-arbitration waiver unconscionable, the Fifth District erred by refusing to take into account Cingular’s offer to (i) pay the full cost of arbitration and (ii) reimburse Kinkel for her reasonable attorneys’ fees if the arbitrator awards her the amount of her claim or more. Given that offer, there can be no doubt that requiring her to arbitrate on an individual basis is not unconscionable. *See* Part I.A.2.b. But even if the Fifth District were correct to ignore Cingular’s offer, the class-arbitration waiver is not unconscionable under Illinois law. *See* Part I.A.2.c.

- a. **The Appellate Court erred by refusing to consider the impact of Cingular’s offer to bear all the costs of arbitration and to reimburse successful claimants for their attorneys’ fees.**

As noted above (at 13-14), Cingular offered to allow Kinkel, *as well as all other past and present customers*, to take advantage of the terms of its revised arbitration provision—under which Cingular pays all costs of arbitration unless the claim is frivolous, plus the claimant’s reasonable attorneys’ fees if she receives the amount of her claim or more in arbitration. The Appellate Court ruled, however, that “[w]e need not determine whether we would” enforce the class-arbitration waiver contained in the revised arbitra-

tion provision because, although “Cingular has offered to apply the new provision to the plaintiff, \* \* \* [i]t is not clear that this offer applies to those the plaintiff seeks to represent, [and thus] giving Cingular the benefit of a piecemeal reworking of the contract that was in effect when the plaintiff cancelled her service would not meet the interests of justice.” A14-A15.

The Appellate Court’s holding is inexplicable. When asked about the scope of the offer by the circuit court, Cingular’s counsel explained: “Any member of the class that wants to take advantage of this will be allowed to do so, so we are stipulating in open court that every current and former Cingular customer is entitled to have their costs of arbitration paid for, and if they succeed in arbitration, to have their attorney fees paid for.” R8. Cingular also pointed this out in its opening brief to the Fifth District (*see* Cingular Br. 12), in oral argument in the Appellate Court, and in its petition for rehearing to the Appellate Court (*see* A30). *See also* [www.cingular.com/disputeresolution](http://www.cingular.com/disputeresolution) (reproducing revised arbitration provision and explaining that all current or former customers of Cingular or any of its predecessors are entitled to take advantage of the revised arbitration provision’s terms).

But even had Cingular’s offer to allow Kinkel to rely on the consumer-friendly features of the revised arbitration provision been specific only to her, in treating that offer as a nullity the Fifth District plainly erred. For starters, it has been Illinois law for almost fifty years 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.” *Ellman v. Ianni*, 21 Ill. App. 2d 353, 361, 157 N.E.2d 807, 812 (2d Dist. 1959).

Beyond that—as numerous courts around the nation have explained—in order to effectuate the strong federal policy favoring arbitration, offers to pay the costs of arbitration should be credited when considering whether an arbitration provision is enforceable. *See, e.g., Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th 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); *Anders v. Hometown Mtg. Servs., Inc.*, 346 F.3d 1024, 1026 (11th Cir. 2003); *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.”); *Dobbins v. Hawk’s Enters.*, 198 F.3d 715, 717 (8th Cir. 1999); *Anderson v. Delta Funding Corp.*, 316 F. Supp. 2d 554, 567 (N.D. Ohio 2004); *Jung v. Ass’n of Am. Med. Colls.*, 300 F. Supp.2d 119, 148-49 (D.D.C. 2004); *In re Currency Conversion Fee Antitrust Litig.* 265 F. Supp. 2d 385, 411-12 (S.D.N.Y. 2003); *Nelson v. Insignia/ESG, Inc.* 215 F. Supp. 2d 143, 157 (D.D.C. 2002); *First Family Fin. Servs., Inc. v. Sanford*, 203 F. Supp. 2d 662, 667 (N.D. Miss. 2002); *Baughner v. Dekko Heating Techs.*, 202 F. Supp. 2d 847, 850 (N.D. Ind. 2002); *Phillips v. Assocs. Home Equity Servs., Inc.*, 179 F. Supp. 2d 840, 847 (N.D. Ill. 2001); *Nur v. K.F.C., USA, Inc.*, 142 F. Supp. 2d 48, 52 (D.D.C. 2001); *Zuver v. Airtouch Commc’ns, Inc.*, 103 P.3d 753, 763 & n.7 (Wash. 2004) (“refus[ing] to ig-

nore” defendant’s “offer[] to ‘defray the cost of arbitration’ by paying arbitration fees,” thus rendering “moot” the plaintiff’s argument that the fees were unconscionable). In fact, the Fifth District *itself* had previously recognized that an offer to pay all costs of arbitration “serves to moot” the argument that arbitration would be excessively costly. *Zobrist*, 354 Ill. App. 3d at 1146, 822 N.E.2d at 539.

Thus, the Fifth District plainly erred by refusing to consider the fact that, for Kinkel and all other present, former, and future Cingular customers, individual arbitration is cost-free and can result in an award of attorneys’ fees to a prevailing plaintiff even if the claim is not one that would otherwise support such an award. As we next discuss, given that fact, requiring individual arbitration cannot be deemed unconscionable under Illinois’s strict unconscionability standard.

**b. The class-arbitration waiver is not substantively unconscionable given Cingular’s offer to bear all the costs of arbitration and to reimburse successful claimants for their attorneys’ fees.**

As discussed above (at 22-23), under Illinois law a contractual term is substantively unconscionable only if “it is so one-sided that *only one under delusion* would make it and only one unfair and dishonest would accept it.” *Croake*, 28 Ill. App. 3d at 127, 578 N.E.2d at 569 (emphasis added). It would deprive that strict standard of any meaning to say that requiring individual arbitration runs afoul of it, especially when, as here, arbitration is essentially cost-free. Indeed, the vast majority of courts that have addressed the question have held that a class-arbitration waiver, standing by itself, is not substantively unconscionable even when arbitration is not entirely cost-free.

For example, the U.S. Supreme Court broached the issue in *Gilmer v. Inter-*

*state/Johnson Lane Corp.*, 500 U.S. 20 (1991). The plaintiff there contended that disputes under the Age Discrimination in Employment Act (“ADEA”) should not be subject to arbitration because, among other things, arbitration procedures “do not provide for \* \* \* class actions.” *Id.* at 32. The Supreme Court rejected that argument, 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.* (quotation marks and citation omitted; alteration in original).

The First District, too, has repeatedly rejected the contention that class-arbitration waivers are unconscionable. *See Rosen*, 343 Ill. App. 3d 1075, 799 N.E.2d 488; *Hutcherson*, 342 Ill. App. 3d 109, 793 N.E.2d 886. In *Hutcherson*, the court explained that, “[a]lthough 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.” 342 Ill. App. 3d at 124, 793 N.E.2d at 896. Although the *Hutcherson* court was applying Arizona law (*see* 342 Ill. App. 3d at 115-16, 793 N.E.2d at 890), it based its decision on generally applicable principles of law because no Arizona court had addressed the enforceability of a class-arbitration waiver. *See id.* at 121, 793 N.E.2d at 894. That there is no difference between Arizona and Illinois law in this respect was confirmed in *Rosen*, in which the First District again rejected the argument that an arbitration provision was “unconscionable because it prohibit[ed] class actions” (343 Ill. App. 3d at 1082, 799 N.E.2d at 494), explaining that class-arbitration waivers are not unconscionable *under Illinois law* and that any policy arguments against them “should be addressed by the legislature.”

*Id.*

Numerous other courts have upheld arbitration provisions that included a prohibition on class-wide arbitration. As the Seventh Circuit explained in one of the earliest cases on this issue, “[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 (7th Cir. 1995) (quotation marks and citation omitted). This is perfectly acceptable because the right to a class action is “merely a procedural one, \* \* \* that may be waived.” *Johnson v. W. Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000).

The list of other cases upholding class-arbitration waivers is long and growing by the day. *See, e.g., Caley v. Gulfstream Aerospace Corp.*, \_\_\_ F.3d \_\_\_, 2005 WL 2840372, at \*13 (11th Cir. Oct. 31, 2005) (Georgia law); *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 877-78 (11th Cir. 2005) (Georgia law); *Iberia*, 379 F.3d at 174-75 (Louisiana law); *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); *Copeland v. Katz*, 2005 WL 3163296, at \*4 (E.D. Mich. Nov. 28, 2005) (Michigan law); *Edwards v. Blockbuster, Inc.*, \_\_\_ F. Supp. 2d \_\_\_, 2005 WL 3199440, at \*4 (E.D. Okla. Nov. 17, 2005) (Oklahoma law); *Lux v. Good Guys*, 2005 WL 1713421 (C.D. Cal. July 11, 2005) (Nevada law); *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); *Billups v. Bankfirst*, 294 F. Supp. 2d 1265, 1273-77 (M.D. Ala. 2003) (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, 166-67 & n.23 (Haw. 1996) (Hawaii law); *Hubbert v. Dell Corp.*, 359 Ill. App. 3d 976, 835 N.E.2d 113 (5th Dist. 2005) (Texas law); *Ragan v. AT&T Corp.*, 355 Ill. App. 3d 1143, 824 N.E.2d 1183 (5th Dist. 2005) (New York law); *Wilson v. Mike Steven Motors, Inc.*, 111 P.3d 1076 (table), 2005 WL 1277948, at \*7 (Kan. Ct. App. 2005) (Kansas law); *Stenzel v. Dell, Inc.*, 870 A.2d 133, 144 (Me. 2005) (Texas law); *Walther v. Sovereign Bank*, 872 A.2d 735, 742-43 (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, 926-27 (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 Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 279-281 (W. Va. 2002); *Leonard v. Terminix Int'l Co.*, 854 So.

2d 529 (Ala. 2002).<sup>4</sup>

That so many courts have held that there is nothing unconscionable about class-arbitration waivers makes perfect sense because class actions, although at times useful, are in no way so fundamental to the vindication of small claims as to be unwaivable. For the vast majority of the history of this state and this nation, class actions for money damages did not even exist. Class actions for damages of the type so prevalent today took shape no more than 40 years ago.<sup>5</sup> Such a recent innovation can hardly be deemed so fundamental as to make a contractual waiver of it categorically unconscionable under Il-

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<sup>4</sup> The U.S. District Court for the Northern District of West Virginia recently refused to follow *Berger* on the ground that its analysis is preempted by the FAA. See *Schultz v. AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 691 (N.D. W. Va. 2005) (West Virginia Supreme Court's holding that class-arbitration waiver was unconscionable is preempted by the FAA and therefore "the plaintiff's argument that the arbitration clause is unconscionable due to its foreclosure of class action relief \* \* \* lacks merit"). Numerous federal district courts in Alabama have distinguished *Leonard* and enforced class-arbitration waivers under Alabama law on the ground that the arbitration fees in *Leonard* were far greater than any potential recovery and that the arbitration provision in *Leonard* limited the types of damages that could be awarded and in particular precluded the award of attorneys' fees. See, e.g., *Pitchford v. AmSouth Bank*, 285 F. Supp. 2d 1286, 1296 (M.D. Ala. 2003) ("The costs of arbitrating the Leonards' claim (at least [\$1,100]) exceeded the dollar value of their claim (less than [\$500]), which effectively made arbitration an illusory forum for vindicating their substantive rights."); *Battles v. Sears Nat'l Bank*, 365 F. Supp. 2d 1205, 1217 (M.D. Ala. 2005); *Taylor v. First N. Am. Nat'l Bank*, 325 F. Supp. 2d 1304, 1319-22 (M.D. Ala. 2004); *Lawrence v. Household Bank (SB), N.A.*, 343 F. Supp. 2d 1101, 1112 (M.D. Ala. 2004); *Billups*, 294 F. Supp. 2d at 1276-77; *Gipson v. Cross Country Bank*, 294 F. Supp. 2d 1251, 1263-64 (M.D. Ala. 2003); *Taylor v. Citibank USA, N.A.*, 292 F. Supp. 2d 1333, 1345-46 (M.D. Ala. 2003).

<sup>5</sup> As the United States Supreme Court has explained, it was only in 1966 that the Federal Rules of Civil Procedure were amended to authorize "class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614-15 (1997). And before 1977, it was very unclear whether class actions were even *allowed* under Illinois law. See, e.g., *Steinberg v. Chicago Med. Sch.*, 69 Ill. 2d 320, 335, 371 N.E.2d 634, 642 (1977).

linois law.

According to the Fifth District, “the prohibition of class arbitration [in this case is] substantively unconscionable” because it “is a one-sided limitation on \* \* \* customers’ ability to seek relief for claims where damages are quite low.” A10-A11. But there can be no serious question that, as modified by Cingular’s across-the-board offer to bear all of the costs of arbitration unless the plaintiff’s claims are frivolous and to reimburse the plaintiff for her attorneys’ fees if she is awarded the amount of her claim or more (even if no statute mandates an award of attorneys’ fees), the arbitration provision in this case addresses the Fifth District’s concern about “customers’ ability to seek relief for claims where damages are quite low” (A10-A11). Numerous courts have relied on precisely these sorts of cost-transfer provisions to reject unconscionability attacks on class-arbitration prohibitions. In *Jenkins*, for example, “[t]he Arbitration Agreements expressly permit[ed] [the plaintiff] and other consumers to recover attorneys’ fees and expenses ‘[i]f allowed by statute or applicable law’” and required the company to “advance [the plaintiff’s] arbitration expenses, such as filing and administrative fees, if she submit[ed] a written request.” 400 F.3d at 878 & n.8. The Eleventh Circuit held that, because of these features, “the \* \* \* contention that consumers would likely be unable to obtain legal representation [for small claims] without the class action vehicle is unfounded.” *Id.* at 878.

In equivalent circumstances, another federal court explained:

[Plaintiff’s] argument is based on the erroneous assumption that her costs and attorney’s fees will be paid from her damage award. This is simply not the case. If the Plaintiff’s claim is successful, [Defendant] will pay the Plaintiff’s attorneys’ fees and costs; the Plaintiff will not have to forego

[sic] any of her damages in order to compensate her lawyers. \* \* \* Although the Plaintiff and her lawyers may be unwilling to litigate this case due to the fact that it may not provide them with enough financial incentive to justify their efforts, this court cannot conclude that either the Plaintiff or her attorneys are so lacking in economic incentive to warrant a finding that [Defendant's] class action prohibition is unconscionable.

*Billups*, 294 F. Supp. 2d at 1274-75 (citations omitted). *See also, e.g., Iberia*, 379 F.3d at 175 & n.19; *Strand*, 693 N.W.2d at 926-27; *Snowden*, 290 F.3d at 638; *Johnson*, 225 F.3d at 374; *Taylor*, 325 F. Supp. 2d at 1319-22.

The reasoning of these cases applies with even greater force here: If “the \* \* \* contention that consumers would likely be unable to obtain legal representation [for small claims] without the class action vehicle is unfounded” when the defendant is obligated to advance the costs of arbitration and the arbitrator is authorized to award attorneys’ fees under fee-shifting statutes (*Jenkins*, 400 F.3d at 878), it is all the more so when, as here, the defendant has agreed to reimburse claimants for their reasonable attorneys’ fees *in all cases* in which they obtain the amount of their claim or more and also has agreed to pay all of the costs of arbitration outright—not merely to “advance” those costs. *See* 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 *Quin. L. Rev.* 737, 826-27, 841-42 (2004) (class-arbitration prohibition should not be deemed unconscionable, even when amount at stake is small, if the arbitration provision commits the defendant to pay the full cost of arbitration and a reasonable attorneys’ fee to prevailing parties).

Moreover, under Cingular’s arbitration provision Kinkel need not arbitrate at all; instead, she may pursue her claim in small claims court. *See* R. C38. That forum is

speedy, simple, and inexpensive—and therefore is a fully adequate means for Kinkel to obtain redress for any valid claims she may have without the need for a class action.

It has long been recognized that the very 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 [a]re worth.” *San Francisco v. Small Claims Ct.*, 141 Cal. App. 3d 470, 474 (1983). Indeed, small claims court is often a *better* option than a class action for the resolution of small claims because “[c]ertification of \* \* \* a class [can] promote complicated lengthy legal embattlement,” while small claims court allows parties to resolve disputes “expeditiously and with minimum costs and fees.” *Pulver v. Ist Lake Props., Inc.*, 681 So.2d 965, 970 (La. App. 1996).

Thus, the *Iberia* court focused on the availability of small claims court in rejecting the contention that Cingular’s original arbitration provision made it impossible to pursue small claims. *See Iberia*, 379 F.3d at 175 n.19. And in *Jenkins*, the United States Court of Appeals for the Eleventh Circuit also relied on the existence of a small-claims-court provision in rejecting challenges to a class-arbitration waiver. As that court explained:

[T]he provision providing access to small claims tribunals was intended to benefit, not injure, consumers. The American Arbitration Association (AAA) has developed a set of principles, known as the Consumer Due Process Protocol, to protect consumers and ensure they are treated equitably in arbitration. Principle 5 of this Protocol expressly states that consumer arbitration agreements, like those at issue here, should offer all parties the option of seeking adjudication in a small claims tribunal. The Comment to Principle 5 explains ‘access to small claims tribunals is an important right of Consumers’ because it provides ‘a convenient, less formal, and relatively expeditious judicial forum for handling ... disputes’ involving small amounts of money. By including a provision that offers access to such tribunals, the Arbitration Agreements at issue here merely

complied with the AAA's Consumer Due Process Protocol. *Jenkins*, 400 F.3d at 879 (quoting AAA, *Consumer Due Process Protocol* (available at <http://www.adr.org/protocols>) (internal citations omitted)).<sup>6</sup>

In short, because Cingular has provided customers with multiple ways to vindicate small claims without the need for a class action, the Fifth District manifestly erred in holding that the prohibition of class-wide arbitration is substantively unconscionable.

**c. The class-arbitration waiver in the parties' original arbitration agreement is not substantively unconscionable even if Cingular's offer to make available the pro-consumer features of its revised provision is disregarded.**

Even disregarding Cingular's offer to allow Kinkel to avail herself of the features of the revised arbitration provision, the class-arbitration waiver contained in the parties' original arbitration agreement is not substantively unconscionable under Illinois law.

For starters, the Fifth District's attempt to distinguish *Rosen* and *Hutcherson* from this case on the ground that "the arbitration clause at issue in each [of those cases] provided that the defendant creditor would advance any arbitration fees required to be paid by the plaintiff consumer" and that "the consumer would only be required to repay these

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<sup>6</sup> See also Bunch, Note, *To Be Announced: Silence from the United States Supreme Court and Disagreement Among Lower Courts Suggest an Uncertain Future for Class-Wide Arbitration*: *Green Tree Fin. Corp. v. Bazzle*, 2004 J. Disp. Resol. 259, 274 ("Although the possibility of leaving individual consumers without any avenue to pursue relief is not by any means a favored outcome, to employ a procedural device which negates the very advantages of arbitration as an alternative form of dispute resolution is equally unfavorable. In light of the alternatives available even in the absence of class-wide arbitration, such as small claims court or individual arbitration, it should not be said that plaintiffs would be left without alternatives, especially because these alternatives may not necessitate the hiring of costly legal counsel.").

expenditures if an arbitrator determined that the consumer was required to do so” (*see* A14) is unfounded.<sup>7</sup> In fact—as Cingular pointed out in its Fifth District briefs and again in its Petition for Rehearing—it is undisputed that the cost of arbitrating under Cingular’s now-superseded arbitration provision would be limited to \$125 under the AAA Consumer Arbitration rules (*see* R. C191), an amount that is equivalent to the cost of filing in court and is *identical* to the filing fee at issue in *Rosen* (*see* 343 Ill. App. 3d at 1085, 799 N.E.2d at 496).<sup>8</sup> Accordingly, *Rosen* is indistinguishable from this case.

Furthermore, as discussed above (at 26-30), the overwhelming majority rule around the country is that an arbitration provision containing a class-arbitration waiver is not unconscionable if it neither requires the consumer to pay greater costs than he or she would have to bear in court nor prohibits the arbitrator from awarding a prevailing plaintiff her attorneys’ fees under applicable fee-shifting statutes. Cingular’s original arbitration provision satisfied these conditions: Customers were required to pay no more than \$125 to arbitrate a claim of less than \$10,000 (equivalent to the circuit court’s filing fee), and the arbitrator had the authority to award statutory attorneys’ fees and other remedies that are required by law. In addition, under Cingular’s original arbitration provision

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<sup>7</sup> In the same breath, the court acknowledged that “in *Rosen*, the clause only provided that the creditor would advance the amount of any arbitration fees in excess of what it would cost the consumer to bring the action in court instead of in arbitration” (*id.*), thus obliterating the very distinction it was seeking to draw.

<sup>8</sup> 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.)

plaintiffs are entitled to bring claims in small claims court which, as discussed above (at 33-34), is a recognized means of vindicating small claims.

Indeed, the Fifth Circuit rejected an unconscionability challenge to the very arbitration provision into which Kinkel entered, explaining that the provision “does not leave the plaintiffs without remedies or so oppress them as to rise to the level of unconscionability” in part because “an arbitrator would presumably be empowered to award [attorneys’ fees] in enforcing a [Louisiana Unfair Trade Practice Act] plaintiff’s substantive rights” and “Cingular’s arbitration clause expressly permits customers to bring inexpensive small-claims actions.” *Iberia*, 379 F.3d at 175 & n.19.

Thus, even disregarding Cingular’s across-the-board offer to make arbitration cost-free, the prohibition against class-wide arbitration in the parties’ arbitration agreement is not substantively unconscionable.

**B. The Fifth District’s Holding That The Class-Arbitration Waiver In The Parties’ Arbitration Agreement Is Unconscionable Is Preempted By The FAA.**

As explained above (at 22-36), the Fifth District’s unconscionability holding is wrong under Illinois law. In addition, it is preempted by the FAA, for two distinct reasons.

**1. Section 2 of the FAA expressly preempts the Fifth District’s holding.**

Under Section 2 of the FAA,

[a]n agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, “save upon such grounds as exist at law or in equity for the revocation of *any* contract.” \* \* \* 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.

*Perry v. Thomas*, 482 U.S. 483, 492-93 n.9 (1987) (citation omitted; emphasis in original) (quoting 9 U.S.C. § 2). Thus, agreements to arbitrate may be invalidated on state-law grounds only “if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.” *Id.* (emphasis in original).

That principle does not simply prohibit the invalidation of “arbitration agreements under state laws applicable *only* to arbitration provisions.” *Casarotto*, 517 U.S. at 687 (emphasis in original). It also bars courts from impeding the enforceability of arbitration agreements by fashioning rules that invoke broad concepts of contract law but in fact apply only or predominantly to the arbitration setting. As the Fifth Circuit recently explained in holding that Cingular’s original arbitration provision is enforceable:

That a state decision employs a general principle of contract law, such as unconscionability, is not always sufficient to ensure that the state-law rule is valid under the FAA. \* \* \* [S]tate courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny.

*Iberia*, 379 F.3d at 167.

Nor can a court manufacture new principles in the context of thwarting an arbitration agreement. To put it bluntly, “no state can apply to arbitration (when governed by the Federal Arbitration Act) any novel rule.” *Oblix, Inc. v. Winiacki*, 374 F.3d 488, 492 (7th Cir. 2004). *See also Zuver*, 103 P.3d at 759 (“courts may not refuse to enforce arbitration agreements under state laws which apply only to such agreements, or by relying on the *uniqueness* of an agreement to arbitrate”) (quotation marks, alterations, and citations omitted; emphasis in original).

The Fifth District’s holding that the class-arbitration waiver in Kinkel’s arbitra-

tion agreement is unconscionable runs afoul of these principles and thus is preempted by Section 2 of the FAA.

First, Illinois has no *generally applicable* prohibition against contractual waivers of class actions; neither the Fifth District nor Kinkel has pointed to any 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 Appellate Court erred in creating such a rule specifically in the context of arbitration. In essence, the 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 492 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. *See Oblix*, 374 F.3d at 492 (“[N]o state can apply to arbitration (when governed by the Federal Arbitration Act) any novel rule.”).

Second, as noted above (at 22-23), the *generally applicable* standard for finding substantive unconscionability in Illinois is a strict one. Under that standard, a contract is substantively unconscionable only if it is “*grossly* one-sided.” *Basselen*, 341 Ill. App. 3d

at 288, 792 N.E.2d at 507 (emphasis added). In particular, a contractual term is substantively unconscionable only if “it is so one-sided that only one under delusion would make it and only one unfair and dishonest would accept it.” *Croake*, 218 Ill. App. 3d at 127, 578 N.E.2d at 569.

We submit that it is impossible to conclude that “only one under delusion” would accept a fully disclosed class-arbitration waiver in an arbitration provision. To the contrary, there are many reasons why a reasonable person would accept an arbitration provision that allowed the inexpensive and easy resolution of her own actual, concrete disputes, but deprived her of the ability to bring class actions for other customers’ benefit. For example, individual arbitration is the least expensive means of dispute resolution and hence serves to moderate the cost of wireless phones and wireless service. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991) (explaining that limiting fora in which cruise line may be sued leads to reduced fares for passengers); *see also* Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 94 (arguing that class arbitration makes consumers worse off by increasing the cost of doing business and, as a result, raises prices for consumers). As the Seventh Circuit has recognized, “arbitration offers cost-saving benefits to telecommunication providers and ‘these benefits are reflected in a lower cost of doing business that in competition are passed along to customers.’” *Boomer v. AT&T Corp.*, 309 F.3d 404, 419 n.7 (7th Cir. 2002) (quoting *Metro East Center for Conditioning & Health v. Qwest Communications Int’l, Inc.*, 294 F.3d 924, 927 (7th Cir. 2002)).

Individuals may also understand that arbitration will provide them with better re-

sults. Studies have shown that “consumers are likely to fare better in arbitration, both in terms of the likelihood of success on the merits and the size of the award, than in litigation” and that “parties who participate in arbitration proceedings are generally satisfied, both in terms of the fairness of the process and the equity of the outcome.” Joshua Lipshutz, Note, *The Court’s Implicit Roadmap: Charting the Prudent Course At the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits*, 57 Stan. L. Rev. 1677, 1712 (2005) (footnotes omitted). Consumer perceptions match the reality. A recent poll found that “[a]rbitration is widely seen” by participants “as faster (74%), simpler (63%), and cheaper (51%) than going to court.” Harris Interactive, *Arbitration: Simpler, Cheaper, and Faster Than Litigation* (Apr. 2005), at 5, available at <http://www.institute-forlegalreform.org/resources/ArbitrationStudyFinal.pdf>.

Finally, consumers might prefer arbitration out of general antipathy to class actions. A March 2003 survey found that “67% of Americans believe that lawyers benefit most from the current class action suit system while 61% think that *consumers* (32%) and *class members* (29%) *benefit least* from the current system.” Penn, Schoen & Berland Associates, U.S. Chamber of Commerce, Institute for Legal Reform, Polling on The Class Action System: National Results, available at [www.institute-forlegalreform.com/resources/classaction.pdf](http://www.institute-forlegalreform.com/resources/classaction.pdf) (emphasis added). These results support the view that “[m]any ordinary Americans seem to think that class actions are a new-fangled litigation device invented by greedy plaintiff attorneys.” Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 Duke J. Comp. & Int’l L. 179, 180 (2001).

As the courts of this state have repeatedly recognized, “[c]ourts should not assume an overly paternalistic attitude toward the parties to a contract by relieving one or another of them of the consequences of what is at worst a bad bargain.” *Trans Leasing Int’l v. Schmer*, 194 Ill. App. 3d 70, 75, 550 N.E.2d 1085, 1088 (1st Dist. 1990) (quoting *Dillman Assocs., Inc. v. Capitol Leasing Co.*, 110 Ill. App. 3d 335, 343, 442 N.E.2d 311, 317 (4th Dist. 1982)). Yet that is precisely what the Fifth District did in this case by ruling that the class-arbitration waiver in the parties’ arbitration agreement is unconscionable. Because that is not Illinois’s *generally applicable* approach to unconscionability, Section 2 of the FAA precludes its use in this instance. *See Iberia*, 379 F.3d at 167 (“Even when using doctrines of general applicability, the state courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny.”).

**2. Conditioning enforcement of an arbitration provision on the availability of class-wide arbitration conflicts with the objectives of Congress in enacting the FAA and is therefore preempted under the Supremacy Clause.**

The Fifth District’s holding that an arbitration provision must allow for class-wide arbitration in order to be enforceable is also preempted under traditional principles of conflict preemption because it “stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress” in enacting the FAA. *United States v. Locke*, 529 U.S. 89, 109 (2000) (citation and internal quotation marks omitted).

Section 2 of the FAA declares 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 Sub-*

*comms. of the Comms. on the Judiciary*, 68th Cong., 1st Sess., at 7 (1924) (statement of Charles Bernheimer, N.Y. Chamber of Commerce). 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). The U.S. Supreme Court, too, has recognized the superior “simplicity, informality, and expedition of arbitration.” *Mitsubishi*, 473 U.S. at 628.

Class action procedures, by contrast, are antithetical to the low-cost and efficient resolution of disputes that is the hallmark of arbitration. While the average length of an AAA arbitration from filing to award is less than six months (*see Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280-81 (1995)), class actions take years. These complex litigations invariably begin with a lengthy collateral proceeding to determine the propriety of class certification, which generally entails (i) substantial discovery, including 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) an interlocutory appeal initiated by the losing party pursuant to Supreme Court Rule 306(a)(8) or Federal Rule of Civil Procedure 23(f).

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 then commence and likely continue for months, if not 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, as well as by any objectors. And if the defendant chooses not to settle, there would need to be a 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.

These procedures would make arbitration more expensive and more time consuming—and, in the process, eradicate the distinction between arbitration and litigation.<sup>9</sup> In fact, some commentators believe that “class arbitration may actually prove *more* burdensome than class litigation.” Jack Wilson, *supra*, 23 *Quin. L. Rev.* at 774 (emphasis added); *see also* Lindsay R. Androski, *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”).

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<sup>9</sup> *See* Bunch, *supra*, 2004 *J. Disp. Resol.* at 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.”).

Not only would grafting time-consuming and expensive class-action procedures onto an arbitral proceeding essentially eliminate the distinction between arbitration and litigation, but it also presents businesses with a “worst-of-all-worlds” scenario. While the stakes would be increased exponentially over an individual arbitration, any class-wide arbitral award would remain reviewable only for fraud, bias, or “manifest disregard” of the law. *See* 9 U.S.C. § 10; *Roubik v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 181 Ill.2d 373, 393, 692 N.E.2d 1167, 1176 (1998); *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953). In such circumstances, few businesses would be willing to roll the dice by including an arbitration provision in their consumer contracts: “[c]lass arbitration just seems to present too many risks.” Wilson, *supra*, 23 *Quin. L. Rev.* at 778. As the distinction between litigation and arbitration erodes, businesses will stop including arbitration provisions in their contracts in the first place, concluding “that the known, class litigation, is preferable to unknown, class arbitration.” *Id.*

Thus, the consequence of conditioning the enforcement of consumer arbitration provisions on the business subjecting itself to class-wide arbitration would not be fairer or more efficient arbitration—but rather *more litigation* and *less arbitration*. Nothing could more clearly “frustrate the purpose” (*Livadas v. Bradshaw*, 512 U.S. 107, 116 (1994)) of the FAA. As the Fifth Circuit recently put it in rejecting an unconscionability attack on the class-arbitration waiver in Cingular’s original arbitration provision, “the fact that certain litigation devices may not be available in 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*, 379 F.3d at 174 (quoting *Gilmer*, 500 U.S. at 31); *see also id.* at 175-76 (for parties to demand “all of the procedural accoutrements that accompany a judicial proceeding” would undermine “the point of arbitration”).

Accordingly, under the doctrine of conflict preemption—and 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). *See also Schultz*, 376 F. Supp. 2d at 691 (West Virginia Supreme Court’s holding that class-arbitration waiver was unconscionable is preempted by the FAA and therefore “the plaintiff’s argument that the arbitration clause is unconscionable due to its foreclosure of class action relief \* \* \* lacks merit”); *Am. Gen’l Life & Accident Ins. Co. v. Wood*, \_\_ F.3d \_\_, 2005 WL 3031113, at \*6 (4th Cir. Nov. 14, 2005) (“West Virginia precedent generally barring state claims from arbitration must be necessarily circumscribed in light of [the FAA]”); *Caley*, \_\_ F.3d \_\_, 2005 WL 2840372, at \*13 (arbitration provision’s prohibition of class actions is “consistent with the goals of ‘simplicity, informality, and expedition’ touted by the Supreme Court in *Gilmer*”) (quoting *Gilmer*, 500 U.S. at 31).

## **II. At Minimum, The Appellate Court Erred By Severing The Class-Arbitration Waiver.**

At minimum, this Court should hold that the prohibition against class-wide arbitration is not severable from the remainder of the parties’ arbitration provision. In this case, the Fifth District reached the question whether the class-arbitration waiver is sever-

able without any briefing on that issue by the parties. *Both* Cingular *and* Kinkel petitioned the Fifth District for rehearing on the issue, arguing (albeit for different reasons) that the class-arbitration waiver is not severable. *See* A33, A40-41. There is no valid justification for the Fifth District’s imposition of a hybrid class-arbitration procedure to which the parties never agreed.

For the reasons discussed above (at 41-45), class actions are inherently inconsistent with the streamlined nature of arbitration—including, importantly, the limited standard of review. It would violate Cingular’s due process rights to subject it to a class certification decision and potential class-wide arbitral award that might be subject only to review for “manifest disregard” of the law (*Roubik*, 181 Ill.2d at 393, 692 N.E.2d at 1176; *Wilko*, 346 U.S. at 436-37; *see also* 9 U.S.C. § 10). Thus, were this Court to disagree with our argument and hold that the class-arbitration waiver is unenforceable, the Court should hold that the parties’ entire agreement to arbitrate is unenforceable.

### **CONCLUSION**

The Court should reverse the decision of the Appellate Court and hold that the class-arbitration waiver in the parties’ arbitration agreement is enforceable.

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