

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. Kardis,
Circuit Judge

CINGULAR WIRELESS LLC,

No. 02-L-1087

Defendant-Appellant.

REPLY BRIEF OF APPELLANT CINGULAR WIRELESS LLC

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ORAL ARGUMENT REQUESTED

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Virtually all of the circuit court's grounds for refusing to enforce Cingular's arbitration provision have already been expressly rejected by the United States Supreme Court, the Illinois Supreme Court, the United States Court of Appeals for the Seventh Circuit, the Illinois Appellate Court for the First District, and numerous federal and state courts outside of Illinois. In the face of this tidal wave of on-point authority, plaintiff invokes a trio of Illinois Appellate Court decisions (two by this Court) about automobile appraisal clauses. As one of those decisions expressly recognizes, however, arbitration provisions are materially different from provisions requiring that the value of an insured object be determined by an appraiser. *Lundy v. Farmers Group, Inc.*, 322 Ill. App. 3d 214, 218, 750 N.E.2d 314, 318 (2d Dist. 2001). Plaintiff's suggestion that this Court extend the appraisal cases to the arbitration context thus cannot be squared with those cases themselves, much less the strong federal and state policy supporting enforcement of arbitration agreements – a policy that does not necessarily apply to appraisal clauses.

Equally off the mark is plaintiff's repeated exhortation that this Court construe Cingular's customer agreement in the manner *least* favorable to finding the arbitration agreement enforceable. Such an approach is squarely foreclosed by Supreme Court precedent. *See 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"). If the customer agreement is construed in a manner most favorable to upholding the arbitration provision, many of plaintiff's claims of unconscionability (*e.g.*, her claims that the limitations on liability afford her no remedy at

all and that the arbitrator is precluded from awarding remedies authorized by the ICFA) become moot.

Ultimately, plaintiff is forced to argue that the Illinois Appellate Court decision most closely in point – *Rosen v. SCIL, LLC*, 343 Ill. App. 3d 1075, 1084-85, 799 N.E.2d 488 (1st Dist. 2003), *appeal denied*, ___ N.E.2d ___ (Ill. Jan. 28, 2004) – was wrongly decided. *See* Appellee’s Br. 39. Needless to say, this Court should be most reluctant to create a split with a sister Appellate Court, especially when, as here, that decision is supported by abundant case law from other jurisdictions.¹

In short, the law here is clear and compels enforcement of Cingular’s arbitration provision. The circuit court’s order refusing to do so must be reversed.²

¹ Plaintiff ignores entirely a second Illinois Appellate Court case – *Hutcherson v. Sears Roebuck & Co.*, 342 Ill. App. 3d 109, 793 N.E.2d 886 (1st Dist. 2003), *appeal denied*, 205 Ill. 2d 582, 803 N.E.2d 482 (2003) – upon which *Rosen* was based.

² As we explained in our opening brief (at 17 n.4), plaintiff’s challenges to the arbitration provision are preempted by the federal telecommunications laws under *Boomer v. AT&T Corp.*, 309 F.3d 404, 418-21 (7th Cir. 2002). Plaintiff responds (at 5 n.2) that the “rationale” of *Boomer* does not apply to her lawsuit because, unlike in *Boomer*, the relevant preemption provision here applies only to “rates,” not to “other terms and conditions” of service. *Boomer* explains, however, that the arbitrability of claims *is* a rate-related issue. *See* 309 F.3d at 419 (“[A] state law challenge to an arbitration clause (or for that matter a provision prohibiting class actions) not only affects the uniformity of that term, but it also threatens to destroy the consistency of rates offered consumers throughout the United States.”). Accordingly, *Boomer* is every bit as applicable to cellular telephony as it is to traditional wire-line service.

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.”

As she did in the circuit court, plaintiff argues that the parties’ agreement to arbitrate “*any dispute or claim* arising from or relating to” their contract (R. C38 (emphasis added)) does not encompass her claims because she alleges in her Amended Complaint that “the Arbitration provision * * * is part and parcel of [Cingular’s alleged] fraud” (Appellee’s Br. 6). She cites no authority whatsoever for the proposition that a plaintiff can evade arbitration merely by alleging that the arbitration provision “promote[s] and protect[s]” the underlying conduct that is the subject of the complaint.³ Nor could she. As we explained in our opening brief (at 21), under Illinois law the parties’ arbitration clause encompasses plaintiff’s claims (as well as any other claim between the parties). *See, e.g., Bass v. SMG, Inc.*, 328 Ill. App. 3d 492, 497-98, 765 N.E.2d 1079, 1085 (1st Dist. 2002) (describing arbitration clauses containing “arising from or relating to” language used in the agreement here as “generic” arbitration clauses and explaining that courts have “generally construed [such] arbitration clauses broadly, concluding that the parties are obligated to arbitrate *any* dispute that arguably arises under an agreement containing [such a] provision.”) (citing *J & K Cement Constr., Inc. v. Montalbano Builders, Inc.*, 119 Ill. App. 3d 663, 670, 456 N.E.2d 889, 895 (2d Dist.

³ We agree with plaintiff that under *Greentree Financial Corp. v. Bazzle*, 123 S. Ct. 2402 (2003), the circuit court had jurisdiction to determine whether her claims fall within the scope of the arbitration provision. *See* Appellee’s Br. 11-12. Thus, the circuit court did not err in *addressing* her argument; rather, it erred in *concluding* that her claims do not have to be arbitrated.

1983)) (emphasis in original); *Hill v. Galaxy 2000*, 105 F.3d 1147, 1150-51 (7th Cir. 1997) (rejecting argument that plaintiff could escape an arbitration agreement by “conten[ding] that the arbitration clause is * * * part of a scheme to defraud”).⁴ This is so because, as the Illinois Supreme Court stressed earlier this month, “plaintiffs’ state law claims may not be premised solely on the fact that a contract to arbitrate is at issue.” *Borowiec v. Gateway 2000, Inc.*, ___ Ill. 2d ___, ___ N.E.2d ___, 2004 WL 636562, at *5 (Apr. 1, 2004).

Bereft of relevant precedent, plaintiff instead places heavy weight on three cases involving *appraisal* clauses – *Hanke v. Am. Int’l S. Ins. 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), *Travis v. Am. Mfrs. Mut. Ins. 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), and *Lundy v. Farmers Group, Inc.*, 322 Ill. App. 3d 214, 750 N.E.2d 314 (2d Dist. 2001). As explained in our opening brief (at 19), however, arbitration is materially different from automobile appraisal. Most fundamentally, as the *Lundy* court recognized, neither the FAA nor the Uniform Arbitration Act – with their attendant policies favoring arbitration – applies to appraisal clauses. 322 Ill. App. 3d at 218, 750 N.E.2d at 318. In addition, unlike arbitrators, appraisers are neither authorized nor trained to resolve legal claims; rather,

⁴ Plaintiff stresses (at 9 n.3) that the arbitration clause calls for arbitral proceedings to be confidential, which she argues is part of Cingular’s purported fraud. But in so doing plaintiff ignores (1) our explanation of the reasons why arbitration traditionally has been confidential (*see* Cingular Br. 18 n.5); (2) Cingular’s offer to waive this confidentiality provision; and (3) the fact that Cingular’s revised arbitration provision does not include a confidentiality requirement (*see id.* at 12).

their sole function is to determine the value of an insured item. Plaintiff offers no response to these points or to our related point that extending *Hanke* and *Travis* to the arbitration context would facilitate the evisceration of arbitration agreements in contravention of the strong federal and state policies favoring enforcement of such agreements (Cingular Br. 18).

In fact, the very case plaintiff “points to” for the proposition that appraisal clauses and arbitration clauses “are to be construed in the same manner” (Appellee’s Br. 7) – *Beard v. Mount Carroll Mut. Fire Ins. Co.*, 203 Ill. App. 3d 724, 561 N.E.2d 116 (5th Dist. 1990) – demonstrates the fallacy in her argument. Although in *Beard* this Court drew parallels between arbitration clauses and appraisal clauses *for purposes of determining that contractual appraisal clauses are enforceable under Illinois law* (*id.* at 727, 561 N.E.2d at 118), it also noted the distinctions between the two. In particular, it explained that arbitration is “a quasi-judicial determination of *any dispute*,” whereas appraisal involves only the “application of the arbitrators’ skill and knowledge to determine the *fair cash * * * value* of [an item].” *Id.* at 728, 561 N.E.2d at 118 (quoting *Bailey v. Timpone*, 75 Ill. 2d 539, 545-46, 389 N.E.2d 1193, 1196 (1979)) (emphasis added).

The Second District also recently explained this fundamental distinction between appraisal and arbitration. See *FTI Int’l, Inc. v. Cincinnati Ins. Co.*, 339 Ill. App. 3d 258, 790 N.E.2d 908 (2d Dist. 2003). Noting that appraisals are “primarily concerned with ascertaining the value of something,” the Second District quoted at length from the leading insurance treatise to differentiate appraisal from arbitration: “[A]ppraisal and

arbitration are two distinct procedures. Appraisal calls for the *mere determination of a particular fact* or set of facts. * * * Arbitration is a more far-reaching proceeding, by which the parties agree to have a neutral person or persons *resolve a disputed matter.*” *Id.* at 260, 790 N.E.2d at 910 (quoting 15 COUCH ON INSURANCE 3D § 209:4 (1999)) (emphasis added).

Precisely because appraisers are neither empowered nor trained to adjudicate legal claims, the holdings in *Lundy*, *Hanke*, and *Travis* that allegations of fraudulent conduct by automobile insurers need not (indeed could not) be referred for resolution to an appraiser in no way justify allowing plaintiff to evade her written obligation to arbitrate any and all claims arising out her contract for cellular service.⁵

B. The Fact That Plaintiff Pled A Claim Under The ICFA Does Not Justify Allowing Her To Avoid Her Agreement To Arbitrate.

As we explained in our opening brief, the fact that plaintiff alleges that Cingular violated the ICFA does not mean that her claims cannot be arbitrated. *See* Cingular Br. 21-22; *Borowiec v. Gateway 2000, Inc.*, ___ Ill. 2d ___, ___ N.E.2d ___, 2004 WL 636562 (Apr. 1, 2004) (holding that parties must arbitrate claims brought under the Magnuson-Moss Act and the ICFA). Furthermore – as we also explained – plaintiff is incorrect in asserting that Cingular’s arbitration provision bars her from obtaining the remedies to which she would be entitled in litigation. *See* Cingular Br. 24-25.

⁵ As we explain below (at 7, 10), plaintiff is fundamentally mistaken in claiming (at 10-11) that the arbitration provision “expressly prevents an arbitrator from resolving this controversy.” If plaintiff successfully proves her allegations before an arbitrator, that arbitrator will be entitled to award her any relief authorized by law.

In response, plaintiff now concedes that ICFA claims may be arbitrated (*see* Appellee’s Br. 12), but she continues to assert that the arbitration clause “cancel[s]” her right under the ICFA to attorneys’ fees and costs, injunctive relief, and punitive damages, where appropriate (*see id.* at 13-14). She is mistaken. Because it specifies that the arbitrator must enforce the contract’s limitations on remedies “[e]xcept where prohibited by law” (R. C38), the arbitrator *ipso facto* is **entitled** to award these remedies when they are required by law – including by the ICFA. Indeed, the First District recently held exactly that. *See Rosen*, 343 Ill. App. 3d at 1084-85, 799 N.E.2d at 495-96 (provision in arbitration agreement that prohibited an award of attorneys’ fees “unless unlawful” did not render arbitration agreement unconscionable because an award of attorneys’ fees is required under the ICFA and therefore is not prohibited by the arbitration provision); *see also Carter v. Countrywide Credit Indus., Inc.*, ___ F.3d ___, 2004 WL 414072, at *3 (5th Cir. Mar. 5, 2004) (holding that arbitration agreement that provided that “[e]ach party shall pay for each party’s own costs and attorneys’ fees,” but that also specified that arbitration “shall be adjudicated in accordance with * * * state or federal law” authorizes arbitrator to award attorneys’ fees in claim brought under the Fair Labor Standards Act, pursuant to which attorneys’ fees are available to prevailing plaintiffs).

Plaintiff ignores *Rosen*, instead arguing that “[t]he ICFA does not ‘prohibit’ Cingular’s limits on the arbitrator’s authority,” but instead that these limits “defeat[] [the] statute’s remedial purpose.” Appellee’s Br. 14. In addition to inviting a split with the First District, that argument ignores the foundational principle that contracts should be interpreted in the manner most conducive to finding an arbitration agreement enforceable.

See Moses H. Cone, 460 U.S. at 24 (“questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitrations”); *Borowiec*, 2004 WL 636562, at *4 (same).

Furthermore, none of the cases plaintiff cites (at 14-15) for the contention that limitations on liability render an arbitration provision unconscionable involved a provision with an explicit exception for remedies required by law. For example, the arbitration provision at issue in *McCaskill v. SCI Management Corp.*, 298 F.3d 677 (7th Cir 2002), precluded the award of attorneys’ fees without regard to whether such an award is required by law. Although there was no majority opinion in the case, Judges Bauer and Rovner each concluded that the arbitration provision was unenforceable because Title VII, the statute under which the plaintiff’s claim was brought, requires that successful plaintiffs be awarded attorneys’ fees. *See id.* at 680 (Bauer), 685 (Rovner). In *this* case, by contrast, the arbitration provision contains *exactly* the sort of escape clause that was lacking in *McCaskill*, rendering *Rosen* the applicable precedent.

Finally, to the extent there is any ambiguity about the meaning of the phrase “except where prohibited by law,” under *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003), the circuit court should have compelled arbitration and allowed the arbitrator to interpret the contract in the first instance. *See id.* at 406-07 (courts “should not, on the basis of ‘mere speculation’ that an arbitrator might interpret * * * ambiguous agreements in a manner that casts their enforceability into doubt, take upon [themselves] the authority

to decide the antecedent question of how the ambiguity is to be resolved”) (quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 541 (1995)).⁶

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

Plaintiff next asserts that she should be allowed to avoid her agreement to arbitrate because an arbitrator would be precluded from awarding her any relief even if she were to convince the arbitrator of the merits of her claims. *See* Appellee’s Br. 17-21. We do not dispute plaintiff’s contention that arbitration is a matter of contract. Nor do we deny that an arbitration agreement is subject to a defense of unconscionability. *See* Appellee’s Br. 17-18. But these basic propositions of law do not aid plaintiff’s argument in the slightest.

For starters – as we explained in our opening brief (at 26) – the “Limitation of Liability” section on which plaintiff focuses is distinct from the arbitration provision and therefore applies regardless of the forum. Accordingly, the validity of that provision is a question for the arbitrator, not for a court. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-85 (2002) (courts may decide only “gateway” questions of arbitrability); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403 (1967). Moreover, even if this Court could properly adjudicate plaintiff’s attack on Cingular’s Limitation of Liability provision and even if it would deem that provision to be unconscionable, that

⁶ As we explained in our opening brief (at 24), even if the arbitration clause did not contain an escape hatch that permits arbitrators to award relief required by law, Cingular’s offer to pay the costs of arbitration and to reimburse plaintiff for her attorneys’ fees if the arbitrator awards her an amount equal to or greater than her claim would moot any challenge based on the unavailability of these remedies. Plaintiff’s argument to the contrary (*see* Appellee’s Br. 16-17) is baseless. *See* pages 12-14, *infra*.

would be a reason to invalidate the limitations on liability, not the entirely separate arbitration provision.

There is, however, nothing unconscionable about the limitation of liability provision; plaintiff's challenge is based on an incorrect reading of this provision, which does not limit the relief an arbitrator could award her if she successfully proved her claims. By its terms, this provision addresses only losses of service: it purports to limit liability "caused by use of, or inability to make use of, service or equipment provided by or through Cingular" (*see* R. C38), not to restrict Cingular's liability for billing disputes or the violation of state or federal statutes. Beyond that, the very sentence in the arbitration provision on which plaintiff focuses (at 20) makes clear that the arbitrator will be entitled to award whatever relief is called for by the ICFA: "The Arbitrator(s) must give effect to the limitation on Cingular's liability as set forth in this agreement, *any applicable* tariff, *law* or regulation." R. C38 (emphasis added). Thus, even if plaintiff were right that the limitation-of-liability provision applies to her claim, the arbitrator would be required to "give effect to * * * any applicable * * * law," including the common-law presumption against enforcement of such provisions that plaintiff invokes (at 22).

Furthermore, to the extent there is any ambiguity about whether the contract unlawfully limits the relief to which plaintiff is entitled, under *PacifiCare*, the circuit court should have compelled arbitration and allowed the arbitrator to interpret the contract in the first instance. Plaintiff's efforts to distinguish *PacifiCare* miss the mark. For starters, her argument that the contract here is purportedly "clear and unambiguous"

is misguided. The Agreement here is no more or less ambiguous than the one at issue in *PacifiCare*. The point of *PacifiCare*, however, is not that there should be some specific quantum of ambiguity, but rather that – because of the strong federal policy favoring agreements to arbitrate – it is appropriate to allow arbitrators to attempt to resolve *any* ambiguity in the first instance.

Plaintiff’s contention that *PacifiCare* is inapplicable because “Cingular intended that a court – not an arbitrator – would resolve gateway matters about the Arbitration Provision” (Appellee’s Br. 21) is equally baseless. Plaintiff cites to a two-sentence provision of the arbitration provision to support this argument, but omits the critical part of those sentences, which demonstrates that this phrase purports only to clarify that claims will be tried before a judge rather than a jury if the arbitration provision is found to be unenforceable. *See* R. C38 (“If for some reason this arbitration clause is at some point deemed inapplicable or invalid, ***you and CINGULAR agree to waive, to the fullest extent allowed by law, any trial by jury. In such case,*** a judge shall decide the subject dispute or claim.”) (portion omitted by plaintiff emphasized).

Finally, plaintiff’s argument that Cingular “should not [be] permit[ted] to tinker with an admittedly illegal contract simply to defeat Plaintiff’s lawsuit” (Appellee’s Br. 22) is misguided. Cingular has not admitted – and does not believe – that there is anything unenforceable about the contract as written; rather, we have demonstrated that the contract is perfectly lawful when properly interpreted. But as we have explained, because there is a powerful federal and state policy favoring enforcement of arbitration provisions, courts routinely deem offers to waive assertedly objectionable features of

arbitration provisions to be a perfectly valid means of mootng the objections. *See* Cingular Br. 28-30.

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

As we explained in our opening brief (at 27-34), the expenses plaintiff would incur if she arbitrated this dispute do not justify refusing to compel her to arbitrate. Any argument based on such costs being prohibitive is moot, as Cingular has agreed to bear those costs. In any event, the allocation of costs in the original agreement is not unlawful – but even if it were, the appropriate remedy would be to sever the provisions placing excessive costs on plaintiff and then to enforce the agreement to arbitrate, rather than to refuse to enforce the arbitration agreement in its entirety. Plaintiff’s arguments to the contrary are unpersuasive.

1. Plaintiff’s first argument (at 24-26) – that Cingular’s offer to pay her costs does not moot her expense-based challenges to the enforceability of the arbitration provision – is baseless. For starters, the two cases upon which she relies for the premise of this argument – that a party “cannot unilaterally change the contract ‘on the fly’ to suit its needs” – do not support it. As we explained in our opening brief (at 30), *Ellman v. Ianni*, 21 Ill. App. 2d 353, 157 N.E.2d 807 (2d Dist. 1959), in fact explicitly clarifies that a party generally *may* waive “a condition or provision of a contract.” *Id.* at 361, 157 N.E.2d at 812. And *Channell v. Citicorp National Services, Inc.*, 89 F.3d 379 (7th Cir. 1996), is simply off point: the conclusion that a lender may not unilaterally alter its method of calculating an early termination fee under a lease (*id.* at 384) has no bearing on the question whether a party may offer to pay the costs of arbitration.

In any event, although plaintiff cites (at 24-25) a few non-Illinois cases that have rejected offers to pay arbitration costs, she **does not deny** that “the vast majority of [non-Illinois] courts ... 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.” Appellee’s Br. 25 (quoting Cingular Br. 28) (alterations are Appellee’s). In fact, since we filed our opening brief, the United States Court of Appeals for the Fifth Circuit also has so held. *See Carter*, 2004 WL 414072, at *4 (finding that offer to pay all but \$125 of costs of arbitration mooted prohibitive-costs argument).⁷

Furthermore, **Illinois** case law expressly rejects plaintiff’s argument. In our opening brief (at 28-29), we cited two cases that, in applying Illinois law, held that offers to pay the costs of arbitration moot expense-based challenges to arbitration agreements. Plaintiff cites no Illinois cases to the contrary, and her attempts to distinguish these two cases are unsuccessful. *Phillips v. Associates Home Equity Servs., Inc.*, 179 F. Supp. 2d 840, 847 (N.D. Ill. 2001), is on all fours with this case. The arbitration agreement at issue in *Phillips* specified that the plaintiff could ask the defendant to **front** the costs of arbitration, but did not authorize the defendant to **bear** those costs. Thus, in holding that an offer to pay these costs mooted the plaintiff’s cost-based challenge to the arbitration provision, the *Phillips* court was relying upon an extra-contractual offer. *See id.* at 843. *Livingston v. Associates Finance, Inc.*, 339 F.3d 553, 557 (7th Cir. 2003), is also directly

⁷ Note that \$125 is all that plaintiff would have had to pay even if Cingular had never offered to pay the costs of arbitration. *See Cingular Br. 31.*

on point. Although the arbitration agreement in *Livingston* specified that the parties could *agree* to change the allocation of costs and attorneys' fees (*id.* at 555 n.1), the plaintiff in that case *rejected* the defendant's offer, and thus there was no such agreement. The Seventh Circuit nonetheless held that the defendant's offer mooted plaintiff's challenge. *Id.* at 557 n.3.

Finally, even those few cases that plaintiff cites in which courts refused to accept offers to pay the costs of arbitration are distinguishable from this case. None of those cases involved a defendant's offer to pay the costs of arbitration on an *across-the-board* basis that was applicable to *all* of its current and former customers – rather than on a case-specific *ad hoc* basis. Because the offer here is generally applicable and was sent to all current customers, Cingular cannot justifiably be accused of preventing its customers from bringing arbitrations by tricking them into believing that arbitration would be costly. *See* Cingular Br. 28; *cf.* Appellee's Br. 26 (quoting *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003) (en banc)).⁸

2. Even if Cingular's offer to pay all the costs of arbitration – and to pay plaintiff's attorneys' fees if she recovers the amount of her claim or more – did not moot plaintiff's prohibitive-costs argument, that argument is nonetheless baseless. Plaintiff can cite to no case that stands for the proposition that it is unconscionable to require customers to pay a \$125 arbitration fee and to bear responsibility for their own attorneys'

⁸ Notably, although the court in *Morrison* held that the costs of arbitration under a specific arbitration provision were excessive, it then severed that cost-allocation provision and enforced the agreement to arbitrate. *Id.* at 674-75, 677-78. *See* page 16, *infra*.

fees. Rather, the cases plaintiff cites (*see* Appellee’s Br. 28), such as *Ting v. AT&T*, 319 F.3d 1126 (9th Cir.), *cert. denied*, 124 S. Ct. 53 (2003), are all easily distinguishable. As we explained in our opening brief (at 43), unlike the defendants in these cases, Cingular has ensured that arbitration is a cost-effective means of vindicating its customer’s rights.

In any event, the only *Illinois* court to rule on the enforceability of an agreement that imposed costs similar to those at issue in this case held that those costs did not render the arbitration agreement unconscionable. In *Rosen*, the First District held that a \$125 arbitration fee is not unconscionable even if the plaintiff’s claim is only for \$3.19. *See Rosen*, 343 Ill. App. 3d at 1085-86, 799 N.E.2d at 496-97; Cingular Br. 32. *A fortiori*, an arbitration fee of \$125 cannot be unconscionable when the plaintiff’s claim is for \$150.

Plaintiff claims (at 29) that *Rosen* is distinguishable because the First District indicated there that the plaintiff had adduced no evidence that the arbitrator would make him repay thousands of dollars in costs in the event he were to lose the arbitration, whereas she has adduced an affidavit saying that she would have to pay an attorney \$3,500 to pursue her claim. But neither *Rosen* nor any other case she cites supports her unspoken assumption that the cost of an attorney – as opposed to the fees of the arbitration organization – is relevant. To the contrary, the focus of the *Rosen* court was squarely and exclusively on the “filing, administrative, and hearing fees for the arbitration of [the plaintiff’s] Claim.” *See* 343 Ill. App. 3d at 1084, 799 N.E.2d at 496. Because plaintiff’s distinction of *Rosen* is untenable (and because plaintiff does not deny that the maximum cost to a plaintiff of arbitrating a claim like hers is \$125), this Court

can find the costs of arbitration to be excessive here only by creating a split with the First District.

3. Plaintiff's final argument – that the circuit court properly refused to enforce the remainder of the arbitration agreement after finding that agreement to impose prohibitive costs – is also meritless. Plaintiff does not dispute that the courts in several of the cases on which she principally relies severed cost-allocation provisions held to be unlawful and then compelled arbitration. The reasoning of those cases applies here, as well. As the Sixth Circuit explained in *Morrison*, because “Supreme Court precedent dictates that we resolve any doubts as to arbitrability in favor of arbitration,” courts “should not lightly conclude that a particular provision of an arbitration agreement taints the entire agreement” if the contract contains a severability clause. 317 F.3d at 675 (citations and internal quotation marks omitted) (severing cost-allocation provision and ordering plaintiff to arbitrate dispute). This presumption applies with full force here, and mandates that the cost-allocation provisions be severed.

In an effort to escape from this presumption of severability, plaintiff asserts that two portions of the Agreement demonstrate that the parties intended the arbitration provision to stand or fall as a whole. Neither provision supports the reading plaintiff gives it. First, the provision she quotes on page 30 of her brief is, as we have already explained (*see* page 11, *supra*), merely a jury-waiver applicable in the event the arbitration provision is invalidated. This clause in no way suggests that the parties intended the entire arbitration provision to sink or swim as a unified whole. Second, plaintiff's analysis of the Agreement's severability clause (*see* Appellee's Br. 31) is

equally off base. Plaintiff focuses on the fact that the severability clause applies if any “provision” is found to be unenforceable, and asserts that the section of the Agreement addressing arbitration is one “provision.” Nothing in the Agreement suggests that this is a correct interpretation of the contract, however; rather, a “provision” could just as easily be any sentence (or even portion of a sentence) that has independent meaning. Given the presumption that courts should sever portions of an arbitration agreement so as to enforce the parties’ agreement to arbitrate (*Morrison*, 317 F.3d at 675; see also *Moses H. Cone*, 460 U.S. at 24-25), any latent ambiguity in this case should be resolved in favor of finding the severability clause to apply to subsections of the arbitration agreement.

The cases plaintiff cites (at 32-33) do not support her argument. In *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244, 1249 (9th Cir. 1994) (cited at 33), the court invalidated an arbitration agreement that the parties *intended* to be read as a whole, as evidenced by a clause that required the arbitration provisions to be considered in their entirety, apart from the rest of the contract. The Agreement in this case contains no such clause. Moreover, *Graham* is in conflict with decisions of other federal circuits, including the Seventh Circuit, regarding the enforceability of various arbitration provisions. See, e.g., *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995). Similarly, in *Lopez v. Plaza Finance Co.*, 1996 WL 210073, at *6 (N.D. Ill. Apr. 25, 1996) (cited at 33), the court voided the entire arbitration agreement for lack of mutuality because only one side agreed to arbitrate all of its claims. In this case, plaintiff has not claimed lack of mutuality. Nor can she: both parties have agreed to arbitrate all of their claims. In any event, *Lopez* is inconsistent with, and hence superseded by, subsequent

Seventh Circuit case law. *See We Care Hair Dev., Inc. v. Engen*, 180 F.3d 838, 843 (7th Cir. 1999) (enforcing arbitration agreement where franchisees were fully aware that franchisor could bring suit in court for eviction while franchisees were required to arbitrate their claims). Finally, *Browne v. Kline Tysons Imps., Inc.*, 190 F. Supp. 2d 827, 832 (E.D. Va. 2002) – in which the court refused to rewrite an agreement that provided for binding arbitration so as to provide for non-binding arbitration – has no bearing on this case, as that alteration went to the very heart of the arbitration agreement. By contrast, provisions dealing with the costs of arbitration are obviously peripheral to the parties’ core agreement in an arbitration clause – the agreement to arbitrate disputes.

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

Although plaintiff asserts (at 34-42) that the arbitration provision’s prohibition against class actions renders that provision substantively unconscionable, she largely ignores our arguments on the point. *See* Cingular Br. 34-44.

In particular, plaintiff’s contention that “the validity of a class action waiver is entirely a question of state law” because the FAA allows courts “to strike down an arbitration clause “upon such grounds as exist at law or in equity for the revocation of any contract”” (Appellee’s Br. 34 (quoting Cingular Br. 35 (in turn quoting 9 U.S.C. § 2))), misses the point. Although true as a general matter,⁹ this does not mean what plaintiff seems to think. As we explained in our opening brief (at 35-37), under this

⁹ Of course, principles of conflict preemption limit even generally applicable state-law defenses to the enforcement of an arbitration provision. That is the case here. *See* Cingular Br. 41-43.

principle a prohibition against class-action waivers in the arbitration context would be valid only if Illinois contained a preexisting, general prohibition against class-action waivers *outside* the context of arbitration. But plaintiff has pointed to no authority for the proposition that class-action waivers outside the context of arbitration are generally unenforceable under Illinois law.

Rather, the only Illinois authority of which we are aware that addresses the question of the enforceability of class-action waivers in any context is *Rosen*, which held that such waivers are enforceable. *See* 343 Ill. App. 3d at 1082, 799 N.E.2d at 494. In so doing, the court explicitly analyzed the question and held that such waivers are not unconscionable (*id.* at 1082-83, 799 N.E.2d at 494-95); it did not “decline[] to address the issue,” as plaintiff asserts (at 39).

Unable to effectively distinguish *Rosen*, plaintiff instead invokes general principles of unconscionability law for the proposition that “[n]othing could be more ‘unreasonable’ than eliminating the weaker party’s ability to bring a claim by making it completely impractical.” Appellee’s Br. 38. But we have already explained that, because 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, arbitration of this dispute is by no means impractical. *See* Cingular Br. 43.¹⁰ The fact

¹⁰ Small claims court, which is expressly authorized under the terms of the arbitration provision, would also be a practical method for plaintiff to obtain relief. In fact, as the Louisiana Court of Appeal has recognized, small claims court is in fact often a *better* option for the resolution of small claims than a class action because “[c]ertification of * * * a class [can] promote complicated lengthy legal embattlement,” whereas small claims court allows parties to resolve disputes “expeditiously and with minimum costs
(*cont’d*)

that arbitrating against Cingular is cost-free distinguishes cases such as *Ting* and *Szetela v. Discover Bank*, 118 Cal. Rpt. 2d 862, 97 Cal. App. 4th 1094 (2002), *cert. denied*, 537 U.S. 1226 (2003), on which plaintiff relies (at 36-37). Furthermore, none of the authority plaintiff cites to support this argument (*see id.* at 36-37, 40-41) is from Illinois. The only new development outside of Illinois in the last several months, however, is the Fifth Circuit's decision to join the Third, Fourth, Sixth, Seventh, and Eleventh Circuits in holding that it is not unconscionable to waive the right to proceed on a class basis in arbitration. *See Carter*, 2004 WL 414072, at *3.

Plaintiff's effort to distinguish these cases on the ground that they involve federal causes of action rather than state causes of action (*see* Appellee's Br. 35-36) is factually incorrect and legally baseless. Considering just the cases decided by federal courts of appeals, the plaintiffs in both *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995), and *Adkins v. Labor Ready, Inc.*, 303 F.3d 496 (4th Cir. 2002), brought state-law claims, but those courts nonetheless held that class-action waivers were enforceable. Furthermore, the plaintiffs in most or all of the cases we listed (at 37-39) relied upon state-law unconscionability doctrines to argue that a class-action waiver was unenforceable; the fact that the underlying cause of action is based on state or federal law is irrelevant.

Finally, plaintiff's attacks on Cingular's motives (*see* Appellee's Br. 36-37) have no basis in the record. As we have explained (Cingular Br. 12 n.2), Cingular designed

and fees." *Pulver v. 1st Lake Props., Inc.*, 681 So. 2d 965, 970 (La. Ct. App. 1996).

the arbitration provision in its contracts to make arbitration convenient and inexpensive for consumers, and continues to refine that provision when concerns about particular features – such as the confidentiality provision – are brought to its attention (whether in litigation or extra-judicially). But as we explained in our opening brief (at 41-43), it is fundamentally inconsistent with the very nature of arbitration to allow arbitrations to proceed on a class-wide basis. Thus, plaintiff’s argument is not really an attack on class-action waivers, but rather on arbitration agreements in the first place. Such an argument is precluded by U.S. Supreme Court and Illinois Supreme Court precedent. *See, e.g., Bd. of Mgrs. of Courtyards at Woodlands Condo. Ass’n v. IKO Chicago, Inc.*, 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).¹¹

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

Plaintiff’s next argument – that the arbitration provision is unenforceable because it prohibits the arbitrator from awarding punitive damages – is also meritless. As we explained in our opening brief, the Illinois Supreme Court, the First District, the United States Supreme Court, and the vast majority of the other federal and state courts that have considered the issue either have held or have strongly suggested that in agreeing to

¹¹ As we explained in our opening brief (at 44 n.12), plaintiff’s argument that individual arbitrations may lead to inconsistent outcomes (Appellee’s Br. 41-42) is legally irrelevant.

arbitrate all disputes under a contract the parties to that contract may also agree to waive any eventual claim for punitive damages. *See* Cingular Br. 45-46 (collecting cases). That plaintiff has identified a handful of cases, all from outside Illinois, holding otherwise does nothing to undermine this weight of authority.

In any event, plaintiff ignores our subsidiary argument: under the explicit terms of the arbitration provision, arbitrators may award punitive damages in those situations in which they find a bar on punitive damages to be prohibited by law. *See* R. C38. Thus, if plaintiff is correct that the ICFA precludes parties from waiving their right to punitive damages, and if she presents evidence to the arbitrator suggesting that punitive damages are warranted in this dispute, then the arbitrator's award to her may include punitive damages. *See* Cingular Br. 46; Section B, *supra*.

G. The Agreement Is Not Procedurally Unconscionable.

As we explained in our opening brief (at 46-49), the Terms and Conditions of the Agreement, including the arbitration provision, are not procedurally unconscionable under Illinois law. Plaintiff's arguments otherwise are unpersuasive.

To begin with, plaintiff does not deny (i) that the Terms and Conditions were on the back of her single-page contract; (ii) that the arbitration provision was specifically adverted to in the very first sentence of those Terms and Conditions; (iii) that on the front of her contract she initialed an acknowledgment that the Terms and Conditions, including the arbitration provision, were on the back of the single-sheet contract; and (iv) that in signing the contract she acknowledged having "read and underst[ood]" the Terms and Conditions. *See* R. C38; Cingular Br. 46-47. As explained in our opening brief, these

facts are sufficient to doom plaintiff's claim of procedural unconscionability even under the cases upon which the circuit court relied. See Cingular Br. 47-48; *Larned v. First Chicago Corp.*, 264 Ill. App. 3d 697, 700, 636 N.E.2d 1004, 1006 (1st Dist. 1994); *Frank's Maint. & Eng'g, Inc. v. C. A. Roberts Co.*, 86 Ill. App. 3d 980, 990-92, 408 N.E.2d 403, 410-11 (1st Dist. 1980).

Rather than focusing on these facts, plaintiff asserts that the arbitration provision is procedurally unconscionable because it was presented to plaintiff "on a 'take-it-or-leave-it' basis" (Appellee's Br. 44), and because "[n]othing on the *front* of the Contract indicates Cingular will force Plaintiff to arbitrate disputes" (*id.* at 45 (emphasis added)). The cases she herself cites demonstrate that this is incorrect, however. Both of these facts were also true in *Larned*, in which the provision in dispute was contained in a form credit-card agreement. See *Larned*, 264 Ill. App. 3d at 699, 636 N.E.2d at 1005. And as we explained in our opening brief (at 48), the only reason the *Frank's* court found a term printed on the back of a contract to be procedurally unconscionable was that the clause directing the plaintiff to examine the reverse side of that contract "was stamped over, indicating that legend was irrelevant." 86 Ill. App. 3d at 991-92, 408 N.E.2d at 411. Here, by contrast, plaintiff specifically initialed an acknowledgment that there were additional terms and conditions on the reverse side of her contract, and signed the contract below an acknowledgment that she had read and understood those terms. Under these facts, there is nothing procedurally unconscionable about the parties' contract.

Plaintiff also states that "[t]he reverse side of *the copy* of the contract Cingular gave [her] was blank." Appellee's Br. 44-45 (emphasis added). Plaintiff did not raise this

issue in opposition to our Renewed Motion to Compel and to Stay Litigation Pursuant To the Federal Arbitration Act (*see* A48-90), and did not include this ground in the proposed order she tendered to the circuit court and that the circuit court proceeded to sign. Accordingly, she has waived it. *See, e.g., W. Cas. & Surety Co. v. Brochu*, 105 Ill. 2d 486, 500, 475 N.E.2d 872, 879 (1985) (“It is axiomatic that questions not raised in the trial court are deemed waived and may not be raised for the first time on appeal.”). In any event, she cites to no authority to support the argument that this purported fact renders the arbitration agreement procedurally unconscionable – nor could she, as she does not and cannot deny that the **original** agreement that she examined and signed contained the Terms and Conditions on the reverse side.

Finally, neither of the remaining two cases plaintiff cites (at 44) – *Williams v. Illinois State Scholarship Comm’n*, 139 Ill. 2d 24, 563 N.E.2d 465 (1990), and *Mellon First United Leasing v. Hansen*, 301 Ill. App. 3d 1041, 705 N.E.2d 121 (2d Dist. 1998) – supports the circuit court’s finding of procedural unconscionability. Both cases address forum-selection clauses, which are reviewed for enforceability under criteria materially different from those used to analyze the enforceability of other contractual terms. *See Mellon*, 301 Ill. App. 3d at 1046, 705 N.E.2d at 125 (detailing relevant factors, including “(1) which law governs the formation and construction of the contract; (2) the residency of the parties; (3) the place of execution and/or performance of the contract; (4) the location of the parties and the witnesses participating in the litigation; (5) the inconvenience to the parties of any particular location; and (6) whether the clause was equally bargained for”). Neither case even mentions the term “procedural

unconscionability,” much less analyzes the contract at issue to determine whether it was procedurally unconscionable.

H. 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.

Under the arbitration agreement between the parties, “either party may bring an action *in small claims court*.” See R. C38 (emphasis added). This provision means what it says; under it plaintiff could have brought her action in small claims court – the jurisdiction of which is limited under Supreme Court Rule 281 to claims of \$5,000 or less – paying the \$36 filing fee applicable to her individual claim of \$150 (see R. C135). But plaintiff did not do that; instead she filed a putative nationwide class action in the circuit court, paying the filing fee of \$186 associated with claims of \$15,000.01 and over (see R. C131; Cingular Br. 31). As we explained in our opening brief (at 49-51), this is not authorized under the terms of the contract between the parties, under which the parties agreed to exempt claims brought in *small claims court* from the requirement that all disputes be arbitrated, but did not agree to allow *small claims* to be brought in *any* court.

Plaintiff ignores our argument entirely, simply reiterating the circuit court’s flawed interpretation of the arbitration provision. Mere repetition, however, is not persuasive. Thus – as we observed in our opening brief (at 50) – neither the fact that class actions can be an affordable method of adjudicating small claims (Appellee’s Br. 46-47), nor the fact that the ICFA “was designed and intended to provide redress for small claims” (*id.* at 47 n.11), means that arbitration is not *also* an “effective, expeditious, and cost-efficient method of dispute resolution” (*Salsitz v. Kreiss*, 198 Ill. 2d 1, 13, 761

N.E.2d 724, 731 (2001), *cert. denied*, 535 U.S. 1055 (2002)) for small claims. In any event, the fact that class actions may be cost-effective in some circumstances has no bearing on the interpretation of the parties' contract in this case, under which either party may proceed in small claims court or via arbitration, but under which neither party may bring an action in a court of general jurisdiction.¹²

CONCLUSION

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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¹² As we explained in our opening brief (at 50 n.13), plaintiff is flatly incorrect in asserting (at 46 n.10) that Cingular may bring an action in a court of general jurisdiction. Rather, Cingular, too, is limited to either bringing an action in small claims court or proceeding via arbitration.