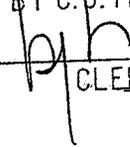


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SUPREME COURT OF THE STATE OF WASHINGTON

**DOUG SCOTT, LOREN TABASINKE, SANDRA TABASINSKE,
PATRICK OISHI, JANET OISHI, et al.,**

Petitioners,

v.

CINGULAR WIRELESS,

Respondent.

PETITIONERS' STATEMENT OF ADDITIONAL AUTHORITIES

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STATEMENT OF ADDITIONAL AUTHORITIES

Pursuant to RAP 10.8, Petitioners submit this statement of additional authorities to provide the Court with the recent decision in *Merritt v. Cingular Wireless LLC*, No. B178747, 2006 WL 2744357 (Cal. Ct. App. Sept. 27, 2006), which held that the class action ban in Cingular's Revised Arbitration Clause renders the clause unconscionable under California law.

First, the *Merritt* court held that the class action ban in Cingular's clause is substantively unconscionable under California law because it would operate as an exculpatory clause, despite terms permitting a customer to bring an action in small claims court and providing that Cingular will pay various costs and attorneys' fees. *Id.* at *5-6. That holding is relevant to Petitioners' argument that Cingular's class action ban is substantively unconscionable under Washington law because it would operate as an exculpatory clause. Opening Br. at 19-29; Reply Br. at 6-8; Mot. for Disc. Rev. at 6-10; Reply in Support of Disc. Rev. at 6-9; Supp. Br. at 8-13.

Second, the *Merritt* court held that the class action ban in Cingular's arbitration clause is substantively unconscionable under California law because it is one-sided. 2006 WL 2744357 at *6. That holding is relevant to Petitioners' argument that Cingular's class action

ban is unconscionable under Washington law because it is one-sided.

Opening Br. at 11–19; Reply Br. at 4–6; *see also* Brief *Amici Curiae* of AARP and National Association of Consumer Advocates at 6–16.

Finally, the *Merritt* court held that Cingular’s arbitration clause is procedurally unconscionable. 2006 WL 2744357 at *6. That holding is relevant to Petitioners’ argument that Cingular’s arbitration clause is procedurally unconscionable. Opening Br. at 43–50; Mot. for Disc. Rev. at 11–13.

Respectfully submitted this 29th September, 2006.

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Briefs and Other Related Documents

Only the Westlaw citation is currently available.
California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

Court of Appeal, Second District, Division 1,
California.

Shannon MERRITT, Plaintiff and Respondent,
v.

CINGULAR WIRELESS LLC, Defendant and
Appellant.

No. B178747.

(Los Angeles County Super. Ct. No. BC307433).

Sept. 27, 2006.

APPEAL from an order of the Superior Court of Los Angeles County, Teresa Sanchez-Gordon, Judge. Affirmed.

Mayer, Brown, Rowe & Maw, Donald M. Falk, Evan M. Tager, David M. Gossett; Weston Benschopf Rochefort Rubalcava & MacCuish, Jesse M. Jauregui, Michele A. Powers and Scott J. Leipzig; for Defendant and Appellant.

Caddell & Chapman, Cynthia B. Chapman; Girard Gibbs & De Bartolomeo, Eric H. Gibbs, Karen L. Hindin and Rosemary M. Rivas for Plaintiff and Respondent.

INTRODUCTION

JACKSON, J.^{FN*}

FN* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

*1 Cingular Wireless LLC (Cingular) appeals from an order denying its motion to compel arbitration. It claims the trial court erred in denying its motion on the ground the provision in Cingular's arbitration clause waiving the right to class action arbitration is unconscionable and therefore unenforceable. We disagree and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Shannon Merritt (Merritt) has been a customer of Cingular or one of its predecessors since August 26, 1999. When Merritt obtained a new wireless phone from Cingular on April 19, 2001, she signed a Wireless Service Agreement (Agreement) that governed her continuing relationship with Cingular. She acknowledged reading the terms of the Agreement and agreeing to be bound by them.

The Terms and Conditions listed in the Agreement begin with the following advisement: "IMPORTANT NOTICE: THIS AGREEMENT CONTAINS MANDATORY ARBITRATION AND OTHER IMPORTANT PROVISIONS LIMITING THE REMEDIES AVAILABLE TO YOU IN THE EVENT OF A DISPUTE. PLEASE REFER TO THE SECTION ENTITLED 'ARBITRATION' FOR DETAILS." In the arbitration provision, Cingular and Merritt "agree[d] to arbitrate any and all disputes and claims ... arising out of or relating to this Agreement, or to any prior Agreement for products or service," or to bring any such claims in small claims court. The Agreement specified that the arbitration would be final and binding, and that the arbitrator could not order consolidation or class arbitration. It further specified that the results of the arbitration could not be disclosed.

In July 2003, pursuant to a provision in the Agreement allowing a change in terms, Cingular sent to each of its direct-billed customers, including Merritt, a revised arbitration provision as an insert in their billing envelopes (Revised Arbitration Provision). This Revised Arbitration Provision became effective upon receipt. It provided that notwithstanding the agreement to arbitrate, either party had the right to bring an action in small claims court.

Under the Revised Arbitration Provision, Cingular agreed to pay "all AAA filing, administration and arbitrator fees," unless the arbitrator found the claim or the relief sought to be frivolous. Cingular also agreed to "reimburse [the customer] for [her] reasonable attorneys' fees and expenses incurred for the arbitration" if the customer recovered the amount of her demand or more. The Revised Arbitration Provision deleted the prohibition against punitive

damages and the requirement that the results of the arbitration be kept confidential. It also provided: "YOU AND CINGULAR MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, and not as a plaintiff or class member in any purported class or representative proceeding. Further, you agree that the arbitrator may not consolidate proceedings or more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding, and if this specific proviso is found to be unenforceable, then the entirety of this arbitration clause shall be null and void...."

*2 On December 9, 2003, Merritt, Samantha Terrazas (Terrazas), and Amanda Byrne (Byrne) filed this action against Cingular and SBC Communications (SBC) as a class and representative action for equitable and injunctive relief. They alleged generally that on their bills, Cingular imposed per-minute roaming and expanded home plan "taxes," which were not taxes imposed by the government but were, in fact, fees going to Cingular and SBC. By disguising these fees as taxes, Cingular and SBC were able to offer their customers deceptively low monthly rates. They alleged that these actions violated the Unfair Competition Law (Bus. & Prof.Code, § 17200 et seq.), the False Advertising Law (*id.*, § 17500 et seq.) and the Consumers Legal Remedies Act (Civ.Code, § 1750 et seq.).

Cingular moved to strike the allegations of the complaint as to Terrazas and Byrne, who were not California residents, and the nationwide class allegations, in that the statutes on which the action was based apply only to California residents. In response, Merritt filed a first amended complaint on April 30, 2004, deleting allegations as to Terrazas, Byrne and SBC, and limiting the putative class to California residents.

On May 17, 2004, Cingular's attorneys mailed a letter to Merritt's attorneys, advising them that Merritt was subject to a binding arbitration agreement and demanding that Merritt dismiss this action and pursue her claims in arbitration. On May 24, 2004, Merritt's attorneys responded that Merritt was not going to pursue her claims in arbitration, in that she believed the arbitration provision in the Agreement was unconscionable and therefore invalid.

Cingular answered the first amended complaint on July 8, 2004. Among its affirmative defenses, it alleged that under the Agreement, Merritt was obligated to submit to individual arbitration.

Then on September 7, 2004, Cingular filed a motion to compel arbitration. Merritt opposed the motion on the grounds the arbitration provision was unconscionable, and her claims for injunctive and declaratory relief were not arbitrable under California law.

The trial court denied the motion to compel arbitration. It based its ruling on *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094 (*Szetela*), which held a similar arbitration provision was unconscionable. Cingular appealed, and the trial court stayed the proceedings pending resolution of the appeal.

DISCUSSION

We begin our analysis with the Supreme Court's recent decision in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 (*Discover Bank*).^{FN1} *Discover Bank* addressed the validity of a provision in an arbitration agreement prohibiting classwide arbitration.

^{FN1} *Discover Bank* was filed in June 2005, after Cingular filed its opening brief in this case. We thus focus on the arguments raised in Cingular's reply brief, which are based on the Supreme Court's decision in *Discover Bank*, rather than those in the opening brief based on the earlier appellate court decision in *Szetela*.

When the plaintiff in *Discover Bank* originally obtained a credit card from the bank, the credit card agreement did not contain an arbitration provision. The bank added an arbitration provision pursuant to a change-of-terms provision in the agreement, by sending notice of the change to its cardholders. (*Discover Bank, supra*, 36 Cal.4th at p. 153.) The arbitration provision stated that in the event of a dispute between the bank and the cardholder, the dispute would be resolved by arbitration; neither party would have the right to litigate the dispute. It also provided that neither party would "be entitled to join or consolidate claims in arbitration by or against other cardmembers with respect to other accounts, or arbitrate any claim as a representative or member of a class or in a private attorney general capacity." (*Id.* at pp. 153-154, emphasis omitted.)

*3 In deciding whether the arbitration provision was

enforceable, the court began its discussion by reviewing the justifications for class action litigation: “ ‘Frequently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all. Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct. A class action by consumers produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims. The benefit to the parties and the courts would, in many circumstances, be substantial.’ ” (*Discover Bank, supra*, 36 Cal.4th at p. 156, quoting from *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 808.)

The “important role of class action remedies in California law ... led [the Supreme Court] to devise the hybrid procedure of classwide arbitration” in *Keating v. Superior Court* (1982) 31 Cal.3d 584. The court noted that “ ‘[d]enial of a class action in cases where it is appropriate may have the effect of allowing an unscrupulous wrongdoer to “retain[] the benefits of its wrongful conduct.” [Citation.] [Moreover,] “[c]ontroversies involving widely used contracts of adhesion present ideal cases for class adjudication; the contracts are uniform, the same principles of interpretation apply to each contract, and all members of the class will share a common interest in the interpretation of an agreement to which each is a party.” ’ ” (*Keating, supra*, 31 Cal.3d at p. 609, fn. omitted.)” (*Discover Bank, supra*, 36 Cal.4th at p. 157.) Inasmuch as the parties in *Keating* were bound by an arbitration agreement, the court held that the arbitration could be conducted on behalf of a class. (*Ibid.*)

The arbitration agreement in *Keating* was silent on the issue of classwide arbitration, so the court did not discuss the validity of a waiver of the right to classwide arbitration. (*Discover Bank, supra*, 36 Cal.4th at p. 158.) Other courts addressed the issue, however. *Discover Bank* points out that in the later case of *America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, the court refused to enforce a choice of law provision because the forum state did not permit consumer class action lawsuits. *America Online* was based on a provision in the Consumers

Legal Remedies Act (CLRA) that a consumer waiver of the provisions of the CLRA was unenforceable and void. (*Discover Bank, supra*, at p. 158, citing *America Online, Inc., supra*, at pp. 15-16.) The importance of consumer class action lawsuits is so high that “ ‘the elimination of class actions for consumer remedies if the forum selection clause is enforced is ... sufficient in and by itself to preclude enforcement of the ... forum selection clause.’ ” (*Discover Bank, supra*, at p. 159, quoting *America Online, Inc., supra*, at p. 18.)

*4 The Supreme Court then reviewed the *Szetela* case, in which the court held that a classwide arbitration waiver was unenforceable. (*Discover Bank, supra*, 36 Cal.4th at p. 159.) This holding was based on a finding that the arbitration waiver was unconscionable. The *Szetela* court “found procedural unconscionability in the adhesive nature of the contract.” (*Discover Bank, supra*, at p. 159, citing *Szetela, supra*, 97 Cal.App.4th at p. 1100.) It “also found substantive unconscionability in the imposition of a one-sided and oppressive class action waiver provision. “This provision is clearly meant to prevent customers, such as *Szetela* and those he seeks to represent, from seeking redress for relatively small amounts of money, such as the \$29 sought by *Szetela*. Fully aware that few customers will go to the time and trouble of suing in small claims court, *Discover* has instead sought to create for itself virtual immunity from class or representative actions despite their potential merit, while suffering no similar detriment to its own rights. [¶] ... The clause is not only harsh and unfair to *Discover* customers who might be owed a relatively small sum of money, but it also serves as a disincentive for *Discover* to avoid the type of conduct that might lead to class action litigation in the first place. By imposing this clause on its customers, *Discover* has essentially granted itself a license to push the boundaries of good business practices to their furthest limits, fully aware that relatively few, if any, customers will seek legal remedies, and that any remedies obtained will only pertain to that single customer without collateral estoppel effect. The potential for millions of customers to be overcharged small amounts without an effective method of redress cannot be ignored. Therefore, the provision violates fundamental notions of fairness. [¶] ... This is not only substantively unconscionable, it violates public policy by granting *Discover* a “get out of jail free” card while compromising important consumer rights.’ ” (*Discover Bank, supra*, at pp. 159-160, quoting from *Szetela, supra*, at p. 1101.)

The Supreme Court “agree[d] that at least some class action waivers in consumer contracts are unconscionable under California law. First, when a consumer is given an amendment to its cardholder agreement in the form of a ‘bill stuffer’ that he would be deemed to accept if he did not close his account, an element of procedural unconscionability is present. [Citation.] Moreover, although adhesive contracts are generally enforced [citation], class action waivers found in such contracts may also be substantively unconscionable inasmuch as they may operate effectively as exculpatory contract clauses that are contrary to public policy. As stated in Civil Code section 1668: ‘All contracts *which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.*’ (Italics added.)

*5 “Class action and arbitration waivers are not, in the abstract, exculpatory clauses. But because, as discussed above, damages in consumer cases are often small and because ‘[a] company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit’ [citation], ‘the class action is often the only effective way to halt and redress such exploitation.’ [Citation.] Moreover, such class action or arbitration waivers are indisputably one-sided. ‘Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover [Bank], because credit card companies typically do not sue their customers in class action lawsuits.’ [Citation.] Such one-sided, exculpatory contracts in a contract of adhesion, at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable.” (Discover Bank, supra, 36 Cal.4th at pp. 160-161.)

The Supreme Court stopped short of holding “that all class action waivers are necessarily unconscionable.” (Discover Bank, supra, 36 Cal.4th at p. 162.) It concluded, however, that “when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the

exemption of the party ‘from responsibility for [its] own fraud, or willful injury to the person or property of another.’ (Civ.Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced.” (Discover Bank, supra, at pp. 162-163.)

Cingular acknowledges that we are bound by the Supreme Court’s decision in Discover Bank (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.) It argues, however, that “the particular circumstances surrounding [its] arbitration provision distinguish it from Discover Bank’s arbitration provision and necessitate its enforcement.”

It is true that Cingular’s arbitration provision contains terms favorable to its customers. The Revised Arbitration Provision allows the customers the option of bringing an action in small claims court. Cingular agrees to pay “all AAA filing, administration and arbitrator fees,” unless the arbitrator finds the claim or the relief sought to be frivolous. Cingular also agrees to “reimburse [the customer] for [her] reasonable attorneys’ fees and expenses incurred for the arbitration” if the customer recovers the amount of her demand or more. In the abstract, the provision does not appear to be substantively unconscionable. It does not appear to contain “‘an allocation of risks or costs which is overly harsh or one-sided and is not justified by the circumstances in which the contract was made.’” (Samura v. Kaiser Foundation Health Plan, Inc. (1993) 17 Cal.App.4th 1284, 1296; accord, Discover Bank, supra, 36 Cal.4th at p. 160.)

*6 In reality, however, the arbitration provision operates as an exculpatory clause in Cingular’s favor where, as here, the customer complaint involves allegations of a business practice that results in small losses to individual customers but huge profits to the company. For example, Merritt alleged that she was assessed \$1.78 in “roaming taxes” for the billing period ending January 24, 2001, and \$1.36 in “roaming taxes” for the billing period ending February 24, 2001. If these figures are average for a month of services, her annual losses would be less than \$24. Even with Cingular paying the fees for arbitration or a small claims action, the vast majority of customers are not likely to take the time and trouble necessary to pursue either one for such a small sum. (See Discover Bank, supra, 36 Cal.4th at p. 159.) Cingular can pay off the few customers who challenge the charges and continue to “‘reap a handsome profit’” “‘from its practices. (Id. at p. 161.) Thus, a “‘class action is ... the only effective way to halt and redress such exploitation.” “‘(Ibid.)

Additionally, as in *Discover Bank*, the prohibition on classwide arbitration is one-sided. Cellular service providers, like credit card companies, “typically do not sue their customers in class action lawsuits.” [Citation.] Such one-sided, exculpatory contracts in a contract of adhesion, at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable.” (*Discover Bank, supra*, 36 Cal.4th at p. 161.)

There also is an element of procedural unconscionability in the arbitration provision. Procedural unconscionability arises from unequal bargaining power, resulting in no real negotiation and an absence of meaningful choice. (*Crippen v. Central Valley RV Outlet* (2004) 124 Cal.App.4th 1159, 1165.) The original arbitration provision here was part of a form Agreement, presented to the customer on a “take it or leave it” basis with no opportunity for negotiation of the terms. The Revised Arbitration Provision was sent to the customer “in the form of a ‘bill stuffer’ “ and was automatically made a part of the Agreement, with no opportunity for customer negotiation or response. The arbitration provision thus is “a contract of adhesion and, hence, procedurally unconscionable.” (*Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.* (2001) 89 Cal.App.4th 1042, 1053-1054; *Crippen, supra*, at p. 1165.)

The instant case therefore falls squarely within the holding of *Discover Bank*. The classwide arbitration waiver “is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, ... it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, ... [and] the waiver becomes in practice the exemption of [Cingular] ‘from responsibility for [its] own fraud, or willful injury to the person or property of another.’ (Civ.Code, § 1668.) Under these circumstances, [the waiver is] unconscionable under California law and should not be enforced.” (*Discover Bank, supra*, 36 Cal.4th at pp. 162-163.)

*7 Cingular nonetheless argues that section 2 of the Federal Arbitration Act preempts “an across-the board rule that class-action prohibitions are substantively unconscionable under California law because that rule does not apply equally to all contracts.” This section provides that “[a]n agreement

to arbitrate is valid, irrevocable, and enforceable, as a matter of federal law, [citation], ‘save upon such grounds as exist at law or in equity for the revocation of any contract.’ “ (*Perry v. Thomas* (1987) 482 U.S. 483, 492-493, fn. 9, italics omitted, quoting from 9 U.S.C. § 2.)

Discover Bank does not establish “an across-the board rule that class-action prohibitions are substantively unconscionable under California law.” It holds that a waiver of classwide arbitration may be held unconscionable and unenforceable under certain circumstances. (*Discover Bank, supra*, 36 Cal.4th at pp. 162-163.) Additionally, the principles applied in reaching that conclusion apply to any contract, not only contracts to arbitrate. (See *id.* at pp. 158-159; *America Online, Inc. v. Superior Court, supra*, 90 Cal.App.4th at pp. 15-16.) Cingular's preemption argument thus is without merit.

The Revised Arbitration Provision here specifically provides: “You and Cingular may bring claims against the other only in your or its individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding. Further, you agree that the arbitrator may not consolidate proceedings or more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding, and if this specific proviso is found to be unenforceable, then the entirety of this arbitration clause shall be null and void.” (Emphasis omitted.) Inasmuch as the classwide arbitration waiver is unenforceable, the arbitration provision is void. The trial court therefore did not err in denying Cingular's motion to compel arbitration.

The order is affirmed.

We concur: MALLANO, Acting P.J. and VOGEL, J.
Cal.App. 2 Dist., 2006.
Merritt v. Cingular Wireless LLC
Not Reported in Cal.Rptr.3d, 2006 WL 2744357
(Cal.App. 2 Dist.)

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• [B178747](#) (Docket) (Oct. 18, 2004)

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