No. 100925

IN THE SUPREME COURT OF ILLINOIS

DONNA M. KINKEL,	)	On Appeal from the
	)	Illinois Appellate Court,
Plaintiff-Appellee	)	Fifth District, No. 5-03-0774
	)	
v.	)	Circuit Court of Madison
	)	County, Third Judicial District
CINGULAR WIRELESS LLC,	)	No. 02 L 1087
	)	Hon. Phillip J. Kardis,
Defendant-Appellant.	)	Judge, Presiding

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT CINGULAR WIRELESS LLC

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
Tel: (202) 463-5337
Fax: (202) 463-5346

Marci A. Eisenstein
Aphrodite Kokolis
SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, Illinois 60606
Tel: (312) 258-5500
Fax: (312) 258-5600

Attorneys for the *Amicus Curiae*

Dated: December 28, 2005

The Chamber of Commerce of the United States of America (the "Chamber") respectfully moves for leave to file a Brief *Amicus Curiae* in support of Defendant-Appellant Cingular Wireless LLC ("Cingular"). In support of this Motion, the Chamber states:

1. On December 5, 2005, the Chamber moved for leave to file a Brief *Amicus Curiae* in support of Cingular's appeal. On December 19, 2005, this Court entered an Order denying the Chamber's motion "without prejudice to submit a motion that complies with Supreme Court Rule 345 as amended December 6, 2005." The Chamber submits this revised Motion and Brief *Amicus Curiae* in compliance with the Court's Order.

2. The Chamber is the world's largest business federation, representing an underlying membership of more than 3,000,000 businesses and organizations of every size. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases that have raised issues of vital concern to the nation's business community.

3. Many of the Chamber's members, constituent organizations, and affiliates have adopted as standard features of their business contracts provisions that mandate the arbitration of disputes arising from or related to those contracts. They use arbitration because it is a prompt, fair, inexpensive, and effective method of resolving

disputes with consumers and other contracting parties. Many of those advantages would be forfeited if the class action device were superimposed on arbitration. As a result, arbitration agreements, like the one at issue here, frequently preclude the parties from seeking to arbitrate their disputes on a classwide basis.

4. The court below purported to apply Illinois "unconscionability" principles to invalidate a class action waiver in an arbitration provision that is employed by thousands of businesses in a variety of fields. Intrusion into the private contracting process is of great concern to the Chamber, many of whose members have implemented or are planning to implement arbitration programs in reliance on the heretofore settled premise that arbitration agreements governed by the Federal Arbitration Act will be enforced as written. Because the decision below would wreak havoc with countless arbitration provisions in contracts entered into by the Chamber's members, the Chamber has a strong interest in having its views on the validity of these provisions considered by this Court.

5. Furthermore, the Chamber's knowledge of and real-world experience with consumer arbitrations, developed over the course of many years, will assist the Court in its determination of Cingular's appeal in this matter. Indeed, the Chamber has filed *amicus curiae* briefs in numerous courts throughout the country, including this Court and the United States Supreme Court, on the issue of the enforceability of arbitration provisions. See, e.g., Borowiec v. Gateway 2000, Inc., 209 Ill. 2d 376, 808 N.E.2d 957 (2004); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003); PacifiCare Health Sys., Inc. v. Book, 538 U.S. 401 (2003).

6. The court below made a number of pronouncements regarding, among other things, the alleged costs and benefits of consumer arbitrations, the alleged "unhelpful[ness]" of alternatives to classwide dispute resolution, the economic realities of individual arbitration *versus* class litigation or arbitration, and the procedures applicable to arbitrations conducted by the American Arbitration Association (the institution selected in Cingular's arbitration provision). The appellate court also concluded that arbitrators had the institutional capability and contractual authority to determine whether class arbitration would be a "more convenient and efficient" means of resolving consumer disputes like the one at issue here. Kinkel v. Cingular Wireless LLC, 357 Ill. App. 3d 556, 828 N.E.2d 812, 819-24 (5th Dist. 2005).

7. The Chamber strongly disagrees with the appellate court's underlying assumptions and ultimate conclusions about individual and class arbitration, and submits that its experience in these matters will assist the Court in this appeal. The Chamber's expertise extends to, among other things, knowledge of the actual benefits and true costs of individual arbitrations of consumer disputes, the procedures applicable to such arbitrations (including those available with the American Arbitration Association), and the effect on businesses and consumers alike -- indeed, on the future of arbitration itself -- of the appellate court's unilaterally imposing cumbersome class action procedures on what was intended to be a streamlined individual arbitration.

WHEREFORE, the Chamber of Commerce of the United States of America respectfully requests that the Court grant this Motion and permit the Chamber to file its Brief *Amicus Curiae* in support of Defendant-Appellant Cingular Wireless LLC.

Date: December 28, 2005

Respectfully submitted,

Aphrodite Kokolis

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
Tel: (202) 463-5337
Fax: (202) 463-5346

Marci A. Eisenstein
Aphrodite Kokolis
SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, Illinois 60606
Tel: (312) 258-5500
Fax: (312) 258-5600

Attorneys for the *Amicus Curiae*

No. 100925

IN THE SUPREME COURT OF ILLINOIS

DONNA M. KINKEL,	)	On Appeal from the
	)	Illinois Appellate Court,
Plaintiff-Appellee,	)	Fifth District, No. 5-03-0774
	)	
v.	)	Circuit Court of Madison
	)	County, Third Judicial District
CINGULAR WIRELESS LLC,	)	No. 02 L 1087
	)	Hon. Phillip J. Kardis,
Defendant-Appellant.	)	Judge, Presiding

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLANT CINGULAR WIRELESS LLC

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
Tel: (202) 463-5337
Fax: (202) 463-5346

Marci A. Eisenstein
Aphrodite Kokolis
SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, Illinois 60606
Tel: (312) 258-5500
Fax: (312) 258-5600

Attorneys for the *Amicus Curiae*

Dated: December 28, 2005

POINTS AND AUTHORITIES

INTEREST OF THE *AMICUS CURIAE*/ASSISTANCE TO THE COURT

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of more than 3,000,000 businesses and organizations of every size. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases that have raised issues of vital concern to the nation's business community.

Many of the Chamber's members, constituent organizations, and affiliates have adopted as standard features of their business contracts provisions that mandate the arbitration of disputes arising from or related to those contracts. They use arbitration because it is a prompt, fair, inexpensive, and effective method of resolving disputes with consumers and other contracting parties. Many of those advantages would be forfeited if the class action device were superimposed on arbitration. As a result, arbitration agreements, like the one at issue here, frequently preclude the parties from seeking to arbitrate their disputes on a classwide basis. Because the appellate court's application of Illinois "unconscionability" principles to invalidate the class action waiver in Cingular's arbitration clause would wreak havoc with countless arbitration provisions in contracts entered into by the Chamber's members, the Chamber has a strong interest in having its views on the validity of these provisions considered by the Court.

Furthermore, the Chamber's knowledge of and real-world experience with consumer arbitrations, developed over the course of many years, will assist the Court in its determination of Cingular's appeal in this matter. The court below made a number of pronouncements regarding, among other things, the alleged costs and benefits of consumer arbitrations, the alleged "unhelpful[ness]" of alternatives to classwide dispute resolution, the economic realities of individual arbitration *versus* class litigation or arbitration, and the procedures applicable to arbitrations conducted by the American Arbitration Association (the institution selected in Cingular's arbitration provision). The appellate court also concluded that arbitrators had the institutional capability and contractual authority to determine whether class arbitration would be a "more convenient and efficient" means of resolving consumer disputes like the one at issue here. Kinkel v. Cingular Wireless LLC, 357 Ill. App. 3d 556, 828 N.E.2d 812, 821 (5th Dist. 2005).

The Chamber strongly disagrees with the appellate court's underlying assumptions and ultimate conclusions about individual and class arbitration, and submits that its experience in these matters will assist the Court in this appeal. The Chamber's expertise extends to, among other things, knowledge of the actual benefits and true costs of individual arbitrations of consumer disputes, the procedures applicable to such arbitrations (including those available with the American Arbitration Association), and the effect on businesses and consumers alike -- indeed, on the future of arbitration itself -- of the appellate court's unilaterally imposing cumbersome class action procedures on what was intended to be a streamlined individual arbitration.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case presents issues of exceptional importance for businesses and consumers alike. The court below invalidated a commonly used contractual provision, governed by the Federal Arbitration Act, that requires the parties to arbitrate disputes on an individual, rather than classwide, basis. The court concluded that the waiver of class action arbitration was "unconscionable" under Illinois law because of the alleged costs of arbitrating Plaintiff's individual claims. Over the objections of both parties, the court struck the prohibition on classwide arbitration and ordered the parties to proceed to arbitration, leaving it to the arbitrator to decide whether it would be "more convenient and efficient" to "handle a class arbitration than to arbitrate [Plaintiff's] claim and perhaps thousands of identical claims through duplicative individual arbitration proceedings." Kinkel v. Cingular Wireless LLC, 357 Ill. App. 3d 556, 828 N.E.2d 812, 821 (5th Dist. 2005).

The court's decision is squarely in conflict with those of the First District, e.g., Rosen v. SCIL, LLC, 343 Ill. App. 3d 1075, 799 N.E.2d 488 (1st Dist. 2003), appeal denied, 207 Ill. 2d 627, 807 N.E.2d 982 (2004); the Seventh Circuit, e.g., Livingston v. Associates Fin., Inc., 339 F.3d 553 (7th Cir. 2003); and the vast majority of courts that have addressed this issue. See infra pp. 9 - 10. These courts have recognized the strong federal and Illinois policy of enforcing arbitration agreements as written, and have concluded that there is nothing unfair or unconscionable about requiring parties to adhere to the terms of their contract and resolve their dispute through individual arbitration -- a time-tested process recognized for its speed, simplicity, and cost-effectiveness.

The court below also exceeded the limited role assigned to state courts in the regulation of contracts subject to the FAA. As a matter of federal law, arbitration agreements must be enforced according to their terms, unless generally applicable state law doctrines require otherwise. States, therefore, cannot create new or different rules designed specifically with arbitration provisions in mind. In this case, however, there is no generally applicable Illinois law that would require the invalidation of class action waivers in any context other than arbitration. The appellate court's decision effectively creates a new rule of "unconscionability" applicable only to arbitration provisions, and makes the validity of those agreements a matter of a court's ad hoc articulation of law.

The decision below is not only wrong, but entirely unnecessary. The court's rationale for not compelling arbitration in accordance with the terms of the contract -- that individual arbitration will be too expensive -- is belied by the fact that Cingular committed to pay Plaintiff her arbitration costs (unless the arbitrator determines the claim to be frivolous) and to pay her reasonable attorneys' fees if she prevails in arbitration. R. C44, 49-50. The court, however, held that this commitment, found in Cingular's new arbitration provisions, was legally irrelevant because it might not extend "to those the plaintiff seeks to represent." 828 N.E.2d at 822.

In fact, Cingular did make this additional commitment. (R. 8; R. C49-50) But more problematic than the court's misreading of the record is the legal principle it announces: that Illinois courts may disregard the clear and unambiguous terms of an arbitration agreement -- even when all concerns about the supposed "costs" of individual arbitration have been eliminated -- in order to allow a plaintiff to attempt to pursue claims

on behalf of a putative class of persons. The decision betrays a fundamental misunderstanding of the nature of class actions: they are merely procedural vehicles, and cannot vitiate parties' substantive rights, including the federally protected right to arbitrate in accordance with the terms of their contracts. Having agreed to arbitrate her claims on an individual basis, Plaintiff has no "right" to bring her claims as part of a putative class action -- in arbitration or otherwise.

The decision below conflicts with the decisions of another appellate court of this State, as well as the majority of federal courts that have addressed this issue. Furthermore, the appellate court's rewriting of the parties' arbitration agreement to impose a classwide arbitration process that neither party contemplated or now wants would result in the abandonment of arbitration as a means of resolving disputes. If courts are permitted materially to alter private arbitration agreements governed by the FAA in order to effectuate the courts' notions of "convenience and efficiency," parties will be discouraged from arbitrating their disputes at all. There will be no predictability or assurance that the parties' contractual terms will be respected -- notwithstanding the FAA's guarantee that such terms must be enforced as written -- and both consumers and the business community will be deprived of the benefits of arbitration recognized by federal and Illinois law. For all these reasons, the Chamber respectfully requests that the Court reverse the decision below and hold that the class-action waiver in the arbitration provision at issue is valid and enforceable.

ARGUMENT

I. AGREEMENTS THAT REQUIRE INDIVIDUAL, RATHER THAN CLASSWIDE, ARBITRATION ARE NOT UNCONSCIONABLE.

A. There Is No Right to Disregard a Contractual Provision Mandating Individual Arbitration in Order to Pursue Claims in a Class Action.

The premise underlying the appellate court's rejection of Cingular's commitment to provide Plaintiff with an essentially cost-free individual arbitration[1] is that Plaintiff has some sort of "right" to attempt to pursue her claims on a classwide basis. There is no such right. The class action is merely a procedural device, and it cannot be employed to deprive parties of their substantive rights, including the federally protected right to arbitrate in accordance with the terms of their arbitration contracts.

The FAA "declared a national policy favoring arbitration." Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 56 (1995) (internal quotations omitted). Illinois law is in accord. See, e.g., Board of Managers of Courtyards at Woodlands Condominium Ass'n v. IKO Chicago, Inc., 183 Ill. 2d 66, 71, 697 N.E.2d 727, 730 (1998). Arbitration, however, is a matter of consent, not coercion. See, e.g., Mastrobuono, 514 U.S. at 57. The FAA is "at bottom a policy guaranteeing the enforcement of private contractual arrangements," EEOC v. Waffle House, Inc., 534 U.S. 279, 294 (2002) (internal quotations omitted), and its "principal purpose" is to "ensur[e] that private arbitration agreements are enforced according to their terms," Volt Info.

[1] Because Cingular has committed to paying Plaintiff's arbitration fees, the supposed "cost" of arbitration is a moot point. See, e.g., Livingston v. Associates Fin., Inc., 339 F.3d 553, 557 (7th Cir. 2003) ("[T]he 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).

Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr. Univ., 489 U.S. 468, 478 (1989). "[N]othing in the [FAA] authorizes a court to compel arbitration of any issues . . . that are not already covered in the agreement." Waffle House, 534 U.S. at 289.

In contrast to the longstanding substantive right of a party to arbitrate according to the terms of its contract, the ability to pursue claims for money damages in a class action is merely procedural -- and a relatively recent procedural innovation at that. See Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims."); Stephen C. Yeazell, Group Litigation and Social Context: Toward a History of the Class Action, 77 Colum. L. Rev. 866, 866 (1977) (modern class action is "something out of the ordinary, an essentially new turn in legal events"). In the federal system, modern class action practice did not emerge until 1966, when revisions to Federal Rule of Civil Procedure 23 first provided that money damages judgments would be binding on all class members who did not opt out -- a "most adventuresome innovation," according to the Court. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997). Class actions are an even more recent phenomenon in Illinois, where class action procedures were not codified until 1977. See 735 ILCS 5/2-801 to -806.

Notwithstanding the procedural efficiencies that sometimes can be effected through the class action mechanism -- when properly employed -- a party's substantive right to arbitrate "may not be sacrificed on the altar of efficient class action management." In re Piper Funds, Inc. Inst'l Gov't Income Portfolio Litig., 71 F.3d 298, 303 (8th Cir. 1995). The "procedural device" of a class action "cannot be allowed to

expand the substance of the claims of class members," Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 345 (4th Cir. 1998), or to deprive a defendant of its substantive rights, e.g., Amchem, 521 U.S. at 615. As the Seventh Circuit has held:

> [The] procedural device [of a class action suit] does not entitle anyone to be in litigation; a contract promising to arbitrate the dispute removes the person from those eligible to represent a class of litigants.

Caudle v. American Arb. Ass'n, 230 F.3d 920, 921 (7th Cir. 2000) (emphasis in original); see, e.g., Marsh v. First USA Bank, N.A., 103 F. Supp. 2d 909, 923 (N.D. Tex. 2000) ("Substantive remedies cannot be created by the availability of a class action. The class action is a procedural vehicle implemented to further the goals of judicial economy and uniform resolution of similar claims by multiple parties. . . . [C]lass actions are just that: procedural. . . . [R]ules of procedure 'shall not abridge, enlarge or modify any substantive right.' ") (quoting Amchem, 521 U.S. at 612).

Accordingly, the ability to pursue claims on a classwide basis is "merely a procedural one . . . that may be waived by agreeing to an arbitration clause." Johnson v. West Suburban Bank, 225 F.3d 366, 369 (3d Cir. 2000), cert. denied, 531 U.S. 1145 (2001). "When 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 'procedural niceties' is the possibility of pursuing a class action . . . ." Champ v. Seigel Trading Co., 55 F.3d 269, 276-77 (7th Cir. 1995) (citations and internal quotations omitted).

Permitting parties to waive the ability to pursue classwide resolution of disputes by choosing individual arbitration is therefore neither fundamentally unfair nor

unconscionable. "[P]arties are generally free to structure their arbitration agreements as they see fit," and may "specify by contract the rules under which that arbitration will be conducted." Volt, 489 U.S. at 479. Just as parties to an arbitration agreement may "stipulate to whatever procedures they want," Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994), they may agree to exclude certain remedies and procedures that they do not want, such as class actions.[2]

For these reasons, numerous courts -- including the First District, e.g., Rosen v. SCIL, LLC, 343 Ill. App. 3d 1075, 1082-84, 799 N.E.2d 488, 493-95 (1st Dist. 2003), appeal denied, 207 Ill. 2d 627, 807 N.E.2d 982 (2004); Hutcherson v. Sears Roebuck & Co., 342 Ill. App. 3d 109, 121-24, 793 N.E.2d 886, 894-96 (1st Dist.), appeal denied, 205 Ill. 2d 582, 803 N.E.2d 482 (2003); the Seventh Circuit, e.g., Livingston v. Associates Fin., Inc., 339 F.3d 553, 557 (7th Cir. 2003);[3] and nearly every other federal appellate court to consider the issue -- have enforced arbitration provisions that do not allow for classwide arbitration, holding that there is nothing unfair or unconscionable about requiring parties to proceed to individual arbitration.[4]

---

[2] Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003), is in accord. The Court in Bazzle held that when an arbitration agreement is silent on the issue whether arbitration can proceed on a classwide basis, the arbitrator should interpret the arbitration provision to determine whether the parties actually agreed to allow for classwide arbitration. Id. at 448-53. Thus, the Court reaffirmed the principle that the nature of the arbitration process is a matter of the parties' consent.

[3] The decisions of federal courts -- particularly the Seventh Circuit -- interpreting a federal statute like the FAA are entitled to considerable deference in Illinois courts so that the federal act is given uniform application. Sprietsma v. Mercury Marine, 197 Ill. 2d 112, 119-20, 757 N.E.2d 75, 80 (2001), rev'd on other grounds, 537 U.S. 51 (2002).

[4] Every other federal Court of Appeals to address the issue has so decided, except for the Ninth Circuit. See, e.g., Johnson v. West Suburban Bank, 225 F.3d 366, 369 (3d

The freedom to determine the arbitration procedures applicable to a particular dispute is in large part what distinguishes private arbitration from courtroom litigation. Whereas the parties to an action in court cannot escape the rules governing discovery, evidence, and appeals, by agreeing to arbitrate they intentionally relinquish "the procedures and opportunity for review of the courtroom." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991); see infra pp. 15 - 20. Indeed, what is an arbitration agreement but a waiver of the right to a trial by jury, a right with a far richer pedigree than the right to proceed on a classwide basis? Yet it is well established that arbitration agreements are not unenforceable merely because they waive the right to a jury trial. See, e.g., Herriford v. Boyles 193 Ill. App. 3d 947, 951, 550 N.E.2d 654, 657 (3d Dist. 1990) (arbitration does not abridge constitutional right to jury because parties can waive constitutional rights by agreement).[5]

Cir. 2000), cert. denied, 531 U.S. 1145 (2001); Snowden v. CheckPoint Check Cashing, 290 F.3d 631, 638 (4th Cir.), cert. denied, 587 U.S. 1087 (2002); Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 174-75 (5th Cir. 2004); In re Piper Funds, Inc., 71 F.3d 298, 303 (8th Cir. 1995); Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1375-79 (11th Cir. 2005); Jenkins v. First Am. Cash Advance of Ga., LLC, 400 F.3d 868, 877-78 (11th Cir. 2005). Cf. JLM Indus., Inc. v. Stolt-Nielsen SA, 387 F.3d 163, 179 n.9 (2d Cir. 2004) (federal courts have "consistently enforced arbitration provisions in the context of class action lawsuits"); Burden v. Check Into Cash, 267 F.3d 483, 492 (6th Cir. 2001) (suggesting that class action waiver likely valid), cert. denied, 535 U.S. 970 (2002). But see, e.g., Ting v. AT&T, 319 F.3d 1126 (9th Cir.) (California Legal Remedies Act creates nonwaivable right to class action), cert. denied, 540 U.S. 811 (2003).

[5] Persons can and do waive even fundamental rights all the time:

> As far as we know, the Supreme Court has never held that any entitlement is outside the domain of contract, unless the statute forbids waiver . . . . Every day criminal defendants waive the most fundamental rights, such as the right to jury trial and proof beyond a reasonable doubt,

The court below substituted its own view of procedural fairness and efficiency for Congress' decision to leave the contours of arbitral proceedings to the parties. The court noted that classwide arbitration may be "more convenient and efficient . . . than to arbitrate [Plaintiff's] claim and perhaps thousands of identical claims through duplicative individual arbitration proceedings." 828 N.E.2d at 821. These "efficiency" considerations have no place in the decision to enforce an arbitration provision: "Whatever may be said pro and con about the cost and efficacy of arbitration . . . is for Congress . . . to consider." Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1151 (7th Cir.), cert. denied, 522 U.S. 808 (1997), cited in Borowiec v. Gateway 2000, Inc., 209 Ill. 2d 376, 398, 808 N.E.2d 957, 970-71, cert. denied, 125 S. Ct. 88 (2004). Indeed, the FAA "requires piecemeal resolution when necessary to give effect to an arbitration agreement." Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 20 (1983) (emphasis in original). The FAA "leaves no place for the exercise of discretion"; a court "shall direct the parties to proceed to arbitration," even when "the result would be the possibly inefficient maintenance of separate proceedings in different forums." Dean

---

> in exchange for lower sentences or other benefits. Public employees can and do waive constitutional rights -- including the right of political speech -- in exchange for employment. Political candidates can surrender some of their speech rights in exchange for a federal subsidy. Perhaps, then, telephone users [pursuant to arbitration provisions] can surrender rights to attorneys' fees in return for more immediate benefits, such as lower monthly charges.

Metro E. Center for Conditioning & Health v. Qwest Communications Int'l, Inc., 294 F.3d 924, 928-29 (7th Cir.) (emphasis in original), cert. denied, 537 U.S. 1090 (2002) (citations omitted).

Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217-18, 220-21 (1985) (emphasis in original); see Board of Managers, 183 Ill. 2d at 71, 76, 697 N.E.2d at 730-32 (same).

B. Class Actions Are Not Necessary to Vindicate the Rights of Consumers.

The court below found individual arbitration to be unconscionable because the supposed "costs" of arbitration would leave consumers "without an effective remedy in the absence of a mechanism for class arbitration or litigation." 828 N.E.2d at 820. The procedural device of a class action, however, not only cannot trump the federally protected right to enforce an arbitration provision as written, but it also is not necessary to provide consumers with an "effective remedy" for resolution of their claims.

Wholly apart from the appellate court's improperly discounting Cingular's commitment to pay Plaintiff's arbitration costs,[6] the fact of the matter is that the costs of consumer arbitration have been declining "as arbitration institutions compete to provide low-cost arbitration services." Christopher R. Drahozal, "Unfair" Arbitration Clauses, 2001 U. Ill. L. Rev. 695, 755 (2001). For example, the American Arbitration Association (the institution selected in Cingular's arbitration provision) caps a consumer's responsibility for arbitrator fees at $125 on claims of $10,000 or less; provides for fee

[6] As courts consistently have held, offers to pay the costs of arbitration disposes of any argument that individual arbitration is somehow "unconscionable." See, e.g., Livingston v. Assocs. Fin., Inc., 339 F.3d 553, 557 (7th Cir. 2003) ("[T]he 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). In fact, the Fifth District previously concluded that such offers to pay for the costs of arbitration "moot[s]" any argument that arbitration is unfair or improper. See Zobrist v. Verizon Wireless, 354 Ill. App. 3d 1139, 1146-47, 822 N.E.2d 531, 539 (5th Dist. 2004)

waivers or deferrals in hardship cases; and makes arbitrators available to conduct hearings on a pro bono basis. See American Arbitration Association, Supplementary Procedures for the Resolution of Consumer-Related Disputes (available at http://www.adr.org/sp.asp?id=22014); American Arbitration Association, Administrative Fee Waivers and Pro Bono Arbitrators Services (http://www.adr.org/sp.asp?id=22040). Other arbitral institutions have similar provisions. See, e.g., Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 95 & n.2 (2000) (Ginsburg, J., concurring in part and dissenting in part). With such institutional protections available, there is no need to impose class action procedures on arbitration to protect consumers.

The appellate court's suggestion that consumers with small claims would not be able to retain attorneys to prosecute those claims on an individual basis is likewise misplaced. As an initial matter, under Cingular's arbitration provision, Plaintiff has the option of pursuing these claims in small claims court (R. C38) -- a mechanism long recognized as an efficient and cost-effective alternative to litigation in circuit court. See, e.g., Jenkins v. First Am. Cash Advance of Ga., LLC, 400 F.3d 868, 879 (11th Cir. 2005) (relying in part on option to pursue claims in small claims court in rejecting challenge to class-arbitration waiver); Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 175 n.19 (5th Cir. 2004) (same).

Moreover, there is no reason to believe that individual arbitration will "choke off the supply of lawyers willing to pursue claims." Johnson v. West Suburban Bank, 225 F.3d 366, 374 (3d Cir. 2000), cert. denied, 531 U.S. 1145 (2001). Many consumer protection statutes, like the Illinois Consumer Fraud Act, provide for punitive

damages, costs, and attorneys' fees to a prevailing plaintiff, see 815 ILCS 505/10a -- more than enough incentive for an attorney to take the case. See, e.g., Rosen v. SCIL, LLC, 343 Ill. App. 3d 1075, 1084, 799 N.E.2d 488, 495-96 (1st Dist. 2003), appeal denied, 207 Ill. 2d 627, 807 N.E.2d 982 (2004).

Finally, federal and state regulatory agencies "possess sufficient sanctioning power to provide a meaningful deterrent" to any misconduct. Johnson, 225 F.3d at 369; see also Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991) (noting EEOC's authority to protect employees); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 233 (1987) (noting SEC's policing authority in securities arena). Here, the Federal Communications Commission is statutorily obligated to protect the interests of consumers in the wireless industry. E.g., In re Implementation of Sections 3(n) & 332 of the Communications Act Regulatory Treatment of Mobile Servs., 9 F.C.C.R. 1411 ¶ 176 (1994); In re Personal Communications Indus. Assn's Broadband Personal Communications Servs. Alliance's Pet. for Forbearance for Broadband Personal Communications Servs., 13 F.C.C.R. 16857 ¶¶ 15-16, 26 (1998). Consumers also may submit complaints to the FCC online. See http://www.fcc.gov/cgb/complaints.html. Likewise, the Illinois Attorney General is authorized under the Illinois Consumer Fraud Act to take a variety of remedial measures -- including bringing suit -- to protect consumers against wrongdoing. See 815 ILCS 505/3 - 7.

There is, therefore, no need to resort to class actions -- in litigation or arbitration -- to remedy any perceived wrongs perpetrated upon consumers. To the contrary, when consumer claims are brought in the context of putative class actions, it is

primarily the class action attorneys who benefit, not class members. See, e.g., Jill E. Fisch, Class Action Reform, Qui Tam, and the Role of the Plaintiff, 60 Law & Contemp. Probs. 167, 168 (1997); Susan B. Koniak, Feasting While the Widow Weeps: *Georgine v. Amchem Products, Inc.*, 80 Cornell L. Rev. 1045, 1138-1151 (1995); Susan P. Koniak & George M. Cohen, Under Cloak of Settlement, 82 Va. L. Rev. 1051, 1053-54 (1996).

C. Imposing Classwide Arbitration on Unwilling Parties Would Undermine the Benefits of Arbitration.

Imposing classwide arbitration without the consent of the parties to the arbitration agreement not only would conflict with the consensual basis for arbitration, but it would undermine the very benefits of arbitration for which the parties did contract: its speed, simplicity, and cost-effectiveness.

As this Court has observed: "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." Board of Managers of Courtyards at Woodlands Condominium Ass'n v. IKO Chicago, Inc., 183 Ill. 2d 66, 71, 697 N.E.2d 727, 730 (1998) (internal quotations omitted). Arbitration is particularly "helpful to individuals" because it is a "less expensive alternative to litigation." Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995). Arbitration's cost-effectiveness is due precisely to its informality: arbitration usually is "cheaper and faster than litigation," has "simpler procedural and evidentiary rules," "minimizes hostility and is less disruptive of ongoing and future business dealings among the parties," and is "more flexible in regard to scheduling." H.R. Rep. No. 97-542, 97th Cong., 2d Sess. at 13 (1982), reprinted in 1982

U.S.C.C.A.N. 765, 777; see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (noting superior "simplicity, informality, and expedition of arbitration").

Arbitration is able to achieve "speedy, informal, and relatively inexpensive" resolutions of disputes by streamlining or eliminating the cumbersome, time-consuming, and expensive procedural wrangling that characterizes so much of litigation today: complex motion practice, protracted discovery and discovery disputes, often years-long appeals. Class action practice is even more involved. Given the due process considerations implicated when courts attempt to adjudicate the rights of non-parties, the class certification process requires, in addition, searching scrutiny into issues of adequacy of representation, commonality of factual and legal questions, and manageability, among others. See 735 ILCS 5/2-801; Fed. R. Civ. P. 23(b). Once a damages class is certified, moreover, notice to class members, along with an opportunity to opt out of the class, are required to satisfy due process. See 735 ILCS 5/2-803; Fed. R. Civ. P. 23(c). Finally, interlocutory appeals of class certification decisions are now available at the federal and state level. See Ill. S. Ct. R. 306(a)(8); Fed. R. Civ. P. 23(f).

An agreement to resolve disputes through individual arbitration allows the parties to avoid or minimize these procedural complications and resolve their dispute in an efficient and cost-effective manner. But converting an agreement to arbitrate individual disputes into an arbitration of classwide proportions radically alters this calculus. Such disregard of the parties' contractual agreement -- as evidenced by the appellate court's decision below -- "disrupt[s] the negotiated risk/benefit allocation" and

requires the parties to proceed with "a different sort of arbitration." Champ v. Siegel Trading Co., 55 F.3d 269, 275 (7th Cir. 1995) (internal quotations omitted).

This "different sort of arbitration" would subject defendants to potential liability on thousands or even millions of claims in one proceeding, and necessarily would require dispensing with the streamlined process of individual arbitration originally contemplated by the parties. In any case in which arbitration is conducted on an all-or-nothing, classwide basis, arbitration's simplicity and informality would become a thing of the past, as teams of lawyers engage in all-out war. For starters, with so much at stake, arbitrator selection would demand as many resources as jury selection now does in large court cases. Arbitral finality would be replaced by endless appeals -- which, given the limited standard of appellate review applicable to arbitration orders (see 9 U.S.C. § 10), likely would be ineffective to rectify errors made by arbitrators inexperienced in class action law. See infra p. 19. To prepare for these appeals, parties would have to arrange for transcription of hearings and request written opinions (instead of the usual bare-bones awards), further driving up costs and arbitrator fees. Moreover, the transaction costs of drafting arbitration agreements also would increase dramatically. If class action and other litigation procedures were to become the default, lengthy negotiations over whether to include or exclude specific procedures would become the norm. Refusing to enforce a contractual ban on classwide arbitrations, therefore, would sweep complex extracontractual issues (class action criteria and other litigation procedures), strangers to the contract (thousands or even millions of absent putative class members), and

constitutional due process considerations into what was supposed to be a fast and economical individual arbitration.

Consumers and businesses alike will pay the price if arbitration is effectively transformed into litigation, with its attendant costly procedures. E.g., Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594 (1991) (restricting forums in which cruise line may be sued leads to reduced fares for passengers). But the detrimental impact of imposing class action procedures on arbitration would extend beyond cost. The control that parties now have over the shape of arbitral proceedings would be all but impossible once the door is opened for the class action bar. Parties now may agree on virtually every aspect of arbitration, from the scope of discovery, to the admissibility of evidence, to the nature of witness testimony, to the site of the hearing. Class actions, by contrast, "tend to be run by, and for the benefit of, the plaintiffs' attorneys," so individual claimants would have to cede their control to class action attorneys. See Drahozal, supra p. 12, at 754. And it is no secret that class action lawyers often put their own interests ahead of those of class members, as in "coupon" settlements that provide little benefit to anyone but lawyers. See Christopher R. Leslie, A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation, 49 U.C.L.A. L. Rev. 991, 993 (2002).

Moreover, classwide arbitration would entail a significantly greater degree of judicial involvement than is normal in arbitration, not only because so much would be at stake, but also because the rights of absent class members must be protected. See, e.g., Developments in the Law -- Class Action, 89 Harv. L. Rev. 1373, 1389 (1976) ("In the

class action, because of manageability problems, the potential for abuse, and the need to protect absentees, judicial control is both explicit and more pervasive.").

It is no answer that arbitrators can supervise class actions as readily as courts. In many respects, arbitral authority is limited. The permissible scope of arbitral subpoenas, for example, is a controversial issue on which the courts are divided. Compare In re Securities Life Ins. Co., 228 F.3d 865, 870-71 (8th Cir. 2000) (enforceable) with COMSAT Corp. v. National Science Found., 190 F.3d 269, 270 (4th Cir. 1999) (not enforceable). Furthermore, the management of large class actions is a time-consuming, costly, and complex process even when managed by experienced trial judges, much less by arbitrators, who typically lack the case-management skills and experience that trial judges develop from handling class actions. And any errors committed by these inexperienced arbitrators likely would go unremedied on appeal, given the restrictive standard of appellate review of arbitration orders. 9 U.S.C. § 10.

Moreover, arbitrators are generally paid by the hour or day or by the amount at issue and, therefore, unlike judges, may have a financial incentive to expand the scope of proceedings before them, leading to certifications of inappropriate classes. Courts inevitably would be called upon to keep arbitrators in check. Such judicial involvement would multiply proceedings, generate attorneys' fees, and "impose[] costs on consumers." Stephen J. Ware, Paying the Prices of Process: Judicial Regulation of Consumer Arbitration Agreements, 2001 J. Disp. Resol. 89, 90. As the Supreme Court has stated, constructions of the FAA that foster the "costs and delays" of litigation should be avoided as inconsistent with the goals of arbitration. Allied-Bruce, 513 U.S. at 281.

The loss or reduction of these benefits would reduce parties' incentives to agree to arbitrate disputes in the first place. If companies are subject to class actions whether they litigate or arbitrate, many will choose to litigate to obtain the greater procedural protections available in court, including effective appellate review. Selecting the reduced formalities of arbitration would be hard to justify with millions of dollars worth of claims subject to resolution at one fell swoop.

As a result of the court's decision, arbitration would not be improved, but destroyed, by imposing upon it procedures suitable only for litigation. The inevitable result will be to move the resolution of consumer disputes out of arbitration and into the courts. At bottom, then, it is arbitration itself, not the lack of class procedures, that the appellate court found objectionable. But Congress rejected that viewpoint by making agreements to arbitrate individually "valid, irrevocable, and enforceable." 9 U.S.C. § 2.

If classwide arbitration procedures have some benefits in some contexts, parties will agree to them. As demonstrated above, however, in the run of cases, class treatment is inimical to arbitration and, if imposed on arbitral agreements not calling for such treatment, effectively would nullify those agreements in the face of strong federal and state policies favoring arbitration. The deterrence of arbitration, which inevitably would follow upon a mandate to arbitrate on a classwide basis, would flatly violate the contrary public policies of the United States and Illinois. That -- not the parties' agreement to arbitrate without using the class action device -- would be unconscionable.

II. COURTS CANNOT FORCE CLASSWIDE ARBITRATION, CONTRARY TO THE TERMS OF THE PARTIES' ARBITRATION AGREEMENT, UNDER THE GUISE OF APPLYING STATE LAW PRINCIPLES OF "UNCONSCIONABILITY."

The appellate court's reliance on purported "unconscionability" principles of Illinois law to invalidate the parties' contractual prohibition on classwide arbitration likewise conflicts with the federal mandate embodied in the FAA: that arbitration agreements be interpreted and enforced in the same manner as other contracts.

The FAA aims "to put arbitration provisions on the same footing as a contract's other terms." Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 275 (1995) (internal quotations omitted). To that end, the FAA provides that "[a] written provision . . . to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Absent even-handed application of state law principles that would invalidate any other contract, an agreement to arbitrate must be enforced in accordance with its terms as a matter of federal law. See, e.g., Perry v. Thomas, 482 U.S. 483, 492-93 (1987).

Thus, state law principles of "unconscionability" cannot serve to invalidate an arbitration agreement if they subject arbitration clauses to scrutiny not applied to other contracts:

> 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. Even when using doctrines of general applicability, state courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny.

Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 167 (5th Cir. 2004). A court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot." Perry, 482 U.S. at 493 n.9. A state cannot "decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 686 (1996).

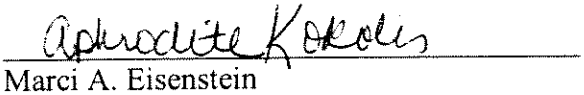
The court below, however, did just that: it created a brand new doctrine of Illinois "unconscionability" law designed specifically to single out and invalidate an arbitration provision. The court disclosed no Illinois law that invalidates or even disfavors class action waivers in other, non-arbitration contexts. The court's decision, therefore, is flatly contrary to the Supreme Court's admonition that state law principles may be used to invalidate arbitration clauses only if they "arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." Perry, 482 U.S. at 493 n.9 (emphasis added); e.g., American Gen'l Life & Accident Ins. Co. v. Wood, No. 04-2252, 429 F.3d 83, 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].").

CONCLUSION

The *Amicus Curiae* respectfully requests that the Court reverse the decision below and hold that the class-action waiver in the arbitration provision at issue is valid and enforceable.

Date: December 28, 2005

Respectfully submitted,



Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
Tel: (202) 463-5337
Fax: (202) 463-5346

Marci A. Eisenstein
Aphrodite Kokolis
SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, Illinois 60606
Tel: (312) 258-5500
Fax: (312) 258-5600

Attorneys for the *Amicus Curiae*