NO. 77406-4

SUPREME COURT OF THE STATE OF WASHINGTON

DOUG SCOTT, LOREN TABASINKE, SANDRA TABASINKE, et al.,

Appellants,

v.

CINGULAR WIRELESS, LLC,

Respondent.

BRIEF OF *AMICUS CURIAE* ATTORNEY GENERAL OF WASHINGTON IN SUPPORT OF APPELLANTS

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I. INTEREST OF AMICUS

Amicus Curiae is the Attorney General of Washington. The Attorney General's constitutional and statutory powers include the submission of amicus curiae briefs on matters that affect the public interest.[1] This case concerns whether Washington's courts should enforce arbitration agreements in consumer contracts of adhesion[2] when the consequences of doing so would preclude consumers from proceeding as a class to enforce the Washington Consumer Protection Act (CPA), chapter 19.86 RCW. This question affects the public interest because it will influence the extent to which the CPA protects consumers from unfair and deceptive acts or practices in the market place.

The Attorney General is authorized to protect Washington consumers and businesses from unfair and deceptive acts or practices in trade or commerce.[3] As the state agency charged with directly enforcing the CPA, the Attorney General has an interest in the development of CPA case law in Washington. The Legislature intends that the Attorney General will have the opportunity to participate in such cases, as

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[1] *See Young Americans for Freedom v. Gorton,* 91 Wn.2d 204, 212, 588 P.2d 195 (1978).

[2] A contract of adhesion is a standard form printed contract, that was prepared by one party and presented to the other on a take it or leave it basis, without true equality of bargaining power. *See Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima*, 122 Wash.2d 371, 393, 858 P.2d 245 (1993). Contracts of adhesion are not unfair or unreasonable *per se*.

[3] RCW 19.86.080.

evidenced by the statutory requirements that the Attorney General be served with any complaint for injunctive relief under the CPA and with any appellate brief that addresses any provision of the CPA.[4]

II. DECISIONS BELOW

The decisions below are *Scott et al. v. Cingular Wireless,* LLC, Order Denying Discretionary Review, No. 55028-4-I (June 21, 2005); and *Scott et al. v. Cingular Wireless, et al.*, King County Superior Court, No. 04-2-04205-4KNT, Order [Granting Defendants' Motion to Compel Arbitration and to Stay Proceedings] (Sept. 10, 2004).

III. ISSUE PRESENTED BY *AMICUS*

Whether an arbitration agreement contained in a consumer contract of adhesion that prohibits consumers from maintaining class actions to enforce the CPA is unconscionable and unenforceable?

IV. STATEMENT OF THE CASE

Plaintiffs are Washington residents who entered into contracts with Defendant Cingular Wireless, LLC (Cingular) for wireless telephone service.[5] The contracts were pre-printed, standard form contracts prepared by Cingular.[6] The contracts contained an arbitration provision, which provided that Plaintiffs and Cingular agreed to arbitrate any disputes

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[4] RCW 19.86.095.
[5] Clerk's Papers (CP), at 339, 342.
[6] CP at 1139, 1249.

arising out of or pertaining to the agreement, or to bring any such claims in small claims court.[7]

Some time after the Plaintiffs signed their agreements, Cingular sent Plaintiffs a revised arbitration provision.[8] The revised arbitration provision was sent to Plaintiffs as a "bill stuffer."[9]

Cingular's arbitration agreement contains the following prohibition on class actions:

> You and Cingular agree that 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 that . . . if this specific proviso is found to be unenforceable, then the entirety of this arbitration shall be null and void.[10]

The Plaintiffs brought a class action in King County Superior Court, contending that Cingular wrongfully charged them for long distance and "roaming."[11] Among other causes of action, the Plaintiffs alleged that Cingular violated the CPA.[12]

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[7] CP at 345.
[8] CP at 352.
[9] CP at 355-56.
[10] CP at 355-56.
[11] CP 18. "Roaming" occurs when a subscriber of one wireless service provider uses the facilities of another wireless service provider. *Id.*
[12] CP 25-26.

Cingular moved to dismiss the complaint and compel arbitration.[13] The trial court granted Cingular's motion.[14] The plaintiffs filed a motion for discretionary review with the Court of Appeals, which was denied.

V. ARGUMENT

A. Consumer Class Actions Under the CPA Further an Important Public Interest.

The CPA's purpose "is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition."[15] Washington courts shall liberally construe the CPA to serve its beneficial purposes.[16]

When the CPA was enacted in 1961, the Attorney General had sole authority to enforce its provisions.[17] In 1971, the Legislature responded to the need for additional enforcement capabilities by providing for "a private right of action whereby individual citizens would be encouraged to bring suit to enforce the CPA."[18] This Court has held that the purpose of the private right of action is "to enlist the aid of private individuals . . . to

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[13] CP 39.

[14] CP 1870-71.

[15] RCW 19.86.920; *see also Fisher v. World Wide Trophy*, 15 Wn. App. 742, 747, 551 P.2d 1398 (1976)(purpose of the CPA is to protect the public by prohibiting and eliminating injurious acts or practices).

[16] RCW 19.86.920.

[17] *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 783-84, 719 P.2d 531 (1986).

[18] *Id.* at 784.

assist in the enforcement of the [CPA]."[19] In order to prevail in a private right of action under the CPA, consumers must show that the acts or practices complained of affect the public interest.[20] Thus, the CPA is not a vehicle for resolving purely private disputes.[21] When consumers bring a private CPA action, they represent the public interest.

This Court has held that a private consumer may obtain injunctive relief in addition to recovering damages in a private CPA action, even if the injunction would not directly affect the consumer's private interests.[22] The Court also held that allowing private consumers to enjoin future violations of the CPA serves the public interest by preventing fraudulent practices from continuing unchecked.[23]

The private consumer action is a vital feature of the CPA. Therefore, Washington courts should refrain from enforcing arbitration agreements that would impair Washington citizens' ability to bring private CPA actions because doing so would undermine the dual enforcement scheme the Legislature intended and the efficacy of the CPA as a means to a fair and honest market place.

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[19] *Lightfoot v. MacDonald*, 86 Wash. 2d 331, 335-36, 544 P.2d 88 (1976).
[20] *Hangman* Ridge, 105 Wash. 2d at 788.
[21] *Id.* at 790.
[22] *Hockley v. Hargitt*, 82 Wash. 2d, 337, 349-50, 510 P.2d 1123 (1973).
[23] *Id.* at 350.

As this Court has noted, class actions serve an important function in our justice system.[24] Class actions facilitate judicial economy because they resolve individual claims in a single action, and they avoid repetitious and possibly inconsistent results.[25] Class actions also improve access to justice because they "establish effective procedures for redress of injuries for those whose economic position would not allow individual lawsuits."[26] Where, as here, consumers have nominal individual damages, a class action may be their only effective redress.[27] Otherwise, consumers "might not consider it worth the candle" to pursue their claims.[28]

The class action also plays an important role in the vitality of consumer protection law:

> 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 [are] 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

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[24] *Darling v. Champion Home Builders Co.*, 96 Wash. 2d, 706, 638 P.2d 1249 (1982).

[25] *Id.*

[26] *Id.* (*citing* 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE § 1754, at 543 (1972)).

[27] *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339, 100 S.Ct. 1166, 63 L. Ed. 2d 427 (1980).

[28] *Id.* at 338.

> 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.[29]

Consumer class actions further the CPA's purpose because they afford consumers a cost effective opportunity to enforce the CPA that otherwise would not be available to them.

B. Public Policy Favors Arbitration of Disputes So Long as the Arbitral Forum Preserves the Parties' Ability to Vindicate Their Statutory Rights.

It is without question that state and federal policy favors arbitration of disputes.[30] Arbitration allows parties to avoid the formalities, expense, and delays of the court system.[31] An agreement to arbitrate does not require parties to the agreement to forego their statutory rights; rather, it requires them to arbitrate statutory claims rather than resolve them in the courts.[32] The public policy favoring arbitration is defeated where an arbitration agreement operates to deprive a party of a forum for vindicating his or her claims.[33]

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[29] *Vasquez v. Superior Court*, 4 Cal. 3d 800, 808, 94 Cal.Rptr 796, 484 P.2d 964 (1971), *quoted in American Online, Inc. v. Superior Court*, 90 Cal.App.4th 1, 17, 108 Cal.Rptr.2d 699 (2001).

[30] *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 454, 45 P.3d 594 (2002); *see also* 9 U.S.C. § 2.

[31] *Id.*

[32] *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L. Ed. 2d 444 (1985); *Mendez*, 111 Wn. App. at 461-64.

[33] *See Mendez*, 111 Wn. App. at 464-65 (holding that prohibitively high arbitration costs may deprive a party of a forum for vindicating his or her rights; an arbitration agreement that imposes such costs may be unenforceable).

C. An Arbitration Agreement Contained in a Consumer Contract of Adhesion that Precludes Consumers from Bringing Class Actions to Enforce the CPA Is Unconscionable and Unenforceable.

The national policy favoring arbitration of disputes is set forth in the Federal Arbitration Act (FAA).[34] Section 2 of the FAA provides that contractual agreements to resolve through arbitration disputes arising from the contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[35] The strong preference for enforcing arbitration agreements does not mean that contracts containing arbitration provisions are immune from scrutiny under state contract law. This Court has held that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2 [of the FAA]."[36]

Washington law recognizes two kinds of unconscionability, procedural and substantive.[37] Contracts are procedurally unconscionable if a party lacks any meaningful choice in forming the contract; they are substantively unconscionable where a clause or term is one-sided or

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[34] 9 U.S.C §§ 1-16.

[35] 9 U.S.C. § 2.

[36] *See, e.g., Zuver v. Airtouch Communications, Inc.*, 153 Wash. 2d 293, 302, 103 P.3d 753 (2004).

[37] *Id.* at 303.

overly-harsh.[38]

In deciding whether an arbitration agreement is procedurally unconscionable, Washington courts will consider the manner in which the agreement was entered, whether each party had a reasonable opportunity to understand the terms of the agreement, and whether the agreement's important terms were hidden in a maze of fine print.[39] Whether a contract is an adhesion contract is relevant to the inquiry of procedural unconscionability; but an adhesion contract is not procedurally unconscionable *per se*.[40]

Washington courts frequently have analyzed whether various arbitration agreements are substantively unconscionable.[41] For example, in *Zuver v. Airtouch Communications, Inc.*, this Court held that a fee-splitting provision could be substantively unconscionable if it would it would impose prohibitive costs on a party;[42] and that a confidentiality clause was substantively unconscionable because it benefited only one party.[43]

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[38] *See id.*

[39] *Id.* at 304.

[40] *Id.*

[41] *See, e.g., Zuver*, 153 Wash. 2d at 307-19; *Alder v. Fred Lind Manor*, 153 Wash. 2d 331, 351-58, 103 P.3d 773 (2004); *Men dez*, 111 Wn. App. at 461-471.

[42] *Zuver*, 153 Wn. App. at 307-10 (citing *Mendez*, 111 Wn. App. at 461-70).

[43] *Id.* at 312-15 (confidentiality provision in an employment contract benefited only the employer because it limited the employee's ability to prove a pattern of discrimination or take advantage of prior arbitrations).

Amicus contends here that arbitration agreements prohibiting consumers from bringing class actions to enforce the CPA are substantively unconscionable because they are one-sided and overly harsh. Arbitration agreements that prohibit consumers from bringing class actions are substantively unconscionable for the additional reason that they deny consumers an opportunity to enforce the CPA to the detriment of consumers and the public interest. These provisions are procedurally unconscionable where they are contained in contracts of adhesion, and the consumers have no bargaining power or opportunity to negotiate. These contentions are consistent with decisions from other state courts and with the public policy underpinning the CPA.

Other courts have concluded that arbitration agreements can have a detrimental affect on state consumer protection statutes. For example, in *Szetela v. Superior Court*,[44] the California Court of Appeal ruled that an arbitration agreement that prohibited class actions was unconscionable and unenforceable. *Szetela* involved a putative class action against Discover Bank, alleging that the bank engaged in practices that resulted in credit cardholders being charged improper overdraft fees.[45] After the plaintiff had entered into a credit card agreement with Discover, Discover amended

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[44] 97 Cal. App. 4th 1094, 119 Cal.Rptr.2d 862 (2002)(*review denied* Jul. 31, 2002), *cert. denied* 537 U.S. 1226 (2003).

[45] *Id.* at 865.

the agreement to include an arbitration clause that prohibited class actions.[46] Discover notified the plaintiff of that amendment in a bill stuffer.[47] The plaintiffs brought action against Discover on several theories, including fraudulent or negligent misrepresentation and deceptive business practices.[48] Following a unique procedural history that is not relevant here, the California of Appeal considered whether the arbitration agreement was enforceable.

In concluding that the arbitration agreement was procedurally unconscionable, the court characterized the one-sidedness of the provision barring class actions as "blindingly obvious."[49] The court noted that while the class action prohibition was styled as a mutual obligation, the consumer was the only obligated party because it was unlikely that Discover would bring a class action against its cardholders.[50] The court construed the provision as having the purpose of preventing consumers from seeking redress for small amounts of money, and thereby granting Discover "virtual immunity from class or representative actions despite

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[46] *Id.* at 864.
[47] *Id.*
[48] *Id.*
[49] *Id.* at 867.
[50] *Id.*

their potential merit, while suffering no similar detriment to its own rights."[51]

In addition, the court held that the class action prohibition would allow Discover to engage in the kinds of business practices that consumer class actions are effective in curtailing—cases where millions of consumers may be overcharged small amounts of money—and without the availability of the class action, the consumers would have no redress and the unscrupulous businesses would retain unlawful profits.[52] The court found this to be fundamentally unfair.[53]

The court also held that the class action prohibition violated California public policy because it jeopardized consumers' rights to any effective means of litigating Discover's business practices, while at the same time "granting Discover a 'get out of jail free' card."[54]

Recently, the California Supreme Court decided *Discover Bank v. Superior Court*,[55] a case with nearly identical facts as *Szetela*. In holding that the arbitration agreement in *Discover Bank* was unconscionable, the California Supreme Court found an element of procedural unconscionability in that the challenged arbitration agreement was

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[51] *Id.*
[52] *Id.* at 868.
[53] *Id.*
[54] *Id.*
[55] 36 Cal. 4th 148, 30 Cal.Rptr.3d 76 (2005).

provided to cardholders as a bill stuffer, which the cardholder was deemed to accept if he or she did not cancel the account.[56] The court also noted that while adhesion contracts are generally enforced, class action prohibitions contained in them are often substantively unconscionable because "they may operate effectively as exculpatory contract clauses that are contrary to public policy."[57]

A class action prohibition has the effect of an exculpatory clause in consumer protection cases because, in situations where an individual consumer's damages are small, the consumer likely will not bring an action, and the company wrongfully extracting a small amount of money from a large number of consumers will profit from its conduct.[58] Class actions are often the only effective way to stop and redress such conduct.[59]

The California Supreme Court did not hold that all class action prohibitions are unconscionable. Rather, it established a rule of law that where a class action prohibition is contained in a consumer contract of adhesion in which any dispute likely will involve relatively small damages, and where it is alleged that the party with superior bargaining power has engaged in an unfair or deceptive practice to deprive a large number of consumers of relatively small amounts of money, then the class

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[56] *Id.* at 160.
[57] *Id.* at 160-61.
[58] *See id.* at 161.
[59] *Id.*

action prohibition is an exculpatory clause that is unconscionable and unenforceable.[60]

The Missouri Court of Appeals applied similar reasoning when it held that an arbitration agreement that prohibited class actions was unconscionable and unenforceable in *Whitney v. Alltel Communications, Inc.*[61] The arbitration agreement under consideration in that case prohibited class actions (which are expressly authorized by the Missouri Merchandising Practices Act), required each party to bear its costs of arbitration, and provided that Alltel could not be held liable for punitive, damages or attorneys' fees (which also are recoverable under the Missouri Merchandising Practices Act).[62] Like the contracts at issue in *Szetela* and *Discover Bank*, the arbitration agreement in *Whitney* was contained in an adhesion contract and was provided to the consumers in a bill stuffer, whereby the consumers were deemed to have accepted the agreement by using Alltel's wireless telephone service.[63]

The Missouri Court found the agreement procedurally unconscionable because it was mailed to plaintiff as a bill stuffer, the plaintiff had to take it or leave it, Alltel was in a superior bargaining

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[60] *Id.* at 162.

[61] 173 S.W.3d 300 (Mo. Ct. App. 2005), *rehearing and/or transfer denied* (Aug 30, 2005), *transfer denied* (Nov. 1, 2005).

[62] *Id.* at 311. *See also* Mo. Rev. Stat. § 407.025 (expressly authorizing class actions, recovery of punitive damages, and attorneys' fees).

[63] *Id.* at 304.

position, there was no negotiation between the parties, and the arbitration provision was in fine print on the back of side of the page.[64]

The court found the arbitration agreement substantively unconscionable because it prohibited class actions and required the consumer to bear the costs of arbitration.[65] The plaintiff in that case had damages of $24.64, which was less than the plaintiff would spend in arbitration costs.[66] The court reasoned that other consumers also would not arbitrate their claims for small sums of money, which would allow Alltel "to retain millions and millions of dollars from what are allegedly improper and deceptive charges," and because no single consumer would undertake a case against Alltel, "the company could continue its improper and deceptive charges *ad infinitum* since none of its customers would have a practical remedy to bring about a stop to the conduct."[67] The court determined that the class action prohibition "would effectively strip consumers of the protections afforded to them under the Merchandising Practices Act and unfairly allow companies like Alltel to insulate themselves from the consumer protection laws of [Missouri]."[68] That

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[64] *Id.* at 310.
[65] *Id.* at 313.
[66] *Id.*
[67] *Id.* at 314.
[68] *Id.*

result, the court held, would be unconscionable and in direct conflict with the public policy set forth in Missouri's consumer protection laws.[69]

The *Szetela*, *Discover Bank*, and *Whitney* decisions demonstrate the degree to which class action prohibitions harm consumers and the public interest embodied in consumer protection statutes. Consumers are unlikely to invest the time, expense, and effort necessary to bring individual claims to recover small amounts of money that they are wrongfully charged. Without a class action, consumers will have no redress for their claims, and the businesses who unfairly collect a small amount of money from millions of consumers will keep their unlawful profits with impunity. This is unconscionable and contrary to the public policy embodied in the CPA.

The Washington Court of Appeals reached a similar conclusion in *Mendez v. Palm Harbor Homes*,[70] where that court held that arbitration agreements are unconscionable if they are cost-prohibitive:

> Avoiding the public court system to save time and money is a laudable societal goal. But avoiding the public court system in a way that effectively denies citizens access to resolving everyday societal disputes is unconscionable. Goals favoring arbitration of civil disputes must not be used to work oppression. When the goals given in support of contract clauses like this are used as a sword to strike down access to justice instead of a shield against

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[69] *Id.*
[70] 111 Wn. App. 446, 45 P.3d 594 (2002).

> prohibitive costs, we must defer to the overriding principle of access to justice.[71]

In addition to inhibiting access to justice, arbitration agreements that preclude consumers from bringing class actions to enforce the CPA inhibit the efficacy of the CPA as a means to foster a fair and honest market place and undermine the Legislature's intent that the CPA will be enforced by the Attorney General and private consumers. Absent class actions under the CPA in cases involving small individual damages, the likelihood of competent private counsel vindicating the public interest by seeking injunctions to prohibit unfair and deceptive practices would be remote. This Court has noted that injunctions in private actions play an important role in fulfilling the purposes of the CPA.[72]

> If each consumer victim were limited to injunctive relief tailored to his own individual interest, the fraudulent practices might well continue unchecked while a multiplicity of suits developed. On the other hand, if a single litigant is allowed to represent the public and consumer fraud is proven, the multiplicity of suits is avoided and the illegal scheme brought to a halt. Both results are in the public interest and consistent with the liberal construction of our consumer protection act. Indeed, in many private consumer protection cases the damage has already been done to the particular individual plaintiff at the time the lawsuit is filed, making ineffectual an injunction limited solely to the protection of the individual plaintiff. . . .We hold that under RCW 19.86.090 an individual may seek and obtain and injunction that would,

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[71] *Id.* at 465.
[72] *Hockley*, 82 Wash. 2d at 350.

> besides protecting his own interests, protect the public interest.[73]

For these additional reasons, such agreements are unconscionable.

The Washington Attorney General does not ask this Court for a rule of law that all arbitration agreements precluding class relief are unconscionable. Rather, the Attorney General asks this Court to hold that it is unconscionable to include in consumer contracts of adhesion a provision that would prohibit consumers from bringing class actions to enforce the CPA. Such a ruling would be consistent with the decisions of Washington courts regarding unconscionable contracts, the public policy embodied in the CPA, and the well-reasoned decisions of other states' courts.

VI. CONCLUSION

For the foregoing reasons, the Attorney General of Washington respectfully requests that this Court reverse the decisions of the Court of Appeals and the Superior Court, and remand this case for further proceedings.

Respectfully submitted on January 27, 2006,

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[73] *Id.* at 350-51.

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