No. 77406-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

Plaintiffs/Petitioners,

vs.

CINGULAR WIRELESS, LLC,

Defendant/Respondent.

BRIEF OF AMICUS CURIAE WASHINGTON STATE TRIAL LAWYERS ASSOCIATION FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Trial Lawyers Association Foundation (WSTLA Foundation) is a not-for-profit corporation organized under the laws of Washington, and a supporting organization of the Washington State Trial Lawyers Association (WSTLA). WSTLA Foundation, which now operates the amicus curiae program formerly operated by WSTLA, has an interest in the rights of injured persons seeking legal redress, including the rights of Washington citizens sustaining small economic losses due to deceptive acts or practices in a consumer contract setting.

II. INTRODUCTION AND STATEMENT OF THE CASE

This case involves whether an arbitration clause prohibition on classwide arbitrations is substantively unconscionable. For purposes of this brief, the underlying facts are drawn from the briefing of the parties, and select documents from the Clerk's Papers. See Scott Mot. for Disc. Rev. at 2-4; Cingular Resp. to Mot. for Disc. Rev. at 1-4; Scott Br. at 1-7; Cingular Br. at 2-8; CP 842-53 (Second Amended Complaint); and CP 355-56 (full text of the relevant arbitration provision). The following facts are relevant:

Doug Scott, Loren R. and Sandra K. Tabasinske, husband and wife, and Patrick H. and Janet Oishi, husband and wife (Scott), commenced a class action on behalf of themselves and other similarly

situated Washington residents against Cingular Wireless, LLC (Cingular).[1] Scott alleges that putative class members entered into cellular phone contracts with Cingular and were overcharged for certain services, in amounts ranging from less than $1.00 to over $45.00 per month. The Second Amended Complaint alleges claims for relief for unjust enrichment, breach of contract, breach of warranty, injunctive and declaratory relief, and violation of the Washington Consumer Protection Act (CPA), Ch. 19.86 RCW. See CP 842-53.

Cingular moved to compel arbitration under a provision of the standard service agreement, which states in pertinent part:

> 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 is [sic] if this specific proviso is found to be unenforceable, then the entirety of this arbitration clause shall be null and void.

See Scott Mot. for Disc. Rev. at 3 (quoting arbitration provision).[2]

Scott challenged the enforceability of this clause as unconscionable, but the superior court granted Cingular's motion to compel arbitration. The Court of Appeals denied Scott's motion for discretionary review, refusing to find that the arbitration clause is

[1] Scott's entitlement to class certification has yet to be determined. This amicus curiae brief assumes Scott meets the criteria for class designation under CR 23. A copy of this rule is reproduced in the Appendix to this brief, for the convenience of the Court.

[2] The full text of the arbitration clause, which appears at CP 355-56, is reproduced in the Appendix to this brief, for the convenience of the Court.

substantively and procedurally unconscionable. Scott's motion for discretionary review in this Court was granted.

III. ISSUE PRESENTED

In this consumer transaction, is Cingular's arbitration clause, which only permits claims in an individual capacity and prohibits classwide arbitration or consolidation of individual claims, invalid as substantively unconscionable under Washington law?

See Scott Mot. for Disc. Rev. at 6-11.[3]

IV. SUMMARY OF ARGUMENT

Cingular's arbitration provision prohibiting classwide arbitration is substantively unconscionable under the circumstances of this case, because it violates Washington public policies. The provision deprives Scott and other Washington residents of the opportunity to effectively vindicate their rights under the CPA, where the individual claims are otherwise so small that it is unlikely they would be pursued. This result undermines the strong public policies of this state favoring consumer remedies under the CPA and use of a CR 23-type class action device in such circumstances. Under the teachings of this Court's recent opinion in Adler v. Fred Lind Manor, 153 Wn.2d 331, 103 P.3d 773 (2004), the adverse impact of the classwide arbitration prohibition on these public policies properly factors in assessing whether it is overly harsh, and thus substantively unconscionable.

[3] Scott also challenges the arbitration clause as procedurally unconscionable. See Scott Mot. for Disc. Rev. at 11-13. This brief does not address this issue.

This state contract defense is not arbitration-specific, but is wholly consistent with the Federal Arbitration Act, 9 U.S.C. §§1-16.

V. ARGUMENT

Scott and Cingular have provided the Court with thoughtful and extensive briefing on the merits of the substantive unconscionability defense, and whether its application here is preempted under the FAA.[4] These arguments are not revisited here, measure for measure. See RAP 10.3(e) (amicus curiae briefs must avoid repetition of matters in other briefs). Instead, this brief focuses principally on Washington public policies regarding the CPA and CR 23, and the impact of these policies in determining whether the classwide arbitration provision is overly harsh, and thus substantively unconscionable. It also addresses whether the FAA is preemptive here.

Preliminarily, Cingular's arbitration provision not only expressly prohibits classwide arbitration, but also implicitly prevents class actions in court, by limiting judicial remedies to individual actions in small claims court. See Appendix.[5]

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[4] Two other cases are pending before the Court involving arbitration clauses and similar issues, and are set for oral argument the same day as this case. See Kruger Clinic v. Regence BlueShield, 123 Wn.App. 355, 98 P.3d 66 (2004), *review granted*, 155 Wn.2d 1017 (2005) [S.C. #76719-0], and Tacoma Orthopedic Surgeons v. Regence BlueShield, 2005 WL 4555 (unpublished opinion), *review granted*, 155 Wn.2d 1018 (2005) [S.C. #76886-2] (consolidated for argument). A third case, Dix v. ICT Group, Inc., 125 Wn.App. 929, 106 P.3d 841, *review granted*, 155 Wn.2d 1024 (2005) [S.C. #77101-4], involving the validity of a forum selection clause, is also pending before the Court, and scheduled for oral argument the same day as Scott and the other two cases. WSTLA Foundation also is seeking amicus curiae status in these three cases.

[5] Further, the clause has a self-destruct mechanism providing that if the classwide prohibition is unenforceable, then the entire arbitration clause is void. See Appendix.

A. Background Regarding the Federal Arbitration Act and Substantive Unconscionability Defense, Including the Role of Public Policy Considerations in the Analysis in *Adler v. Fred Lind Manor*.

The FAA and State Defenses

The arbitration agreement between Scott and Cingular is subject to the FAA. While this act requires arbitration agreements to be enforced where the parties have consented to this means of dispute resolution, it also recognizes that parties may challenge the enforceability of an agreement "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. Recently, in Zuver v. Airtouch Communications, Inc., 153 Wn.2d 293, 302, 103 P.3d 753 (2004), this Court commented on the nature of the state defenses cognizable under the savings clause of §2:

> Although federal and state courts presume arbitrability, "generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening §2." *Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996); *see also Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 281, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995).

See also Adler v. Fred Lind Manor, 153 Wn.2d 331, 342, 103 P.3d 773 (2004). This Court has acknowledged that under the FAA it may not refuse to enforce an arbitration agreement under state laws that only apply to such agreements, or focus on the uniqueness of the agreement to arbitrate. Zuver, 153 Wn.2d at 302; Adler, 153 Wn.2d at 342.

Substantive Unconscionability and Adler

The question addressed here is whether the classwide arbitration prohibition is substantively unconscionable, thereby rendering the arbitration clause a nullity by virtue of its own self-destruct provision. See Appendix. Review is de novo. Zuver, 153 Wn.2d at 302.

Substantive unconscionability involves "'those cases where a clause or term in the contract is alleged to be one-sided or overly harsh … .'" Nelson v. McGoldrick, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995) (quoting Schroeder v. Fageol Motors, Inc., 86 Wn.2d 256, 260, 544 P.2d 20 (1975)). Typically, this is a question of law for the court. Nelson, 127 Wn.2d at 131.[6]

Determining whether a contract clause is substantively unconscionable, in whole or in part, is typically a fact-specific analysis. However, whether a clause or provision is overly harsh in a particular case may be greatly influenced by the extent to which it undermines or defeats a strong public policy of the state. This occurred recently in Adler, where the Court determined two arbitration clause provisions were substantively unconscionable because of state public policy considerations. Adler involved employment discrimination claims based on disability, age and national origin under Ch. 49.60 RCW, the Washington Law Against Discrimination (WLAD). The employee claimed that an arbitration clause

[6] If key facts are disputed, it may be necessary to conduct a hearing to resolve these disputed issues, in conjunction with determining whether substantive unconscionability exists. See e.g. Adler, 153 Wn.2d at 352-54 (remanding for fact-finding regarding substantive unconscionability claim involving fee-splitting provision).

provision that required parties to bear their own respective attorney fees and costs was substantively unconscionable because it was one-sided and overly harsh. 153 Wn.2d at 340, 354-55. This Court agreed, and struck down this provision, concluding that it:

> effectively undermines a plaintiff's rights to attorney fees under RCW 49.60.030(2) and "helps . . . the party with a substantially stronger bargaining position and more resources, to the disadvantage of an employee needing to obtain legal assistance." *Alexander* [*v. Anthony Int'l L.P.I,* 341 F.3d 256, 267 (3rd Cir. 2003)]. *See also Brooks v. Travelers Ins. Co.*, 297 F.3d 167, 171 (2d Cir. 2002) (noting that an arbitration agreement which restricts recovery of attorney fees would prevent plaintiffs from vindicating their statutory rights under Title VII). Thus, we hold that the attorney fees provision of the agreement is substantively unconscionable.

153 Wn.2d at 355. Adler also struck down as substantively unconscionable a provision in the arbitration clause establishing a six-month limitation period, notwithstanding the fact that no statute expressly prohibited private parties from adopting a limitation period shorter than that applied to WLAD claims. See 153 Wn.2d at 355-58. Again, the Court's analysis was based upon policy considerations and the potential for deprivation of the rights of employees. Id.

Both of these holdings in Adler rest upon a public policy analysis. See generally Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 232, 685 P.2d 1081 (1984) (recognizing public policy emanates from constitutional, statutory or regulatory provisions, or judicial decisions). In voiding the provisions as substantively unconscionable, Adler focused attention on the vindication of claimants' rights *generally*, and not just on providing relief

for Mr. Adler. See 153 Wn.2d at 355. This analysis is wholly in keeping with the public policy reflected in the WLAD, particularly the statement of legislative intent establishing that various forms of discrimination "are a matter of state concern that … threatens not only the rights and proper privileges of its inhabitants, but menaces the institutions and foundation of a free democratic state." RCW 49.60.010. These holdings in Adler make clear that a substantive unconscionability analysis may include consideration of whether the arbitration clause or a particular provision of it undermines public policy to such an extent that it becomes overly harsh and unenforceable.

The Adler holdings do not transgress §2 of the FAA, which prohibits voiding an arbitration clause or provision based upon an arbitration-specific analysis. See Section C., infra. Each of the provisions voided in Adler violated the general public policy of the state, and would have been equally condemned in an employment contract provision that did not provide for arbitration, but instead attempted to alter WLAD remedies in court or shorten the limitations period governing court actions. Substantive unconscionability analysis grounded in public policy considerations applies to *any* contract:

> [A]ny attempt by one party to a contract to waive any rights that he or she legally has will be scrutinized with regard to public policy. Generally, parties may waive contractual or statutory rights by agreement, but an agreement to waive rights involving a question of public policy is void. In other words, parties are free to incorporate in their contacts any provisions not illegal or violative of public policy. Thus, standardized agreements (adhesion

> contracts) and exculpatory clauses must all be conscionable under a public policy standard.

David K. DeWolf & Keller W. Allen, 25 WASH. PRAC. §9.27, at 205 (1998 ed.) (footnotes omitted); see Motor Contract Co. v. Van Der Volgen, 162 Wash. 449, 454, 298 P. 705 (1931) (holding contract provision designating conditional sales contract as "negotiable instrument" void as violative of public policy under Washington's former negotiable instruments act); Dix v. ICT Group, Inc., 125 Wn.App. 929, 937, 106 P.3d 841 (holding forum selection clause unenforceable as violative of CPA, in consumer class action litigation involving small claims that would not otherwise likely be individually pursued), *review granted*, 155 Wn.2d 1024 (2005).

B. Cingular's Classwide Arbitration Prohibition is Substantively Unconscionable As Overly Harsh Because it Undermines the Strong Public Policies of the CPA and CR 23.

As Scott points out, it is appropriate in assessing the substantive unconscionability of Cingular's prohibition on classwide arbitration that the Court take into account the teachings of Adler v. Fred Lind Manor (and Zuver v. Airtouch Communications, Inc.), in which the impact of the arbitration clause provisions on legal remedies is a pivotal consideration in determining their enforceability. See Scott Supp. Br. at 5-7. In this case, the public policies underlying the CPA and CR 23 are likewise pivotal in determining whether the arbitration clause prohibition in question is overly harsh and thus unenforceable.

CPA Public Policy

Among the underlying purposes of the CPA is to "protect the public and foster fair and honest competition." RCW 19.86.920. While the Washington Legislature was mindful of the need not to unduly hamper business practices, it was also careful to note that the ultimate guidepost is the public good:

> It is … the intent of the legislature that this act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are *not injurious to the public interest*, nor be construed to authorize those acts or practices which unreasonably restrain trade or are unreasonable per se.

Id. (emphasis added).[7] To achieve this laudatory purpose, the Legislature requires that the CPA "be liberally construed that its beneficial purposes may be served." Id.

This Court has made clear that the CPA involves *consumer disputes implicating the public interest*, not mere disputes between private parties. See Travis v. Horse Breeders, 111 Wn.2d 396, 406-07, 759 P.2d 418 (1988); see also Physicians Ins. Exchange v. Fisons Corp., 122 Wn.2d 299, 313, 858 P.2d 1054 (1993) (describing CPA as embodying "private attorney general" concept). The public policy underlying the CPA is of the highest order, and certainly no less in stature than the policy governing enforcement of the WLAD, at issue in Adler.

[7] The full text of the current version of RCW 19.86.920 is reproduced in the Appendix to this brief, for the convenience of the Court.

CR 23 Public Policy

There is also a strong public policy at work with respect to CR 23 class actions, particularly in the CPA context. As recently noted in Smith v. Behr Process Corp., 113 Wn.App. 306, 54 P.3d 665 (2002), involving consumer claims including one under the CPA:

> Washington courts favor a liberal interpretation of CR 23 as the rule avoids multiplicity of litigation, "saves members of the class the cost and trouble of filing individual suits[,] and … also frees the defendant from the harassment of identical future litigation." *Brown v. Brown*, 6 Wn.App. 249, 256-57, 492 P.2d 581 (1971). "[A] primary function of the class suit is to provide a procedure for vindicating claims which, taken individually, are too small to justify individual legal action but which are of significant size and importance if taken as a group." *Brown*, 6 Wn.App. at 253. As a federal court has stated, "the interests of justice require that in a doubtful case … any error, if there is to be one, should be committed in favor of allowing the class action." *Esplin v. Hirschi*, 402 F.2d 94, 101 (10th Cir. 1968).

113 Wn.App. at 318-19 (footnote omitted).

Substantive Unconscionability

The interplay between the public policies supporting the CPA and the class action device renders the classwide arbitration prohibition substantively unconscionable under the circumstances of this case. Together, the CPA and CR 23 provide consumers with the opportunity to redress small claims that otherwise would not likely be pursued. As noted recently by the California Supreme Court in Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005), which struck down a classwide arbitration prohibition as unconscionable:

> *Class actions and arbitrations are, particularly in the consumer context, often inextricably linked to the vindication of substantive*

> *rights.* Affixing the "procedural" label on such devices understates their importance and is not helpful in resolving the unconscionability issue.

Id. at 1109 (footnote omitted) (emphasis added); see also Jean R. Sternlight, As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?, 42 William & Mary L. Rev. 1, 81 (2000) (observing some consumer claims only feasible as class actions, including those involving small claims).

Nonetheless, Cingular insists that Scott is not remediless in the absence of classwide arbitration, because claims against Cingular may be pursued in an individual arbitration or, alternately, in small claims court. See Cingular Supp. Br. at 3-4. Various courts and commentators have found that individual remedies, including a small claims court remedy, are not meaningful in these circumstances. See Discover Bank, 113 P.3d at 1109-10; Jean R. Sternlight at 14, 81. As noted in David S. Schwartz, State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act's Encroachment on State Law, 16 Wash. U. L. Rev. 129, 151 (2004):

> "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." Adhesive, pre-dispute waivers of class action remedies should be void as against public policy, or unconscionable, just like any substantive waiver of a damages remedy.

(footnotes omitted; quoting Amchem Prod. Inc. v. Windsor, 521 U.S. 591, 617 (1997) (internal quotations omitted)). Moreover, the availability in individual claims of attorney fees and costs does not render litigation of

the individual claim a realistic alternative. See Discover Bank at 1110; Jean R. Sternlight at 14.[8]

Cingular's classwide prohibition should be declared void as substantively unconscionable.[9]

C. A Declaration that Cingular's Classwide Arbitration Prohibition is Substantively Unconscionable is Not Subject to FAA Preemption.

Cingular argues that if the classwide arbitration prohibition is considered to be substantively unconscionable, such a determination would be violative of the FAA, which has preemptive effect. See Cingular Supp. Br. at 11-14. Cingular first suggests that any such holding would necessarily be arbitration-specific, because Washington has no generally applicable prohibition against contractual waivers of class actions, and thus cannot ban such waivers in the context of arbitration agreements.

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[8] Cingular points to the fact that, notwithstanding the classwide arbitration prohibition, its "consumer friendly" clause permits recovery of attorney fees and costs in certain circumstances, and suggests this somehow should be taken into account. See Cingular Supp. Br. at 3-4, 6-7 n. 7, & 11. Regardless of whether Cingular's provisions are "consumer friendly," the existence of such provisions cannot serve as a basis for enforcing another arbitration clause provision that violates public policy.

[9] The Court of Appeals' holding in Stein v. Geonerco, Inc., 105 Wn.App. 41, 48-50, 17 P.3d 1266 (2001), is not to the contrary. Stein involved a challenge to the enforceability of an arbitration clause because it allegedly prevented classwide arbitration, although the agreement was actually silent on the specific question. The court refused to compel classwide arbitration, concluding "[b]ecause the arbitration clause here is silent on class action and Stein has failed to demonstrate a conflict with statutory provisions, contract law, or due process requirements, we enforce the clause as written." Id., 105 Wn.App. at 49; see also id. at 50 n. 2. Similarly, Heaphy v. State Farm, 117 Wn.App. 438, 72 P.3d 220 (2003), is not helpful here. Heaphy simply echoed Stein, while also noting the lack of any valid argument for distinguishing Stein. See Heaphy, 117 Wn.App. at 447. Further the court concluded that "[m]ore importantly," the criteria under CR 23 is not met. Id. Neither Stein nor Heaphy involved a substantive unconscionability challenge to a classwide arbitration prohibition based upon articulated public policies.

At any rate, the United States Supreme Court recently held in an FAA case that whether the arbitration agreement provides for classwide arbitration is for the arbitrator to decide, where it is alleged the agreement is silent on the issue. See Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003) (plurality opinion).

Cingular Supp. Br. at 11. This raises the question, what if Cingular's standard service agreement clause provided "customers agree that they will not initiate or participate in a class action in court or classwide arbitration involving a CPA claim arising out of or relating to this agreement?" Would such a provision be valid? The simple answer to Cingular's argument is that the interplay between the public policies underlying the CPA and CR 23 dictates that a prohibition on class litigation *or* classwide arbitration of small consumer claims must be condemned under Washington law. See §B., supra. The public policies at issue permeate both the civil litigation and alternate dispute resolution processes, and are not arbitration-specific. See Adler at 354-58 (voiding arbitration clause attorney fees provision and limitations provision); Van Der Volgen, 162 Wash. at 454-55 (voiding conditional sales contract provision that offends public policy). Under the substantive unconscionability analysis here, it makes no difference whether Cingular or others attempt by contract to prevent class-based claims in court or in an arbitration forum, or both.

Cingular insists that such a substantive unconscionability analysis must be deemed arbitration-specific because "very few other contracts prohibit judicial class actions." Cingular Supp. Br. at 12. If accurate, this imbalance may be simply the result of drafters realizing that any consumer contract provision that purports to expressly meddle with matters of court procedure likely would be viewed as an invalid intrusion on the judicial

function. See e.g. Union Machinery & Supply Co. v. McCush, 104 Wash. 62, 73, 77, 175 P. 559 (1918) (voiding provision allowing vendor in conditional sales contact to collect 5% on the contract price as expenses of litigation, above and beyond costs and disbursements allowed by court). In any event, there are instances where forum selection clauses having the effect of disallowing class actions have been found unenforceable on public policy grounds. See e.g. America Online, Inc. v. Superior Court, 108 Cal.Rptr.2d 699 (Cal. App. 2001) (voiding forum selection clause on public policy grounds in consumer litigation context). In fact, this very question is at issue in Dix v. ICT Group, Inc. See supra at 4 n. 4 & 9.

Cingular argues that the standard in Dix for determining whether a forum selection clause is unenforceable is "far lower" than the standard for substantive unconscionability applicable to its arbitration provision. See Cingular Supp. Br. at 17; compare Dix, 125 Wn.App. at 934-37. This does not appear to be true when the flaw in question stems from violation of a strong public policy of this state. See generally Van Der Volgen, 162 Wash. at 454; David K. DeWolf & Keller W. Allen, §9.27, at 205.

Cingular next argues that the complexity of classwide arbitration is itself so inimical to the promised "simplicity, informality, and expedition" that otherwise attends the arbitration procedure as to render it inconsistent with the purposes of the FAA, and thus subject to a conflict-preemption analysis. See Cingular Supp. Br. at 12-14. The added complexity in the arbitration context should be no more pronounced than the added

complexity that occurs when an individual civil claim is transformed into a class action under CR 23. The fundamental nature of each process should remain intact. In turn, each process benefits from the predictability and economy that follows from class-based dispositions. The notion of class-based dispute resolution is not fundamentally at odds with any specific provision of the FAA, nor its underlying purposes. See Bazzle, 539 U.S. at 450- 54 (lead opinion) & 454-55 (Stevens J. concurring/dissenting).

Lastly, Cingular argues that if classwide arbitration is allowed, this will "toll the death knell" for consumer arbitration provisions. Cingular Supp. Br. at 14. It contends that companies will abandon arbitration because classwide arbitration awards are subject to such a deferential standard of review. Id. Of course, this same standard of review applies to individual arbitration awards. Cingular's concern with how the arbitration device operates in this context would explain the self-destruct provision in its arbitration clause. See Appendix. Ultimately, if companies determine that arbitration becomes undesirable when conducted in accord with public policy, then so be it.

Striking down the classwide arbitration prohibition as substantively unconscionable is necessary to assure that consumers with small claims are not deprived of their substantive rights under the CPA. This result is consistent with the repeated assurances of the United States Supreme Court that, under the FAA:

> [b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.

Gilmer v. Interstate/Johnson Lane, 500 U.S. 20, 26 (1991) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)); accord Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001). A determination that Cingular's classwide arbitration prohibition is substantively unconscionable on public policy grounds does not offend the FAA.

VI. CONCLUSION

This Court should adopt the reasoning advanced in this brief, and resolve this case accordingly.

DATED this 30th day of January, 2006.

_____* _____*
BRYAN P. HARNETIAUX DEBRA L. STEPHENS

On Behalf of WSTLA Foundation

*Brief transmitted for filing by e-mail; signed original retained by counsel.