No. 77406-4

SUPREME COURT OF THE STATE OF WASHINGTON

DOUG SCOTT, et al.,

Petitioners,

v.

CINGULAR WIRELESS LLC,

Respondent.

BRIEF *AMICI CURIAE* OF AARP and NATIONAL ASSOCIATION OF CONSUMER ADVOCATES

Deborah M. Zuckerman
(Pro Hac Vice pending)
AARP Foundation
601 E Street, N.W.
Washington, DC 20049
(202) 434-2060

David A. Leen, WSBA No. 3516
Leen & O'Sullivan
520 East Denny Way
Seattle, WA 98122
(206) 325-6022

Counsel for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTE

MISCELLANEOUS

STATEMENT OF INTEREST

AARP is a non-partisan, non-profit organization with more than 36 million members, approximately 845,000 of whom live in Washington. As the largest membership organization dedicated to people 50 and older, AARP is greatly concerned about the many fraudulent, deceptive, and unfair corporate practices that have a disproportionate impact on older people. AARP thus supports laws and public policies to protect the rights of older consumers and to preserve the means for them to seek redress when they are harmed in the marketplace. To help achieve this, AARP advocates improved access to the civil justice system and supports the availability of the full range of enforcement tools, including class actions.

The National Association of Consumer Advocates (NACA) is an organization of more than 1,000 attorneys who represent hundreds of thousands of consumers victimized by fraudulent, abusive and predatory business practices. NACA is committed to consumer justice and its members and their clients actively promote a fair marketplace that forcefully protects consumers, particularly those of modest means. To achieve this, NACA maintains a forum for information sharing among consumer advocates and serves as a voice for its members and consumers in the ongoing struggle to curb unfair and abusive business practices.

AARP and NACA ("*amici*") are concerned that access to justice is

being severely curtailed by corporations that impose binding arbitration. In addition to preventing consumers from bringing individual claims in court, most arbitration clauses preclude class action lawsuits and class-wide arbitration. *Amici* thus are interested in the Court's ruling on the extent to which Washington consumers will be forced to forego these procedures, particularly when they are the only practical means for consumers to vindicate their legal rights. These concerns, and the belief *amici* can provide information to help the Court view the issues in the larger context of cases in which courts have found arbitration clauses unconscionable, have led them to file this brief respectfully urging the Court to rule that Cingular's class action ban is unconscionable and unenforceable under Washington contract law.

INTRODUCTION

Amici agree with plaintiffs that the ban on class-wide relief in Cingular's mandatory arbitration clause violates two rules of Washington state contract law: the prohibitions of one-sided contract provisions that are drafted by and favor the stronger party, and of exculpatory provisions in contracts of adhesion. The parties extensively briefed related case law from other jurisdictions, but have not thoroughly discussed the law around the nation that underpins these decisions or the broader legal context in

which the issue arises. Cingular characterizes plaintiffs' arguments as extreme and unusual and as pushing for dramatic expansion of the law. When one studies how courts in a large number of states have guarded against over-reaching and unfair arbitration clauses, however, a more balanced picture emerges. Plaintiffs' position essentially is a logical extension of two vast bodies of law from numerous states.

It is undisputed that the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., makes arbitration clauses generally enforceable, but there is an important exception: clauses will not be enforced when they violate generally applicable rules of state contract law. In scores of cases courts around the country have struck down clauses that crossed this line and were so unfair as to be unconscionable under state law.[1/] These decisions

---

[1/] *See, e.g., Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370 (6th Cir. 2005), *cert denied*, 126 S. Ct. 730 (Nov. 28, 2005); *Iberia Credit Bureau, Inc. v. Cingular Wireless*, 379 F.3d 159 (5th Cir. 2004); *McMullen v. Meijer, Inc.*, 355 F.3d 485 (6th Cir. 2004); *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256 (3d Cir. 2003); *Ting v. AT&T*, 319 F.3d 1126 (9th Cir.) *cert. denied*, 540 U.S. 811 (2003); *Murray v. United Food & Commercial Workers Int'l Union*, 289 F.3d 297 (4th Cir. 2002); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir. 2002); *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931 (9th Cir. 2001); *Plattner v. Edge Solutions, Inc.*, No. 03-CV-2646, 2004 WL 1575557 (N.D. Ill. Apr. 1, 2004); *Garrett v. Hooters-Toledo*, 295 F. Supp. 2d 774 (N.D. Ohio 2003); *Wilcox v. Valero Refining Co.*, 256 F. Supp. 2d 687 (S.D. Tex. 2003); *Brennan v. Bally Total Fitness*, 198 F. Supp. 2d 377 (S.D.N.Y. 2002); *Torrance v. Aames Funding Corp.*, 242 F. Supp. 2d 862 (D. Or. 2002); *Luna v. Household Fin. Corp. III*, 236 F. Supp. 2d 1166 (W.D. Wash. 2002); *Geiger v. Ryan's Family Steak Houses, Inc.*, 134 F. Supp. 2d 985 (S.D. Ind. 2001); *Lelouis v. W. Directory Co.*, 230 F. Supp. 2d 1214 (D. Or. 2001); *Prevot v. Phillips Petroleum Co.*, 133 F. Supp. 2d 937 (S.D. Tex. 2001); *Lozada v. Dale Baker Oldsmobile,*

are not a suspect effort by courts to undermine the FAA, but represent a compromise inherent in the law -- corporations may insist that customers submit claims to arbitration but not in a way that is grossly unfair.

The majority of those decisions fall into two broad categories that support plaintiffs' arguments. First, there is nothing new or unusual in the doctrine that arbitration clauses should not be unfairly one-sided. As Part I of this brief shows, courts around the country repeatedly have held that one-sided arbitration clauses imposed by powerful corporations are

---

Inc., 91 F. Supp. 2d 1087 (W.D. Mich. 2000); *Nicholson v. Labor Ready, Inc.*, No. C97-0518 FMS, 1997 WL 294393 (N.D. Cal. May 28, 1997); *In re Knepp*, 229 B.R. 821 (Bankr. N.D. Ala. 1999); *Leonard v. Terminix Int'l Co.*, 854 So. 2d 529 (Ala. 2002); *Little v. Auto Stiegler, Inc.*, 63 P.3d 979 (Cal. 2003); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000); *Worldwide Ins. Group v. Klopp*, 603 A.2d 788 (Del. 1992); *Palm Beach Motor Cars Ltd. v. Jeffries*, 885 So. 2d 990 (Fla. Dist. Ct. App. 2004); *Ballard v. Sw. Detroit Hosp.*, 327 N.W.2d 370 (Mich. Ct. App. 1982); *E. Ford, Inc. v. Taylor*, 826 So. 2d 709 (Miss. 2002); *Swain v. Auto Services, Inc.*, 128 S.W.3d 103 (Mo. Ct. App. 2003); *Iwen v. U.S. W. Direct*, 977 P.2d 989 (Mont. 1999); *D.R. Horton, Inc. v. Green*, 96 P.3d 1159 (Nev. 2004); *Teleserve Sys., Inc. v. MCI Telecomms. Corp.*, 659 N.Y.S.2d 659 (App. Div. 1997); *Williams v. Aetna Fin. Co.*, 700 N.E.2d 859 (Ohio 1998); *McNulty v. H&R Block, Inc.*, 843 A.2d 1267 (Pa. Super. Ct. 2004), *appeal denied*, 853 A.2d 362 (Pa. 2004), *cert. denied*, 125 S. Ct. 667 (2004); *Taylor v. Butler*, 142 S.W.3d 277 (Tenn. 2004), *cert. denied*, 125 S. Ct. 1304 (2005); *In re Turner Bros. Trucking Co.*, 8 S.W.3d 370 (Tex. App. 1999); *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996); *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn. 2d 293, 103 P.3d 753 (2004); *Adler v. Fred Lind Manor*, 153 Wn. 2d 331, 103 P.3d 773 (2004); *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 45 P.3d 594 (Ct. App. 2002); *Toppings v. Meritech Mortgage Services*, 569 S.E.2d 149 (W. Va. 2002); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va.), *cert. denied, Friedman's, Inc. v. West Virginia ex rel. Dunlap*, 537 U.S. 1087 (2002); *Wisconsin Auto Title Loans, Inc. v. Jones*, 696 N.W.2d 214 (Wis. Ct. App.), *rev. granted*, 705 N.W.2d 659 (Wis. 2005) (Table).

unenforceable. Those courts have set forth common sense rationales arising out of core bodies of contract law and are highly persuasive. Second, there is nothing new or unusual about the doctrine that arbitration clauses may not, explicitly *or effectively*, strip consumers of substantive rights. As Part II of this brief discusses, courts around the country repeatedly have struck down arbitration clauses that produced this result. Some courts refused to enforce clauses that explicitly stripped legal rights (e.g., prohibited consumers from receiving punitive damages, despite laws providing such relief). Other courts struck down clauses that effectively denied such rights (e.g., imposed prohibitive costs making it realistically impossible for consumers to pursue claims).

The context created by these cases will help the Court evaluate plaintiffs' claims. Many of Cingular's arguments claim these decisions are wrong and that federal law overrides them. These arguments are inconsistent with Washington law[2/] and scores of courts discussed below.

[2/] Plaintiffs maintain that Cingular's arguments on these points are inconsistent with this Court's decisions in *Zuver v. Airtouch Commc'ns., Inc.*, 153 Wn. 2d 293, 103 P.3d 753 (2004), and *Adler v. Fred Lind Manor*, 153 Wn. 2d 331, 103 P.3d 773 (2004). *Amici* agree with plaintiffs but do not address this further because the parties have thoroughly discussed it in their briefs.

ARGUMENT

I. NUMEROUS COURTS HAVE FOUND ONE-SIDED ARBITRATION CLAUSES UNCONSCIONABLE.

As plaintiffs discussed at length, the class action ban in Cingular's arbitration clause is substantively unconscionable because it unreasonably favors Cingular. The provision eliminates the only meaningful avenue for customers to seek redress against Cingular, while in no way limiting Cingular's ability to pursue claims against its customers, as Cingular does not bring class actions against its customers. *See, e.g.*, Appellants' Opening Br., No. 55028-4 I, at 8-9, 16-19 (Ct. App. filed Jan. 21, 2005). *Amici* will not duplicate that discussion, but one aspect of Cingular's argument merits attention. Cingular argues that a recent Fifth Circuit decision, *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004), supports its position that a class action ban in a consumer contract is not unconscionable. *See, e.g.*, Resp't's Supplemental Br. at 13; Resp't's Br., No. 55028-4 I, at 25-26, 29, 37-38 (Ct. App. filed Mar. 24, 2005). *Iberia* must be read in light of the unique principles of state law the court was applying that are inapplicable in Washington. The court stressed there is no general Louisiana policy favoring consumer class actions and found it "highly relevant" that the Louisiana Unfair Trade Practices Act does not permit class actions and that Louisiana law

recognizes alternatives to class actions. *Iberia,* 379 F.3d at 174–75. The court also recognized that unconscionability is a question of state law, noting the Ninth Circuit had applied California law to find an arbitration clause barring class actions unconscionable. *Id.* at 174 (citing *Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir.), *cert. denied*, 540 U.S. 811 (2003)).

In addition to plaintiffs' arguments, *amici* respectfully suggest that a ruling by this Court that the class action ban is unconscionable would be consistent with rulings by numerous courts that arbitration clauses that were one-sided in other ways were substantively unconscionable. Multiple courts have struck down clauses that require consumers and others with inferior bargaining power to arbitrate all their claims while reserving to the corporate drafter of the contract the right to seek judicial relief. In *Taylor v. Butler*, 142 S.W.3d 277 (Tenn. 2004), for example, the court held that a contract requiring consumers to arbitrate their claims while preserving court access to the merchant was substantively unconscionable under Tennessee law. All claims arising out of a car sale had to be resolved by arbitration, but the clause said the dealer "'may pursue recovery of the vehicle under the Tennessee Uniform Commercial Code and Collection of Debt due by state court action.'" *Id.* at 284. The court noted that:

> City Auto has a judicial forum for practically all claims that it could have against Taylor. Indeed, it is hard to imagine what other claims it would have against her other than one

> to recover the vehicle or collect a debt. At the same time, Taylor is required to arbitrate any claim that she might have against City Auto. . . . Looking at the arbitration agreement in the present case, it is clear that it is unreasonably favorable to City Auto and oppressive to Taylor.

Id. at 286.

Likewise, the Montana Supreme Court struck down a one-sided arbitration clause as "unconscionable and oppressive." *Iwen v. U.S. W. Direct*, 977 P.2d 989, 996 (Mont. 1999). The court reversed a trial court's finding that the clause was not unduly oppressive, unconscionable, or against public policy where the language of the provision itself established it was unreasonably favorable to U.S. West Direct.

> [T]he weaker bargaining party has no choice but to settle all claims arising out of the contract through final and binding arbitration, whereas the more powerful bargaining party and drafter has the unilateral right to settle a dispute for collection of fees pursuant to the agreement in a court of law. . . . With the sole remedy for either party being the cost of the advertisement, it makes no sense for one party, U.S. West Direct, to have the freedom to seek the remedy before a court of law, while the other party, Iwen, is forced to seek the same remedy only through arbitration. U.S. West Direct pointedly protected itself by preserving its constitutional right of access to the judicial system while at the same time completely removed that right from [Iwen].

Id. at 995-96.

The Ninth Circuit also applied Montana law to strike down a franchise agreement's arbitration clause that unilaterally reserved court access to the drafting party. *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d

931, 941 (9th Cir. 2001), *cert. denied*, 534 U.S. 1133 (2002). The clause provided:

> Except for our claims against you for indemnification, actions for collection of moneys owed us under this Agreement, or actions seeking to enjoin you from using the [Econo-Lodge marks] in violation of this Agreement, any controversy or claim relating to this Agreement, or the breach of this Agreement . . . will be sent to final and binding arbitration[.]

Id. at 935. The court stated: "[i]n the context of adhesion contracts, the Montana Supreme Court has determined expressly that it will not enforce an arbitration clause that 'lacks mutuality of obligation, is one-sided, and contains terms that are unreasonably favorable to the drafter.'" *Id.* at 939 (quoting *Iwen*, 977 P.2d at 996).

The West Virginia Supreme Court addressed a certified question of whether an arbitration clause in a consumer loan contract was void where it contained "a substantial waiver of the consumer's rights, including access to the courts, while preserving for all practical purposes the lender's right to a judicial forum . . . ." *Arnold v. United Cos. Lending Corp.*, 511 S.E.2d 854, 859 (W. Va. 1998). The borrowers maintained the clause was unconscionable because it forced them to give up their right to go to court and "virtually all substantive rights, while the lender retains the right to a judicial forum for purposes of collection and foreclosure proceedings, deficiency judgments, and all other procedures which the lender may

pursue to acquire title to the borrower's real or personal property." *Id.* at 860. The court drew the "inescapable conclusion that the arbitration agreement . . . is 'void for unconscionability' as a matter of law. Indeed, the kind of agreement here at issue was aptly caricatured by this Court . . . as 'the contract between the rabbits and the foxes.'" *Id.* at 861 (footnote and citations omitted)). The clause was "'unreasonably favorable'" to the lender whose

> acts or omissions could seriously damage the Arnolds, yet the Arnolds' only recourse would be to submit the matter to binding arbitration. At the same time, United Lending's access to the courts is wholly preserved in every conceivable situation where United Lending would want to secure judicial relief against the Arnolds. Like the "rabbits and foxes situation," . . . the wholesale waiver of the Arnolds' rights together with the complete preservation of United Lending's rights "is inherently inequitable and unconscionable . . . ."

Id. at 861-62 (citations omitted).

After surveying various state decisions, the court in *Lytle v. CitiFinancial Servs., Inc.*, similarly found that

> the reservation by CitiFinancial of access to the courts for itself to the exclusion of the consumer creates a presumption of unconscionability, which in the absence of "business realities" that *compel* inclusion of such a provision in an arbitration provision, renders the arbitration provision unconscionable and unenforceable under Pennsylvania law.

810 A.2d 643, 665 (Pa. Super. 2002).

One-sidedness likewise was the basis for an unconscionability finding in *Flores v. Transamerica HomeFirst, Inc.*, 113 Cal. Rptr. 2d 376 (Ct. App. 2001), where older homeowners had to submit controversies arising out of their reverse mortgages to arbitration, while the lender could use a judicial or non-judicial forum to obtain foreclosure, self-help remedies, and an injunction to obtain receivership. The lender even could "proceed with foreclosure despite the pendency of disputes brought to arbitration. . . . Realistically, then, the mandatory arbitration provisions apply to claims of the borrower against HomeFirst but not vice versa. We conclude that this unilateral obligation to arbitrate is so one-sided as to be substantively unconscionable." *Id.* at 383.

A Florida court similarly found a one-sided arbitration clause in an automobile sales agreement unconscionable and unenforceable. *Palm Beach Motor Cars Ltd. v. Jeffries*, 885 So. 2d 990 (Fla. Dist. Ct. App. 2004). Jeffries' used car had "extreme mechanical defects" and he sued the dealer for fraud, theft, and deceptive and unfair trade practices. The court affirmed the trial court's denial of the dealer's motion to compel arbitration, finding substantive unconscionability in the unilateral nature of the clause's requirement that consumers submit all disputes to binding arbitration while the dealer did not have to arbitrate collection or repossession disputes. *Id.* at 992.

A Wisconsin court recently used similar reasoning to find one-sided, non-mutual arbitration provisions substantively unconscionable and void. *Wisconsin Auto Title Loans, Inc. v. Jones*, 696 N.W.2d 214 (Wis. Ct. App.), *rev. granted*, 705 N.W.2d 659 (Wis. 2005) (Table). Jones borrowed $800 and granted Wisconsin Auto a security interest in his car as collateral. The loan contract required Jones to arbitrate all claims but Wisconsin Auto could go to court to repossess the car in case of default. When Jones defaulted, Wisconsin Auto filed a complaint seeking recovery of his car and he counterclaimed, seeking relief for himself and a putative class of customers under the state Consumer Act. The trial court denied Wisconsin Auto's motion to compel arbitration of the counterclaims, finding the arbitration clause unconscionable. The court of appeals agreed, concluding the clause was "substantively unconscionable because it forces Jones to litigate in two separate forums, one in court, one in arbitration." *Id.* at 219. The court explained that

> because the arbitration clause forces consumers such as Jones to litigate in dual forums, it was one-sided, created an unfair advantage to Wisconsin Auto and unreasonably favored Wisconsin Auto. The arbitration clause also reserves Wisconsin Auto's right to self-help repossession of the collateral. Wisconsin Auto fails to show any commercial justification for imposing this unfair burden on Jones and we know of none.

Id. at 220. Moreover, the court affirmed the finding of procedural

unconscionability, in part because the non-mutual provisions showed the parties' unequal bargaining power. *Id.*

Courts also have applied state contract law to find arbitration clauses unconscionable when they unilaterally restrict employees' rights, including court access. In *Pinedo v. Premium Tobacco Stores, Inc.*, 102 Cal. Rptr. 2d 435 (Ct. App. 2000), an employment agreement contained a clause requiring arbitration of any employment-related dispute. It further provided: "Employee specifically agrees and accepts that *any award on account of the end of employment shall be specifically limited to reinstatement and/or back pay*," and required the employee to pay all arbitration fees, including administrative and arbitrator fees. *Id.* at 437. The court found the clause substantively unconscionable because it was

> inherently one-sided: it addresses only claims involving terms of employment described as claims based on "changes in position, conditions of employment or pay, or the end of employment." These are claims which would normally be brought by the employee against the employer. The limitation on damages applies only to damages awarded in favor of the employee, not to damages claimed by the employer.

Id. at 440. The terms indicated "'a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage.'" *Id.* (citation omitted). *See also Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 152 (Ct. App.

1997) (finding an arbitration clause with multiple one-sided provisions unconscionable because it "provides the employer more rights and greater remedies than would otherwise be available and concomitantly deprives employees of significant rights and remedies they would normally enjoy.").

The Delaware Supreme Court found an arbitration provision unconscionable where both parties could obtain *de novo* review of a decision involving uninsured or underinsured motorist benefits *only* if the award exceeded state financial responsibility limits. *Worldwide Ins. Group v. Klopp*, 603 A.2d 788 (Del. 1992). The court stated:

> Under the present policy language both parties are bound by a low award which an insurance company is unlikely to appeal. While high awards may be appealed by either party, common experience suggests that it is unlikely that an insured would appeal such an award. It is the insurer who, generally, would be dissatisfied with a high award. The policy provision thus presents an "escape hatch" to the insurer for avoidance of high arbitration awards, whether or not the award was fair and reasonable.

Id. at 791.

Similarly, in *Schmidt v. Midwest Family Mut. Ins. Co.*, the Minnesota Supreme Court found an arbitration clause in the uninsured motorist provision of an automobile insurance policy unenforceable. 426 N.W.2d 870 (Minn. 1988). Schmidt submitted a claim for uninsured motorist coverage to arbitration and was awarded $45,000, in excess of the

state minimum for body injury liability. Midwest sought court review pursuant to a provision stating:

> This [arbitration provision] applies only if the amount does not exceed the minimum limit for bodily injury liability specified by the financial responsibility law of the state in which your covered auto is principally garaged. If the amount exceeds that limit, either party may demand the right to a trial.

Id. at 871 n.1. As to Midwest's argument that the trial *de novo* clause benefitted both parties, the court stated:

> Though Schmidt was afforded a theoretical contract right to demand a trial de novo following arbitration, as a practical matter any benefit to him flowing from that right is in reality ephemeral. Rarely, if ever, would one in his position assert it. . . . Midwest's arbitration provision, as modified by the trial de novo provision, instead of affording to an insured a retained benefit subjects the insured to the possibility of having to sustain anew the burden of establishing the claim before a different, and more formal, tribunal[.]

Id. at 873. As the trial *de novo* provision effectively provided Midwest a unilateral opportunity to contest every arbitration decision above a certain amount, the court declared the clause in violation of public policy and unenforceable. *Id.* at 875. *See also Zak v. Prudential Prop. & Cas. Ins. Co.*, 713 A.2d 681, 684 (Pa. Super. 1998) (holding clause "completely unconscionable" where it "allows the insurer to obtain a trial when the claimant or insured obtains an arbitration award of any significant amount

but binds the claimant or insured to the amount of the arbitration award when the claimant or insured is awarded nothing or a minuscule amount. Appellee suggests that the clause is fair because "either party" can appeal if the award is over $15,000. This suggestion ignores the reality of the *effect* of the clause. It allows the insurance company the unfettered right to a trial whenever an award is made in favor of a claimant or insured while a losing claimant or insured is bound by his award.").

As these cases demonstrate, courts frequently refuse to enforce a variety of provisions that render arbitration clauses unfairly one-sided in favor of corporations. *Amici* respectfully suggest that these decisions should inform the Court's finding that the class action ban benefits only Cingular and renders its arbitration clause substantively unconscionable.

II. ARBITRATION CLAUSES THAT LIMIT REMEDIES ARE SUBSTANTIVELY UNCONSCIONABLE.

Class action bans effectively limit remedies for consumers, especially those with small claims for whom class actions are the only real avenue for seeking relief. *Amici* will not repeat plaintiffs' discussion of the importance of class actions and how bans exculpate corporations such as Cingular from liability. *See, e.g.*, Pet'r's Supplemental Br. at 8-15; Appellants' Opening Br., No. 55028-4 I, at 19-22 (Ct. App. filed Jan. 21, 2005). Rather, *amici* submit that the ban's effect is analogous to clauses

that limit remedies in other ways that make them unconscionable.

For example, in *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 279 (W. Va.), *cert. denied, Friedman's, Inc. v. West Virginia ex rel. Dunlap*, 537 U.S. 1087 (2002), the state supreme court found an arbitration clause's bans on class actions and punitive damages "clearly unconscionable." Dunlap sued under West Virginia's Consumer Credit & Protection Act, alleging Friedman's fraudulently charged for credit life insurance, credit disability insurance, and property insurance. The trial court compelled arbitration, but the supreme court found:

> the intended effect of the "no punitive damages" provision . . . is that *every Friedman's customer* is deprived of their right to invoke and employ an important remedy provided by law to punish and deter illegal, willful, and grossly negligent misconduct -- and that Friedman's would be categorically shielded from any liability for such sanctions, regardless of Friedman's level of wrongdoing.

Id. at 278.

The Ninth Circuit found a clause substantively unconscionable where it limited employees to injunctive relief, up to one year of back pay and two years of front pay, compensatory damages, and punitive damages up to the greater of back pay and front pay awarded or $5,000. *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir.), *cert. denied*, 535 U.S. 1112 (2002). "By contrast, a plaintiff in a civil suit for sexual harassment under the [Fair Housing and Employment Act] is eligible for all forms of

relief that are generally available to civil litigants -- including appropriate punitive damages and damages for emotional distress." *Id.* at 894.

Similarly, a federal court found an arbitration clause that limited equitable relief substantively unconscionable. *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087 (W.D. Mich. 2000). An auto dealer moved to compel arbitration of a lawsuit purchasers filed under the federal Truth in Lending Act and the state Consumer Protection Act. The clause did not allow class actions or injunctive or declaratory relief, remedies expressly available under both laws. The court found federal and state "case law support a conclusion that an arbitration provision is substantively unconscionable because it waives class remedies, as well as declaratory and injunctive relief." *Id.* at 1105.

In *Ex parte Thicklin*, 824 So. 2d 723, 726 (Ala. 2002), *rev'd on other grounds*, *Patriot Mfg., Inc. v. Jackson*, 2005 WL 3086668 (Ala. Nov. 18, 2005), the clause said: "'the arbitrator will have no power to award punitive damages or other damages not measured by the prevailing party's actual damages.'" The Alabama Supreme Court said this was unconscionable where "it violates public policy for a party to contract away its liability for punitive damages, regardless whether the provision doing so was intended to operate in an arbitral or a judicial forum." *Id.* at 733. If punitive damages can be waived

> "the door will be open wide to rampant fraudulent conduct with few, if any, legal repercussions. The Legislature intended that punitive damages be available as a remedy in fraud actions . . . . The Legislature is endowed with the exclusive domain to formulate public policy in Alabama, a domain upon which the judiciary shall not trod. Thus, we conclude that it is not within the province of the parties to a predispute arbitration agreement to waive a punitive-damages award."

Id. (quoting *Cavalier Mfg. v. Jackson*, 823 So. 2d 1237, 1248-49 (Ala. 2001) (citations omitted).

In *Torrance v. Aames Funding Corp.*, 242 F. Supp. 2d 862 (D. Or. 2002), borrowers alleged violations of Oregon's Unfair Trade Practices Act and the Truth in Lending Act in connection with a home loan. The lender moved to compel arbitration under a clause that allowed only actual damages and waived both parties' rights "to consequential, punitive, exemplary or treble damages." *Id.* at 870. The court affirmed a Magistrate's finding that by not allowing full recovery of statutory damages the clause violated federal law and was unconscionable and unenforceable. *Id.* at 865. *See also Carll v. Terminix Int'l Co.*, 793 A.2d 921, 923 (Pa. Super. 2002) (finding an arbitration clause unconscionable and against public policy for prohibiting the award of "direct, indirect, special, incidental, consequential, exemplary or punitive damages, or . . . damages or penalties relating to or arising out of any claim alleging any deceptive trade practice.").

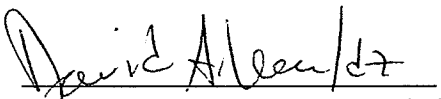
A ruling that Cingular's arbitration clause is unconscionable because the class action ban severely limits, if not eliminates, customers' ability to seek relief is consistent with these decisions refusing to enforce clauses that otherwise limit remedies.

CONCLUSION

Amici respectfully urge the Court to find the class action ban in Cingular's arbitration clause substantively unconscionable under Washington law because it unfairly favors Cingular and effects a limitation on remedies.

January 24, 2006

Respectfully submitted,



David A. Leen, WSBA No. 3516
Leen & O'Sullivan
520 East Denny Way
Seattle, WA 98122
(206) 325-6022

Deborah M. Zuckerman
(pro hac vice pending)
AARP Foundation
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-6045

Counsel for *Amici Curiae*