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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

RITA PARRISH et al., **Plaintiffs and Respondents,** **v.** **CINGULAR WIRELESS, LLC, et al.,** **Defendants and Appellants.**	**A105518** **(Alameda County Super. Ct. No. JCCP 4332)**

In *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094 (*Szetela*), the Court of Appeal held an arbitration clause prohibiting class-wide arbitration to be unconscionable and unenforceable. The trial court in the present case relied upon *Szetela* to rule that the arbitration clause at issue here is likewise unconscionable. Recognizing that the issue is pending before our Supreme Court, we will not follow *Szetela* and will conclude instead that under the facts in the present case the contractual ban on class-wide arbitration is not unduly one-sided, harsh, or in violation of public policy.[1]

FACTUAL AND PROCEDURAL BACKGROUND

Three separate lawsuits were brought against defendant Cingular Wireless, LLC, and other providers of wireless telephone service, challenging the "early termination fee" charged to customers who end their wireless telephone service before the expiration of the term of the service agreement.

[1] The issue is pending before the California Supreme Court in *Discover Bank v. Superior Court*, review granted April 9, 2003 (S113725), and *Mandel v. Household Bank*, review granted April 9, 2003 (S113699).

Rita Parrish sued in Orange County as a private attorney general under the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.), alleging that the early termination fee constituted an unlawful liquidated damages provision in an unconscionable contract. Jerilyn Marlowe and seven other named plaintiffs brought a class action in Alameda County alleging violations of the UCL and the Consumers' Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.). In the third lawsuit, Astrid Mendoza sued in Alameda County as a private attorney general and as a class representative to challenge both the early termination fee and Cingular's locked headsets that preclude the use of competitors' networks. These three lawsuits were consolidated and coordinated with other lawsuits pending against other wireless service providers.

The wireless telephone service agreement at issue in all three lawsuits provides for arbitration of all disputes and claims arising out of or related to the agreement. In July 2003, Cingular modified the arbitration clause, making it more advantageous to the customers, and Cingular notified its customers of the change by way of an insert included with the customers' monthly bill. Both the original and the modified versions of the arbitration clause provide that either party may bring an individual action in small claims court, notwithstanding the agreement to arbitrate all disputes. The modified arbitration clause provides that the arbitration will be governed by the commercial dispute resolution procedures and the supplementary procedures for consumer-related disputes of the American Arbitration Association (AAA).[2] The modified version significantly changed the procedure for payment of fees: If the customer initiates arbitration, Cingular will promptly reimburse the customer for the filing fee. Moreover, Cingular will pay all filing, administration, and arbitrator fees unless the arbitrator finds that the customer's claim is frivolous, in which case payment of fees will be governed by the AAA rules and thereby apportioned by the arbitrator.[3] And if the arbitration award is equal to or greater

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[2] The original version called for using the wireless industry arbitration rules.

[3] The modified arbitration clause states that Cingular will pay all costs unless the arbitrator finds the customer's claim or the relief sought "improper or not warranted, as measured by the standards set forth in Federal Rule of Civil Procedure 11(b)." Rule 11(b) of the Federal Rules of Civil Procedure pertains to frivolous claims.

than the customer's demand, Cingular will pay the customer's attorney fees and expenses.

Most significantly, both the original and the modified version of the arbitration clause allow only individual claims to be heard in arbitration. The modified version reads as follows: "The arbitrator may award injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim. . . . 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 clause shall be null and void." (Capitalization in original.)[4]

Cingular petitioned to compel arbitration of plaintiffs' disputes.[5] Although Cingular did not make a specific request to the court for individual arbitration, Cingular took the position that any arbitration conducted would be limited to arbitration of individual claims. Plaintiffs opposed the petition, arguing, inter alia, that the arbitration clause was unconscionable (1) in precluding class-wide relief, and (2) in requiring plaintiffs to pay the costs of arbitration if they should lose. The trial court agreed with plaintiffs that the ban on class-wide arbitration is unconscionable and invalid under the

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Under the AAA rules, the arbitrator may apportion fees, expenses, and the compensation of the arbitrator. (Rule R-43.) Under California's arbitration statute, costs are apportioned by the arbitrator pro rata. (Code Civ. Proc., § 1284.2.)

4 The original version provided that the arbitrator had no authority to order consolidation or class arbitration.

5 Within the Marlowe lawsuit, plaintiff Marlowe is actually a customer of Verizon, not Cingular. Cingular seeks arbitration only as to the named plaintiffs in that lawsuit who are Cingular customers--James Bethea, Gerry Robertson, Ramzy Ayyad, and Wendy Lowinger. Apparently only one named plaintiff--James Bethea--has actually paid an early termination fee.

Court of Appeal decision in *Szetela, supra*, 97 Cal.App.4th 1094. The court denied Cingular's petition to compel arbitration. By way of dictum, the court noted that if the arbitration clause were enforceable, the arbitration would be on an individual basis and not as a class or representative claim. Cingular now appeals from the order denying arbitration.

DISCUSSION

I. Injunctive Relief

Plaintiffs seek, in addition to monetary recovery of the early termination fees, injunctive relief to benefit the general public. However, the California Supreme Court has held that such claims for injunctive relief are not arbitrable. (*Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 315-316 [UCL]; *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1079-1082 [CRLA].) Cingular conceded below that the claims for injunctive relief were not arbitrable, and on appeal Cingular acknowledges that this court is bound to follow *Cruz* and *Broughton.* We will, therefore, affirm the trial court's denial of Cingular's petition to compel arbitration of the claims for injunctive relief.

II. Monetary Claims

A. Nonsignatory Parrish

With one exception, the plaintiffs who are subject to Cingular's petition to compel arbitration are parties to the arbitration clause in Cingular's wireless service agreement.[6] The one exception is plaintiff Rita Parrish, who is not and never has been a subscriber to Cingular's wireless service. She brought suit only as a private attorney general under the

[6] We find it significant that of the eight named plaintiffs in the Marlowe lawsuit, Cingular sought to compel arbitration only as to the four who are subscribers to Cingular's wireless service. (See fn. 5, *ante*.) In declining to compel arbitration as to the other Marlowe plaintiffs who are not Cingular customers--even though those plaintiffs also sued on behalf of the general public under the UCL --Cingular has taken a position inconsistent with its argument with respect to Parrish that a nonparty can be compelled to arbitrate.

UCL for the benefit of the general public.[7] We conclude that plaintiff Parrish cannot be compelled to arbitrate.

By statute, an order compelling arbitration is warranted when "an agreement to arbitrate the controversy exists" and "a party thereto refuses to arbitrate such controversy." (Code Civ. Proc., § 1281.2.) The fundamental assumption of arbitration is that the parties have consented to resolving their disputes outside the judicial process. The strong policy favoring arbitration as a means of resolving disputes does not extend to persons who are not parties to the arbitration agreement and have not elected to submit to arbitration. (*County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237, 244-245; accord *Benasra v. Marciano* (2001) 92 Cal.App.4th 987, 990.) A proceeding to compel arbitration is essentially a suit in equity for specific performance of an arbitration agreement. A court in equity has no power to compel third party nonsignatories to arbitrate absent some implied authority by the signatory to bind the nonsignatory. (47 Cal.App.4th at pp. 242-245; see also *Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co.* (1998) 68 Cal.App.4th 83, 88-89.)[8]

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[7] At the time of the proceedings below, section 17204 of the Business and Professions Code provided in relevant part: "Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or any [authorized] county counsel . . . or any [qualified] city attorney . . . or by *any person acting for the interests of* itself, its members or *the general public*." (Bus. & Prof. Code, § 17204, italics added.)

While this appeal was pending, on November 2, 2004, the electorate amended the UCL by Proposition 64 to delete the provision for a private attorney general. (2004 West's Cal. Legis. Service, Prop. 64.) Although we asked the parties for supplemental briefing, we find it unnecessary to examine the effect of Proposition 64 upon the present appeal.

Whether Rita Parrish is entitled to pursue her claims under the UCL is not an issue that is cognizable on Cingular's petition to compel arbitration. Cingular's assertions in its supplemental brief that Rita Parrish now lacks standing and that her claims should be entirely dismissed may be raised in the trial court by an appropriate motion.

[8] A nonsignatory third party may invoke an arbitration clause against a signatory based upon equitable estoppel. (E.g., *Alliance Title Co., Inc. v. Boucher* (2005) 127 Cal.App.4th 262; *Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705.)

As discussed at length in *County of Contra Costa v. Kaiser Foundation Health Plans, Inc., supra,* 47 Cal.App.4th at pages 242-245, a nonsignatory has been held bound by an arbitration agreement in limited cases involving a preexisting relationship between the nonsignatory and a party to the agreement.[9] (E.g., *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 702, 704, 709 [insured employee bound by arbitration clause in medical services contract entered into by employer]; *Mormile v. Sinclair* (1994) 21 Cal.App.4th 1508, 1511 [wife bound by arbitration clause in husband's physician-patient agreement]; *Keller Construction Co. v. Kashani* (1990) 220 Cal.App.3d 222 [general partner of the signatory limited partnership bound by arbitration clause in construction agreement].) Here, no preexisting relationship exists between plaintiff Parrish and the wireless telephone subscribers she purports to represent; there is no basis for finding that the wireless subscribers had authority to bind plaintiff Parrish to the arbitration agreement.

Net2Phone, Inc. v. Superior Court (2003) 109 Cal.App.4th 583, upon which Cingular relies, is not on point. The question in that case was whether a forum selection clause could be enforced against a plaintiff who was not a party to the telephone service contract but who brought the action as a private attorney general under the UCL. We draw a distinction between a forum selection clause and an arbitration clause. A forum selection clause may be enforced against a nonparty who is '"closely related to the contractual relationship."' (*Id.* at pp. 587, 588; *Lu v. Dryclean-U.S.A. of California, Inc.,* (1992) 11 Cal.App.4th 1490, 1493.) Enforcement of an arbitration clause, in contrast, requires more than the nonparty's connection to the contract. (E.g., *Buckner v. Tamarin* (2002) 98 Cal.App.4th 140, 143 [father's arbitration agreement with medical providers did not bind his adult daughters on their wrongful death claims]; *Benasra v. Marciano,*

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9 Another theory for binding a nonsignatory is the doctrine of incorporation by reference. (E.g., *Slaught v. Bencomo Roofing Co.* (1994) 25 Cal.App.4th 744, 748-749 [arbitration clause in construction contract between property owner and general contractor incorporated into subcontracts]; *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.* (1992) 6 Cal.App.4th 1266, 1271-1274 [arbitration clause in construction agreement incorporated into surety bond].)

supra, 92 Cal.App.4th at p. 990 [arbitration agreement signed by corporation's president not binding on the individual in his claim for libel]; *Kaneko Ford Design v. Citipark, Inc.* (1988) 202 Cal.App.3d 1220, 1229 [arbitration clause in contract between designer and third party not binding on property owner].)

Our Supreme Court has left unresolved the question whether a plaintiff seeking restitution as a private attorney general under the UCL can be compelled to arbitrate when the plaintiff is not a party to the arbitration agreement but is acting on behalf of injured consumers who are parties to the arbitration agreement. (*Cruz v. PacifiCare Health Systems, Inc., supra*, 30 Cal.4th at p. 320, fn. 7.) We observe that the question has little practical significance, because the same factors that preclude a private attorney general from being compelled to arbitrate also serve to limit the plaintiff's relief in court. While civil penalties may be assessed when the action is initiated by a governmental prosecutor (Bus. & Prof. Code, § 17206), monetary damages are not recoverable under the UCL. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1266.) A private plaintiff is limited to injunctive relief or restitution, i.e., the return of money obtained through an unfair business practice (Bus. & Prof. Code, § 17203). And restitution requires an ownership or vested interest in the money; nonrestitutionary disgorgement of profits is not available to an individual acting as a private attorney general under the UCL. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1149-1152.) As the Supreme Court explained, "The breadth of standing under this act allows any consumer to combat unfair competition by seeking an injunction against unfair business practices. *Actual direct victims of unfair competition may obtain restitution* as well." (*Id.* at p. 1152; italics added.) In the present case, plaintiff Parrish is not an actual direct victim of Cingular's early termination fee and is acting only as a private attorney general. She has no monetary remedies under the UCL, even assuming arguendo that her claims remain viable. (See fn. 7, *ante*.) At most, her remedy is injunctive relief, and, as we have said, the claims for injunctive relief are not arbitrable.

B. The Ban on Class-wide Arbitration

(1) Unconscionability

At the outset, we observe that the parties and the trial court have mischaracterized the arbitration clause as a ban on "class actions." In actuality, the disputed portion of the arbitration agreement prohibits class arbitration. Class actions through litigation are necessarily precluded by the agreement to arbitrate. The question we face here concerns only the manner of arbitration--whether plaintiffs can be denied class treatment of individual claims within the arbitral forum.

An agreement to arbitrate is valid, irrevocable, and enforceable except when grounds exist for the revocation of any contract. (Code Civ. Proc., §§ 1281, 1281.2, subd. (b).)[10] Unconscionability is one ground upon which a court may refuse to enforce a contract (Civ. Code, § 1670.5), and the burden is on the party opposing arbitration to prove the defense. (*Engalla v. Permanente Medical Group, Inc., supra,* 15 Cal.4th at p. 972.)

The determination of unconscionability is a question of law for the court. (Civ. Code, § 1670.5, subd. (a); *Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 851.) On appeal, when the extrinsic evidence is undisputed, as it is here, we review the contract de novo to determine unconscionability. (93 Cal.App.4th at p. 851*; Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1527.)

It bears emphasizing that a finding of unconscionability in a contract clause does not necessarily mean that the contract cannot be enforced. The trial court has discretion to sever the unconscionable provision and enforce the remainder of the contract or to limit the application of the unconscionable clause so as to avoid an unconscionable result. (Civ. Code, § 1670.5, subd. (a); *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1074-1075.) In the present case, however, the modified version of the arbitration clause

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10 The statutory reference to grounds for revocation of an agreement is a misnomer; the issue on a motion to compel arbitration is whether there are grounds to rescind the arbitration agreement. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973.)

precludes severance of the ban on class arbitration: "[T]he arbitrator may not consolidate proceedings or [*sic*, on] more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding, and . . . if this specific proviso is found to be unenforceable, then the entirety of this arbitration clause shall be null and void."

In determining whether a particular contractual provision is unconscionable, we examine both a procedural and a substantive element of unconscionability. The procedural element focuses on the way in which the disputed provision was presented--i.e., whether there was "oppression" or "surprise." Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice. Surprise involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them. The substantive element of unconscionability has to do with the effects of the contractual provision and whether it is overly harsh or one-sided. (*Armendariz v. Foundation Health Psychcare Services, Inc* (2000) 24 Cal.4th 83, 114 (*Armendariz*); *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486.)

To be unenforceable, a contract must be both procedurally and substantively unconscionable, but the courts employ a "sliding scale" or a balancing relationship between the two elements of unconscionability, such that the greater the degree of unfair surprise or unequal bargaining power, the less the degree of substantive unconscionability required to annul the contract and vice versa. (*Armendariz, supra*, 24 Cal.4th at p. 114; *Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.* (2001) 89 Cal.App.4th 1042, 1056.)

We agree with the trial court's conclusion that the arbitration agreement, as amended through the bill insert, was a contract of adhesion and, hence, procedurally unconscionable. (See *Flores v. Transamerica HomeFirst, Inc., supra,* 93 Cal.App.4th at p. 853; *Stirlen v. Supercuts, Inc., supra,* 51 Cal.App.4th at pp. 1533-1534.) Cingular concedes the point. (See *Szetela, supra*, 97 Cal.App.4th at p. 1100 [contract amendment

contained in bill stuffer was procedurally unconscionable].) The more difficult question is whether the ban on class arbitration is substantively unconscionable.

That issue was addressed in *Szeleta, supra,* 97 Cal.App.4th 1094. There the plaintiff was a credit card holder who alleged that the bank (credit card company) had improperly charged him a $29 fee for exceeding his credit limit. The arbitration clause in the credit card agreement prohibited joining or consolidating claims in arbitration or arbitrating claims as a representative, as a member of a class, or as a private attorney general. When the plaintiff brought a class action, the bank successfully moved to compel arbitration on an individual basis. The appellate court held the ban on class treatment to be unconscionable, and the court directed the trial court to proceed to arbitration on a class basis.

The *Szeleta* court reasoned that the ban on class arbitration was unfairly one-sided: "Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover, because credit card companies typically do not sue their customers in class action lawsuits. This provision is clearly meant to prevent customers . . . from seeking redress for relatively small amounts of money, such as the $29 sought by Szeleta. Fully aware that few customers will go to the time and trouble of suing in small claims court, Discover has instead sought to create for itself virtual immunity from class or representative actions despite their potential merit, while suffering no similar detriment to its own rights." (*Szeleta*, *supra*, 97 Cal.App.4th at p. 1101.)

The lack of mutuality is, of course, a basis for finding substantive unconscionability. (*Armendariz, supra,* 24 Cal.4th at pp. 117-121.) The courts have found unconscionable a clause requiring arbitration for the weaker party while giving the stronger party a choice of forum. (*Id.* at pp. 120-121 [only employee's claims of wrongful termination subject to arbitration]; *Little v. Auto Stiegler, Inc., supra,* 29 Cal.4th at p. 1073 [allowing appeal of any award over $50,000 effectively gave only employer right to appeal]; *Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1407-1408 [personal injury damages not available without contractor's consent]; *Flores v. Transamerica*

HomeFirst, Inc., supra, 93 Cal.App.4th at p. 855 [only borrower's claims subject to arbitration while lender had remedy of foreclosure].)[11]

Here, it is true that the ban on class-wide arbitration tends to favor Cingular; the obvious effect is to limit the scope of potential damages that Cingular would face in class arbitration without the ability to obtain judicial review. Yet, the ban on class arbitration does not affect the choice of forum. The limitation is only on the breadth of the arbitration proceeding--i.e., the manner in which the arbitration is to occur. And the limitation in the present case is materially different from the clause in *Szetela.* The arbitration clause here expressly permits the customers to obtain relief in small claims court.[12] Moreover, the costs of arbitration are paid by Cingular. Unlike the credit card customers in *Szetela,* Cingular's subscribers are not deterred from seeking redress for small amounts. Under these circumstances, we do not find the arbitration clause so one-sided or unreasonable to be substantively unconscionable.

(2) Impairment of Statutory Rights

The Supreme Court has recognized two distinct defenses to a motion to compel arbitration: (1) the arbitration agreement is unconscionable and (2) arbitration would compel the claimant to forfeit certain statutory rights. (*Armendariz, supra,* 24 Cal.4th at p. 113; *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 86.) The parties here have not made a distinction between the two defenses but have treated the latter as a version of unconscionability. We treat the two defenses separately.

It is now well settled that even claims arising under a statute designed to further important social policies may be arbitrated. (*Green Tree Fin. Corp.-Ala. v. Randolph*

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11 Not every instance of one-sidedness is invalid: "[A] contract can provide a 'margin of safety' that provides the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need without being unconscionable." (*Stirlen v. Supercuts, Inc., supra,* 51 Cal.App.4th at p. 1536; accord, *Armendariz, supra,* 24 Cal.4th at p. 117.)

12 Oddly, the *Szetela* court seems to have presumed that the credit cardholders were free to go to small claims court but would be unlikely to do so. Yet, the arbitration clause in that case withdrew the right to litigate any claim in court. (*Szeleta, supra,* 97 Cal.App.4th at p. 1096.)

(2000) 531 U.S. 79, 90; *Cruz v. PacifiCare Health Systems, Inc., supra,* 30 Cal.4th at p. 317 [UCL]; *Broughton v. Cigna Healthplans, supra,* 21 Cal.4th at p. 1084 [CLRA].) But arbitration will be denied if the prospective litigant is precluded from fully vindicating the statutory cause of action in the arbitral forum. (531 U.S. at p. 90, *Armendariz, supra,* 24 Cal.4th at pp. 99-104.) In *Armendariz,* the claimant/employees sued for sexual harassment under FEHA, but the arbitration clause in their employment contract confined the potential relief to back pay and precluded recovery of punitive damages and attorney fees--recovery that would otherwise have been available under FEHA. The Supreme Court held that the limitation on remedies was unlawful as it would prevent the employees' full vindication of their rights under FEHA. (See also *Stirlen v. Supercuts, Inc., supra,* 51 Cal.App.4th at pp. 1539-1540 [limit on remedies under several statutes]; *Graham Oil v. ARCO Products Co.* (9th Cir. 1994) 43 F.3d 1244, 1248 [limit on remedies that would be available under Petroleum Marketing Practices Act].)

Plaintiffs apparently rely upon this principle in emphasizing that consumer class actions are given statutory protection. Under the CLRA, class actions are specifically permitted (Civ. Code, §§ 1752, 1781), and any purported contractual waiver of rights granted by the CLRA is invalid (Civ. Code, § 1751). Also, at the time of the events here, the UCL allowed consumers to redress unfair business practices through private attorney general actions. (Bus. & Prof. Code, § 17204; see fn. 7, *ante*.)

The *Szeleta* court apparently relied upon this principle, too, in finding that the contractual ban on class arbitration violates public policy. The *Szeleta* court reasoned that the ban would undermine consumer protection statutes by eliminating the private attorney general mechanism: "[The clause] contradicts the California Legislature's stated policy of discouraging unfair and unlawful business practices, and of creating a mechanism for a representative to seek relief on behalf of the general public as a private attorney general. (See, e.g., Bus. & Prof. Code, § 17200 et seq.) It provides the customer with no benefit whatsoever; to the contrary, it seriously jeopardizes customers' consumer rights by prohibiting any effective means of litigating Discover [Bank's] business practices. This is not only substantively unconscionable, it violates public policy by

granting Discover [Bank] a 'get out of jail free' card while compromising important consumer rights." (*Szeleta, supra*, 97 Cal.App.4th at p. 1101.)

We cannot agree that the ban on class arbitration immunizes businesses from consumer protection lawsuits. The arbitration clause has no effect on actions by the Attorney General or other governmental prosecutors to redress unfair business practices. (*EEOC v. Waffle House, Inc*. (2002) 534 U.S. 279; see *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 32.) Nor does the ban on class arbitration do anything to limit litigation. The customer's right to litigate has already been curtailed by the arbitration agreement itself. As we have said, monetary claims under the UCL and CLRA are arbitrable even though such claims vindicate important statutory rights. What is restricted here is the breadth or manner of arbitration and the ability to pursue the claims of others within the arbitration.

There is no statutory right to class arbitration. Class arbitration has been held permissible when the trial court, in the exercise of its discretion, finds that the interests of justice require class-wide relief. (*Keating v.Superior Court* (1982) 31 Cal.3d 584, 609-614, reversed on other grounds *sub nom. Southland Corp. v. Keating* (1984) 465 U.S. 1; *Blue Cross of California v. Superior Court* (1998) 67 Cal.App.4th 42, 64; see *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444; *Cruz v. PacifiCare Health Systems, Inc., supra,* 30 Cal.4th at pp. 318-319.) However, judicial recognition of a class-wide remedy in arbitration cannot be equated with a nonwaivable statutory right. Indeed, a nonwaivable right to class arbitration would undermine the purpose of arbitration. Arbitration is meant to resolve private disputes in an expeditious and efficient manner, not to remedy a public wrong. (*Broughton v. Cigna Healthplans, supra*, 21 Cal.4th at p. 1080.) The fact that the procedural device of class treatment is not available in arbitration is "part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition' [citing *Gilmer v. Interstate/Johnson Lane Corp., supra*, 500 U.S. at p. 31], characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims." (*Iberia Credit Bureau, Inc. v. Cingular Wireless* (5th Cir. 2004) 379 F.3d 159, 174.)

C. Cost Allocation

Plaintiffs further argue that the provisions for allocation of arbitration costs are unconscionable. Plaintiffs contend that the customer faces the risk that the arbitrator may ultimately find the customer's claim to be "improper or not warranted" and hence may ultimately allocate costs to the customer. The argument is meritless.

We reject plaintiffs' implicit assertion that a consumer cannot be required to pay any costs of arbitration. Plaintiffs rely on *Armendariz, supra,* 24 Cal.4th 83, in which the Supreme Court held that when an employer imposes mandatory arbitration as a condition of employment, the employee cannot be required to bear any type of expense that is unique to arbitration and that the employee would not have to bear, were he free to bring his case to court. (*Id.* at pp. 107-113.) Accordingly, the court interpreted the contract that was otherwise silent on the issue to mean that the employer must bear all costs of arbitration. (*Id.* at p. 113.)

That "categorical" approach differs from the approach taken by the United States Supreme Court in a consumer arbitration case, *Green Tree Fin. Corp.-Ala. v. Randolph, supra,* 531 U.S. 79. In the face of a silent agreement, the court held that a party could seek to invalidate an arbitration agreement on the ground that the costs of arbitration would be "prohibitively expensive," but the consumer in that case failed to prove the likelihood that the costs would be so. (*Id*. at pp. 90, 92.) Subsequent decisions have characterized the *Green Tree* approach as necessitating a case-by-case analysis. (*Gutierrez v. Autowest, Inc., supra,* 114 Cal.App.4th at p. 96.)[13]

The California Supreme Court has not yet ruled on the allocation of costs in a consumer arbitration, but we have concluded that the categorical approach is not appropriate for consumer cases. (*Gutierrez v. Autowest, Inc., supra,* 114 Cal.App.4th at pp. 96-98.) In *Guitierrez,* the claimant established an inability to pay the up-front

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13 In *Little v. Auto Stiegler, Inc., supra,* 29 Cal.4th at pages 1081-1085, the California Supreme Court recognized the difference in the two approaches and affirmed its categorical approach in mandatory employment arbitration.

administrative fees, and we held the fee division provision unconscionable where the arbitration agreement provided no avenue for relief from unaffordable fees. (*Id.* at pp. 89-92.) The present case is markedly different. The arbitration clause provides that Cingular will pay the filing fee up front and will pay all arbitration costs--unless the arbitrator ultimately decides that the claim was frivolous.

In complaining that the customer might be ordered to pay costs if the customer does not prevail in the arbitration, plaintiffs overlook a key phrase in the arbitration clause. The full text of the arbitration clause calls for an award of costs by the arbitrator if the claim is found improper or not warranted "as measured by the standards set forth in Federal Rule of Civil Procedure 11(b)." The reference to Federal Rule of Civil Procedure 11(b) means that costs will be allocated only when the claim is found to be frivolous.[14] We find nothing overly harsh or unfair in the provision relating to costs in arbitration.[15]

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14 Rule 11(b) of the Federal Rules of Civil Procedure provides that by filing a document in court the party is deemed to certify that "(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief." (Fed. Rules Civ. Proc., rule 11(b), 28 U.S.C.)

15 Plaintiffs complain that the original arbitration clause was silent on the allocation of costs and, under the wireless industry arbitration rules, all costs would have been allocated pro rata. That clause was, of course, superseded by the July 2003 contract modification.

Plaintiffs raise other claims of unconscionability that pertain only to the arbitration clause before its modification in July 2003. The original arbitration clause contained a provision requiring the parties to keep confidential the outcome of any arbitration proceeding. That confidentiality provision was entirely omitted from the July 2003 modification. Likewise, plaintiffs' concern about the neutrality of the arbitrator selected under the wireless industry arbitration rules has been nullified by the July 2003 modification calling for a different set of arbitration procedures.

We have no reason to examine these superseded provisions. This is not a case in which a defendant offered to change a defective provision in order to nullify an unconscionability claim. (Cf. *Armendariz, supra,* 24 Cal.4th at p. 125.) Cingular made

DISPOSITION

The order denying the petition to compel arbitration is affirmed as to plaintiff Rita Parrish. As to the remaining plaintiffs, the order is reversed in part, and the trial court is directed to enter a new order compelling arbitration of the monetary claims on an individual basis. With respect to the claims for injunctive relief, the order denying arbitration is affirmed. The parties shall bear their own costs on appeal.

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Jones, P.J.

We concur:

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Stevens, J.

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Simons, J.

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the modification in July 2003 to benefit all existing customers, and Cingular announced its plan to apply the July 2003 modification to past customers as well. Cingular would be estopped from taking a contrary position in any later proceeding. (See *Coleman v. Southern Pacific Co.* (1956) 141 Cal.App.2d 121, 128; cf. *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 960-963.) Plaintiffs' objections to the original arbitration agreement are now moot.

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Trial court:	Alameda County Superior Court
Trial judge:	Hon. Ronald M. Sabraw
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