

TENDERED

RECEIVED
NOV 03 2009
CLERK
SUPREME COURT

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2008-SC-000789-D

FILED
FEB 10 2010
SUPREME COURT CLERK

MICHAEL SCHNUERLE, AMY GILBERT,
LANCE GILBERT and ROBIN WOLFF
Individually and on behalf of all others similarly situated, Appellants

v.

INSIGHT COMMUNICATIONS COMPANY, L.P.,
and INSIGHT COMMUNICATIONS MIDWEST, LLC, Appellees.

Appeal from the Kentucky Court of Appeals, No. 2006-CA-002121-MR
Affirming the Judgment of the Jefferson, Circuit Court,
Action No. 06-CI-04267

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF APPELLANTS

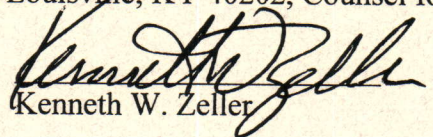
Of Counsel:
Julie Nepveu
AARP Foundation Litigation
Michael Schuster
AARP

Kenneth W. Zeller
KY Bar No. 79659
AARP Foundation Litigation
601 E Street, N.W.
Washington, DC 20049
Telephone (202) 434-2060

601 E Street, N.W.
Washington, DC 20049
Telephone (202) 434-2060

Certificate required by CR 76.12(6)

The undersigned certifies that a copy of this Brief *Amicus Curiae* Of AARP In Support of Appellants was served upon the following named individuals by FedEx overnight delivery service on November 2, 2009: H. Phillip Grossman, Jennifer A. Moore, Grossman & Moore, PLLC, One Riverfront Plaza, Suite 1810, 401 W. Main Street, Louisville, KY 40202, Counsel for Appellants; Clerk, Supreme Court, Room 209, Capitol Building, 700 Capital Avenue, Frankfort, KY 40601; Clerk, Court of Appeals 360 Democrat Drive, Frankfort, KY 40601; Hon. McKay Chauvin, Jefferson Circuit Court, Jefferson County Judicial Center, 700 W. Jefferson Street, Louisville, KY 40202; and Laurence J. Zielke, Nancy J. Schook, Zielke Law Firm, PLLC, 1250 Meidinger Tower, 462 S. Fourth Street, Louisville, KY 40202, Counsel for Appellees.


Kenneth W. Zeller

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF POINTS AND AUTHORITIES i

STATEMENT OF INTEREST 1

ARGUMENT 2

I. Arbitration Provisions Are Often Designed To Shield Corporations From Liability By Limiting Access To Economically Effective Remedies 2

Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) 2

Shearson/Am. Express v. McMahon, 482 U.S. 220 (1987) 2

 David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. Rev. 49 (2003) 2

 Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373 (2005) 3

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 3

Carnegie v. Household Int'l, Inc., 376 F.3d 656 (7th Cir 2004) 3

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) 3

Mace v. Van Ru Credit Corp., 109 F.3d 338 (7th Cir. 1997) 3

 Alba Conte & Herbert B. Newberg, *NEWBERG ON CLASS ACTIONS*, § 9:67 N.2 (4TH ED. 2008) 3, 4

 Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373 (2005) 4

 J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 V and. L. Rev. 1735 (2006) 4

II. Class Actions Bans Undermine Laws Protecting People In The Marketplace 4

<i>Scott v. Cingular Wireless</i> , 161 P.3d 1000 (Wash. 2007).....	4
<i>Discover Bank v. Superior Court</i> , 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (2005).....	4
Henry Cohen, Congressional Research Service, <i>Awards of Attorneys' Fees By Federal Courts and Federal Agencies</i> 63-113 (2006).....	5
Civil Rights Act of 1964, 42 U.S.C. § 2000a-3 (2000)	5
Senate Report No. 95-382, 95th Cong., 1st. Sess., p. 5, reprinted in 1977 U.S.C.C.A.N., 1695, 1699.....	5
<i>Discover Bank v. Superior Court</i> , 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (2005).....	5
<i>Hensley v. Eckerhart</i> , 461 U.S. 424 (1983).....	5
<i>Gramatan Home Investors Corp. v. Starling</i> , 470 A.2d 1157 (1983)	5
<i>Bruntaeger v. Zeller</i> , 515 A.2d 123 (1986)	5
<i>Linoski v. Fleetwood Homes of Texas</i> , #12, 873 So.2d 886 (2004).....	6
<i>Fegley v. Higgins</i> , 19 F.3d 1126 (6th Cir. 1994).....	6
<i>Skirchak v. Dynamics Research Corp.</i> , 432 F. Supp. 2d 175 (D. Mass. 2006)	6
<i>Cooper v. QC Financial Services, Inc.</i> , 503 F.Supp.2d 1266 (D. Ariz. 2007)	6
<i>Coady v. Cross Country Bank</i> , 299 Wis. 2d 420 N.W.2d 732 (Wis. Ct. App. 2007).....	6
Sen. Rep. No. 93-151, <i>reprinted in</i> 1974 U.S.C.C.A.N. 7702.....	7
<i>Vasquez-Lopez v. Beneficial Oregon</i> , 210 Or. App. 553, 152 P.3d 940 (Or. Ct. App. 2007).....	7
<i>Kristian v. Comcast Corp.</i> , 446 F.3d 25 (1st Cir. 2006).....	7
<i>Eagle v. Fred Martin Motor Co.</i> , 157 Ohio App. 3d 150, 178 N.E.2d 1161 (Ohio Ct. App. 2004).....	7

<i>West Virginia ex rel. Dunlap v. Berger</i> , 567 S.E.2d 265 (W. Va. 2002).....	7
<i>Szetela v. Discover Bank</i> , 97 Cal.App.4th 1094, 118 Cal.Rptr.2d 862 (2002)	7, 8
Jean R. Sternlight, <i>As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?</i> Wm and Mary L. Rev. 1 (2000).....	8
Deposit Guaranty [<i>Nat'l Bank v. Roper</i> , 445 U.S. 326 (1980).....	8
<i>Kinkel v. Cingular Wireless LLC</i> , 857 N.E.2d 250 (Ill. 2006)	8
<i>Homa v. American Express Co.</i> , 558 F.3d 225 (3rd Cir. 2009).....	8, 9
<i>Fiser v. Dell Comp. Corp.</i> , 144 N.M. 464, 188 P.3d 1215 (2008)	9
<i>Woods v. QC Financial Services</i> , 280 S.W.3d 90 (Mo. App. 2008)	9
<i>Muhammad v. County Bank of Rehoboth Beach</i> , 912 A.2d 88 (N.J. 2006).....	9
<i>McNulty v. H & R Block</i> , 843 A.2d 1267 (Pa.Super.2004)	9
<i>Powertel, Inc. v. Bexley</i> , 743 So.2d 570 (Fla. Dist. Ct. App. 1999)	9
<i>Dale v. Comcast</i> , 498 F.3d 1216 (11th Cir. 2007).....	9
<i>Luna v. Household Fin. Corp.</i> , III, 236 F. Supp. 2d 1166, (W.D. Wash. 2002).....	9
<i>Gentry v. Superior Court</i> , 64 Cal. Rptr. 3d 773, 165 P.3d 556 (Cal. 2007).....	9, 10
III. A Showing Of Procedural Unconscionability Should Not Be Required In Standard Form Contracts	10
<i>Buck Run Baptist Church, Inc. v. Cumberland Sur. Ins. Co., Inc.</i> , 983 S.W.2d 501 (Ky. 1998).....	10
<i>Louisville Bear Safety Serv. Inc. v. S. Cent. Bell Tel. Co.</i> , 571 S.W.2d 438 (Ky. App. 1978).....	10
Linda J. Demain and Deborah Hensler, " <i>Volunteering</i> " to Arbitrate	

<i>Through Predispute Arbitration Clauses: The Average Consumer's Experience</i> , 67 Law & Contemp. Problems 55 (Winter/Spring 2004).....	10, 11
K. Llewellyn, <i>The Common Law Tradition: Deciding Appeals</i> § 370 (1960)	11
<i>Conseco Finance Servicing Corp. v. Wilder</i> , 47 S.W.3d 335 (Ky. App. 2001)	11
<i>Jones v. Bituminous Cas. Corp.</i> , 821 S.W.2d 798 (Ky. 1991).....	11
Restatement (Second) of Contracts § 208 (1981).....	11
UCC § 2-302.....	11
Francis J. Swayze, <i>The Growing Law</i> , 25 Yale L.J. 1 (1915)	11, 12
Restatement (Second) of Contracts § 178 (1981).....	12
<i>Ting v. AT&T</i> , 319 F.3d 1126 (9th Cir. 2003)	12
Richard H. Thaler, <i>The Behavioral Economics of Retirement Savings Behavior</i> , 2007, available at http://www.aarp.org/research/ppi/econsec/pensions/articles/2007_02_savings.html	12
Mary M. Schmitt, <i>Automatic IRAS: Are They Administratively Feasible, What are the Costs to Employers and the Federal Government, and will They Increase Retirement Savings?</i> 2007, available at http://www.aarp.org/research/surveys/money/work/benefits/articles/enhancing_401k.html	12
A Report for AARP by Towers Perrin, <i>Enhancing 401(k) Value and Participation: Taking the Automatic Approach</i> , June 2007, available at http://www.aarp.org/research/surveys/money/work/benefits/articles/auto_401k.html	12, 13
Robert N. Mayer, Ph.D., <i>Defending Your Financial Privacy: The Benefits and Limits of Self-Help</i> 30 Feb. 2006, available at http://assets.aarp.org/rgcenter/consume/2006_06_privacy.pdf	13
Mark E. Budnitz, <i>The High Cost of Mandatory Consumer Arbitration</i> , 67 Law & Contemp. Probs. 133 (2004).....	13
<i>Kristian v. Comcast Corp.</i> , 446 F.3d 25 (1st Cir. 2006)	14

Coneff v. AT&T Corp., 620 F.Supp.2d 1248 (W.D. Wash. 2009)..... 14

In re American Express Merchants' Litigation, 554 F.3d 300 (2d Cir.
2009), pet. for cert. filed, No. 08-1473 (May 29, 2009)14

Reuter v. Davis, 2006 WL 3743016, *4 (Fla. Cir. Ct. 2006)14, 15

Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*,
57 Stan. L. Rev. 1631 (2005)15

STATEMENT OF INTEREST

AARP is a non-partisan, non-profit organization with nearly 40 million members, approximately 500,000 of whom live in Kentucky. 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. While many older people lose large amounts of money to such practices, many others lose relatively small amounts or are subjected to statutory violations with low damage remedies. These losses nevertheless are significant to them, and may accumulate into huge ill-gotten gains for corporations unless adequate relief is available through private litigation.

AARP is interested in the Court's ruling because of the impact it will have if Kentucky consumers are forced to forego the only effective remedies they have, essentially permitting corporations to operate with impunity. AARP is concerned that access to justice is being severely curtailed by corporations that limit substantive rights and remedies through mandatory arbitration clauses in standardized contracts. In addition to preventing individual consumers from resolving disputes judicially, most arbitration clauses also contain remedy-stripping provisions that would never be permitted or enforced if not imbedded in the arbitration clause. In particular, preclusion of class action lawsuits *and* class-wide arbitration makes it virtually impossible for many consumers to seek relief and effectively immunizes corporations from liability. Arbitration may also limit remedies because of the expense, lack of review, and inherent disadvantages to infrequent users compared to repeat players. AARP has filed *amicus* briefs in numerous cases challenging such provisions and otherwise seeking to preserve access to justice and remedies.

ARGUMENT

I. **Arbitration Provisions Are Often Designed To Shield Corporations From Liability By Limiting Access To Economically Effective Remedies**

Corporations—not willing to face potential liability for their violations of law—are going rogue. Corporate lawyers have devised a system which uses arbitration provisions as a means to shield corporations from liability when they step over the line. Many arbitration clauses, packed with remedy-stripping language, are not designed simply to move disputes from the judicial to the arbitral forum with no loss of substantive rights, as the Federal Arbitration Act was designed to encourage. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001); *Shearson/Am. Express v. McMahon*, 482 U.S. 220, 232 (1987). Instead, their purpose is to immunize corporate defendants from any liability or accountability for wrongdoing by preventing potential victims from seeking redress either in court or before an arbitrator. As one scholar observed, remedy-stripping clauses were inserted into broad arbitration agreements by “overzealous drafters” who hoped that “the courts’ enthusiasm for enforcing arbitration clauses would spill over onto the logically separable remedy limitation, one that would have had no chance of enforcement without the arbitration clause.” David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. Rev. 49, 49-50 (2003).

Operating more like pick-pockets than pirates, many corporations are stealthily eliminating statutory rights and remedies by way of arbitration clauses imbedded in form contracts. Flying below the radar, credit card companies, electronics manufacturers, wireless and cable service providers, nursing homes, employers, homebuilders, and many other corporate entities have devised ever more sophisticated arbitration provisions,

knowing that few people will read or understand their import. Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 395-99 (2005).

In particular, requiring all disputes to be handled on an individual basis permits corporations to shield themselves from liability, unnoticed by most people. On its face, a class action ban does not abolish a remedy. It merely requires a company's thousands or even millions of customers who entered into identical contracts to pursue their grievances under the contract one at a time. Nevertheless, they effectively cut off remedies and shield corporations because often, "[e]conomic reality dictates that [a plaintiff's] suit proceed as a class action or not at all." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974). As Judge Richard Posner aptly observed: "The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

The costs of litigation, including attorneys, experts, and discovery, would take access to justice to be out of reach for most people—even those with substantial damages—if they were required to pursue their cases unaided by the class action mechanism.

"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. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997), quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997). Scholars have warned that the growing reliance on contract provisions prohibiting class arbitration carries great potential for abuse and overreaching. See, e.g., 3 Alba Conte & Herbert B. Newberg, NEWBERG ON

CLASS ACTIONS, § 9:67 n. 2 (4th ed. 2008) (“The bar on class arbitration threatens the premise that arbitration can be a fair and adequate mechanism for enforcing statutory rights.”); Gilles, *supra* at 378 (arguing that “sound public policy requires collective litigation be available for small-claim plaintiffs who would not have the incentive or resources to remedy harms or deter wrongdoing in one-on-one proceedings”); J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 Vand. L. Rev. 1735, 1770 (2006) (urging non-enforcement of class action waivers “where such waivers have the practical effect of extinguishing individual claims”).

II. Class Actions Bans Undermine Laws Protecting People In The Marketplace

The stakes are much higher than might appear at first glance. Not only are individual’s rights and remedies threatened, but ultimately, the integrity of the laws protecting the marketplace is under attack as well. Some practices that cause relatively small individual injuries create a powerful financial incentive for corporations to cheat. In one year, a business with one million customers can net \$12 million by overcharging each customer only a dollar a month. *See, e.g. Scott v. Cingular Wireless*, 161 P.3d 1000, 1004 (Wash. 2007) (holding class action ban unenforceable where it would effectively eliminate relief for customers alleging that their wireless service provider unlawfully overcharged them between \$1 and \$45 per month); *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (2005) (holding class action ban unenforceable where credit card company had allegedly carried out a deliberate scheme to cheat large numbers of consumers out of small sums).

Many of the laws in place to prevent such marketplace abuses are designed primarily to be self-enforcing. Congress entrusts the protection of virtually all of our most

important individual rights to private litigants.¹ See, e.g., Civil Rights Act of 1964, 42 U.S.C. § 2000a-3 (2000). For example, the Senate Report accompanying adoption of the Fair Debt Collections Practices Act (“FDCPA”) states that the “committee views this legislation as primarily self-enforcing; consumers who have been subject to collection abuses will be enforcing compliance.” Senate Report No. 95-382, 95th Cong., 1st. Sess., p. 5, reprinted in 1977 U.S.C.C.A.N., 1695, 1699.

Thus, private individuals, rather than taxpayer-funded agencies, take the lead in policing the marketplace. See *Discover Bank*, 161 P.3d at 1104 (noting that the state attorney general's office relied on private class actions “to correct the deceptive or unfair industry practice and to reimburse consumers for their losses”). Legislatures “could, of course, have provided public funds or government attorneys for litigating ...claims, but it chose to “limi[t] the growth of the enforcement bureaucracy...by continuing to rely on the private bar and by making defendants bear the full burden of paying for enforcement of their ...obligations.” *Hensley v. Eckerhart*, 461 U.S. 424, 445-446 (1983). Courts have found that “[t]he interests of the business community and the public at large are best served by shifting the burden of the expense of consumer fraud litigation onto the shoulders of those whose unfair or fraudulent acts are responsible for the litigation in the first place.” *Gramatan Home Investors Corp. v. Starling*, 470 A.2d 1157, 1162 (1983); accord *Bruntaeger v. Zeller*, 515 A.2d 123 (1986).

When people enforce protective laws through private suits, they also further the public interest by deterring marketplace abuses. Corporations do not have a profit incen-

¹ In addition to the Constitutional provisions protected by self-enforcing laws, “[t]here are also roughly two hundred statutory [provisions], which were generally enacted to encourage private litigation to implement public policy.” Henry Cohen, Congressional Research Service, *Awards of Attorneys’ Fees by Federal Courts and Federal Agencies* 63-112 (2006).

tive to cheat if there is a reasonable chance they will be caught and forced to pay both restitution and the price of enforcement. *Linoski v. Fleetwood Homes of Texas*, #12, 873 So.2d 886 (2004) (finding enforcement discourages sellers and manufacturers from selling shoddy, defective products in the marketplace); *Fegley v. Higgins*, 19 F.3d 1126, 1135 (6th Cir. 1994) (noting “by penalizing an employer who neglected to pay an employee overtime or to even maintain any records of his hours worked; [this lawsuit] therefore encourages employer adherence to the mandates of the [Fair Labor Standards Act] in the future.”).

If, however, private litigants are prohibited from aggregating their claims, enforcement is reduced and marketplace abuses are not deterred. *See, e.g., Skirchak v. Dynamics Research Corp.*, 432 F. Supp. 2d 175, 181 (D. Mass. 2006) (holding a class action waiver unconscionable, “because it may effectively prevent [] employees from seeking redress of [statutory] violations” and “removes any incentive for [the employer] to avoid the type of conduct that might lead to class litigation in the first instance”); *Cooper v. QC Financial Services, Inc.*, 503 F. Supp. 2d 1266, 1288 (D. Ariz. 2007) (noting that “[i]ndividualizing each claim absolutely and completely insulates and immunizes Defendant from scrutiny and accountability for its business practices and ‘also serves as a disincentive for [Defendant] . . . to avoid the type of conduct that might lead to class action litigation in the first place’”) (alterations in original) (citations omitted); *Coady v. Cross Country Bank*, 299 Wis. 2d 420, 452, 729 N.W.2d 732, 747 (Wis. Ct. App. 2007) (noting that without the availability of class action mechanism where small-value claims are concerned, “many consumers may never realize that they have been wronged” and the deterrent effect on corporate wrongdoing provided by the prospect of class-wide relief “is

eviscerated.”). In fact, lack of enforcement puts honorable businesses at a competitive disadvantage. “It is difficult for a company to conform to high standards and practices if it has competitors who continue to reap greater profits by pursuing less honorable tactics.” Sen. Rep. No. 93-151, *reprinted in* 1974 U.S.C.C.A.N. 7702, 7709.

Class action bans undermine laws protecting people from marketplace abuses because there simply is no comparable public enforcement mechanism to fill their role. *See, e.g., Vasquez-Lopez v. Beneficial Oregon*, 210 Or. App. 553, 572, 152 P.3d 940, 951 (Or. Ct. App. 2007) (holding a class action ban unconscionable after finding that it gave the defendant “a virtual license to commit, with impunity, millions of dollars’ worth of small-scale fraud”); *Kristian v. Comcast Corp.*, 446 F.3d 25, 61 (1st Cir. 2006) (finding “[i]f the class mechanism prohibition here is enforced, Comcast will be essentially shielded from private consumer antitrust enforcement liability, even in cases where it has violated the law” and “the social goals of federal and state antitrust laws will be frustrated because of the ‘enforcement gap’ created by the de facto liability shield.”); *Eagle v. Fred Martin Motor Co.*, 157 Ohio App. 3d 150, 178, 809 N.E.2d 1161, 1183 (Ohio Ct. App. 2004) (noting that the elimination of “a consumer’s right to proceed through a class action or as a private attorney general in arbitration . . . directly hinders the consumer protection purposes” of the Ohio Consumer Protection Act); *West Virginia ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va. 2002) (finding “permitting [a ban on] class action relief would go a long way toward allowing those who commit illegal activity to go unpunished, undeterred, and unaccountable.”); *Szetela v. Discover Bank*, 97 Cal.App.4th 1094, 118 Cal.Rptr.2d 862, 868 (2002) (holding class action ban was “not only substantively uncon-

scionable, it violates public policy by granting ... [the defendant] a ‘get out of jail free’ card while compromising important consumer rights.”).

Corporate arguments that the attorney general may be available to fill the enforcement gap have been rejected because it results in “do it yourself” law reform that needs no ye a vote from elected lawmakers. Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?* Wm and Mary L. Rev. 1, 11 (2000). *See also, Deposit Guaranty Nat’l Bank v. Roper*, 445 U.S. 326, 338-339 (1980) (holding “The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government” and noting “increasing reliance on the ‘private attorney general’ for the vindication of legal rights” via class actions). Moreover, few cash-strapped governments are able to increase the size and funding of the attorney general’s office to pursue such claims. As one court noted,

Although the Attorney General could challenge the early-termination fee on behalf of the consumers of Illinois, she must allocate scarce resources to a variety of issues affecting consumers. There is no guarantee that the Attorney General would find the particular claim raised by plaintiff to be a high priority. If we were to conclude that the mere possibility of governmental action were sufficient to overcome the substantive and procedural flaws in Cingular’s class action waiver, we would be denying plaintiff and other consumers any remedy for the allegedly illegal \$150 penalty, at least until the Attorney General had the resources and the incentive to pursue the issue.

Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 262 (Ill. 2006) (holding class action ban in arbitration clause unenforceable).

In light of the importance of private litigation to police the marketplace, courts have refused to aid in corporate efforts to force waiver of important statutory and civil rights through arbitration. *See e.g., Homa v. American Express Co.*, 558 F.3d 225, 230-

31 (3rd Cir. 2009) (emphasizing class action waiver unconscionable based on “the fundamental public policy of New Jersey” that consumers be able to pursue their statutory rights under the state’s consumer protection laws.”); *Fiser v. Dell Comp. Corp.*, 144 N.M. 464, 188 P.3d 1215, 1221 (2008) (enforcement of class action ban “would be tantamount to allowing Defendant to unilaterally exempt itself” from state consumer protection law); *Woods v. QC Financial Services*, 280 S.W.3d 90, 97 & 98 (Mo. App. 2008) (payday lender’s class action ban “reduces the possibility of attracting competent counsel” and, by individualizing claims “absolutely and completely insulates and immunizes Appellant from scrutiny and accountability for its business practices.”); *Muhammad v. County Bank of Rehoboth Beach*, 912 A.2d 88, 99 & 101 (N.J. 2006) (class action ban unenforceable because it effectively shielded payday lender from state statutory consumer protections); *McNulty v. H & R Block*, 843 A.2d 1267, 1273-74 (Pa.Super.2004) (tax preparer’s ban on class arbitration required each individual to pay \$50 filing fee to resolve claim of \$37; “When . . . clauses like this are used as a sword to strike down access to justice instead of a shield against prohibitive costs, we must defer to the overriding principle of access to justice.”); *Powertel, Inc. v. Bexley*, 743 So.2d 570, 576 (Fla. Dist. Ct. App. 1999) (clause prohibiting class action “effectively insulates Powertel from liability under state consumer laws”); *Dale v. Comcast*, 498 F.3d 1216, 1224 (11th Cir. 2007) (noting the importance of considering the practical effect a class action ban will have on the corporation’s ability “to engage in unchecked market behavior that may be unlawful”); *Luna v. Household Fin. Corp., III*, 236 F. Supp. 2d 1166, 1178-79 (W.D. Wash. 2002) (finding class action ban “would prevent borrowers from effectively vindicating their rights for certain categories of claims”); *Gentry v. Superior Court*, 64 Cal. Rptr. 3d 773, 788, 165 P.3d 556,

571 (Cal. 2007) (holding that “class arbitration waivers cannot . . . be used to weaken or undermine the private enforcement of overtime pay legislation by placing formidable practical obstacles in the way of employees’ prosecution of those claims”).

III. A Showing Of Procedural Unconscionability Should Not Be Required In Standard Form Contracts

Courts should carefully scrutinize arbitration clauses despite a superficial appearance of procedural fairness, to ensure they do not unduly limit access to remedies, and by extension, enforcement of laws. The traditional presumption that all contract terms are valid and enforceable is frequently not warranted given the circumstances of the modern marketplace. Unlike in a business-to-business transaction, the average person in the marketplace is usually presented with carefully crafted form contracts designed to provide an advantage to grossly more powerful and knowledgeable corporations. *See, e.g., Buck Run Baptist Church, Inc. v. Cumberland Sur. Ins. Co., Inc.*, 983 S.W.2d 501, 504 (Ky. 1998) (“There is a significant difference between an adhesion contract in which the parties have disparate bargaining power and a contract which voluntarily has been entered into by sophisticated and knowledgeable businessmen concerning a financial transaction of considerable magnitude.”); *Louisville Bear Safety Serv. Inc. v. S. Cent. Bell Tel. Co.*, 571 S.W.2d 438, 439–40 (Ky. App. 1978) (describing difference between contracts entered into by a “knowledgeable businessman” and those between “an uninformed consumer and a coercive or fraudulent company”). “Given the lack of information available to consumers in predispute arbitration clauses, and the difficulty of obtaining and deciphering these clauses, it is likely that most consumers only become aware of what rights they retain and what rights they have waived after disputes arise.” Linda J. Demain and Deborah Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Av-

erage Consumer's Experience, 67 *Law & Contemp. Problems* 55, 73-74 (Winter/Spring 2004).

Particularly when arbitration clauses are buried in the fine print, the ordinary person is unlikely to focus on it or specifically assent to it. As Karl Llewellyn noted,

there is no assent [to boilerplate terms] at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the meaning of those dickered terms which constitute the dominant and only real expression of agreement...

K. Llewellyn, *The Common Law Tradition: Deciding Appeals* § 370 (1960). Because adhesive contracts “are subject to abuse,” courts carefully scrutinize the enforceability of contracts that have “[o]ppressive terms ancillary to the main bargain [that are] concealed in fine print and couched in vague or obscure language.” *Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335, 342 n.20 (Ky. App. 2001); *Jones v. Bituminous Cas. Corp.*, 821 S.W.2d 798, 802 (Ky. 1991) (in contracts of adhesion, ambiguous language must be liberally construed to resolve doubts in favor of consumer).

There is ample authority and sound reason for a court to protect against arbitration clauses which strip remedies and eviscerate enforcement of public laws. Restatement (Second) of Contracts § 208 (1981) states the general rule: “If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract,” and adds by way of comment that “the policy against unconscionable contracts or terms applies to a wide variety of types of conduct.” *Id.* at comment a. Similarly, the Uniform Commercial Code permits a court to refuse to enforce a contract or a clause thereof which was “unconscionable at the time it was made.” UCC § 2-302. *See also* Francis J.

Swayze, *The Growing Law*, 25 Yale L.J. 1, 1 (1915) (observing that courts have historically “refused their aid to the unconscionable bargain”). A closely related doctrine is the historic principle that a contract term “is unenforceable on grounds of public policy if . . . the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement.” Restatement (Second) of Contracts § 178 (1981).

Among other concerns, alternatives offered ostensibly to provide a choice may be illusory. Ever more sophisticated arbitration clauses may appear to be “pro consumer”, when in fact they merely mask the most blatant procedural defects in order to exploit formalistic contract interpretation. *Ting v. AT&T*, 319 F.3d 1126, 1149 n.14 (9th Cir. 2003) (directing courts to “look beyond the facial neutrality and examine the actual effects” of arbitration clauses, and criticizing a case that “ignore[d] the obvious practical implications of the arbitration provision”). For example, permitting a person to refuse arbitration through an opt out provision may ostensibly eliminate the “take it or leave it” element, thereby avoiding heightened scrutiny as adhesive. But it is well known that most people will simply accept the default option. Most will participate in a program designed to allow them to opt out, while the participation rate if asked to opt in is often quite low. Richard H. Thaler, *The Behavioral Economics of Retirement Savings Behavior*, 2007, available at http://www.aarp.org/research/ppi/econsec/pensions/articles/2007_02_savings.html; Mary M. Schmitt, *Automatic IRAS: Are They Administratively feasible, What are the Costs to Employers and the Federal Government, and will They Increase Retirement Savings?* 2007, available at http://www.aarp.org/research/surveys/money/work/benefits/articles/enhancing_401k.html; A Report for AARP by Towers Perrin, *Enhancing 401(k) Value and Participation: Taking the Automatic Approach*, June 2007,

available at http://www.aarp.org/research/surveys/money/work/benefits/articles/auto_401k.html. There are significant educational and motivational disincentives to opting out of a program, even if the outcome would be highly advantageous. Robert N. Mayer, Ph.D., *Defending Your Financial Privacy: The Benefits and Limits of Self-Help* 30 Feb. 2006, available at http://assets.aarp.org/rgcenter/consume/2006_06_privacy.pdf. (concluding “[t]he keys to maintaining consumer motivation to engage in privacy self-protection activities are making such activities less costly and giving consumers confidence that their actions are complemented by those of business, government, and other handlers of their financial information.”).

Similarly, permitting claims to be resolved in small claims court does not eliminate the problem created by a class action ban. As one commentator noted,

However, small claims court may impose even more onerous restrictions than arbitration. For example, many small claims courts do not allow representation by counsel, and without a lawyer it is possible that a consumer would not be aware of the full range of statutory and common law claims available to her. Even if consumers knew about such legal theories, few would be able to effectively litigate such cases without legal representation. In addition, discovery is generally not available in small claims court, and approximately half the states do not allow equitable relief. Finally, because of low monetary jurisdictional limits, the consumer often will not be able to collect more than a fraction of the damages to which she is entitled under the law. In the end, arbitration under the AAA rules may be a more attractive option for consumers with small claims than small claims court. . . .

Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 *Law & Contemp. Probs.* 133, 161 (2004).

Thus, cloaking an arbitration clause with the appearance of procedural fairness does not necessarily alleviate the concerns underlying unequal bargaining power. It may in fact exacerbate those concerns. A corporation can exploit a courts' formalistic approach of requiring both procedural and substantive unconscionability and make even the

most substantively unfair arbitration clause bullet-proof. Therefore, in assessing whether an arbitration clause should be enforced, courts look past formalities to the actual real world effects of such terms. Courts justifiably weigh with skepticism the credibility of a corporation which forces all customers into arbitration, but at the same time gives assurances that customers have other equally effective options. *See, e.g., Kristian v. Comcast Corp.*, 446 F.3d 25, 54 (1st Cir. 2006) (noting that although the class action device is procedural and not formally substantive, a court should refuse to “ignore the substantive implications of this procedural mechanism”). It is hard to understand why there would be any debate if such representations are accurate.

Courts thus focus not only superficially on the availability of options, but probe whether a significant number of aggrieved individuals have actually pursued alternative remedies. *See Coneff v. AT&T Corp.*, 620 F.Supp.2d 1248, 1258 (W.D. Wash. 2009) (rejecting the company’s characterization of the arbitration provision as uniquely “pro-consumer,” pointing out that of over 70 million customers, only 200 consumer arbitrations have been conducted nationwide since 2003); *In re American Express Merchants’ Litigation*, 554 F.3d 300, 316-17, 319 (2d Cir. 2009), pet. for cert. filed, No. 08-1473 (May 29, 2009), (holding ban on collective action which “flatly ensures that no small merchant may challenge American Express’s tying arrangements under the federal anti-trust laws” is unenforceable, and concluding that plaintiffs’ claims “cannot reasonably be pursued as individual actions,” where the cost to litigate an individual case would total between \$600,000 and \$1 million, while the average award a successful individual plaintiff could expect, even after trebling of damages, ranged from a little more than \$9,000 to \$38,549); *Reuter v. Davis*, 2006 WL 3743016, *4 (Fla. Cir. Ct. 2006) (finding that the

“chance that Ms. Reuter could have obtained competent counsel absent the possibility of class action status” was “effectively zero” and that, although over 66,000 customers engaged in over 1,000,000 such transactions during a five year period and the alleged loan sharking was punishable as a third-degree felony under Florida law, not a single individual claim was filed); *see also* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 Stan L Rev 1631, 1655 (2005) (noting, in the first two years in which its contracts featured mandatory arbitration clauses, credit card issuer First USA filed 51,622 arbitration claims against card users, while only four consumers made a claim against the company).

In order to ensure individuals are protected and laws are enforced, courts must scrutinize class action bans in arbitration clauses that shield corporations from liability.

Conclusion

This Court should reverse the lower court’s decision and rule that the arbitration clause is unconscionable and unenforceable.

Respectfully Submitted:



Kenneth W. Zeller
KY Bar No. 79659
AARP Foundation Litigation

Of Counsel:
Julie Nepveu
AARP Foundation Litigation
Michael Schuster
AARP

601 E Street, N.W.
Washington DC 20049
202-434-2060