IN THE SUPERIOR COURT OF PENNSYLVANIA

Docket Nos. 2176 EDA 2005, 2177 EDA 2005
(Consolidated Appeals)

PHILIP THIBODEAU, individually and on behalf of all others similarly situated,
Plaintiff-Appellee,

v.

COMCAST CORPORATION, *et al.,*
Defendants-Appellants.

BRIEF OF *AMICI CURIAE* THE NATIONAL CONSUMER LAW CENTER, THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, and COMMUNITY LEGAL SERVICES, INC., IN SUPPORT OF PLAINTIFF-APPELLEE PHILIP THIBODEAU

Appeal from the June 10, 2005 Order of the Court of Common Pleas for Philadelphia County denying Appellants' Petition to Compel Arbitration and Stay Litigation and the June 10, 2005 Order of the Court of Common Pleas for Philadelphia County denying Appellants' Preliminary Objections to Plaintiff's Class Action and Representative Claims

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Brian R. Mildenberg, Esquire
Attorney I.D. No. 84861
MILDENBERG & STALBAUM, P.C.
1845 Walnut Street, 22nd Floor
Philadelphia, PA 19103
(215) 569-1203

Michael D. Donovan, Esquire
Attorney I.D. No. 51895
DONOVAN SEARLES, LLC
1845 Walnut Street, Suite 1100
Philadelphia, PA 19103
(215) 732-6067

Attorneys for *Amici Curiae*

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STATEMENT OF INTEREST OF AMICI CURIAE

THE NATIONAL CONSUMER LAW CENTER, INC. ("NCLC") is a non-profit corporation established in 1969 to carry out research, education, and litigation regarding significant consumer matters. One of NCLC's primary objectives is to assist attorneys in representing the interests of their low-income and elderly clients in the area of consumer law. A major focus of NCLC's work is to increase public awareness of, and to advocate protections against, deceptive sales and financing schemes. NCLC publishes Unfair and Deceptive Acts and Practices (6th ed. 2004), among its many other treatises, to assist attorneys whose clients have been victimized by unfair, fraudulent, or deceptive practices. In addition, NCLC has directly assisted attorneys in scores of cases brought under federal and state consumer protection statutes and regulations.

THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES ("NACA") is a non-profit group of attorneys and advocates committed to promoting consumer justice and curbing abusive business practices that bias the marketplace to the detriment of consumers. Its membership is comprised of over 1000 law professors, public sector lawyers, private lawyers, legal services lawyers, and other consumer advocates across the country. NACA has established itself as one of the most effective advocates for the interests of consumers in this country.

COMMUNITY LEGAL SERVICES, INC. ("CLS") provides civil legal assistance to the indigent in Philadelphia. CLS has committed substantial resources to consumer protection on behalf of its low-income clients. CLS advised or represented more than 1,700 clients with consumer protection problems in 2003. CLS, in some cases working with the Philadelphia office of the Pennsylvania Attorney General's Bureau of Consumer Protection, has successfully challenged deceptive practices of a rental referral agency, landlords using lease/purchase agreements and leases to evade the Landlord/Tenant Act and mislead tenants about their rights, for-profit trade schools offering false promises of quick training for high-paying jobs, and predatory mortgage lenders and brokers stripping hard-earned wealth from minority homeowners, among others. CLS believes that it is vital for the Consumer Protection Law to remain an effective tool to combat unfair and deceptive business practices that victimize its low-income clients.

STATEMENT OF FACTS

Plaintiff Philip Thibodeau filed this Class Action in the Court below claiming that a class of Comcast customers were improperly billed for cable converter box equipment that was unnecessary for viewing non-premium programming (hereinafter "Basic" services) provided by defendants. (R. 1344-5a). Plaintiff claims that Comcast's practices of billing and charging for the rental of unnecessary equipment violated consumer protection statutes and common law in that Federal Communication Commission ("FCC") regulations have, since April, 1994, prohibited the scrambling of basic service; required that consumers be allowed to view all non-scrambled stations without renting a converter box; and, mandated that consumers be able to use commercially available remote controls in conjunction with the provision of cable services. (R. 1357-60a); 47 C.F.R. § 76.630; 47 U.S.C. § 543(f).

After April, 1994, Comcast no longer scrambled its Basic and Expanded Basic cable service. Once Comcast ceased scrambling its cable television service, consumers could use their TVs, VCRs and remotes that already existed in their homes without renting such equipment from Comcast or paying Comcast in any manner. (R. 1360-2a). Plaintiff claims that Comcast, however, continued to bill and collect fees for this equipment from plaintiff and the class. (R. 1361a).

The Complaint alleges that Comcast's practices, including the violations of federal regulations, gave rise to state law claims under Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 Pa. Cons. Stat. §§ 201-1 *et seq*., and also are actionable under the common law for fraud, negligent misrepresentation, unjust enrichment and breach of contract. (R. 1368-82a).

Comcast claims, however, that Plaintiff has waived his right to file suit in court or to file a class action because of the contents of a standard "Notice of Terms and Conditions" in a billing insert Comcast mailed to millions of its customers. (R. 12-13a); (R704-5a). Specifically, an Arbitration Agreement contained in the Notice states as follows:

> If We are unable to resolve informally any claim or dispute related to or arising out of This Agreement or the Services provided, We have agreed to binding arbitration, except as provided below. You must contact us within one (1) year of the date of the occurrence of the event or facts giving rise to a dispute or You waive the right to pursue a claim based upon such facts or dispute.
>
> There shall be no right or authority for any claims to be arbitrated on a class action or consolidated basis …
>
> ***
>
> You are responsible for all costs that you incur in the arbitration, including, but not limited to, your expert witnesses or attorneys.

Id.

The Notice also contained language eliminating punitive, treble damages and consequential damages, and reserving to Comcast alone access to the courts for enforcement of its rights, including recovering amounts owed to it and for theft of service issues, while requiring Plaintiff to arbitrate all of his claims. (R. 719a).

Plaintiff claims that the monthly amounts he was unlawfully charged for the rental of converter boxes and remote controls was $4.95 per converter and $.30 per remote control, amounting to $126 per year for two converters and two remote controls. (R. 483a).

ARGUMENT

I. Consumer Disputes Concerning the Cable Industry are Generally Small, but Widespread, Common and Recurrent

A. The Cable Industry Has Experienced an Extraordinary Rate of Growth

The cable industry, like other technology industries, has experienced substantial growth, particularly in the last two decades, ranging in millions of customers. The National Cable and Telecommunications Association ("NCTA") is the leading trade association representing the cable television industry in the United States with members serving over 90 percent of the nation's cable television subscribers.[1] According to the NCTA, between 2001 and 2005, the number of digital cable users increased from 12.2 million to 28.5 million, a growth rate of greater than 100%.[2] In addition, cable modem customers experienced a significant increase with 5.5 million users in 2001 to 25.4 million users in 2005, for a 500% increase. *Id.* Of the 110.6 million television households, 59 percent of them utilize cable services creating an estimated annual cable revenue of $69.5 billion. *Id.*

In 1992, Congress started to resolve compatibility problems that existed between consumer electronic equipment and cable service. To expand the market,

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[1] *See* NCTA website at: http://ncta.com/ContentView.aspx?contentId=2930.

[2] *See* NCTA 2006 Annual Report, available at: http://i.ncta.com/ncta_com/PDFs/NCTAAnnual%20Report4-06FINAL.pdf.

Congress added Section 624A to the Communications Act of 1934.[3] Then, in 1994, the FCC promulgated rules and regulations to reduce consumer costs and to limit the use of the converter box for Basic cable services. *Id.* In an effort to expand the market and ensure compatibility, the FCC made a number of recommendations for the improvement of compatibility. *Id.*

The FCC's 1994 amendments: (1) established equipment compatibility requirements that prohibited the manufacture or importation of non-compatible cable-ready equipment effective October 31, 1994; (2) required cable companies to permit consumers to view all non-scrambled stations without the need to rent a cable box, including those non-scrambled stations purportedly available only if one subscribes to defendant's "Standard Service" and rents a box; (3) required cable operators to permit subscribers to use commercially available remote controls regardless of the level of service and prohibited the scrambling of basic service; (4) required that cable operators promote the commercial availability of third party equipment for all levels of service, including Standard Service and premium service; and, (5) initiated a consumer education program to keep cable subscribers

[3] Such problems included interference with VCR functions such as: problems with timed recording of sequential programs on different channels, recording one program while watching another program, also set-top devices interfered with customer-owned remote control devices and universal remote controls. *In the Matter of Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act: Compatibility Between Cable Systems and Consumer Electronics Equipment, First Report and Order,* FCC Order 94-80

informed of the fact that it was no longer necessary to rent converter box equipment or remote controls from the cable system operators.[4]

Most notably, in 1994 the Decoder Interface connector was developed as a means for eliminating the need to use "set-top" devices. 1995 FCC Fact Sheet. This new device would also provide a medium for compatibility with future services that use digital compression. After these amendments, cable operators would no longer scramble their Basic and Expanded Basic cable services. These regulations were promulgated with the purpose to stimulate market growth as compatibility is maintained and new digital cable technologies are introduced. FCC Order 94-80. Thus, manufacturers and retailers would experience increased market participation and provide incentives for technological innovation.

The Comcast Corporation, in particular, has reached the position of the nation's leading provider of cable, entertainment and communications products and services.[5] Comcast is calculated to serve 21.6 million cable customers, with 9.0 million high-speed Internet customers, and 1.5 million voice customers.[6] Within the last three years, Comcast has experienced significant financial growth

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at 4, Adopted April 4, 1994 ("FCC Order 94-80").

[4] *Id.; see also* the FCC's October 1995 Fact Sheet (1995 FCC Fact Sheet), available at http://www.fcc.gov/Bureaus/Cable/Informal/smallsys.wp (stating that the standards were intended to allow for a "transition to an environment where subscriber owned and cable system equipment are fully compatible."

[5] *See* http://comcast.com/About_Comcast/default.html?LinkID=80.

[6] *See* http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-factsheet

with the addition of more than 8 million revenue-generating units with nearly one million added during the first quarter of 2006.[7] Additionally, through the repurchase of Comcast stock and related securities, Comcast has experienced a return of $5.7 billion in value to shareholders through the first quarter. *Id.*

B. The Cable Industry's Robust Growth Has Been Accompanied By Widespread Unfair, Misleading and Deceptive Business Practices <u>That Adversely Affect Consumers</u>

The FCC's Consumer and Government Affairs Bureau ("CGB") tracks the number of consumer complaints and other customer inquiries it has received and issues a quarterly report on the top five subject areas for inquiries and complaints. These reports confirm that there is an increase in the number of complaints in the radio and television services. The CGB reports are conducted quarterly with the most recent report being the first quarter of 2006.[8] Cable and satellite services complaints increased from 225 in the 4th quarter to 290 in 1st quarter. *Id.*

A 2005 decision in the recent bankruptcy of Adelphia Cable Communications from the United States District Court for the Southern District of New York highlights the unfair practices in the cable industry. *Dibbern v. Adelphia et al.,* 331 B.R. 93, (S.D.N.Y. 2005). The complaint in that case alleged

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(Comcast factsheet).

[7] *See* Comcast Press Release, available at: http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-newsArticle&ID=858566&highlight=.

[8] http://www.fcc.gov/cgb/quarter/welcome.html

that after the cable upgrade, Adelphia was contractually obligated to advise its customers that the converter boxes were no longer necessary, but that Adelphia waited months before notifying its customers of this fact, and still collected charges for the hardware. *Id.* at 98-99.

Adelphia experienced similar legal turmoil in 2002 in the state of Vermont when a subscriber decided to take legal action against the unnecessary rental payments of his converter box. *See Yankowski vs. Mountain Cable Company, d/b/a Adelphia Cable Communications, in re: dispute concerning the charges related to the use of cable converter boxes*, State of Vermont Public Service Board, Docket No. 6574 (2002) (statement by John P. Bentley, Esq. Hearing Officer). Adelphia settled the case with a stipulation that required it to contact all current customers using an analog converter box and who were not subscribing to premium channel or pay-per-view services. *Id.* Any customer who believed he or she was paying rental fees for an unnecessary converter box would receive a maximum six-month refund from the time the use of the converter box was necessary.[9]

In March 2006, Comcast agreed to pay a $1 million settlement along with additional provisions to improve its customer service practices and to change its advertising for cable television, Internet, and telephone services.[10] According to the

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[9] Rutland Herald, December 7, 2002, Section: News.

[10] *See* http://www.consumeraffairs.com/news04/2006/03/ma_comcast.html.

Massachusetts Attorney General's Office, Comcast engaged in the following deceptive practices:

> • Advertising limited time offers of free or reduced rate digital cable packages without adequately disclosing to consumers what the actual price of those services would be during and after the promotional period;
>
> • Promoting Comcast's higher priced digital packages, like its "Digital Gold" video programming, without disclosing to consumers that they could purchase less expensive digital cable packages;
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> • Overstating the number of channels available on digital cable packages by failing to distinguish among video, music, and pay-per-view channels, and overstating the capabilities or benefits of Comcast's "On-Demand" and "Digital Video Recorder" services;
>
> • Hiding material terms and conditions from consumers in difficult to read fine print, in violation of the Attorney General's advertising regulations;
>
> • Advertising "free" installation, but then charging consumers for installation, and requiring them to redeem coupons or vouchers to receive an installation credit. In some cases consumers were unable to receive the "free" installation as advertised;
>
> • <u>Charging a $5 monthly rental fee for a converter box and remote control, even for consumers who did not need the converter box and remote to get their programming.</u>

Id. (emphasis added).

By way of further example, in 2004, Charter Communications settled a class action with a settlement valued at $42.6 million based upon allegations of improper converter box rental and other fees charged to consuerms. *See* Order and Final Judgement of December 13, 2004, *Tobar, et al. v. Charter Communications Holding*

Company, et al., Superior Court of Athens-Clarke County, Civ. No. SU-02-CV-0659-G (Georgia 2004) (R. 501).

These misleading practices, similar to the practices forming the basis for the instant consumer protection action, are widespread, with proceedings of record from Maine to Georgia to New York to Pennsylvania, and beyond. Clearly, the nature of consumer disputes relating to cable service, whether a $5.00 monthly fee for a useless converter, or a small monthly fee for rental of an unnecessary remote control, involves small amounts of damages on an individual basis. It is only when these claims are aggregated in a class action that such claims become practical or financially viable.

II. Class Actions Serve the Important Function of Vindication of Small Individual Claims that are Practically Impossible for the Individual Consumer to Bring

Class actions improve access to justice because they "establish procedures for redress of injuries for those whose economic position would not allow individual lawsuits." *Darling v. Champion Home Builders Co.,* 96 Wash. 2d, 706, 638 P.2s 1249 (1982). In consumer cases dealing with nominal individual damages, a class action may be the only effective redress. *Deposit Guaranty Nat'l Bank v. Roper,* 445 U.S. 326, 339, 100 S.Ct. 1166, 63 L.Ed. 2d 427 (1980). In the words of the United States Supreme Court, without class actions, consumers "might not consider it worth the candle" to pursue their claims." *Id.*

As recently noted by one court,

> [B]ecause… damages in consumer cases are often small and because a company which wrongfully extracts a dollar from each of millions of customers will reap a handsome profit, the class action is often the only effective way to halt and redress such exploitation.

Discover Bank v. Superior Court, 113 P.3d 1100, 1108-1109 (Cal. 2005) (internal quotations and citation omitted). In a 2005 case, the Missouri Court of Appeals made a similar observation:

> Here, plaintiff filed a putative class action challenging a charge of 88 cents per month. By itself, such a claim would not be economically feasible to prosecute. However, when all of the customers are added together, large sums of money are at stake. Prohibiting class treatment of these claims would leave consumers with relatively small claims without a practical remedy.

Whitney v. Alltel Communications, Inc., 173 S.W.3d 300, 309 (Mo. App. 2005).

This familiar thread was succinctly stated in a California case, as follows:

> Frequently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all. Individual actions by each of the defrauded consumers [are] often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct. A class action by consumers produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims. The benefit to the parties and the courts would, in many circumstances, be substantial.

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

Indeed, the United States Supreme Court has also stated that:

> 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 Products, Inc. v. Windsor, 521 U.S. 591, 617 117 S.Ct. 2231, 2246 (quoting from *Mace v. Van Ru Credit Corp.,* 109 F.3d 338, 344 (7th Cir. 1997)). Without class actions, many consumer claims would never be brought at all, and defendants who have wrongfully charged consumers fees would remain unjustly enriched, by virtue of the lack of a practical individual remedy.

III. Class Actions Actually Reduce Market Costs for Consumers and Businesses

Contrary to the popularized myth that class actions increase market and transaction costs, and that these increased costs are passed on the consumer through increased prices, class actions actually reduce market costs for consumers and businesses. Where businesses are overcharging consumers in violation of consumer protection laws, these improper charges are removed from the price structure and the wise corporation takes steps to ensure that they are not charged again, thereby avoiding further liability or costs.

A study conducted by a public interest group found that "when it comes to class action lawsuits to remedy fraudulent practices, there is no question that litigation *reduces* the prices that consumers pay." *See* Public Citizen, *Six Common Transactions that Cost Less Because of Class Actions,* August 20, 2003, available at: http://www.citizen.org/congress/civjus/class_action/articles.cfm?ID=10278. According to this study:

> Most class actions are aimed at undisclosed fees, markups, kickbacks, and other overcharges that chisel consumers in small quantities. Often obscured by complicated billing statements, these hidden costs enable businesses to advertise one price, but secretly charge a higher amount. This undermines consumers' ability to comparison shop, and benefits unscrupulous businesses at the expense of more honest competitors.

Id. The study found, for example, that after a bank agreed to pay $5.5 million to settle a consumer class action challenging a $35.00 annual fee, that the bank no longer charged the fee after the class action, thereby reducing consumer costs.

With respect to telephone services, the study found that after settlement of a class action by MCI, consumers could save as much as $2.82 per call, as follows:

> MCI customers expecting a five-cent charge on their phone bill were surprised to see charges as high as $2.87 for a one-minute call after the company had widely advertised "Five Cent Sundays." Customers figured that this $2.82 overcharge was a mistake, but when they contacted MCI, they were told that the practice was perfectly legal under federal guidelines. In fact, MCI and other phone companies

> routinely charged subscribers a much higher "casual calling" rate. After being overcharged by thousands of dollars, one small business decided to challenge MCI. Lacking the resources to take on the nation's second largest residential long distance company, the small business initiated a class action representing all MCI customers. MCI eventually settled the case, agreeing to pay back its customers $90 million in cash. Class members could choose either a fixed award of $75 cash or a reasonable approximation of actual damages. As a result of the class action, MCI changed its internal polices so that no subscriber would ever be charged non-subscriber rates. For a one-minute call, this policy could save consumers as much as $2.82 per call.

Id.

Business interests commonly make the claim that class actions are bad because defendant corporations are forced to raise prices as a result of high settlement and legal costs incurred when they are held accountable for violating consumer protection laws. The sky is always falling when it comes to class actions, the logic goes: it is not the wrongful monetary charges of the company that raises prices, but rather it is the legal mechanism used by customers to reclaim those charges.

To the contrary, these arguments are unpersuasive. The argument that enforcing consumer protection laws will drive up prices rests upon the faulty assumption that corporations pass on to their consumers the profits realized from breaking consumer protection laws. In fact, the evidence points in the other direction. Rather than pass savings on to consumers, corporations in today's economy do a great many things with such income other than pass it on to consumers. *See, e.g.,* Claudia L. Deutsch, *Executive Pay: My Big Fact C.E.O. Paycheck,* N.Y. Times, April 3, 2005, at 31 (C.E.O.'s at large corporations paid average of $9.84 million in 2004, up 12 percent from 2003). There is no evidence at all, and no reason to believe, that if there was no class action remedy to recover the ill-gotten gains, corporations would pass those gains on to their consumers.

In cases like the case at bar, without class actions, there will be no recovery by the public of these ill-gotten gains, because as a practical matter, small individual claims will not be pursued in our legal system.

IV. Statutory Attorneys' Fees Do Not Provide an Adequate Substitute to Class Actions

Industries defend class action bans by asserting that because many consumer protection statutes contain fee-shifting provisions, the availability of attorneys' fees ensures that private attorneys will handle consumer cases on an individual basis, no matter how small an individual claim may be. This assertion that a ready cadre of private attorneys exists to take cases seeking damages of a few thousand dollars or less on the hope that they will receive a fee disproportionate to the underlying amount in controversy is purely speculative, and ignores the realities of private litigation. In most consumer claims like those raised by plaintiffs here, the cost of an attorney's time is likely to greatly exceed the stake of any individual claim. While some putative class members may be able to find an attorney that will take such a case, the reality is that many other attorneys will not, and therefore many aggrieved consumers will be left without recourse if class actions are disallowed.

A. Prevailing Parties Often Do Not Receive a Full Fee

Many attorneys will be deterred from taking plaintiffs' claims on an individual basis by the risk that they will not recover a fee, even if the plaintiff prevails. For instance, in claims brought under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa.C.S. § 201-1 *et seq.* ("UTPCPL"), the statute authorizes an award of attorneys' fees to a prevailing plaintiff, but does not guarantee an award. 73 P.S. § 201-9.2. Rather, § 201-9.2 states that "the court *may* award to the plaintiff, in addition to the other relief provided in this section, costs and reasonable attorney fees…." *Id.* (emphasis added).

Even though fees are not denied in all cases, the risk that courts will exercise their discretion to deny a fee award creates a significant impediment for attorneys when deciding whether to handle individual small-dollar claims under the UTPCPL or similar statutes. Private attorneys may be very reluctant to take such claims under the hope that they will be able to obtain attorneys' fees, and therefore many consumers likely will be unable to find an attorney to represent them in their individual claims.

Even where a plaintiff with small-dollar claims can overcome these hurdles and obtain a fee award, the size of the fee often will be too small to make it worthwhile for an attorney to take such cases. It is an unfortunate fact of litigation that many courts create a disincentive to handle small dollar claims by tying their determination of a reasonable fee to the amount at stake in the underlying dispute. Some courts refuse to award attorneys' fees that are out of proportion to the plaintiff's damages. *See, e.g., McCauslin v. Reliance Fin. Co.*, 751 A.2d 683, 686 (Pa. Super. Ct. 2000) (stating that "the term 'reasonable' does impart a sense of proportionality between an award of damages and an amount of attorney's fees" and finding it is unreasonable for an attorney to expect a fee award that is twice the size of the plaintiff's damages); *Sheppard v. Riverview Nursing Center, Inc.*, 88 F.3d 1332, 1335-36 (4th Cir. 1996) (holding that under 42 U.S.C. § 1988, "considerations of proportionality should guide the decision whether to award fees" and instructing that a proportionality rule helps guard against lawsuits that benefit attorneys rather than plaintiffs).

Similarly, courts applying various statutes have found it unreasonable to award fees that exceed the amount at stake in the underlying litigation.[11] For

[11] *See, e.g.*, *Geissal v. Moore Med. Corp.*, 338 F.3d 926, 932-33 (8th Cir. 2003) (instructing the district court "that any attorney's fee awarded for the proceedings on remand may not exceed one-third of the remaining amounts in

small-dollar cases like plaintiffs' – involving a few less than a thousand dollars– a fee award tied to the amount at stake will make the case a money-loser for the attorney. While there undoubtedly are instances where courts have awarded a full fee even though the fee request is larger than the plaintiffs' damages, the counter-examples are replete. Many attorneys simply cannot afford to take the risk that a court will sharply curtail a fee award, and thus often will be deterred from representing aggrieved individuals with valid claims. Thus, even where fee-shifting statutes apply, small claims often translate into small fees, fees that likely represent just a fraction of the attorney's costs, time and labor.

In short, even where a few private attorneys are willing to face the risk of receiving no fee in a small individual claim, or a substantially reduced fee, that same risk will deter many others from handling such cases, and while some consumers may be able to obtain relief for their injuries, may others will not.

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controversy"); *James v. Thermal Master, Inc.*, 563 N.E.2d 917, 919 (Ohio App. 1988) (affirming trial court's decision to reduce attorney's fee in light of small jury award); *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1264 (2d Cir. 1987) ("New York courts have stated that, as a general rule, they will rarely find reasonable an award to a plaintiff that exceeds the amount involved in litigation." (citation omitted)); *Strama v. Peterson*, 689 F.2d 661, 665 (7th Cir. 1982) ("usually attorneys' fees should not be granted greatly in excess of a client's recovery" (citation omitted); *In re Taylor*, 2003 WL 22282173 at *5 (Bankr.D.Vt. Oct. 1, 2003) (holding that under federal bankruptcy law, "attorney's fees in excess of the amount in controversy is *prima facie* unreasonable").

B. Individuals with Small Claims Have Little Incentive To Seek Out an Attorney or Pursue Their Claims

Even if fee-shifting statutes do provide an adequate incentive for attorneys to handle individual cases (which they do not), they fail to provide an adequate incentive for consumers to seek an attorney. Fee-shifting statutes are an inadequate substitute for class actions because individual consumers suffering small injuries are unlikely to find it worthwhile to pursue small claims. The value of a class action is not only that it provides an incentive for an attorney to pursue claims that are otherwise economically infeasible, but also that it enables individual claimants to obtain relief that they otherwise would not be willing to pursue.

Even aside from financial costs, litigation is a stressful and time-consuming endeavor for any plaintiff, and therefore the stakes of any case must be substantial enough so that a claimant will be willing to put up with the attendant burdens of litigation. Thus, as already noted *supra,* the Supreme Court has concluded that for small claims, rational individuals would "not consider it worth the candle to embark on litigation." *Roper*, 445 U.S. at 338. Similarly, other courts have rejected the contention that a claimant will want to sue over small amounts as inaccurately assuming that the claimant is "willing to subject himself to all the burdens of suing." *Abels v. JBC Legal Group, P.C.*, 227 F.R.D. 541, 546 (N.D.

Cal. 2005) (finding class action superior because individuals would not want to sue over small amounts).

Small dollar claims will not be brought unless incentives exist for both attorneys *and* their potential clients. Regardless of whether fee-shifting statutes make *attorneys* willing to bring individual cases, they do nothing to make potential plaintiffs willing to subject themselves to the hassle of litigation over small damages. *Cf. Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("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.").

Moreover, even if potential plaintiffs would be willing to sue to protect their rights, many claims still will go unremedied in the absence of a class action because, especially as to deceptive practices directed toward unwary consumers, "[m]any plaintiffs may not know their rights are being violated." *Abels*, 227 F.R.D. at 547 (quoting *Sledge v. Sands*, 182 F.R.D. 255, 259 (N.D. Ill. 1998)).

A primary benefit of class actions is that they provide relief to all victims of a defendant's misconduct, regardless of whether the defendant's illegal activities fly under the radar screens of many injured consumers. That broad relief cannot be replicated on an individual basis unless each potential class member knows that her rights were violated. Thus, prohibiting class actions and requiring individual actions or arbitrations inevitably will leave many consumers like plaintiffs with no recovery at all for violations of their rights, even if there are attorneys willing to take their cases. Fee-shifting statutes, therefore, do not adequately substitute for class actions.

V. The FAA and Pennsylvania Law Preserve Contract Defenses, Including Unconscionability, in Determining Enforceability of Arbitration Agreements

The purpose of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq* . (the "FAA"), is to "place Arbitration Agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) ; *accord Green Tree Financial Corp. v. Randolph,* 531 U.S. 79, 89 (2001) . "The FAA makes agreements to arbitrate enforceable to the same extent as other contracts." *Sues v. Nuveen & Co.,* 146 F.3d 175, 178 (3rd Cir. 1998)).

The FAA provides that a written arbitration provision covering a contract involving interstate commerce, "shall be valid.... save upon any grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Fully consistent with the FAA, Arbitration Agreements may be challenged and invalidated on any generally applicable contract principle. Indeed, the United States Supreme Court has expressly stated that state contract law defenses—including unconscionability—are available to a party challenging an Arbitration Agreement. *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) ("generally applicable contract defenses, such as… unconscionability, may be applied to invalidate

Arbitration Agreements without contravening [the Federal Arbitration Act]"). *See also Perry v. Thomas,* 482 U.S. 483 (1987) (generally applicable contract defenses may invalidate an Arbitration Agreement).

"[T]here is no appreciable difference between Pennsylvania law and the provisions of the FAA on the enforceability of agreements to arbitrate…." *Lytle v. Citifinancial Serv., Inc.,* 810 A.2d 643, 656 (Pa. Super 2002) (citing *Carll v. The Terminix International Company, L.P.,* 793 A.2d 921 (Pa.Super. 2002)). "Pennsylvania law on the enforceability of agreements to arbitrate is in accord with federal law and requires enforcement of arbitration provisions as written, permitting such provisions to be set aside only for generally recognized contract defenses such as… unconscionability." *Id.; accord McNulty v. H&R Block, Inc.,* 843 A.2d 1267 (Pa. Super. 2004), *alloc. denied,* 853 A.2d 362, 578 Pa. 709, *cert. denied,* 125 S.Ct. 667, 2004 WL 2269460.

In fact, under Pennsylvania's Uniform Arbitration Act, 42 Pa.C.S.A. § 7301 *et seq.,* as in the FAA ,

> [a] written agreement to subject any existing controversy to arbitration or a provision in a written agreement to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, *save upon such grounds as exist at law or in equity relating to the validity, enforceability or revocation of any contract.*

42 Pa.C.S.A. § 7303 (validity of agreements to arbitrate) (emphasis added). Accordingly, and notwithstanding the arguments made by Defendants that Pennsylvania and federal law "favor" or "encourage" arbitration, there can be no real dispute that unconscionability may serve as a defense to an Arbitration

Agreement, under both federal and Pennsylvania law.

VI. **The Arbitration Agreement at Issue is Unconscionable and Exculpatory and is Therefore Unenforceable**

Amici do not dispute or challenge the Commonwealth's long established public policy generally favoring the settlement of disputes by arbitration, consistent with the FAA. *See, e.g., Carll,* 793 A.2d at 924, (citing *Children's Hospital of Philadelphia v. American Arbitration Ass'n,* 331 A.2d 848, 231 Pa. Super. 230 (1974). However, Arbitration Agreements that impede a "litigant . . . from effectively vindicating her . . . statutory rights" are disfavored and unenforceable. *See Green Tree Fin. Corp.-Ala. v. Randolph,* 531 U.S. 79, 90, 121 S. Ct. 513, 522, 148 L. Ed. 2d 373, 383 (2000).

A. **This Court Applies a Two-Pronged Test to Determine Unconscionability**

In *Lytle,* this Court restated and reapplied Pennsylvania's long-standing two-pronged and well-accepted unconscionability rule. Exposition of this rule in Pennsylvania was first made by the Pennsylvania Supreme Court in *Witmer v. Exxon Corp.,* 495 Pa. 540, 434 A.2d 1222 (1981), wherein this Court recognized that: The classic and oft-quoted definition of "unconscionability" was articulated by the United States Court of Appeals for the District of Columbia Circuit in *Williams v. Walker-Thomas Furniture Company,* 350 F.2d 445 (D.C. Cir. 1965):

> Unconscionability has generally been recognized to include [1] an absence of meaningful choice on the part of one of the parties[; (2)]

> together with contract terms which are unreasonably favorable to the other party. 350 F.2d at 449….

Witmer, 495 Pa. at 551, 434 A.2d at 1228 (numbering in brackets added).

As noted in detail in *Lytle,* 810 A.2d 658-660, since then, this Honorable Court has adopted this rule in many cases. *See, e.g., Huegel v. Mifflin Contr. Co.,* 796 A.2d 350, 357 (Pa. Super 2002); *Robson v. EMC Insurance Companies,* 785 A.2d 507, 510 (Pa.Super. 2001); *accord Rudolph v. Pennsylvania Blue Shield,* 553 Pa. 9, 17, 7171 A.2d. 508, 512 (1998) (Unconscionability requires a two-fold determination: that the contractual terms are unreasonably favorable to the drafter and that there is no meaningful choice on the part of the other party regarding acceptance of the provisions. (Nigro, J., Concurring Opinion)).

Well before *Lytle,* the Third Circuit recognized Pennsylvania's unconscionability rule, as restated in *Lytle,* and, later, in 2004, in this Court's *McNulty* decision. *See Worldwide Underwriters Ins. Co. v. Brady,* 973 F.2d 192, 196 (3rd Cir. 1992), which recited Pennsylvania law as follows:

> Unconscionability requires a two-fold determination: that the contractual terms are unreasonably favorable to the drafter and that there is no meaningful choice on the part of the other party regarding acceptance of the provisions.

Koval v. Liberty Mutual Insurance Co., 366 Pa.Super. 415, 531 A.2d 487, 491 (1987). *Id.* (discussing insurance contract). In *Lytle,* as restated again by the Superior Court in *McNulty,* a mirror image of the Third Circuit's *Worldwide*

Underwriters decision is found:

> A determination of unconscionability requires a two-fold determination: 1) that the contractual terms are unreasonably favorable to the drafter, and 2) that there is no meaningful choice on the part of the other party regarding the acceptance of the provisions.

Lytle, 810 A.2d at 658-59; *McNulty*, 843 A.2d 898. Accordingly, this two-pronged analysis is well settled under this Court's jurisprudence, and should not be changed now.

B. The Second Prong of Unconscionability is Met in A <u>Contract of Adhesion</u>

The Arbitration Agreement in this case is a contract of adhesion, which Pennsylvania courts have defined as follows:

> An adhesion contract is defined as a 'standard form contract prepared by one party, to be signed by the party in a weaker position, [usually] a consumer, who has little choice about the terms.' " *Huegel v. Mifflin Construction Co.,* 796 A.2d 350, 357 (Pa.Super.2002), *quoting* Black's Law Dictionary (7th ed.1999). *Accord: Robson v. EMC Insurance Companies,* 785 A.2d 507, 510 (Pa.Super.2001), *appeal denied,* 568 Pa. 703, 796 A.2d 984 (2002); *Armendariz v. Foundation Health Psychcare Services, Inc.,* 24 Cal.4th 83, 99 Cal.Rptr.2d 745, 6 P.3d 669 (2000); *Cooper v. MRM Investment Co.,* 199 F.Supp.2d 771, 776 (M.D.Tenn.2002).

Lytle, 810 A.2d *at 658.* In *McNulty,* this Court again defined an adhesion contract as a "form contract prepared by one party, to be signed by the other party in a weaker position, usually a consumer, who has little choice about the terms." *Id.,* 843 A.2d at 1273 (internal citations omitted). *See also Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003) (arbitration agreement was adhesionary where defendant "imposed the [service agreement] on its customers without the opportunity for negotiation, modification, or waiver." *Id*. at 1149.

According to the Pennsylvania Supreme Court,

> [a] finding that a contract is one of adhesion does not require that the court find the contract unconscionable. Even where a contract is found to be a contract of adhesion, the terms of the contract must be analyzed to determine whether the contract as a whole, or specific provisions of it, are unconscionable.

Rudolph, 553 Pa. at 17, 717 A.2d at 512 (citing *Denlinger, Inc. v. Dendler,* 415 Pa.Super. 164, 608 A.2d 1061 (1992)).

It is essentially undisputed in the case at bar that the Arbitration Agreement is a contract of adhesion. It certainly meets the *Rudolph* test. The terms of this Agreement were "not bargained for, but rather dictated by [AWS]." *Id.* In the case at bar, Plaintiff, "the weaker party must adhere to the terms of a form contract which are not negotiable…." *Id.* The instant Arbitration Agreement, like the agreement in *McNulty*, "is a classic example of an adhesion…." *McNulty,* 2004 Pa. Super. 45, 843 A.2d at 1273 (*quoting, Lytle*, 2002 Pa. Super 327, 810 A.2d at 658). "*Thus, the second prong is met*." *Id.* (emphasis added).

"[T]he second prong is met," *id.,* and therefore the only remaining question is to determine the first prong: whether the terms of the Arbitration Agreement are "unreasonably favorable to the drafter."

C. The Adhesion Contract Contains Exculpatory Terms <u>Unreasonably Favorable to the Drafting Party</u>

In *Lytle,* this Court found as a matter of public policy that class actions are favored in the Commonwealth of Pennsylvania as a method to determine "many meritorious claims which would otherwise, due to the amounts involved, escape prosecution." *Lytle*, 810 A.2d at 665-6. Accordingly, the Honorable court below was correct to find that the class action ban would prevent plaintiff and the class from vindicating their statutory claims and that defendants would be provided with a windfall of unjust profits if class actions are disallowed.

In *McNulty,* this Court discussed the affirmative use of arbitration agreements as insulation against liability:

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

Id., 2004 Pa. Super. 45, 843 A.2d at 1273 (<u>*quoting*</u>, *Lytle*, 2002 Pa. Super 327, 810 A.2d at 667-68). This Court has also held a class action ban to be unconscionable where the damages claimed are "insufficient to permit the *[Plaintiffs]* to seek legal redress for their injuries in the absence of a class action." *Lytle,* 810 A.2d at 666.

Similarly, legal scholarship in this field notes the trend of corporations to attempt to "opt-out" of liability for their intentional wrongs:

> Allowing companies to simply opt out of exposure to collective litigation is no more defensible than a system in which corporations may decide whether they wish to be exposed to federal antitrust, securities, or civil rights laws.

Myriam Gilles, "Opting Out of Liability: The Forthcoming Near-Total Demise of the Modern Class Action," 104 Mich. L. Rev. 373, 430 (2005). Indeed, as one court has noted, these unfair provisions provide businesses with a "get out of jail free card," *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1101 (2002).

There is no reason to believe that individual arbitrations will allow recovery of the overcharges, or even economy or efficiency of litigation of claims. Rather,

> [c]ompelling individual arbitration would force individuals already straitjacket by an industry-wide practice of Arbitration Agreements to fight alleged improprieties at an exorbitant economic cost. Individual arbitration would be small deterrent to companies certain that few proceedings will be instituted against them. Because the principles of *res judicata* and collateral estoppel are not applicable to arbitration proceedings, each plaintiff would be forced to fully litigate his complaint.

Dickler v. Shearson Lehman Hutton, Inc., 408 Pa. Super. 286, 300, 596 A.2d 860, 867 (Pa. Super. 1991) (*emphasis added*).

As the Honorable Judge Bernstein stated in the Court below:

> Everyone knows that these [small value] claims will never be arbitrated on an individual basis, either by the named plaintiffs or by any of the millions of class members they represent. No individual will expend the time, fees,

> costs and or other expenses necessary for individual litigation or individual arbitration for this small potential recovery.

Id. Accordingly, "the enforcement of the arbitration provision would work to deny the allegedly injured parties access to justice and is therefore unconscionable." *McNulty,* 2004 Pa. Super. 45, 843 A.2d at 1273 .

Likewise, in *Whitney v. Alltel*, 173 S.W. 3d 300 (Mo. Ct. App. 2005) , a class action ban was substantively unconscionable because it would prevent consumers from vindicating their small-value claims, and would "effectively strip consumers of the protections afforded to them under the [Missouri] Merchandising Practices Act and unfairly allow companies like Alltel to insulate themselves from the consumer protections statutes of this state." *Whitney*, 173 S.W. 3d 300 at 313-14 .

In addition, the Arbitration Agreement unconscionably allows access to the courts for the corporate defendant while requiring consumers to arbitrate their claims. A contract of adhesion is unconscionable where the drafting party reserves "access to the courts for itself to the exclusion of the consumer . . ." *Lytle*, 2002 Pa. Super 327, 810 A.2d at 665 . Under such circumstances, "the arbitration provision [is] unconscionable and unenforceable under Pennsylvania law." *Id*.

In *Ting,* the 9th Circuit held that:

> In addition to being exculpatory, this arbitration clause's ban on class claims is unreasonably one-sided in favor of AT&T because its only effect is to eliminate consumer claims since

> telephone companies never bring class actions *against* consumers. [T]here is no chance that any large company like AT&T would file a class action against its consumers. That a company *may* do so is not dispositive. To hold otherwise ignores the question that underlies the substantive unconscionability analysis, namely, whether the agreement is unduly one-sided.

Ting, 319 F.3d at 1150, n14 . California's Supreme Court recently invalidated an arbitration clause with a class action ban based on similar factors, stating as follows:

> Moreover, such class action or arbitration waivers are indisputably 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 Bank, because credit card companies typically do not sue their customers in class-action lawsuits.

Discover Bank v. Superior Court, 113 P.2d 1100, 1109 (Cal. 2005)

In *Kinkel v. Cingular Wireless,* LLC, 357 Ill. App. 3d 556, 828 N.E.2d 812 (Ill. App., May 2, 2005), the court sided with *Ting :*

> Similarly, cellular telephone service providers typically do not sue their customers in class action lawsuits. Thus, Cingular's provision barring class arbitrations is a one-sided limitation on its customers' ability to seek relief for claims where damages are quite low. We agree with the *Szetela* court that such a one-sided limitation that could effectively deny plaintiffs their day in court is substantively unconscionable.

Kinkel v. Cingular Wireless, LLC, 357 Ill. App. 3d at 565. (Ill. App. 2005).

In a recent case in the United States Court of Appeals for the First Circuit, *Kristian v. Comcast Corp.*, 2006 U.S. App. LEXIS 9881 (1st Cir., April 20, 2006) , the court also based its decision on the *Ting* court's reasoning, holding that class action bans in consumer arbitration agreements are unconscionable because:

> it would not have been economically feasible to pursue the claims in these cases on an individual basis, whether the case was brought in court or in arbitration…. The net result is that cases such as the ones listed above will not be prosecuted even if meritorious. Thus, the prohibition on class action litigation functions as an effective deterrent to litigating many types of claims involving rates, services or billing practices and, ultimately, would serve to shield AT & T from liability even in cases where it has violated the law.

Kristian, 2006 U.S. App. LEXIS 9881, * 93-*95 (<u>*citing*</u>, *Ting*, 319 F.3d at 1130 ; <u>*quoting*</u>, *Ting v. AT&T,* 182 F. Supp. 2d 902, 918 (N.D. Ca. 2002)).

In *Zak v. Prudential Property and Ins. Co.*, 713 A.2d 681 (Pa. Super. 1998), this Court held unconscionable an insurer's arbitration clause provision allowing appeals *only* of awards exceeding $15,000. In *Zak*, the unconscionable provisions had the effect of allowing the insurance company access to the courts to appeal an arbitration outcome adverse to it, while binding the consumer to an arbitration outcome adverse to him. Although the provision appeared to be facially neutral because it nominally applied to awards against either party, the Court held that it was unreasonably favorable to the insurer-drafter because only the insurer could benefit from the right to appeal an award of over $15,000. *Id*. at 684. (citation omitted). *See also Klussman v. Cross Country Bank,* 36 Cal. Rptr. 3d 728 (Cal. App. 1st Dept. 2005) (denying motion to compel arbitration because under state contract law the arbitration provision is unconscionable and therefore unenforceable).

The imposition of substantial arbitration costs is also a well-settled reason for invalidating an arbitration provision. *See Green Tree,* 531 U.S. at 90; *Parilla v. IAP Worldwide Services, VI, Inc.,* 368 F.3d 269, 284 (3rd Cir. 2004) ("[A]n arbitration provision that makes the arbitral forum prohibitively expensive for a weaker party is unconscionable."). The cost allocation provisions in the Arbitration Agreement are oppressive and would deter the consumer litigant from challenging the Defendant's conduct in the arbitral forum.

Arbitration fees charged by any of the three national arbitration organizations significantly exceed fees associated with any civil action in state or federal court, which creates a significant obstacle for low-income consumers.[12] In reality, consumers cannot afford the extensive up-front costs associated with private arbitration. As such, the arbitration provision is unconscionable as a matter of law. *See Parilla,* 368 F.3d at 284; *Alexander v. Anthony Int'l, L.P.,* 341 F.3d 156, 263 (3d Cir. 2003).[13]

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[12] The American Arbitration Association fees include $1250 filing fee, "case service fee" of $750, and hourly arbitrators' fees. The National Arbitration Forum fees include filing fee of approximately $1300, $1750 for initial hearing, $1,500 for each subsequent hearing and $100 for each discovery order sought. JAMS Financial Services Arbitration fees include arbitrator fees of approximately $300 to $500 per hour.

[13] *See also Spinetti v. Serv. Corp., Int'l,* 324 F.3d 212, 217-218 (3d Cir.

As stated by the *McNulty* Court, "if the costs associated with arbitration of a single claim would operate to preclude a claimant from pursuing a remedy, then the enforcement of the provision would be unconscionable." *McNulty,* 2004 Pa. Super. 45, 843 A.2d at 1273 (citing, *Lytle*, 2002 Pa. Super 327, 810 A.2d at 667-68). In *McNulty*, the agreement was unconscionable where plaintiffs were required to pay $50 to arbitrate and the potential recovery was small compared to the costs. The same result should obtain here.

Moreover, in Pennsylvania, "an arbitration provision which limit[s] the ability of the arbitrators to award consequential or punitive damages was unconscionable and thus unenforceable under Pennsylvania law, despite the applicability of the FAA." *Lytle*, 2002 Pa. Super 327, 810 A.2d at 664 . *See also Carll v. Terminix Int'l Co.*, 793 A.2d 921 (Pa. Super. 2002), (company's mandatory arbitration clause barring consumers from claiming personal injury damages violated public policy, and thus was unenforceable); *Spinetti v. Serv. Corp., International*, 324 F.3d 212, 216 (3d Cir. 2003) (arbitration provision requiring each party to pay their own costs regardless of outcome is contrary to

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2003) (holding "fee-splitting" cost allocation provision of Arbitration Agreement unconscionable); *Ting v. AT & T*, 319 F.3d 1126, 1151 (9th Cir. 2003); *Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549 (4th Cir. 2001); *Morrison v. Circuit City Stores, Inc.,* 317 F.3d 646, 669-70) (6th Cir. 2003); *Murphy v. Mid-West Life Ins. Co. of Tenn.,* 78 P.3d 766 (Idaho 2003); *Eagle v. Fred Martin Motor Co.,* 809 N.E.2d 1161 (Ohio App. 2004); *Mendez v. Palm Harbor Homes, Inc.,* 45 P.3d 594, 607 (Wash. App. 2002); *Camacho v. Holiday Homes, Inc.,* 167 F. Supp.

Title VII and ADEA that permit an award of attorney's fees and costs to a prevailing party).

VII. The Arbitration Agreement is Unenforceable as a Whole Because its Problematic Provisions are Too Pervasive and Central to be Severed

The unconscionable provisions of the Arbitration Agreement cannot be severed because severance of the categorically unconscionable provisions would undermine the primary purpose of the agreement and defeat public policy. As a result, the Court should deem the entire agreement unenforceable.

Under Pennsylvania contract law, an unconscionable Arbitration Agreement invalidates the entire contract if the Arbitration Agreement is not independent of the provisions sought to be severed. *Carll v. The Terminix Int'l Co.,* 793 A.2d at 925- 26. As the Supreme Court recently held, there is "no bright line rule" for determining severability of contract provisions. *Jacobs v. CNG Transmission Corp.,* 565 Pa. 228, 239, 772 A.2d 445, 452 (2001). "[A] court may look to the contract as a whole, including the character of the consideration, to determine the intent of the parties as to severability and may also consider the circumstances surrounding the execution of the contract, the conduct of the parties, and any other factor pertinent to ascertaining the parties' intent." *Id.; see also Heilwood Fuel Company v. Manor Real Estate Company,* 405 Pa. 319, 175 A.2d 880 (1961)

2d 892 (W.D. Va. 2001).

(finding that absent separate consideration, the contract provisions could not be severed).

Here, the exculpatory and unconscionable provisions combine to make it practically impossible for a consumer to bring a claim on an individual basis and cannot be severed because they form the core of the Arbitration Agreement. The only way to cure the unconscionability produced by the provision here is to strike the baseline mandatory arbitration requirement of the agreement and to permit class action litigation over the small value claims.

In addition, the unconscionable cost provisions in the Arbitration Agreement also cannot be severed. To do so would undermine public policy against enforcing contract provisions that deter future litigants from vindicating important rights. Consistent with the Court's holdings in *Jacobs v. CNG Transmission Corporation* and *Heilwood Fuel Company v. Manor Real Estate Company,* the enforcement of a contract with unconscionable provisions does not depend on merely on a court's ability to mechanically separate those provisions. Rather, a court should determine whether partial enforcement would violate public policy or bring injustice to the parties.

In the exercise of its equitable powers in this case, *Amici* urge the Court to engage in a similarly thorough consideration of the interests at stake. As a practical matter, after striking the cost provision, the only way the remainder of the

Agreement could be saved (leaving aside the improper scheme to make it impossible for individual consumers to vindicate their rights) would be for a court to equitably order one of the parties to pay for the arbitration. Moreover, simply severing this one provision does not provide a sufficient disincentive for the Defendant to change its practices. Defendant will continue including the unconscionable cost provisions in its agreements, in contravention of the public interest, because the worst that could happen is that a court might equitably order them to pay arbitration costs. Meanwhile, in the vast majority of subsequent cases the existence of the provision on the face of the agreement will discourage any litigation or arbitration at all.

By contrast, if Defendant knows that its continued use of this unconscionable cost provision will result in the inability to arbitrate at all, it is far more likely to discontinue its use of them. Only that result is consistent with the public interest. Severance of the cost provisions, therefore, is an insufficient response to inclusion of such grossly unfair terms, terms that are deliberately constructed to avoid litigation of small value claims charged to hundreds or thousands of customers, and that wrongfully enrich the party requiring arbitration by making individual pursuit of claims practically impossible.

As stated in *Janda v. T-Mobile, USA, Inc.,* 2006 U.S. Dist. LEXIS 15748 (N.D. Cal. 2006), "[i]f the central purpose of [a] contract is tainted with illegality, then the contract as a whole cannot be enforced…." (striking down similar Arbitration Agreement as unconscionable and unenforceable) (quoting *Armendariz v. Foundation Health Psychcare Servs.,* 24 Cal. 4th 83, 124, 99 Cal. Rptr. 2d 745, 6 P.3d 669 (2000)); *see also* 17A Am. Jur. 2d Contracts § 319 (explaining that the "illegality taints the entire contract" when "the agreement is an integrated scheme to contravene public policy"). The Arbitration Agreement *sub judice* is no less tainted than the agreements in, for example, *Lytle, McNulty,* or *Janda* and the same result should obtain here.

CONCLUSION

For the foregoing reasons, this Court should rule that that Arbitration Agreement at issue in this case is unconscionable in its entirety and therefore unenforceable.

Dated: June 8, 2006

Respectfully submitted,

Brian R. Mildenberg, Esquire
Attorney I.D. No. 84861
MILDENBERG & STALBAUM, P.C.
1845 Walnut Street, 22nd Floor
Philadelphia, PA 19103
(215) 569-1203

Michael D. Donovan, Esquire
Attorney I.D. No. 51895
DONOVAN SEARLES, LLC
1845 Walnut Street, Suite 1100
Philadelphia, PA 19103
(215) 732-6067

Attorneys for *Amici Curiae*
THE NATIONAL CONSUMER LAW CENTER, THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, COMMUNITY LEGAL SERVICES, INC.
IN SUPPORT OF PLAINTIFF-APPELLEE PHILIP THIBODEAU

PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing Uncontested Application for Extension of Time upon the persons and in the manner indicated below which service satisfies the requirements of Pa.R.A.P. 121:

Service by First Class Mail as follows:

Heim, Robert C.
Law Firm: Dechert LLP
Address:
2929 Arch Street
Philadelphia, PA 19104
Phone No.: (215)994-2570

Inscho, David Kehm
Law Firm: Dechert LLP
Address:
2929 Arch Street
Philadelphia, PA 19104
Phone No.: (215)994-2389

Miller, Nory
Law Firm: Dechert LLP
Address:
2929 Arch Street
Philadelphia, PA 19104
Phone No.: (215)994-2369

Attorney:
Williams, Gerald J.
Law Firm: Williams Cuker Berezofsky
Address:
1617 JFK Blvd Suite 800
Philadelphia, PA 19103
Phone No.: (215)557-0099

Dated: June 8, 2006

Respectfully submitted,

MILDENBERG & STALBAUM, P.C.

Brian R. Mildenberg, Esquire
Attorney I.D. No. 84861
MILDENBERG & STALBAUM, P.C.
1845 Walnut Street, 22nd Floor
Philadelphia, PA 19103
(215) 569-1203