

SUPREME COURT OF ILLINOIS

Kinkel v. Cingular Wireless LLC, 223 Ill. 2d 1

857 N.E.2d 250 (2006) · No. 100925 · Decided October 5, 2006

SUMMARY

The Illinois Supreme Court considered whether a class-arbitration limitation in Cingular Wireless's standard service agreement was unconscionable and unenforceable. The court held that a later revision to Cingular's arbitration provision did not apply to the plaintiff's already-terminated agreement and rejected Cingular's federal preemption arguments. The opinion addresses arbitration agreements, class-action waivers, contract modification, unconscionability, and the Federal Arbitration Act.

CASE DETAILS

COURT	Supreme Court of Illinois
WRITING FOR THE COURT	Justice Garman; Justice Freeman; Justice Fitzgerald; Justice Kilbride; Justice Karmeier; Chief Justice Thomas; Justice Burke
JURISDICTION	Illinois
DECIDED	October 5, 2006
DOCKET	100925
DISPOSITION	affirmed
PROCEDURAL POSTURE	Cingular appealed interlocutorily from the denial of its motion to compel arbitration. The appellate court reversed and remanded, holding that the arbitration clause was enforceable but the class-arbitration limitation was unconscionable and severable. The Illinois Supreme Court granted leave to appeal and affirmed the appellate court.
STANDARD OF REVIEW	De novo review applied to the applicability of the revised arbitration provision, questions of federal preemption, and unconscionability. The court stated that modification of an existing contract is ordinarily a question of fact when evidence conflicts, but is a question of law when the evidence is undisputed.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Cingular Wireless LLC v. Donna M. Kinkel

TOPICS

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PRACTICE AREAS

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QUESTIONS PRESENTED

1. Whether Cingular's 2003 revised arbitration provision could be applied to Kinkel's claim after she had terminated her service agreement.
2. Whether the Federal Arbitration Act expressly or impliedly preempted an Illinois-law determination that the class-action waiver was unconscionable.
3. Whether the class-action waiver in the original arbitration provision was unconscionable under generally applicable Illinois contract law.
4. Whether the unconscionable class-action waiver was severable from the remainder of the arbitration clause.

HOLDINGS

1. Cingular could not unilaterally modify the arbitration provision after Kinkel had terminated the service agreement. The unconscionability analysis therefore had to focus on the original arbitration clause.
2. The FAA did not expressly or impliedly preempt an Illinois-law determination that the class-action waiver was unconscionable, so long as the state-law analysis applied generally applicable contract principles and did not treat arbitration clauses differently merely because they involved arbitration.
3. Under the circumstances of this case, the class-action waiver was unconscionable and unenforceable.
4. Class-action waivers are not per se unconscionable; their enforceability must be determined case by case based on the totality of the circumstances.
5. The unconscionable class-action waiver was severable from the remainder of the arbitration clause, which remained enforceable.

KEY QUOTATIONS

"We further hold that the offending clause is severable from the arbitration clause. We do not hold that class action waivers are per se unconscionable." (39-40)

"It is unconscionable because it is contained in a contract of adhesion that fails to inform the customer of the cost to her of arbitration, and that does not provide a cost-effective mechanism for individual customers to obtain a remedy for the specific injury alleged in either a judicial or an arbitral forum." (39)

FACTUAL BACKGROUND

Kinkel entered a two-year cellular-service agreement with Cingular in July 2001 and canceled service in April 2002, before the term expired. Cingular charged her a \$150 early-termination fee, which she paid under protest. The agreement required arbitration of disputes and prohibited class arbitration, while disclosing only that

arbitration fee information was available upon request. Kinkel alleged that the termination fee was an unenforceable penalty and that the arbitration and class-action provisions made it economically impracticable to pursue her claim individually.

PROCEDURAL HISTORY

Kinkel filed an individual and putative class action in the circuit court of Madison County alleging that Cingular's \$150 early-termination fee was an illegal penalty, a breach of contract, and a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. The circuit court denied Cingular's motion to compel arbitration. On interlocutory appeal under Illinois Supreme Court Rule 307(a)(1), the appellate court reversed and remanded, finding the class-action waiver unconscionable but severable. The Illinois Supreme Court affirmed and remanded for further proceedings.

DISPOSITION

affirmed

REMAND INSTRUCTIONS

The cause was remanded to the trial court for further proceedings consistent with the appellate court's judgment and the Illinois Supreme Court's holding that the class-action waiver is unenforceable but severable from the arbitration clause.

CASES CITED

- *Ellman v. Ianni*, 21 Ill. App. 2d 353, 361 (1959)
- *Livingston v. Associates Finance, Inc.*, 339 F.3d 553, 557 (7th Cir. 2003)
- *Kristian v. Comcast Corp.*, 446 F.3d 25, 30 (1st Cir. 2006)
- *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 676-77 (6th Cir. 2003)
- *Spinetti v. Service Corp. International*, 324 F.3d 212, 217 n.2, 219 (3d Cir. 2003)
- *Perry v. Thomas*, 482 U.S. 483, 489-92 & n.9 (1987)
- *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)
- *Southland Corp. v. Keating*, 465 U.S. 1, 10-11 (1984)
- *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 683, 686 (1996)
- *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995)
- *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990)
- *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)
- *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 453-54 (2003)
- *Razor v. Hyundai Motor America*, 222 Ill. 2d 75, 99-102 (2006)
- *Zobrist v. Verizon Wireless*, 354 Ill. App. 3d 1139, 1147 (2004)
- *Ting v. AT&T*, 319 F.3d 1126, 1149-52 (9th Cir. 2003)
- *Pierce v. Catalina Yachts, Inc.*, 2 P.3d 618, 624 n.28 (Alaska 2000)

- Frank's Maintenance & Engineering, Inc. v. C.A. Roberts Co., 86 Ill. App. 3d 980, 989-93 (1980)
- Streams Sports Club, Ltd. v. Richmond, 99 Ill. 2d 182, 191 (1983)
- H&M Commercial Driver Leasing, Inc. v. Fox Valley Containers, Inc., 209 Ill. 2d 52, 71 (2004)
- Hutcherson v. Sears Roebuck & Co., 342 Ill. App. 3d 109, 121-22 (2003)
- Rosen v. SCIL, LLC, 343 Ill. App. 3d 1075, 1082 (2003)
- Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 161-75 & n.19 (5th Cir. 2004)
- Leonard v. Terminix International Co., 854 So. 2d 529, 538-39 (Ala. 2002)
- Discover Bank v. Superior Court, Discover Bank v. Superior Court of Los Angeles, 36 Cal. 4th 148, 162-63, 113 P.3d 1100, 1110, 30 Cal. Rptr. 3d 76, 87 (2005)
- Aral v. Earthlink, Inc., 134 Cal. App. 4th 544, 564, 36 Cal. Rptr. 3d 229, 244 (2005)
- Klussman v. Cross Country Bank, 134 Cal. App. 4th 1283, 1299, 36 Cal. Rptr. 3d 728, 740-41 (2005)
- Szetela v. Discover Bank, 97 Cal. App. 4th 1094, 1101, 118 Cal. Rptr. 2d 862, 867 (2002)
- Bellsouth Mobility LLC v. Christopher, 819 So. 2d 171, 173 (Fla. App. 2002)
- Powertel, Inc. v. Bexley, 743 So. 2d 570, 575-76 (Fla. App. 1999)
- Whitney v. Alltel Communications, Inc., 173 S.W.3d 300, 313-14 (Mo. App. 2005)
- Muhammad v. County Bank of Rehoboth Beach, Delaware, No. AB39B05, slip op. at 3, 24, 31-33 (N.J. Aug. 9, 2006)
- State ex rel. Dunlap v. Berger, 211 W. Va. 549, 566, 567 S.E.2d 265, 282 (2002)
- Laster v. T-Mobile USA, Inc., 407 F. Supp. 2d 1181, 1190 (S.D. Cal. 2005)
- Strand v. U.S. Bank National Ass'n ND, 2005 ND 68, ¶¶ 21, 23, 693 N.W.2d 918, 926-27
- Rains v. Foundation Health Systems Life & Health, 23 P.3d 1249, 1254 (Colo. App. 2001)
- Fonte v. AT&T Wireless Services, Inc., 903 So. 2d 1019, 1025-26 (Fla. App. 2005)
- Walther v. Sovereign Bank, 386 Md. 412, 438-42, 872 A.2d 735, 750-53 (2005)
- Gras v. Associates First Capital Corp., 346 N.J. Super. 42, 53, 786 A.2d 886, 892 (2001)
- Ranieri v. Bell Atlantic Mobile, 304 A.D.2d 353, 354, 759 N.Y.S.2d 448, 449 (2003)
- Pyburn v. Bill Heard Chevrolet, 63 S.W.3d 351, 357-63 (Tenn. Ct. App. 2001)
- AutoNation USA Corp. v. Leroy, 105 S.W.3d 190, 200 (Tex. 2003)
- Pulver v. 1st Lake Properties, Inc., 681 So. 2d 965, 970 (La. App. 1996)
- Jenkins v. First American Cash Advance of Georgia, LLC, 400 F.3d 868, 879 (11th Cir. 2005)
- Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 338-40 (1980)