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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

AMANDA SELBY,

Plaintiff and Appellant,

v.

CINGULAR WIRELESS LLC,

Defendant and Respondent.

G045769

(Super. Ct. No. 04CC06353)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kim Garlin Dunning, Judge. Affirmed.

Franklin & Franklin, J. David Franklin; Law Offices of Anthony A. Ferrigno and Anthony A. Ferrigno for Plaintiff and Appellant.

Mayer Brown, Donald M. Falk; John Nadolenco for Defendant and Respondent.

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## INTRODUCTION

Plaintiff Amanda Selby appeals from a judgment entered after defendant Cingular Wireless (Cingular) made a successful motion for judgment on the pleadings. Selby's lawsuit is for injunctive relief only; it is based on the theory seven provisions of Cingular's customer agreement violate California's Consumer Legal Remedies Act (CRLA), Civil Code sections 1750-1784.<sup>1</sup> However none of the provisions Selby claims violate the CRLA have ever been enforced against her – with one exception. Under *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634 (*Meyer*), unless a plaintiff has suffered some “damage” from the enforcement of a contract provision which allegedly violates the CRLA, the plaintiff has no standing to pursue a claim based on the theory the contract provision violates the CRLA.

The one exception complicates this case. Back in 2005, about six years before the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* (2011) \_\_\_ U.S. \_\_\_, 131 S.Ct. 1740 (*Concepcion*), Cingular filed a motion to compel arbitration of Selby's claims. The motion was ultimately unsuccessful, because California law at the time was clear a suit for injunctive relief only under the CRLA was immune from contractual arbitration provisions. (See *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066 (*Broughton*).) In the process of opposing the motion to compel, Selby may have incurred liability for about \$25,000 in attorney fees.

However, *Concepcion* is clear that state law defenses to arbitration agreements which “derive their meaning from the fact that an agreement to arbitrate is at issue” are preempted by the Federal Arbitration Act (9 U.S.C. § 1 et seq.), a statute dating back to 1925. *Concepcion* means Cingular had the right under federal law, back in 2005, to request arbitration of Selby's claims. The trial court reasoned all of Selby's claims failed, either because she had incurred no damage per *Meyer*, or, with respect to the

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<sup>1</sup> All further statutory references are to the Civil Code unless otherwise indicated.

claims based on the unsuccessful motion to compel arbitration, were precluded by federal law per *Concepcion*. We therefore agree with the trial court's analysis and affirm.<sup>2</sup>

## FACTS

There are no "facts" to relate here, in the sense of a narration of events leading up to the litigation. Literally no events led up to this litigation with the exception of Cingular's widespread use of a customer service agreement which contained certain terms.<sup>3</sup> This lawsuit was initially filed by Susanne Ball in May 2004. But Ball was not a customer of Cingular and never had any dealings with Cingular. After Proposition 64 was passed in November 2004, Ball's standing to sue a company with whom she had no dealings was called into question. So in April 2005, the complaint was amended to omit Ball and add Amanda Selby, the girlfriend of the nephew of one of Ball's attorneys, who was at least one of Cingular's customers. But while a customer of Cingular, Selby had never actually had a billing dispute with the company – or any dispute other than this lawsuit itself.

The operative pleading is the second amended complaint filed in May 2009. The pleading challenges these provisions of the Cingular customer service agreement:

- (1) Its preclusion of both class action lawsuits and class action arbitrations.
- (2) Its provisions for allocating costs for any arbitration.
- (3) Its provisions which do not provide for claimed sufficient pre-arbitration discovery.

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<sup>2</sup> Since 2007 Cingular has been known as AT&T Mobility. (See *Concepcion, supra*, 131 S.Ct. at p. 1744, fn. 1 ["The Concepcions' original contract was with Cingular Wireless. AT&T acquired Cingular in 2005 and renamed the company AT&T Mobility in 2007."].) The caption for the judgment in the trial court entered in August 2011, however, retained Cingular Wireless as the named defendant. The notice of appeal likewise only listed Cingular Wireless as the named defendant. For continuity's sake, we will continue to refer to the defendant as Cingular.

<sup>3</sup> The record actually contains three versions of Cingular's customer service contract, from 2003, 2006, and 2009. We dispense with any need to detail the differences between them. Since Selby is the appellant in a case coming to the Court of Appeal from a successful motion for judgment on the pleadings, she receives the benefit of any differences in the three agreements.

(4) Its limitations on liability, its disclaimer of any implied warranty, and its limits on remedies and damages.

(5) Its allowance of unilateral modification of the arbitration provisions.

(6) Its requirement that American Arbitration Association rules govern any arbitration, combined with the absence of anything showing what those rules are.

(7) Its contractual statute of limitations of 100 days on any billing dispute.

All of these provisions are alleged to be unconscionable under the CRLA.<sup>4</sup>

Selby makes no claims apart from violations of the CRLA.

No billing dispute or any complaints about Cingular's service are to be found in the second amended complaint.<sup>5</sup> It is based instead on various provisions of the customer agreement being wrong in the abstract.

#### LITIGATION HISTORY

It is somewhat unusual for a suit that commenced in 2004 to still be around in 2012, and to then come to the Court of Appeal after a motion that is typically made early on in civil proceedings. A quick review of the course of the litigation explains the delay.

As noted, the lawsuit began in 2004 with a different plaintiff, Susanne Ball. Selby was substituted in for Ball in April 2005. Cingular quickly filed a motion to compel arbitration. Cingular lost in the trial court. Cingular appealed. This court, following the then-controlling precedent *Broughton, supra*, 21 Cal.4th 1066, affirmed the

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<sup>4</sup> Selby devotes roughly a fourth of her argument in her opening brief to the merits of her contentions these terms are unconscionable. But the merits of her claims are irrelevant. We deal here with whether Selby can show "any damages" under the CRLA as interpreted by *Meyer* and with whether her claims are otherwise precluded by the FAA as interpreted by *Concepcion*.

<sup>5</sup> While we affirm the judgment of dismissal, we observe that, under *Meyer*, Selby may have already won de facto on the point of enforceability. *Meyer* puts a premium on a company's self-restraint in *not* enforcing arguably unconscionable contract terms – a kind of self-censorship in contract law – because without such "enforcement," a named plaintiff in a class action has no standing to complain about those terms.

order denying arbitration. (*Selby v. Cingular Wireless LLC* (Aug. 25, 2006, G036158) [nonpub. opn.] (*Selby I*)

Then, in 2007, this court decided another case which presented an “identical claim” to Selby’s. That case would later become *Meyer, supra*, 45 Cal.4th 634, but in the interim the parties decided to put this case on hold.

In 2009, the Supreme Court handed down *Meyer*. The *Meyer* decision held the plaintiff there could show no damage as a result of any of the unconscionable terms about which she had complained, because none of those terms had ever been “enforced” against her. (*Id.* at pp. 641, 643.)

A few months after *Meyer*, Cingular moved for summary judgment. In May 2010, the trial court (then Judge Thierry Colaw) denied the motion, reasoning that Cingular’s previous attempt to compel arbitration effectively sought to enforce an unconscionable arbitration provision against Selby so she *was* effected by the agreement. Further, he noted that in any event, there was a triable issue of fact as to whether Selby might, or might not, be obligated to pay roughly \$25,000 in attorney fees for fending off the 2005 attempt to compel arbitration.<sup>6</sup>

Then came *Concepcion*. Cingular again moved to dismiss the case, this time via a motion for judgment on the pleadings. The motion was assigned to a new trial judge (now Judge Kim Dunning). In the wake of *Concepcion*, Cingular prevailed. Selby has now appealed.

## DISCUSSION

### A. *Procedural Arguments for Reversal*

Selby’s two leadoff arguments are procedural. First, relying on section 1008 of the Code of Civil Procedure [requirement of new or different circumstances or

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<sup>6</sup> Selby’s deposition attached in the motion for summary judgment was equivocal as to whether she might have to pay the \$25,000 incurred defending the motion to compel arbitration at all.

law required to bring motion for reconsideration], she asserts the trial judge (that is, Judge Dunning) was without “jurisdiction” to grant Cingular’s motion for judgment on the pleadings because another trial judge (that is, Judge Colaw) had previously denied Cingular’s motion for summary judgment.

By its terms, however, Code of Civil Procedure section 1008 allows for renewed motions if “new or different facts, circumstances, or law” have intervened. Here, a significant United States Supreme Court decision – *Concepcion*, so significant a tanker of ink has been spilled about it in the less than the two years after it was handed down – intervened between Judge Colaw’s decision and Judge Dunning’s.<sup>7</sup>

Selby argues *Concepcion* does not qualify as “new law” for purposes of the motion for judgment on the pleadings because *Concepcion* was “wholly collateral to the merits of the initial motion for summary judgment.” We disagree.

Far from being wholly collateral, the arbitration issue as presented in *Concepcion* was central to the unsuccessful motion for summary judgment. An examination of Judge Colaw’s order denying the motion for summary judgment reveals its focus was on Cingular’s 2005 attempt to compel arbitration of this case, combined with the possible liability which Selby might have incurred for fees in fending off that attempt to compel arbitration. Judge Colaw, relying on a pre-*Concepcion* legal model, concluded that *Meyer* did not apply because there had been a clear attempt to enforce the (putatively unconscionable) arbitration requirement against Selby. *Concepcion* may indeed be “collateral” to any of the attacked provisions which, for sake of argument, might be independent of the arbitration requirement (or not<sup>8</sup>), but the change in the law it

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<sup>7</sup> In California alone, more than 200 appellate cases have already mentioned *Concepcion*.

<sup>8</sup> Selby argues that of the seven provisions attacked, *Concepcion* only implicates one, namely the prohibition against class arbitrations. That is an unsound reading of *Concepcion*. The *Concepcion* court said provisions that “derived their meaning from the fact that an agreement to arbitrate is at issue” are preempted by the FAA. (*Concepcion, supra*, 131 S.Ct. at p. 1746.) Deriving meaning from arbitration being at issue is a broader idea than “everything goes but class arbitrations,” which is how Selby reads *Concepcion*.

presented was most certainly not collateral to the very reason the summary judgment motion was denied.

Significantly, because of procedural deficiencies in Cingular's moving papers, Judge Colaw did not reach the issue of whether *Meyer* precluded a challenge to any of the provisions of the contract *other than* arbitration. He began his ruling on the summary judgment by noting that any attempt at summary adjudication, as distinct from summary judgment, was "procedurally defective" under the summary judgment statute because Cingular's moving papers did not identify whether it was attacking specific causes of action or was based on an affirmative defense. He thus never decided the merits of whether the lack of any attempt by Cingular to enforce any of the allegedly unconscionable provisions of the contract other than those relating to arbitration was dispositive under *Meyer*. Judge Colaw's focus was on the arbitration. His ruling did not act as a bar to Judge Dunning's ruling.

Selby's second procedural argument centers on the availability of declaratory relief. She argues that even if the motion for judgment on the pleadings was correctly granted, the trial court erred in dismissing her request for declaratory relief. We defer discussion of this point until after we explain the *Meyer* decision in detail below. As it turns out, *Meyer* is dispositive of this procedural point as well as all of Selby's substantive claims other than the ones involving the arbitration.

#### B. *The Merits*

In *Meyer*, as here, a subscriber to a cell phone service sought injunctive and declaratory relief to the effect that a number of provisions in her cell phone contract violated the CRLA – in fact, the plaintiff was Selby's actual predecessor in this case, Susanne Ball. The plaintiff's argument was that "the very presence of unconscionable terms" in the cell phone contract violated the CRLA and, accordingly, allowed her to sue for injunctive and declaratory relief. (*Meyer, supra*, 45 Cal.4th at p. 641.) The cell phone company countered with the argument the CRLA requires "some damage," and the

plaintiff hadn't suffered *any* damage, because none of the allegedly unconscionable provisions in the contract had ever been enforced against her. (*Ibid.*)

The Supreme Court ruled the cell phone company had the "better position." (*Meyer, supra*, 45 Cal.4th at p. 641.) The court examined the language of the CRLA's standing statute, section 1780, subdivision (a), which provides that any consumer who "suffers any damage as a result of" any of the practices considered unlawful by the CRLA may bring an action under the CRLA. The court noted the language of the statute required both that the consumer be "exposed" to the unlawful practice *and* that "some kind of damage must result." (*Ibid.*) The plaintiff in *Meyer* might have been exposed to allegedly unconscionable terms in her contract, but she certainly had not suffered "any damage" as the result of the enforcement of those terms. (*Id.* at p. 643.) Moreover, given the absence of standing to seek *injunctive* relief, the high court held the trial court was certainly within its discretion in dismissing the plaintiff's *declaratory* relief action as well, since declaratory relief, given the absence of any damage incurred by the plaintiff, would not "have any practical consequences." (*Id.* at p. 648.)

Our case was considered by the parties to be "identical" to *Meyer* back in 2007, when they stipulated to put this case on hold until *Meyer* was decided by the Supreme Court. Now, in 2012, the only difference is Cingular's failed 2005 attempt to compel arbitration, which *may* have resulted in Selby's incurring \$25,000 in liability to her attorneys for work in warding off the attempt.

Selby's argument to take this case out of the purview of *Meyer* is that the potential liability represented by the \$25,000 defense costs concerning the motion to compel arbitration represents "transaction costs" which the court in *Meyer* allowed as within the purview of the "any damages" language in section 1780.

But the argument doesn't help Selby. To the degree that Cingular's motion to compel arguably caused Selby to incur a "transaction cost" as the law stood at the time *Meyer* was decided, it was a transaction cost which Cingular had a federal right to inflict,

and for which our state's CRLA can give no relief because such relief would be preempted by federal law.

*Concepcion* is the large animal in this room. That case was a class action against this very defendant, Cingular (called AT&T in the opinion), arising out of the company's charging sales tax on a "free" cell phone acquired by the named plaintiffs in the class action. Cingular moved to compel arbitration; the named plaintiffs countered that the contract's arbitration provisions were unconscionable. (*Concepcion, supra*, 131 S.Ct. at pp. 1744-1745.) The federal district court denied arbitration, and the Ninth Circuit affirmed that decision on the theory the arbitration provision was indeed unconscionable under California law *and* California law on the point was *not* preempted by the FAA. (See *id.* at p. 1745.) The Supreme Court, however, reversed the Ninth Circuit, holding the California law on point interfered with the federal right to have an enforceable arbitration agreement. (*Id.* at p. 1750.) The court reasoned the FAA made arbitration agreements valid and enforceable, and the exception set forth in the "savings clause" of the FAA (permitting arbitration agreements to be declared unenforceable "upon such grounds as exist in law or in equity for the revocation of a contract") did *not* apply to defenses to arbitration "that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." (*Id.* at pp. 1745-1746.) In the process *Concepcion* expressly disapproved the state law on which the Ninth Circuit had relied, *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148.<sup>9</sup>

There is recent California Court of Appeal authority which indicates that a state law unconscionability defense to the assertion of an arbitration agreement survived *Concepcion*. (E.g., *Sparks v. Vista Del Mar Child and Family Services* (2012) 207

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<sup>9</sup> *Broughton* – which this court relied on in *Selby I*, and which the *Meyer* court had cited to observe that resistance to a motion to compel arbitration to a deceptive or unlawful practice could entail transaction cost damages under the CRLA – also did not survive *Concepcion*. (*Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115, 1136 ["Since *Broughton-Cruz* prohibits outright the arbitration of claims for public injunctive relief, it is in conflict with the FAA."].)

Cal.App.4th 1511, \_\_\_ [“Moreover, the United States Supreme Court in *Concepcion* did not eliminate state law unconscionability as a defense to the enforcement of arbitration agreements subject to the Federal Arbitration Act.”]; see also *Samaniego v. Empire Today, LLC* (2012) 205 Cal.App.4th 1138, 1150.)

But this case is fundamentally different from the usual case where a party to a contract has a claim against the other party and the other party invokes an arguably unconscionable arbitration agreement. In this case, Selby fired the first shot by suing Cingular on the basis of various provisions in Cingular’s customer agreement before Cingular had enforced *any* of those provisions against her, including the arbitration provision. Had *Meyer* been around at the time, it would have been clear Selby had no standing to bring her suit at all. And so, when Selby filed her suit, Cingular effectively had no choice but to invoke its arbitration provision. Not to have done so would have waived the provision. (See generally *Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 446 [noting delays as short as four months could result in waiver of right to arbitrate].)

Cingular’s posture was thus defensive at the time it invoked its arbitration clause. It never asserted its arbitration clause in response to claims which, for example, would have been cognizable under *Meyer*. Rather, when the case began back in 2004 with Susanne Ball as plaintiff, the only dispute between Cingular and any party was one constructed by Selby’s attorneys. And any dispute remains wholly an abstract one, attacking contract terms “in the sky” as it were. Judge Dunning explicitly recognized, as do we, that the arbitration motion was the direct “result” of Selby’s bringing a suit that did not arise out of any real dispute in the first place.

It would be a perversion of state law unconscionability doctrine – which is supposed to protect consumers from oppressive contracts, including arbitration agreements which deter consumers from seeking relief for their claims (see *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83) – to apply it here

where Selby, not Cingular, picked the fight in the first place. If Selby indeed incurred liability for \$25,000 in fees for fending off Cingular's invocation of its arbitration right in response to a lawsuit where she had not suffered "any damage" at all, those costs are the legal equivalent of a self-inflicted wound, and cannot be regarded as recoverable transaction costs.

Other than the "transaction costs" represented by the 2005 motion to compel arbitration, Selby makes no claims of "any damage" from the *non*-arbitration related provisions she attacks. None of those provisions have been enforced against her. Thus what might survive *Concepcion* does not survive *Meyer*, and vice versa.

Finally, by the same token, as in *Meyer*, no "practical consequences" would flow from consideration of Selby's declaratory relief claims. Her claims based on Cingular's enforcement of its arbitration right are covered by *Concepcion* and the FAA; her claims not based on the enforcement of the arbitration provisions are precluded under *Meyer* because they have never been enforced against her. *Meyer's* affirmance of the trial court's decision to preclude declaratory relief is exactly on point here.

#### DISPOSITION

The judgment is affirmed. Cingular shall recover its costs.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.