Case No. SC05-1247
Lower Tribunal Case No. 4D04--219

SUPREME COURT
FOR THE STATE OF FLORIDA

BETZAIDA FONTE

Plaintiff - Appellant

v.

AT&T WIRELESS SERVICES, INC.

Defendant – Appellee

ON APPEAL FROM THE STATE OF FLORIDA
FOURTH DISTRICT COURT OF APPEAL AND
THE CIRCUIT COURT
OF THE 15TH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

SECOND CORRECTED JURISDICTION BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

On January 28, 2002, Plaintiff/Appellant Betzaida Fonte ("Fonte") purchased wireless service offered by Defendant/Appellee AT&T Wireless Services, Inc. ("AT&T") from Alpha Cellular. (App. at 1). As part of the purchase, Plaintiff signed a two-year Personal Service Agreement with AT&T. (App. at 1). The Agreement states in part:

> This Agreement hereby incorporates by reference the Terms and Conditions and other information set forth in the AT&T Wireless Welcome Guide . . . the Rate Plan brochure and/or feature or promotional materials (collectively, "Sales Information") that you were provided . . . By signing below you acknowledge that you have received and reviewed the Terms and Conditions and Sales Information and that you agree to be bound by such Terms and Conditions and the Sales Information for the term of your Agreement.
>
> (App. at 1).

In the "AT&T Wireless Welcome Guide," which was a separate document, there was an arbitration clause contained in a section called "Terms and Conditions" at page 32 of the guide. (App. at 2). The arbitration clause stated, in relevant part:

> . . . Any dispute or claim made by you against us (or against any of our subsidiary, parent or affiliate companies) arising out of or relating to this Agreement or the Service or any equipment used in connection with the Service (whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory) will be resolved by binding arbitration except that (1) you may take claims to small claims court if they qualify for hearing by such a court, or (2) you or we may choose to pursue claims in court if the claims relate solely to the collection of any debts you owe to us. However, even for those

> claims that may be taken to court, you and we both waive any claims for punitive damages and any right to pursue claims on a class representative basis.
>
> . . . . By this agreement, both you and we are waiving certain rights to litigate disputes in court. If for any reason this arbitration clause is deemed inapplicable or invalid, you and we both waive, to the fullest extent allowed by law, any claims to recover punitive or exemplary damages and any right to pursue any claims on a class or consolidated basis or in a representative capacity.
> (App. at 2).

On September 26, 2002, Fonte filed a Class Action Complaint against AT&T, alleging breach of contract, fraud and violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). (App. at 3). On November 25, 2003, the trial court held an evidentiary hearing on AT&T's Motion to Stay Case and Compel Arbitration ("Motion to Compel"). (App. at 3-4). The trial court granted AT&T's Motion to Compel and adopted in large part AT&T's proposed order, finding that the challenged provisions were not procedurally or substantively unconscionable. (App. at 4).

On appeal, the Florida District Court of Appeal for the Fourth Circuit reversed in part and affirmed in part. The court held that the arbitration clause's bar on attorneys fees defeated a remedial purpose of the FDUTPA and instructed the trial court on remand to sever the clause. (App. at 5-6). The court then addressed whether the arbitration clause was unconscionable. The court found that "AT&T had almost unilateral bargaining power" and that the underlying contract

was an "adhesion contract." (App. at 7). However, the court determined that because the procedural irregularities were not sufficient on their own to set aside the arbitration clause, "we need not address substantive unconscionability." (App. at 9). The court concluded that the arbitration clause was not unconscionable. *Id.*

SUMMARY OF ARGUMENT

Fonte requests that the Court exercise its discretion and entertain this case on the merits, because the district court of appeal's decision expressly and directly conflicts with a decision of another district court of appeal on a question of law. Specifically, the court of appeal's decision conflicts with *Romano ex rel. Romano v. Manor Care, Inc.*, 861 So.2d 59 (Fla. 4th DCA 2003), which held that the issue of unconscionability requires a "balancing approach" in that "[t]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Id.* When there is a substantial level of substantive unconscionability, procedural unconscionability may be found if "there is *some irregularity in the contract formation . . . .*" *Id.* (emphasis added). By refusing to address the issue of substantive unconscionability, the appellate court failed to engage in the "balancing approach" prescribed by *Romano.* The issue is of particular importance to consumers in the state of Florida, because the enforcement of a one-sided, adhesion contract that bans class action relief and

punitive damages would effectively deny many Florida consumers any practical option for obtaining relief for deceptive business practices.

ARGUMENT

THE APPELLATE COURT ERRED IN AFFIRMING THE TRIAL COURT'S ORDER COMPELLING ARBITRATION WITHOUT ADDRESSING THE SUBSTANTIVE UNCONSCIONABILITY OF THE ARBITRATION CLAUSE BECAUSE THE PROPER STANDARD FOR DETERMINING UNCONSCIONABILITY REQUIRES A BALANCING OF PROCEDURAL AND SUBSTANTIVE CONCERNS.

The validity of an arbitration clause is an issue of state contract law. *Powertel, Inc. v. Bexley*, 743 So.2d 570, 574 (Fla. 1st DCA 1999). "[G]enerally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening the Federal Arbitration Act." *Id., citing Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Courts may properly decline to enforce a contract on the ground that it is procedurally and substantively unconscionable. *Romano*, 861 So.2d at 62. Procedural unconscionability "relates to the manner in which the contract was entered and it involves consideration of such issues as the relative bargaining power of the parties and their ability to know and understand the disputed contract terms." *Bellsouth Mobility LLC v. Christopher*, 819 So.2d 171, 173 (Fla. 4th DCA 2002), *quoting Powertel*, 743 So.2d at 574. Substantive unconscionability focuses

on the agreement itself and looks to whether the terms of the contract are unreasonable and unfair. *Id*.

The question of unconscionability requires a "balancing approach." *Romano,* 861 So.2d at 62. "[T]o tip the scales in favor of unconscionability, most courts seem to require a certain quantum of procedural plus a certain quantum of substantive unconscionability." *Id*. The amount of either may vary. "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Id*.

The appellate court addressed the underlying process but not the substance of the arbitration clause. After finding that procedural unconscionability, standing alone, was insufficient to set aside the arbitration clause, the court held that "as we have found a lack of procedural unconscionability, which is necessary before we could decline to enforce a contract as unconscionable, we need not address substantive unconscionability." (App. at 9). Treating the issue of substantive unconscionability as an afterthought is contrary to the framework set forth in *Romano.*

In *Romano,* the husband and guardian of a nursing home resident filed a claim against a nursing home for deprivation of the resident's rights as set forth under a Florida statue. The nursing home moved to compel arbitration pursuant to

the arbitration agreement signed by the husband after his wife's admission to the home. The trial court determined that the parties had entered into a valid arbitration agreement. The Fourth District Court of Appeal reversed, holding that the arbitration clause was unconscionable. *Id*. at 63.

The court first addressed substantive unconscionability, holding that the arbitration agreement unfairly and unreasonably denied the plaintiff her legal right to recover punitive damages, equitable relief and fees. *Id*. The court then turned to the issue of procedural unconscionability. The agreement was not "hidden in the fine print" but included as a six-page, stand alone contract. The first page of the agreement stated that it contained a waiver of statutory rights. The administrator who supervised the signing of the agreement gave each document to the husband to sign but did not attempt to explain any of the terms used in the documents.

The court noted that although the husband owned his own business, he and his wife were "elderly" and "there was no showing that he had legal training to understand the rights he was signing away for his wife." *Id*. Moreover, although the husband or his wife could cancel the agreement within three days of its signing, the documents were provided to the husband one day after his wife had been admitted to the facility. The court concluded that the ages of the resident and her husband, coupled with the circumstances under which the agreement was signed, established procedural unconscionability. *Id*.

The *Romano* case illustrates the proper framework for determining the unconscionability of arbitration clauses. As here, the arbitration clause required that customers waive specific legal remedies. The appellate court specifically held that the contract was one of "adhesion" in that Fonte had almost no bargaining power. (App. at 7). Moreover, the high level of substantive unconscionability meant that a lesser amount of "degree" of "irregularity" was required to justify a conclusion that the arbitration clause was unenforceable. *Id*. By refusing to address the issue of substantive unconscionability, the appellate court's opinion directly conflicts with *Romano*'s holding that both procedural and substantive irregularities must be balanced to determine whether the arbitration clause is unconscionable.

The issue is one of particular importance for consumers in the state of Florida. Fonte alleges that after she purchased wireless telephone service from AT&T, the company began charging her for busy or unanswered calls, including those that lasted longer than thirty seconds, and overcharging her for directory assistant calls. (App. at 3-4). The value of an individual claim in this case, like most consumer suits, is so small that if the claims are required to be arbitrated individually, it is likely that few, if any, claims would be pursued. If AT&T were permitted to enforce a ban on class actions, the likelihood that any claim would be pursued against it or against other businesses in the state of Florida would be

slight. AT&T would be avoiding responsibility for its unlawful and deceptive policies and practices. This is contrary to the spirit and purpose of the FDUTPA and the Florida class action rule, and should be rejected.

Moreover, the allegations in this case are precisely the type of consumer claims that are ripe for class action relief. There are numerous common issues of law to members of the putative class, including whether AT&T breached its Agreements with class members by charging them for unconnected and busy calls longer than thirty seconds and whether AT&T's unilateral Agreement change, charging customers for unconnected and busy calls longer than thirty seconds, is an unfair practice under consumer protection statutes. AT&T's practices were consistently applied to all members of the putative class, defined as all customers of AT&T as of July 31, 2002.

AT&T is attempting to use federal and state policy favoring arbitration to force consumers into unfair, unconscionable contracts that ban all class action relief. Yet it is not arbitration that AT&T wants; it is the systemic destruction of customers' remedies and rights through arbitration clauses buried in fine print, in form contracts, and offered without negotiation or explanation. Arbitration is simply the vehicle through which AT&T hopes to realize this goal. Fonte asks that the Court reject AT&T's efforts to inoculate itself from liability and entertain the case on its merits.

CONCLUSION

For the reasons set forth above, Fonte respectfully requests that the Court exercise its discretion and entertain the merits of the case on appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. Mail to: David P. Ackerman and Ryon M. McCabe, Ackerman, Link & Sartory, P.A., 222 Lakeview Ave., Suite 1250, West Palm Beach, FL 33401, on August 19, 2005.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of the font used in the Reply Brief of Appellant is 14 point proportionately spaced Times New Roman, and complies with the requirements of Fla. R. App. P. Rule 9.210(a)(2).

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