NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JENNIFER L. LASTER; ANDREW THOMPSON; ELIZABETH VOORHIES, on behalf of themselves and all others similarly situated and on behalf of the general public,

Plaintiffs - Appellees,

v.

T-MOBILE USA, INC.; OMNIPOINT COMMUNICATIONS, INC., a Delaware corporation dba T-Mobile,

Defendants - Appellants,

And

VERIZON COMMUNICATIONS, INC., a Delaware corporation; CELLCO PARTNERSHIP, a Delaware corporation dba Verizon Wireless; VERIZON WIRELESS (VAW) LLC, a Delaware limited liability company, dba Verizon Wireless; AIRTOUCH CELLULAR, a Delaware limited liability company, dba Verizon Wireless; CINGULAR WIRELESS LLC, a Delaware limited

No. 06-55010

D.C. No. CV-05-01167-DMS

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

liability company; GO WIRELESS, a California corporation; NEW CINGULAR WIRELESS PCS, dba Cingular Wireless,

Defendants.

Appeal from the United States District Court
for the Southern District of California
Dana M. Sabraw, District Judge, Presiding

Submitted October 16, 2007**
Pasadena, California

Before: PREGERSON, HAWKINS, and FISHER, Circuit Judges.

T-Mobile USA, Inc., Omnipoint Communications, Inc., and TMO CA/NV, LLC (collectively, "Appellants") appeal from the district court's order denying their motion to compel arbitration. We affirm.

Although Appellants argue that their arbitration provision is not procedurally or substantively unconscionable under California law, the Appellants' agreement—which requires customers to waive class action and bring claims only in an individual capacity—is not substantively distinguishable from the Cingular arbitration agreement this court held unconscionable in Shroyer v. New Cingular Wireless Servs., Inc.,498 F.3d 976, 2007 WL 2332068, at *5-9 (9th Cir. 2007).

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Appellants argue their agreement is not procedurally unconscionable because customers accepted the arrangement from the outset and could have elected a different mobile phone company; however, this court specifically rejected the "marketplace alternatives" rationale in Shroyer, id. at *7-8, and California courts have done the same, Gatton v. T-Mobile USA, Inc., 152 Cal. App. 4th 571, 582-85 (2007).

Shroyer also expressly and conclusively rejected the argument that California law is preempted by the Federal Arbitration Act ("FAA"), 498 F.3d 976, 2007 WL 2332068, at *9-15, and we lack the authority to revisit the decision of a prior three-judge panel. Miller v. Gammie, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc). Appellants' attempts to circumvent this rule are unavailing, as this is not a case where the prior panel simply assumed California law applied without discussing the preemptive effect of the FAA. Cf. Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285, 1288 (9th Cir. 1985) (prior panel assumed Commerce Clause applied to Guam without discussing the issue); Matter of Baker, 693 F.2d 925, 925-26 (9th Cir. 1982) (prior panel exercised jurisdiction and parties did not contest the issue). Even if Shroyer did not address the specific arguments Appellants would like to make, there is no doubt that it clearly and explicitly ruled on the contested preemption issue.

AFFIRMED.