SEYFARTH SHAW

Management Alert

California Supreme Court Invalidates Contractual Waivers Of Public Injunctive Relief

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Seyfarth Synopsis: *No California contractual provision, including one in an arbitration agreement, can waive the statutory right to seek injunctive relief to protect the general public.* McGill v. Citibank, N.A. *(April 6, 2017).*

The Facts

Sharon McGill had a Citibank credit card. The account had a "credit protector" plan, by which Citibank would defer certain amounts on the credit card account if a qualifying condition occurred, such as divorce, hospitalization, or unemployment.

In 2001, Citibank gave notice to McGill that their disputes would be subject to arbitration unless she opted out. She did not do so, either in 2001, or when Citibank gave renewed notices in 2005 and in 2007. In 2011, McGill filed a class action against Citibank based on how it handled her account following her loss of a job in 2008. By the time McGill sued, the arbitration agreement provided that disputes would be handled "on an individual (non-class, non-representative) basis, and the arbitrator may award relief only on an individual (non-class, non-representative) basis." By way of emphasis, the agreement stated: "Claims must be brought in the name of an individual person or entity and must proceed on an individual (non-class, non-representative) basis. The arbitrator will not award relief for or against anyone who is not a party."

McGill alleged claims under California's Unfair Competition Law ("UCL"), Consumer Legal Remedies Act ("CLRA"), and false advertising law. McGill sought an injunction prohibiting Citibank from continuing "illegal and deceptive practices" against the public.

Trial and Appellate Court Decisions

Citibank, invoking the arbitration agreement, petitioned to compel McGill to arbitrate her claim on an individual basis. The trial court ordered her to arbitrate all claims other than those for injunctive relief under the UCL, the CLRA, and the false advertising law. The trial court held that, under the *Broughton-Cruz* rule, agreements to arbitrate claims for public injunctive relief under these statutes are not enforceable.

On Citibank's appeal, the Court of Appeal reversed, directing the trial court to compel all claims to arbitration because the Federal Arbitration Act ("FAA") preempts the *Broughton-Cruz* rule. McGill then filed a petition for review, asserting (1) that the Court of Appeal erred in finding FAA preemption of the *Broughton-Cruz* rule, and (2) the arbitration provision is invalid and unenforceable because it waives her right to seek public injunctive relief in any forum.

The California Supreme Court Decision

The Supreme Court did not address the first issue (FAA preemption). And even as to the second issue, the Supreme Court did not reach the issue of whether there was an enforceable agreement to arbitrate, but rather decided that a contractual waiver of the right to seek a public injunction was unenforceable, regardless of whether that waiver appears in an arbitration agreement.

The Supreme Court's decision on this narrow issue was unanimous.

The Supreme Court began by noting that the three statutes at issue (the UCL, the CLRA, the false advertising law) all authorize injunctions to protect the general public. These public injunctions—which benefit a plaintiff only incidentally, as a member of the general public—differ from private injunctive relief, which resolves the plaintiff's private dispute and benefits the public, if at all, only incidentally. The *Broughton-Cruz* rule holds that agreements to arbitrate claims for public injunctive relief under the statutes in question are not enforceable.

Although the Supreme Court had agreed to review whether this *Broughton-Cruz* rule is FAA-preempted, the Supreme Court concluded that the rule was not relevant here, because Citibank's arbitration agreement did not refer claims for public injunctions to arbitration, but rather banned such claims *in any forum*.

Viewed in this light, the case was *not* about what an enforceable arbitration agreement would look like, but rather whether *any kind* of agreement could effectively waive the right to seek a public injunction. The Supreme Court concluded: "the arbitration provision here at issue is invalid and unenforceable under state law insofar as it purports to waive McGill's statutory right to seek such relief." That result followed from Civil Code section 3513, which states that "a law established for a public reason cannot be contravened by a private agreement." The Supreme Court reasoned that the three statutes in question, in authorizing public injunctive relief, did so for a public reason.

The Supreme Court found this result consistent with the FAA. Although the FAA requires courts to treat arbitration agreements on a par with other contracts and to enforce them according to their terms, the FAA also permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." In this case, Civil Code section 3513 would provide a ground to revoke any provision, whether it appears in an arbitration agreement or some other kind of agreement. Thus, the Supreme Court concluded, the FAA did not preempt a California anti-waiver rule protecting the right to pursue a public injunction.

Nor, the Supreme Court concluded, would an anti-waiver rule regarding public injunctions interfere with the fundamental attributes of arbitration (as the old *Discover Bank* anti-waiver rule had with respect to class actions).

The existence of an anti-waiver rule with respect to public injunctions did not necessarily mean that the Citibank arbitration agreement was unenforceable. The Supreme Court expressly declined to decide that question and left it to be resolved on remand to the Court of Appeal.

What *McGill* Means for Employers

McGill is important for what it did not decide as well as for what it did decide. First, *McGill* does *not* invalidate agreements that would have the arbitrator decide whether to issue a public injunction. All that would stand in the way of such an arbitration agreement would be the *Broughton-Cruz* rule, the continuing viability of which is suspect. That rule is FAA-preempted, according to the (now depublished) Court of Appeal decision in *McGill*, and the Supreme Court's decision avoids endorsing that rule.

Second, *McGill* does *not* say that an arbitration agreement containing an invalid ban on public injunctive relief would necessarily be unenforceable. Courts often sever an unenforceable provision from an arbitration agreement and enforce the remainder of the agreement. Whether courts can thus save an arbitration agreement depends on the surrounding circumstances.

McGill does counsel that employers, whether in the form of an arbitration agreement or in some other sort of agreement, cannot require employees to waive their right to seek injunctions that would be primarily for the benefit of the public, and only incidentally of benefit for the employee.

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