CLIENT ALERT

McGill v. Citibank, N.A.: California Supreme Court Holds Arbitration Clauses Cannot Waive Consumers' Rights to Seek Public Injunctive Relief "In Any Forum"

Apr.10.2017

On April 6, 2017, in what may become a seminal case on the subject of arbitration clauses and class-action waivers in consumer contracts, the California Supreme Court handed down its unanimous decision in *McGill v. Citibank, N.A.* The Court's opinion held that:

1. "A provision in a predispute arbitration agreement that waives the right to seek [public injunctive relief under California's consumer-protection statutes] in any forum … is contrary to California public policy and is thus unenforceable under California law."
2. "The Federal Arbitration Act does not preempt this rule of California law."

The *McGill* decision is the latest entry in the California Supreme Court's well-known history of limiting what rights consumers may waive through arbitration agreements—potentially setting the stage for another review by the U.S. Supreme Court.

Background to the Decision

The dispute arose from a putative class action brought by Sharon McGill, a consumer account-holder with Citibank. McGill opened a credit card account with Citibank in 2011. In October of that year, Citibank amended the account agreement to provide for "mandatory, binding arbitration," at Citibank's option, of account-holders' claims pursuant to the Federal Arbitration Act (FAA). Under this new provision, "all claims" were "subject to arbitration," no matter "what remedy (damages, or injunctive or declaratory relief)" they sought. And it specifically waived the customer's right to bring *any* claims on a representative or class-action basis. McGill never opted out of her agreement and instead continued using her card.

In 2011, McGill filed a class action in California state court based on Citibank's marketing of a "credit protector" plan she had purchased. The complaint invoked California's three major consumer-protection statutes—the Unfair Competition Law (UCL), False Advertising Law (FAL), and Consumer Legal Remedies Act (CLRA)—each of which provides injunctive relief as a remedy. Citing the arbitration clause, Citibank sought to compel arbitration of each of these claims on an individual basis.

The trial court agreed that arbitration was mandatory for all of McGill's claims *except* those for public injunctive relief—that is, claims for an injunction that would benefit not the individual plaintiff herself but members of the public at large. The court grounded its decision on California's *Broughton-Cruz* rule: "Agreements to arbitrate claims for public injunctive relief under the CLRA, the UCL, or the [FAL] are not enforceable in California." The Court of Appeal, however, disagreed and ordered *all* of McGill's claims to arbitration, reasoning that the *Broughton-Cruz* doctrine was preempted by the FAA.

What the Court Held

The California Supreme Court reversed, holding that the contractual waiver of McGill's right to seek public injunctive relief was unenforceable under California law and public policy. Central to the Court's decision was the fact that the arbitration clause at issue "purport[ed] to prohibit [McGill] from pursuing claims for public injunctive relief, not just in arbitration, but *in any forum*." The Court thus declined to address the issue of whether the FAA preempted the *Broughton-Cruz* rule, as that rule only applies to cases where the parties have *agreed to arbitrate* claims for public injunctive relief.

In *McGill*, by contrast, the arbitration clause provided that the plaintiff *could not arbitrate* injunctive relief claims on behalf of other members of the public; it left her with no recourse for such claims "in arbitration, in court, or *in any forum*." This, the Court held, was a bridge too far:

> [T]he waiver in a predispute arbitration agreement of the right to seek public injunctive relief under [California's consumer-protection] statutes would seriously compromise the public purposes the statutes were intended to serve. Thus, insofar as the arbitration provision here purports to waive McGill's right to request in any forum such public injunctive relief, it is invalid and unenforceable under California law.

The Court further explained that, in its view, this holding posed no conflict with the FAA as interpreted by the U.S. Supreme Court in *AT&T Mobility LLC v. Concepcion* (2011) and *American Express Co. v. Italian Colors Restaurant* (2013). In *Concepcion*, the late Justice Antonin Scalia, writing for the majority, explained that the FAA permits arbitration agreements to be invalidated by "generally applicable contract defenses"—but not by defenses that apply *only* to arbitration, or "that derive their meaning from the fact that an agreement to arbitrate is at issue." This was not the case in *McGill*, the California Court reasoned, because"[t]he contract defense at issue [t]here—'a law established for a public reason cannot be contravened by a private agreement'—*is* a generally applicable contract defense, *i.e.*, it is a ground under California law for revoking *any* contract"—not just arbitration agreements.

The Supreme Court further stated that, "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." In *McGill*, by contrast, the waiver at issue prevented the plaintiff from pursuing "substantive statutory remedies" in any forum—arbitral or judicial. According to the California Supreme Court, this fact distinguished the case from *Concepcion* and *Italian Colors*, in which the U.S. Supreme Court upheld contractual waivers of the right to maintain a class action—which the *McGill* Court characterized as "a procedural right only, ancillary to the litigation of substantive claims."

What *McGill* Means Going Forward

While *McGill* did not reach the important question of whether the *Broughton-Cruz* rule remains viable, the decision is still notable insofar as it carves out a frequently-invoked set of statutory claims that California consumers cannot contractually waive their right to pursue in some forum. In that sense, the decision is a significant departure from federal Supreme Court precedent in *Concepcion* and *Italian Colors*. Both those decisions upheld contractual waivers of plaintiffs' rights to maintain class actions to seek relief on behalf of other parties outside the contractual relationship. *McGill* creates an important legal exception to those rulings in California to the extent that class-action plaintiffs are seeking injunctive relief under its consumer-protection statutes—which give rise to extensive litigation in both state and federal court.

McGill does, however, leave intact *Concepcion* and *Italian Colors*' protection for contractual class-action waivers of consumer claims for damages, restitution, or other monetary relief. Further, there is still the possibility that *McGill* itself will undergo appellate review. The U.S. Supreme Court has repeatedly ruled against California's high court in recent cases centered on arbitration, most notably *AT&T Mobility v. Concepcion* in 2011. With Judge Neil Gorsuch now confirmed to fill the Court's vacant ninth seat, that familiar story could repeat itself in *McGill*.

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