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Calif. High Court Creates Exception To Concepcion

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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 NA.

The court 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," and
>
> (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 United States 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. 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 with some public impact under its consumer protection statutes — which give rise to extensive litigation in both state and federal court.

There is reason to think, however, that the decision's impact may be more limited in practice. McGill does leave intact Concepcion and Italian Colors' protection for contractual class action waivers of consumer claims for damages, restitution or other monetary relief. Further, the decision's influence may be particularly attenuated in consumer class actions filed in or removed to federal court. The reason is that consumer-plaintiffs already face serious obstacles to establishing their standing to seek injunctive relief in Article III courts. Many federal judges have noted that requests for injunctions under California's consumer-protection statutes are in tension with Article III's requirement that each plaintiff have standing for the relief that she seeks. After all, the consumer has already been injured by the practice at issue; having now learned of the misconduct alleged, how can she plausibly claim that she herself faces a "sufficient likelihood" that she will be injured again by the same practice?

There is still the possibility, moreover, 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 Justice Neil Gorsuch now confirmed to fill the court's vacant ninth seat, that familiar story could repeat itself in McGill.

—By Kathleen Taylor Sooy, Christopher A. Cole and Josh Thomas Foust, Crowell & Moring LLP

Kathleen Sooy and Christopher Cole are partners at Crowell & Moring in Washington, D.C. Josh Foust is counsel at Crowell & Moring in San Francisco. Sooy is national chair of Crowell & Moring's class action litigation practice. Cole is co-chair of the firm's advertising & product risk management group.