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Dancing On Their Own: California Supreme Court's Decision in McGill v. Citibank, N.A. that Class Action Waivers Do Not Apply to Claims for Public Injunctive Relief under California's Consumer Protection Laws

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On April 6, 2017, the ***California Supreme Court*** struck another blow in its contentious battle with the United States Supreme Court on the enforceability of consumer arbitration clauses subject to the ***Federal Arbitration Act (FAA)***. In ***McGill v. Citibank, N.A.***, No. S224086, Slip Op. at 1 (Cal. Apr. 6, 2017), the Court held that an arbitration clause in Citibank's credit card agreement purporting to waive the plaintiff's right to seek public injunctive relief under the Consumers Legal Remedies Act (CLRA), the Unfair Competition Law (UCL), or the False Advertising Law (FAL) *in any forum* was unenforceable as against California public policy. The Court further held that, notwithstanding the U.S. Supreme Court's decisions on the subject, including in ***AT&T Mobility v. Concepcion*****,** 131 S. Ct. 1740, 1747 (2011), the FAA did not preempt California's policy. As discussed below, these holdings are troubling and likely inconsistent with federal law.

In 2011, plaintiff Sharon McGill brought a putative class action against Citibank about a credit protection plan she purchased for her Citibank credit card account. She sued under the UCL, CLRA, and FAL, seeking, among other relief, an injunction barring Citibank from continuing to engage in marketing practices she alleged were deceptive. Based on the account agreement's arbitration clause, Citibank petitioned to compel McGill's claims to arbitration on an individual basis. The arbitration clause provided, in pertinent part, as follows: "This arbitration provision is governed by the Federal Arbitration Act (the "FAA") . . . . 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. If you or we require arbitration of a Claim, neither you, we, nor any other person may pursue the Claim in arbitration in a class action, private attorney general action or other representative action, *nor may such Claim be pursued on your or our behalf in any litigation in any court*." (Emphasis added). The trial court, relying on California's *Broughton/Cruz* rule, which provides that agreements to arbitrate claims for public injunctive relief under the CLRA, UCL, or FAL are unenforceable, severed McGill's claims for such relief from its order compelling arbitration.

The Court of Appeal reversed the trial court's ruling, concluding that the *Broughton/Cruz* rule was preempted by the FAA, and ordered all of plaintiff's claims to arbitration. In reaching this conclusion, the Court of Appeal explained that, under *Concepcion*, the "FAA preempts all state-law rules that prohibit arbitration of a particular type of claim because an outright ban, no matter how laudable the purpose, interferes with the FAA's objective of enforcing arbitration agreements according to their terms." *McGill v. Citibank, N.A.*, 232 Cal. App. 4th 753, 757 (2014). The Court of Appeal reasoned that, because the *Broughton/Cruz* rule categorically prohibits arbitration of claims for injunctive relief under the UCL, FAL, and CLRA brought for the public's benefit, the rule fell squarely within *Concepcion*'s preemptive scope. *Id.* at 766 (quoting *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1747 (2011)). McGill appealed on two grounds: First, that the Court of Appeal erred in holding *Broughton/Cruz* preempted by the FAA, and second, that the arbitration provision was unenforceable because it waived McGill's right to seek public injunctive relief *in any forum,* not just arbitration. *McGill*, No. S224086, Slip Op. at 4. The California Supreme Court granted review and reversed.

The Court side-stepped the issue of whether the *Broughton/Cruz* rule was preempted. Instead, it focused on the arbitration clause's unusual language purporting to prevent plaintiff from seeking public injunctive relief *in any forum* (court or arbitration). Relying on the "savings clause" of the FAA, which "permits arbitration agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract[,]'" the Court reached three conclusions. First, it determined that California Civil Code section 3513—which provides that "a law established for a public reason cannot be contravened by a private agreement"— was a state law providing for revocation of any contract and thus within the savings clause. Notably, the Court cited no case law applying section 3513 to revoke a contract other than an arbitration agreement—and very little exists—but nevertheless concluded that the statute applies to "*any* contract—even a contract that has no arbitration provision—that purports to waive, in all fora, the statutory right to seek public injunctive relief under the UCL, the CLRA, or the false advertising law . . . ." *Id.* at 16. Second, the Court deemed a public injunction to be a "substantive statutory remedy" and not a procedural device like a class action. Such a right, it concluded, could not be waived as part of an arbitration clause or otherwise. Reasoning that Congress' purpose in enacting the FAA "'was to make arbitration agreements as enforceable as other contracts, *but no more so*[,]'" the Court held that Citibank's arbitration clause was unenforceable. *Id.* at 15 (quoting *Prima Paint v. Flood & Conklin*, 388 U.S. 395, 404 n.12 (1967) (emphasis added)). Finally, the Court dismissed Citibank's concerns about piecemeal litigation if plaintiff's individual claim were arbitrated while her public injunction claim waited for later resolution by a court. All three conclusions appear to be inconsistent with U.S. Supreme Court decisions holding that the scope of arbitration under the FAA is broad, that state laws must not single out arbitration clauses for disfavored treatment, that the purpose of arbitration is to streamline the resolution of disputes, not extend them.

What about arbitration clauses that, like most, do not purport to preclude class procedures in any forum, but only in arbitration? The case does little to clarify whether parties can waive claims for public injunctive relief in agreeing to individual arbitration, which is currently prohibited by *Broughton/Cruz.* The effect of the Court's holding, unfortunately, will be more years of litigation about the enforceability of consumer arbitration clauses in California —at least until the U.S. Supreme Court has the final word.

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