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## California Deals Another Blow to Arbitration Agreements, But It Is Far From A Knockout Punch

California continues to modify the *Concepcion* landscape. On April 6, 2017, the California Supreme Court once again issued a pro-consumer ruling that is already being applauded by the plaintiffs' bar. The ruling came out in the *Sharon McGill v. Citibank, N.A.*, Riverside County Superior Court matter, Case No. RIC1109398 and is being viewed as a departure of the U.S. Supreme Court's ruling in *AT&T Mobility LLC v. Concepcion*, which established that the Federal Arbitration Act preempted all state-law rules that created an outright ban of arbitration. In its 7-0 order, the state's high court voided part of a credit card company's arbitration agreement in which a party waived its right to seek injunctive relief.

Before the *McGill* court was whether a mandatory arbitration agreement could waive a statutory right to seek injunctive relief in California courts, and whether such provision purporting to waive that right is contrary to California public policy. That notice added an arbitration provision as follows:

"Either you or we may, without the other's consent, elect mandatory, binding arbitration for any claim, dispute, or controversy between you and us (called "individual claims")." "All Claims related to your account or a prior related account, or our relationship are subject to arbitration, including Claims regarding the application, enforceability, or interpretation of this agreement and this arbitration provision. All Claims are subject to arbitration, no matter what legal theory they are based on or what remedy (damages, or injunctive or declaratory relief) they seek". . . "This provision is governed by the Federal Arbitration Act (the 'FAA')."

Not surprisingly given California's hostility toward arbitration provisions, the California Supreme Court held that the provision was contrary to California public policy and unenforceable under California law. Further, it held that the Federal Arbitration Act does not preempt this rule. The court ruled that Citibank could not compel arbitration of the dispute under a contract that waived the credit card holder's claim for public injunctive relief.

The facts of the *McGill* case are not particularly complicated. Sharon McGill opened a credit card account with Citibank and purchased a credit protector plan. Subsequently, Citibank sent McGill a Notice of Change in Terms regarding binding arbitration to her Citibank credit card agreement.

Subsequently, McGill was given the opportunity to opt out of the arbitration provision, but did not do so. In 2011, McGill filed the underlying class action based on Citibank's marketing of the plan. The operative complaint alleged causes of action under the unfair competition law, the California Legal Remedies Act, the false advertising law as well as the insurance code. It requested, among other things, an injunction prohibiting Citibank from continuing to engage in its allegedly illegal and deceptive practices.

Citibank petitioned to compel McGill to arbitrate her claims on an individual basis pursuant to the terms of its agreement. The trial court granted the petition in part and denied it in part. The trial court, applying the Broughton-Cruz rule<sup>1</sup> ordered McGill to arbitrate all claims other than those for injunctive relief under the unfair competition law, the false advertising law, and the Consumer Legal Remedies Act. McGill appealed. The Court of Appeals reversed and remanded for the trial court to order all of McGill's claims to arbitration, concluding that the

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*Concepcion* case preempted the Broughton-Cruz rule. The State Supreme Court determined that the Broughton-Cruz rule was not at issue in the case before it as repeatedly McGill asserted, that the arbitration agreement was unenforceable because it purports to prohibit her from pursuing claims for public injunctive relief not just in arbitration but in any form. The State Supreme Court agreed.

On its face, *McGill* is another example of the California courts' attempts to reduce the enforceability of consumer and employment arbitration agreements. However, the provision in the arbitration agreement was particularly aggressive in that it eliminated the remedy of injunctive relief altogether. Few arbitration provisions contain that kind of language.

Arbitration agreements will likely continue to meet hostility in California's high courts, but the *McGill* case may not be as far reaching as the plaintiffs' bar may want. We believe that *McGill's* application should be limited to a situation where an arbitration provision eliminates a fundamental right established by state statute altogether. For practical advice, companies should review the terms of their contracts with consumers and make sure the contracts do not eliminate the remedy of injunctive relief altogether or include other terms contrary to the rights established under California's consumer protection statutes.

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<sup>1</sup>The Broughton-Cruz rule stems from two cases, *Broughton v. Cigna Healthplans*, 21 Cal. 4th 1066 (1999) and *Cruz v. Pacificare Health Systems, Inc.*, 30 Cal. 4th 1157 (2003), which together established the following principle: Agreements to arbitrate claims for public injunctive relief under the CLRA, the UCL, or the false advertising law are not enforceable in California. Those cases distinguished between private injunctive relief—i.e., relief that primarily “resolve[s] a private dispute” between the parties (*Broughton*, supra, 21 Cal.4th at p. 1080) and “rectif[ies] individual wrongs” (*Id.* at p. 1080, fn. 5), and that benefits the public, if at all, only incidentally—and public injunctive relief—i.e., relief that “by and large” benefits the general public (*id.* at p. 1079) and that benefits the plaintiff, “if at all,” only “incidental[ly]” and/or as “a member of the general public” (*Id.* at p. 1080, fn. 5). Likewise, in *Cruz*, an injunction under the UCL or the false advertising law against deceptive advertising practices “is clearly for the benefit of . . . the general public”; “it is designed to prevent further harm to the public at large rather than to redress or prevent injury to a plaintiff.” (*Cruz*, supra, 30 Cal.4th at pp. 315-316.)

*This document is intended to provide you with general information regarding California arbitration agreements. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.*