CALIFORNIA BANKERS ASSOCIATION

CBA Regulatory Compliance Bulletin

April 17, 2017

Supreme Court Erects New Barrier to Arbitration Agreements

Continuing to buck the trend toward greater enforceability of arbitration agreements, the California Supreme Court in a unanimous decision struck down a pre-dispute arbitration agreement between a consumer and a bank where the remedy sought was public injunctive relief.[1] In *McGill v. Citibank* the Court found that the arbitration agreement had the effect of preventing Plaintiff from seeking statutory remedies in any forum and was unenforceable as contrary to public policy. The Court also held that the Federal Arbitration Act ("FAA") does not preempt this ruling.

Two lower court decisions (hereafter referred to as the *Broughton* and *Cruz*[2] decisions) had made this same distinction but both had been decided before the U.S. Supreme court's decision in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333 which broadly affirmed the enforceability of arbitration agreements under the FAA. *Broughton* and *Cruz* distinguished between on the one hand damages and private injunctive relief that primarily resolve a private dispute between the parties and, on the other hand, public injunctive relief that benefits the general public. For example, an injunction barring the defendant from engaging in a specific practice would affect the public but not the Plaintiff, whose claims had already arisen. Those cases held that an agreement to arbitrate a claim for public injunctive relief is not enforceable as against public policy.

But in the *McGill* decision, the Supreme Court found that the *Broughton-Cruz* rule is not relevant to this case and thus chose not to consider whether those decisions survive the *Concepcion* decision. It said that *Broughton* and *Cruz* apply only where parties have *agreed* to arbitrate requests for such relief (which those cases determined is not allowed) whereas in this case, the Court argued, the parties had agreed to *waive* Plaintiff's right to seek public injunctive relief *in any forum*. Because the arbitration agreement is a private waiver of a right intended to

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[1] Injunctive relief is available under the Consumers Legal Remedies Act (Civil Code Section 1750 *et seq.*), the Unfair Competition Law (Business & Professions Code Section 17200 *et seq.*), and the False Advertising Law (B&P Code Section 17500 *et seq.*).The law suit alleged violations of each of these statutes.

[2] *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, and *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1077.

protect the public, the agreement is invalid and unenforceable.[3]

The Court also found that this case falls within the FAA's "saving clause" which permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." This provision has been interpreted to mean that the FAA was intended to put the enforceability of arbitration agreements on equal footing with other contracts.[4] The Court reasoned that California's policy—that a law established for a public reason cannot be contravened by a private agreement—is generally applicable to contracts, not just to arbitration agreements. To allow contravention of the policy simply because the provision was placed in an arbitration agreement is to elevate arbitration agreements above other contracts, a conclusion that is not required under the FAA.

The Court's reasoning in this regard is sound in concept but in practice a waiver of the ability to adjudicate claims of on behalf of third parties usually, if not mostly, is in the form of an arbitration agreement. Thus the practical effect of this ruling is judicial discrimination against arbitration agreements, which the FAA forbids.

The Court stated its position as follows: "[We] conclude that the FAA does not require enforcement of a provision in a predispute arbitration agreement that, in violation of generally applicable California contract law, waives the right to seek in any forum public injunctive relief under the UCL, the CLRA, or the false advertising law."

The Court rejected Defendant's argument that both claims for public injunctive relief in this case and the demand for class arbitration that was under *Concepcion* impermissibly expand the scope of arbitration and thus diminish the advantages of arbitration that the FAA was intended to promote. Indeed according to the *Concepcion* court the promotion of swift resolution of individual disputes is one of the key purposes of the FAA, but this Court was unmoved. It maintained that while class action is a mere procedural device allowing aggregation multiple claims into a single claim, a claim for public injunctive relief is a substantive statutory remedy and is unwaivable.[5] The Court also diminishes

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[3] Civil Code section 3513: "Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement."

[4] *Prima Paint v. Flood & Conklin* (1967) 388 U.S. 395, 404, fn. 12, which states in part that Congress's purpose in enacting the FAA "was to make arbitration agreements as enforceable as other contracts, but not more so."

[5] *American Express Co. v. Italian Colors Restaurant* (2013) 570 U.S. __, __ [133 S.Ct. 2304, 2309, 2312]: the Court distinguished between the waiver of a party's right to pursue statutory remedies and the waiver of a "procedural path to the vindication of every claim" such as a

the reality that parties, under this ruling, may be both arbitrating and litigating their disputes, again a result that is inimical to the goals of the FAA.

The decision leaves open whether the *Broughton* and *Cruz* decisions remain viable in California, that is, whether an agreement to arbitrate a claim for public injunctive relief is enforceable. If the decision is appealed to the U.S. Supreme Court, the high court will have yet another opportunity to clarify the scope and limits of the FAA.

provision forbidding class action arbitration which the Court upheld.

CBA participated in this case by filing an amicus brief on behalf of Citibank.

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