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CLIENT ALERT: McGill v. Citibank, N.A. Undermines Proposition 64 and the FAA

April 11, 2017

On Thursday, the California Supreme Court filed its opinion in *McGill v. Citibank, N.A.*, (April 6, 2017; S224086) __Cal.4th __. The opinion addresses several topics of interest to consumers and businesses alike: plaintiffs' ability to recover public injunctive relief under various consumer protection statutes, the enforceability of arbitration agreements, and federal preemption.

The Holdings

McGill delivers three principal holdings:

- California courts have historically recognized a distinction between private injunctions and injunctions seeking relief on behalf of the public. A provision in an arbitration agreement purporting to waive the right to seek public injunctive relief is contrary to public policy and is thus unenforceable under California law.

- Proposition 64 enhanced the standing requirements under the Unfair Competition Law and False Advertising Law and required class certification for so-called "representative actions." Nevertheless, the latter rule did not preclude private individuals from filing representative actions seeking public injunctive relief without class certification.

- The Federal Arbitration Act does not preempt California law's invalidation of a waiver of the right to seek public injunctive relief, or require enforcement of such a waiver in connection with an otherwise enforceable arbitration clause. The landmark decision in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, upholding such a waiver in the case of class actions, is distinguishable because the right to a class action is procedural while the right to seek public injunctive relief is substantive.

Future Implications

The *McGill* decision's holding concerning representative actions will have an immediate practical impact on companies utilizing arbitration agreements that purport to waive claims for public injunctive relief *in any forum*. Those waiver clauses are now unenforceable under California law, at least for cases pending in California state courts. One peculiar omission in the opinion is any discussion of the Ninth Circuit's contrary opinion in *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928 (2013). As it now stands, the enforceability of such a waiver will depend on whether a case is pending in federal or state court. Defendants facing claims for public injunctive relief in a California state court would be well advised to seek removal to federal court, if at all possible.

But what about agreements that require plaintiffs to *arbitrate* (rather than waive) their claims for public injunctive relief or are silent about such representative claims? The decision expressly avoided answering whether such clauses are enforceable. However, in *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303 and *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, the Court held that such clause were unenforceable. *McGill* leaves *Cruz* and *Broughton* intact, so California courts will likely continue viewing clauses requiring arbitration of public injunctive relief claims with skepticism. There is also an ambiguity in the Ninth Circuit's *Ferguson* decision, which leaves open the question of whether such claims

are arbitrable and, if not, whether they are still viable in state court.

The decision's holding about the FAA's preemptive effect on California law may invite scrutiny from the U.S. Supreme Court if Citibank petitions for certiorari. No doubt anticipating the high court's inspection, *McGill* devotes seven pages explaining why it is consistent with the U.S. Supreme Court's recent arbitration-favoring decisions like *Concepcion*. *McGill* reasons that California's rule forbidding the waiver of laws that exist for the public benefit—which it characterizes as substantive rather than procedural— is "a generally applicable contract defense" and not unique to arbitration agreements. Accordingly, *McGill* explains that allowing the defense to invalidate the waiver would not interfere with fundamental attributes of arbitration. In so holding, McGill has set the stage for the U.S. Supreme Court to re-examine the scope of the FAA and its preemptive effect on generally applicable state law contract defenses.

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