Another Post-*Concepcion* Twist – California Supreme Court Rules Claims for Public Injunctive Relief Might Not be Arbitrable

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In a long-awaited decision further developing the contours of the U.S. Supreme Court's decision in *AT&T Wireless v. Concepcion*, 563 U.S. 33 (2011), on April 6, 2017 the California Supreme Court issued its ruling in *McGill v. Citibank, N.A.*, 2017 WL 1279700 (Cal., Apr. 6, 2017). Originally the issue in *McGill* was whether claims for injunctive relief, if public in nature, might be subject to arbitration under *Broughton v. Cigna Health Plans*, 21 Cal. 4th, 1066, 1077 (1999) and *Cruz v. PacificCare Health Systems, Inc.*, 30 Cal. 4th 303, 315-16 (2003). The California Supreme Court unanimously ruled, while not addressing that question, a provision that waives the right to seek public injunctive relief in any forum was invalid and not preempted by the Federal Arbitration Act ("FAA").

Background of *McGill*

In 2011, Sharon McGill filed a class action lawsuit challenging Citibank's allegedly misleading promotion of a credit protection plan that would defer payments of certain amounts based on satisfying certain conditions (*e.g.* unemployment or hospitalization). Asserting claims under California's consumer protection statutes for false and misleading advertising, she sought, among other remedies, an injunction prohibiting Citibank from continuing to engage in misleading marketing and promotion of that plan.

Based on several clauses contained in the credit card agreement, Citibank moved to compel individual, non-class and non-representative arbitration of her claims. The Court of Appeal ultimately ruled that under *Concepcion,* all claims, including claims for injunctive relief, must be arbitrated on an individual, non-class basis. The Court of Appeal did not address whether the clause was invalid because it purportedly waived the right to seek public injunctive relief in its entirety in any representative capacity in any forum, as asserted by McGill on appeal.

The Supreme Court's Ruling

In reversing the Court of Appeal, the California Supreme Court focused on several clauses in the arbitration provision, which stated that no claim for relief on a representative or class basis could be brought in any forum. The Court explained there was a fundamental difference between an injunction that seeks to primarily resolve a private dispute and one that by and large is intended to benefit the general public and only incidentally benefits the plaintiff. While citing *Broughton and Cruz* for the general law on this subject, the Court concluded: "it is now clear that the *Broughton-Cruz* rule is not at issue in this case". McGill, at *4. Rather, the Court focused on the fact, conceded by Citibank, that the provisions as written precluded plaintiff from seeking public injunctive relief in any forum. The Court found it need not address the continued viability of that rule.

Instead, the Court found that plaintiffs had the right to seek such public injunctive relief based on the allegations such conduct was on-going, and there was no evidence such practices were not likely to recur. Plaintiff would seek relief even where they might no longer be subject to the practice, because they had standing to seek all available forms of relief if they could show they suffered damage or lost money or property as a result of the challenged practice. Any waiver of the right to seek such public injunctive relief "would seriously compromise the public purposes the statutes were intended to serve." Id. at *7. And because this was a right provided and protected by state law as an unwaivable public right, it was not preempted under the FAA.

Impact on Litigants and Courts

It will be interesting to see if the U.S. Supreme Court decides to take up *McGill* in light of the limited provisions the Court focused upon in its ruling and the fact its ruling is based largely on statements from *Concepcion.*

In framing both arbitration provisions and Complaints, parties do not typically focus on whether the specific injunctive relief that may be sought is "public" versus "private" in nature. Both clause drafters, litigants and courts will likely spend time more carefully considering both the precise wording of those clauses and the specific nature of any injunctive relief sought.

Finally, the Court stated it was not addressing whether the *Broughton-Cruz* rule remains viable. The split among courts, both state and federal, on that issue will likely to continue to exist, left for the Court to address another day. Thus, parties will still argue about the continued viability of that rule. (*See, e.g., Ferguson v. Corinthian Colleges, Inc.,* 733 F. 3d 928 (9th Cir. 2013)). The outcome of these questions will slow whether the implications *McGill* will be limited or suite broad.