

UNANSWERED QUESTIONS – THE ARBITRABILITY OF PUBLIC INJUNCTIVE RELIEF



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In April 2017, the California Supreme Court handed down a decision that many thought would clarify whether claimants in arbitration may seek public injunctive relief under California’s Unfair Competition Law (“UCL”), False Advertising Law (“FAL”) and Consumer Legal Remedies Act (“CLRA”), despite the common law *Broughton-Cruz* rule. But the decision—*McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017)—left the question mostly unanswered, possibly inviting U.S. Supreme Court review in the future.

1. *Broughton-Cruz*

California’s *Broughton-Cruz* rule—named after *Broughton v. Cigna Healthplans of California*, 21 Cal. 4th 1066 (1999) and *Cruz v. PacifiCare Health Systems, Inc.*, 30 Cal. 4th 303 (2003)—is that agreements to arbitrate claims for public injunctive relief under the UCL, FAL, or CLRA are not enforceable. The rationale behind this rule is that arbitration, which is meant to expeditiously and efficiently resolve private disputes, is not the appropriate forum in which to remedy a public wrong. However, since the 2011 United States Supreme Court decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), the Ninth Circuit, the Central District of California, and multiple state courts have all held that the Federal Arbitration Act (“FAA”) preempts the *Broughton-Cruz* rule. See *Ferguson v. Corinthian*

Colleges, Inc., 733 F.3d 928, 937 (9th Cir. 2013); *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115, 1136 (2012); *Martinez v. Leslie’s Poolmart, Inc.*, No. 8:14-CV-01481-CAS, 2014 WL 5604974, at *6 (C.D. Cal. Nov. 3, 2014); *Valdez v. Terminix Int’l Co. Ltd. P’ship*, No. CV 14-09748 DDP (EX), 2015 WL 4342867, at *7 (C.D. Cal. July 14, 2015).

In *Concepcion*, the U.S. Supreme Court held that the FAA preempts state laws that prohibit arbitration of a particular type of claim. 563 U.S. at 341 (holding that the FAA preempted a California judicial rule classifying most class action waivers in consumer contracts as unconscionable). *Concepcion* reasoned that “[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.” *Id.* After this decision, there was a lingering question in California (and courts disagreed) as to whether claimants could seek public injunctive relief under the UCL, FAL, and CLRA in arbitration.

2. *McGill v. Citibank*

In *McGill v. Citibank*, plaintiff Sharon McGill opened a credit card account with defendant Citibank and purchased credit protection for the account. Under that plan, Citibank agreed to defer or credit certain amounts where there were extenuating circumstances, such as the loss of a job. The plan included an arbitration provision containing a class action waiver. *McGill* lost her job, but did not receive the benefits advertised under the credit protection plan. She filed a class action based on Citibank’s marketing of the plan, alleging claims under the UCL, FAL, and CLRA. She sought both damages and an injunction against the allegedly illegal marketing.

Citibank filed a petition to compel arbitration. The

trial court granted the petition as to all claims other than those for public injunctive relief, following *Broughton-Cruz*. The Court of Appeal reversed and ordered the trial court to order all of McGill's claims to arbitration, holding that *Concepcion* effectively overruled *Broughton-Cruz*.

The California Supreme Court granted review in order to consider the continued viability of *Broughton-Cruz*, but ultimately decided that *Broughton-Cruz* was not at issue. The court instead ruled for McGill based on her argument that the arbitration provision precluded her from seeking public injunctive relief in any forum. The California Supreme Court stated that, whereas the *Broughton-Cruz* rule applies only where the parties agreed to arbitrate requests for such relief, the parties here stipulated that the arbitration clause prevented McGill from seeking public injunctive relief in arbitration. The court held that "the waiver in a predispute arbitration agreement of the right to seek public injunctive relief under these statutes would seriously compromise the public purposes the statutes were intended to serve. Thus, insofar as the arbitration provision here purports to waive McGill's right to request in any forum such public injunctive relief, it is invalid and unenforceable under California law." *McGill*, 2 Cal. 5th at 961.

Citibank understandably argued that a California rule precluding enforcement of a class action waiver was preempted by the FAA. The court rejected that argument as well, squaring its decision with *Concepcion* by reasoning that arbitration agreements, like other contracts, may be invalidated by generally applicable contract defenses, but not by defenses that apply only to arbitration. The court concluded that McGill presented a generally applicable contract defense—that a law established for a public reason cannot be contravened by a private agreement—which therefore was not preempted by the FAA.

3. Going Forward

What does this mean in practice? First, *McGill* does not bar all class action waivers, just waivers that

preclude seeking public injunctive relief in any forum. Thus, a broad arbitration clause mandating that parties arbitrate all claims would be unenforceable as applied to UCL, FAL, and CLRA claims seeking public injunctive relief because such a clause would prevent plaintiffs from seeking such relief in any forum due to the *Broughton-Cruz* rule's bar on arbitrating such claims because they seek relief that primarily benefits the public. Accordingly, future arbitral class action waivers should be as limited in scope as possible by doing no more than barring class litigation or class arbitration.

Many questions remain unanswered after *McGill*. Can the injured consumer choose to seek public injunctive relief in arbitration if she wishes? Or must the wronged party seek public injunctive relief in court while arbitrating all other claims? And will the U.S. Supreme Court allow California courts to continue down the path of resisting mandatory arbitration provisions, despite the clear arbitration-friendly trend of the high court's cases in recent years? The *McGill* decision effectively leaves the *Broughton-Cruz* rule to live another day, meaning that the U.S. Supreme Court will likely have to weigh in on the issue. In fact, the U.S. Supreme Court has granted certiorari and will hear argument in October 2017 in three consolidated cases addressing whether employers can enforce mandatory arbitration clauses with class action waivers in employment contracts. See *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 85 U.S.L.W. 3343 (U.S. Jan. 13, 2017) (No. 16-285); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 85 U.S.L.W. 3343 (U.S. Jan. 13, 2017) (No. 16-300); and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, 85 U.S.L.W. 3343 (U.S. Jan. 13, 2017) (No. 16-307).

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