

Litigation Alert

April 10, 2017

Key Points

- Arbitration provisions that foreclose an individual's right to seek statutory remedies are unenforceable under California law.
- The FAA does not preempt California law disfavoring arbitration provisions that waive a substantive remedy.
- Arbitration provisions are on equal footing with other contracts and subject to revocation on the same grounds.
- Plaintiffs may pursue public injunctive relief under the UCL, false advertising law, and the CLRA, but only if they suffered an injury in fact.



***McGill v. Citibank* and Arbitration Agreements**

On Thursday, April 7, 2017, in *McGill v. Citibank*, the California Supreme Court held that a pre-dispute arbitration agreement that waives the right to seek public injunctive relief is contrary to public policy and thus unenforceable under California law. In so holding, the court also held that the Federal Arbitration Act (FAA) does not preempt this California rule or require enforcement of the waiver provision. The court's decision prevents waiver of substantive statutory rights, but does not affect contract provisions governing the procedure for dispute resolution, like class action waivers.

Background

In 2001, Plaintiff Sharon McGill entered into an agreement with Citibank to open a credit card account. Under the agreement, McGill purchased a "credit protector" plan under which Citibank agreed to defer or to credit certain amounts on McGill's credit card account if a "qualifying event" occurred. Citibank charged a monthly premium for the credit protector plan based on the amount of McGill's credit card balance. This agreement did not contain an arbitration provision.

In October 2001, Citibank sent McGill a notice that added a broad arbitration agreement to McGill's credit card agreement. The notice gave McGill the option to decline the arbitration provision and continue using her credit card under the existing terms until the end of the agreement. McGill did not decline and the arbitration provision soon became effective. Citibank sent a similar notice in February 2005 and McGill again did not opt-out.

In 2011, McGill filed a putative class action lawsuit against Citibank related to its handling of a claim she made under the credit protector plan when she lost her job in 2008. The operative complaint alleged claims under California's Unfair Competition Law (UCL), the Consumer Legal Remedies Act (CLRA), and

false advertising law, as well as under the California Insurance Code. The complaint sought, among other things, an injunction prohibiting Citibank from continuing to engage in its allegedly wrongful practices. Citibank sought to enforce the arbitration provision with respect to McGill's individual claims.

The trial court ordered McGill to arbitrate all claims other than those for injunctive relief under the UCL, the false advertising law, and the CLRA. On appeal, McGill argued that the FAA does not preempt her claims and the arbitration provision is invalid and unenforceable because it waives her right to seek public injunctive relief. The Court of Appeal reversed and remanded for the trial court to order all of McGill's claims to arbitration, concluding that the FAA, as construed by the United States Supreme Court in *AT&T Mobility LLC v. Concepcion*, preempts prior California law that held that claims for public injunctive relief—i.e., injunctive relief that has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public—under the CLRA, the UCL, or the false advertising law are not enforceable.

McGill then petitioned to the California Supreme Court, which granted review of the Court of Appeal's order.

The Supreme Court's Opinion

The California Supreme Court reversed the appellate court in part, holding that the FAA does not preempt California law with respect to McGill's claim for public injunctive relief and the arbitration provision is unenforceable because its enforcement would violate public policy.

As a threshold matter, the court held that recent amendments to California law do not foreclose the standing of private plaintiffs who have suffered injury in-fact, like McGill alleges, to seek public injunctive relief under the UCL, false advertising law, and the CLRA. The court contrasted McGill's claims with claims where the plaintiff did not suffer an injury in-fact and the claims are brought solely on a representative basis.

The court then held the arbitration provision unenforceable under California law because its enforcement would violate public policy. As the court reasoned, a law established for a public reason cannot be waived by private agreement. Thus, because the purpose of public injunctive relief is to remedy a public wrong—not resolve a private dispute—waivers of a public injunction are unenforceable. While a public injunction may benefit the individual plaintiff, the court reasoned that any such individual benefit is incidental.

With respect to preemption, the court held that the FAA does not preempt relevant California law. The court reasoned that the FAA requires courts to place arbitration provisions on equal—not superior—footing with other contracts. Because other contracts would be unenforceable if they violated public policy, California law is not preempted by the FAA where arbitration agreements are held unenforceable for a reason that would make other contracts unenforceable.

The court supported its decision with reference to *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, a U.S. Supreme Court decision holding that courts are not required to enforce an arbitration

provision that forbids the assertion of statutory rights or eliminates a plaintiff's right to pursue a statutory remedy. Thus, the court distinguished its holding from provisions in which parties agree on the procedure for resolving disputes, including class action waivers. As the court explained, provisions that deal with the procedure by which parties resolve disputes—like class action waivers—may be enforceable because, while they may make pursuing a remedy not worth the expense, they do not foreclose the possibility of pursuing a statutory remedy. In contrast, waivers of public injunctive relief are not enforceable because they foreclose a substantive statutory remedy rather than a procedural path.

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