



California Supreme Court Rules Waivers of Right to Seek “Public Injunctive Relief” Unenforceable

July 24th, 2017 | and [Eric D. Mulligan](#)

[Eric D. Mulligan](#)

On April 6, the California Supreme Court held that an arbitration provision’s pre-dispute waiver of the right to seek “public injunctive relief” under the Consumers Legal Remedies Act, the Unfair Competition Law, and the False Advertising Law was void as against public policy. The court held that the Federal Arbitration Act did not preempt the rule of California law that voided the waiver.

Background

In 2001, Sharon McGill opened a credit card account with Citibank. McGill bought a “credit protector” plan, under which Citibank agreed to defer some obligations on the account in case of certain events such as disability, unemployment, or divorce. Citibank charged a monthly premium that depended on the account balance. Later that year, Citibank sent McGill a notice of change in terms. The change in terms added an arbitration provision. The arbitration provision read, in part: “The arbitrator will not award relief for or against anyone who is not a party.” The notice gave McGill the option to decline the arbitration provision if she stopped using her credit card at the end of the membership year or when the card expired, whichever was later. McGill continued to use the card, and as a result, the arbitration provision took effect.

In 2011, McGill filed a class action against Citibank. McGill asserted claims under California’s Unfair Competition Law (“UCL”), Consumers Legal Remedies Act (“CLRA”), and False Advertising Law (“FAL”). McGill sought, among other forms of relief, an injunction against allegedly illegal and deceptive marketing practices by Citibank. Citibank invoked the arbitration provision and moved to compel arbitration. The trial court granted the motion in part and denied it in part. The trial court applied California Supreme Court precedent and ruled that McGill’s claims for injunctive relief under the UCL, CLRA, and FAL were not subject to arbitration. Citibank appealed to the California Court of Appeal. The Court of Appeal reversed. The Court of Appeal cited United States Supreme Court precedent and ruled that the Federal Arbitration Act preempted the California precedent on which the trial court had relied. McGill appealed to the California Supreme Court.

Supreme Court Analysis

The California Supreme Court reversed and ruled that the arbitration provision was unenforceable because it waived McGill’s right to seek “public injunctive relief” in any forum. According to the court, the CLRA, the UCL, and the FAL each provide injunctive relief as a remedy for a person

who has suffered harm due to a violation of the law. The court explained that these statutes provided not for “private injunctive relief,” relief that benefits one party primarily, but for “public injunctive relief,” relief that benefits the general public. The court originally took the case to review the Court of Appeal’s conclusion that the FAA required arbitration of McGill’s claims for public injunctive relief under the CLRA, UCL, and FAL, despite California Supreme Court precedent. However, during oral argument before the Court of Appeal, McGill asserted that the arbitration provision prevented her from seeking public injunctive relief in any forum. Citibank agreed with this interpretation of the arbitration provision during oral argument before the Supreme Court. As a result, the Supreme Court determined that the relevant question was whether the arbitration provision was valid to the extent that it prevented McGill from seeking public injunctive relief in any forum.

The court first determined that McGill’s complaint sought public injunctive relief. The complaint asserted unfair and deceptive practices by Citibank and sought an order enjoining Citibank from continuing those practices. According to the court, an order stopping unfair and deceptive practices would constitute public injunctive relief. The court explained that California law prohibits a party from waiving the protection of a law whose purpose is to benefit the public in general. As a result, the court concluded, the waiver of a right to seek public injunctive relief in any forum is invalid and unenforceable under California law.

Citibank argued that the FAA preempted any California law that would preclude enforcement of the waiver. The court disagreed. As the court explained, the FAA requires courts to enforce arbitration agreements as they would enforce other contracts. However, the court continued, arbitration agreements remain subject to general contract defenses. The defense at issue—that one may not waive the protection of a law that exists to benefit the public in general—is a general contract defense, according to the court. The court explained that the parties could not make the waiver enforceable simply by including it in an arbitration agreement. Because the court found that the waiver contravened California public policy, it ruled that the waiver was invalid and unenforceable. Companies that use arbitration agreements should review those agreements closely with their attorneys to determine what impact, if any, this case will have on the agreements.

Citibank, N.A. v. McGill, S224086 (Cal. Apr. 6, 2017).

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