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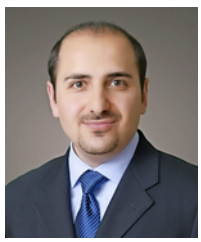
# California Supreme Court Arbitration Decision May Have Limited Impact

The California Supreme Court ruling in *McGill v. Citibank*, addressing the validity of an arbitration agreement waiving a party's right to seek injunctive relief in a consumer class action, may not have the significant impact on arbitration agreements that was anticipated, attorney Arsen Kourinian says. Although the court did not expressly address this issue, *McGill* appears to suggest that an arbitrator has authority to award an individual public injunctive relief, assuming such a remedy is available by statute, the author says.



By Arsen Kourinian

On April 6, 2017, the California Supreme Court issued its long-awaited decision in *McGill v. Citibank, N.A.*, No. S224086 (Cal. Apr. 6, 2017), addressing the validity of an arbitration agreement waiving a party's right to seek injunctive relief in a consumer class action against a credit card company.

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Contrary to what was argued and what many expected, *McGill* neither affirmed nor reversed the *Broughton-Cruz* rule, which precluded certain statutory claims for public injunctive relief from arbitration. Instead, the *McGill* court held that because both parties agreed that the arbitration agreement denied plaintiff public injunctive relief in ''any forum,'' it waived a law intended for the public benefit and thus, was unenforceable. The court then remanded the case back to the trial court to decide which parts of the arbitration agreement may be enforced after severing the unlawful provision.

Ultimately, the long wait for a decision in *McGill* was all for naught, as it may not have the significant impact on arbitration agreements that was anticipated. *McGill* did not reaffirm the *Broughton-Cruz* rule, further cast in doubt its continued vitality, and left unscathed the Ninth Circuit's decision in *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928 (9th Cir. 2013), which holds that the *Broughton-Cruz* rule is invalid following the United States Supreme Court's seminal decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011). As such, *McGill* may have a limited impact on arbitration agreements, but it still remains to be seen how lower courts will apply this latest California Supreme Court decision.

The *Broughton-Cruz* rule developed out of two California Supreme Court cases: *Broughton v. Cigna Healthplans of California*, 21 Cal. 4th 1066 (1999), and *Cruz v. PacifiCare Health Sys., Inc.*, 30 Cal. 4th 303 (2003). In *Broughton*, plaintiffs filed suit against defendant, alleging violations of the Consumers Legal Remedies Act, Civil Code § 1750 *et seq.* (''CLRA'') and seeking damages and public injunctive relief. *See*

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*Broughton*, 21 Cal. 4th at 1072-73. Defendant moved to compel the action to arbitration, and plaintiffs opposed the motion, arguing, *inter alia*, that CLRA claims are not arbitrable. *See id.* at 1073. The trial court agreed with plaintiffs' argument, denied defendant's motion to compel the CLRA claim to arbitration, and the decision was affirmed by the Court of Appeal and California Supreme Court. *See id.* The *Broughton* court held that CLRA actions for injunctive relief are not subject to arbitration because they are for the benefit of the general public. The court also explained that a judicial forum has significant advantages over arbitration in administering a public injunction. *See id.* at 1080-83. The court, however, also held that CLRA claims for monetary damages are arbitrable because it is consistent with the Federal Arbitration Act (''FAA''). *See id.* at 1084.

The California Supreme Court in *Cruz* extended the holding in *Broughton* to public injunction claims under California's Unfair Competition Law, Business and Professions Code § 17200 *et seq.* (''UCL''), and False Advertising Law, Business and Professions Code § 17500 *et seq.* (''FAL''). *See Cruz*, 30 Cal. 4th at 316. In so holding, *Cruz* reasoned that, like CLRA actions for public injunctive relief, both the UCL and FAL are ''designed to prevent further harm to the public at large rather than to redress or prevent injury to a plaintiff'' and thus, there is an inherent conflict between arbitration and the purpose of injunctive relief under these statutes. *Id.*

The continued vitality of the *Broughton*/*Cruz* rule remains in question following *Concepcion*, where the United States Supreme Court held that California law finding certain class action waivers in arbitration agreements per se unconscionable (the so-called *Discover Bank* rule) is preempted by the FAA. *See Concepcion*, 563 U.S. at 352. The *Concepcion* court very clearly held 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.* at 341. Based on this holding, because the *Broughton*/*Cruz* rule prohibits the arbitration of statutory claims for public injunctive relief, it is also preempted under the FAA.

For this reason, the Ninth Circuit in *Ferguson* rejected the *Broughton*/*Cruz* rule in 2013, holding that this rule is preempted by the FAA consistent with the Supreme Court's decision in *Concepcion*. *See Ferguson*, 733 F.3d at 938. In that case, the district court, relying on the *Broughton*/*Cruz* rule, denied defendant's motion to compel plaintiff's UCL, FAL, and CLRA claims for public injunctive relief to arbitration. *See id.* at 931. The district court's order was reversed on appeal, and remanded back to direct all of plaintiff's claims to arbitration. *See id.* at 938. The *Ferguson* court reasoned that, like the *Discover Bank* rule in *Concepcion*, because the *Broughton-Cruz* rule outright exempts from arbitration claims for public injunctive relief under the CLRA, UCL and FAL, it is preempted under the FAA. *See id.* at 934.

Even though it appears that the *Broughton*/*Cruz* rule is invalid following *Concepcion* and *Ferguson*, this issue was heavily contested in the lower court, on appeal, and before the California Supreme Court in *McGill*. The plaintiff in that case filed a putative class action against a credit card company, Citibank, alleging violations of the UCL, CLRA, FAL and the Insurance Code. *See McGill*, No. S224086, Slip Opinion at 3. Citibank moved to compel arbitration pursuant to an individual, non-class arbitration provision in the parties' credit card agreement. *See id.* The trial court granted in part and denied in part the motion, holding that under the *Broughton*/*Cruz* rule, plaintiff's claims seeking public injunctive relief are not arbitrable. *See id.* at 3-4.

Citibank appealed the trial court's decision, arguing that, per *Concepcion*, the *Broughton*/*Cruz* rule is preempted by the FAA. *See McGill v. Citibank, N.A.*, 232 Cal. App. 4th 753 (2014). Plaintiff, however, contended that the *Broughton*/*Cruz* is still viable based on the California Supreme Court's ruling in *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014), where the court held that a claim under the Labor Code Private Attorneys General Act of 2004 (''PAGA'') falls ''outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the *state*. . . .'' *Id.* 386 (emphasis in original). The Court of Appeal reversed the trial court's decision, and squarely rejected plaintiff's argument, holding that *Iskanian* was inapplicable because it did not address the *Broughton*/*Cruz* rule, and it was a narrow ruling regarding PAGA claims. *See McGill*, 232 Cal. App. 4th at 508-10.

Plaintiff filed a petition for review, which was granted by the California Supreme Court. *See McGill v. Citibank*, 345 P.3d 61 (Cal. 2015). Although both parties extensively briefed whether the *Broughton*/*Cruz* rule is preempted by the FAA, the *McGill* court declined to address this issue: ''Although we granted review to consider the Court of Appeal's conclusion, it is now clear that the *Broughton-Cruz* rule is not at issue in this case.'' *McGill*, No. S224086, Slip Opinion at 7.

In so doing, the court stated that under the UCL and FAL, a litigant who has suffered injury in fact and has lost money or property can bring a private individual action seeking public injunctive relief. *See id.* at 10-11. Moreover, the *McGill* court held that the pursuit of such relief does not constitute a representative action or a class action that would require compliance with certification requirements. *See id.* at 12.

Next, because both parties agreed that the arbitration agreement precluded plaintiff from seeking public injunctive relief in any forum (whether in arbitration or a judicial form), *id.* at 7, the court held that it was unlawful under Civil Code § 3513, *id.* at 14, which states that ''a law established for a public reason cannot be contravened by a private agreement.'' Cal. Civ. Code § 3513. The court concluded: ''Thus, insofar as the arbitration provision here purports to waive [plaintiff's] right to request in any forum such public injunctive relief, it is invalid and unenforceable under California law.'' *McGill*, No. S224086, Slip Opinion at 14.

Lastly, the *McGill* court addressed whether the rest of the arbitration agreement is enforceable if only the public injunctive relief waiver is found invalid. *See id.* at 21-22. The court ultimately remanded this question for the trial court to decide because Citibank had two arbitration agreements applicable to the parties' credit card agreement and it was uncertain which one applied to the case. *See id.* One agreement states that if one portion of the arbitration agreement is invalid, the entire arbitration provision shall nevertheless remain in force, while the other states that if any portion of the arbitration agreement is invalid, the entire arbitration agreement shall not remain in force. *See id.*

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The ultimate impact of *McGill* remains to be seen, but some conclusions can be drawn from this decision. First, by declining to address the *Broughton/Cruz* rule, the *McGill* court did not reawaken a rule that is by now dead per *Concepcion* and its progeny. Second, because the court held that a litigant may pursue public injunctive relief in an individual action without certify a class, an arbitration agreement with a class action waiver clause does not automatically violate Civil Code § 3513's bar against waiving laws for the public benefit. Indeed, following *McGill*, it remains uncertain what specific language in an arbitration agreement would constitute a waiver of public injunctive relief ''in any forum.'' The *McGill* court avoided addressing this issue because Citibank stipulated at oral argument that the arbitration agreement did in fact bar plaintiff from seeking public injunctive relief in either arbitration or a judicial forum. Had Citibank not made this concession, it is uncertain whether *McGill* would find the language in its arbitration agreement as waiving plaintiff's right to public injunctive relief in any forum and thus, invalid under Civil Code § 3513.

Finally, although the court did not expressly address this issue, *McGill* appears to suggest that an arbitrator has authority to award an individual public injunctive relief, assuming such a remedy is available by statute. Critically, had the *McGill* court held otherwise, it would cross the delicate line that it walked to avoid addressing the *Broughton/Cruz* rule and implicating *Concepcion*, which held that state law cannot per se preclude certain claims from arbitration.

In sum, it remains to be seen how trial courts will apply *McGill*, but because the court declined to address broader and more significant arbitration issues in this case, *McGill* may ultimately have limited impact on arbitration agreements.