California Supreme Court: Arbitration Agreements Must Permit Public Injunctive Relief

By Michael Stortz, Zoë Wilhelm and Nicholas Stevens

In a long-awaited decision, the California Supreme Court has declined to enforce an arbitration agreement due to a provision allegedly waiving plaintiff’s ability to seek “public injunctive relief” under California’s consumer protection statutes. The court’s rationale seems contrary, if not openly hostile, to the recent U.S. Supreme Court precedent enforcing such agreements under the Federal Arbitration Act (FAA).

In McGill v. Citibank, plaintiff filed a putative class action challenging Citibank’s credit protection plan. Citibank petitioned to compel arbitration pursuant to the arbitration agreement in plaintiff’s cardholder account agreement. The arbitration agreement required individual arbitration of all claims arising thereunder and precluded the arbitrator from awarding relief “for or against anyone who is not a party.”

The trial court granted the petition, except as to plaintiff’s claims seeking injunctive relief on behalf of the general public, or at least those portions of the public subject to Citibank’s credit protection plan. The trial court denied arbitration as to these claims, citing a line of California Supreme Court decisions known as Broughton/Cruz, that prohibit arbitration of claims for public injunctive relief. The intermediate appellate court reversed, holding (in line with the Ninth Circuit) that the Broughton/Cruz rule was no longer good law in light of U.S. Supreme Court precedent establishing the preemptive effect of the FAA’s policy in favor of arbitration.

On its review, the California Supreme Court did not reach the continued viability of Broughton/Cruz. The court held instead that the arbitration agreement could not be enforced because it violated California’s anti-waiver statute (Civil Code section 3513) that prohibits contractual terms waiving a party’s “public rights.”

The court reasoned that the anti-waiver statute prohibited enforcement of the arbitration agreement, as it required plaintiff to waive her rights to seek public injunctive relief in any forum. The FAA was not implicated, the court reasoned, because the saving clause of Section 2 of the FAA permits arbitration agreements to be subject to generally applicable contract defenses. Because the California anti-waiver statute provided a generally applicable contract defense, rather than a defense specific to arbitration agreements, the FAA did not preempt California’s anti-waiver statute, or otherwise require enforcement of the parties’ agreement.

It is difficult to reconcile this holding with recent U.S. Supreme Court decisions that enforce arbitration agreements under the FAA, even where the plaintiff invoked state law or policy grounds as a defense against enforcement. That the McGill plaintiff sought public injunctive relief should be irrelevant to the analysis; the Supreme Court has held time and again that the type of remedy sought does not affect whether the claim is subject to arbitration. Likewise, the Court has held that the core purpose of the FAA – that is, the efficient and individual resolution of disputes – is undermined when enforceability of arbitration agreements is conditioned on the availability of relief for persons other than the parties. Further, recent Supreme Court precedent confirms that under the Supremacy Clause, state statutes such as California’s anti-
waiver statute cannot stand as an obstacle to the FAA.

It remains to be seen whether Citibank will seek U.S. Supreme Court review. In the meantime, we can expect California plaintiffs to consider a shift in focus to claims for public injunctive relief, as a potential means of avoiding the federal policy in favor of arbitration.

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