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Whither Arbitration Of Public Injunctive Relief?

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Law360, New York (May 3, 2017, 11:18 AM EDT) -- Earlier this month, the California Supreme Court, in McGill v. Citibank NA, No. S224086, Slip Op. at 1 (Cal. Apr. 6, 2017), unanimously held that "that the [Federal Arbitration Act] does not require enforcement of a provision in a predispute arbitration agreement that, in violation of generally applicable California contract law, waives the right to seek *in any forum* public injunctive relief under the UCL [Unfair Competition Law], the CLRA [Consumer Legal Remedies Act], or the false advertising law [FAL]" (emphasis added). This narrow exception, however, does not foreclose the possibility of arbitrating public injunctive relief claims.

The plaintiff in McGill was a Citibank account holder whose account agreement included an arbitration provision requiring that "claims and remedies sought as part of a class action, private attorney general or other representative action are subject to arbitration on an individual (nonclass, nonrepresentative) basis, and the arbitrator may award relief only on an individual (nonclass, nonrepresentative) basis ... neither you, we, nor any other person may pursue [claims] in arbitration as a class action, private attorney general action [PAGA] or other representative action, nor may such [claims] be pursued on your behalf in any litigation in any court." The plaintiff sought, among other things, public injunctive relief under the UCL, the CLRA and the FAL.

Upon Citibank's motion to compel arbitration, the trial court ordered arbitration of all claims except those for public injunctive relief. On appeal, a California court of appeal reversed and remanded, ordering all claims to arbitration. On appeal before the California Supreme Court, both sides agreed that the language of the arbitration provision precluded litigation or arbitration of public injunctive relief claims in any forum. The Supreme Court thus focused on the narrow question of whether public injunctive relief is waiveable.

Public vs. Private Benefit

The Supreme Court in McGill focused on the public benefit derived from a public injunctive relief claim, similar to the analysis in Iskanian v. CLS Transportation regarding PAGA claims. Both McGill and Iskanian relied on California Civil Code Section 3513, which provides that while "any one may waive the advantage of a law intended solely for his benefit ... a law established for a public reason cannot be contravened by a private agreement," in holding that the respective arbitration provisions at issue were unenforceable under California law, and that the FAA does not preempt state law on this

point.

Iskanian identified the distinguishing feature of a PAGA claim as "a dispute between an employer and the state, which alleges directly or through its agents — either the Labor and Workforce Development Agency or aggrieved employees — that the employer has violated the Labor Code .... Simply put, a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship."

McGill similarly distinguished a public injunctive relief claim as "for the benefit of the general public," designed "to remedy a public wrong [and] not to resolve a private dispute" (internal citations omitted). Unlike in Iskanian, the California Supreme Court did not address the issue of whether public injunctive relief may be arbitrable — because the parties agreed the arbitration provision at issue precluded such relief in any forum. The court's analysis was limited to whether such relief is waiveable.

Broughton-Cruz

California's Broughton-Cruz rule barred arbitration of all public injunctive relief claims. McGill did not address whether this rule is still viable, particularly in light of AT&T Mobility v. Concepcion, which overruled a similar rule in Discover Bank. McGill did, however, take the first step in rejecting Citibank's argument that the refusal to allow a waiver of public injunctive relief would "interfere with the fundamental attributes of arbitration in the same way as the Discover Bank antiwaiver rule regarding class procedures." McGill followed the framework established by American Express Co. v. Italian Colors Restaurant in distinguishing public injunctive relief from the Discover Bank anti-waiver rule. It characterized the former as a "substantive statutory remedy" and the latter as "a procedural device." This may have been intended to signal that public injunctive relief should fall outside the scope of the FAA.

But McGill stopped short of determining whether public injunctive relief is arbitrable. And while McGill follows Iskanian in focusing on the public/private benefit distinction, there are some key differences between PAGA and public injunctive relief claims. Unlike a PAGA claim, public injunctive relief is not sought directly on behalf of the state. As such, public injunctive relief claims do not involve penalties that are paid to the state, they do not require pre-suit notice to the state, and they are not binding on state agencies. These are not insignificant differences.

Practical Problems

While the California Supreme Court has not yet ruled on the viability of the Broughton-Cruz rule post-Concepcion, the Ninth Circuit has, holding that the rule is "clearly irreconcilable with [recent] United States Supreme Court decisions concerning the FAA." Ferguson v. Corinthian Colleges Inc., 733 F.3d 928 (9th Cir. 2013). In Ferguson, unlike in McGill, the arbitration clause allowed for arbitration of public injunctive relief claims. Ferguson rejected the notion that there are "institutional advantages of the judicial forum" for such claims. It also rejected application of the effective vindication doctrine. Instead, the court followed Concepcion in holding that "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."

But Ferguson did not address the mechanics of how an arbitrator might rule on a public injunctive relief claim. While the court recognized the enforceability of the arbitration provision at issue, it did not address whether an arbitrator had authority to issue public injunctive relief, whether such an injunction issued by an arbitrator would be confirmable or enforceable in court, and "what, if any, court remedy Plaintiffs might be entitled to should the arbitrator determine that it lacks the authority to issue the requested injunction." These issues remain unresolved.

Conclusion

McGill should help refocus attention on the unresolved issues from Ferguson — issues of practical application with which both federal and state courts are likely to continue to struggle. While these issues are significant, parties desiring to craft broad arbitration provisions should not view McGill as an automatic bar to arbitrating public injunctive relief claims.

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