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Labor & Employment ADVISORY ■

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California Supreme Court Creates More Confusion

The California Supreme Court recently created yet another exception to the enforceability of arbitration agreements with class action waivers, and in doing so generated more uncertainty about what companies should (and should not) include in their arbitration agreements. In *McGill v. Citibank*, Sharon McGill brought suit against the bank alleging unfair competition and false advertising. The focus of the case from the California Supreme Court's standpoint, however, was whether Citibank could force McGill to arbitrate her injunctive relief claim under California's unfair competition law (UCL). In a decision that further muddies the waters for companies doing business in the Golden State, and serves as another attempt by California courts to undermine the Federal Arbitration Act (FAA), the court held that arbitration agreements that waive public injunctive relief are unenforceable.

Background

McGill filed a class action suit against Citibank under the California Consumers Legal Remedies Act (CLRA), the UCL, and California's false advertising law. In response, Citibank filed a motion to compel McGill to individually arbitrate her claims based on the arbitration agreement she signed with the bank. Under that agreement, McGill agreed that she would pursue only individual claims and waived the right to bring claims on behalf of others. The trial court held that California law under the *Broughton–Cruz* rule[1] prohibited arbitration of public injunctive relief claims, or relief that would affect citizens around the state of California, and deemed the provision unenforceable. On appeal, the California Court of Appeal reversed the trial court's decision, determining that the FAA preempted California law. Reversing the appellate court's decision, the California Supreme Court noted that Citibank's arbitration agreement barred injunctive relief in any forum. California's high court held that an agreement precluding public injunctive relief in *any* forum was unenforceable as contrary to California law. According to Justice Ming Chin, "Any one may waive the advantage of a law

[1] The *Broughton–Cruz* rule refers to California precedent established by two California Supreme Court decisions, *Broughton v. Cigna Healthplans*, 21 Cal. 4th 1066 (1999), and *Cruz v. PacifiCare Health Systems Inc.*, 30 Cal. 4th 303 (2003), which together hold that agreements to arbitrate claims for public injunctive relief under the CLRA, UCL, or false advertising law are not enforceable in California.

intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." The court further held that the FAA does not preempt this California law or require enforcement of the waiver provision.

The Fallout

Not surprisingly, the *Citibank* decision has generated confusion and concern across the state for employers who use arbitration agreements. As an initial matter, although the *Citibank* ruling applies to consumer arbitration agreements, it is possible that California trial courts will broadly apply *Citibank* to all kinds of arbitration agreements, including employment agreements. Consequently, California employers who use arbitration agreements are struggling with how to adapt to the uncertainty this ruling has produced.

Many California employers use employment agreements that contain arbitration agreements with class action waiver provisions similar to the one used by Citibank, and the court's ruling is problematic because it may leave these agreements vulnerable to attack. Before the *Citibank* decision, California courts have generally enforced arbitration agreements with class action waivers as long as they adhered to various rules adopted by the California courts, with the only exception being claims brought under California's Private Attorneys General Act (PAGA). Now, employers must concern themselves with whether California trial courts will enforce arbitration agreements with class action waivers.

While the only remaining recourse available would be to file a petition for certiorari with the U.S. Supreme Court, it remains to be seen whether Citibank will take such action. There is no clear path forward at this point.

To the extent employers utilize agreements with class action waivers that arguably prohibit employees from seeking public injunctive relief, employers should anticipate that their agreements will be attacked in the trial courts. We are hopeful that the U.S. Supreme Court will bring some clarity to whether the FAA preempts California law.

In the meantime, employers can take steps to draft around the *Citibank* decision. More specifically, employers could modify arbitration agreements to include a provision giving parties the right to go to court to seek public injunctive relief following the arbitration of all other claims. Such a provision would waive the right to bring class or collective actions except for claims for public injunctive relief, and so maintain the class action waiver while presumably not offending the California Supreme Court's recent ruling.

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