Appellate Reports

McGill v. Citibank, NA — Allows an individual plaintiff to seek a public injunction under the UCL and FAL – relief whose primary purpose is to benefit the public generally – without the need to pursue the claim as a class action

By Jeffrey I. Ehrlich

McGill v. Citibank, NA

(2017) __ Cal.4th __ (Cal. Supreme)

Who needs to know about this decision: (1) lawyers handling cases involving requests for injunctive relief; and (2) lawyers handling UCL claims seeking injunctive relief.

Why it's important: (1) Holds that arbitration provisions that purport to waive the right to seek the remedy of public injunctive relief in any forum are unenforceable in California, even after the U.S. Supreme Court's decision in *Concepcion*. (2) Makes clear that a plaintiff may seek public injunctive relief under the UCL without having to bring the case as a class action.

Synopsis: The California Supreme Court adopted a rule in *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 315-316 and *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1077, which held that agreements to arbitrate claims for public injunctive relief under the CLRA, the UCL, or the false advertising law are not enforceable in California (the "*Broughton-Cruz* rule.") Several California and federal decisions have held that the *Broughton-Cruz* rule was abrogated by the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333 (*Concepcion*), which substantially increased the preemptive force of the Federal Arbitration Act ("FAA").

In *McGill*, the California Supreme Court granted review to decide whether the *Broughton-Cruz* rule survived *Concepcion*. But it ultimately decided that the case did not present that issue, as explained below.

McGill opened a credit card account with Citibank and purchased a "credit protector" plan (Plan). Under the Plan, Citibank agreed to defer or to credit certain amounts on McGill's credit card account when a qualifying event occurred, such as long-term disability, unemployment, divorce, military service, or hospitalization. Citibank charged a monthly premium for the Plan based on the amount of McGill's credit card balance. As originally issued the Plan had no arbitration provision, but Citibank amended the original agreement to include one. The arbitration clause applied to "all claims" between McGill and Citibank, including all claims "relating to your account or a prior related account, or our relationship, including claims regarding the application, enforceability, or interpretation of the agreement and the arbitration provision. The provision applied to "all claims, no matter what legal theory they are based on or what remedy (damages, or injunctive or declaratory relief) they seek."

The arbitration clause specifically limited the relief that the arbitrator could provide: "Claims and remedies sought as part of a class action, private attorney general or other representative action are subject to arbitration on an individual (non-class, non-representative) basis, and the arbitrator may award relief only on an individual (non-class, non-representative) basis." It further provided that "Claims must be brought in the name of an individual person or entity and must proceed on an individual (non-class, non-representative) basis. The arbitrator will not award relief for or against anyone who is not a party. If you or we require arbitration of a Claim, neither you, we, nor any other person may pursue the Claim in arbitration as a class action, private attorney general action or other representative action, nor may such Claim be pursued on your or our behalf in any litigation in any court."

In 2011, McGill filed this class action based on Citibank's marketing of the Plan and the handling of a claim she made under it when she lost her job in 2008. The operative complaint alleges claims under the UCL, the CLRA, and the false advertising law, as well as the Insurance Code. For relief, it requests, among other things, an injunction prohibiting Citibank from continuing to engage in its allegedly illegal and deceptive practices.

Citibank petitioned to compel McGill to arbitrate her claims on an individual basis. The trial court ordered McGill to arbitrate all claims other than those for injunctive relief under the UCL, the false advertising law, and the CLRA. The Court of Appeal reversed and remanded for the trial court to order all of McGill's claims to arbitration, concluding that under *Concepcion* the FAA preempts the *Broughton-Cruz* rule. The Supreme Court granted review and reversed.

(1.) *Public vs. private injunctive relief.* *Broughton* and *Cruz* distinguished between public and private injunctive relief. The latter primarily resolves a private dispute between the parties and rectifies individual

wrongs. It benefits the public, if at all, only incidentally. By contrast, public injunctive relief by and large benefits the general public, and benefits the plaintiff, if at all, only incidentally and/or as a member of the general public. For example, an injunction under the CLRA against a defendant's deceptive methods, acts, and practices generally benefits the public directly by the elimination of deceptive practices and will not benefit the plaintiff directly because the plaintiff has already been injured, allegedly, by such practices and is aware of them.

McGill's claims are framed as claims for public injunctive relief. She sought, inter alia, an order requiring Citibank "to immediately cease such acts of unfair competition and enjoining Citibank from continuing to conduct business via the unlawful, fraudulent or unfair business acts and practices complained of herein and from failing to fully disclose the true nature of its misrepresentations."

(2.) *The* Broughton-Cruz *rule is not implicated by McGill's claims.* The provisions in Citibank's arbitration clause did not simply require that McGill's claims for public injunctive relief be heard in an arbitral forum, they precluded her from asserting claims for public injunctive relief in *any* form. Accordingly, the issue in the case was whether such a provision was valid under California law; not the continuing vitality of the *Broughton-Cruz* rule, which the Court did not address.

(3.) *An arbitration provision that precludes a plaintiff from seeking a public injunction in any forum is unenforceable under California law*. Civil Code section 3513 provides: "Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." Consistent with this provision, the Court has explained that "a party may waive a statutory provision if a statute does not prohibit doing so, the statute's public benefit . . . is merely incidental to [its] primary purpose," and "waiver does not seriously compromise any public purpose that [the statute was] intended to serve." By definition, the public injunctive relief available under the UCL, the CLRA, and the false advertising law, as discussed in *Broughton* and *Cruz*, is primarily for the benefit of the general public. Its evident purpose is "to remedy a public wrong," "not to resolve a private dispute," and any benefit to the plaintiff requesting such relief "likely . . . would be incidental to the general public benefit of enjoining such a practice."

Accordingly, the waiver in a predispute arbitration agreement of the right to seek public injunctive relief under these statutes would seriously compromise the public purposes the statutes were intended to serve. Thus, insofar as the arbitration provision here purports to waive McGill's right to request in any forum such public injunctive relief, it is invalid and unenforceable under California law.

(4.) *The FAA does not preempt California law forbidding a waiver of the right to seek a public injunction.*

Congress's purpose in enacting the FAA "was to make arbitration agreements as enforceable as other contracts, *but not more so*." Thus, arbitration agreements, "like other contracts," "may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability." They may not, however, be invalidated "by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."

The contract defense at issue here – "a law established for a public reason cannot be contravened by a private agreement" (Civ. Code, § 3513) – is a generally applicable contract defense, i.e., it is a ground under California law for revoking any contract. It is not a defense that applies only to arbitration or that derives its meaning from the fact that an agreement to arbitrate is at issue.

(5.) *Proposition 64 allows an individual plaintiff to seek public injunctive relief without the need to certify the case as a class action.*

When *Broughton* and *Cruz* were decided the UCL and the false advertising law allowed "any person" to seek relief on their own behalf or acting on behalf of the general public. But Proposition 64 amended these statutes in 2004, to provide that private individuals may (1) file an action for relief only if they have "suffered injury in fact and [have] lost money or property as a result of" a violation (Bus. & Prof. Code, §§ 17204, 17535), and (2) "pursue representative claims or relief on behalf of others only if they meet those standing requirements *and* comply with Section 382 of the Code of Civil Procedure," which relates to representative suits.

The Court held that these provisions do not preclude a private individual who has "suffered injury in fact and has lost money or property as a result of" a violation of the UCL or the false advertising law (Bus. & Prof. Code, §§ 17204, 17535) – and who therefore has standing to file a private action – from requesting public injunctive relief in connection with that action. A request for such relief does not constitute the "pursu[it]" of "representative claims or relief on behalf of others" within the meaning of Business and Professions Code sections 17203 or 17535, such that "compliance with Section 382 of the Code of Civil Procedure" is required.

This latter holding has broad implications, because it allows an individual plaintiff to seek a public injunction under the UCL and FAL – relief whose primary purpose is to benefit the public generally – without the need to pursue the claim as a class action.

Short(er) takes:

Attorney's fees; Civ. Code § 1717; dismissal based on forum-selection clause. *DisputeSuite.com, LLC v. Scoreinc.com*. (2017) __ Cal.4th __ (Cal. Supreme.)

DisputeSuite markets software to credit-repair organizations. Scoreinc.com ("Score") performs services for credit-repair organizations. The parties entered

into an exclusive marketing arrangement, which provided that the Florida courts had sole jurisdiction to resolve any disputes.

DisputeSuite sued Score in California. The trial court stayed the action, giving DisputeSuite time to re-file in Florida, which it did. The court then dismissed the California action. Score then moved for an award of attorney's fees under Civ. Code § 1717 as the prevailing party.

The trial court denied the motion, finding that Score had not prevailed in the dispute, which was pending in Florida. The Court of Appeal affirmed, and the Supreme Court granted review. Affirmed. "We hold that Score's victory in moving the litigation to Florida did not make it the prevailing party as a matter of law under Civil Code section 1717, and the trial court therefore acted within its discretion in denying Score's motion for attorneys' fees."

Appellate procedure; notices of appeal; sufficiency: *West v. United States* (2017) __ F.3d __ (Ninth Cir.)

West was convicted of robbery and received a 25-year sentence. When it was discovered that former FBI agent Joe Gordwin had coerced witnesses at West's trial, West was released and the charges against him were dismissed. He sued the U.S. and Gordwin. The U.S. representing itself alone, filed a motion to dismiss. The district court granted the motion, and dismissed the entire action, including the claims against Gordwin. West filed a notice of appeal that included both the U.S. and Gordwin in the caption, and which identified the dismissal order and judgment but which did not otherwise separately identify Gordwin. He did address his claims against both the U.S. and Gordwin in his opening brief.

The Ninth Circuit reversed. Rule 3 of the Federal Rules of Appellate Procedure requires a notice of appeal to identify each appellant and to designate the judgment, order, or part thereof being appealed. These requirements are jurisdictional. In *Torres v. Oakland Scavenger Co*. (1988) 487 U.S. 312, 317, the appellant's appeal was dismissed because he omitted his name from the notice of appeal. But neither *Torres* nor the text of Rule 3 mentions appellees. Consistent with other circuits and the text of the rule, the Court held that failing to name an appellee in the notice of appeal is not a jurisdictional defect. Since the notice identified certain counts against the U.S., and twice specifically named the order being appealed, the notice was sufficient to indicate West's intent to appeal from the entire order and judgment dismissing the entire lawsuit. The Court reversed the dismissal of the claims against Gordwin, who had not even been served with the complaint when the district court dismissed the case.


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