HRHero.com
A division of BLR®

California
Employment Law Letter

Part of your California Employment Law Service

Vol. 27, No. 14
April 24, 2017

ARBITRATION

Supreme court: Arbitration clause can't bar public injunctive relief

by Michael Futterman and
Jaime Touchstone
Futterman Dupree Dodd
Croley Maier LLP

A consumer sued after she fell victim to a credit card company's allegedly deceptive marketing and administration of a credit protection plan. The company moved to compel arbitration. The California Court of Appeal ordered the consumer to arbitrate her claims. The California Supreme Court reversed, deeming the arbitration agreement unenforceable and invalid because it waived the consumer's right to seek public injunctive relief in any forum.

Consumer sues Citibank over credit protector plan

In 2001, Sharon McGill opened a Citibank credit card account and purchased a "credit protector" plan. Under the plan, Citibank agreed to defer or credit amounts on her account if she experienced a qualifying event, such as disability, unemployment, divorce, military service, or hospitalization. Citibank charged a monthly fee for the plan.

McGill's original account agreement did not contain an arbitration provision. Citibank later sent her a "Notice of Change in Terms Regarding Binding Arbitration to Your Citibank Card Agreement," which contained an arbitration provision. The notice provided McGill the option to opt out of the arbitration provision, but she did not do so. In February 2005, Citibank informed McGill of changes to the agreement's arbitration provisions. Again, she did not opt out and continued using her credit card.

In January 2007, Citibank sent McGill a complete copy of her account agreement, which stated, "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 a class action lawsuit against Citibank alleging deceptive marketing of the credit protector plan and unlawful handling of a claim she had made under the plan after she lost her job. She sued the company under California's unfair competition law (UCL), Consumer Legal Remedies Act (CLRA), false advertising law (FAL), and Insurance Code. She requested, among other things, an injunction prohibiting Citibank from continuing to engage in allegedly illegal deceptive practices.

Citibank petitioned the trial court to compel McGill to arbitrate her claims. The court granted the petition in part and denied it in part. The court of

appeal reversed and sent the case back to the trial court, concluding that the Federal Arbitration Act (FAA) required McGill to arbitrate all of her claims. McGill filed a petition for review, and the California Supreme Court reversed the court of appeal's ruling, deeming the arbitration provision invalid because it waived McGill's right to seek public injunctive relief in any forum.

Consumer sought public injunctive relief

The CLRA, the UCL, and the FAL are designed to protect consumers and competitors against unfair, fraudulent, and deceptive business practices and to promote fair competition. Consumers damaged by unlawful business practices may seek court intervention, including public injunctive relief to prohibit future unlawful conduct that could further injure the public. Public injunctive relief primarily benefits the general public, not the individual litigant.

Citibank's arbitration agreement precluded McGill from seeking public injunctive relief in arbitration, court, or any other forum. In seeking to enforce the agreement, Citibank asserted that McGill could not be deemed to have requested "public injunctive relief" because her lawsuit failed to (1) adequately specify the nature of the injunctive relief she sought; (2) explain how the public would benefit from the relief; or (3) establish that the company's misconduct was ongoing or likely to recur. The supreme court rejected Citibank's argument.

McGill's complaint alleged that Citibank's marketing was unfair, deceptive, and misleading and that it sold the credit protector plan via false advertising. Her complaint specifically requested:

(1) A declaration that Citibank violated the UCL, the FAL, and the CLRA by disseminating unfair, deceptive, or misleading advertising;

(2) Injunctive relief to ensure compliance with applicable statutes;

(3) Entry of an order requiring Citibank "to immediately cease" its "wrongful conduct" and "enjoining" (barring) the company "from continuing to falsely advertise or conceal material information and conduct business via the unlawful and unfair business acts and practices complained of herein"; and

(4) Entry of a judgment "for injunctive relief."

As a matter of pleading, she had sufficiently alleged that Citibank's continuing bad conduct required public injunctive relief.

The court also rejected the company's argument that Proposition 64, which amended the UCL and the FAL, only permits public officials to prosecute actions on behalf of the general public. Proposition 64 allows individuals to sue for relief under the UCL and the FAL if they have suffered some injury and lost money or property as the result of a violation and to pursue statutory representative claims or relief on behalf of others. McGill had legal standing (the right) to pursue a claim for public injunctive relief because she claimed to have suffered individual injury due to Citibank's practices. Furthermore, the court held that she did not need to have her lawsuit certified as a class action.

Arbitration provision invalid and unenforceable under California law

California Civil Code Section 3513 states that "a law established for [a] public reason cannot be contravened by a private agreement." The public

continued on pg. 4

continued from pg. 2

injunctive relief available under the UCL, the CLRA, and the FAL is primarily for the benefit of the public. The California Supreme Court held that the Citibank arbitration agreement's waiver of cardholders' right to seek public injunctive relief violated the public policy articulated in Section 3513 and was thus invalid and unenforceable under California law.

The supreme court rejected the argument that the FAA preempts California law. The FAA requires courts to place arbitration agreements on an equal footing with other contracts and enforce them according to their terms. However, the FAA's "savings clause" permits arbitration agreements, like any other contract, to be invalidated by generally applicable contract defenses such as fraud, duress, or unconscionability. In other words, the FAA makes arbitration agreements as enforceable as other contracts, but not more so.

California's Supreme Court continues to push back against arbitration agreements that contravene well-established California law.

The contract defense set forth in Section 3513 is a generally applicable contract defense and constitutes a basis under California law for revoking any contract. Thus, a provision in any contract, including an arbitration agreement, that purports to waive the right to seek public injunctive relief in any forum under the UCL, the CLRA, or the FAL is unenforceable.

Citibank argued that those principles apply only when enforcement of an arbitration agreement would lead to forfeiture of a *federal* statutory right because only federal laws stand on equal footing with the FAA, whereas state laws are preempted. The court rejected that argument, finding the FAA savings clause explicitly retains an external body of the state law governing issues involving the validity, revocability, and enforceability of contracts generally. *McGill v. Citibank, N.A.* (California Supreme Court, 4/6/17).

Bottom line

California's Supreme Court continues to push back against arbitration agreements that contravene well-established California law. Here, the court refused to accept an interpretation that would have ceded to the federal courts complete control over the validity of predispute arbitration clauses when that interpretation would violate laws designed for the public's benefit. This case is yet another reminder that businesses should consult with legal counsel and draft consumer arbitration agreements with great care, while recognizing that this area of law is in flux.

The authors can be reached at Futterman Dupree Dodd Croley Maier LLP in San Francisco, mfutterman@fddcm.com and jtouchstone@fddcm.com. ✤