FEBRUARY 26, 2021

Ninth Circuit holds public injunctive relief may be pursued by an individual in arbitration, thereby enforcing arbitration agreement and class action waiver

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Takeaway: One of the most effective tools for a business to reduce its exposure to class action litigation is to include compulsory arbitration provisions and class action waivers in customer-facing contracts. But there are landmines inherent in taking such an approach, especially in California. If an arbitration provision operates to waive the right to seek "public" injunctive relief, then the arbitration provision will not be enforced. But a recent Ninth Circuit decision, *DiCarlo v. MoneyLion, Inc.*, --- F.3d ---, No. 20-55058, 2021 WL 647502 (9th Cir. Feb. 19, 2021), navigated this issue by holding that public injunctive relief is available to an individual litigant in arbitration, and thus MoneyLion's arbitration clause and class action waiver could be enforced.

In *DiCarlo*, Marggieh DiCarlo sued MoneyLion, a financial services company that offers "credit-builder loans" to consumers through a smartphone app, alleging that MoneyLion "lured her into debt" through its "high-tech debt trap" app. 2021 WL 647502, at *1-2. She brought a putative class action against MoneyLion, asserting claims under California's Unfair Competition Law ("UCL"), False Advertising Law ("FAL"), and Consumers Legal Remedies Act ("CLRA").

But DiCarlo had signed a loan agreement that gave each party the right to demand arbitration. MoneyLion moved to compel arbitration, and the district court granted the motion and dismissed the action. DiCarlo appealed to the Ninth Circuit.

The appeal turned on the validity of the arbitration provision, specifically, whether it prohibited the grant of public injunctive relief. Under California's "*McGill* rule," a person cannot contractually waive the right to seek "public" injunctive relief (*see McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 216 Cal. Rptr. 3d 627, 393 P.3d 85 (2017)), and the Ninth Circuit held in 2019 that the Federal Arbitration Act does not preempt that rule. *See Blair v. Rent-A-Ctr., Inc.*, 928 F.3d 819, 830–31 (9th Cir. 2019). If an arbitration provision operates to waive private injunctive relief, "then the arbitration provision will self-destruct," voiding the arbitration agreement in its entirety. *Id*.

The *DiCarlo* panel rejected DiCarlo's argument that the arbitration agreement prohibited the grant of private injunctive relief, given that the clause provided that "[t]he arbitrator . . . shall be authorized to award all remedies available in an individual lawsuit . . ., including, without limitation, . . . injunctive . . . relief." 2021 WL 647502, at *6. The panel observed that the UCL, the FAL, and the CLRA all authorize public injunctive relief and reasoned that, because a plaintiff may seek public injunctive relief in an individual action, DiCarlo could seek public injunctive relief in an individual, bilateral arbitration against MoneyLion. Accordingly, the panel affirmed the district court's order compelling arbitration and

dismissing the action.

Practice point: Had MoneyLion simply obtained an interlocutory order from the district court compelling arbitration and staying the litigation (as opposed to dismissing it), MoneyLion could have avoided the appeal altogether, as the Federal Arbitration Act prohibits an appeal of an interlocutory order compelling arbitration and staying litigation (unless the appellant satisfies the requirements for taking an interlocutory appeal under 28 U.S.C. § 1292(b)). *See* 9 U.S.C. § 16(b). For this reason, practitioners seeking to compel arbitration should expressly seek a stay rather than a dismissal and seek to avoid the entry of final judgment by a federal district court.