[Blogs]
April 25, 2018
Consumer Protection Review

Arbitration Poison Pill Spells Doom for AT&T's Arbitration Hopes

Takeaways:

1. California Supreme Court recently held that an arbitration agreement that waives the right to seek public injunctive relief regardless of forum is (1) contrary to public policy and (2) not preempted by the Federal Arbitration Act.

2. District Court for the Northern District of California granted a motion to reconsider its earlier order compelling arbitration of putative class action because the arbitration agreement at issue waived consumers' right to seek public injunctive relief and was, by its terms, not severable from the remainder of the arbitration agreement.
3. Parties may agree to arbitrate claims for public injunctive relief, but they cannot agree to waive consumers' right to assert those claims at all.
4. Drafters of arbitration agreements should reconsider poison-pill provisions that invalidate the entirety of the arbitration agreement if only the portion addressing injunctive relief is unenforceable.

Last week, the U.S. District Court for the Northern District of California reconsidered its earlier order compelling arbitration of a putative class action in which the plaintiffs alleged that AT&T violated the California Consumer Legal Remedies Act and Unfair Competition Law by failing to adequately disclose that so-called "unlimited" data plans were subject to speed-throttling conditions. *Roberts v. AT&T Mobility LLC*, No. 15-cv-03418-EMC, ECF No. 103 (N.D. Cal. March 14, 2018). After the Ninth Circuit Court of Appeals, on an interlocutory appeal, affirmed the district court's arbitration order, plaintiffs sought reconsideration in the district court in light of new California Supreme Court precedent. Specifically, in *McGill v. Citibank*, N.A., 2 Cal. 5th 945, 951 (2017), the state supreme court held that an arbitration agreement that waives the right to seek the statutory remedy of public injunctive relief in any forum is contrary to public policy and unenforceable. The *McGill* court also concluded that the Federal Arbitration Act did not preempt that statutory rule because the rule applied equally to general contracts as well as arbitration agreements. *Id.* at 962. Stated differently, because parties remain "free to contract for any procedures they choose for arbitrating, or litigating, public injunctive relief," the rule does not disfavor arbitration or interfere with the fundamental attributes of arbitration. *McArdle v. AT&T Mobility LLC*, No. 09-CV-01117-CW, 2017 WL 4354998, at *4 (N.D. Cal. Oct. 2, 2017) (citing *McGill*). The rule merely prohibits parties from opting out of the central feature of the statute—the right to public injunctive relief regardless of forum. Because the arbitration agreement in AT&T's Terms of Use limited the award of any injunctive relief "only in favor of the individual party," it waived consumers' right to seek public injunctive relief even in the arbitration. *Roberts*, ECF No. 103, at *13. The court therefore concluded that the arbitration provision violated public policy and was unenforceable under *McGill*. *Id.* at 9. AT&T unsuccessfully attempted to salvage the arbitration agreement by urging the court to merely sever the offending provision that waived consumers' ability to seek public injunctive relief. *Id.* at 11. AT&T argued that arbitration on the merits should proceed first, and if the plaintiffs prevailed on liability, then they may seek a public injunction in court. *Id.* at 12. But because the arbitration agreement included a poison pill specifying that the entire arbitration agreement was void if the particular provision on injunctive relief was unenforceable, the court concluded that the entire arbitration agreement was "null and void." *Id.* at 14.

Authors

Eric J. Weiss

Partner
EWeiss@perkinscoie.com   206.359.3456

Explore more in

Consumer Protection
Blog series

Consumer Protection Review

Consumer Protection Review helps businesses that market and sell to consumers navigate federal and state legal issues related to advertising, privacy, promotions, products liability, government investigations, unfair competition, class actions and general consumer protection. Subscribe ?

View the blog