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Arbitration & Alternative Dispute Resolution Litigation

April 22, 2013

# Ninth Circuit: Injunctive Relief Claims Relating Only to Past Harms to a Limited Class Are Not Exempt From Arbitration

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*Following the U.S. Supreme Court's decision favoring arbitration clauses in* AT&T Mobility LLC v. Concepcion*, the Ninth Circuit Court of Appeals held in* Kilgore v. KeyBank, N.A. *that the Federal Arbitration Act ("FAA") preempts the California* Broughton-Cruz *rule that prohibited arbitrating claims for injunctive relief under California's Unfair Competition Law. Then, on rehearing en banc, the Ninth Circuit again enforced the arbitration agreement, but without reaching the broader preemption issue.*

In *Kilgore v. KeyBank, N.A.*, No. 09-16703, 2013 WL 1458876 (Apr. 11, 2013), the Ninth Circuit, sitting *en banc*, upheld an arbitration clause in an injunctive relief case brought under California's Unfair Competition Law ("UCL"). The Ninth Circuit held that the complaint sought only private, as opposed to public, injunctive relief. The Court did not reach the broader issue of whether FAA preempts California's "*Broughton-Cruz* rule" – named after the decisions in *Broughton v. Cigna Healthplans*, 21 Cal. 4th 1066 (1999) and *Cruz v. Pacificare Health Systems, Inc.*, 30 Cal. 4th 1157 (2003), in which the California Supreme Court refused to enforce arbitration clauses in cases seeking public injunctive relief. The *Kilgore* decision leaves open the question of whether and to what extent the *Broughton-Cruz* rule survives the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740 (2011) *("Concepcion").*

## Background of the Underlying Dispute and District Court Proceedings

The plaintiffs, former students of a private helicopter vocational school, took out loans with KeyBank to pay for their helicopter training. Before they completed their training, the school filed for bankruptcy. KeyBank paid the school the full amount of each plaintiff's loan. The plaintiffs alleged that the school was a "sham aviation school" that targeted limited-income individuals who could not afford to pay for their pilot training without taking out student loans. The students could not sue the school because it had filed for bankruptcy protection. Instead, they filed a putative class action against the school's "preferred lender," KeyBank. They asserted claims of unfair competition under the UCL. Plaintiffs did not ask for damages. Instead, they

asked for an order enjoining KeyBank from (1) reporting any default by class members under their loan's promissory note ("Note"), (2) enforcing the Notes against class members, and (3) "engaging in false and deceptive acts and practices" with respect to consumer credit contracts involving purchase money loans.

KeyBank moved to compel arbitration. The Notes contained an arbitration clause, which was included in a separate section entitled "**ARBITRATION**." The arbitration clause informed the plaintiffs that they could opt out of the clause within 60 days of signing, and that if they did not opt out, they would give up their right to litigate any claim in court and to proceed with any claim on a class basis. Conspicuous statements immediately above the plaintiffs' signature lines restated that the student understood that the Note contained an arbitration clause, warned of the importance of thoroughly reading the Note before signing, and stated that the student would not sign the Note before he or she read it.

The district court applied California law and denied KeyBank's motion to compel arbitration. It held that California's *Broughton-Cruz* rule prohibited the plaintiffs from arbitrating their injunctive relief claims, and the arbitration clause was unenforceable. While KeyBank's appeal was pending, the U.S. Supreme Court issued its *Concepcion* decision.

## The Panel Opinion Addressed Concepcion's Effect on the *Broughton-Cruz* Rule

On appeal, the Ninth Circuit initially held that the FAA preempted the *Broughton-Cruz* rule. The panel applied the analysis in *Concepcion* and held that the *Broughton-Cruz* rule prohibited outright the arbitration of particular types of claims, and therefore "the analysis is simple: The conflicting [*Broughton-Cruz*] rule is displaced by the FAA. *Concepcion*, 131 S. Ct. at 1747. *Concepcion* allows for no other conclusion." The panel then considered and rejected the plaintiffs' unconscionability argument. It noted that unconscionability under California law has both a procedural and a substantive element, **both** of which must be satisfied for a court to hold an arbitration agreement unenforceable. The panel found no procedural unconscionability, and enforced the arbitration agreement without reaching the element of substantive unconscionability.

The court later granted the plaintiffs' petition for rehearing *en banc*, and ordered that the panel opinion would not be cited as precedent by or to any court of the Ninth Circuit.

## The En Banc Opinion Orders Arbitration on Narrower Grounds

Sitting *en banc*, the Ninth Circuit reached the same result as the panel, but on different grounds. The court first addressed the plaintiffs' unconscionability argument, considering both the substantive and procedural elements. It held that *Concepcion* "expressly foreclosed" the plaintiffs' argument that the agreement's ban on class arbitration made it substantively unconscionable, and the "risk" that the plaintiffs might not be able to afford arbitration fees was "too speculative" to justify invalidating the arbitration agreement. The court then held that there was no procedural unconscionability. The arbitration clause contained an "opt out" provision that allowed students to reject arbitration within 60 days of signing the Note, and appeared in its own section, clearly labeled, in boldface type.

In contrast to the prior panel opinion, the *en banc* decision did not consider whether the FAA preempts the *Broughton-Cruz* rule. For all practical purposes, the injunctive relief requested related only to past harms allegedly suffered by the members of the limited putative class. The relief sought by the plaintiffs would benefit only the approximately 120 putative class members, and KeyBank had completely withdrawn from the private school loan business. "Even assuming the continued viability of the *Broughton-Cruz* rule, Plaintiffs' claims do not fall within its purview."

## Conclusion

*Kilgore* is significant for two reasons. First, it leaves open an important question – whether the *Broughton-Cruz* rule has survived *Concepcion* – an issue on which the federal district courts in California have reached differing conclusions. Second, it suggests additional guidance to maximize enforcement of arbitration agreements and class action waivers. Plaintiffs increasingly attack arbitration agreements through the "generally applicable" defense of unconscionability. *Kilgore* identifies factors that will be considered sufficient for the Ninth Circuit to uphold an arbitration agreement. Clients might be well served to review their arbitration agreements in light of *Kilgore*.

Click here to read *Kilgore v. KeyBank, N.A.,* No. 09-16703 (Apr. 11, 2013)

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If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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