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## Ninth Circuit Narrows California Exception To Arbitration Agreements, But Puts Off Deciding Whether FAA Preempts The Exception Altogether

By Andrew J. Pincus and Archis A. Parasharami on April 11, 2013

Earlier today, the Ninth Circuit issued its en banc opinion in *Kilgore v. KeyBank, N.A.* The court had granted en banc review to decide whether the Federal Arbitration Act preempts California's so-called "*Broughton/Cruz*" rule, which declares that claims for "public" injunctive relief under California consumer protection statutes are unsuitable for, and exempt from, arbitration.

As we have discussed in prior blog posts—and argued in an amicus brief on behalf of the U.S. Chamber of Commerce—the answer should be easy. The Supreme Court stated in *AT&T Mobility LLC v. Concepcion* that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." That is exactly what the *Broughton/Cruz* rule does.

But the Ninth Circuit decided that there was no need to address that issue in this case, stating: "Defendants argue that *Davis [v. O'Melveny & Myers]*"—a prior case applying *Broughton/Cruz*—"was vitiated by *Concepcion*, and the *Broughton-Cruz* rule no longer exempts a public injunction claim from arbitration. We need not reach that broad argument. Even assuming the continued viability of the *Broughton-Cruz* rule, Plaintiffs' claims do not fall within its purview." The court went on to explain why the claim at issue did not in fact seek relief on behalf of the general public and thus did not even qualify for the *Broughton/Cruz* exemption as a matter of California law.

The court's analysis on this point is helpful to defendants; since *Concepcion*, plaintiffs have (as in *Kilgore* itself) sought to recast damages class actions as injunction-only class actions in an attempt to invoke the *Broughton/Cruz* doctrine and avoid arbitration. The Ninth Circuit's restrictive reading of the state-law doctrine means that it will be harder for plaintiffs' lawyers to use this gambit to try to circumvent *Concepcion*.

There is some additional good news in *Kilgore* for businesses: The court made clear that any argument that a prohibition of "class arbitration is unconscionable under California law" is "now expressly foreclosed by *Concepcion*." That conclusion seems clear from *Concepcion* itself, but a number of plaintiffs have sought to convince federal district courts that some wiggle room remains. This aspect of *Kilgore*'s holding should make those efforts even more of an uphill battle.

Ultimately, the court put off for another day the more significant question of FAA preemption for those cases in

which plaintiffs have properly pleaded (as a matter of California law) a claim for public injunctive relief. And while the vast majority of federal district courts in California to address the question have held that the FAA preempts *Broughton/Cruz*, there are some outlier decisions going the other way.

*Kilgore*'s bottom line is: important additional progress in ensuring the enforceability of arbitration agreements, but more litigation needed before California's *Broughton/Cruz* loophole is finally eliminated.

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