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9th Circ. Removes Calif. Barrier To Arbitration Enforcement

By **Andrew Scurria**

Law360, New York (October 28, 2013, 8:11 PM ET) -- The Ninth Circuit ruled Monday that the U.S. Supreme Court's Concepcion and Italian Colors decisions required it to invalidate a California precedent shielding claims for broad, public injunctive relief from arbitration, saying the state rule is trumped by the Federal Arbitration Act.

A unanimous panel reversed the denial of Corinthian College Inc.'s bid to arbitrate a consolidated consumer class action, holding that California's so-called Broughton-Cruz rule barring arbitration of demands for public injunctive relief contravenes, and is therefore preempted by, the FAA.

The plaintiffs are ex-students accusing Corinthian of making false promises to boost enrollment at its for-profit schools. Applying Broughton-Cruz, a district court had refused to enforce an arbitration provision in their enrollment contracts to claims under the state Consumer Legal Remedies Act, Unfair Competition Law and False Advertising Law for an injunction stopping the purported misconduct.

The appeals court determined on Monday that the rule, established in 1999, was irreconcilable with intervening decisions from the high court in AT&T Mobility LLC v. Concepcion and elsewhere giving broad effect to arbitration agreements and forbidding state laws that hold a particular type of claim off-limits to arbitration.

"By exempting from arbitration claims for public injunctive relief under the CLRA, UCL and FAL, the Broughton-Cruz rule similarly prohibits outright arbitration of a particular type of claim," the panel said. "Even where a specific remedy has implications for the public at large, it must be arbitrated under the FAA if the parties have agreed to arbitrate it."

The panel stressed that exceptions to the enforcement of arbitration agreements — where arbitrating would prevent a statute's effective vindication or conflict with a statute's underlying purposes — can only arise in cases brought under federal laws, which stand on equal footing with the FAA.

In contrast, the Supreme Court ruled emphatically in American Express Co. v. Italian Colors Rest. that state-law claims cannot survive FAA preemption, indicating that Broughton-Cruz is "flawed," according to the opinion.

In so ruling, the appeals court rejected the plaintiffs' contention that Broughton-Cruz was unaffected by the high court's jurisprudence because an injunction is not a cause of action but a remedy.

The panel also walked back the California Supreme Court's prior determination that public injunctions are generally beyond the power of arbitrators to grant, calling the conclusion "not necessarily true." The Corinthian plaintiffs might be able to secure a public injunction in arbitration, and if not, they can then take a second shot in the district court, the opinion said.

Francis A. Bottini Jr. of Bottini & Bottini Inc., who represents the plaintiffs, told Law360 that the ruling was unsurprising given the high court's intervening jurisprudence and said the opinion likely would not be appealed further.

"Right now, nothing is escaping the black hole of arbitration from the U.S. Supreme Court's point of view," he said. "My personal opinion is that Congress is going to have to amend the FAA if they want to prevent consumers from being unable to assert any of their rights at all."

Archis Parasharami of Mayer Brown LLP, who authored an amicus brief for the U.S. Chamber of Commerce supporting Corinthian, noted that the opinion drew on statements from all the high court justices in Italian Colors to demonstrate why states cannot avoid the federal requirement that arbitration agreements be enforced on their terms.

"To be sure, plaintiffs' lawyers in California will continue to look for wiggle room to avoid arbitration agreements where they can," Parasharami said. "But today's decision by the Ninth Circuit represents the welcome removal of one of the few remaining obstacles to the enforcement of arbitration agreements in California."

The plaintiffs, who say Corinthian duped them with assurances of a quality education at a low price, fared no better on their argument that the injunctive relief fell outside the scope of their arbitration provisions. The panel ruled that the claims arose directly from, rather than collateral to, the plaintiffs' enrollment and were therefore covered by the broad terms of the provision.

The ruling will likely provide the clarity attorneys had hoped for in the Ninth Circuit's April en banc ruling on the validity of KeyBank NA's arbitration agreement with student borrowers, which the court upheld without addressing Broughton-Cruz.

The plaintiffs are represented by Francis A. Bottini Jr. and Albert Y. Chang of Bottini & Bottini Inc.

Corinthian is represented by Peter W. Homer and Christopher King of HomerBonner PA; Paul D. Fogel and Felicia Yu of Reed Smith LLP; and Kevin P. Jacobs.

The case is Kevin Ferguson et al. v. Corinthian Colleges Inc. et al., case number 11-56965, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Philip Shea.