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Ninth Circuit Helps Reconcile the Tension Between Public Injunctive Relief and Arbitration in *DiCarlo v. MoneyLion*

By David Singh, Pravin Patel, and Shireen Leung

Over two decades ago, the California Supreme Court, in *Broughton v. Cigna Healthplans*, 21 Cal. 4th 1066, 1082 (1999), acknowledged the "inherent conflict" between arbitration and public injunctive relief. Notably in *McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 962-63 (2017), the California Supreme Court held that contracts that have the purpose of waiving all of a plaintiff's rights to seek public injunctive relief in both court and arbitration are unenforceable. Since then, both California and federal courts have scrutinized arbitration agreements that attempt to curtail the availability of public injunctive relief through the implementation of certain contractual mechanisms. The Ninth Circuit, however, has recently helped reconcile this tension by holding that public injunctive relief may be pursued on an individual basis. *DiCarlo v. MoneyLion,* No. 20-55058, 2021 U.S. App. LEXIS 4817, at *18 (9th Cir. 2021).

Background

MoneyLion is a smart phone app operator that offered financial services to consumers through its Plus membership program. Plus members were required to sign a Membership Agreement (the "Agreement"), which explained the members' obligations to make monthly payments. The Agreement also included an arbitration provision that, in relevant part, prohibited claimants from engaging in both class actions and joinder claims and from acting as private attorneys general, but allowed the arbitrator to "award all remedies available in an individual lawsuit…, including [injunctive relief]." *Dicarlo v. Moneylion, Inc.,* No. EDCV 19-1374 PSG (SHKx), 2019 U.S. Dist. LEXIS 228268, at *2–3 (C.D. Cal. Dec. 20, 2019).

After falling behind on her fee deposits and monthly loan payments, Plaintiff Marggieh DiCarlo sought to cancel her membership, but MoneyLion refused to cancel her account until DiCarlo paid her still-accumulating fees and

outstanding loan payments. Subsequently, DiCarlo filed a class action complaint in the Central District of California, alleging that the Plus program was a "high-tech debt trap" that violated California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act. The District Court dismissed the complaint and compelled arbitration pursuant to MoneyLion's arbitration provision, explaining that the provision was enforceable because it expressly allowed an arbitrator to award all remedies, including public injunctive relief, on an individual basis.

On appeal, Plaintiff argued that MoneyLion's arbitration provision was invalid under California law because the arbitration provision's joinder clause and private attorney general waiver improperly barred an individual's right to seek public injunctive relief. The Ninth Circuit reviewed the district court's interpretation of the arbitration provision and its decision to compel arbitration, noting that both federal and state law point toward interpreting the Agreement to permit arbitration.

The Ninth Circuit's Decision in *MoneyLion*

Under California law, contracts that waive all rights to seek public injunctive relief in both courts and arbitration are unenforceable. Public injunctive relief is relief that "by and large benefits the general public… and that benefits the plaintiff, if at all, only incidentally and/or as a member general public." *McGill*, 2 Cal. 5th at *id.* at 955 (internal citation omitted).

In determining whether MoneyLion's arbitration provision was valid under *McGill*, the Ninth Circuit first looked at the Agreement's joinder clause, which provided that members are not allowed to join or consolidate claims and that each member must arbitrate separately. Under DiCarlo's interpretation of the joinder clause, the joinder clause restricts an individual lawsuit to one that has no substantial impact on others. Extrapolating on this interpretation, DiCarlo argued that a claim for public injunctive relief would effectively violate the Agreement's joinder clause because such a claim would undoubtedly impact others. Dismissing this argument, the Ninth Circuit posited that a separate, single victory could theoretically result in an injunction that broadly affects others or a single damages action could be so large as to run the company out of business so as to have an impact on others. Thus, the Ninth Circuit concluded that the joinder clause had no bearing on the meaning of an individual lawsuit nor the relief sought, and thus did not affect an individual's right to bring a public injunctive relief claim.

The Ninth Circuit also rejected DiCarlo's assertion that plaintiffs effectively acted as private attorneys general, which was prohibited by the arbitration provision, when they sought public injunctive relief. Despite acknowledging the appealing symmetry of DiCarlo's theory between the public rights vindicated and the public relief sought, the Court noted that California law allows individuals to seek public injunctive relief and explicitly rejected the notion that seeking public injunctive relief meant that a plaintiff was acting on behalf of the general public.

Furthermore, the Court also found that any reliance on the California Supreme Court's prior quotations describing plaintiffs "in a public injunction" as "act[ing] in the purest sense as a private attorney general" is misplaced. *Id.* at *15 (quoting *Cruz v. PacifiCare Health Sys., Inc.,* 30 Cal. 4th 303, 312 (2003); *Broughton*, 21 Cal. 4th at 1075–76 (similar)). The Court noted that, in both *Cruz* and *Broughton*, those quotations had the limited purpose of distinguishing Supreme Court precedent and did not apply to the facts presented.

The Ninth Circuit also explained that her arguments were insufficient to overturn well-established contract law. Specifically, both parties agreed to the all-remedies clause, which expressly authorized the arbitrator to grant public injunctive relief on an individual basis.

Based on the foregoing reasons, the Ninth Circuit concluded that DiCarlo's theory fell short and was insufficient to contravene both California law and the Federal Arbitration Act's mandate to construe the Agreement to abide by *McGill* and allow arbitration.

Conclusion

California courts may remain skeptical of arbitration provisions that attempt to curtail the availability of public injunctive relief. The *DiCarlo* panel, however, has clarified that consumers can obtain *"public"* injunctive relief even in *"individual"* lawsuits. Thus, businesses and practitioners can rest easy knowing that arbitration agreements containing class or collection waivers, joinder waivers, and/or private attorney general waivers are likely valid under the *McGill* rule, so long as the agreements provide an individual with a right to public injunctive relief in arbitration.

Full *Daubert*: Fifth Circuit Mandates Complete Evaluation of Expert Opinions at Class Certification

By Edward Soto, Pravin Patel, and Daniel Guernsey

In *Prantil v. Arkema Inc.*, a two-judge panel of the Fifth Circuit held that courts must conduct a full and complete *Daubert* analysis when evaluating expert opinions at the class certification stage.

In the wake of Hurricane Harvey, several trailers owned by Arkema used to store Luperox, a volatile chemical that combusts unless chilled, combusted after flooding destroyed the trailers' cooling systems. The combustion sent clouds of white smoke into the air and left deposits of ash on the property of local residents. The flooding also caused wastewater tanks adjacent to the trailers to overflow and disperse wastewater. Several residents filed suit against Arkema seeking to represent a class of local residents in a seven-mile radius who suffered personal injury and property damage from these toxic releases.

The District Court Applied a Relaxed Daubert Standard

The plaintiffs sought class certification, offering the testimony of several experts to demonstrate that the proposed class met the requirements of Federal Rule of Civil Procedure 23. For example, one expert would testify that the contaminants found on the plaintiffs' properties could be traced to the Arkema facility containing the trailers and wastewater tanks. Among other challenges to certification, the defendants filed *Daubert* motions seeking to exclude the testimony of the plaintiffs' experts.

When deciding whether to exclude the testimony of plaintiffs' experts, the district court implicitly applied a relaxed *Daubert* standard. It first outlined the *Daubert* factors (*e.g.*, whether an expert's methodologies have been tested, subject to peer review, etc.) and noted that it is unclear whether "a full *Daubert* analysis at the class certification stage is required . . . ." It then went on to note that it would "examine the reliability of the expert opinions . . ." without explicitly stating whether it would perform a full *Daubert* analysis for each expert. However, the court's statements demonstrate it performed a relaxed *Daubert* analysis. For example, it noted certain analyses by an expert would have been "better[,]" but they were "not necessary under *Daubert* at the class certification stage." It also made comments that certain considerations by an expert were "sufficient under *Daubert*—especially at the class certification stage."

The district court ultimately granted one of the defendants' motions to exclude but nonetheless granted the plaintiffs' motion for class certification.

The Fifth Circuit Reversed

The defendants appealed and argued, relevant here, that the district court failed to perform a thorough and complete *Daubert* analysis. The Fifth Circuit agreed and joined the Third, Seventh, and Eleventh Circuits, holding that a full *Daubert* analysis is required at the class certification stage.

The court pointed to the consequential nature of class certification—dismissal if a class is not certified or significant pressure to settle if a class is certified—as the basis of its holding that courts should apply *Daubert* at class certification as they would at trial.

It also found persuasive the Third Circuit's opinion in *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015). The Third Circuit relied on two Supreme Court cases for its holding, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011), and *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013). In *Dukes* the Supreme Court in *dicta*

expressed doubt that "*Daubert* did not apply to expert testimony at the certification stage of class-action proceedings." The Supreme Court in *Behrend* held that a party must submit "evidentiary support" to demonstrate that a purported class "in fact" satisfies all the requirements of Rule 23. The Third Circuit found that such "evidentiary proof" cannot consist of expert testimony failing to pass muster under *Daubert* because such evidence does not demonstrate that a party met the requirements of Rule 23 "in fact." This position is bolstered by the Supreme Court's statement in *Dukes*, according to the Third Circuit.

Therefore, the Fifth Circuit remanded the case and directed the district court to perform a full and complete *Daubert* analysis, pointing to the district court's statements suggesting that *Daubert* applies to a lesser degree at the class certification stage.

Conclusion

Class certification is a pivotal point in any class action lawsuit because it can shift the bargaining power between the parties. It is crucial that a class certification ruling accurately reflects the merits of the case. Anything less than a full *Daubert* analysis can artificially tip the bargaining scale and the tone for the rest of the litigation. The Fifth Circuit's opinion provides defendants with an additional argument to challenge class certification and should be persuasive authority in circuits in which the applicability of *Daubert* at the class certification stage has not yet been resolved.

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Whether our clients face a nationwide class action in one court or statewide class actions in courts across the country, we develop tailored litigation strategies based on our clients' near- and long-term business objectives, and guided by our ability to exert leverage at all phases of the case – especially at trial. Our principal focus is to navigate our clients to the earliest possible favorable resolution, saving them time and money, while minimizing risk and allowing them to focus on what truly matters—their businesses.

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If you have questions concerning the contents of this issue of Class Action Monitor, or would like more information about Weil's Class Action practice, please speak to your regular contact at Weil or to the editors listed below:

Editor:

David Singh	View Bio	david.singh@weil.com	+ 1 650 802 3010

Associate Editor:

Pravin Patel	View Bio	pravin.patel@weil.com	+ 1 305 577 3112