

[Banking and Finance Law Daily Wrap Up, INTEREST-USURY—S.D. Cal.: Speedy Cash denied arbitration in suit over 'usurious interest rates', \(Jun. 11, 2019\)](#)

Banking and Finance Law Daily Wrap Up

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By Nicole D. Prysby, J.D.

The agreement was procedurally unconscionable because it required consumers to waive statutory causes of action before they knew claims existed. The agreement's waiver of public injunctive relief was substantively unconscionable under California law and not preempted by the FAA.

Consumers were required to arbitrate claims that a lender's interest charges were excessive and prohibited by California law, because the arbitration provision in their loan agreements was unconscionable, held a federal district court in California. After entering into loans with interest rates of 95-135 percent, the consumers brought claims against the lender, including a claim for public injunctive relief under California law. The agreement was procedurally unconscionable because the consumers could opt out of the arbitration requirement, but only within 30 days, which required them to waive statutory causes of action before they knew any such claims existed. The agreement contained a waiver of public injunctive relief, which was substantively unconscionable and not preempted by the Federal Arbitration Act (FAA). The public injunctive relief waiver provision was not severable, because the arbitration agreement contained "poison pill" language stating that if the provision was declared invalid, the entire arbitration agreement was void. The court also held that California law applied to the dispute. Although the agreement stipulated that Kansas law would apply, California had a materially greater interest, given its interest in maintaining the availability of public injunctive relief and the fact that the loans were obtained in California ([Delisle v. Speedy Cash](#), June 10, 2019, Curiel, G.).

Background. Two consumers brought a putative class action against Speedy Cash, a licensed California finance lender, after entering into installment loan agreements with Speedy Cash that had an annual percentage rate (APR) of over 95 percent for one loan and over 135 percent for the other. The loan agreements were drafted by Speedy Cash and contained clauses disallowing class actions in court or in arbitration, requiring arbitration of any claims arising from a dispute related to the agreement, and disallowing plaintiffs from acting as a private attorney general in court or in arbitration. The consumers claimed that the APR charged by Speedy Cash is excessive and prohibited by California's Unfair Competition Law (UCL) and California's Consumer Legal Remedies Act law (CLRA). They sought disgorgement, restitution, punitive damages, reasonable attorney's fees, a declaration that Speedy Cash is in violation of the UCL and CLRA, and public injunctive relief under the UCL. Speedy Cash motioned to compel arbitration. The consumers argued that the arbitration provision is unconscionable and against California public policy, and that waivers of public injunctive relief are invalid.

California law applies. The parties disputed whether Kansas or California law should govern issues related to contract formation and validity. Speedy Cash argued for Kansas law, pointing out that the agreement stipulated that Kansas law is to be applied with respect to the enforceability of the agreement. The consumers argued that California law should be applied because California has a materially greater interest than Kansas in the enforcement of its more protective laws. The court found that Kansas has a substantial relationship to Speedy Cash (which is headquartered in that state) and that a reasonable basis exists for the parties' choice of law. However, it went on to conclude that California has a materially greater interest than Kansas in employing its laws to resolve the instant dispute, given California's interest in maintaining the availability of public injunctive relief for UCL claims and the fact that the loans were obtained in California.

Arbitration provision is unconscionable. The consumers argued that the arbitration provision is procedurally unconscionable and the court agreed. Although the consumers had the right to reject the arbitration requirement

within 30 days, opt-out provisions which require plaintiffs to waive statutory causes of action before they knew any such claims existed are unenforceable.

The consumers also argued that the waiver of public injunctive relief is substantively unconscionable under California law. Once again, the court agreed. The court considered whether the rule in *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017)—that predispute waivers of public injunctive relief are unenforceable as matter of California public policy—is preempted by the FAA. Speedy Cash argued that the consumers only have a claim for private, not public injunctive relief and that the *McGill* rule is invalid as preempted under the FAA. The court disagreed, finding that the arbitration clause prohibited public injunctive relief and that the consumers sought public injunctive relief (as opposed to private relief), because they asked that Speedy Cash be enjoined from entering into loan agreements with an APR in excess of 90 percent. The fact that the consumers would themselves receive an incidental benefit from the requested injunction did not make it private relief.

The court then concluded that the *McGill* rule is not preempted by the FAA. Although *McGill*'s preemption analysis is not binding on federal courts and Speedy Cash made strong arguments as to why the reasoning in the case was insufficient, Speedy Cash's arguments were largely addressed by the Ninth Circuit in *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015), a case involving waivers of California Private Attorneys General Act (PAGA) actions. PAGA claims are similar to claims for public injunctive relief and courts that have considered claims for public injunctive relief under the UCL have found them highly similar to PAGA claims for preemption purposes because both claims carry a potential remedy that reflects vindication of claims on behalf of the state. Speedy Cash claimed that arbitrating public injunctive claims would sacrifice arbitration's informality and render it akin to a class action which is slower and more costly. But as *Sakkab* pointed out in the PAGA context, potential complexity should not suffice to ward off arbitration where the complexity flows from the substance of the claim itself, rather than any procedures required to adjudicate it (as with class actions). Speedy Cash also argued that claims for public injunctive relief interfere with fundamental attributes of arbitration because they greatly increase risks to defendants. That argument was also addressed by the *Sakkab* court, which held that the FAA does not require courts to enforce agreements to waive the right to bring representative PAGA actions just because the amount of penalties an aggrieved employee is authorized to recover for the state makes the formal procedures of litigation more attractive than arbitration's informal procedures.

Finally, the court concluded that the public injunctive relief waiver provision is not severable, because the arbitration agreement contained "poison pill" language stating that if the provision is declared invalid, the entire arbitration agreement is void.

The case is [No. 3:18-cv-02042-GPC-RBB](#).

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Companies: Speedy Cash

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