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New 9th Circ. Rulings May Restrict McGill Rule's Scope

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In the 2017 McGill v. Citibank NA decision, the California Supreme Court held that any arbitration clause that bars a plaintiff from seeking public injunctive relief in any forum is unenforceable.

The so-called McGill rule has become a central feature of the California arbitration landscape, and parties have vigorously litigated its validity and scope.

One of the first key challenges to the McGill rule came in the form of a preemption challenge. A number of entities facing McGill rule challenges argued that the rule was preempted by the Federal Arbitration Act.

In 2019, the U.S. Court of Appeals for the Ninth Circuit held that the FAA did not preempt the McGill rule, and the U.S. Supreme Court declined review of that decision in 2020.[1] Since these decisions, most litigation about the McGill rule has focused on its scope and applicability, rather than on whether or not it is preempted.

However, two recent Ninth Circuit decisions that interpret the McGill rule once again raise the possibility of federal preemption, and of new paths for seeking U.S. Supreme Court review. This article explores the development of the McGill rule, discusses these recent Ninth Circuit decisions, and outlines what they might mean for the future of McGill.

The Federal Arbitration Act

The FAA reflects a "liberal federal policy favoring arbitration agreements," according to the 1983 Moses H. Cone Memorial Hospital v. Mercury Construction Corp. ruling by the U.S. Supreme Court,[2] which has vigorously protected that policy, repeatedly striking down inconsistent statutes and court-made rules.

At the same time, in its 2010 decision in Rent-A-Center West Inc. v. Jackson, the U.S. high court recognized that while arbitration agreements may be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability."[3]

The U.S. Supreme Court also recognized in its 2011 decision in AT&T Mobility v. Conception that these agreements may not be invalidated "by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[4]

Beginning with the U.S. Supreme Court's 1984 decision in Southland Corp. v. Keating, the boundary between permissible and impermissible defenses to arbitration based on the application of state law has played out in a series of cases in which the U.S. Supreme Court has reviewed California Supreme Court decisions applying the FAA to defenses grounded in California law.[5]

The McGill Rule and Its Interpretation

Enter the California Supreme Court's McGill decision. In McGill, the California high court determined that arbitration provisions that foreclose an individual's right to seek public injunctive relief in any forum violate California public policy and are unenforceable as a matter of law.

The California high court reached this conclusion over vociferous objections that this new exception to arbitration was preempted by the FAA, as the U.S. Supreme Court found with respect to the Discover Bank rule and other previous attempts by California courts to limit the enforceability of arbitration agreements.

In June 2020, the U.S. Supreme Court declined a petition for a writ of certiorari in AT&T Mobility LLC v. McArdie, challenging the McGill rule. Thus, until or unless the U.S. high court decides to review the issue in connection with a future petition for a writ of certiorari, McGill is binding California law.

Key to the McGill rule is the concept of public injunctive relief. The McGill court went to great lengths to distinguish between public and private injunctive relief.

The McGill court explained that while

> public injunctive relief ... is relief that has "the primary purpose and effect of" prohibiting unlawful acts that threaten future injury to the general public ... [r]elief that has the primary purpose or effect of redressing or preventing injury to an individual plaintiff — or to a group of individuals similarly situated to the plaintiff — does not constitute public injunctive relief.[6]

Since the McGill decision, parties have wrestled with how, and when, the McGill rule is applied. At the center of the confusion is:

1. What, exactly, constitutes public injunctive relief; and

2. Whether the McGill rule applies if a plaintiff does not actually seek public injunctive relief.

These two issues were squarely addressed in two recent Ninth Circuit cases.

The Ninth Circuit's Decisions in Hodges and Cottrell

In September and October, the Ninth Circuit handed down two decisions that call into question the future of the McGill rule and may once again provide an avenue for review by the U.S. Supreme Court.

Notably, the Ninth Circuit took a restrictive view of two key issues discussed above — according to the Ninth Circuit, public injunctive relief is limited to forward-looking relief that primarily benefits the general public rather than a specific class, and for McGill to apply, a plaintiff must actually seek public injunctive relief.

In the Sept. 10 Hodges v. Comcast Cable Communications LLC[7] decision, the plaintiff brought a putative class action challenging a cable company's privacy and data collection practices, and sought a variety of monetary and equitable remedies, including statewide public injunctive relief.

The cable company moved to compel arbitration based on an arbitration provision in the

plaintiff's subscriber agreements. The U.S. District Court for the Northern District of California denied the cable company's motion to compel arbitration, and the cable company appealed.

On appeal, the Ninth Circuit first rejected the plaintiff's argument that for purposes of the McGill rule, it is irrelevant whether his complaint actually includes a claim for public injunctive relief, and that because the subscriber agreement theoretically waived public injunctive relief in any case, it is invalid.

The court explained that California state precedent "forecloses the [plaintiff's] argument that courts should stretch to invalidate contracts based on hypothetical issues that are not actually presented in the parties' dispute."

The Hodges court then turned to what constitutes nonwaivable public injunctive relief under California law, concluding that

> public injunctive relief within the meaning of McGill is limited to forward-looking injunctions that seek to prevent future violations of law for the benefit of the general public as a whole, as opposed to a particular class of persons, and that do so without the need to consider the individual claims of any non-party.

The Hodges court explained that the "paradigmatic example" of such relief was the injunctive relief sought in McGill itself, where the plaintiff sought an injunction against the use of false advertising to promote a credit protection plan.

The court contrasted such relief with injunctive relief being sought "for the benefit of a discrete class of persons, or would require consideration of the private rights and obligations of individual non-parties," which it deemed to be private injunctive relief.

Applying the standard, the Hodges court concluded that the injunctive relief sought was not public. Examining the requested injunctions outlined in the complaint, the court observed that while some of the requested forms of relief sought forward-looking prohibitions against future violations of law, the requests on their face stood to benefit the cable company's cable subscribers.

Accordingly, the court reasoned, "there is simply no sense in which this relief could be said to primarily benefit the general public as a more diffuse whole." In order for the would-be violations to occur, the beneficiary would need to become a customer.

Moreover, the court explained, administering the requested relief would require the consideration of individualized claims of numerous cable subscribers, including the particular consents of each subscriber and individual disclosures. And "[a]dministering an injunction of this sort, on this scale, is patently incompatible with the procedure simplicity envisioned by bilateral arbitration," the court said.

In Hodges, the plaintiff advocated for an interpretation of the McGill rule that would mean any request for an injunction to prevent future violations of consumer protection statutes constitutes public injunctive relief, relying on two recent decisions in the Court of Appeals of California as support:

- Mejia v. DACM Inc. in 2020; and
- Maldonado v. Fast Auto Loans Inc. last January.

The Hodges court rejected this interpretation, finding that if the McGill rule swept that broadly, it would be preempted by the FAA. The court explained that the Mejia-Maldonado rule that any injunction against future illegal conduct constitutes nonwaivable public injunctive relief

> disregards all of the limitations on public injunctive relief that were emphasized in McGill and [Blair v. Rent-A-Center Inc. as it] forbids waiving claims for prospective injunctive relief against unlawful conduct even if, for example, the implementation of such an injunction would require evaluation of the individual claims of numerous non-parties.

Such a rule, the Hodges court stated, is "inherently incompatible" with the streamlined procedures that the FAA seeks to protect. Accordingly, the court concluded, the Mejia-Maldonado rule was preempted by the FAA.

The Hodges decision has generated significant attention from the plaintiffs bar, which has relied heavily on the McGill rule to challenge arbitration clauses. In late October, the Hodges plaintiff filed a petition for rehearing en banc, and in early November, several consumer groups filed amicus briefs in support of that petition.

A month after the Hodges decision, the Ninth Circuit issued the October Cottrell v. AT&T Inc.[8] decision, in which it applied Hodges and reiterated its narrow interpretation of the McGill rule. In Cottrell, the plaintiff brought a class action against telephone and cable provider AT&T Inc, alleging that it charged customers for certain services without authorization.

The plaintiff specifically sought forward-looking injunctive relief, including:

- Enjoining future violations of the Consumer Legal Remedies Act;
- Requiring the cable provider to give an accounting of all monies obtained from its customers related to the challenged conduct;
- Requiring cable provider AT&T to give individualized notice to its customers; and
- Establishing an ongoing monitoring mechanism to ensure compliance with the injunction.

The U.S. District Court for the Northern District of California denied AT&T's motion to compel arbitration, finding the injunctive relief requested was "public injunctive relief" within the meaning of McGill, and the agreement barred it in any forum — in violation of the McGill rule.

Alternatively, the district court found that even if the relief was not public injunctive relief, that did not matter because a consumer is not required to actually pursue public injunctive relief in order to invoke the McGill rule.

The Ninth Circuit reversed both of these holdings, explaining that the plaintiff's requested relief "suffers from the same flaw" as that in Hodges — the injunction sought would require an accounting and notice to customers of the cable provider.

In other words, the injunction would primarily benefit cable company customers rather than the general public. And, as in Hodges, seeking an injunction prohibiting future violations of the law is insufficient because, for that violation to ever occur, the individual must become a customer — and the injunction therefore does not primarily benefit the general public.

The Cottrell court also rejected the district court's suggestion that the arbitration prohibition against public injunctions would make the agreement "categorially unenforceable" even if the plaintiff did not himself seek public injunctive relief, stating that that argument is "foreclosed by Hodges."

What Does This Mean for the Future of the McGill Rule?

Practically speaking, the Ninth Circuit's approach in Hodges and Cottrell restricts the scope of the McGill rule and raises questions about when the McGill rule might apply with respect to claims that fall outside the very specific and narrow paradigmatic example of a case seeking an injunction against the future use of false advertising.

These decisions also foreclose the argument that a plaintiff need not actually seek public injunctive relief for the McGill rule to apply.

As to the Hodges plaintiff's request for en banc review, the petition could give the entire court an opportunity to reverse course and align itself with the Mejia-Maldonado view of the McGill rule. But such an outcome could be a double-edged sword for consumer groups, as the fact that a panel found the FAA would preempt such an interpretation may give the Supreme Court a reason to review the McGill rule as a whole. Notably, the Supreme Court's composition has changed since it declined review of the McGill rule in 2020.

Hodges and Cottrell also set the stage for a potential split between the Ninth Circuit and the California Supreme Court. Hodges squarely finds that interpretations of two California Courts of Appeal are preempted. If the California Supreme Court adopts a similarly broad reading of its own McGill rule, it is walking that rule into a preemption defense — assuming Hodges stands.

Finally, the decision also has implications for drafting arbitration clauses and litigating arbitration disputes. Businesses that have taken steps to address the McGill rule in arbitration clauses should continue to monitor the situation closely, as further developments could potentially give good cause to revisit how certain clauses are drafted. With respect to litigation, Hodges and Cottrell open the door to a number of arguments against the applicability of the McGill rule in cases not involving alleged false advertising.

In sum, it remains to be seen whether the Ninth Circuit will reconsider its interpretation of the McGill rule, and whether the U.S. Supreme Court will accept another opportunity to opine on the issue.

Until then, observers can expect continued disagreement over the scope of the McGill rule, and defendants seeking to enforce arbitration provisions will find strong support in the interpretation outlined in Hodges and Cottrell.

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[1] Blair v. Rent-A-Center, Inc., 928 F.3d 819, 825, 830–31 (9th Cir. 2019); McArdle v. AT&T Mobility LLC, 772 Fed. Appx. 575, 575 (9th Cir. 2019), cert. denied 140 S.Ct. 2827 (2020); Tillage v. Comcast Corp., 772 Fed. Appx. 569, 575 (9th Cir. 2019), cert. denied 140 S.Ct. 2827 (2020).

[2] See Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983).

[3] Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 68 (2010).

[4] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).

[5] See, e.g., Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1417-19 (2019); DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 471 (2015); Concepcion, 563 U.S. at 343–44; Preston v. Ferrer, 552 U.S. 346, 352–63 (2008); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).

[6] See McGill, 393 P.3d at 90 (quoting Broughton v. Cigna Healthplans of Cal., 988 P.2d 67, 74 (Cal. 1999).

[7] Hodges v. Comcast Cable Communs. LLC, 2021 U.S. App. LEXIS 27268 (9th Cir. Sept. 10, 2021).

[8] Cottrell v. AT&T Inc. 2021 U.S. App. LEXIS 32093 (9th Cir. Oct. 26, 2021).