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Ninth Circuit reexamines California's McGill rule – which prohibits contractual waivers of "public injunctive relief" – through the lens of federal preemption

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Takeaway: One would think that "public injunctive relief" – especially under California law – would be a broad remedy. Not so, according to the majority opinion in *Hodges v. Comcast Cable Communications, LLC,* --- F.4th ----, No. 19-16483, 2021 WL 4127711 (9th Cir. Sep. 10, 2021). Under California's "*McGill* rule," arbitration agreements cannot waive claims for "public injunctive relief." See generally *McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2007). In *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819 (9th Cir. 2019), the Ninth Circuit held that – given the limitations placed on "public injunctive relief" in *McGill* – the Federal Arbitration Act ("FAA") did not preempt the *McGill* rule. The recent *Hodges* majority used *Blair*'s reasoning to conclude that both the district court and dissenting Judge Marsha Berzon misapprehended the *McGill* rule, as well as to conclude that two recent decisions by a California intermediate appellate court rested "on such a patent misreading of California law that we do not think it would be followed by the California Supreme Court." 2021 WL 4127711, at *7. We expect to hear more about these issues from both the federal and California state courts, given the interrelationship between the *McGill* rule and class action waivers commonly found in consumer arbitration agreements.

In *Hodges*, former Comcast subscriber Brandon Hodges filed a putative class action against Comcast, alleging that Comcast violated the class members' privacy rights by collecting (1) "data about subscribers' cable television viewing activity" and (2) "personally identifiable demographic data about its subscribers." *Id.* at *2. He alleged that this conduct violated the federal Cable Communications Policy Act of 1984, as well as the California Invasion of Privacy Act. He further alleged that these federal and state statutory violations constituted "unlawful" business practices supporting a derivative claim under California's unfair competition law. *Id.* Among other relief, he claimed the class was entitled to seven forms of what he alleged constituted "statewide [California-wide] public injunctive relief." *Id.*

As a Comcast subscriber, however, Mr. Hodges had agreed to Comcast's "Subscriber Agreement," which included an arbitration provision incorporating a "Waiver of Class Actions and Collective Relief." *Id.* Comcast moved to compel arbitration. But because Mr. Hodges's complaint sought "public injunctive relief," the Northern District of California denied Comcast's motion based on the "*McGill* rule," which provides that "a contractual provision that waives the right to seek 'public injunctive relief' in all forums is unenforceable" under California law. *Id.* at *1 (citing *McGill*, 393 P.3d at 87). Comcast directly appealed the ruling under 9 U.S.C. § 16(a)(1)(B).

The majority's analysis focused on *Blair*, which ruled that the FAA did *not* preempt the *McGill* rule. In *Blair*, the Ninth Circuit analyzed *McGill* to determine what constitutes "public injunctive relief" under California law. Based on this analysis, *Blair* determined that public injunctive relief constituted a limited

remedy in important respects, and these limitations saved the *McGill* rule from running afoul of (and thus being preempted by) the FAA.

The majority began its analysis by focusing on the distinction highlighted in *McGill* between private injunctive relief, on the one hand, and public injunctive relief, on the other. According to *McGill,* California law "distinguished between private injunctive relief – *i.e.*, relief that primarily resolves a private dispute between the parties and rectifies individual wrongs and that benefits the public, if at all, only incidentally – and public injunctive relief – *i.e.*, relief that by and large benefits the general public and that benefits the plaintiff, if at all, only incidentally and/or as a member of the general public." *Id*. at *4 (citation omitted). The *McGill* court "emphasized three key features" of public injunctive relief:

- First, public injunctive relief "has 'the primary purpose and effect of' prohibiting unlawful acts that threaten future injury to the general public." *Id*. (citation omitted).
- Second, public injunctive relief "does not constitute the pursuit of representative claims or relief on behalf of others," nor does it involve "prosecut[ing] actions on behalf of the general public." *Id*. at *5.
- Third, the beneficiaries of public injunctive relief usually cannot be ascertained – in other words, public injunctive relief involves "diffuse benefits" to the "general public" as a whole, rather than to an ascertainable class of persons in the class action sense. *Id*.

Distilling these key features, the majority summed up the *McGill* rule as follows: "It follows 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." *Id*. (emphasis added). According to the majority, "[t]he paradigmatic example would be the sort of injunctive relief sought in *McGill* itself, where the plaintiff sought an injunction against the use of false advertising to promote a credit protection plan." *Id*. "By contrast, when the injunctive relief being sought is for the benefit of a discrete class of persons, or would require consideration of the private rights and obligations of individual non-parties, it has been held to be private injunctive relief." *Id.*

The majority viewed *Blair's* holding – that the FAA did not preempt the *McGill* rule – as placing "loadbearing weight" on the key features of public injunctive relief specified in *McGill*, including that (1) a "plaintiff requesting a public injunction files the lawsuit 'on his or her own behalf'" and not as the representative of other parties; (2) "claims for public injunctive relief need not comply with state-law class procedures"; and (3) public injunctive relief benefits "the general public" and not "specific absent parties." *Id*. at *6 (quoting *Blair*, 928 F.3d at 828–29).

Relying on recent decisions of a California intermediate appellate court in *Mejia v. DACM Inc*., 54 Cal. App. 5th 691, 268 Cal. Rptr. 3d 642 (4th Dist. 2020), and *Maldonado v. Fast Auto Loans, Inc.*, 60 Cal. App. 5th 710, 275 Cal. Rptr. 3d 82 (4th Dist. 2021), Mr. Hodges argued for a broader reading of the *McGill* rule. According to the majority, however, these decisions "substantially broadened the *McGill* rule by effectively defining as 'public injunctive relief' any forward-looking injunction that restrains any unlawful conduct." *Id*. at *7. For two reasons, the majority declined to follow those cases:

- "First, *Mejia's* expanded version of the *McGill* rule rests on such a patent misreading of California

law that we do not think it would be followed by the California Supreme Court." *Id*.

- Second, "*Mejia*'s and *Maldonado*'s . . . expansion of the *McGill* rule is preempted by the FAA." *Id*. at *8.

Turning to the forms of "public injunctive relief" set out in Hodges' complaint, the majority concluded that Hodges sought private and not public injunctive relief under California law. Rather than seeking injunctive relief on behalf of the general public "as a whole," Hodges sought to benefit Comcast "cable subscribers," who represented a "group of individuals similarly situated to the plaintiff." *Id*. at *10. According the majority, "[t]here is simply no sense in which this relief could be said to *primarily* benefit the general public as a more diffuse whole." *Id*. (emphasis in original). Additionally, according to the majority, "it is apparent that administering any injunctive relief of the sort sought here would entail the consideration of the individualized claims of numerous cable subscribers." *Id*.

Because Hodges' complaint did not seek public injunctive relief, the *McGill* rule did not apply, and Comcast's motion to compel arbitration should have been granted.

In dissent, Judge Berzon summarized her point of view as follows: "The majority concludes, contrary to our precedent and to recent decisions of the California Court of Appeal [referring to *Mejia* and *Maldonado*], that a forward-looking injunction protecting the privacy rights of millions of cable consumers is not 'public injunctive relief' under California state law. I disagree." *Id*. at * 11 (Berzon, J., dissenting). According to Judge Berzon, the majority drew an "untenable" distinction as between "relief benefiting consumers who contract with businesses" – which the majority viewed as private injunctive relief – and "relief benefiting consumers who are exposed to advertisements" – which the majority characterized as a paradigm of public injunctive relief. *Id*. at *14. This distinction, in Judge Berzon's view, "would be rejected by the California Supreme Court." *Id*.

While the California Supreme Court has the last word on the contours of the *McGill* rule, a federal court likely will have the last word on whether any "reinterpretation" of the *McGill* rule would run afoul of and therefore be preempted by the FAA. We expect several more decisions addressing the interplay of the *McGill* rule and the FAA in the not-too-distant future.