Blogs

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Consumer Protection Review



On June 28, the Ninth Circuit adopted the California Supreme Court's *McGill* rule in *Blair v. Rent-a-Center, Inc.*, 928 F.3d 819 (9th Cir. 2019).

In *Blair*, the Ninth Circuit held the *McGill* rule to be consistent with the Federal Arbitration Act ("FAA"), and therefore not preempted by the federal statute. The *McGill* rule was the result of a decision by the California Supreme Court in which it held that a consumer credit card agreement waiving the consumer's right to seek public injunctive relief violated California Civil Code § 3513. Section 3513 provides that "a law established for a public reason cannot be contravened by a private agreement." *Blair*, 928 F.3d at 824. Several California

consumer protection statutes explicitly provide consumers with the right to pursue a public injunctive remedy. The contract at issue in McGill was an arbitration agreement that both waived the plaintiff's right to seek public injunctive relief in arbitration and required arbitration of all claims. This contractual double-bind created a waiver of the plaintiff's right to seek a public injunction through litigation. Because this waiver prevented the plaintiff from seeking a public injunction in any forum, it was inconsistent with Section 3513 and therefore unenforceable. In Blair, the Ninth Circuit rejected Rent-a-Center's argument that the McGill rule was inconsistent with, and therefore preempted by, the FAA. The FAA's liberal policy favoring arbitration agreements can preempt a state-law rule like McGill in two ways: first, if the state law rule is not a "generally applicable contract defense"; and second, even if it is a generally applicable defense, if the state-law rule would "stand as an obstacle to the accomplishment of the FAA's objectives." See Blair, 928 F.3d at 825 (citing AT&T Mobility v. Concepcion, 563 U.S. 333, 339, 341 (2011)). The appellate court held that the McGill rule is a generally applicable contract defense because it applies equally to arbitration and non-arbitration agreements. Id. at 827. The Ninth Circuit specifically highlighted the California Supreme Court's holding that "any contract-even a contract that has no arbitration provision" that waives the statutory right to public injunctive relief is unenforceable as a matter of California law. *Id.* (emphasis original). As such, the *McGill* rule "expresses no preference as to whether public injunction claims are litigated or arbitrated, it merely prohibits the waiver of the right to pursue those claims in any forum." Id. As to the second possible avenue of preemption, the Ninth Circuit also held that the McGill rule does not interfere with the FAA's objectives in enforcing arbitration agreements because it would "leave[] undisturbed an agreement that both requires bilateral arbitration and permits public injunctive claims." Blair, 928 F.3d at 829. In other words, the McGill rule still allows parties to compel public injunctive claims to arbitration; it simply does not allow arbitration agreements (or any other private contracts) to waive the consumer's statutory rights to bring public injunctive claims in any forum. This is not inconsistent with the FAA's objective, and therefore the FAA does not preempt the state-law rule established in McGill. Kev Takeaways:

- Arbitration agreements which can be read to waive a consumer's right to public injunctive relief will not be enforced in California state or federal courts.
- Companies should review their consumer-facing arbitration agreements with California customers to ensure at least *one* forum—be it federal court or arbitration—is available to a plaintiff seeking a public injunction.

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