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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*. **Key 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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