

Public Injunctive Relief Vs. Arbitration: An Ongoing Debate

By **Stefan Love and Ashley Simonsen** (May 13, 2020, 3:48 PM EDT)

Twenty years ago, in *Broughton v. Cigna Healthplans of California*, the California Supreme Court decided that there was an inherent conflict between private arbitration and public injunctive relief — a form of injunctive relief available under various California consumer protection statutes.[1]

Over time, the court has limited in various ways the enforceability of arbitration agreements that purport to curtail the availability of public injunctive relief — most recently, in *McGill v. Citibank NA* in 2017, holding that arbitration agreements that waive entirely the right to pursue public injunctive relief are not enforceable.[2]

The U.S. Court of Appeals for the Ninth Circuit has held that the *McGill* rule is not preempted by the Federal Arbitration Act, notwithstanding the FAA's embodiment of a "liberal federal policy favoring arbitration agreements." [3] Practically, the rule forces companies to allow public injunctive relief claims in arbitration, or face them in court.

It was perhaps inevitable that a doctrine unique to California and born of a perceived conflict with private arbitration would end up before the U.S. Supreme Court. Now pending before that court are twin petitions for certiorari seeking a holding that *McGill* is preempted by the FAA by using this inherent conflict against the doctrine: The petitioners in *AT&T Mobility LLC v. McArdle* and *Comcast Corp. v. Tillage* argue that state law cannot condition "the enforceability of arbitration agreements on acquiescence to public-injunction proceedings," because these claims are "fundamentally inconsistent with arbitration." [4]

In this article, we trace the circular journey of public injunctive relief, from the inherent conflict identified in 1999 by the California Supreme Court, through *McGill* in 2017, and on to the fundamental inconsistency the petitioners point out in 2020. We evaluate the petitioners' strongest argument for overturning *McGill*, deepening the argument's historical roots.

The Broughton-Cruz rule: Public injunctive relief poses an inherent conflict with arbitration.

A claimant under California's central consumer protection statutes — the Consumers Legal Remedies Act, Unfair Competition Law and False Advertising Law — may seek injunctive relief to correct whatever



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the defendant did that led to the lawsuit.[5]

In two decisions from 1999 and 2003 — *Broughton v. Cigna Healthplans* and *Cruz v. PacifiCare Health Systems Inc.* — the California Supreme Court decided that one form of these injunctive relief claims was not subject to private arbitration: claims for public injunctive relief.[6] The court defined "public injunctive relief" as relief whose "primary purpose and effect" is to "prohibit and enjoin conduct injurious to the general public," and from which any benefit to the plaintiff is "only by virtue of being a member of the public." [7]

A typical example of public injunctive relief would be an injunction against a public communication that the plaintiff already knows is deceptive.[8] The *Broughton-Cruz* rule, named for these two decisions, states that claims for public injunctive relief are inarbitrable.

The inherent conflict between claims for public injunctive relief and arbitration identified in *Broughton-Cruz* is twofold. First, it is substantive: "[T]he purpose of arbitration is to voluntarily resolve private disputes," while the purpose of public injunctive relief "is not to resolve a private dispute, but to remedy a public wrong." [9]

Second, the inherent conflict is administrative: Modifying an arbitrator's injunction requires the inconvenience of a new arbitration proceeding.[10] Moreover, an arbitrator's injunction is enforceable only by the parties, not by a member of the public whom it might have been meant to benefit.[11]

Broughton-Cruz was overruled by the Ninth Circuit in 2013 because of the FAA, which preempts any state law that "prohibits outright the arbitration of a particular type of claim." [12] Under the FAA, arbitration provisions in commercial contracts "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The final clause results in the preemption of state laws that single out arbitration agreements for different treatment from other contracts.[13]

The McGill rule: Claims for public injunctive relief cannot be waived in all forums.

Broughton-Cruz attempted to negate agreements to arbitrate claims for public injunctive relief; McGill threatens agreements neither to arbitrate nor to litigate such claims.

The arbitration provision in McGill barred the plaintiff from requesting public injunctive relief in any forum.[14] The California Supreme Court held that this provision was unenforceable through a syllogism on the rule that a "law established for a public reason cannot be contravened by a private agreement." [15]

Public injunctive relief, being established for a public reason, cannot be contravened by agreement, the court reasoned, so arbitration agreements effectively waiving these claims in all forums are unenforceable.[16] Unlike *Broughton-Cruz*, McGill has been blessed by the Ninth Circuit, and plaintiffs are invoking the rule to strike down arbitration agreements with burgeoning vigor.[17]

Though McGill describes its target as waivers of public injunctive relief in any forum, the form of such waivers is commonly in two parts (including in McGill itself): first, a requirement that all disputes are subject to arbitration; and second, an explicit or effective bar on the arbitration of claims for public injunctive relief.[18] When this combination of provisions is present, the effective waiver of public injunctive relief in any forum is unenforceable, and the claimant may pursue in court his claims for

public injunctive relief — and perhaps other claims too, depending on how other provisions of the arbitration agreement are worded.[19]

The alternative to allowing public injunctive relief claims in court is to make room for them in arbitration. This requires two things: First, the arbitrator must have the power to award this remedy.

One agreement, held enforceable under *McGill*, gave the arbitrator "authority to issue any and all remedies authorized by law." [20] But another agreement was found unenforceable because it barred the arbitrator from issuing orders that changed the company's policies or practices — just what public injunctive relief may require. [21]

Second, the parties must not be barred from bringing claims for public injunctive relief. The case law helpfully distinguishes waivers of class or aggregated claims, which are enforceable, from waivers of public injunctive relief, which are not. [22]

For example, one court held that a prohibition on "act[ing] in any arbitration in the interests of the general public" was an unenforceable ban on claims for public injunctive relief. [23]

Do claims for public injunctive relief interfere with fundamental attributes of arbitration?

Unlike *Broughton-Cruz*, *McGill* does not "prohibit outright the arbitration of a particular type of claim;" it prohibits an all-forum waiver, which may not offend the FAA in the same way. [24] But the FAA also preempts state law that "interferes with fundamental attributes of arbitration," such as its individualized nature. [25] This is the strongest argument that the certiorari petitions offer for overturning *McGill*, and it occupies the rest of our analysis. [26]

The argument proceeds by analogy from public injunctive relief claims to class action claims. The petitioners are hoping the U.S. Supreme Court will follow its own example of *AT&T Mobility LLC v. Concepcion*, which concerned California's Discover Bank rule prohibiting waivers of class claims: In *Concepcion*, the Supreme Court held that Discover Bank was unenforceable because classwide arbitration interferes with arbitration's individualized nature. [27]

The petitioners weave the analogy from the ways that class claims and public injunctive relief claims are actually arbitrated, and how those proceedings differ from individual arbitration. Like class claims, public injunctive relief claims depend on "persons other than the claimant who institutes the arbitration," as they require a threat of "injury to the general public." [28]

Also like class claims, public injunctive relief claims are procedurally complex, as they may include third-party discovery, and, if successful, could result in administratively burdensome injunctions. [29] Finally, like class claims, claims for public injunctive relief pose massive risks — specifically, the cost of compliance with a potentially expansive injunction. [30]

The petitioners might have gone beyond this analogy. "Individualized" is more than an antonym of "class," and public injunctive relief claims might interfere with arbitration's individualized nature even if they are more than just class claims by another name.

Four decades separate the FAA, enacted in 1925, from the modern Federal Rule of Civil Procedure 23, enacted in 1966. Historically, arbitration is individualized in the sense that it properly comprehends only the individual parties to the arbitration contract.

Early FAA case law conceives of arbitration as no more than a forum for disputes between contractual counterparties.[31] According to a 1960 Supreme Court case — *United Steelworkers v. Warrior & Gulf Navigation Co.* — quoted approvingly by the court 50 years later in *Stolt-Nielsen SA v. Animalfeeds International Corp.*, an arbitrator "has no general charter to administer justice for a community which transcends the parties;" she is only "part of a system of self-government created by and confined to the parties." [32]

McGill's interference with arbitration's historically individualized nature becomes apparent upon a review of the arbitration provisions that have been held unenforceable under the rule:

- All claims "are subject to arbitration on an individual ... basis," and the "arbitrator will not award relief for or against anyone who is not a party";[33]
- The arbitrator cannot award "relief that would affect ... account holders other than" the party to the agreement;[34]
- "The arbitrator shall not ... change, require the Company to establish, nor diminish the Company's authority to establish or revise its policies, procedures, rules and/or practices";[35] and
- Parties cannot "act in any arbitration in the interests of the general public." [36]

Through the eyes of a midcentury jurist, these are unremarkable, perhaps superfluous descriptions of simply the way that arbitration is. They do not limit the power of arbitration to make the claimant whole; they merely require arbitration to allow no more than this.

Conclusion

Until *Broughton*, not much legal significance attached to whether a particular injunction would primarily benefit the general public rather than the plaintiff. The *Broughton* court saw a conflict between these public injunctions and private arbitration, and said that this conflict required state law to override private agreement.

The petitioners urging preemption of McGill also see a conflict between public injunctions and private arbitration, but based on an additional 20 years of FAA jurisprudence, they argue that this conflict requires federal law to preempt state law.

In the end, the *Broughton* court likely would agree with the petitioners about the fundamental conflict between public injunctive relief and private arbitration. Yet it is the defenders of McGill and public injunctive relief who must now deny the very conflict that bore the doctrine.[37]

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[1] See *Broughton v. Cigna Healthplans of Cal.*, 21 Cal. 4th 1066, 1077 (1999) (holding that certain claims for injunctive relief under the Consumers Legal Remedies Act are inarbitrable due to their "inherent conflict" with arbitration); see also *Cruz v. PacifiCare Health Sys., Inc.*, 30 Cal. 4th 303, 315–16 (2003) (extending *Broughton* to Unfair Competition Law, False Advertising Law).

[2] *McGill v. Citibank*, 2 Cal. 5th 945, 961 (2017).

[3] *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819, 825, 830–31 (9th Cir. 2019) (quoting the "liberal federal policy" passage from *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

[4] Petition for a Writ of Certiorari, *AT&T Mobility LLC v. McArdle*, No. 19-1078 (Feb. 27, 2020), at 14–16; see also Petition for a Writ of Certiorari, *Comcast Corp. v. Tillage*, No. 19-1066 (Feb. 27, 2020).

[5] Cal. Civ. Code §§1770, 1780(a)(2) (Consumers Legal Remedies Act); Cal. Bus. & Prof. Code §§17200, 17203 (Unfair Competition Law); Cal. Bus. & Prof. Code §§17500, 17535 (False Advertising Law).

[6] See *Broughton*, 21 Cal. 4th at 1077 (holding this for Consumers Legal Remedies Act); *Cruz*, 30 Cal. 4th at 315–16 (extending to Unfair Competition Law, False Advertising Law).

[7] *Broughton*, 21 Cal. 4th at 1077, 1080 n.5.

[8] See *id.* at 1080 n.5 ("In the present case [of public injunctive relief], plaintiffs asked for an injunction against [defendant's] 'deceptive methods, acts, and practices,' an injunction that will obviously not benefit them directly, since they have already been injured, allegedly, by such practices and are aware of them.").

[9] *Id.* at 1080.

[10] *Id.* at 1081.

[11] *Id.*

[12] See *Ferguson v. Corinthian Colls.*, 733 F.3d 928, 934 (9th Cir. 2013) (quoting and applying *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011)).

[13] 9 U.S.C. §2.

[14] *McGill*, 2 Cal. 5th at 956.

[15] *Id.* at 961 (quoting Cal. Civ. Code §3513).

[16] *McGill*, 2 Cal. 5th at 961.

[17] See *Blair*, 928 F.3d at 830–31 ("We hold that the FAA does not preempt the *McGill* rule."); see, e.g., *Lyons v. NBCUniversal Media, LLC*, 2019 WL 6703396, at *8 (C.D. Cal. Sept. 27, 2019) (holding arbitration provision unenforceable under *McGill*); *Delisle v. Speedy Cash*, 2019 WL 2423090, at *13 (S.D. Cal. June 10, 2019) (same).

[18] See, e.g., *McGill*, 2 Cal. 5th at 952 (agreement stated that "[a]ll Claims are subject to arbitration"

and the "arbitrator will not award relief for or against anyone who is not a party"); Lyons, 2019 WL 6703396, at *6 (agreement subjected all claims to arbitration but denied arbitrator the authority to change the company's policies or practices).

[19] See, e.g., Lotsoff v. Wells Fargo Bank, N.A., 2019 WL 4747667, at *5 (S.D. Cal. Sept. 30, 2019) (holding entire agreement unenforceable because it included a waiver barred by McGill and a "poison pill" clause that voided the entire agreement if any provision was unenforceable); Lyons, 2019 WL 6703396, at *13 (holding entire agreement unenforceable because it was "permeated with unconscionability," including, most importantly, a waiver barred by McGill).

[20] See Gonzalez-Torres v. Zumper, Inc., 2019 WL 6465283, at *8 (N.D. Cal. Dec. 2, 2019).

[21] See Lyons, 2019 WL 6703396, at *6.

[22] See, e.g., Dicarlo v. Moneylion, Inc., 2019 WL 8108731, at *3 (C.D. Cal. Dec. 20, 2019) (holding waiver of class claims enforceable under McGill and citing cases in agreement); cf. McGill, 2 Cal. 5th at 959–60 (holding that claims for public injunctive relief are not "the pursuit of representative claims or relief on behalf of others") (internal alterations and quotation marks omitted).

[23] See Lotsoff, 2019 WL 4747667, at *4–5.

[24] See, e.g., Blair, 928 F.3d at 827 (holding that McGill is a "generally applicable contract defense" rather than a bar on the arbitration of particular claims).

[25] See Concepcion, 563 U.S. at 344 (holding that a state law that "interferes with fundamental attributes of arbitration" is preempted by the FAA); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1622 (2018) (stating that arbitration's "individualized nature" is one of its "fundamental attributes").

[26] See Petition for a Writ of Certiorari, McArdle, No. 19-1078, at 12–19.

[27] See Concepcion, 563 U.S. at 344–50 (detailing how "classwide arbitration interferes with fundamental attributes of arbitration"); see also Epic, 138 S. Ct. at 1623 ("Concepcion's essential insight remains: courts may not allow a contract defense to reshape traditional individualized arbitration....").

[28] Petition for a Writ of Certiorari, McArdle, No. 19-1078, at 15.

[29] Id. at 17; see also Concepcion, 563 U.S. at 348 (noting the difficulty of deciding "how discovery for the class should be conducted" in the arbitration of class claims).

[30] Petition for a Writ of Certiorari, McArdle, No. 19-1078, at 18–19; see also Concepcion, 563 U.S. at 350 ("[C]lass arbitration greatly increases risks to defendants.").

[31] See, e.g., Zip Mfg. Co. v. Pep Mfg. Co., 44 F.2d 184, 186 (D. Del. 1930) (summarizing "the circumscribed class of disputes adapted to arbitration" and stating "it was the intention of Congress that the [FAA] should be confined to agreements for the arbitration of disputes arising in commerce and in maritime transactions").

[32] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 683 (2010) (quoting United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 581 (1960)).

[33] McGill, 2 Cal. 5th at 952.

[34] Blair v. Rent-A-Center, Inc., 2017 WL 4805577, at *5 (N.D. Cal. Oct. 25, 2017), aff'd, 928 F.3d 819 (9th Cir. 2019).

[35] Lyons, 2019 WL 6703396, at *6.

[36] Lotsoff, 2019 WL 4747667, at *2.

[37] See, e.g., Resp't Br. Opp'n to Pet. Writ Cert., AT&T Mobility LLC v. McArdle, No. 19-1078 (Apr. 24, 2020), at 20 (stating that parties who arbitrate claims for public injunctive relief "need not forgo 'arbitration as envisioned by the FAA' or resort to 'a procedure that is inconsistent with the FAA'" (quoting Concepcion, 563 U.S. at 351)).