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9th Cir. holds anti-joinder and class action waiver provisions did not violate California law

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The U.S. Court of Appeals for the Ninth Circuit recently affirmed an order compelling arbitration, even though the arbitration clause contained a class action waiver and an anti-joinder provision, and dismissing a putative class action brought against the operator of a smartphone app offering financial services to its customers.

In so ruling, the Ninth Circuit held that (1) the arbitration agreement allowed injunctive relief under California law, and that (2) public injunctive relief under the various California consumer protection statutes at issue is available in an individual lawsuit without a plaintiff acting as a private attorney general.

This meant that the arbitration clause did not violate the California Supreme Court's ruling in *McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2017), which held that no one can contractually waive all rights to seek public injunctive relief, and therefore that any contract that bars public injunctive relief in both court and arbitration is invalid.[1]

The plaintiff enrolled in the defendant financial technology company's Plus program, which offers a $500 credit-builder loan. The plaintiff signed a membership agreement that explained that Plus members owe monthly fees, monthly investment deposits and, if applicable, monthly loan payments.

The agreement also had a provision that gave each party the right to demand arbitration if a dispute arose and authorized the arbitrator to award all injunctive remedies available in an individual lawsuit under California law.

In addition, the agreement prohibited class actions as well as claim joinder, under which the plaintiff could not "join or consolidate claim(s) involving you with claims involving any other person." In other words, each plaintiff would have to arbitrate separately.

The plaintiff fell behind on her fees, deposits, and loan payments and tried to cancel the agreement, but the defendant refused. In order to cancel, the defendant required that the plaintiff first pay off her membership fees followed by paying her loan in full. The plaintiff allegedly could not afford to pay her accumulated fees and loan.

The plaintiff filed a putative class action alleging that the defendant violated California's Unfair Competition Law (UCL), False Advertising Law (FAL), and Consumers Legal Remedies Act (CLRA) for, among other things, "[f]alsely advertising to the general public within the State of California that the [credit-builder] Loans contain 'no hidden fees.'"

The trial court granted the defendant's motion to compel arbitration and dismissed the plaintiff's complaint. This appeal followed.

The plaintiff asserted that the arbitration provision was invalid because it violated California law requiring contracts to allow public injunctive relief. Specifically, the plaintiff argued she could secure public injunctive relief only by acting as a private attorney general, which the arbitration agreement supposedly prohibited.

> The Ninth Circuit held that public injunctive relief under the various California consumer protection statutes at issue is available in an individual lawsuit without a plaintiff acting as a private attorney general.

Thus, one of the questions to be answered on appeal was whether or not public injunctive relief under the relevant statutes was available in an "individual lawsuit" without the plaintiff "act[ing] as a private attorney general."

To answer that question, the Court noted that it had to determine (A) the scope of an individual lawsuit, and (B) when someone acts as a private attorney general.

California's legal requirement that contracts allow public injunctive relief is known as the *McGill* rule.[2] Public injunctive relief is "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."[3]

In *McGill*, the California Supreme Court held that no one can contractually waive all rights to seek public injunctive relief.[4] Thus, any contract that bars public injunctive relief in both court and arbitration is invalid.[5]

The plaintiff argued that the joinder clause contained in the agreement, prohibiting her from "join[ing] or consolidat[ing]

claims involving you with claims involving any other person[,]" restricted an individual lawsuit to one that has no substantial impact on others.

According to the plaintiff, this would mean that a claim for public injunctive relief, which impacts others, would violate the joinder clause, and therefore fall outside an individual lawsuit. This, the plaintiff argued, caused the arbitration provision to fail under *McGill*.

The Ninth Circuit disagreed, holding the arbitration and anti-joinder clause did not prohibit all claims that impact other people. Instead, the Court explained, it draws a line between two distinct types of claims — those "involving you" and those "involving any other person" — and prohibits bringing one of each type in the same proceeding.

To demonstrate, the Court used an example of an individual named John who received a large number of automated telephone calls. He sues the company responsible for making his contact information public — a claim that "involves him."

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His neighbor, who has also received constant calls, hears about the lawsuit and wants to get involved. If John brings a second claim in his lawsuit that relies on robocalls to his neighbor, that claim would "involve any other person" (his neighbor) and would not be his own claim.

The joinder clause provides that John and his neighbor may each bring claims against the company but must do so individually. John's victory could theoretically result in an injunction that broadly affects others, which would have an impact on others, including his neighbor, but it is still John's claim.

The Court noted that California has identified two distinct concepts of a "private attorney general": the standing-to-sue private attorney general, and the fee-shifting private attorney general.

The standing-to-sue private attorney general did not need to suffer even a factual injury in order to bring a lawsuit under certain statutes.[6]

The "fee-shifting" private attorney general is an equitable practice created by statute to incentivize private enforcement of civil-rights legislation, making attorney fees available to the prevailing plaintiff.

The fee-shifting provisions act as "a tool that ensures the vindication of important rights, even when large sums of money are not at stake, by making attorney's fees available under a private attorney general theory." *Farrar v. Hobby*, 506 U.S. 103, 122 (1992).

However, when California passed Proposition 64, it decided "that only the California Attorney General and local public officials [should] prosecute actions on behalf of the general public." Prop. 64, § 1(f). After Proposition 64, individuals must suffer their own injuries to sue.

Moreover, they can no longer bring a UCL or FAL claim "for the interest of ... the general public" without being a victim of the conduct at issue. Prop. 64, §§ 3, 5. Thus, Proposition 64 effectively limited standing-to-sue private attorneys general.

This led to a question for the California Supreme Court in *McGill* — without the ability to act for the interest of the general public, can individual UCL and FAL litigants still seek public injunctive relief in individual lawsuits? *McGill*, 393 P.3d at 92.

The *McGill* court held that, because individuals seeking public injunctive relief under the UCL and FAL do so "on [their] own behalf" and not "on behalf of the general public," the relief remains available.

Although *McGill* did not discuss the CLRA, the Ninth Circuit believed there is no apparent reason why suit under the CLRA for the same relief could not just as plausibly be brought "on [the plaintiff's] own behalf."

The Court noted that the plaintiff's argument that public injunctive relief was categorically unavailable could not be squared away with the clear text of the all-remedies clause providing that "[t]he arbitrator ... shall be authorized to award all remedies available in an individual lawsuit ... including, without limitation, ... injunctive ... relief."

Accordingly, the Ninth Circuit held that, under the agreement at issue, litigants proceeding in individual lawsuits could request public injunctive relief in arbitration with the defendant. Therefore, the agreement did not violate the *McGill* rule and was valid and enforceable.

Notes

[1] A copy of the opinion in *DiCarlo v. MoneyLion, Inc.* is available at https://bit.ly/3t9z3vR.

[2] *See McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2017).

[3] *Id.* at 89.

[4] *Id.* at 94.

[5] *Id.* at 94.

[6] *See Californians for Disability Rts. v. Mervyn's LLC*, 138 P.3d 207, 209 (Cal. 2006).

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