



# MCLE Self-Study Test

## Contractual Waiver of Public Injunctive Relief in Arbitration Agreements: Conflicting Federal Interpretation of the *McGill* Rule

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Published in the *Contra Costa Lawyer*, June 2020

For each of the following questions identify the best answer from the choices provided.

- The principal purpose and effect of public injunctive relief is to:
  - Compensate a class of victims for a private harm.
  - Compensate a class of victims for a public harm.
  - Prohibit unlawful acts that threaten future injury to the general public.
  - Prohibit unlawful acts that threaten future injury to a specific plaintiff.
- In 2017, the California Supreme Court in *McGill v. Citibank, N.A.* held that contractual arbitration agreements waiving public injunctive relief arising under California's unfair competition laws ("UCLs") are:
  - Contrary to California public policy and unenforceable under California law.
  - Not contrary to California public policy and thus enforceable under California law.
  - Contrary to California public policy but enforceable under California unfair competition law.
  - Not contrary to California public policy but unenforceable under California unfair competition law.
- The *McGill* court further held that the Federal Arbitration Act ("FAA"):
  - Preempts the *McGill* rule in all situations and so provisions in contractual arbitration agreements waiving public injunctive relief arising under California's unfair competition laws must be enforced.
  - Preempts the *McGill* rule to the extent that private injunctive relief is sought in addition to public injunctive relief.
  - Does not preempt the *McGill* rule to the extent private injunctive relief is sought in addition to public injunctive relief.
  - Does not preempt the *McGill* rule or require enforcement of provisions in contractual arbitration agreements waiving public injunctive relief arising under California's unfair competition laws.
- The *McGill* Court held that the FAA's savings clause:
  - Prevented an arbitration agreement from being declared unenforceable.
  - Allowed an arbitration agreement to be declared unenforceable for any reason.
  - Prevented an arbitration agreement from being declared unenforceable when public injunctive relief was sought.
  - Provided that an arbitration agreement may be declared unenforceable upon such grounds as exist at law or in equity for the revocation of any contract.
- Regarding interplay between public laws and private contracts, the *McGill* decision emphasized that:
  - Freedom of contract principles permit a private contract to contravene a law established for a public reason.
  - A law established for a public reason cannot be contravened by a private agreement.
  - The FAA preempts California law and therefore a private agreement may not waive public injunctive relief.
  - The FAA does not preempt California law and therefore private agreements may contravene a law established for a public reason.

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- 6. For purposes of the *McGill* analysis, UCLs are:
  - a. Federal Unfair Competition Laws.
  - b. California's Unfair Competition Laws.
  - c. Under-applied contracting laws.
  - d. Unpled claims or losses.
- 7. In the context of the *McGill* decision, the FAA is:
  - a. The Federal Aviation Administration.
  - b. The California Fair Agreements Act.
  - c. A fully-integrated agreement for arbitration.
  - d. The Federal Arbitration Act.
- 8. The *McGill* opinion also emphasizes that, under California's UCLs, public injunctive relief is:
  - a. General contract defenses described in the FAA's saving clause.
  - b. Unavailable due to the FAA savings clause.
  - c. Unavailable under the California UCLs.
  - d. Only available to the extent specified by the terms of the arbitration agreement.
- 9. The *McGill* Court acknowledged that the FAA preempts a generally applicable state law contract defense if the defense is applied in a fashion that disfavors arbitration or interferes with the fundamental attributes of arbitration.
  - True     False
- 10. The *McGill* Court agreed with the argument that the anti-waiver rule for public injunctive relief interferes with arbitration.
  - True     False

- 11. The *McGill* Court found public injunctive relief to be a substantive statutory remedy under the California UCLs.
  - True     False
- 12. The *McGill* Court found public injunctive relief was not a procedural device, such as class action arbitration.
  - True     False
- 13. All federal courts in California have unanimously agreed that the *McGill* rule is preempted by the FAA.
  - True     False

Fill in the missing terms in the following two statements:

- 14. In the 2019 opinion of the U.S. District Court for the Southern District of California cited in the article as opposing the *McGill* decision, the court held that the *McGill* Rule is preempted by the FAA and private contractual arbitration provisions purporting to waive public injunctive relief are enforceable because (1) the *McGill* Rule is not a ground for \_\_\_\_\_ any contract and (2) the rule obstructs the FAA's objectives to promote \_\_\_\_\_ arbitration concerning only the plaintiff's claims and relief that would make plaintiff whole.
- 15. Nevertheless, in a trio of separate cases, the United States Court of Appeals for the Ninth Circuit subsequently held the *McGill* Rule is not preempted by the FAA because an agreement to waive the right to seek public injunctive relief violates California Civil

Code § 3513, which provides that a law established for a public reason cannot be contravened by a private agreement. Public injunctive relief is primarily for the benefit of the general public. Waivers of such relief, therefore, are \_\_\_\_\_ and \_\_\_\_\_ under California law and that the *McGill* Rule is a \_\_\_\_\_ and the rule does not obstruct the FAA's objectives because it does not mandate procedures that interfere with arbitration.

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