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DEFENDER

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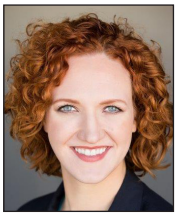
New Developments in Arbitration Law Require Auto Dealer Counsel to Assess Several Issues. What Do You Need to Know?

By Christian Scali and Monica Baumann, *The Scali Law Firm*


Scali


Baumann

As you are undoubtedly aware, the Senate voted to strike the Consumer Financial Protection Bureau's new arbitration rule on October 24. The rule, which would have prohibited the use of class-action waivers in mandatory pre-dispute consumer financial service and product contracts, will not go into effect on March 19, 2018.

For many car dealers and legal practitioners, the Senate's action is welcome. For dealers and lenders, especially those in highly litigious states, arbitration clauses have played an important part in risk mitigation for years by allowing contract holders to force litigants to individually arbitrate claims. However, the CFPB regulation was not the only attack on the availability of arbitration clauses in consumer lending contracts. Recent California court decisions and proposed legislation may limit dealers' and lenders' ability to rely on consumer arbitration to defeat class actions. This article highlights various issues facing reliance on arbitration agreements.

For example, in *Harshad & Nasir Corporation v. Global Sign Systems, Inc.,* 14 Cal. App. 5th 523 (2017), the Court of Appeal overturned the trial court's review of the arbitrator decision regarding the scope of the arbitration agreement. An arbitrator's decision generally cannot be reviewed for errors of fact or law, but parties can limit an arbitrator's authority by providing in the arbitration agreement for review of the merits determination. Here, the arbitration agreement contained language requiring the arbitrator to apply California and federal law and providing for review as though the decision had been issued by a court. The court therefore found the agreement allowed for judicial review of the arbitrator's decision for legal error, held the arbitrator committed legal error, and held the arbitrator did not have the authority to add parties to an arbitration after one of the arbitrating parties expressly reserved its right to seek a court order on this issue.

The resulting review of the arbitrator's decision was severe for the litigants. The

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litigants each expended over $1 million dollars to take the case through numerous appeals. Further, the party prevailing in arbitration saw the reversal of an award for attorneys' fees.

This decision also highlights the importance of controlling how legal questions are answered in arbitration. Saddling the arbitrator with the obligation to decide a dispute consistent with the facts and controlling law and including a right of review for errors of fact and law in your clients' arbitration agreements may help insulate your client from a bad decision. This is particularly important due to the penchant of some arbitrators for "splitting the baby" in their decisions, resulting in minimal damage awards, but high attorneys' fees awards, and due to arbitrators more concerned with repeat business than getting the right result.

In another recent decision by a California Court of Appeal, the court in *Sprunk v. Prisma LLC,* No. B268755, 2017 Cal. App. LEXIS 731 (Ct. App. Aug. 23, 2017), held that a defendant in class action litigation can waive its right to seek arbitration against absent, unnamed class members by deciding not to compel arbitration against the named plaintiff within a reasonable timeframe. The appeal turned on how defendant's choice to delay compelling arbitration as to the named plaintiff for several years should be weighed. The defendant argued the court should only consider its reasons for delay in compelling arbitration as to the unnamed class members themselves, as the defendant could not have moved to compel arbitration against these individuals until the class was certified. The Court of Appeal disagreed and found that substantial evidence supported the trial court's finding that the defendant had delayed its motions to compel arbitration to obtain a strategic advantage: it hoped to give itself another opportunity to win the case by first defeating the class certification in court.

Sprunk illustrates that a defendant may lose its right to compel arbitration if it delays compelling arbitration as to the named plaintiff to obtain a strategic advantage against the class. For dealers, the decision shows some of the strategic issues they may face in a post-class action waiver dispute environment.

Two other recent cases also highlight attacks that may be coming to consumer arbitration. In *McGill v. Citibank,* 2 Cal. 5th 945 (2017), the California Supreme Court held that an arbitration agreement that waives a party's right to obtain public injunctive relief under California statute in any forum is contrary to California law and that the Federal Arbitration Act does not preempt this rule. Before the SCOTUS's opinion in *Concepcion,* the California Supreme Court held that statutory public injunctive relief, a remedy offered under state unfair competition, consumer protection, and advertising law schemes, may not be arbitrated. This rule, called the *Broughton-Cruz* rule after the twin cases that created the doctrine, has not been revisited by the California Supreme Court after *Concepcion*. Instead, the court has studiously avoided reviewing this doctrine and has so proclaimed in almost every subsequent arbitration opinion – including

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Matthew Newell
Holman Automotive
Phone: 360.553.7381
Email: mnewell@holmanauto.com

McGill – that artfully dances around the issue. In *McGill,* the court focused on the arbitration agreement's provision that prohibited the consumer from obtaining public injunctive relief in arbitration. It held that an arbitration agreement that prohibited consumers from seeking any remedy through the courts effectively deprived the consumer of a remedy because consumers had to arbitrate their claims and the arbitrator's power did not include the ability to award public injunctive relief, because the parties agreed to so limit it in the arbitration agreement. Depriving a consumer of the right to obtain public injunctive relief in any forum, the court held, was a violation of California law and public policy. The lower courts are now trying to apply this decision in the face of consumer attorneys arguing for an expansive view of its holding. Counsel should review their arbitration agreements to be sure they do not limit or prohibit remedies in arbitration and run afoul of this decision.

Finally, last year, the California Supreme Court, in *Sandquist v. Lebo Automotive, Inc.,* 1 Cal. 5th 233 (2016), reversed the dismissal of class claims and held that an employment arbitration agreement required that the arbitrability of the legal questions in the agreement be first determined by the arbitrator. The agreement, which stated "any claim, dispute and/or controversy . . . which would otherwise require or allow resort to any court," except for a few specifically delineated exceptions, had to be "submitted and determine[d] exclusively by binding arbitration…." The defendant had applied to the trial court to compel arbitration and enforce the class action waiver in the case. The trial court granted that motion and dismissed the class claims resulting in the appeal. The importance of this decision is that an arbitration agreement requiring the arbitrator to decide "threshold issues" of arbitrability could result in extraordinary cost for a defendant, who has to pay the costs unique to arbitration to avoid the risk that the agreement is unconscionable, if the arbitrator erroneously refuses to dismiss the class claims, or worse, finds that individual arbitrations for each putative class member must be prosecuted in

lieu of dismissal of the class claims. This is a costly result because it is not appealable until the final decision on the merits is reached. Counsel should therefore develop arbitration agreements that: (1) limit the scope of the arbitrator's authority so that the arbitrator is not empowered to determine threshold issues of arbitrability; or (2) allow for an immediate right of judicial appeal as to the arbitrator's determination of the threshold issues of arbitrability.

Taken together these cases suggest that while dealer attorney must carefully consider attacks on consumer arbitration. Specifically, these cases highlight the importance of constructing arbitration agreements in a way that resolves legal questions regarding the scope of an arbitration at an early stage. ■

Christian J. Scali - Founder and Managing Partner, The Scali Law Firm
Christian Scali has a diverse automotive industry practice that includes advertising, consumer finance, consumer product safety, data security, employment advice and counsel and litigation, employee mobility, F&I advice and counsel, franchise, privacy and trade secret protection. He regularly litigates on behalf of clients in complex and high-stakes cases.

Monica J. Baumann - Senior Associate Attorney, The Scali Law Firm
Monica Baumann advises dealers on all aspects of legal and regulatory compliance. Formerly the Director of Legal and Regulatory Affairs with the California New Car Dealers Association, she represents clients in consumer and business litigation, as well as works with clients to solve compliance issues.

PLEASE NOTE: OUT OF OFFICE

Executive Director Erin Murphy is planning to be out on maternity leave from November 10th through April 2nd. Please contact Justine Coffey, Interim Executive Director, at jcoffey@dealercounsel.com or 202-868-4423 in Erin's absence.

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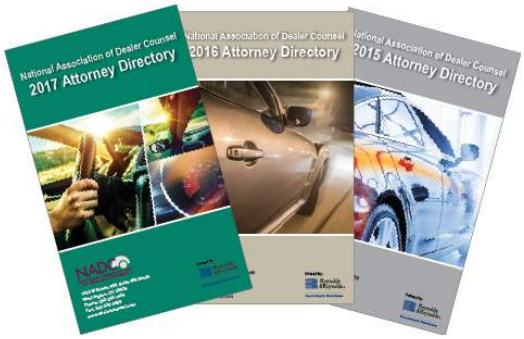

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Please send any news that you would like to share to: emurphy@dealercounsel.com.

Executive Director's Message

Erin H. Murphy
NADC Executive Director

The NADC Fall Conference held October 22-24 in Chicago was by all accounts a great success! Attendees of the Fall Conference enjoyed a change in venue at the Ritz-Carlton, Chicago and eight informative, timely educational sessions. For the second time this year, the conference piggybacked the ATAE Conference in an effort to accommodate folks attending both meetings. There were an outstanding 228 members in attendance . . . record breaking numbers for an NADC Conference!

NADC members who were not in attendance can benefit from the conference materials that have been uploaded to our website at www.dealercounsel.com. Please look under the Conference, Workshop and Webinar Handouts section in the eLibrary (2017 NADC Fall Conference) section of the website. Please don't forget that you can upload any documents that you wish to share with the membership in the eLibrary. If you have questions, please contact Jennifer Polo-Sherk at jpolo-sherk@dealercounsel.com.

I would like to thank all of our event sponsors for their contributions to the Fall Conference. Many thanks to:

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It is with the help of our sponsors that we are able to elevate the quality of the conference while keeping the cost low for members.

I would also like to thank the Program Planning Committee for putting together an excellent line up of sessions. Thank you to:

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Please also note that due to the recent hurricane in Florida, the Ritz-Carlton, South Beach has been forced to close because of damages that were suffered. Unfortunately, they will not re-open in time for the NADC 2018 Annual Member Conference in April. We are working to find a new, suitable location and plan to update the membership on the new location as soon as possible. Thank you for your patience during this process.

However, planning for the program is still underway! The conference will be a two day program designed to provide you with updates, best practices, lessons learned, and other useful information. If you are interested in submitting a session proposal for the conference, please send the following information to emurphy@dealercounsel.com:

- Session Topic
- Outline and/or short description of session
- Names and bios of presenters
- Requested length of time

Please check the website www.dealercounsel.com for more information in the "Events" section. We look forward to seeing you at the 2018 Annual Member Conference! ■

October 22 - 24

The Ritz-Carlton, Chicago

2017 NADC FALL CONFERENCE

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Sexual Harassment in the Dealership

Feature Article

By Jim Ganther, *Mosaic Compliance Services*

Sexual harassment is recognized as a widespread problem, and dealerships are not exempt. However, I personally had not given the issue much thought until I got involved in one dealership's legal woes recently. In that case a manager was having sexual relations with an hourly employee–at the dealership–recorded in digital clarity by the dealership's security cameras. Even more disturbing was the General Manager's reaction: "So what?" REALLY? Cue the Seinfeld episode where George Costanza asks, "Was that wrong? Should I not have done that?"

Although the offending manager eventually got fired, the GM's attitude may take a little more effort to change. And so, for the George Costanzas of the dealership world who have not yet gotten the memo, here is a brief primer on sexual harassment and why it has no place at a dealership.

What is sexual harassment? It can take many forms, and includes unwelcome sexual advances, requests for sexual favors, and other sexually-related conduct. It is also deemed to be harassment if submission to sexual conduct is made a term of employment. This behavior is known as "quid pro quo" harassment.

Quid pro quo sexual harassment occurs when a supervisor conditions an employment benefit on an employee's engaging in sexual behavior. An employment benefit or "tangible economic action" could include a raise if the employee goes along with the sexual conduct, or a "penalty" such as being demoted or even fired if the sexual conduct is refused. Asserting that the victim of harassment was a willing participant in the sexual activity is not a defense. The difference in relative power between the harasser and the victim makes this a weak and ineffective response to such an allegation.

Sexual harassment also exists if the sexual conduct unreasonably interferes with the victim's work performance or creates an intimidating or offensive working environment. This is often called "hostile environment" harassment. Any sexual activity can constitutes an extreme form of harassment.

Sexual harassment includes the following kinds of conduct:

- Sexual jokes, whether spoken on the job or forwarded through emails or faxes;
- Explicit pictures, graffiti, posters, or calendars;
- Vulgarity which interferes with job performance;
- Indecent exposure
- Abusive language;
- Improper touching;
- Vulgar nicknames;
- Repeated requests to a co-worker or subordinate for a date after refusals; and
- Sexually explicit music.

Hostile environments can be created not only by managers and supervisors, but also by co-workers, vendors, customers, or other non-employees. Additionally, regular instances of the types of conduct described above can create a hostile environment, even when the conduct is directed to no one person in particular.

Often, cases of sexual discrimination involve allegations of both quid pro quo and hostile work environment. A common fact pattern is one in which a supervisor persistently requests sex from a subordinate. The subordinate consistently refuses. Once the supervisor gets the hint, a campaign ensues to force the victim to voluntarily quit the dealership. For example, in one particular case, a female sales associate refused the sexual advances of the Sales Manager. In response, the rest of the sales associates "boxed her out" – that is they took every "up" and prevented her from engaging any customers. It is hard to make a living that way, so it should be no surprise that she sued and won.

As noted, harassment may also be committed by non-employees. Consider this example: an outside trainer regularly comes to the dealership to instruct employees, including women, on the use of an F&I menu system. In the course of this training, the male trainer fills his lectures with sexually degrading comments directed towards women. A situation like this should be brought to the immediate attention of dealership management or the human resources department at the dealership to avoid potential liability.

"Intolerable working conditions" that would compel a reasonable person to quit can also be a form of harassment. Examples of such behavior are having sexually suggestive calendars or pulling up porn on dealership computers. It is not a defense that the calendar or pictures are kept in an employee's desk drawer or that the computer porn can only be accessed with an employee's password. Even playing sexually-charged music could be deemed intolerable by some, and should be avoided. Again, these types of charges cannot be defended by claiming the conduct occurred in the privacy of an alleged offender's own office or workspace at the dealership.

Let's be clear: these types of conduct have no place at a dealership, or anywhere else. Engaging in this type of behavior can result in employees being disciplined or terminated, or in managers or owners getting sued. It cannot be stressed enough that this type of behavior is unacceptable. To quote Herman Edwards, "What you tolerate, you encourage."

Dealership personnel need to be trained to treat every co-worker, subordinate, vendor, and customer with respect and dignity. This will avoid even the appearance of sexual harassment, and enhance the dealership's reputation for professionalism and excellence. Training should stress that if any employee becomes aware of, or even suspects, any form of sexual harassment at the dealership, that behavior should be reported immediately to dealership management.

Yes, George, that's WRONG. ■

This article originally appeared in *Auto Dealer Today* magazine.

Jim Ganther is the co-counder and CEO of Mosaic Compliance Services, an attorney-led provider of online compliance programs for dealerships. He is a frequent speaker and author on compliance topics; his first book, Compliance for Green Peas (And Old Dogs Who Think They Know it All, was published in 2017. He and his wife, Melissa, have seven children. His hobbies include car insurance, curfews, and tuition.

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Contact:
Erin Murphy, emurphy@dealercounsel.com
NADC
1800 M Street, NW, Suite 400 South
Washington, DC 20036
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Jami Farris, Editor
jamifarris@parkerpoe.com

Michael Charapp, Assistant Editor
mike.charapp@cwattorneys.com

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1800 M Street, NW, Suite 400 South, Washington, DC 20036
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