MADISON LAW

The California Supreme Court Addressed the Viability of Class Action Waivers

The California Supreme Court has again taken up the issue of an individual consumer's ability to obtain remedies for similarly situated third parties. This change in the law may have a significant impact in the auto sales/auto finance industry.

The California Supreme Court recently ruled in *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, that companies cannot require individuals to waive their right to seek remedies for the public benefit, namely injunctive relief, predispute. In *McGill*, Citibank claimed that the arbitration clause contained in its credit card agreement prohibited an award against it unless that award was "on an individual (non-class, non-representative) basis." (*McGill* at 952.) Citibank clarified that its intention was

to prohibit its customers "from seeking public injunctive relief *in any forum*." (*Id.* at 955.) The Court concluded that a prohibition of the right to seek relief for the public benefit, prior to an actual dispute arising, violated California law. (*Id* at 961.)

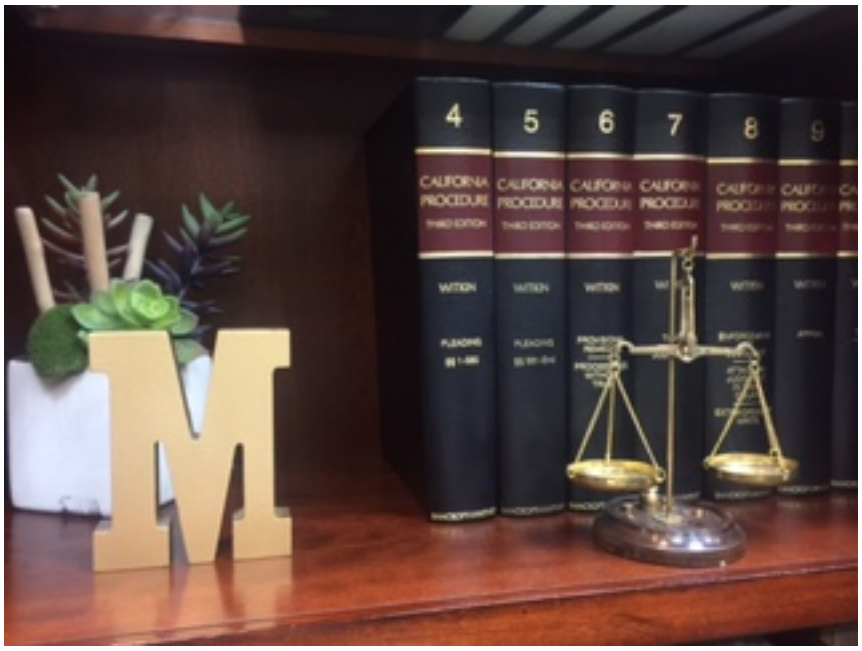
Many of our dealer and finance company clients have inquired as to what this ruling means in the context of auto sales and auto finance. We read *McGill* to resolve an issue that had been a point of contention. Specifically, whether claims for injunctive relief could be resolved in arbitration, or whether those claims must be resolved in the court system. In *McGill*, the Court declined to address the viability of the *Broughton-Cruz* rule, which held that claims for public injunctive relief under California consumer protection statutes are not arbitrable in California (*Id.* at 1088), in light of the U.S. Supreme Court's holding in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333 ("*Concepcion*"), which took a broad approach to arbitration agreements, including affirming the ability of companies to arbitrate class action claims. While *McGill* does limit the enforceability of arbitration clauses which seek to limit an individual's right to seek relief otherwise available, it does not hold that a claim for injunctive relief must be litigated in the court system, just that there must be some forum available for that claim to be litigated.Unlike the arbitration clause in *McGill*, the Arbitration Provision in the standard Retail Installment Sales Contract ("RISC") does not prohibit the arbitrator from issuing

injunctive relief, but does state that "[a]ny claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action." That waiver is likely invalid in light of *McGill*. However, an argument can be made that given *McGill's* prohibition against a blanket waiver, if the dealer/holder agrees to allow an arbitrator to resolve the issue of injunctive relief, ala *Concepcion*, *McGill's* limitations on waiver will never come to bear as the consumer will have a forum for the claim. The arbitration provision in *McGill* differed from the Arbitration Provision in the RISC in that it included language that invalidated the entire arbitration agreement where any portion of it was invalidated.

While we certainly expect a revision in the RISC's Arbitration Provision to clarify the extent of the agreement as it relates to agreements to arbitrate claims for the public benefit, we do not believe that *McGill* invalidates the RISC's Arbitration Provision outside of the class action waiver. Many consumer attorneys have attempted to argue that *McGill* unequivocally prohibits waivers of claims for injunctive relief. However, this reading of *McGill* goes too far as *McGill* only prohibits waivers of claims for injunctive relief "predispute." (*Id* at 961.) While the ability to obtain a class action waiver appears to be at its end, at least for now, the viability of the Arbitration Provision in the RISC appears to remain intact.

- James S. Sifers, Esq.

Let's Get Started



One last thing.

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