***Moving the Metal: The Auto Finance Podcast* — Lemon Law Shakeup: *Rodriguez vs. FCA US* has Unexpected Result**
Hosts: Brooke Conkle and Chris Capurso
Guest: Ethan Ostroff
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Brooke Conkle:

Welcome to *Moving the Metal*, the premier legally focused podcast for the auto finance industry. I'm Brooke Conkle, a partner in Troutman Pepper's Consumer Financial Services Practice Group.

Chris Capurso:

And I'm Chris Capurso, an associate in Troutman Pepper's Consumer Financial Services Practice Group.

Brooke Conkle:

Today, we're joined by Ethan Ostroff, a partner in our CFS Practice Group, and we will be discussing a recent decision from the Supreme Court of California. Before we jump into that, let me remind you to please visit and subscribe to our blogs. We have two great ones that may be of interest to you, TroutmanPepperFinancialServices.com and ConsumerFinancialServicesLawMonitor.com. Also, we have a bevy of other podcasts that you might find interesting. We have *The Consumer Finance Podcast*, which, as you might guess, is all things consumer finance related. *FCRA Focus*, a podcast dedicated to all things credit reporting. *Unauthorized Access*, a deep dive into the personalities and issues in the privacy, data, and cybersecurity industry. Finally, *Payments Pros*, a great podcast focused exclusively on the payments industry. All of these insightful shows are available on your favorite podcast platform, so check them out.

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Today, as I previously mentioned, we're discussing the recent decision of Rodriguez versus FCA US from the Supreme Court of California.

Chris Capurso:

As Brooke said, we've got Ethan with us, who, in addition to being a Tottenham Hotspur fan like myself, and for our listeners, we know this is probably the first time ever that Tottenham fans are

going to outflank city fans on anything, let alone a podcast, Ethan is also a partner in our Consumer Financial Services Practice Group. Ethan, tell us a little bit of background about your practice.

Ethan Ostroff:

Yeah. Thanks, Chris. I appreciate you guys having me on. I do a wide variety of work, both litigation and compliance and regulatory work for companies of all types and sizes, a lot of FinTech work and also, a lot of work with indirect auto finance company. I was particularly interested when I saw this decision, Rodriguez, come out and how it might impact manufacturers and dealers and auto finance companies. I also will just selfishly plug the podcast that I host, *The Crypto Exchange*, where I'll mention, we recently talked about the California DMV putting 42 million car titles on blockchain in an attempt to fight fraud and look forward to, perhaps, talking with you all on your podcast about that sometime in the future.

Brooke Conkle:

Great. Thanks, Ethan. As you mentioned, we're going to talk about the Rodriguez decision from the California Supreme Court. Just to orient us a little bit, Ethan, as you know, California, not always a great place to be as a corporate defendant. Rodriguez comes in a long line of cases from the California Supreme Court that have an impact on the auto finance industry. In 2017, the Supreme Court of California issued the McGill versus Citibank decision, which is an arbitration decision and does not have, I would say, a direct impact on auto finance and did not directly deal with legal issues concerning auto finance, but did have important implications for arbitration clauses that might be in retail installment sales contracts.

Specifically, the Supreme Court found that an arbitration provision was invalid, because it waived a plaintiff's right to seek public injunctive relief. Then just a couple of years ago, we all know the Pulliam versus HNL Automotive decision, the California Supreme Court finding that the holder rule does not limit the amount of attorney's fees that a prevailing plaintiff can recover against the holder of a retail installment sales contract if state law authorizes an award of attorney's fees. A very long-winded way of saying that liability, or potential liability, in California can be significant in large measure because of the legal framework that has been espoused and created by the California Supreme Court. Chris, tell us a little bit about the factual background behind this Rodriguez case.

Ethan Ostroff:

Sure. This feels like a throwback to law school. Mr. Capurso described the facts of the case. It's one of the areas I was good at. In 2013, the plaintiffs bought, and as soon as I read this, I had to do my best Will Arnett voice, a 2011 Dodge Ram 2500 from a dealer, a used car dealer in California. At the time of the sale, the vehicle was about two years old with a little over 55,000 miles on it. The three-year $36,000 mile bumper-to-bumper warranty on the truck had expired, but the five-year 100,000-mile powertrain warranty issued by the vehicle's manufacturer had remained in effect. While the powertrain warranty was still in effect, the plaintiffs repeatedly experienced engine problems and had to take the vehicle into authorized repair facilities for the manufacturer for repair. But those issues continued to persist. Ultimately, they took the vehicle in for a repair five times. Finally, several years later, the plaintiff sued the manufacturer for,

among other things, violating California's Song-Beverly Act. Specifically, that acts refund, or replace provision.

The plaintiffs had alleged that they had afforded the manufacturer a reasonable number of attempts to repair the vehicle, and that because the manufacturer failed to repair it to conform to the applicable warranty, they were entitled to restitution of the purchase price, or replacement vehicle. Now, the manufacturer moved for summary judgment on the ground that the refund, or replace remedy applied only to a new motor vehicle, and that plaintiff's car was not a new motor vehicle within the meaning of the act. The trial court held a hearing, and it actually granted the manufacturer's motion. The court of appeal affirmed, holding the phrase, in the act, other motor vehicle sold with a manufacturer's new car warranty does not cover the sale of “previously owned vehicles with some balance remaining on the manufacturer's express warranty.”

Based on that language, the court construed that disputed phrase as what they called a catch-all for sales of essentially new vehicles where the applicable warranty was issued with the vehicle. The court distinguished this result from its prior precedent, which had stated that the phrase, other motor vehicle sold with a manufacturer's new car warranty covered “car sold with a balance remaining on the manufacturer's new motor vehicle warranty.” The thought being that that phrase could cover a used motor vehicle that still had pieces of a manufacturer's original warranty still in effect. Those are the basic facts, without getting too much into the holdings of the prior cases, because that's going to come up a little bit later when we discuss the reasoning of the court.

Chris Capurso:

I think in the context of the McGill and the Pulliam cases that you mentioned at the outset, Brooke, we saw the tide turning against manufacturers and dealers and auto finance companies. This opinion, I mean, it basically overturned about 30 years of case law, right? Because, I think, since the Jensen decision in ’95, I believe, this had been interpreted, the Song-Beverly Act and this provision, had been interpreted in the way asserted by the plaintiffs here.

Very interesting that we got a unanimous opinion from the California Supreme Court holding that the state's Lemon Law does not cover used cars, when the vehicle has an unexpired manufacturer's warranty. Basically, found that new automobiles under the Song-Beverly Act applies to vehicle sold as new with full manufacturers' warranties, but not to used ones that come with unexpired warranties.

I think the court went through a pretty straightforward typical analysis that leaves one scratching their head as to how this language, which was, I believe, added in an amendment to the Song-Beverly Act in 1998 took so long to get interpreted. In this case, this Jensen case took so long to get distinguished, I would say, in this context. Because I think the court did end up discussing the Jensen case and basically said, Jensen involved a lease by a manufacturer affiliated dealer who issued a full new car warranty along with the lease. The court, in this case, in the Rodriguez case, really took pains to limit the holding of that case and basically disapprove of the reasoning to the extent it could be applied outside of that limited factual scenario.

The court went through a pretty typical statutory analysis, acknowledged at the outset that both the plaintiffs in the manufacturer in this instance had what it described as reasonable readings

of how the statute could be construed. I think, effectively, the plaintiff said, “Hey, look. This can apply to any vehicle sold with an unexpired manufacturer's new car warranty.” FCA, the manufacturer said, “No, it only applies to a vehicle with the manufacturer's new car warranty that was issued with the sale.”

The court went through the process of its statutory interpretation, looked at the legislative history of not just this act, but other acts by the California legislature and basically said, “Look, we think the legislature knows how to make remedies under California statutes applicable to used goods, including used cars, and they didn't do it here in a way they had done in other places.” That, in their mind, further justified limiting the applicability of the Song-Beverly Act to just vehicles sold as new with full manufacturers warranties, but not to use ones that come with unexpired warranties.

Brooke Conkle:

Yeah. Ethan, I think what I found really interesting about this opinion, one was two things. Both you and Chris have highlighted this word that the court really seems to have grasped onto and it's the word issue. That seemed to be the focus for the court. When is the warranty issued? Is it issued at the time of sale, or was it issued at a prior point? That seemed to be the trigger line for the court here. When is the warranty issued, and that's going to tell you whether or not a vehicle warranty is covered under the Song-Beverly Act.

Then secondly, the thing as a opinion nerd and as someone who came through in the new wave of law school, this is a very textualist opinion. A court that probably is going to have very little in common with Justice Scalia is still following a tradition that he set out on how to read law, how to interpret law, how to structure a legal analysis. Ethan, you're exactly right. It takes a very measured walk through the statute, figuring out what certain phrases mean in connection with other portions of the statute. Then thirdly, Ethan, exactly as you mentioned, we have a court that has given us McGill, a court that has given us Pulliam, and I would not have expected this from the court. It is a decision that, as you said, goes back on 30 years of precedent and winds up with a decision that isn't necessarily unfriendly to consumers, but does not construe the Song-Beverly Act in a way that would be to the manufacturer's detriment. Chris, what do you think this means going forward, specifically for vehicle manufacturers?

Chris Capurso:

Before I get to what, I think, this means for manufacturers, I just wanted to note that you're talking about the textual approach. What I appreciated as the non-litigator in this triumvirate here is that this is the way I look at things when we're trying to figure out if a statute applies, or trying to figure out what requirements may be imposed on any client is like, okay, is this term defined somewhere else? Or does the law use this term somewhere else, so that we can have an argument later on if a regulator comes knocking that, “Oh, well. You defined it over here.”

It was very refreshing to see the court go through that entire analysis and be like, well, they defined used goods over here. They know how to do that. They didn't do it here. Specifically, having the call out to demonstrators in the definition. They're specifically calling out a sliver of what could be called a used vehicle liberally. I appreciated that, because sometimes when I read cases, I was like, man, that's not the approach I would take and I'm not a litigator. Different approaches for different people, but I appreciated that this followed where my logic would go.

To your original question, Brooke, how do manufacturers feel? I'm sure they're elated. I mean, this is wonderful news. One thing I appreciate it is that at the end, even though the court wouldn't talk about it, understandably so, they still outline the policy arguments of each side and why each side believed that they were correct and the long-standing ramifications of what the court could decide and how it would affect consumers and how it would affect manufacturers. Consumers talked about, you're leaving buyers of used cars just hanging with this worthless warranty and now we're subject to all these defects.

The manufacturer saying, the chain of title of a used vehicle could go through dozens. I mean, literally it could go through dozens of people by the time one of these warranties expires and who knows who's had it? The intent behind the law was to have the manufacturer be responsible if they were the most recent party. In this case, it could have gone through many people. It could have been tampered. Any number of things could have happened in there. The onus shouldn't be on the manufacturer to try to fix something that could have happened 10 owners ago, just because the time period is still there. I thought it was a fair argument.

The court obviously didn't get into the policy arguments, and for the manufacturer side, it really didn't matter because they sided with them. I thought that was interesting. I think that goes to how manufacturers are going to feel. Now, as Ethan noted, if 30 years, unbelievably, when he said 30 years and it was 1995, I broke a little. But 30 years of case law about this question about whether a used vehicle could be covered is now gone. Manufacturers can be like, “Oh, I can actually read the law the way it reads and the way it should read and have it actually apply the way it should apply.” I would imagine they're elated.

Brooke Conkle:

Yeah. I think what's interesting for dealers and for auto finance companies is by taking out used cars from the scope of the Song-Beverly Act, you limit, slightly, the plaintiff's counsel's ability to add additional claims. This is not going to mean that suddenly, the plaintiff's lawyers in California don't have the tools in their arsenal to be able to bring suits. It likely just means that there's one fewer claim that's going to be on a motor vehicle-based case.

One of the things that I did find interesting towards the end of the opinion was that the Supreme Court addressed some of the concerns about, well, how do consumers who have used motor vehicles that have some warranty remaining? Where do they go? The court says, okay, you're not without recourse. You go either to the California UCC, or you go to the Federal Mag-Moss Act. What's interesting as someone who often is defending companies that are on the defendant’s side is that plaintiff's lawyers probably aren't going to like either of those options. One, the California UCC is not going to provide for attorney's fees, so that doesn't necessarily work out well for plaintiffs. Then on the Mag-Moss side, that's a federal claim. The majority of plaintiff's lawyers would much rather be in state court.

The prevalence of Song-Beverly claims probably is going to decrease. Whether that's a significant decrease or not still remains to be seen. For auto finance companies and for dealers, this decision is good news overall.

Ethan Ostroff:

Yeah. I mean, I tend to agree good news. Although, like you said, look, I mean, typically, you're going to see a complaint with five, six, seven, eight, nine different counts, right? A whole bunch of different defendants all involved. I think, practically speaking, you're just going to see less counts enumerated in the same complaint, but plaintiff's lawyers at the end of the day, is seeking precisely the same type of relief and remedies they seek now for the most part. I don't envision, quite frankly, the valuation by plaintiff's lawyers of these types of cases changing much.

Chris Capurso:

With that, that'll wrap it up for today's podcast. Thank you to our audience for tuning in. Don't forget to check out our blogs, where you can subscribe to the entire blog, or to just the specific content you find most helpful. That's the ConsumerFinancialServicesLawMonitor.com and the TroutmanPepperFinancialServices.com blogs. While you're at it, in addition to blogs, as Ethan noted, check out *The Crypto Exchange*, which he hosts and releases episodes regularly. You should also head out over to troutmanpepper.com and sign up for our Consumer Financial Services mailing list, so that you can stay abreast of current issues with our insightful alerts and advisories and receive invitations to our industry insider webinars. Of course, please mark your calendars for a great new episode of *Moving the Metal*, which will be released in two weeks. Until next time.