No. S266034

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LISA NIEDERMEIER,

Plaintiff and Respondent,

v.

FCA US LLC,

Defendant and Appellant.

California Court of Appeal, Second District, Division One
Civil No. B293960
Appeal from Los Angeles County Superior Court
Case No. BC638010
Honorable Daniel Murphy

EXHIBITS TO MOTION FOR JUDICIAL NOTICE
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Punitive damages may not imposed absent actual injury. The Supreme Court of California stated the rule applicable here in *Mother Cobb's Chicken Tea, Inc. v. Fox*, 10 Cal.2d 203, 204, 73 P.2d 1185 (1937):

> "The foundation for the recovery of punitive or exemplary damages rests upon the fact that substantial damages have been sustained by the plaintiff. Punitive damages are not given as a matter of right, nor can they be made the basis of recovery independent of the showing which would entitle the plaintiff to an award of actual damages. Actual damages must be found as a predicate for exemplary damages. This is the rule announced in many authorities."

Accord, *Esparaza v. Specht*, 55 Cal.App.3d 1, 6, 127 Cal.Rptr. 493 (1976) ("It is well settled in California that punitive damages cannot be awarded unless actual damages are suffered".)

By imposing a civil penalty that constitutes punishment for the exercise of a constitutional right, A.B. 2057 is unconstitutional.

III. A.B. 2057 IS UNCONSTITUTIONAL BECAUSE IT DELEGATES JUDICIAL POWER TO ARBITRATORS

A.B. 2057 also violates the Constitution because it impermissibly delegates judicial authority to non-judicial entities. Two provisions of the California Constitution bar any such attempt. The first, Article III § 3, provides that:

> "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

The second, Article VI, § 1, states that:

> "The judicial power of this State is vested in the Supreme Court, courts of appeal, superior courts, municipal courts, and justice courts. All except justice courts are courts of record."

The constitutional bar posed by these sections to delegation of judicial power has been consistently recognized by the courts. For example, *in Standard Oil Company of California v. State Board of Equalization*, 6 Cal.2d 557, 59 P.2d 119 (1936), petitioner sought a writ of certiorari to review a State Board of Equalization order imposing an additional assessment of retail sales tax. The Supreme Court raised sua sponte the issue of propriety of such review, concluding as follows:

> "Concisely stated, our conclusion that we are without authority or jurisdiction to entertain this proceeding or to issue the writ here sought, is based upon the established premises that a writ of certiorari. . .will lie only to review the exercise of judicial functions . . . *and that the legislature is without power, in the absence of constitutional provision authorizing the same, to confer judicial functions upon a statewide administrative agency of the character of the respondent.*"
>
> 6 Cal.2d 559. (Emphasis added.)

The Court based its conclusion on Article VI, § 1 of the Constitution, *See* 6 Cal.2d at 559-65.

California Supreme Court cases since *Standard Oil* have raised the delegation issue primarily in situations concerning the proper standard of judicial review of decisions of administrative agencies, and have emphasized the impropriety of delegation of judicial powers. For example, in *Laisne v. California State Board of Optometry*, 19 Cal.2d 831, 123 P.2d 457 (1942), appellant argued that he was entitled to *de novo* review of an order of the Board of Optometry revoking his certificate of registration to practice optometry. The Court first restated the doctrine that delegation of judicial power is unconstitutional under Article III, § 3 and Article VI, § 1 of the California Constitution:

> "The powers of the government of the state are divided into three separate departments -- the legislative, executive and judicial. (Article III, section 1, of the state Constitution.) State-wide judicial power may be exercised by only three *enumerated* courts, viz., the Supreme Court, the District Court of Appeal, and the superior courts. (Article VI, section 1, of the state Constitution.) . . .If, therefore, some agency with state-wide jurisdiction, other than one of the enumerated courts, without sanction by constitutional amendment, exercises or attempts to exercise judicial power, such action is in direct violation of the articles of the state Constitution cited above."
>
> 19 Cal.2d at 834-35 (Emphasis in original.)

The Court concluded that failure to accord the appellant *de novo* review of the agency proceeding would violate the bar to delegation of judicial functions. *Id.* at

835. *See also Drummey v. State Board of Funeral Directors & Embalmers*, 13 Cal.2d 75, 87 P.2d 848 (1939); *Bixby v. Pierno*, 4 Cal.3d 130, 93 Cal.Rptr. 234, 481 P.2d 242 (1971).

A.B. 2057 delegates judicial power because it gives arbitrators the power to issue binding decisions in warranty disputes and gives a state agency the authority to "certify" and "verify" a judicial process, functions traditionally left to the courts.

Resolution of disputes between private parties by making binding decisions is a judicial function which cannot be delegated to a non-judicial body. Thus, in *Jersey Maid Milk Products Co. v. Brock*, 13 Cal.2d 620, 91 P.2d 577 (1939), the Court struck down as unconstitutional a section of the Milk Stabilization Act authorizing the Director of Agriculture to determine the amount of damages due in disputes between producers and distributors of milk, and to "make an order directing the offender to make reparation and pay to such person complaining such amount on or before the date fixed in the order." 13 Cal.2d at 651. Similarly, in *Hustedt v. Workers' Compensation Appeals Board*, 30 Cal.3d 329, 178 Cal.Rptr. 801, 636 P.2d 1139 (1981), the Supreme Court struck down as unconstitutional a state statute granting the Worker's Compensation Appeals Board the power to issue "final" orders disciplining attorneys by temporarily or permanently prohibiting them from practicing before the Board. While limited judicial review of such orders was provided by the statute, the Court found that the review was insufficient to allow it to exercise its judicial functions and hence to remedy the unconstitutional delegation of the court's inherent authority. 30 Cal.3d at 339-40.

Numerous other California decisions which uphold delegations of authority emphasize the non-binding nature of the determinations involved and/or the availability of full judicial review. *See, e.g., Collier & Wallis v. Astor*, 9 Cal.2d 202, 70 P.2d 171 (1937) ("While a statute which makes the decision of arbitrators, or of an administrative officer, final and conclusive may not be sustained, if the statute gives to the parties the further right to appeal, or other procedure to carry the case before a regular judicial tribunal and have the issues there tried, it does not operate to deprive the parties of any constitutional right and is therefore valid"); *Cowell v. Clark*, 37 Cal.App.2d 255, 99 P.2d 594 (1940) (court held delegation of power to real estate commissioner was not unconstitutional because "no one of the provisions under attack purports to declare that any one of the administrative determinations of the defendant may not be reviewed by the courts"); *In re Shattuck*, 208 Cal. 6, 279 P. 998 (1929) (delegation of authority to State Bar constitutional where Bar's actions not final and court issues orders on Bar's decision); *Brydonjack v. State Bar*, 208 Cal. 439, 281 P. 1018 (1929) (same).

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A.B. 2057 empowers arbitrators to "[r]ender decisions which are binding on the manufacturer, if the buyer elects to accept the decision." Thus, the proposed amendment does what the authorities prohibit -- it removes from the judicial realm the resolution of disputes through binding decisions -- and hence is unconstitutional.

California decisions also demonstrate that certain matters traditionally adjudicated by the courts cannot be delegated, even where subsequent review by a judicial body exists. For example, in *Reaves v. Superior Court*, 21 Cal.App.3d 587, 99 Cal.Rptr. 156 (1971), petitioners sought a writ of mandate directing the San Joaquin County Superior Court to adopt new procedures for processing extraordinary writ petitions filed by inmates. Under the existing procedure, such petitions were reviewed initially by the presiding judge of the Superior Court, but then were forwarded to the district attorney for verification and/or development of information. The district attorney prepared a proposed order based on the facts, or, if the petition presented unusual facts, the presiding judge reviewed the matter and directed the district attorney to prepare an appropriate order. In either case, orders were reviewed and entered by the court. The court held that the County's procedures improperly delegated judicial power:

> "The question is not whether the district attorney is scrupulously fair in such matters. Rather, *the question is whether the trial court has abdicated its judicial responsibility by delegating this function to the district attorney.* We think this point is well taken regardless of the fact the respondent court declares in its affidavit that in every instance it exercises its own independent discretion in reviewing the petitions and the orders drafted by the district attorney."
>
> 22 Cal.App.3d at 596. (Emphasis added.)

In *Reaves*, it was the nature of the delegated activity itself rather than the lack of later judicial review which compelled the court to find an unconstitutional delegation of judicial function. *Cf. Esteybar v. Municipal Court for the Long Beach Judicial District of Los Angeles County*, 5 Cal.3d 119, 95 Cal.Rptr. 524, 485 P.2d 1140 (1971) (statute requiring consent of prosecutor before magistrate could hold defendant charged with a misdemeanor violated separation of powers); *People v. Tenorio*, 2 Cal.3d 89, 89 Cal.Rptr. 249, 473 P.2d 993 (1970) (requiring court to obtain district attorney's approval before striking prior convictions unconstitutional).

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Like the situation in *Reaves*, judicial power under A.B. 2057 is improperly delegated in the first instance. The Bureau of Automotive Repair, an agency of the executive branch, is charged with the responsibility of certifying and auditing judicial processes. Arbitrators are charged with the responsibility of finding facts and, presumably, have the authority to determine questions of law. In *Reaves*, at least a judge gave the matter his independent review, yet the practice still was held unconstitutional. A.B. 2057 makes the same mistakes and should, for the same reasons, be held invalid.

IV. THE STATE STATUTE CONFLICTS WITH POLICIES EXPRESSED IN THE FEDERAL MAGNUSON-MOSS ACT

The Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.* ("Magnuson-Moss"), preempts A.B. 2057. Magnuson-Moss delegates to the Federal Trade Commission ("FTC") the responsibility for establishing standards for informal dispute resolution mechanisms. A.B. 2057, however, requires dispute resolution features that are contrary to those expressed by the FTC.

Any preemption analysis begins with the Supremacy Clause of the U.S. Constitution. Where federal and state laws conflict, federal law is supreme. A federal statute can preempt a state law in three ways. First, the federal law can expressly preempt state law. Second, federal law can occupy the field of regulation such that it is implicit that Congress meant to prevent states from regulating in the field. Third, federal law can implicitly preempt state law if state law actually conflicts with federal law. This last form of preemption exists if it is impossible to comply with both the state and federal statutes, or if the state statute stands as an obstacle to the full accomplishment of the objectives of Congress. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n.*, 461 U.S. 190, 203-04 (1983).

While Magnuson-Moss may not occupy the field, since it states that "[n]othing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law," 15 U.S.C. §2311(b)(1), nevertheless it implicitly preempts A.B. 2057 because of *actual* conflicts between the two statutes. Thus, A.B. 2057 contains state policy choices contrary to those reached by the federal government. The Court in *Chrysler Corporation v. Texas Motor Vehicle Comm'n*, 755 F.2d 1192, 1205-06 (5th Cir.), *reh'g denied*, 761 F.2d 695 (5th Cir. 1985), ruled that "[w]e think it plain that the preclusive effect of section 110 [of Magnuson-Moss] is limited to rules governing informal dispute resolution procedures created by private warrantors. . . ." 755 F.2d at 1206. A.B.

2057 contains exactly those rules governing informal dispute resolution procedures which the Court stated were precluded.

Rather than leaving to the states the authority to make rules in this area, Congress instead gave to the FTC authority to prescribe regulations to implement Congress' policy of encouraging informal dispute resolution mechanisms (15 U.S.C. § 2310(a)(1)):

> "The Commission shall prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this chapter applies. Such rules shall provide for participation in such procedure by independent or governmental entities."
>
> 15 U.S.C. §2310(a)(2).

Under this authority, the FTC has made its judgments about which requirements will encourage manufacturers to establish dispute resolution procedures, and which ones will not. Under A.B. 2057, however, the state has made *contrary* determinations in certain areas.

1. The Binding Nature Of The State Mechanism Conflicts With The FTC Determination That Such Mechanisms Should Not Be Binding

A.B. 2057 conflicts with Magnuson-Moss by providing for *binding* resolution of automobile warranty disputes. Thus, unlike Magnuson-Moss, A.B. 2057 provides that a qualified dispute resolution process must not only comply with the minimum requirements of the FTC (16 C.F.R. § 703 *et seq.*) but also must

> "(B) Render decisions which are binding on the manufacturer if the buyer elects to accept the decision."
>
> A.B. 2057, Sec. 2 at 13 (proposed amendment to Section 1793.2(e)(3)(B) of Civil Code).

However, the FTC in 16 C.F.R. § 703.5(j) has explicitly provided to the contrary:

> "Decisions of the Mechanism shall *not* be legally binding on any person."
>
> (Emphasis added.)

The FTC has stated explicitly that it made this determination because, in the Commission's judgment, it was the most likely way to fulfill Magnuson-Moss'

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statutory charge to encourage manufacturers to establish warranty dispute resolution mechanisms:

> "Many consumer representatives stated that Mechanism decisions should be binding on the warrantor alone, because the warrantor is the party who has chosen the Mechanism as the forum for dispute resolution. The Rule presently requires the warrantor to act in good faith in deciding whether, and to what extent, it will abide by Mechanism decisions. Thus, an adverse Mechanism decision will have a far greater impact on a warrantor than it will on a consumer. The Commission is not persuaded that making this impact on the warrantor even greater would benefit consumers more than it would discourage warrantors from adopting Mechanisms."
>
> FTC Statement of Basis and Purpose, 40 Fed. Reg. at 60210-211.

Thus, in an area committed by Congress to the judgment of the FTC, A.B. 2057 has expressed a judgment contrary to that of the FTC.

2. The State Statute Conflicts With The Federal Policy Encouraging National Dispute Resolution Processes

In several ways A.B. 2057 conflicts with the national federal policy of encouraging manufacturers to establish dispute resolution mechanisms. It does so by creating the requirement that mechanisms be local. Thus, the bill vests authority in a state agency, the Bureau of Automotive Repair, requiring the Bureau 1) to determine if a dispute resolution mechanism should be certified; 2) to conduct a periodic review of the procedure; and 3) to investigate consumer complaints and, if necessary, recommend that the Department of Motor Vehicles commence license revocation hearings. In addition, A.B. 2057 vests in civil juries the authority to determine if a dispute resolution procedure willfully fails to comply with the FTC standards. Since a California agency *only* can regulate constitutionally within its own borders, *see Archibald v. Cinerama Hotels*, 73 Cal.App.3d 152, 159, 140 Cal.Rptr. 599 (1977), the only way a manufacturer could comply with the California statute is to have its resolution process operate only *within California.* But this requirement of *local* dispute resolution mechanisms directly conflicts with the determination made by the FTC to encourage national mechanisms.

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Thus, in providing that oral presentations in a dispute resolution process only be optional (and then only if both parties agree), 16 C.F.R. § 703.5(f), the FTC concluded that the way to fulfill the statute's mandate of encouraging expeditious mechanisms was to encourage a variety of mechanisms, including *national* mechanisms:

> "It is recognized that several existing mechanisms operate at a national level and do all of their information gathering by telephone or mail. To require an opportunity for an oral presentation at a reasonable time and place would make it impossible for these mechanisms to achieve the expeditious settlement of disputes which is envisioned by Section 110(a) of the Act.
>
> * * *
>
> "Several witnesses suggested that an oral presentation should be allowed when the consumer requests, or when either party requests. These comments did not adequately support the view that the right to an oral presentation is essential at this informal level of dispute settlement. Since the need to foster a variety of Mechanisms, including national ones, is greater than the need for oral presentations at the behest of the parties, the Commission has retained this provision [as it is]."
>
> FTC Statement of Basis and Purpose, *supra*, 40 Fed. Reg. at 60209.

A.B. 2057, however, contradicts this determination of the FTC. Moreover, A.B. contradicts the unequivocal command of Magnuson-Moss which vests the *FTC* with authority to "review the bona fide operation of any dispute settlement procedure" and to take appropriate remedial action if it finds non-compliance with any of the FTC's rules. 15 U.S.C. § 2310 (a)(4). In preferring local determinations over those national judgments reached by Congress and the FTC, A.B. 2057 stands as an obstacle to the full accomplishment of Magnuson-Moss' objectives.

Congress commanded that the FTC be the entity to make judgments regarding the efficacy of dispute resolution mechanisms, and the cases clearly provide that "considerable weight should be accorded to an executive department's construction of a statute it is entrusted to administer." *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). *See also United States v. Shimer*, 367 U.S. 374, 383 (1961). Federal agencies implementing federal

law can preempt state action, just as Congress can. *Fidelity Federal Savings & Loan v. de la Cuesta*, 458 U.S. 141 (1982). A.B. 2057 conflicts with the FTC determinations, and thus is preempted.

V. THE STATUTE AFFORDS CONSUMERS AND MANUFACTURERS UNEQUAL TREATMENT IN REGARDS TO FUNDAMENTAL RIGHTS, AND THUS DENIES MANUFACTURERS THE EQUAL PROTECTION OF THE LAWS

A.B. 2057 provides that the decision in a dispute-resolution mechanism is binding on the manufacturer if the customer elects to make it so. (Civil Code § 1793.2(e)(3); A.B. 2057 at 7.) While parties to a voluntary arbitration may agree to be bound without the right of appeal, A.B. 2057 compels manufacturers to resort to a binding arbitration process through the imposition of civil penalties. (See Section I and II, *supra*.) This compulsion, and the inequality of the appeal process under the bill, violate constitutional guarantees of equal protection under the laws.

The equal protection clause of the United States Constitution provides:

> "No State shall ... deny to any person within its jurisdiction the equal protection of the laws."
>
> U.S. Const. amend. XIV, § 1.

The California Constitution provides:

> "A person may not be ... denied equal protection of the laws;
>
> "A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens."
>
> Cal. Const., Art 1, § 7.[5]

Under the equal protection clauses of the federal and California constitutions there is a basic inquiry: does the law in question treat similarly

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[5] This memorandum analyzes decisions under both the federal and California Constitutions because the equal protection clause of the latter has "independent validity" apart from the Fourteenth Amendment under California law. *Gay Law Students Ass'n v. Pacific Telephone & Telegraph Co.*, 24 Cal.3d 458, 469, 156 Cal.Rptr. 14, 595 P.2d 592 (1979). The California Constitution states explicitly that "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." Cal. Const. Art. I, § 24.

situated persons in a similar manner?[6] In examining this question, both federal and California courts traditionally analyze the equal protection right under a two-tier analysis. Under the first tier, if the legislation in question establishes a "suspect" distinction between classes, such as one based on race or national origin, or if a "fundamental right" (such as speech) is granted to one class of persons and denied another, the legislation is viewed under the "strict scrutiny" test. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 216-17 (1982); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); *Bobb v. Municipal Court*, 143 Cal.App.3d 860. 865, 192 Cal.Rptr. 270 (1983). When strict scrutiny analysis is applied, the statute is invalid unless the state can establish that it has a compelling governmental interest that is precisely served by the classification:

> "The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right.' With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest."
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> *Plyler v. Doe, supra*, 457 U.S. at 216-17; *accord, Darces v. Woods*, 35 Cal.3d 873, 885-86, 201 Cal.Rptr. 287, 679 P.2d 458 (1984).

The second tier of analysis, employed where neither a suspect classification nor fundamental right is in question, is the "rational basis" test. Under this test, the presumption of constitutionality shifts; state or local legislation will be upheld unless the plaintiff can demonstrate that there is no rational basis for the distinction in the legislation. As the Supreme Court explained in *Vance v. Bradley*, 440 U.S. 93 (1979):

> "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial

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[6] *See, e.g., F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); *Purdy and Fitzpatrick v. State of California*, 71 Cal.2d 566, 578, 79 Cal.Rptr. 77, 456 P.2d 645 (1969).

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> intervention is generally un varranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."
>
> 440 U.S. at 97.

Rational basis analysis is most often employed where the legislation at issue has regulated economic relationships, such as statutes involving the licensing of professionals. *See, e.g., Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Brandwein v. California Board of Osteopathic Examiners*, 708 F.2d 1466, 1470 (9th Cir. 1983).

A.B. 2057 violates the equal protection clause by infringing on fundamental rights, without compelling justification.

A. THE STATUTE DENIES ONLY MANUFACTURERS THE RIGHT OF ACCESS TO THE COURTS

A.B. 2057 violates the equal protection clause of the California constitution by denying automobile manufacturers their basic right of access to the courts. The California Constitution separately protects the right to a jury trial, Cal. Const., Art. I, § 16, and where a trial by jury is available, that right may not be denied by statute. *People v. Wardlow,* 118 Cal.App.3d 375, 384, 173 Cal.Rptr. 500 (1981). As the Court noted in *Byram v. Superior Court*, 74 Cal.App.3d 648, 654, 14 Cal.Rptr. 604 (1977), "[t]he right to trial by jury is a basic and fundamental part of our system of jurisprudence (citations omitted)," citing, *inter alia*, the California Constitutional provision guaranteeing the right to jury trial. Since an action for breach of warranty entitles the parties to a jury trial (*see* section IIA, *supra*), A.B. 2057 discriminates against manufacturers with regard to a fundamental right. Strictly scrutinizing A.B. 2057 yields no "precisely tailored" classification to serve a *compelling* state interest in making this discrimination.

B. THE STATUTE DENIES ONLY MANUFACTURERS THE OPPORTUNITY FOR JUDICIAL REVIEW

The second fundamental right impinged by A.B. 2057 is the right of equal judicial review. As noted above, the bill would allow the customer *de novo* judicial review of the decision of the dispute resolution process. With respect to the

manufacturer, however, there is no right to review if the customer elects to bind the manufacturer. This unequal treatment violates the equal protection guarantees.

The Supreme Court has held that, if an appeal process has been provided by the state, that process must be equally available to all parties. The leading case is *Lindsey v. Normet*, 405 U.S. 56 (1972). In *Lindsey*, an Oregon statute required defendants in a forcible entry and detainer ("FED") action to provide, in addition to a normal appeal bond, a second bond for the payment of twice the rental value of the premises during the pendency of the action. 405 U.S. at 76. The Court held that this double-bond requirement violated the equal protection clause of the Fourteenth Amendment by unfairly and arbitrarily burdening FED defendants. 405 U.S. at 76-77. Stated the Court, "[w]hen an appeal is afforded . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." 405 U.S. at 77.

Because A.B. 2057 establishes disparate opportunities of appealing the decision of an arbitrator in an automobile warranty claim, the bill impinges on the right to an equal opportunity of appeal, as set forth in *Lindsey*. Again, no compelling state interest justifies this unequal treatment. While the state may have an interest in ensuring that automobile warranty disputes are handled expeditiously through arbitration, the state can ensure that goal without denying to manufacturers their right to a jury trial or judicial review: the classification is not "precisely tailored" to accomplish its objective.

C. THE ONE DECISION APPLYING A LESSER EQUAL PROTECTION STANDARD FOR A TOTALLY DIFFERENT KIND OF LEMON LAW HAS NO APPLICATION HERE

One court has applied a "minimum rationality" standard in evaluating an equal protection challenge to a lemon law, but that decision has no application to an analysis of A.B. 2057. In *Chrysler Corp. v. Texas Motor Vehicle Commissioner*, 755 F.2d 1192 (5th Cir. 1985), Chrysler made two equal protection challenges to the Texas law: 1) that by providing for fines against a losing manufacturer pending the appeal of an administrative board's decision, the Texas statute treated manufacturers differently than purchasers; and 2) that in allowing purchasers the right to a *de novo* trial after the administrative process, but refusing to attach prejudice to the administrative decision if the consumer lost, the statute treated consumers and manufacturers differently, for manufacturers possessed no corresponding right to a lawsuit free from the prejudice attaching to the administrative decision. The Court rejected both arguments, the first because

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Chrysler *did* have a method under Texas law to secure prompt review without paying fines, and the second because it concluded the statute discriminated with regard to economic relationships, which was within the province of the Texas legislature. This decision, and the statutory scheme it considered, differ markedly from California decisions and the reach of A.B. 2057.

To begin with, *Chrysler* did not consider the argument that discriminations with regard to a fundamental right to jury trial under a state Constitution violate equal protection guarantees under that state's Constitution. Rather, the *Chrysler* analysis applies only to the federal Constitution, not with regard to any analysis of fundamental rights under state law. Yet, as noted, California law explicitly provides that the right to jury trial in a civil case is a fundamental right, and that discriminations with regard to fundamental rights are barred by the state's equal protection clause. The Texas law in any event was fairer; although it gave consumers, not manufacturers, a second opportunity to litigate *de novo*, it also at least gave consumers and manufacturers an equal opportunity to review of the administrative board's decision. A.B. 2057, of course, gives manufacturers *no* right to review of the arbitrators' decision.

Moreover, the argument advanced in *Chrysler* clearly did not implicate fundamental rights. Texas decided to give purchasers two bites at the apple, but to give manufacturers only one. This constituted discrimination in economic regulation, the Court ruled, for which the state needed little justification. Although the Court's reasoning is somewhat circular -- finding that manufacturers and purchasers were not similarly situated because the Texas law did not treat them as similarly situated -- nevertheless, the classification there clearly differed from a classification which differentiated with respect to fundamental rights.

VI. A.B. 2057 IS ALSO UNLAWFUL BECAUSE IT PERMITS THE ADMISSIBILITY INTO EVIDENCE OF THE ARBITRATOR'S DECISION AND ALLOWS THE IMPOSITION OF VICARIOUS PUNITIVE LIABILITY

There are two remaining defects in A.B. 2057: (1) it denies manufacturers the right of cross-examination because it permits the admission into evidence of the decision of an arbitrator, who cannot be cross-examined on the basis of his decision; and (2) it permits the imposition of civil penalties against a manufacturer for the wrongdoing of an independent third party, in contravention of the rule prohibiting vicarious punitive liability.

A. THE ADMISSION INTO EVIDENCE OF AN ARBITRATOR'S DECISION WITHOUT THE RIGHT OF CROSS-EXAMINATION OF THE ARBITRATOR IS UNCONSTITUTIONAL

Under the existing Lemon Law, "findings and decision of the third party [i.e., the arbitrator who presides over the non-judicial resolution process] shall be admissible in evidence in [any later civil] action without further foundation." Civil Code § 1793.2(e)(2). This provision is substantially the same as one appearing in Magnuson-Moss, 15 U.S.C. § 2310(a)(3). Neither provision raises any question of legality because these statutes only provide for voluntary arbitration; when the parties voluntarily enter into a dispute resolution process, any objection to the admissibility of the arbitrator's decision in a subsequent civil action is waived because the parties had notice of the above referenced requirement.

Under A.B. 2057, however, participation in the non-judicial process is not voluntary; as noted above, it is compelled by the threat of civil penalties. As a result, the compelled admission of the arbitrator's findings in a subsequent civil action violates the Constitution by prohibiting the right of cross-examination.

So teaches *McLaughlin v. Superior Court*, 140 Cal.App.3d 473, 189 Cal.Rptr. 479 (1983). There, the husband in a dissolution/child custody proceeding challenged the constitutionality of a local court rule which required pre-trial mediation of child custody disputes. The rule provided that the mediator could make recommendations to the court regarding custody, but did not permit cross-examination of the mediator at trial. On appeal the court held that this procedure violated due process:

> "The facts remain that the policy permits the court to receive a significant recommendation on contested issues but denies the parties the right to cross-examine its source. This combination cannot constitutionally be enforced."
>
> 140 Cal.App.3d at 481.

The "combination" held impermissible in *McLaughlin* exists under A.B. 2057, because California law generally prohibits cross-examination of arbitrators on the basis of their decision. *See Arco Alaska, Inc. v. Superior Court*, 168 Cal.App.3d

139, 147, 214 Cal.Rptr. 51 (1985).[7] In *Webb v. West Side District Hospital*, 144 Cal.App.3d 946, 193 Cal.Rptr. 80 (1983) the court explained the rationale behind this policy:

> "To promote the efficiency and finality of dispute settlements through arbitration, trial courts are generally precluded from examining the merits of the controversy, the sufficiency of the evidence, or the reasoning supporting the arbitrator's decision."
>
> 144 Cal.App.3d at 948-949.

The policy of prohibiting cross-examination of arbitrators applies squarely to the non-judicial process set forth in A.B. 2057: the goal of making that process informal, expeditious and "efficient" is undermined if cross-examination of the arbitrator is permitted. Yet under *McLaughlin*, "denial of the right to cross-examination . . . cannot constitutionally be enforced." 140 Cal.App.3d at 481. The solution to this dilemma heretofore has been to make arbitration voluntary. In forcing manufacturers to arbitrate, however, A.B. 2057 forces them to forego their constitutional right to cross-examination.[8]

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[7] This policy has two exceptions, not applicable here. First, an arbitrator may testify in order to determine which issues were submitted to arbitration. *Sartor v. Superior Court*, 136 Cal.App.3d 322, 327, 187 Cal.Rptr. 247 (1982). Second, examination is permissible where there is clear evidence of impropriety by the arbitrator. *Griffin Company v. San Diego College for Women*, 45 Cal.2d 501, 505, 289 P.2d 476 (1955).

[8] The situation may well arise that even if the manufacturer prevails in an arbitration, the admitted findings will be favorable in part to the consumer (e.g. on liability only), and introduction of these findings against the manufacturer absent the right of cross-examination is impermissible. Moreover, when an arbitrator's findings are admissible (e.g., where the arbitration was voluntary), the courts will give such findings "such weight as the court deems appropriate". *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 (1974). *See Criswell v. Western Airlines, Inc.*, 709 F.2d 544 (9th Cir.) *aff'd*, 105 S.Ct. 743 (1985) (court upholds instruction that the jury should consider an arbitration board's determination as a "reasonable factor").

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B. THE POSSIBILITY UNDER THE STATUTE OF VICARIOUS IMPOSITION OF PUNITIVE DAMAGES CONTRAVENES ESTABLISHED PUBLIC POLICY IN CALIFORNIA

As noted previously, A.B. 2057 imposes a civil penalty, *inter alia*, if:

> "The manufacturer's qualified third party dispute resolution process willfully fails to comply with subdivision (e) of section 1793.2 in the buyer's case."

There are two possible constructions to this language. One construction is that the manufacturer may be penalized for the *manufacturer's* own willful failure to comply with the statutory requirements of the third-party dispute resolution process. Another interpretation, however, is that the manufacturer is vicariously liable for punitive damages based on some willful failure of the third party dispute process itself, i.e., the acts of independent third parties.[9] Under this interpretation of the statute, the manufacturer could be held liable for civil penalties if, for example, an independent arbitrator willfully violated the requirements of the statute. This result contravenes established public policy in California.

The "civil penalty" permitted by Civil Code § 1794 is tantamount to a punitive damage award. *Troensegaard v. Silvercrest Industries, Inc., supra*, 175 Cal.App.3d at 226. Since the purpose of punitive damages is punishment, such damages may be levied only against the party actually responsible for the wrong. *Magallanes v. Superior Court*, 167 Cal.App.3d 878, 213 Cal.Rptr. 547 (1985). In *Magallanes*, the court precluded the imposition of punitive damages on a party not proven responsible for the plaintiff's injuries:

> "The concept of punitive damages embodies a rule for individualized punishment of a wrongdoer whose conduct toward the plaintiff is particularly outrageous. Implicit in this concept is the notion that, where punishment is to be exacted, it must be certain that the wrongdoer being punished because of his conduct actually caused plaintiff's injuries."
>
> 167 Cal.App.3d at 889 (citation omitted).

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[9] Under the FTC rules applicable to A.B. 2057, no member of the resolution process may be a representative of the manufacturer. In addition, there are limitations on whether the arbitrators can have direct involvement in the manufacture, distribution, sale or service of any product. 16 C.F.R. §§ 703 *et seq.*

In *Peterson v. Superior Court*, 31 Cal.3d 147, 181 Cal.Rptr. 784 (1982) the state Supreme Court likewise stated:

> "[T]he policy considerations in a state where . . . . punitive damages are awarded for punishment and deterrence would seem to require that the damages rest ultimately as well as nominally on the party actually responsible for the wrong."
>
> 31 Cal.3d at 157 n.4.

These decisions express the policy of Civil Code § 3924, which provides that a corporate employer, liable for the torts of its employee by the doctrine of respondeat superior, is only liable for punitive damages where the corporation is itself guilty of wrongdoing or otherwise approved the employee's wrongful act. *See Merlo v. Standard Life and Accident Insurance Co. of California*, 59 Cal.App.3d 5, 18, 130 Cal.Rptr. 416 (1976); *Mitchell v. Keith*, 752 F.2d 385, 390 (9th Cir.), *cert. denied*, 105 S.Ct. 3502 (1985). A.B. 2057, however, goes a step further, apparently permitting punitive damages to be imposed on a manufacturer for the "willful" wrongdoing of a third party process. As such, the statute contravenes the established public policy prohibiting such vicarious punishment.

C. A.B. 2057 IS UNLAWFUL BECAUSE IT IMPOSES A DOUBLE PENALTY FOR THE SAME OFFENSE

The imposition of civil penalties under Section 1794(e) is also unlawful because it constitutes a double penalty for the same offense, in violation of the due process clause of the U.S. Constitution. Since the civil penalties under Section 1794(e) cannot be predicated solely on a manufacturer's refusal to establish a third party dispute resolution process (because the statute does not explicitly require a manufacturer to establish any process), the civil penalties under the statute only duplicate the civil penalties already available under Section 1794(c). This constitutes double punishment for the same act and is impermissible. The court in *Silvercrest, supra*, quoting from a holding of a United States district court, set forth the applicable principle:

> "A defendant has a due process right to be protected against unlimited multiple punishment for the same act. A defendant in a civil action has a right to be protected against double recoveries not because they violate 'double jeopardy' but simply because overlapping damage awards violate that send of 'fundamental fairness' which lies at the heart of

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> constitutional due process (*In Re No. Dist. of Cal. Dalkon Shield IUD Products* (N.D. Cal. 1981) 526 F.Supp. 887, 889, vacated on other grounds in *Abed v. A.H. Robbins Co.*, (9th Cir. 1982) 693 F.2d 847) *and see Atlantic Purchasers Inc. v. Aircraft Sales, Inc.* (4th Cir. 1983) 705 F.2d 712, 717, N.4, holding: 'the two remedies are overlapping and, therefore probably inconsistent . . .'"
>
> 175 Cal.App.3d at 227.

The court in *Hometowne Builders, Inc. v. Atlantic Nat. Bank*, 447 F.Supp. 717 (E.D. Va. 1979) reached a similar conclusion in holding that a plaintiff in a federal antitrust action cannot recover both treble damages and punitive damages because such recovery would be a "necessarily duplicative" punishment. *Id.* at 720. *Hometowne* relied upon the Wisconsin Supreme Court's decision in *John Mohr and Sons, Inc. v. Jahnke*, 55 Wis.2d 402, 198 N.W.2d 363 (1972) that due process precludes recovery of both punitive damages and treble damages under a state antitrust statute:

> "[T]o allow treble damages and punitive damages would amount to double recovery of a penalty and this violates the basic fairness of a judicial proceeding required by the due process clause of the 14th amendment to the Federal Constitution".
>
> 198 N.W.2d at 367.

The imposition of penalty damages under Section 1794(c) and the additional imposition of further penalty damages under Section 1794(e) constitutes the same kind of impermissible double punishment.

VII. CONCLUSION

A.B. 2057 contains several provisions that are unconstitutional. The infirmities of the legislation stem from the binding nature of the arbitration which, *inter alia*, infringes on the manufacturer's right to jury trial. In addition, the statute threatens manufacturers with the imposition of double actual damages and double attorneys' fees for the failure to maintain the binding arbitration process. Accordingly, for all the reasons discussed in this memorandum, A.B. 2057 is unlawful and unconstitutional.

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Date of Hearing: May 5, 1987

AB 2057

ASSEMBLY COMMITTEE ON GOVERNMENTAL EFFICIENCY AND CONSUMER PROTECTION
RUSTY AREIAS, Chairman

AB 2057 (Tanner) - As Amended: April 28, 1987

ASSEMBLY ACTIONS:

COMMITTEE	G. E. & CON. PRO.	VOTE		COMMITTEE		VOTE	
Ayes:				Ayes:			
Nays:				Nays:			

SUBJECT

Warranties: new motor vehicles (lemon law).

DIGEST

Existing law provides that a manufacturer who is unable to service or repair consumer goods, including motor vehicles, so that they conform to the applicable warranties after a reasonable number of attempts, must either replace those goods or reimburse the buyer. In 1982, the law was amended by AB 1787 (Tanner), commonly referred to as the lemon law. Specifically, it:

-Defines "reasonable number of attempts" for new motor vehicles as either four or more repair attempts on the same major defect, or, more than 30 days out of service for service/repair of one or more major defects, within the first year or 12,000 miles of use.

-Requires a buyer to notify the manufacturer directly of a continuing defect and to use a dispute resolution program meeting specified minimum standards prior to asserting the "lemon presumption" in a legal action to obtain a vehicle replacement or refund.

-Defines the "lemon presumption" as the "reasonable number of attempts" in the paragraph above.

This bill amends and clarifies the lemon law. It specifies a structure for certifying third-party dispute mechanisms, specifies requirements for certification and provides for treble damages and attorney's fees to consumers who obtain a judgement against a manufacturer who does not have a certified lemon law arbitration program. Specifically, it:

- continued -

1) Requires the Bureau of Automotive Repair (BAR) to: certify the arbitration programs for resolution of vehicle warranty disputes as requested; annually recertify those programs or decertify as inspection warrants; notify the Department of Motor Vehicles (DMV) of the failure of a manufacturer, distributor, or their branches to comply with arbitration decisions; investigate consumer complaints regarding qualified programs; and, submit a biennial report to the Legislature evaluating the effectiveness of the program.

2) Authorizes BAR to charge fees to be collected by the New Motor Vehicle Board (NMVB) in the Department of Motor Vehicles (DMV), beginning July 1, 1988, from specified NMVB licensees, not to exceed $1 (one dollar) for each new motor vehicle sold, leased, or distributed in California. The fees would be deposited into the Certification Account of the Automotive Repair Fund.

3) Requires motor vehicle manufacturers to replace defective vehicles or make restitution if the manufacturer is unable to service or repair the vehicles after a reasonable number of buyer requests. The buyer, however, would be free to take restitution in place of a replacement vehicle.

4) Specifies what is included in the replacement and refund option.

   -In case of replacement, the new motor vehicle must be accompanied by all express and implied warranties. The manufacturer must pay for, or to, the buyer the amount of any sales or use tax, license and registration fees, and other official fees which the buyer is obligated to pay in connection with the replacement, plus any incidental damages the buyer is entitled to including reasonable repair, towing, and rental car costs.

   -In case of restitution, the manufacturer must pay the actual price paid including any charges for transportation and manufacturer-installed options, sales tax, license fees, and registration fees plus incidental damages. The amount directly attributable to use by the buyer must be determined as prescribed and may be subtracted from the total owed to the buyer.

5) Clarifies that the vehicle buyer may assert the "lemon presumption" in any civil action, small claims court action or other formal or informal proceeding.

6) Sets forth a qualified third party dispute resolution process and requires compliance with the minimum requirements of the Federal Trade Commission (FTC) for informal dispute settlement procedures as defined on January 1, 1987.

- continued -

7) Amends the definition of a "new motor vehicle" which is covered by the lemon law to include dealer-owned vehicles and demonstrator vehicles.

8) Prevents a vehicle repurchased by a manufacturer under the lemon law from being resold as a used car unless the nature of the car's problems are disclosed, the problems are corrected, and the manufacturer warrants that the vehicle is free of those problems for one year.

9) Requires the Board of Equalization to reimburse the manufacturer in an amount equal to the sales tax paid for vehicles for which the manufacturer provides the specified refund to the buyer.

10) Provides for treble damages and reasonable attorney's fees and costs if the buyer is awarded a judgement and the manufacturer does not maintain a qualified third party dispute resolution process as established by this chapter.

FISCAL EFFECT

This bill will result in unknown costs to the BAR to certify arbitration programs, fully offset by fees charged to vehicle manufactures and distributors. According to the Board of Equalization, enactment of the bill would result in insignificant administrative costs to the board.

COMMENTS

The purpose of this bill, sponsored by the author, is to strengthen existing lemon law, to eliminate inequities that have occurred from that law's implementation and to ensure that owners of seriously defective new cars can obtain a fair, impartial and speedy hearing on their complaints.

Similar legislation, AB 3611 (Tanner, 1986 Session), generally makes many of the same changes except for the provision in AB 2057 for treble damages. AB 3611 died in the Senate.

The author and proponents state that since the effective date of the lemon law over four years ago, there have been numerous complaints from new car buyers concerning its implementation. While these complaints reflect continued dissatisfaction with the manufacturer's own resolution of disputes regarding defective new vehicles, they have also alleged that the dispute resolution programs financed by the manufacturers are not operated impartially. Consumers have complained of: long delays in obtaining a hearing (beyond the prescribed 40-60 day time limit); unequal access to the arbitration process; unreasonable decisions that do not appear to exhibit knowledge of the lemon law's provisions or provide an adequate amount of reimbursement even when a refund decision is ordered.

- continued -

Opponents of the bill state that the number of consumers dissatisfied with the current arbitration process is small relative to the number of arbitrations. They do not object to most of the provisions which update the lemon law, however, they strenuously object to the provision of treble damages and an award of attorney's fees to consumers. They feel this creates an improper incentive for consumers to hire an attorney to go to court over procedural issues. They feel treble damages, usually associated with gross and willful wrongdoing, would set a dangerous precedent by making consumers eligible for a financial windfall by the sole fact that a new car manufacturer may not have a certified lemon law arbitration program.

Policy Questions

The committee may wish to consider the following:

1) Are treble damages necessary to ensure that arbitration programs used by manufacturers assist consumers in resolving the problems with their new car?

2) If BAR is going to have jurisdiction over the certification of arbitration programs dealing with new car warranty lemon law provisions, should they be given additional authority in the vehicle warranty area, where jurisdiction is presently unclear, since they will get more questions from consumers in that area?

3) Are the components of the qualified arbitration program fair to consumers and manufacturers alike? Should the components specify that if a dealer is present and allowed to speak, a consumer should be given equal time?

SUPPORT (verified 5/1/87)

CA Public Interest Research Group (CalPIRG)

OPPOSITION

Automobile Importers of America
General Motors Corporation
Ford Motor Company

Ann Evans
324-2721
ageconpro

P. mins since 7/88
(1) Effec 7/1/88
(2) [illegible] Pro [illegible] all of [illegible]
Pg 14 + adds (A) reqmt ~~of that~~ arbitrator can't be party, employee etc + ~~can't~~ discuss w/ [illegible] unless buyer agree ~~[illegible]~~ parties
(I) Hearing for last rep ~~attmpt~~ + time limit + replacement or restit

Pg 17 - Of DRP willfully fails to comply

LEGAL
ANALYSIS OF CALIFORNIA
ASSEMBLY BILL 2057

Prepared by
McCUTCHEN, BLACK, VERLEGER & SHEA
Los Angeles, California

June 30, 1987

TABLE OF CONTENTS

I. INTRODUCTION

Pending Assembly Bill 2057 is unconstitutional because it violates a number of basic rights. Perhaps foremost, A.B. 2057 violates the right to jury trial: it compels automobile manufacturers either to forego their right to trial by jury in warranty disputes, or to be penalized if they stand on their right and choose not to establish arbitration mechanisms to resolve warranty disputes. In providing that manufacturers "may" establish such systems, but that the failure to do so will result in stiff civil penalties, A.B. 2057 is a transparent attempt to indirectly make manufacturers do that which they cannot be directly compelled to do. This is impermissible, because the constitution prohibits laws purporting to compel the waiver of the right to jury trial, and those purporting to penalize the exercise of a constitutional right.

As amended on May 13, 1987, A.B. 2057 provides that a manufacturer may establish a non-judicial dispute resolution process for warranty claims that is binding only on the manufacturer; requires the state Bureau of Automotive Repair to certify the process and to periodically inspect and audit it; and subjects manufacturers (1) to license revocation if they do not comply with decisions of the non-judicial dispute resolution process and (2) to civil penalties if they do not establish the process or if the process willfully fails to comply with the statutory requirements. (A.B. 2057 at 3-6, 17 (attached).)

The most important of these statutory requirements is that the process must be empowered to "[r]ender decisions which are binding on the manufacturer if the buyer elects to accept the decision." Failure to establish such a process gives rise to civil penalties (Proposed amendment to Civil Code § 1793.2(e)(3)(B) and § 1794(e); A.B. 2057 at 13 and 17). In an action for damages for breach of warranty, a prevailing consumer automatically recovers treble damages and attorney's fees for the manufacturer's failure to have maintained a binding non-judicial process:

> "In addition to the recovery of actual damages, the buyer shall recover a *civil penalty of two times the amount of actual damages and reasonable attorneys fees and costs* if the manufacturer fails to rebut the presumption [of non-conforming goods in] Section 1793.2, and either (1) *the manufacturer does not maintain a third party dispute resolution process which complies with subdivision (e) of Section 1793.2, or* (2) the manufacturer's qualified third party

dispute resolution process willfully fails to comply with subdivision (e) of Section 1793.2 in the buyer's case."

(Emphasis added.)

This section imposes a penalty of double the compensatory damages *and* double the attorney's fees; a prior section of A.B. 2057 already awards attorney's fees and costs to a prevailing consumer. (Proposed amendment to Civil Code § 1794(d); A.B. 2057 at 16.) Another prior section, already law, also allows for *discretionary* civil penalties for a manufacturer's willful failure to comply with any provision of the Song-Beverly Act. (Cal.Civ.Code § 1794(c).)

A.B. 2057 is invalid legislation for each of the following reasons:

1. A.B. 2057 infringes on the right to jury trial because it (1) compels a party to participate in binding arbitration without also affording that party the right to *de novo* trial; and (2) imposes a civil penalty on the exercise of the right to jury trial.

2. A.B. 2057 contravenes the due process clause and the doctrine of separation of powers, because it impermissibly delegates judicial authority to a non-judicial body.

3. A.B. 2057 violates the Supremacy Clause of the U.S. Constitution because it imposes a dispute resolution system whose features are contrary to the policy judgments expressed under the federal Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.*

4. A.B. 2057 deprives manufacturers of equal protection of the laws because it affords consumers the fundamental right of access to the courts, but denies manufacturers that same access.

5. A.B. 2057 also is unlawful because it: a) permits the decision of an arbitrator to be admitted into evidence in a subsequent civil action even though California law precludes cross-examination of an arbitrator on the basis of his decision; b) in contravention of public policy allows civil penalties to be imposed vicariously if the arbitration process, not the manufacturer, willfully fails to comply with the statute; and c) imposes a double penalty for the same offense.

II. A.B. 2057 IS UNCONSTITUTIONAL BECAUSE IT INFRINGES ON THE RIGHT TO JURY TRIAL GUARANTEED BY THE CALIFORNIA CONSTITUTION

A. A MANUFACTURER HAS A CONSTITUTIONAL RIGHT TO JURY TRIAL UNDER CALIFORNIA LAW FOR A CLAIM FOR BREACH OF WARRANTY

In denying manufacturers a jury trial in warranty disputes, A.B. 2057 violates the state constitution's guarantee of a right to jury trial. As summarized by the California Supreme Court in *C&K Engineering Contractors v. Amber Steel Co., Inc.*, 23 Cal.3d 1, 151 Cal.Rptr. 323, 587 P.2d 1136 (1978):

> "The right to a jury trial is guaranteed by our Constitution. (Cal.Const., Art. I, § 16.) We have long acknowledged that the right so guaranteed, however, is the right as it existed at common law in 1850, when the Constitution was first adopted, 'and what that right is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact'."
>
> 23 Cal.3d at 8 (citation omitted).

Equally well settled is the principle that at common law the jury trial right existed only for actions "at law" and not for actions "in equity". *Id.* at 8. In determining whether an action is "at law" or "in equity" the courts look to the "gist" of the action:

> "As we stated in *People v. One 1941 Chevrolet Coupe, supra*, 37 Cal.2d 283, 'If the action has to deal with ordinary common-law rights cognizable in courts at law, it is to that extent an action of law. In determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case -- the *gist* of the action. A jury trial must be granted where the *gist* of the action is legal, where the action is in reality cognizable at law'."
>
> 23 Cal.3d at 9. (Emphasis in original.)

The "gist" of a claim against an automobile manufacturer for breach of warranty is breach of contract. *See Keith v. Buchanan*, 173 Cal.App.3d 13, 19, 220 Cal.Rptr. 392 (1985). A "warranty is a contractual term concerning some aspect of [a] sale . . . ." 2 *Witkin*, Summ.Cal.Law (8th ed. 1973), Sales § 48, 1128. An express warranty is a contractual promise (*Keith*, *supra*, at 19-20; *Stott v. Johnston*, 36 Cal.2d 864, 866, 229 P.2d 348 (1951)), while an implied warranty is a contract term that arises by operation of law (*Keith*, *supra*, at 24-25; *Holmes Packaging Machinery Corp. v. Bingham*, 252 Cal.App.2d 862, 60 Cal.Rptr. 769 (1967)).

Under California law a claim for damages based on breach of contract undeniably is one for which there is a right to jury trial. *C & K Engineering*, *supra*, 23 Cal.3d at 9; *Raedke v. Gibraltar Savings and Loan Association*, 10 Cal.3d 665, 671, 111 Cal.Rptr. 693, 517 P.2d 1157 (1974); *Abbott v. City of Los Angeles*, 50 Cal.2d 438, 462, 326 P.2d 484 (1958). There are reported cases as early as 1885 in which juries have tried claims for breach of warranty under contract principles. *See Hoult v. Baldwin*, 67 Cal. 610, 8 P. 440 (1885); *Greenleaf v. Stockton Combined Harvester & Agricultural Works*, 78 Cal. 606, 21 P. 369 (1889). Claims for breach of express or implied warranty continue to be tried by juries in recent times. *Fluor Corp. v. Jeppeson & Co.*, 170 Cal.App.3d 468, 216 Cal.Rptr. 68 (1985); *Putensen v. Clay Adams, Inc.*, 12 Cal.App.3d 1062, 91 Cal.Rptr. 319 (1970). Indeed, the issues relevant for determination in a breach of warranty case have been set forth in standard jury instructions prepared by the Committee on Standard Jury Instructions. *See* Bar Association Jury Instructions ("BAJI") Nos. 9.40-9.90.

Furthermore, it is apparent from the damage measures in the existing statute that the claims arising thereunder are those for which a jury is available. Civil Code § 1794 expressly provides for damages based on (1) the "revocation of goods" measure under Cal. Comm. Code §§ 2711 *et seq.* and (2) the "cost of repairs" measure under Cal. Com. Code §§ 2714 *et seq.* (Civ. Code § 1794 (a) (1) and (2).) These remedies are traditional breach of contract damages for which jury trials are available. Moreover, A.B. 2057 expressly refers to the buyer's remedy for breach of warranty as "restitution" or "replacement." (Civil Code § 1793.2(d)(2); A.B. 2057 at 10.) Restitution is a recognized form of legal action for which there is a right to jury trial. *Paularena v. Superior Court*, 231 Cal.App.2d 906, 914, 42 Cal.Rptr. 356 (1965). While "replacement" is analogous to the equitable remedy of specific performance, under the statute the manufacturer has the election of whether to provide restitution or replacement (Civ. Code § 1793.2(d)(2)). Further, the existence of an equitable remedy for a legal claim does not defeat a party's right to jury trial on the legal issues. *Escamilla v. California Insurance Guarantee*

Association, 150 Cal.App.3d 53, 57-58, 197 Cal.Rptr. 463 (1983); 3 *Witkin*, Cal.Proc. (3d ed. 1985), *Actions*, § 94, p. 120.

There are no cases that have challenged the right to jury trial for a breach of a warranty claim. In the one reported decision where a consumer went to trial for an obligation arising under § 1794 of the Civil Code, a jury trial was had. *See Troensegaard v. Silvercrest Industries, Inc.*, 175 Cal.App.3d 218, 220 Cal.Rptr. 712 (1985) (action for damages for willful violation of Civil Code § 1794). There is plainly a right to jury trial for an action based on the breach of express or implied warranty.

B. A STATUTE LIKE A.B. 2057 WHICH COMPELS A PARTY TO ARBITRATE A MATTER FOR WHICH THERE IS A RIGHT TO JURY TRIAL, BUT DOES NOT ALSO AFFORD THE RIGHT TO TRIAL *DE NOVO*, IS UNCONSTITUTIONAL UNDER CALIFORNIA LAW

The United States Supreme Court has unequivocally ruled:

> "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."
>
> *United Steelworkers of America, AFL-CIO v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

This principle has been adopted under California law. In *Wheeler v. St. Joseph Hospital*, 63 Cal.App.3d 345, 133 Cal.Rptr. 775 (1976), the court reversed an order compelling arbitration pursuant to an arbitration clause contained in an adhesion contract because the weaker party's consent was not clearly demonstrated. The court stated:

> "[W]e start with the basic premise that arbitration is consensual in nature. The fundamental assumption of arbitration is that *it may be invoked as an alternative to the settlement of disputes through the judicial process 'solely by reason of an exercise of choice by [all] parties'*."
>
> 63 Cal.App.3d at 355. (Citation omitted, emphasis added.)

Accord, *Ramirez v. Superior Court*, 103 Cal.App.3d 746, 163 Cal.Rptr. 223 (1980) (Legislature cannot constitutionally establish a presumption that a party who has signed an arbitration agreement has in fact waived the right to jury trial).

Consistent with these principles, under California law the right to jury trial cannot be infringed by a statute purporting to compel arbitration without the right of trial *de novo*. This principle was expressed in *Hebert v. Harn*, 133 Cal.App.3d 465, 184 Cal.Rptr. 83 (1982), which reviewed a California statute that makes arbitration compulsory for claims under $25,000, but preserves to either party the right of trial *de novo*. In *Hebert*, the court invalidated a local court rule that denied a trial *de novo* to a party who did not file a motion for trial after the arbitration hearing. In so doing, the court observed that the constitutionality of the statute depended on the existence of the *de novo* jury trial right:

> "In enacting judicial arbitration as an alternative to the traditional method of dispute resolution, *the Legislature, aware of the constitutional mandate of the right to jury trial, unconditionally provided any party could . . . elect [trial de novo]* upon making a request within twenty days of the award."
>
> 133 Cal.App.3d at 469. (Emphasis added.)

See also, *Lyons v. Wickhorst*, 42 Cal.3d 911, 915, 231 Cal.Rptr. 738, 727 P.2d 1019 (1986) (lower court erred in dismissing action of party who did not participate in compulsory arbitration).

Hebert cited with approval *In Re Smith*, 381 Pa. 223, 112 A.2d 625, *appeal dismissed*, 350 U.S. 858 (1955), where Pennsylvania's compulsory arbitration system was similarly upheld only because of its provision for *de novo* jury trial. *Id.* at 230. Subsequently, in *Blanton v. Womancare, Inc.*, 38 Cal.3d 396, 212 Cal.Rptr. 151, 696 P.2d 645 (1985), the California Supreme Court emphasized that "[o]pportunity for de novo trial" is the chief feature which distinguishes the compulsory arbitration program from "private arbitration conducted pursuant to the agreement of the parties. . . ." *Id.* at 401. Through these decisions, California has aligned itself with courts in other states which have held that the right to a *de novo* jury trial is necessary to make a compulsory arbitration program constitutional. *See Eastin v. Broomfield*, 116 Ariz. 576, 570 P.2d 744 (1977); *Grace v. Howlett*, 51 Ill.2d 478, 283 N.E.2d 474 (1972); *Attorney General v. Johnson*, 282 Md. 274, 385 A.2d 57, *appeal*

dismissed, 439 U.S. 805 (1978); *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977); *State ex rel. Strykowski v. Wilkie*, 81 Wis.2d 491, 261 N.W.2d 434 (1978).[1]

A.B. 2057 fails under these authorities because it coerces a manufacturer to participate in an arbitration to which there is no right of judicial review, much less a trial *de novo*, if the consumer wishes to bind the manufacturer. The purported choice given to manufacturers to not establish the arbitration process does not save the defect; while A.B. 2057 permits a manufacturer to avail itself of its jury trial right by declining to make available a non-judicial dispute resolution process, the statute punishes a manufacturer who so "elects" by imposing civil penalties in the event the manufacturer does not prevail at trial. Consequently, the statute is also unconstitutional because it impermissibly penalizes the exercise of a constitutional right.

C. THE CIVIL PENALTIES PROVISION OF A.B. 2057 IS UNCONSTITUTIONAL BECAUSE IT PENALIZES THE MANUFACTURER FOR EXERCISING THE CONSTITUTIONAL RIGHT TO JURY TRIAL

In California, "[i]t is well settled that to punish a person for exercising a constitutional right is 'a due process violation of the most basic sort.'" *In Re Lewallen*, 23 Cal.3d 274, 278, 152 Cal.Rptr. 528, 590 P.2d 383 (1979). This rule has

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1 Compulsory arbitration statutes that do not provide for trial *de novo* are likewise impermissible under the jury trial guarantee of the Seventh Amendment of the U.S. Constitution. (The Seventh Amendment, however, has not been made applicable to the States. *Crocker v. First Hudson Assocs.*, 583 F.Supp. 21, 22 (D.N.J. 1983).) The Supreme Court invalidated compulsory arbitration statutes in *Dorchy v. Kansas*, 264 U.S. 286 (1924) and *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522 (1923). These older decisions were more recently followed in *United Farm Workers v. Babbitt*, 449 F.Supp. 449 (D. Az. 1978), which invalidated an Arizona statute requiring an employer to submit to binding arbitration in order to obtain an injunctive order against his employees to prevent certain strikes. *Babbitt* was reversed and vacated on appeal by the Supreme Court on the grounds that the constitutionality of the arbitration provision had not been contested by the parties, thus making the decision an unnecessary advisory opinion, and because the statute was not necessarily compulsory because it afforded the employer other remedies aside from binding arbitration. 442 U.S. at 304, 305 (1979).

been applied to strike down legislation or judicial action which penalizes the exercise of the right to jury trial. The lead case is *Lewallen*, where the Supreme Court reversed a sentence in a criminal case because the trial court "gave consideration to petitioner's election to plead not guilty in imposing sentence." *Id.* at 279. This sentence effectively penalized the defendant for having availed himself of his jury trial right. Citing several decisions by the U.S. Supreme Court prohibiting punishment for the exercise of the right to jury trial, the Court held that the goal of expediting legal actions did not justify penalizing the exercise of the right to jury trial. 23 Cal.3d at 279.

The principle set forth in *Lewallen* has been consistently followed. In *People v. Justice*, 168 Cal.App.3d Supp. 1, 215 Cal.Rptr. 234 (1985), the court held unconstitutional a local court policy permitting the imposition of a harsher sentence on a defendant who pled not guilty and exercised the right to a jury trial. *Id.* at Supp. 4. ("This practice violates the right to trial by jury.") Similarly, in *In Re Javier A*, 159 Cal.App.3d 913, 973, 206 Cal.Rptr. 386 (1984), the court stated that it is an unconstitutional burden on the right to jury trial to offer a juvenile the option of non-jury trial in a juvenile court or jury trial as an adult in criminal court, since "forcing . . . this election would place an unconstitutional burden on the exercise of [the] right to trial by jury." *Id.* at 973, n.59.[2]

The aforementioned authorities apply squarely to the civil penalties imposed under A.B. 2057 on the exercise of the jury trial right. In *Hale v. Morgan*, 22 Cal.3d 388, 149 Cal.Rptr. 375, 584 P.2d 512 (1978) the Supreme Court affirmed that civil penalties are penal in nature. 22 Cal.3d at 405. *Accord*, *Tos v. Mayfair Packing Co.*, 160 Cal.App.3d 67, 79, 206 Cal.Rptr. 459 (1984). The court in *Silvercrest*, *supra*, confirmed that the civil penalties in Civil Code § 1794 are designed to punish, thus serving the same purpose as punitive damages. 175 Cal.App.3d at 226. The imposition of civil penalties to punish the exercise of the right to jury trial is equally as offensive as the punishment found impermissable in *Lewallen* and its progeny.

The punitive nature of A.B. 2057 is not saved by the authorities permitting the legislature to require payment of fees and costs which do not punish a party for exercising his right to jury trial. The distinction between punishment on the one hand, and fees and costs on the other, begins with *U.S. v. Jackson*, 390 U.S. 570

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[2] *See also People v. Black*, 32 Cal.3d 1, 9-10, 184 Cal.Rptr. 454, 648 P.2d 104 (1982) (Constitution forbids pressuring juvenile to forego jury trial rather than take risk that if he turns eighteen years old before sentencing, he may suffer imprisonment).

the rule prohibiting punishment for the exercise of the right to jury trial. The court there struck down a provision of the federal Kidnapping Act which permitted a jury to recommend the death sentence for a convicted defendant, but prohibited such penalty for a defendant who waived the right to jury trial or pled guilty. The court ruled as follows:

> "Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. [Citations omitted.] The question is not whether the chilling effect is 'incidental' rather than 'intentional'; the question is whether that effect is unnecessary and therefore excessive. In this case the answer to that question is clear . . . . [T]he goal [of limiting the circumstances under which a death penalty can be imposed] can be achieved without penalizing those defendants who plead not guilty and demand jury trial. . . . Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right. . . ."
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> *Id.* at 582-83.[3]

Subsequent Supreme Court authorities have made clear that fees or costs are impermissible if they are imposed as a punishment for the exercise of the jury trial right. In *Fuller v. Oregon*, 417 U.S. 40 (1974), the Court upheld the constitutionality of Oregon's recoupment statute under which defendants convicted of criminal offenses could be required to repay the costs of court-appointed counsel. The Court reasoned that this state law involved no "penalty" on the exercise of the jury trial right:

> "This case is fundamentally different from our decisions . . . which have invalidated state and federal laws that placed a penalty on the exercise of a constitutional right. [Citations omitted.] Unlike the statutes found invalid in those cases, where the provisions 'had no other purpose or effect than to chill the assertion of constitutional rights by penalizing

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[3] *People v. Coogler*, 71 Cal.2d 153, 77 Cal.Rptr. 790, 454 P.2d 686 (1969), *cert. denied*, 406 U.S. 971 (1972) refuted a *Jackson* challenge to California's kidnapping statute, Penal Code § 209, on the ground that, unlike the federal Kidnapping Act, either the jury or the trial court could impose the death sentence on a convicted defendant. *Id.* at 160.

> those who choose to exercise them.' . . . Oregon's recoupment statute merely provides that a convicted person who later becomes able to pay for his counsel may be required to do so."
>
> *Id.* at 54.

The distinction between the impermissible imposition of a penalty and the permissible imposition of costs and fees was addressed by the Ninth Circuit in *U.S. v. Chavez*, 627 F.2d 953 (9th Cir. 1980), *cert. denied*, 450 U.S. 924 (1981). *Chavez* upheld a federal statute that required a taxpayer found guilty of willfully filing a false return to pay the costs of prosecution. The Ninth Circuit rejected a claim that the imposition of such costs was an impermissible infringement on the right to jury trial under *Jackson*, finding the court's analysis in *Fuller* to be more on point:

> "It must be emphasized that not every assertion that a statutory scheme has chilled the exercise of a constitutional right results in a finding of unconstitutionality. The Supreme Court, in post-*Jackson* decisions, has not enthusiastically embraced the 'chill' rationale articulated in *Jackson*. In *Fuller v. Oregon*, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974), the Court upheld an Oregon recoupment scheme which required convicted defendants who were indigent at the time of the criminal proceeding against them, but who subsequently acquired the financial means to do so, to repay the costs of their legal defense."
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> 627 F.2d at 956.

The court concluded that the absence of any punishment arising from the imposition of such costs made the statute constitutional:

> "A defendant, prosecuted for willful failure to file a tax return, is not subject to a substantial risk of greater punishment because of the existence of the costs of prosecution provision. The provision does serve legitimate governmental purposes. We cannot say with any confidence that the costs of prosecution provision . . . does in fact penalize a defendant's exercise of his constitutional rights . . . . The presence of the mandatory costs of prosecution provision does not, with any degree of certainty, substantially increase the threatened punishment. Any encouragement of the waiver of

> constitutional rights that this provision may induce is substantially different from the pressures that undeniably existed in *Jackson*, and cannot be said to be an impermissible burden upon the exercise of constitutional rights."
>
> *Id.* at 957.

See also Ludwig v. Massachusetts, 427 U.S. 618, 627 (1976) ("Due process is violated only by the *vindictive imposition* of an increased sentence." (Emphasis added.))[4]

Fees and costs can be imposed without impermissibly burdening the jury trial right, but punishment cannot. The civil penalty provision to be added to Civil Code § 1794 is not a cost or fee; it is a punishment. First, it is denominated a penalty. Second, it more than covers costs. Third, as noted, the civil penalty provision already found in Civ. Code § 1794(c) -- permitting recovery of treble damages for any willful violation of the Song-Beverly Act -- has been held to perform the same function as punitive damages: to punish. *Silvercrest, supra*, 175 Cal.App.3d at 226-27. A.B. 2057 would make the same kind of civil penalty (only greater) mandatory in a certain class of cases -- those where the manufacturer insists on his right to jury trial. In short, A.B. 2057 would penalize the exercise of a constitutional right.

Moreover, the cases also provide that punishment in the form of punitive damages cannot be imposed if there has been no injury. Since a manufacturer has a right to jury trial in breach of warranty claims, the fact that he exercises that right cannot create legal injury to a consumer. Yet under proposed Civil Code § 1794(e), civil penalties tantamount to punitive damages would be imposed solely because a manufacturer has exercised the right to jury trial, even though the consumer already has been fully compensated; the civil penalties of § 1794(e) are only available to a consumer who has already prevailed and thus recovered all actual damages, costs and expenses under § 1794(d). This is tantamount to imposing punitive damages without any underlying actual damages, a tack forbidden by law.

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[4] Similarly, *Meyers v. Astoria Convalescent Hospital*, 105 Cal.App.3d 682, 164 Cal.Rptr. 495 (1980), a case involving civil penalties, upheld the constitutionality of a statute that permits a health care facility to pay a civil penalty within four days of receiving a citation rather than contest that citation at trial. The court held that this statute "is no more than a statutory offer of settlement of the citation at the earliest possible time in exchange for the least possible penalty," and was thus permissible. 105 Cal.App.3d at 688.

Punitive damages may not imposed absent actual injury The Supreme Court of California stated the rule applicable here in *Mother Cobb's Chicken Tea, Inc. v. Fox*, 10 Cal.2d 203, 204, 73 P.2d 1185 (1937):

> "The foundation for the recovery of punitive or exemplary damages rests upon the fact that substantial damages have been sustained by the plaintiff. Punitive damages are not given as a matter of right, nor can they be made the basis of recovery independent of the showing which would entitle the plaintiff to an award of actual damages. Actual damages must be found as a predicate for exemplary damages. This is the rule announced in many authorities."

Accord, *Esparaza v. Specht*, 55 Cal.App.3d 1, 6, 127 Cal.Rptr. 493 (1976) ("It is well settled in California that punitive damages cannot be awarded unless actual damages are suffered".)

By imposing a civil penalty that constitutes punishment for the exercise of a constitutional right, A.B. 2057 is unconstitutional.

III. A.B. 2057 IS UNCONSTITUTIONAL BECAUSE IT DELEGATES JUDICIAL POWER TO ARBITRATORS

A.B. 2057 also violates the Constitution because it impermissibly delegates judicial authority to non-judicial entities. Two provisions of the California Constitution bar any such attempt. The first, Article III § 3, provides that:

> "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

The second, Article VI, § 1, states that:

> "The judicial power of this State is vested in the Supreme Court, courts of appeal, superior courts, municipal courts, and justice courts. All except justice courts are courts of record."

The constitutional bar posed by these sections to delegation of judicial power has been consistently recognized by the courts. For example, *in Standard Oil Company of California v. State Board of Equalization*, 6 Cal.2d 557, 59 P.2d 119 (1936), petitioner sought a writ of certiorari to review a State Board of Equalization order imposing an additional assessment of retail sales tax. The Supreme Court raised sua sponte the issue of propriety of such review, concluding as follows:

> "Concisely stated, our conclusion that we are without authority or jurisdiction to entertain this proceeding or to issue the writ here sought, is based upon the established premises that a writ of certiorari. . .will lie only to review the exercise of judicial functions . . . *and that the legislature is without power, in the absence of constitutional provision authorizing the same, to confer judicial functions upon a statewide administrative agency of the character of the respondent.*"
>
> 6 Cal.2d 559. (Emphasis added.)

The Court based its conclusion on Article VI, § 1 of the Constitution. *See* 6 Cal.2d at 559-65.

California Supreme Court cases since ***Standard Oil*** have raised the delegation issue primarily in situations concerning the proper standard of judicial review of decisions of administrative agencies, and have emphasized the impropriety of delegation of judicial powers. For example, in ***Laisne v. California State Board of Optometry***, 19 Cal.2d 831, 123 P.2d 457 (1942), appellant argued that he was entitled to *de novo* review of an order of the Board of Optometry revoking his certificate of registration to practice optometry. The Court first restated the doctrine that delegation of judicial power is unconstitutional under Article III, § 3 and Article VI, § 1 of the California Constitution:

> "The powers of the government of the state are divided into three separate departments -- the legislative, executive and judicial. (Article III, section 1, of the state Constitution.) State-wide judicial power may be exercised by only three *enumerated* courts, viz., the Supreme Court, the District Court of Appeal, and the superior courts. (Article VI, section 1, of the state Constitution.) . . .If, therefore, some agency with state-wide jurisdiction, other than one of the enumerated courts, without sanction by constitutional amendment, exercises or attempts to exercise judicial power, such action is in direct violation of the articles of the state Constitution cited above."
>
> 19 Cal.2d at 834-35 (Emphasis in original.)

The Court concluded that failure to accord the appellant *de novo* review of the agency proceeding would violate the bar to delegation of judicial functions. *Id.* at

835. *See also Drummey v. State Board of Funeral Directors & Embalmers*, 13 Cal.2d 75, 87 P.2d 848 (1939); *Bixby v. Pierno*, 4 Cal.3d 130, 93 Cal.Rptr. 234, 481 P.2d 242 (1971).

A.B. 2057 delegates judicial power because it gives arbitrators the power to issue binding decisions in warranty disputes and gives a state agency the authority to "certify" and "verify" a judicial process, functions traditionally left to the courts.

Resolution of disputes between private parties by making binding decisions is a judicial function which cannot be delegated to a non-judicial body. Thus, in *Jersey Maid Milk Products Co. v. Brock*, 13 Cal.2d 620, 91 P.2d 577 (1939), the Court struck down as unconstitutional a section of the Milk Stabilization Act authorizing the Director of Agriculture to determine the amount of damages due in disputes between producers and distributors of milk, and to "make an order directing the offender to make reparation and pay to such person complaining such amount on or before the date fixed in the order." 13 Cal.2d at 651. Similarly, in *Hustedt v. Workers' Compensation Appeals Board*, 30 Cal.3d 329, 178 Cal.Rptr. 801, 636 P.2d 1139 (1981), the Supreme Court struck down as unconstitutional a state statute granting the Worker's Compensation Appeals Board the power to issue "final" orders disciplining attorneys by temporarily or permanently prohibiting them from practicing before the Board. While limited judicial review of such orders was provided by the statute, the Court found that the review was insufficient to allow it to exercise its judicial functions and hence to remedy the unconstitutional delegation of the court's inherent authority. 30 Cal.3d at 339-40.

Numerous other California decisions which uphold delegations of authority emphasize the non-binding nature of the determinations involved and/or the availability of full judicial review. *See, e.g., Collier & Wallis v. Astor*, 9 Cal.2d 202, 70 P.2d 171 (1937) ("While a statute which makes the decision of arbitrators, or of an administrative officer, final and conclusive may not be sustained, if the statute gives to the parties the further right to appeal, or other procedure to carry the case before a regular judicial tribunal and have the issues there tried, it does not operate to deprive the parties of any constitutional right and is therefore valid"); *Cowell v. Clark*, 37 Cal.App.2d 255, 99 P.2d 594 (1940) (court held delegation of power to real estate commissioner was not unconstitutional because "no one of the provisions under attack purports to declare that any one of the administrative determinations of the defendant may not be reviewed by the courts"); *In re Shattuck*, 208 Cal. 6, 279 P. 998 (1929) (delegation of authority to State Bar constitutional where Bar's actions not final and court issues orders on Bar's decision); *Brydonjack v. State Bar*, 208 Cal. 439, 281 P. 1018 (1929) (same).

A.B. 2057 empowers arbitrators to "[r]ender decisions which are binding on the manufacturer, if the buyer elects to accept the decision." Thus, the proposed amendment does what the authorities prohibit -- it removes from the judicial realm the resolution of disputes through binding decisions -- and hence is unconstitutional.

California decisions also demonstrate that certain matters traditionally adjudicated by the courts cannot be delegated, even where subsequent review by a judicial body exists. For example, in *Reaves v. Superior Court*, 21 Cal.App.3d 587, 99 Cal.Rptr. 156 (1971), petitioners sought a writ of mandate directing the San Joaquin County Superior Court to adopt new procedures for processing extraordinary writ petitions filed by inmates. Under the existing procedure, such petitions were reviewed initially by the presiding judge of the Superior Court, but then were forwarded to the district attorney for verification and/or development of information. The district attorney prepared a proposed order based on the facts, or, if the petition presented unusual facts, the presiding judge reviewed the matter and directed the district attorney to prepare an appropriate order. In either case, orders were reviewed and entered by the court. The court held that the County's procedures improperly delegated judicial power:

> "The question is not whether the district attorney is scrupulously fair in such matters. Rather, *the question is whether the trial court has abdicated its judicial responsibility by delegating this function to the district attorney*. We think this point is well taken regardless of the fact the respondent court declares in its affidavit that in every instance it exercises its own independent discretion in reviewing the petitions and the orders drafted by the district attorney."

22 Cal.App.3d at 596. (Emphasis added.)

In *Reaves*, it was the nature of the delegated activity itself rather than the lack of later judicial review which compelled the court to find an unconstitutional delegation of judicial function. *Cf. Esteybar v. Municipal Court for the Long Beach Judicial District of Los Angeles County*, 5 Cal.3d 119, 95 Cal.Rptr. 524, 485 P.2d 1140 (1971) (statute requiring consent of prosecutor before magistrate could hold defendant charged with a misdemeanor violated separation of powers); *People v. Tenorio*, 2 Cal.3d 89, 89 Cal.Rptr. 249, 473 P.2d 993 (1970) (requiring court to obtain district attorney's approval before striking prior convictions unconstitutional).

Like the situation in *Reaves*, judicial power under A.B. 2057 is improperly delegated in the first instance. The Bureau of Automotive Repair, an agency of the executive branch, is charged with the responsibility of certifying and auditing judicial processes. Arbitrators are charged with the responsibility of finding facts and, presumably, have the authority to determine questions of law. In *Reaves*, at least a judge gave the matter his independent review, yet the practice still was held unconstitutional. A.B. 2057 makes the same mistakes and should, for the same reasons, be held invalid.

IV. THE STATE STATUTE CONFLICTS WITH POLICIES EXPRESSED IN THE FEDERAL MAGNUSON-MOSS ACT

The Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.* ("Magnuson-Moss"), preempts A.B. 2057. Magnuson-Moss delegates to the Federal Trade Commission ("FTC") the responsibility for establishing standards for informal dispute resolution mechanisms. A.B. 2057, however, requires dispute resolution features that are contrary to those expressed by the FTC.

Any preemption analysis begins with the Supremacy Clause of the U.S. Constitution. Where federal and state laws conflict, federal law is supreme. A federal statute can preempt a state law in three ways. First, the federal law can expressly preempt state law. Second, federal law can occupy the field of regulation such that it is implicit that Congress meant to prevent states from regulating in the field. Third, federal law can implicitly preempt state law if state law actually conflicts with federal law. This last form of preemption exists if it is impossible to comply with both the state and federal statutes, or if the state statute stands as an obstacle to the full accomplishment of the objectives of Congress. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n.*, 461 U.S. 190, 203-04 (1983).

While Magnuson-Moss may not occupy the field, since it states that "[n]othing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law," 15 U.S.C. §2311(b)(1), nevertheless it implicitly preempts A.B. 2057 because of *actual* conflicts between the two statutes. Thus, A.B. 2057 contains state policy choices contrary to those reached by the federal government. The Court in *Chrysler Corporation v. Texas Motor Vehicle Comm'n*, 755 F.2d 1192, 1205-06 (5th Cir.), *reh'g denied*, 761 F.2d 695 (5th Cir. 1985), ruled that "[w]e think it plain that the preclusive effect of section 110 [of Magnuson-Moss] is limited to rules governing informal dispute resolution procedures created by private warrantors. . . ." 755 F.2d at 1206. A.B.

2057 contains exactly those rules governing informal dispute resolution procedures which the Court stated were precluded.

Rather than leaving to the states the authority to make rules in this area, Congress instead gave to the FTC authority to prescribe regulations to implement Congress' policy of encouraging informal dispute resolution mechanisms (15 U.S.C. § 2310(a)(1)):

> "The Commission shall prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this chapter applies. Such rules shall provide for participation in such procedure by independent or governmental entities."
>
> 15 U.S.C. §2310(a)(2).

Under this authority, the FTC has made its judgments about which requirements will encourage manufacturers to establish dispute resolution procedures, and which ones will not. Under A.B. 2057, however, the state has made *contrary* determinations in certain areas.

1. The Binding Nature Of The State Mechanism Conflicts With The FTC Determination That Such Mechanisms Should Not Be Binding

A.B. 2057 conflicts with Magnuson-Moss by providing for *binding* resolution of automobile warranty disputes. Thus, unlike Magnuson-Moss, A.B. 2057 provides that a qualified dispute resolution process must not only comply with the minimum requirements of the FTC (16 C.F.R. § 703 *et seq.*) but also must

> "(B) Render decisions which are binding on the manufacturer if the buyer elects to accept the decision."
>
> A.B. 2057, Sec. 2 at 13 (proposed amendment to Section 1793.2(e)(3)(B) of Civil Code).

However, the FTC in 16 C.F.R. § 703.5(j) has explicitly provided to the contrary:

> "Decisions of the Mechanism shall *not* be legally binding on any person."
>
> (Emphasis added.)

The FTC has stated explicitly that it made this determination because, in the Commission's judgment, it was the most likely way to fulfill Magnuson-Moss'

statutory charge to encourage manufacturers to establish warranty dispute resolution mechanisms:

> "Many consumer representatives stated that Mechanism decisions should be binding on the warrantor alone, because the warrantor is the party who has chosen the Mechanism as the forum for dispute resolution. The Rule presently requires the warrantor to act in good faith in deciding whether, and to what extent, it will abide by Mechanism decisions. Thus, an adverse Mechanism decision will have a far greater impact on a warrantor than it will on a consumer. The Commission is not persuaded that making this impact on the warrantor even greater would benefit consumers more than it would discourage warrantors from adopting Mechanisms."
>
> FTC Statement of Basis and Purpose, 40 Fed. Reg. at 60210-211.

Thus, in an area committed by Congress to the judgment of the FTC, A.B. 2057 has expressed a judgment contrary to that of the FTC.

2. The State Statute Conflicts With The Federal Policy Encouraging National Dispute Resolution Processes

In several ways A.B. 2057 conflicts with the national federal policy of encouraging manufacturers to establish dispute resolution mechanisms. It does so by creating the requirement that mechanisms be local. Thus, the bill vests authority in a state agency, the Bureau of Automotive Repair, requiring the Bureau 1) to determine if a dispute resolution mechanism should be certified; 2) to conduct a periodic review of the procedure; and 3) to investigate consumer complaints and, if necessary, recommend that the Department of Motor Vehicles commence license revocation hearings. In addition, A.B. 2057 vests in civil juries the authority to determine if a dispute resolution procedure willfully fails to comply with the FTC standards. Since a California agency *only* can regulate constitutionally within its own borders, *see Archibald v. Cinerama Hotels*, 73 Cal.App.3d 152, 159, 140 Cal.Rptr. 599 (1977), the only way a manufacturer could comply with the California statute is to have its resolution process operate only *within California*. But this requirement of *local* dispute resolution mechanisms directly conflicts with the determination made by the FTC to encourage national mechanisms.

Thus, in providing that oral presentations in a dispute resolution process only be optional (and then only if both parties agree), 16 C.F.R. § 703.5(f), the FTC concluded that the way to fulfill the statute's mandate of encouraging expeditious mechanisms was to encourage a variety of mechanisms, including *national* mechanisms:

> "It is recognized that several existing mechanisms operate at a national level and do all of their information gathering by telephone or mail. To require an opportunity for an oral presentation at a reasonable time and place would make it impossible for these mechanisms to achieve the expeditious settlement of disputes which is envisioned by Section 110(a) of the Act.
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> * * *
>
> "Several witnesses suggested that an oral presentation should be allowed when the consumer requests, or when either party requests. These comments did not adequately support the view that the right to an oral presentation is essential at this informal level of dispute settlement. Since the need to foster a variety of Mechanisms, including national ones, is greater than the need for oral presentations at the behest of the parties, the Commission has retained this provision [as it is]."
>
> FTC Statement of Basis and Purpose, *supra*, 40 Fed. Reg. at 60209.

A.B. 2057, however, contradicts this determination of the FTC. Moreover, A.B. contradicts the unequivocal command of Magnuson-Moss which vests the *FTC* with authority to "review the bona fide operation of any dispute settlement procedure" and to take appropriate remedial action if it finds non-compliance with any of the FTC's rules. 15 U.S.C. § 2310 (a)(4). In preferring local determinations over those national judgments reached by Congress and the FTC, A.B. 2057 stands as an obstacle to the full accomplishment of Magnuson-Moss' objectives.

Congress commanded that the FTC be the entity to make judgments regarding the efficacy of dispute resolution mechanisms, and the cases clearly provide that "considerable weight should be accorded to an executive department's construction of a statute it is entrusted to administer." *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). *See also United States v. Shimer*, 367 U.S. 374, 383 (1961). Federal agencies implementing federal

law can preempt state action, just as Congress can. *Fidelity Federal Savings & Loan v. de la Cuesta*, 458 U.S. 141 (1982). A.B. 2057 conflicts with the FTC determinations, and thus is preempted.

V. THE STATUTE AFFORDS CONSUMERS AND MANUFACTURERS UNEQUAL TREATMENT IN REGARDS TO FUNDAMENTAL RIGHTS, AND THUS DENIES MANUFACTURERS THE EQUAL PROTECTION OF THE LAWS

A.B. 2057 provides that the decision in a dispute-resolution mechanism is binding on the manufacturer if the customer elects to make it so. (Civil Code § 1793.2(e)(3); A.B. 2057 at 7.) While parties to a voluntary arbitration may agree to be bound without the right of appeal, A.B. 2057 compels manufacturers to resort to a binding arbitration process through the imposition of civil penalties. (See Section I and II, *supra*.) This compulsion, and the inequality of the appeal process under the bill, violate constitutional guarantees of equal protection under the laws.

The equal protection clause of the United States Constitution provides:

> "No State shall ... deny to any person within its jurisdiction the equal protection of the laws."
>
> U.S. Const. amend. XIV, § 1.

The California Constitution provides:

> "A person may not be ... denied equal protection of the laws;
>
> "A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens."
>
> Cal. Const., Art 1, § 7.[5]

Under the equal protection clauses of the federal and California constitutions there is a basic inquiry: does the law in question treat similarly

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[5] This memorandum analyzes decisions under both the federal and California Constitutions because the equal protection clause of the latter has "Independent validity" apart from the Fourteenth Amendment under California law. *Gay Law Students Ass'n v. Pacific Telephone & Telegraph Co.*, 24 Cal.3d 458, 469, 156 Cal.Rptr. 14, 595 P.2d 592 (1979). The California Constitution states explicitly that "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." Cal. Const. Art. I, § 24.

situated persons in a similar manner?[6] In examining this question, both federal and California courts traditionally analyze the equal protection right under a two-tier analysis. Under the first tier, if the legislation in question establishes a "suspect" distinction between classes, such as one based on race or national origin, or if a "fundamental right" (such as speech) is granted to one class of persons and denied another, the legislation is viewed under the "strict scrutiny" test. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 216-17 (1982); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); *Bobb v. Municipal Court*, 143 Cal.App.3d 860, 865, 192 Cal.Rptr. 270 (1983). When strict scrutiny analysis is applied, the statute is invalid unless the state can establish that it has a compelling governmental interest that is precisely served by the classification:

> "The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right.' With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest."
>
> *Plyler v. Doe, supra*, 457 U.S. at 216-17; *accord, Darces v. Woods*, 35 Cal.3d 873, 885-86, 201 Cal.Rptr. 287, 679 P.2d 458 (1984).

The second tier of analysis, employed where neither a suspect classification nor fundamental right is in question, is the "rational basis" test. Under this test, the presumption of constitutionality shifts; state or local legislation will be upheld unless the plaintiff can demonstrate that there is no rational basis for the distinction in the legislation. As the Supreme Court explained in *Vance v. Bradley*, 440 U.S. 93 (1979):

> "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial

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[6] *See, e.g., F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); *Purdy and Fitzpatrick v. State of California*, 71 Cal.2d 566, 578, 79 Cal.Rptr. 77, 456 P.2d 645 (1969).

> intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."
>
> 440 U.S. at 97.

Rational basis analysis is most often employed where the legislation at issue has regulated economic relationships, such as statutes involving the licensing of professionals. *See, e.g., Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Brandwein v. California Board of Osteopathic Examiners*, 708 F.2d 1466, 1470 (9th Cir. 1983).

A.B. 2057 violates the equal protection clause by infringing on fundamental rights, without compelling justification.

A. THE STATUTE DENIES ONLY MANUFACTURERS THE RIGHT OF ACCESS TO THE COURTS

A.B. 2057 violates the equal protection clause of the California constitution by denying automobile manufacturers their basic right of access to the courts. The California Constitution separately protects the right to a jury trial, Cal. Const., Art. I, § 16, and where a trial by jury is available, that right may not be denied by statute. *People v. Wardlow*, 118 Cal.App.3d 375, 384, 173 Cal.Rptr. 500 (1981). As the Court noted in *Byram v. Superior Court*, 74 Cal.App.3d 648, 654, 14 Cal.Rptr. 604 (1977), "[t]he right to trial by jury is a basic and fundamental part of our system of jurisprudence (citations omitted)," citing, *inter alia*, the California Constitutional provision guaranteeing the right to jury trial. Since an action for breach of warranty entitles the parties to a jury trial (*see* section IIA, *supra*), A.B. 2057 discriminates against manufacturers with regard to a fundamental right. Strictly scrutinizing A.B. 2057 yields no "precisely tailored" classification to serve a *compelling* state interest in making this discrimination.

B. THE STATUTE DENIES ONLY MANUFACTURERS THE OPPORTUNITY FOR JUDICIAL REVIEW

The second fundamental right impinged by A.B. 2057 is the right of equal judicial review. As noted above, the bill would allow the customer *de novo* judicial review of the decision of the dispute resolution process. With respect to the

manufacturer, however, there is no right to review if the customer elects to bind the manufacturer. This unequal treatment violates the equal protection guarantees.

The Supreme Court has held that, if an appeal process has been provided by the state, that process must be equally available to all parties. The leading case is *Lindsey v. Normet*, 405 U.S. 56 (1972). In *Lindsey*, an Oregon statute required defendants in a forcible entry and detainer ("FED") action to provide, in addition to a normal appeal bond, a second bond for the payment of twice the rental value of the premises during the pendency of the action. 405 U.S. at 76. The Court held that this double-bond requirement violated the equal protection clause of the Fourteenth Amendment by unfairly and arbitrarily burdening FED defendants. 405 U.S. at 76-77. Stated the Court, "[w]hen an appeal is afforded . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." 405 U.S. at 77.

Because A.B. 2057 establishes disparate opportunities of appealing the decision of an arbitrator in an automobile warranty claim, the bill impinges on the right to an equal opportunity of appeal, as set forth in *Lindsey*. Again, no compelling state interest justifies this unequal treatment. While the state may have an interest in ensuring that automobile warranty disputes are handled expeditiously through arbitration, the state can ensure that goal without denying to manufacturers their right to a jury trial or judicial review: the classification is not "precisely tailored" to accomplish its objective.

C. THE ONE DECISION APPLYING A LESSER EQUAL PROTECTION STANDARD FOR A TOTALLY DIFFERENT KIND OF LEMON LAW HAS NO APPLICATION HERE

One court has applied a "minimum rationality" standard in evaluating an equal protection challenge to a lemon law, but that decision has no application to an analysis of A.B. 2057. In *Chrysler Corp. v. Texas Motor Vehicle Commissioner*, 755 F.2d 1192 (5th Cir. 1985), Chrysler made two equal protection challenges to the Texas law: 1) that by providing for fines against a losing manufacturer pending the appeal of an administrative board's decision, the Texas statute treated manufacturers differently than purchasers; and 2) that in allowing purchasers the right to a *de novo* trial after the administrative process, but refusing to attach prejudice to the administrative decision if the consumer lost, the statute treated consumers and manufacturers differently, for manufacturers possessed no corresponding right to a lawsuit free from the prejudice attaching to the administrative decision. The Court rejected both arguments, the first because

Chrysler *did* have a method under Texas law to secure prompt review without paying fines, and the second because it concluded the statute discriminated with regard to economic relationships, which was within the province of the Texas legislature. This decision, and the statutory scheme it considered, differ markedly from California decisions and the reach of A.B. 2057.

To begin with, *Chrysler* did not consider the argument that discriminations with regard to a fundamental right to jury trial under a state Constitution violate equal protection guarantees under that state's Constitution. Rather, the *Chrysler* analysis applies only to the federal Constitution, not with regard to any analysis of fundamental rights under state law. Yet, as noted, California law explicitly provides that the right to jury trial in a civil case is a fundamental right, and that discriminations with regard to fundamental rights are barred by the state's equal protection clause. The Texas law in any event was fairer; although it gave consumers, not manufacturers, a second opportunity to litigate *de novo*, it also at least gave consumers and manufacturers an equal opportunity to review of the administrative board's decision. A.B. 2057, of course, gives manufacturers *no* right to review of the arbitrators' decision.

Moreover, the argument advanced in *Chrysler* clearly did not implicate fundamental rights. Texas decided to give purchasers two bites at the apple, but to give manufacturers only one. This constituted discrimination in economic regulation, the Court ruled, for which the state needed little justification. Although the Court's reasoning is somewhat circular -- finding that manufacturers and purchasers were not similarly situated because the Texas law did not treat them as similarly situated -- nevertheless, the classification there clearly differed from a classification which differentiated with respect to fundamental rights.

VI. A.B. 2057 IS ALSO UNLAWFUL BECAUSE IT PERMITS THE ADMISSIBILITY INTO EVIDENCE OF THE ARBITRATOR'S DECISION AND ALLOWS THE IMPOSITION OF VICARIOUS PUNITIVE LIABILITY

There are two remaining defects in A.B. 2057: (1) it denies manufacturers the right of cross-examination because it permits the admission into evidence of the decision of an arbitrator, who cannot be cross-examined on the basis of his decision; and (2) it permits the imposition of civil penalties against a manufacturer for the wrongdoing of an independent third party, in contravention of the rule prohibiting vicarious punitive liability.

A. THE ADMISSION INTO EVIDENCE OF AN ARBITRATOR'S DECISION WITHOUT THE RIGHT OF CROSS-EXAMINATION OF THE ARBITRATOR IS UNCONSTITUTIONAL

Under the existing Lemon Law, "findings and decision of the third party [i.e., the arbitrator who presides over the non-judicial resolution process] shall be admissible in evidence in [any later civil] action without further foundation." Civil Code § 1793.2(e)(2). This provision is substantially the same as one appearing in Magnuson-Moss, 15 U.S.C. § 2310(a)(3). Neither provision raises any question of legality because these statutes only provide for voluntary arbitration; when the parties voluntarily enter into a dispute resolution process, any objection to the admissibility of the arbitrator's decision in a subsequent civil action is waived because the parties had notice of the above referenced requirement.

Under A.B. 2057, however, participation in the non-judicial process is not voluntary; as noted above, it is compelled by the threat of civil penalties. As a result, the compelled admission of the arbitrator's findings in a subsequent civil action violates the Constitution by prohibiting the right of cross-examination.

So teaches *McLaughlin v. Superior Court*, 140 Cal.App.3d 473, 189 Cal.Rptr. 479 (1983). There, the husband in a dissolution/child custody proceeding challenged the constitutionality of a local court rule which required pre-trial mediation of child custody disputes. The rule provided that the mediator could make recommendations to the court regarding custody, but did not permit cross-examination of the mediator at trial. On appeal the court held that this procedure violated due process:

> "The facts remain that the policy permits the court to receive a significant recommendation on contested issues but denies the parties the right to cross-examine its source. This combination cannot constitutionally be enforced."
>
> 140 Cal.App.3d at 481.

The "combination" held impermissible in *McLaughlin* exists under A.B. 2057, because California law generally prohibits cross-examination of arbitrators on the basis of their decision. *See Arco Alaska, Inc. v. Superior Court*, 168 Cal.App.3d

139, 147, 214 Cal.Rptr. 51 (1985).[7] In *Webb v. West Side District Hospital*, 144 Cal.App.3d 946, 193 Cal.Rptr. 80 (1983) the court explained the rationale behind this policy:

> "To promote the efficiency and finality of dispute settlements through arbitration, trial courts are generally precluded from examining the merits of the controversy, the sufficiency of the evidence, or the reasoning supporting the arbitrator's decision."
>
> 144 Cal.App.3d at 948-949.

The policy of prohibiting cross-examination of arbitrators applies squarely to the non-judicial process set forth in A.B. 2057: the goal of making that process informal, expeditious and "efficient" is undermined if cross-examination of the arbitrator is permitted. Yet under *McLaughlin*, "denial of the right to cross-examination . . . cannot constitutionally be enforced." 140 Cal.App.3d at 481. The solution to this dilemma heretofore has been to make arbitration voluntary. In forcing manufacturers to arbitrate, however, A.B. 2057 forces them to forego their constitutional right to cross-examination.[8]

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[7] This policy has two exceptions, not applicable here. First, an arbitrator may testify in order to determine which issues were submitted to arbitration. *Sartor v. Superior Court*, 136 Cal.App.3d 322, 327, 187 Cal.Rptr. 247 (1982). Second, examination is permissible where there is clear evidence of impropriety by the arbitrator. *Griffin Company v. San Diego College for Women*, 45 Cal.2d 501, 505, 289 P.2d 476 (1955).

[8] The situation may well arise that even if the manufacturer prevails in an arbitration, the admitted findings will be favorable in part to the consumer (e.g. on liability only), and introduction of these findings against the manufacturer absent the right of cross-examination is impermissible. Moreover, when an arbitrator's findings are admissible (e.g., where the arbitration was voluntary), the courts will give such findings "such weight as the court deems appropriate". *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 (1974). *See Criswell v. Western Airlines, Inc.*, 709 F.2d 544 (9th Cir.) *aff'd*, 105 S.Ct. 743 (1985) (court upholds instruction that the jury should consider an arbitration board's determination as a "reasonable factor").

B. THE POSSIBILITY UNDER THE STATUTE OF VICARIOUS IMPOSITION OF PUNITIVE DAMAGES CONTRAVENES ESTABLISHED PUBLIC POLICY IN CALIFORNIA

As noted previously, A.B. 2057 imposes a civil penalty, *inter alia*, if:

> "The manufacturer's qualified third party dispute resolution process willfully fails to comply with subdivision (e) of section 1793.2 in the buyer's case."

There are two possible constructions to this language. One construction is that the manufacturer may be penalized for the *manufacturer's* own willful failure to comply with the statutory requirements of the third-party dispute resolution process. Another interpretation, however, is that the manufacturer is vicariously liable for punitive damages based on some willful failure of the third party dispute process itself, i.e., the acts of independent third parties.[9] Under this interpretation of the statute, the manufacturer could be held liable for civil penalties if, for example, an independent arbitrator willfully violated the requirements of the statute. This result contravenes established public policy in California.

The "civil penalty" permitted by Civil Code § 1794 is tantamount to a punitive damage award. *Troensegaard v. Silvercrest Industries, Inc., supra*, 175 Cal.App.3d at 226. Since the purpose of punitive damages is punishment, such damages may be levied only against the party actually responsible for the wrong. *Magallanes v. Superior Court*, 167 Cal.App.3d 878, 213 Cal.Rptr. 547 (1985). In *Magallanes*, the court precluded the imposition of punitive damages on a party not proven responsible for the plaintiff's injuries:

> "The concept of punitive damages embodies a rule for individualized punishment of a wrongdoer whose conduct toward the plaintiff is particularly outrageous. Implicit in this concept is the notion that, where punishment is to be exacted, it must be certain that the wrongdoer being punished because of his conduct actually caused plaintiff's injuries."
>
> 167 Cal.App.3d at 889 (citation omitted).

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[9] Under the FTC rules applicable to A.B. 2057, no member of the resolution process may be a representative of the manufacturer. In addition, there are limitations on whether the arbitrators can have direct involvement in the manufacture, distribution, sale or service of any product. 16 C.F.R. §§ 703 *et seq.*

In *Peterson v. Superior Court*, 31 Cal.3d 147, 181 Cal.Rptr. 784 (1982) the state Supreme Court likewise stated:

> "[T]he policy considerations in a state where . . . . punitive damages are awarded for punishment and deterrence would seem to require that the damages rest ultimately as well as nominally on the party actually responsible for the wrong."
>
> 31 Cal.3d at 157 n.4.

These decisions express the policy of Civil Code § 3924, which provides that a corporate employer, liable for the torts of its employee by the doctrine of respondeat superior, is only liable for punitive damages where the corporation is itself guilty of wrongdoing or otherwise approved the employee's wrongful act. *See Merlo v. Standard Life and Accident Insurance Co. of California*, 59 Cal.App.3d 5, 18, 130 Cal.Rptr. 416 (1976); *Mitchell v. Keith*, 752 F.2d 385, 390 (9th Cir.), *cert. denied*, 105 S.Ct. 3502 (1985). A.B. 2057, however, goes a step further, apparently permitting punitive damages to be imposed on a manufacturer for the "willful" wrongdoing of a third party process. As such, the statute contravenes the established public policy prohibiting such vicarious punishment.

C. A.B. 2057 IS UNLAWFUL BECAUSE IT IMPOSES A DOUBLE PENALTY FOR THE SAME OFFENSE

The imposition of civil penalties under Section 1794(e) is also unlawful because it constitutes a double penalty for the same offense, in violation of the due process clause of the U.S. Constitution. Since the civil penalties under Section 1794(e) cannot be predicated solely on a manufacturer's refusal to establish a third party dispute resolution process (because the statute does not explicitly require a manufacturer to establish any process), the civil penalties under the statute only duplicate the civil penalties already available under Section 1794(c). This constitutes double punishment for the same act and is impermissible. The court in *Silvercrest, supra*, quoting from a holding of a United States district court, set forth the applicable principle:

> "A defendant has a due process right to be protected against unlimited multiple punishment for the same act. A defendant in a civil action has a right to be protected against double recoveries not because they violate 'double jeopardy' but simply because overlapping damage awards violate that send of 'fundamental fairness' which lies at the heart of

> constitutional due process (*In Re No. Dist. of Cal. Dalkon Shield IUD Products* (N.D. Cal. 1981) 526 F.Supp. 887, 889, vacated on other grounds in *Abed v. A.H. Robbins Co.*, (9th Cir. 1982) 693 F.2d 847) *and see Atlantic Purchasers Inc. v. Aircraft Sales, Inc.* (4th Cir. 1983) 705 F.2d 712, 717, N.4, holding: 'the two remedies are overlapping and, therefore probably inconsistent . . .'"
>
> 175 Cal.App.3d at 227.

The court in *Hometowne Builders, Inc. v. Atlantic Nat. Bank*, 447 F.Supp. 717 (E.D. Va. 1979) reached a similar conclusion in holding that a plaintiff in a federal antitrust action cannot recover both treble damages and punitive damages because such recovery would be a "necessarily duplicative" punishment. *Id.* at 720. *Hometowne* relied upon the Wisconsin Supreme Court's decision in *John Mohr and Sons, Inc. v. Jahnke*, 55 Wis.2d 402, 198 N.W.2d 363 (1972) that due process precludes recovery of both punitive damages and treble damages under a state antitrust statute:

> "[T]o allow treble damages and punitive damages would amount to double recovery of a penalty and this violates the basic fairness of a judicial proceeding required by the due process clause of the 14th amendment to the Federal Constitution".
>
> 198 N.W.2d at 367.

The imposition of penalty damages under Section 1794(c) and the additional imposition of further penalty damages under Section 1794(e) constitutes the same kind of impermissible double punishment.

VII. CONCLUSION

A.B. 2057 contains several provisions that are unconstitutional. The infirmities of the legislation stem from the binding nature of the arbitration which, *inter alia*, infringes on the manufacturer's right to jury trial. In addition, the statute threatens manufacturers with the imposition of double actual damages and double attorneys' fees for the failure to maintain the binding arbitration process. Accordingly, for all the reasons discussed in this memorandum, A.B. 2057 is unlawful and unconstitutional.

SENATE COMMITTEE ON JUDICIARY

BACKGROUND INFORMATION

AB 2057

1. Source

(a) What group, organization, governmental agency, or other person, if any, requested the introduction of the bill? Please list the requestor's telephone number or, if unavailable, his address.

Author introduced bill.

(b) Which groups, organizations, or governmental agencies have contacted you in support of, or in opposition to, your bill?

Support:		OPPOSITION:	
	CA Public Interest Group		Ford Motor Co.
	Consumers Union		General Motors Corp.
	Motor Voters		Automobile Importers of America
	Attorney General		Chrysler Motors

(c) If a similar bill has been introduced at a previous session of the Legislature, what was its number and the year of its introduction?

AB 3611 (1986)

2. Purpose

What problem or deficiency under existing law does the bill seek to remedy?

1) Ensures that owners of "lemon" cars will be reimbursed for sales tax and license fees when manufacturer buys back the vehicle.
2) Creates a program to ensure that auto manufacturer-run arbitration panels are operated fairly and impartially and in accordance with applicable law and regulations.

If you have any further background information or material relating to the bill, please enclose a copy of it or state where the information or material is available.

Arnie Peters 5-7783

PLEASE COMPLETE THIS FORM AND RETURN IT TO THE SENATE COMMITTEE ON JUDICIARY, ROOM 2187 AS SOON AS POSSIBLE. THE COMMITTEE STAFF CANNOT SET THE BILL FOR A HEARING UNTIL THIS FORM HAS BEEN RETURNED.

1. The rt to jury trial is guaranteed per Art I, Sec 16 of Cal Const, in a civil ~~trial~~ action at law, but not in equity. C & K Engineering v Amber Steel Co. (1978) 23 C 3d 1, 8.

2. The arbitration/trial de novo issue is valid. Herbert v. Lando (1982) 133 Cal App 3d 465

2. Penalizing mfgr for exercising rt to jury trial: this argument is based on a bootstrapping approach to mobilizing supporting authority. The argument that civil penalties are civil in nature is based on a Landlord-T case where the LL ~~turned off~~ T's water & electricity, an act which resulted in the statutory imposition of a $100 daily fine. The Ct stated that not all applications of the statutes penalty formula will be unconstl; the propriety of such a sanction must be done on a case by case basis. Hale v. Morgan (1978) 22 Cal 3d 388

As to the pt abt punishment for exercising unlawful rts being a due process violation, the case cited is a criminal (habeas corpus) action and the Ct expressly refers to this in the context of criminal proceedings. In re Lewallen (1974) 23 Cal 3d 274

George R. Steffes

1121 L STREET SUITE 909

LEGISLATIVE ADVOCATES

SACRAMENTO CALIFORNIA 95814

TELEPHONE 916 444-6034

July 7, 1987

MEMORDANDUM

TO: MEMBERS OF THE SENATE JUDICIARY COMMITTEE

FROM: SARAH MICHAEL, REPRESENTING THE AUTOMOBILE IMPORTERS OF AMERICA

SUBJECT: OPPOSITION TO AB 2057 RELATING TO NEW CAR WARRANTIES AND THE LEMON LAW - HEARING JULY 14, 1987

On behalf of the **Automobile Importers of America**, we are writing in opposition to AB 2057 which is before the Senate Judiciary Committee. The Automobile Importers of America **(AIA)** includes most European and Asian vehicle manufacturers offering cars in California.

AB 2057 makes a number of procedural changes to California's Lemon Law which are supported by consumer groups. The bill also creates a new bureaucratic certification process for auto manufacturers' voluntary lemon law programs. In addition, it would impose treble damages and an award of attorney's fees to consumers when they win a lawsuit against a manufacturer who has failed to establish or maintain a certified lemon law arbitration program.

AIA feels that the creation of a certification process and imposition of treble damages and attorney fees against manufacturers who don't have a "certified" program if a consumer wins in court are **unwarranted and unconstitutional.** AIA has undertaken a detailed legal analysis of AB 2057 which concludes that it is unconstitutional because it violates a number of basic rights. Attached is a checklist of constitutional problems with AB 2057.

AIA must continue to oppose AB 2057 as long as state certification and treble damages and attorney fees are included in the bill.

For these reasons, we urge your "no" vote on AB 2057.

CONSTITUTIONAL ARGUMENTS

The failure of AB 2057 to afford manufacturers a jury trial is unconstitutional under the California Constitution.

The civil penalties provision is unconstitutional because it penalizes the manufacturer for exercising its right to a jury trial.

The bill is unconstitutional because it delegates judicial power to arbitrators, who are not judicial officers.

The bill's requirement that a manufacturer must have a dispute resolution process conflicts with the provisions of the Magnuson-Moss Warranty Act, which encourages voluntary programs, and with specific provisions of 16 C.F.R. Section 703.

AB 2057 is unconstitutional on equal protection grounds because it affords unequal treatment to manufacturers in regards to fundamental rights.

The admission of the arbitrator's decision into evidence without providing the right to cross-examine the arbitrator is unconstitutional.

Section 4 of the bill is unlawful because it (1) impermissibly imposes civil penalties on manufacturers for the acts of third parties and (2) apparently imposes a double penalty for the same offense.

AB 2057

(1) Need way to compel attendance participation in certification proceed
Punitives wld be this
Only applies where no certif'd
Wld allow where willful misconduct
How cld it be lmtd to subst'l viol.
a) Discretionary w/ ct.

(2) Atty Fees
Discretionary & if car owner prevails

(3) AB 3611
Passed Judic as is now
except no treble dmgs
& no cal trcat
Went to Approp susp file - killed by Burkwright

GENERAL MOTORS CORPORATION
1170 PARK EXECUTIVE BUILDING, 925 L STREET, SACRAMENTO, CALIFORNIA 95814

July 8, 1987

Honorable Bill Lockyer, Chairman
Senate Judiciary Committee
State Capitol Building, Room 2032
Sacramento, California 95814

Re: AB 2057 (Tanner) Lemon Law Revision

Dear Bill:

This is to advise you that the General Motors Corporation is opposed to AB 2057 (Tanner), which is scheduled for hearing by the Senate Judiciary Committee on July 14.

AB 2057 would create a new certification process for automobile manufacturers voluntary arbitration programs. In so doing, it would formalize the procedure to the point where an arbitrator would be required to be trained in the specifics of the lemon law. If one of the arbitrators misapplied the principles of the lemon law, the manufacturer would be liable for treble damages and attorney fees. General Motors has about 1,000 arbitrators in California. No more than 250 are attorneys. It seems unreasonable to provide for treble damages based upon the decision of a layman arbitrator, untrained in the law.

The idea of General Motors' arbitration program, which is voluntary and predates California's lemon law, is that it be informal and non-legal, that the process be easily understood by the consumer, and that a lengthy court setting be avoided. AB 2057 would formalize the procedure by attempting to make layman arbitrators judges and then injecting treble damages.

For these reasons we must respectfully oppose AB 2057.

Sincerely,

G. Lee Ridgeway, Regional Manager
Industry-Government Relations

GLR/rp
cc: Members, Senate Judiciary Committee
Assemblywoman Sally Tanner

Regional Governmental Affairs Office
Ford Motor Company

Suite 260 – 925 L Street
Sacramento, California 95814
Telephone: 916/442-0111

July 10, 1987

To: Members, Senate Judiciary Committee

Subject: Opposition to AB 2057

Ford Motor Company is opposed to Assembly Bill 2057, relating to vehicle warranties, which is set for hearing in the Senate Judiciary Committee July 14, 1987. Ford's opposition is based on three main issues:

(1) We feel this bill raises serious constitutional issues as contained in the attached Checklist of Constitutional Problems with AB 2057 prepared by Automobile Importers of America, Inc., dated July 2, 1987.

(2) Ford also opposes the multiple damages provision of the bill as it would encourage litigation. The recovery of damages would place a high premium on prevailing under the statute, rendering "lemons" extremely valuable. A multiple damage provision is particularly unfair if it penalizes the manufacturer for the actions of a third party dispute resolution mechanism over which it does not exert control.

(3) We further oppose the requirement that our voluntary third party lemon law arbitration programs must be certified by a state bureaucratic certification process.

We urge your NO" vote on AB 2057.

Richard L. Dugally

RICHARD L. DUGALLY
Regional Manager
Governmental Affairs

RLD:cme

cc: Honorable Sally Tanner
Consultants, Senate Judiciary Committee

AUTOMOBILE IMPORTERS OF AMERICA, INC.

CHECKLIST OF CONSTITUTIONAL PROBLEMS WITH A.B. 2057

- The failure of A.B. 2057 to afford manufacturers a jury trial is unconstitutional under the California Constitution. The right to a jury trial is guaranteed by the California Constitution.[1] Consumer warranty claims are essentially contract claims,[2] for which the jury trial right is guaranteed.[3] Moreover, under California Law, the right to jury trial cannot be infringed by a statute purporting to compel arbitration without the right of trial de novo.[4]

- The civil penalties provision is unconstitutional because it penalizes the manufacturer for exercising its right to a jury trial. Civil penalties are penal in nature.[5] In California, "[i]t is well settled that to punish a person for exercising individual rights [such as the right to jury trial] is a due process violation of the most basic sort."[6]

- The bill is unconstitutional because it delegates judicial power to arbitrators, who are not judicial officers. Under the California Constitution, judicial powers and responsibilities are vested solely in the judicial branch and may not be exercised by any other branch.[7] Thus, "the legislature is without power, in the absence of constitutional provision authorizing the same, to confer judicial functions upon a statewide administrative agency."[8] In the absence of de novo judicial review, the delegation of judicial functions--such as that in the A.B. 2057--to nonjudicial bodies is unconstitutional.[9]

- The bill's requirement that a manufacturer must have a dispute resolution process conflicts with the provisions of the Magnuson-Moss Warranty Act, which encourages voluntary programs, and with specific provisions of 16 C.F.R. Section 703.

- A.B. 2057 is unconstitutional on equal protection grounds because it affords unequal treatment to manufacturers in regards to fundamental rights. Under A.B. 2057, the decision of a dispute resolution process is binding on the manufacturer but not on the consumer, who is free to challenge the decision in court. It is impermissible to grant a fundamental right, such as the right to jury trial, to one class and deny

it to another.[10] Moveover, under California law it is impermissible to discriminate against manufacturers merely because they may have more wealth than consumers.[11]

- o <u>The admission of the arbitrator's decision into evidence without providing the right to cross-examine the arbitrator is unconstitutional.</u> In California, "denial of the right to cross-examination [of a non-judicial decision-maker] cannot constitutionally be enforced."[12] Consequently, A.B 2057, which compels the manufacturer into arbitration by the threat of civil penalties and then admits the arbitrator's decision into evidence without cross-examination, is unconstitutional.[13]

- o <u>Section 4 of the Bill is unlawful because it (1) impermissibly imposes civil penalties on manufacturers for the acts of third parties and (2) apparently imposes a double penalty for the same offense.</u> The civil penalty of Section 1794(e) is tantamount to a punitive damage award,[14] and thus may only be imposed on the party actually responsible for the wrong,[15] not on a manufacturer for the actions of the "third party dispute resolution process" that must, under FTC rules, be independent of the manufacturer. The civil penalties under Section 1794(e) duplicate the penalties under Section 1794(c) and are, therefore, unlawful.[16]

AUTOMOBILE IMPORTERS OF AMERICA, INC.

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FOOTNOTES

1. C & K Engineering Contractors v. Amber Steel Co., Inc., 23 Cal. 3d 1, 8, 557 P. 2d 1136 (1978).

2. See Keith v. Buchanan, 173 Cal. App. 3d 13, 19, 220 Cal. Rptr. 392 (1985).

3. C & K Engineering Contractors, 23 Cal. 3d at 9.

4. Herbert v. Harn, 133 Cal. App. 3d 465, 469, 184 Cal. Rptr. 83 (1982).

5. Hale v. Morgan, 22 Cal. 3d 388, 405, 149 Cal. Rptr. 375, 584 P. 2d 512 (1978).

6. In re Lewallen, 23 Cal. 3d 274, 278, 590 P.2d 383 (1979).

7. Cal. Const., Art. III, Sec. 3; Art. VI, Sec. 1.

8. Standard Oil Co. of California v. State Board of Equalization, 6 Cal. 2d. 557, 569, 59 P.2d 119 (1936).

9. Laisne v. California State Board of Optometry, 19 Cal. 2d 831, 834-35, 123 P.2d 457 (1942).

10. Cf. Pyler v. Doe, 457 U.S. 202, 216-17 (1982); United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

11. See Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1214 (1971) (tax revenue distinctions based upon school district wealth are unconstitutional).

12. McLaughlin v. Superior Court, 140 Cal. App. 3d 473, 481, 189 Cal. Rptr. 479 (1983).

13. Statutes like the Magnuson-Moss Act or the current Lemon Law--which also make the arbitrator's decision admissible--survive constitutional scrutiny because the arbitration process is voluntary.

14. Troensegaard v. Silvercrest Industries Inc., 175 Cal. App. 3d 218, 226, 220 Cal. Rptr. 712 (1985).

15. See Magallanes v. Superior Court, 167 Cal. App. 3d 878, 889, 213 Cal. Rptr. 647 (1985).

16. Silvercrest Industries, 175 Cal. App. 3d at 227.

Legislative Counsel of California

BION M. GREGORY

July 13, 1987

Assemblywoman Sally Tanner

A.B. 2057 – Conflict

The above measure, introduced by you, which is now set for hearing in the Senate Judiciary Committee, appears to be in conflict with the following other measure(s):

A.B. 2050-Tanner
A.B. 282-Statham
A.B. 343-Cortese
A.B. 410-Frazee
A.B. 735-McClintock
A.B. 901-Mountjoy
A.B. 1635-Dennis Brown
A.B. 276-Eaves
A.B. 1367-Tanner
S.B. 71-Leroy Greene
S.B. 205-Kopp
S.B. 263-Rogers
S.B. 1028-Morgan
S.B. 1349-Nielsen

ENACTMENT OF THESE MEASURES IN THEIR PRESENT FORM MAY GIVE RISE TO A SERIOUS LEGAL PROBLEM WHICH PROBABLY CAN BE AVOIDED BY APPROPRIATE AMENDMENTS.

WE URGE YOU TO CONSULT OUR OFFICE IN THIS REGARD AT YOUR EARLIEST CONVENIENCE.

Very truly yours,
BION M. GREGORY
LEGISLATIVE COUNSEL

cc: Committee named above
Each lead author concerned

SENATE COMMITTEE ON JUDICIARY
Bill Lockyer, Chairman
1987-88 Regular Session

AB 2057 (Tanner)
As amended June 11
Hearing date: July 14, 1987
Various Codes
TDT

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NEW MOTOR VEHICLE WARRANTIES

HISTORY

Source: Author

Prior Legislation: AB 3611 (1986) - Held in Senate Appropriations Committee
AB 1787 (1982) - Chaptered

Support: California Public Interest Research Group (CALPIRG); Consumers' Union; Motor Votors; Attorney General

Opposition: Ford Motor Co; General Motors Corp; Chrysler Motors; Automobile Importers of America

Assembly Floor Vote: Ayes 54 - Noes 20

KEY ISSUES

SHOULD THE VEHICLE MANUFACTURERS' VOLUNTARY DISPUTE RESOLUTION PROCEDURES BE REPLACED BY A STATE CERTIFIED DISPUTE RESOLUTION PROCESS?

SHOULD A VEHICLE MANUFACTURER BE LIABLE TO A BUYER FOR TREBLE DAMAGES AND ATTORNEY'S FEES?

PURPOSE

Existing law imposes various duties upon manufacturers making express warranties with respect to consumer goods, including the duty to replace the goods or reimburse the buyer, as specified, if the goods are not repaired to conform to those warranties after a reasonable number of attempts. Existing law also prohibits a buyer of such goods from asserting a presumption that a reasonable number of attempts have been made to conform a new motor vehicle, as specified, unless the buyer first resorts to a third party dispute resolution process, as defined, following notice that such a process is available.

(More)

This bill would revise the provisions relating to warranties on new motor vehicles to require the manufacturer or its representative to replace the vehicle or make restitution, as specified, if unable to conform the vehicle to the applicable express warranties after a reasonable number of attempts. The bill would, on July 1, 1988, revise the definitions of "motor vehicle," "new motor vehicle," and "qualified third party dispute resolution process" and define the term "demonstrator" for these purposes, and require the Bureau of Automotive Repair to establish a program for the certification of third party dispute resolution processes pursuant to regulations adopted by the New Motor Vehicle Board, as specified. The bill would prohibit the sale or lease of a motor vehicle transferred by a buyer or a lesser to a manufacturer for a nonconformity, except as specified.

The bill would, on July 1, 1988, create the Certification Account within the Automotive Repair Fund, to be funded by fees imposed on manufacturers and distributors and collected by the New Motor Vehicle Board, to be expended upon appropriation by the Legislature to pay the expenses of the bureau under the bill.

Existing law authorizes the award of court costs and attorney's fees to consumer who prevail in such actions, and would also require the award of civil penalties, including treble damages, against certain manufacturers. Existing law provides for the disposition of moneys in the Retail Sales Tax Fund.

The purpose of this bill is to improve protections for vehicle purchasers under the existing lemon law.

COMMENT

1. Existing lemon law

Existing law provides that a manufacturer who is unable to service or repair consumer goods, including motor vehicles, so that they conform to the applicable warranties after a reasonable number of attempts, must either replace those goods or reimburse the buyer. In 1982, the law was amended by AB 1787 (Tanner), commonly referred to as the lemon law. Specifically, it:

-Defines "reasonable number of attempts" for new motor vehicles as either four or more repair attempts on the same major defect, or, more than 30 days out of service for service/repair of one or more major defects, within the first year or 12,000 miles of use.

(More)

-Requires a buyer to notify the manufacturer directly of a continuing defect and to use a dispute resolution program meeting specified minimum standards prior to asserting the "lemon presumption" in a legal action to obtain a vehicle replacement or refund.

-Defines the "lemon presumption" as the "reasonable number of attempts" in the paragraph above.

This bill would amend and clarify the lemon law. It would establish a structure for certifying third-party dispute mechanisms, requirements for certification and provide for treble damages and attorney's fees to consumers who obtain a judgement against a manufacturer who does not have a certified lemon law arbitration program.

2. Need for legislation

The purpose of this bill, according to the author, is to strengthen existing lemon law, to eliminate inequities that have occurred from that law's implementation and to ensure that owners of seriously defective new cars can obtain a fair, impartial and speedy hearing on their complaints.

The author and proponents state that since the effective date of the lemon law over four years ago, there have been numerous complaints from new car buyers concerning its implementation. While these complaints reflect continued dissatisfaction with the manufacturer's own resolution of disputes regarding defective new vehicles, they have also alleged that the dispute resolution programs financed by the manufacturers are not operated impartially. Consumers have complained of: long delays in obtaining a hearing (beyond the prescribed 40-60 day time limit); unequal access to the arbitration process; unreasonable decisions that do not appear to exhibit knowledge of the lemon law's provisions or provide an adequate amount of reimbursement even when a refund decision is ordered.

3. Provisions of the bill

This bill would:

a) Require the Bureau of Automotive Repair (BAR) to: certify the arbitration programs for resolution of vehicle warranty disputes as requested; annually recertify those programs or decertify as inspection

(More)

warrants; notify the Department of Motor Vehicles (DMV) of the failure of a manufacturer, distributor, or their branches to comply with arbitration decisions; investigate consumer complaints regarding qualified programs; and, submit a biennial report to the Legislature evaluating the effectiveness of the program.

b) Authorize BAR to charge fees to be collected by the New Motor Vehicle Board (NMVB) in the Department of Motor Vehicles (DMV), beginning July 1, 1988, from specified NMVB licensees, not to exceed $1 (one dollar) for each new motor vehicle sold, leased, or distributed in California. The fees would be deposited into the Certification Account of the Automotive Repair Fund.

c) Require motor vehicle manufacturers to replace defective vehicles or make restitution if the manufacturer were unable to service or repair the vehicles after a reasonable number of buyer requests. The buyer, however, would be free to take restitution in place of a replacement vehicle.

d) Specify what would be included in the replacement and refund option.

-In case of replacement, the new motor vehicle must be accompanied by all express and implied warranties. The manufacturer would pay for, or to, the buyer the amount of any sales or use tax, license and registration fees, and other official fees which the buyer would be obligated to pay in connection with the replacement, plus any incidental damages the buyer would be entitled to including reasonable repair, towing, and rental car costs.

-In case of restitution, the manufacturer must pay the actual price paid including any charges for transportation and manufacturer-installed options, sales tax, license fees, and registration fees plus incidental damages. The amount directly attributable to use by the buyer would be determined as prescribed and could be subtracted from the total owed to the buyer.

e) Clarify that the vehicle buyer could assert the "lemon presumption" in any civil action, small claims court action or other formal or informal proceeding.

(More)

f) Set forth a qualified third party dispute resolution process and require compliance with the minimum requirements of the Federal Trade Commission (FTC) for informal dispute settlement procedures as defined on January 1, 1987.

g) Amend the definition of a "new motor vehicle" which is covered by the lemon law to include dealer-owned vehicles and demonstrator vehicles.

h) Prevent a vehicle repurchased by a manufacturer under the lemon law from being resold as a used car unless the nature of the car's problems were disclosed, the problems were corrected, and the manufacturer warranted that the vehicle is free of those problems for one year.

i) Require the Board of Equalization to reimburse the manufacturer in an amount equal to the sales tax paid for vehicles for which the manufacturer provided the specified refund to the buyer.

j) Provide for awards of treble damages and reasonable attorney's fees and costs if the buyer were awarded a judgement and the manufacturer did not maintain a qualified third party dispute resolution process as established by this chapter.

4. Opposition

Opponents of the bill state that the number of consumers dissatisfied with the current arbitration process is small relative to the number of arbitrations. They do not object to most of the provisions which update the lemon law, however, they strenuously object to the provisions for treble damages and an award of attorney's fees to consumers. They feel this creates an improper incentive for consumers to hire an attorney to go to court over procedural issues. They feel treble damages, usually associated with gross and willful wrongdoing, would set a dangerous precedent by making consumers eligible for a financial windfall by the sole fact that a new car manufacturer may not have a certified lemon law arbitration program.

a. General Motors

GM opposes the provisions of this bill because it would formalize the manufacturers' heretofore voluntary arbitration procedures to such an extent that the

(More)

arbitrator would need to be trained in the specifics of the lemon Law. They contend the bill would make them liable unreasonably for treble damages and the buyer's attorney's fees if a layman arbitrator untrained in the law, misapplied the lemon Law. GM has approximately 1,000 arbitrators in California, only 250 of whom are attorneys.

b. Automobile Importers of America

AIA which includes most European and Asian vehicle manufacturers selling cars in California, opposes the state certification, treble damages and attorneys' fee award provisions of the bill. They view the certification provisions as creating a new bureaucratic process for the manufacturers' voluntary lemon law programs.

AIA feels the creation of a certification process and imposition of treble damages and attorneys' fees against manufacturers who fail to establish or maintain a certified program, if a consumer wins in court, would be unwarranted and unconstitutional.

In general, opponents of the bill argue that the intent of arbitration programs such as GM's, which predates the lemon law, is that they be voluntary, informal, nonlegal, and easily understood by the consumer procedurally.

5. Possible alternative provisions

As an alternative to the bill's current provisions for mandatory treble damages and attorney's fee awards, the court could be given discretion to award those items where the situation was appropriate and such were warranted. Further, the award of treble damages could be restricted to cases involving "substantial violations". Such a compromise would satisfy the consumer's interests and retain a method to compel the manufacturers meaningful participation in the certification process. Finally, a key issue which should be considered, is whether a manufacturer must have a certified dispute resolution program to avoid the imposition of treble damages and attorneys' fees.

****

2187

STATE OF CALIFORNIA—BUSINESS, TRANSPORTATION AND HOUSING AGENCY GEORGE DEUKMEJIAN, Governor

OFFICE OF THE DIRECTOR
DEPARTMENT OF MOTOR VEHICLES
P O BOX 932328
SACRAMENTO, CA 94232-3280

August 13, 1987

Honorable Sally Tanner
Member of the Assembly
State Capitol - Room 4146
Sacramento, CA 95814

Dear Assemblywoman Tanner,

The Department of Motor Vehicles has completed its analysis of your bill, AB 2057, as amended June 11, 1987. The bill requires this department to collect a $1 fee for each vehicle sold, leased or distributed by motor vehicle manufacturers and distributors. These monies would be used to fund a Third-Party Dispute Resolution Program administered by the Bureau of Automotive Repair.

While we have no problem with this concept, we must point out that the bill will cause us to incur implementation costs of $25,334 in order to have the collection mechanisms in place by the July 1, 1988 operative date. Therefore, we would ask that an appropriation be included in the bill to provide the required funding.

Attached is our fiscal impact statement and an itemization of the costs involved. We have also taken the liberty of attaching suggested amendment language which would provide the requested amount.

Thank you for your consideration of this request. If I can provide any additional information or clarification regarding this data, please feel free to contact me at your convenience.

Respectfully,

Rebecca Ferguson
Legislative Liaison Officer

Attachment

cc: Senate Judiciary Committee

AB 2057 (Tanner) Warranties: New Motor Vehicles
4-28-87, 5-13-87
& 6-11-87

FISCAL IMPACT SUMMARY

Amended June 11, 1987

ASSUMPTIONS:

1. BAR will develop the reporting form to be used by licensees. DMV will consult on the fee-collection aspect for form development.

2. DMV will mail the reporting form to affected licensees with their renewal notices and will include the form with new license applications.

3. When processing returned applications, DMV will cashier the fee paid for the program from the total shown on the reporting form and deposit it to the Certification Account. DMV will correspond with the applicant or licensee if forms and/or fees are not submitted or if the amount due on the form does not match the amount paid. DMV will not otherwise check the forms for accuracy or validity of reporting.

4. Forms will be forwarded to BAR at established intervals.

IMPLEMENTATION COSTS:	87/88 FY
Programming to establish flag for mailing reporting forms with renewal notices.	$11,200 (280 hours)
Programming to deposit fees to special fund	12,000 (300 hours)
Notice to affected licensees. Coordination of reporting form and procedure development with BAR.	2,134 (.13PY)
Total	$25,334*

ANNUAL ON-GOING COSTS:	
Maintenance of special fund	$ 5,466
Mailing reporting forms, cashiering, correspondence	1,500
Total	$ 6,966

* The Department will require an appropriation of $25,334 to cover the costs in FY 87/88.

AB 2057 (Tanner) Registration: New motor vehicles
4-28-87, 5-13-87
& 6-11-87

AMENDMENT

On page 8, before line 23, INSERT:

(r) An appropriation in the amount of twenty-five thousand three hundred thirty-four dollars ($25,334) shall be made to the Department of Motor Vehicles for implementation purposes.

JOHN K. VAN DE KAMP
Attorney General

State of California
DEPARTMENT OF JUSTICE

3580 WILSHIRE BOULEVARD, ROOM 800
LOS ANGELES 90010
(213) 736-2304

BACKGROUND STATEMENT

AB 2057 (Tanner)
Warranties: New Motor Vehicles

Over the past two years, the Attorney General's Office has heard from hundreds of frustrated new car buyers who cannot get manufacturers to fix defects or replace or buy back "lemons."

Current law requires that a manufacturer honor its written warranties. If a manufacturer is unable to correct a defective new motor vehicle within a reasonable number of attempts, then the manufacturer must replace the vehicle or reimburse the buyer. A manufacturer may establish an arbitration procedure to resolve warranty disputes.

The Attorney General's Office has looked at each of the arbitration programs in California. In many cases, these programs are not fair and impartial. For example, employees of the manufacturer may be involved in the decision-making process. Arbitrators often are not instructed in California's warranty law and make decisions contrary to law. In addition, arbitrators have limited power to order an independent expert examination of a "lemon" vehicle and have to rely on the manufacturer's technical evaluation.

AB 2057 strengthens arbitration programs by incorporating into their framework safeguards to ensure a fair and impartial arbitration. The bill also permits the Bureau of Automotive Repair to certify that an arbitration program complies with statutory requirements.

Additionally, the bill allows a court in its discretion to impose a penalty on a manufacturer which fails to honor its warranty, fails to correct defects within a reasonable number of attempts, fails to replace or buy back a "lemon" vehicle, and requires a buyer to go to court to resolve the dispute. The penalty amount is limited to twice the amount of actual damages. But, no penalty can be awarded if the manufacturer maintains an arbitration program that substantially complies with statutory requirements.

California is not alone in trying to resolve this growing area of discontent with new motor vehicle warranty problems. Eight other states have already enacted far stronger "lemon" laws and have set up state-run arbitration programs. Four other states have statutes or pending legislation similar to AB 2057.

This bill will invigorate the existing automobile "lemon" law which has not provided an adequate remedy to buyers of defective new cars.

SENATE COMMITTEE ON JUDICIARY
Bill Lockyer, Chairman
1987-88 Regular Session

AB 2057 (Tanner)
As amended August 17
Hearing date: August 18, 1987
Various Codes
TDT

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NEW MOTOR VEHICLE WARRANTIES

HISTORY

Source: Author

Prior Legislation: AB 3611 (1986) - Held in Senate Appropriations Committee
AB 1787 (1982) - Chaptered

Support: California Public Interest Research Group (CALPIRG); Consumers' Union; Motor Votors; Attorney General

Opposition: Ford Motor Co; General Motors Corp; Chrysler Motors; Automobile Importers of America

Assembly Floor Vote: Ayes 54 - Noes 20

KEY ISSUES

SHOULD THE VEHICLE MANUFACTURERS' VOLUNTARY DISPUTE RESOLUTION PROCEDURES BE REPLACED BY A STATE CERTIFIED DISPUTE RESOLUTION PROCESS?

SHOULD A VEHICLE MANUFACTURER BE LIABLE TO A BUYER FOR TREBLE DAMAGES AND ATTORNEY'S FEES?

PURPOSE

Existing law imposes various duties upon manufacturers making express warranties with respect to consumer goods, including the duty to replace the goods or reimburse the buyer, as specified, if the goods are not repaired to conform to those warranties after a reasonable number of attempts. Existing law also prohibits a buyer of such goods from asserting a presumption that a reasonable number of attempts have been made to conform a new motor vehicle, as specified, unless the buyer first resorts to a third party dispute resolution process, as defined, following notice that such a process is available.

(More)

This bill would revise the provisions relating to warranties on new motor vehicles to require the manufacturer or its representative to replace the vehicle or make restitution, as specified, if unable to conform the vehicle to the applicable express warranties after a reasonable number of attempts. The bill would, on July 1, 1988, revise the definitions of "motor vehicle," "new motor vehicle," and "qualified third party dispute resolution process" and define the term "demonstrator" for these purposes, and require the Bureau of Automotive Repair to establish a program for the certification of third party dispute resolution processes pursuant to regulations adopted by the New Motor Vehicle Board, as specified. The bill would prohibit the sale or lease of a motor vehicle transferred by a buyer or a lesser to a manufacturer for a nonconformity, except as specified.

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Existing law authorizes the award of court costs and attorney's fees to consumer who prevail in such actions, and would also require the award of civil penalties, including treble damages, against certain manufacturers. Existing law provides for the disposition of moneys in the Retail Sales Tax Fund.

The purpose of this bill is to improve protections for vehicle purchasers under the existing lemon law.

COMMENT

1. Existing lemon law

Existing law provides that a manufacturer who is unable to service or repair consumer goods, including motor vehicles, so that they conform to the applicable warranties after a reasonable number of attempts, must either replace those goods or reimburse the buyer. In 1982, the law was amended by AB 1787 (Tanner), commonly referred to as the lemon law. Specifically, it:

-Defines "reasonable number of attempts" for new motor vehicles as either four or more repair attempts on the same major defect, or, more than 30 days out of service for service/repair of one or more major defects, within the first year or 12,000 miles of use.

(More)

-Requires a buyer to notify the manufacturer directly of a continuing defect and to use a dispute resolution program meeting specified minimum standards prior to asserting the "lemon presumption" in a legal action to obtain a vehicle replacement or refund.

-Defines the "lemon presumption" as the "reasonable number of attempts" in the paragraph above.

This bill would amend and clarify the lemon law. It would establish a structure for certifying third-party dispute mechanisms, requirements for certification and provide for treble damages and attorney's fees to consumers who obtain a judgement against a manufacturer who does not have a certified lemon law arbitration program.

2. Need for legislation

The purpose of this bill, according to the author, is to strengthen the existing lemon law, to eliminate inequities that have occurred from that law's implementation and to ensure that owners of seriously defective new cars can obtain a fair, impartial and speedy hearing on their complaints.

The author and proponents state that since the effective date of the lemon law over four years ago, there have been numerous complaints from new car buyers concerning its implementation. While these complaints reflect continued dissatisfaction with the manufacturer's own resolution of disputes regarding defective new vehicles, they have also alleged that the dispute resolution programs financed by the manufacturers are not operated impartially. Consumers have complained of: long delays in obtaining a hearing (beyond the prescribed 40-60 day time limit); unequal access to the arbitration process; and unreasonable decisions that do not appear to exhibit knowledge of the lemon law's provisions or provide an adequate amount of reimbursement even when a refund decision is ordered.

3. Provisions of the bill

This bill would:

a) Require the Bureau of Automotive Repair (BAR) to: certify the arbitration programs for resolution of vehicle warranty disputes as requested; annually recertify those programs or decertify as inspection

(More)

warrants; notify the Department of Motor Vehicles (DMV) of the failure of a manufacturer, distributor, or their branches to comply with arbitration decisions; investigate consumer complaints regarding qualified programs; and, submit a biennial report to the Legislature evaluating the effectiveness of the program.

b) Authorize BAR to charge fees to be collected by the New Motor Vehicle Board (NMVB) in the Department of Motor Vehicles (DMV), beginning July 1, 1988, from specified NMVB licensees, not to exceed $1 (one dollar) for each new motor vehicle sold, leased, or distributed in California. The fees would be deposited into the Certification Account of the Automotive Repair Fund.

c) Require motor vehicle manufacturers to replace defective vehicles or make restitution if the manufacturer were unable to service or repair the vehicles after a reasonable number of buyer requests. The buyer, however, would be free to take restitution in place of a replacement vehicle.

d) Specify what would be included in the replacement and refund option.

-In case of replacement, the new motor vehicle would be accompanied by all express and implied warranties. The manufacturer would pay for, or to, the buyer the amount of any sales or use tax, license and registration fees, and other official fees which the buyer would be obligated to pay in connection with the replacement, plus any incidental damages the buyer would be entitled to including reasonable repair, towing, and rental car costs.

-In case of restitution, the manufacturer would pay the actual price paid including any charges for transportation and manufacturer-installed options, sales tax, license fees, and registration fees plus incidental damages. The amount directly attributable to use by the buyer would be determined as prescribed and could be subtracted from the total owed to the buyer.

e) Clarify that the vehicle buyer could assert the "lemon presumption" in any civil action, small claims court action or other formal or informal proceeding.

(More)

f) Set forth a qualified third party dispute resolution process and require compliance with the minimum requirements of the Federal Trade Commission (FTC) for informal dispute settlement procedures as defined on January 1, 1987.

g) Amend the definition of a "new motor vehicle" which is covered by the lemon law to include dealer-owned vehicles and demonstrator vehicles.

h) Prevent a vehicle repurchased by a manufacturer under the lemon law from being resold as a used car unless the nature of the car's problems were disclosed, the problems were corrected, and the manufacturer warranted that the vehicle is free of those problems for one year.

i) Require the Board of Equalization to reimburse the manufacturer in an amount equal to the sales tax paid for vehicles for which the manufacturer provided the specified refund to the buyer.

j) Provide for awards of treble damages and reasonable attorney's fees and costs if the buyer were awarded a judgement and the manufacturer did not maintain a qualified third party dispute resolution process as established by this chapter, with specified exceptions.

4. Opposition

Opponents of the bill state that the number of consumers dissatisfied with the current arbitration process is small relative to the number of arbitrations. They do not object to most of the provisions which update the lemon law, however, they strenuously object to the provisions for treble damages and an award of attorney's fees to consumers. They feel this creates an improper incentive for consumers to hire an attorney to go to court over procedural issues. They feel treble damages, usually associated with gross and willful wrongdoing, would set a dangerous precedent by making consumers eligible for a financial windfall.

a. General Motors

GM opposes the provisions of this bill because it would formalize the manufacturers' heretofore voluntary arbitration procedures to such an extent that the arbitrator would need to be trained in the specifics of the lemon law. They contend the bill would make them

(More)

liable unreasonably for treble damages and the buyer's attorney's fees if a layman arbitrator untrained in the law, misapplied the lemon law. GM has approximately 1,000 arbitrators in California, only 250 of whom are attorneys.

b. Automobile Importers of America

AIA which includes most European and Asian vehicle manufacturers selling cars in California, opposes the state certification, treble damages and attorneys' fee award provisions of the bill. They viewed the certification provisions as creating a new bureaucratic process for the manufacturers' voluntary lemon law programs.

AIA feels the creation of a certification process and imposition of treble damages and attorneys' fees against manufacturers who fail to establish or maintain a certified program, if a consumer wins in court, would be unwarranted and unconstitutional.

In general, opponents of the bill argue that the intent of arbitration programs such as GM's, which predates the lemon law, is that they be voluntary, informal, nonlegal, and easily understood by the consumer procedurally.

5. Amended requirements for an award of civil penalties

Under the bill as recently amended, if the buyer established that the manufacturer failed to replace a vehicle or make restitution after unsuccessful attempts to repair the vehicle, the buyer would be entitled to recover actual damages, reasonable attorney's fees and costs and a civil penalty of up to two times the actual damages.

The bill in its current form would give the court discretion to award less than treble damages where appropirate. The civil penalty would not be allowed, however, if:

(1) the manufacturer maintained a qualified dispute resolution process or

(2) the buyer failed to serve written notice on the manufacturer requesting compliance with the statutory requirement of replacement or restitution or

(More)

(3) the buyer served such notice and the manufacturer complied with the request within 30 days of the notice.

The major features of the amended treble damage provisions are first, the creation of a threshold for the award of such penalties. That is, the manufacturer must fail to satisfactorily repair or make a substitution or restitution. Second, by making the award of treble damages discretionary, the court may decline to award treble damages if a violation were not substantial or if for any reason the court deemed such an award unwarranted.

Third, the court could award a penalty in excess of actual damages in any amount which did not exceed two times the actual damages.

Finally, unlike an earlier version of the bill, the amended bill would not absolutely require an award of treble damages merely because the manufacturer did not have a qualified dispute resolution process. Such a manufacturer who made restitution or gave a replacement would not be subject to treble damages. A manufacturer who did not do either of those alternatives however would be subject to a maximum of treble damages at the court's discretion.

****

AMENDMENTS TO ASSEMBLY BILL NO. 2057
AS AMENDED IN SENATE AUGUST 17, 1987

Amendment 1
On page 5, line 21, after "in" insert:

substantial

Amendment 2
On page 5, line 23, after "in" insert:

substantial

Amendment 3
On page 6, line 14, after "survey" insert:

by the bureau

Amendment 4
On page 7, strike out lines 27 to 29, inclusive, and insert:

preceding calendar year, and shall

Amendment 5
On page 14, line 7, after "orders" insert:

, under the terms of this chapter,

Amendment 6
On page 14, strike out line 17 and insert:

(G) Takes into account, in rendering decisions, all legal and equitable factors, including, but not limited to, the written warranty, the

Amendment 7
On page 14, line 22, strike out "and this chapter" and insert:

this chapter, and any other equitable considerations appropriate in the circumstances

Amendment 8
On page 14, lines 34 and 35, strike out ", or an employee, agent, or dealer for the manufacturer;"

Amendment 9
On page 14, lines 37 and 38, strike out "in formal or informal discussions" and insert:

substantively in the merits of any dispute

Amendment 10
On page 14, line 39, strike out "equally" and insert:

also. Nothing in this paragraph prohibits any member of an arbitration board from deciding a dispute

Amendment 11
On page 14, strike out line 40, on page 15, strike out lines 1 to 12, inclusive, in line 13, strike out "(J)" and insert:

(I)

Amendment 12
On page 15, lines 36 and 37, strike out "as the result of a nonconformity" and insert:

pursuant to paragraph (2) of subdivision (d)

Amendment 13
On page 18, line 1, strike out the comma and insert:

and

Amendment 14
On page 18, line 2, after the second "and" insert:

may recover

- 0 -

STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)

(916) 445-3956

July 14, 1988

Honorable Sally Tanner
Assemblywoman, 60th District
State Capitol, Room 4146
Sacramento, CA 95814

Dear Assemblywoman Tanner:

In accordance with the requirements of Government Code Section 11017.5, following is a report of action taken by the State Board of Equalization to implement Assembly Bill 2057 (1987) Chapter 1280, effective January 1, 1988.

I. Purpose:

Among other provisions, this act requires the Board to reimburse the manufacturer of a new motor vehicle for an amount equal to the sales tax which the manufacturer includes in making restitution to the buyer pursuant to Section 1793.2 of the Civil Code (commonly known as the California "Lemon Law"). Prior to the effective date of the act, the Board was not authorized to make a refund to the manufacturer, since the retailer had paid the sales tax to the Board, and the transaction between the manufacturer and the buyer did not nullify the retailer's sale.

II. Action Taken By the Board:

A. Information to Affected Taxpayers

1. A notice was mailed in January 1988 to manufacturers and distributors of motor vehicles, explaining the provisions of the act.

2. The Board's pamphlet, "Tax Tips for Motor Vehicle Dealers (New and Used)" is currently being revised to reflect the act's provisions.

3. A brief summary of this statute was included in the Board's "Tax Information" Bulletin issued in December 1987, and mailed to all taxpayers registered with the Board, as an attachment to the blank form of the quarterly, yearly, or monthly tax returns.

B. Information to Board Staff

1. The Board's "Tax Information" Bulletin issued in December 1987 was also furnished to Board staff.

2. A memo was sent by the Principal Tax Auditor to District Administrators, explaining the amendments made by the act.

3. Operations Memo No. 907, which explains the administrative procedures related to reimbursement to a manufacturer of an amount equal to the sales tax, was distributed to the staff on January 8, 1988.

4. Operations Memo No. 900 was prepared and issued on November 18, 1987, summarizing the new legislation enacted during the 1987 Legislative Session; it included a brief summary of the provisions of this act.

Copies of the information provided to taxpayers and the Board staff are attached.

Sincerely,

Cindy Rambo
Executive Director

CR:kc

Attachment

cc: Assembly Governmental Efficiency Committee
Assembly Ways and Means Committee
Senate Judiciary Committee
Senate Appropriations Committee

STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

1020 N STREET, SACRAMENTO, CALIFORNIA

(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)

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Executive Secretary

NOTICE TO MOTOR VEHICLE MANUFACTURERS AND DISTRIBUTORS

MANUFACTURERS MAY NOW RECEIVE
REIMBURSEMENT FOR CALIFORNIA SALES TAX
REFUNDED TO BUYERS OF DEFECTIVE VEHICLES

Assembly Bill 2057 (Chapter 1280, Statutes of 1987) amends Sections 1793.2, 1794, and adds Section 1793.25 to the Civil Code, effective January 1, 1988. These sections are commonly known as the California "Lemon Law".

The Lemon Law provides an arbitration process to resolve disputes between manufacturers and consumers of new cars which are purported to have major manufacturing defects. This law stipulates that if an arbitrator's judgment is in favor of the buyer, the manufacturer must replace the vehicle or make restitution. In the case of replacement, the new vehicle is considered a replacement under warranty and the tax liability is measured only by the amount the customer pays in excess of the credit received. In the case of restitution, the manufacturer must pay an amount equal to the actual price paid or payable by the buyer, including applicable sales tax. Previously, manufacturers were not entitled to reimbursement for the amount of California sales tax refunded to buyers.

Effective January 1, 1988, the State Board of Equalization is authorized to reimburse manufacturers and distributors of new motor vehicles for the sales tax which the manufacturer includes in making restitution to the buyer. For purposes of this law a "new motor vehicle" means a motor vehicle bought for personal, family, or household use; but does not include a motorcycle, motorhome or commercial vehicle over 10,000 pounds. Satisfactory proof must be provided that the retailer of the motor vehicle reported and paid the sales tax on the original sale of the motor vehicle.

When making restitution, the manufacturer may deduct an amount for the buyer's usage of the defective vehicle and any amount charged for nonmanufacturer items installed by the dealer. These amounts, as well as amounts exempt from tax in the original sale must be deducted from the original vehicle selling price before calculating the sales tax refund.

Claims for reimbursement of sales tax refunded to buyers under the Lemon Law should be directed to the California State Board of Equalization, Audit Review and Refund Unit, P.O. Box 942879, Sacramento, CA 94279-0001.

A list of Board of Equalization offices and their telephone numbers is included on the reverse side of this notice. If you have any questions about this newly-enacted legislation please contact them.

STATE BOARD OF EQUALIZATION

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PAMPHLET 34

TOOLS AND EQUIPMENT

When tools and equipment are purchased for use in your business they should not be purchased ex-tax for resale. If these items are purchased from automotive supply houses who also sell you repair parts for resale, you should make it clear to your supplier that the tools and equipment are not purchased for resale.

WARRANTIES

PARTS USED FOR WARRANTY SERVICE

If you furnish repair parts under a mandatory factory warranty, the parts so furnished are considered to have been included in the original selling price of the vehicle. In this case there is no further tax liability because of the use of the parts.

When you furnish repair parts under an optional warranty, i.e., a warranty the customer purchased for an extra charge without being required to do so, tax applies to the cost of the parts you use to make repairs which are required under the warranty. These parts should be reported as self consumed merchandise. Tax also applies to any amount the customer is required to pay under the warranty for the replacement parts furnished. The charge for an optional warranty is not subject to sales or use tax.

TRANSFERS OF WARRANTIES

A transfer of a mandatory warranty after the original sale of the automobile to which it applies is a transfer of the obligation of the manufacturer to provide replacement parts and/or labor pursuant to the warranty to the new owner in the event that such parts and/or labor are needed, and is not a sale of tangible personal property. Warranty transfer fees are therefore not subject to sales tax.

Such a warranty remains in existence and follows the ownership of the automobile until the period of its effectiveness has expired. Parts provided and used after a mandatory warranty has been transferred are considered to have been sold as part of the original sale of the automobile. Since the warranty applies to the automobile itself, the furnishing of parts pursuant to the warranty, either to the purchaser/owner or to subsequent owners, is not subject to sales tax.

CALIFORNIA LEMON LAW

Civil Code Section 1793.2 incorporates legislation commonly known as the "California Lemon Law." The law provides an arbitration process to resolve disputes between manufacturers and consumers when cars that are purported to have "major manufacturing defects." If the mediators rule in favor of the customer, the manufacturer is required by law either to replace the automobile or to reimburse the purchase price with a possible reduction for an amount attributable to use prior to discovery of the defect, and any amount charged for non-manufacturer items installed by the dealer.

The customer's rights under the "California Lemon Law" are ~~only~~ against the manufacturer ~~only~~ and not the dealer.
AGAINST

~~motor vehicle reported and paid the tax on the original sale of the motor vehicle.~~

~~In the case of a replacement, the~~

TAX INFORMATION

QUARTERLY ISSUE
DECEMBER 1987

California State Board of Equalization

Published by the
California State Board of Equalization
P.O. Box 942879
Sacramento, CA 94279-0001

FEATURED ARTICLES

1. SUMMARY OF NEW LEGISLATION

Here is a summary of changes in the Sales and Use Tax Law, Transactions and Use Tax Law, Motor Vehicle Fuel License Tax Law, Use Fuel Tax Law, Cigarette Tax Law, Energy Resources Surcharge Law, Emergency Telephone Users Surcharge Act, and the California Universal Telephone Service Act, which were enacted in 1987. The changes are effective January 1, 1988 unless otherwise indicated.

DIESEL FUEL IS EXEMPT FROM SALES AND USE TAX WHEN IT IS USED IN CERTAIN COMMERCIAL WATERCRAFT OPERATIONS—Assembly Bill 57 (Felando and Hauser), Chapter 1352, Statutes of 1987, exempts from sales and use tax the sale or use of diesel fuel which is used in operating watercraft in commercial deep sea fishing operations or commercial passenger fishing boat operations by persons who are regularly engaged in these operations outside the territorial waters of this state. This exemption will be in effect only during the calendar year 1988.

BIOMECHANICAL FOOT ORTHOSES ARE EXEMPT FROM THE SALES AND USE TAX—Assembly Bill 99 (Johnson), Chapter 384, Statutes of 1987, effective September 3, 1987, exempts from sales and use tax the sale or use of custom-made biomechanical foot orthoses.

SALES AND USE TAX PREPAYMENT REQUIREMENTS MAY BE AMENDED—Assembly Bill 229 (Leonard), Chapter 1144, Statutes of 1987, may raise the minimum amount of taxable sales for which a retailer is required to prepay his or her tax liability from $17,000 or more per month to $50,000 or more per month. This amendment to the prepayment requirements will become operative only if it is certified by the Attorney General that the revisions to the definition of "retailer engaged in business in this state" (as described in the discussion of Assembly Bill 877 below) are legally enforceable under the United States Constitution, as determined by a final decision of the courts, and certification by the Department of Finance that revenues from such revisions are being remitted to the State Board of Equalization.

THE EXEMPTION FROM SALES AND USE TAX FOR SALES OF COMMEMORATIVE "CALIFORNIA GOLD" MEDALLIONS IS PERMANENT—Assembly Bill 257 (Kelley), Chapter 1095, Statutes of 1987, makes permanent the sales and use tax exemption provided for "California Gold" medallions produced and sold pursuant to Chapter 25 (commencing with Section 7551) of Division 7 of Title 1 of the Government Code.

(Continued On Page 2)

For further information about these articles, contact any Board of Equalization office listed in your telephone directory white pages under "California, State of — Board of Equalization". Requests for advice regarding a particular activity or transaction should be in writing and should fully describe the facts and circumstances of the activity or transaction.

(Continued From Page 1)

THE PERIOD DURING WHICH THE BOARD MAY FILE A JUDGMENT AGAINST A TAX DEBTOR HAS BEEN EXTENDED—Assembly Bill 293 (Cortese), Chapter 38, Statutes of 1987, extends from three to ten years (from the date the amount was due) the period during which the Board may file a certificate in any county requesting that judgment be entered against a debtor.

CORPORATE OFFICERS CAN BE HELD PERSONALLY LIABLE FOR USE TAX—Assembly Bill 293 (Cortese), Chapter 38, Statutes of 1987, provides that personal liability may be imposed on corporate officers if the corporation has included use tax on the billing to the customer and has collected the use tax, or has issued a receipt for the use tax, and has failed to report and pay the use tax.

CLASS CLAIMS FOR REFUND OF SALES AND USE TAX MUST BE ACCOMPANIED BY WRITTEN AUTHORIZATION—Assembly Bill 293 (Cortese), Chapter 38, Statutes of 1987, requires that a claim for refund filed on behalf of a class of taxpayers must be accompanied by written authorization from each taxpayer, sought to be included in the class, or the authorized representative.

PENALTY FOR FAILURE TO MAKE A TIMELY PREPAYMENT OF GASOLINE TAX MAY BE WAIVED—Assembly Bill 293 (Cortese), Chapter 38, Statutes of 1987, provides that the penalty for failure to make a timely prepayment of gasoline tax may be waived if the Board finds that a person's failure to make the timely prepayment is due to reasonable cause and circumstances beyond the person's control and occurred with the exercise of ordinary care and without willful neglect.

ANNUAL FLAT RATE USE FUEL TAX WILL BE ASSESSED FOR THE YEAR FOLLOWING THE DATE THE FLAT RATE TAX IS PAID—Assembly Bill 293 (Cortese), Chapter 38, Statutes of 1987, requires the Board to use annual periods, not calendar years, to apply the annual flat rate use fuel tax. The tax applies for the annual period from the end of the month in which the tax is paid.

EMERGENCY TELEPHONE USERS SURCHARGE ACT: SERVICE SUPPLIERS MUST MAINTAIN RECORDS FOR FOUR YEARS—Assembly Bill 293 (Cortese), Chapter 38, Statutes of 1987, requires service suppliers to maintain records for four years, which may be necessary to determine the amount of surcharge collected.

THE DEFINITION OF "SERVICE SUPPLIER," FOR EMERGENCY TELEPHONE USERS SURCHARGE, IS AMENDED—Assembly Bill 320 (Moore), Chapter 556, Statutes of 1987, effective January 1, 1988 and thereafter, amended the definition of "service supplier" to include any person supplying intrastate telephone communications services for whom the Public Utilities Commission modifies or eliminates the requirement to prepare and file intrastate tariffs.

THE CALIFORNIA UNIVERSAL TELEPHONE SERVICE ACT IS REPEALED—Assembly Bill 386 (Moore), Chapter 163, Statutes of 1987, effective July 16, 1987, repealed the California Universal Telephone Service Act, which was administered by the Board of Equalization. The Universal Lifeline Telephone Service Program will continue in effect, but the program will be administered by the Public Utilities Commission.

EXEMPTION FROM SALES TAX FOR MEALS IN ALCOHOL RECOVERY FACILITIES CLARIFIED—Assembly Bill 538 (Seastrand), Chapter 278, Statutes of 1987, clarifies that meals and food products served to and consumed by residents or patients of an alcoholism recovery facility are exempt from the sales and use tax. These transactions were exempt prior to January 1, 1985, when a change in the Health and Safety Code section related to the licensing of these facilities technically repealed the exemption. For this reason, the provisions of Assembly Bill 538 are retroactive to January 1, 1985.

MORE OUT-OF-STATE RETAILERS ARE REQUIRED TO COLLECT AND REMIT THE USE TAX ON SALES MADE IN CALIFORNIA—Assembly Bill 677 (Moore), Chapter 1145, Statutes of 1987, amends the definition of "retailer engaged in business in this state" to include several types of out-of-state retailers who are not currently required to collect and remit California use tax. Affected retailers include those who solicit orders by a telecommunication or television shopping system and those who solicit orders by mail under specified circumstances.

PRODUCTS WHICH ARE GENERALLY TAXABLE ARE EXEMPT WHEN PURCHASED WITH FOOD STAMPS—Assembly Bill 1087 (Polanco), Chapter 1103, Statutes of 1987, effective October 1, 1987, exempts from sales and use tax the sale or use of all property purchased with food stamps. Consequently, some items that are otherwise taxable are exempt when purchased with food stamps. Examples of affected transactions are sales of nonalcoholic carbonated beverages, distilled water (in containers less than one-half gallon), food coloring, and ice.

INTENT TO DEFEAT OR EVADE THE DETERMINATION OF TAX LIABILITY MAY BE A FELONY—Assembly Bill 1555 (McClintock), Chapter 1064, Statutes of 1987, makes it a felony for any person to intend to defeat or evade the determination of tax liability of $25,000 or more in any 12-month period. The felony provisions are applicable to the following tax programs: the Sales and Use Tax Law, the Use Fuel Tax Law, the Cigarette Tax Law, the Energy Resources Surcharge Law, and the Emergency Telephone Users Surcharge Law.

"LEMON LAW"—MANUFACTURERS MAY BE REIMBURSED FOR SALES TAX RETURNED TO THE PURCHASER OF A NEW MOTOR VEHICLE—Assembly Bill 2057 (Tanner), Chapter 1280, Statutes of 1987, requires the Board to reimburse the manufacturer of a new motor vehicle for the sales tax the manufacturer returned to the buyer, if the manufacturer presents documentation that the retailer paid the sales tax to the state.

(Continued From Page 2)

RETAILERS OF CERTAIN VEHICLES, VESSELS, AND AIRCRAFT NOT LOCATED IN TRANSIT DISTRICTS ARE REQUIRED TO COLLECT TRANSACTIONS (SALES) AND USE TAX—Assembly Bill 2446 (Eastin), Chapter 308, Statutes of 1987, requires all retailers of registered vehicles, licensed aircraft, and undocumented vessels to collect and remit transactions use tax when the purchaser registers or licenses the vehicle, aircraft, or vessel at an address in a transit district which imposes such a tax. Information concerning the cities and counties located within these transit districts (and the tax rates applicable in those districts) is available at your local Board of Equalization office.

LEASES OF ANIMATED MOTION PICTURES ARE EXEMPT FROM SALES AND USE TAX—Assembly Bill 2609 (Condit and Nolan), Chapter 915, Statutes of 1987, effective September 21, 1987, clarifies that leases of animated motion pictures are exempt from sales and use tax. The act also expresses the intent of the Legislature that the Board, in promulgating regulations, determine that certain charges for animation, as used in the production of animated motion pictures, are not taxable.

SALES OF FOOD THROUGH VENDING MACHINES ARE PARTIALLY EXEMPT FROM SALES TAX—Senate Bill 121 (Maddy), Chapter 1300, Statutes of 1987, partially exempts from sales tax the sale of food products (other than hot prepared food products) when sold through a vending machine for more than $0.15. The percentage of gross receipts which is exempt from tax is 23% during the year 1988, 45% during the year 1989, and 67% thereafter.

UNDER THE SALES AND USE TAX LAW, THE OPERATOR OF A BULK VENDING MACHINE IS THE CONSUMER OF CERTAIN FOOD PRODUCTS SOLD FOR $0.25 OR LESS—Senate Bill 121 (Maddy), Chapter 1300, Statutes of 1987, provides that any vending machine operator is a consumer, rather than a retailer, of unsorted food products (other than beverages or hot prepared food products) sold through a vending machine which dispenses food products at random, without selection by the customer.

SALES OF AVIATION GASOLINE ARE EXEMPT FROM THE PREPAYMENT REQUIREMENTS FOR MOTOR VEHICLE FUEL—Senate Bill 190 (Craven), Chapter 210, Statutes of 1987, effective July 23, 1987, provides that distributors and brokers are not required to collect prepayments of the sales and use tax on transfers of aviation gasoline for use in propelling aircraft.

THE BOARD MAY READJUST THE RATE OF PREPAYMENT OF RETAIL SALES TAX BY DISTRIBUTORS AND BROKERS OF MOTOR VEHICLE FUEL—Senate Bill 190 (Craven), Chapter 210, Statutes of 1987, effective July 23, 1987, provides that, in the event the price of fuel decreases or increases after April 1 of each year, the Board may readjust the prepayment rate to avoid prepayments which consistently exceed or are significantly lower than the retailers' sales tax liability.

DISTRIBUTORS AND BROKERS MAY CLAIM A REFUND FOR UNCOLLECTIBLE PREPAYMENTS OF RETAILERS' SALES TAX ON SALES OF MOTOR VEHICLE FUEL—Senate Bill 190 (Craven), Chapter 210, Statutes of 1987, effective July 23, 1987, provides that a refund may be granted to any person who is unable to collect the prepayment of sales tax on transfers of motor vehicle fuel insofar as the sales of the fuel are represented by accounts which have been found to be worthless and have been charged off for income tax purposes.

UNDER THE SALES AND USE TAX LAW, NONPROFIT PARENT COOPERATIVE NURSERY SCHOOLS MAY BE CONSUMERS OF TANGIBLE PERSONAL PROPERTY THEY SELL—Senate Bill 312 (McCorquodale), Chapter 1213, Statutes of 1987, provides that a nonprofit parent cooperative nursery school is a consumer, not a retailer, of tangible personal property it sells, if the profits are used exclusively in furtherance of the purposes of the organization.

THE PORTION OF A USED VEHICLE WHICH HAS BEEN MODIFIED FOR PHYSICALLY DISABLED PERSONS MAY BE EXEMPT FROM SALES TAX—Senate Bill 522 (Russell), Chapter 1471, Statutes of 1987, exempts from sales and use tax the gross receipts from the sale, and the use, of items used to modify a vehicle for the physically disabled. The exemption is applicable only if the modified vehicle is sold to a disabled person who is eligible to be issued a distinguishing license plate or placard for parking purposes pursuant to Section 22511.5 of the Vehicle Code.

ART PURCHASED BY STATE OR LOCAL GOVERNMENTS MAY BE EXEMPT FROM SALES AND USE TAX—Senate Bill 597 (Mello), Chapter 1266, Statutes of 1987, exempts from sales and use tax the sale or use of original works of art purchased by state or local governments for display in public places. The act also exempts from sales or use tax the sale or use of tangible personal property purchased by state or local governments, for display to the public, which has value as a museum piece and is used exclusively for display purposes, to the same extent that such property is exempt when sold to a nonprofit museum.

VEHICLE DEALERS AND LESSOR-RETAILERS — THE LAWS RELATED TO ADVERTISED PRICE OF VEHICLES HAVE BEEN CHANGED—Senate Bill 1573 (Campbell), Chapter 503, Statutes of 1987, increases from $20 to $25 the dealer documentary preparation charge which may be excluded from the advertised total price of a vehicle. The act also excludes certain taxes and fees and up to $25 in documentary preparation charges from advertisements and sales by licensed lessor-retailers. Although the documentary preparation charges may be excluded from the advertised total price of a vehicle, these charges are taxable as part of the selling price of the vehicle.

THE ADJUSTMENT FORMULA FOR HAZARDOUS WASTE DISPOSAL FEES, THE CRITERIA FOR SURFACE IMPOUNDMENTS, AND THE CURRENT FACILITY FEES ARE IN EFFECT UNTIL JULY 1, 1988—Assembly Bill 1308 (Wright), Chapter 1417, Statutes of 1987, extends the termination date for the adjustment formula for disposal fees, the impoundment criteria, and the facility fees from April 1, 1988 until July 1, 1988.

(Continued From Page 3)

HAZARDOUS WASTES GENERATED OR DISPOSED OF BY CERTAIN ENTITIES ARE EXEMPT FROM THE DISPOSAL FEE—Assembly Bill 1308 (Wright), Chapter 1417, Statutes of 1987, exempts from the disposal fee hazardous wastes generated or disposed of by 1) state and local agencies operating a household hazardous waste collection program, 2) by local vector control agencies or 3) county agricultural commissioners meeting specified requirements.

"FACILITY" HAS BEEN REDEFINED—Assembly Bill 1308 (Wright), Chapter 1417, Statutes of 1987, redefines "facility" subject to the facility fee to exclude any facility operated by a local government agency which is used for hazardous waste generated or disposed of by local vector control agencies or by county agricultural commissioners meeting specified requirements.

CERTAIN SHREDDER WASTE IS EXEMPT FROM SPECIFIED HAZARDOUS WASTE DISPOSAL FEES AND TAXES—Assembly Bill 1542 (Bradley), Chapter 1483, Statutes of 1987, exempts from the hazardous waste fee or tax, until January 1, 1989, shredder waste disposed of pursuant to Section 25143.8 of the Health and Safety Code. That section provides that the Department of Health Services shall not prohibit any person from disposing of shredder waste in an appropriate Class III landfill designated by a California regional water quality control, if the department determines that the waste will not pose a threat to human health or water quality, the waste is disposed of within 45 days after production or determination of its hazardous constituents, and the producer of the waste complies with the following requirements:

1. The producer carries out an ongoing shredder waste testing program as specifically described in the act,
2. The producer, on or before February 15, 1988, takes a representative sample of shredder waste which has been stored, but not disposed of, as of January 1, 1988, in accordance with the sampling methodology and sample handling procedures described in the act, and
3. The producer maintains records documenting the use of a registered hauler and a weigh bill, bill of lading, or similar papers indicating specific information as described in the act.

The act defines "shredder waste" as waste which results from the shredding of automobile bodies, household appliances, and sheet metal. The act specifically provides that its provisions do not apply to any shredder waste which contains total concentrations of polychlorinated biphenyls in excess of 50 parts per million.

THE DISPOSAL OF SOLID WASTE IS SUBJECT TO A FEE—Assembly Bill 2448 (Eastin), Chapter 1319, Statutes of 1987, effective September 28, 1987, provides that every operator of a solid waste landfill required to have a solid waste facilities permit shall pay an annual fee to the Board of Equalization on all solid waste disposed of at each disposal site on and after January 1, 1989. The act states that each feepayer, on or before March 1 of each year, shall report to the Board the amount of waste disposed at each site during the preceding calendar year. The Board will use the reported amounts to compute the fees which will result in the collection of $20 million each year. The Board will notify each feepayer of the amount due. The fee must be paid on or before July 1 of each year.

2. PROPOSED TAX REGULATION ACTION

Following is a list of regulations which are currently being revised to implement, interpret, or make specific recent legislation which amended provisions of the Revenue and Taxation Code, or to reflect recent court decisions. The current regulations may not incorporate all of the recent amendments to the law. Whenever the statute and regulation do not agree, statutory law prevails.

Sales and Use Tax Regulation 1502 — Automatic Data Processing Services and Equipment
Sales and Use Tax Regulation 1529 — Motion Pictures
Sales and Use Tax Regulation 1587 — Animal Life and Feed
Sales and Use Tax Regulation 1589 — Containers and Labels
Sales and Use Tax Regulation 1593 — Aircraft
Sales and Use Tax Regulation 1594 — Watercraft
Sales and Use Tax Regulation 1702 — Successor's Liability
Sales and Use Tax Regulation 1703 — Interest and Penalties
Use Fuel Tax Regulation 1323 — Passenger Carriers — Transit Partial Exemption

In addition, the following new regulations are being written to implement, interpret, or make specific recent legislation which amended provisions of the Revenue and Taxation Code.

Sales and Use Tax Regulation 1541.5 — Printed Sales Messages
Sales and Use Tax Regulation 1699.5 — Direct Payment Permits

For more information concerning regulations for which revisions are pending, contact your local Board of Equalization [illegible]

State of California

Board of Equalization

Memorandum

To : District Administrators

Date : January 7, 1988

From : Glenn A. Bystrom
Principal Tax Auditor

Subject : "Lemon Law" Notice Mailed to Motor Vehicle Manufacturers and Distributors

Assembly Bill 2057, Statutes of 1987, revised the Civil Code provisions related to the California "Lemon Law". Sections 1793.2 and 1793.25 of that code now require the Board to reimburse the manufacturer of a new motor vehicle for an amount equal to the sales tax which the manufacturer includes in making restitution to the buyer. These new provisions took effect January 1, 1988 and apply to refunds resulting from arbitrators' decisions made on and after that date.

The attached notice will be mailed on January 7, 1988, to 125 motor vehicle manufacturers and distributors. The notice is self-explanatory and refers recipients with questions to their local Board office. Please advise your staff of this notice. An operations memo explaining this change in the law will be distributed very soon.

GAB:gjm
0154W

Attachment

cc: Headquarters Audit Supervisors
Headquarters Compliance Supervisors

State Board of Equalization
Department of Business Taxes

OPERATIONS MEMO

No: 907
Date: January 8, 1988

SUBJECT: Reimbursement of Sales Tax Refunded Under the "Lemon Law"

GENERAL

Effective January 1, 1988, Assembly Bill 2057 (Chapter 1280, Statutes of 1987) amended Sections 1793.2, and 1794 and added Section 1793.25 to the Civil Code. These sections, commonly known as the California "Lemon Law", now require the Board to reimburse the manufacturer of a new motor vehicle for an amount equal to the sales tax which the manufacturer includes in making restitution to the buyer of a defective vehicle. Section 7102 of the Sales and Use Tax Law was amended to allow refunds pursuant to Section 1793.25.

BACKGROUND

The Lemon Law became effective January 1, 1983 and provides an arbitration process for disputes between manufacturers and consumers of new cars purported to have major manufacturing defects. If the mediator rules in favor of the consumer, the manufacturer is required by law either to replace the automobile or reimburse the consumer for the purchase price. The manufacturer may reduce the purchase price by an amount attributable to the value of the use made before the defect was discovered.

Prior to January 1, 1988, sales tax refunds paid by manufacturers as restitution to purchasers of defective vehicles were not reimbursable by the Board because refunds or replacements made under the arbitration process did not qualify as credits for returned merchandise. The law also required that the full selling price (less rehandling and restocking costs, but without any deduction for usage) be refunded in order to qualify for a returned merchandise credit.

PROVISIONS

For purposes of the Lemon Law, the term "manufacturer" means a new motor vehicle manufacturer, manufacturer branch, distributor, or distributor branch. "New motor vehicle" means a new passenger or commercial motor vehicle which is bought primarily for personal, family or household purposes. The term does not include a motorcycle, a motor home, or any vehicle with a gross weight over 10,000 pounds. Dealer owned vehicles, including demonstrators, are covered under the Lemon Law.

NOTICE MAILED

A special notice was mailed to all identified motor vehicle manufacturers and distributors explaining the provisions of Assembly Bill 2057 which affect the Sales and Use Tax Law (copy of notice attached). This law contains other provisions not related to the Sales and Use Tax Law. Inquiries related to other provisions of this law should be referred to the California State Bureau of Automotive Repair.

OBSOLESCENCE

This operations memo will become obsolete after its provisions are incorporated into the appropriate manuals, pamphlets, and the Business Taxes Law Guide.

Judy A. Agan
Assistant Executive Secretary
Business Taxes

Attachment
Distribution 1-D
0139W

State Board of Equalization
Department of Business Taxes

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PROVISIONS

For purposes of the Lemon Law, the term "manufacturer" means a new motor vehicle manufacturer, manufacturer branch, distributor, or distributor branch. "New motor vehicle" means a new passenger or commercial motor vehicle which is bought primarily for personal, family or household purposes. The term does not include a motorcycle, a motor home, or any vehicle with a gross weight over 10,000 pounds. Dealer owned vehicles, including demonstrators, are covered under the Lemon Law.

Beginning January 1, 1988, the Board is authorized to reimburse manufacturers and distributors of new motor vehicles for the sales tax which they include in refunds to buyers pursuant to an arbitrator's decision. Satisfactory proof must be provided that the retailer of the motor vehicle (for which the manufacturer is making restitution) has reported and paid the sales tax on that motor vehicle.

When the buyer chooses to have a vehicle replaced, the new vehicle is considered a replacement under warranty and the tax liability is measured only by the amount the customer pays in excess of the credit received.

When the buyer chooses restitution, the manufacturer must pay an amount equal to the actual price paid or payable by the buyer, including any sales tax and any incidental damages to which the buyer is entitled. The manufacturer may deduct for usage of the defective vehicle and any amount charged for nonmanufacturer items installed by the dealer. These amounts must be deducted from the original vehicle selling price before calculating the sales tax refund.

The buyer is liable for use of the defective vehicle prior to the time the buyer first delivers the vehicle to the manufacturer, or to its authorized service and repair facility for correction of the problem that gave rise to the nonconformity. The amount attributable to use by the buyer will be calculated by multiplying the total sales price of the motor vehicle by a fraction having as its denominator 120,000 and as its numerator the number of miles the vehicle was used by the buyer.

These newly-enacted Civil Code provisions in no way change the application of the sales and use tax to the gross receipts and the sales price from the sale, and the storage, use, or other consumption in this state, of tangible personal property pursuant to Part 1 (commencing with Section 6001) of Division 2 of the Revenue and Taxation Code.

CLAIMS FOR REFUND

Manufacturers may file a claim for refund with the Board with respect to any amounts refunded to buyers after December 31, 1987. All claims should be forwarded to the Audit Review and Refund Unit for processing.

NOTICE MAILED

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Judy A. Agan
Assistant Executive Secretary
Business Taxes

Attachment
Distribution 1-D
0139W

STATE OF CALIFORNIA
STATE BOARD OF EQUALIZATION
1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)

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The Lemon Law provides an arbitration process to resolve disputes between manufacturers and consumers of new cars which are purported to have major manufacturing defects. This law stipulates that if an arbitrator's judgment is in favor of the buyer, the manufacturer must replace the vehicle or make restitution. In the case of replacement, the new vehicle is considered a replacement under warranty and the tax liability is measured only by the amount the customer pays in excess of the credit received. In the case of restitution, the manufacturer must pay an amount equal to the actual price paid or payable by the buyer, including applicable sales tax. Previously, manufacturers were not entitled to reimbursement for the amount of California sales tax refunded to buyers.

Effective January 1, 1988, the State Board of Equalization is authorized to reimburse manufacturers and distributors of new motor vehicles for the sales tax which the manufacturer includes in making restitution to the buyer. For purposes of this law a "new motor vehicle" means a motor vehicle bought for personal, family, or household use; but does not include a motorcycle, motorhome or commercial vehicle over 10,000 pounds. Satisfactory proof must be provided that the retailer of the motor vehicle reported and paid the sales tax on the original sale of the motor vehicle.

When making restitution, the manufacturer may deduct an amount for the buyer's usage of the defective vehicle and any amount charged for nonmanufacturer items installed by the dealer. These amounts, as well as amounts exempt from tax in the original sale must be deducted from the original vehicle selling price before calculating the sales tax refund.

Claims for reimbursement of sales tax refunded to buyers under the Lemon Law should be directed to the California State Board of Equalization, Audit Review and Refund Unit, P.O. Box 942879, Sacramento, CA 94279-0001.

A list of Board of Equalization offices and their telephone numbers is included on the reverse side of this notice. If you have any questions about this newly-enacted legislation please contact them.

STATE BOARD OF EQUALIZATION

0136W
12/87

LEGISLATIVE INTENT SERVICE (800) 666-1917

CALIFORNIA STATE BOARD OF EQUALIZATION OFFICES

10-87

BOARD MEMBERS

DISTRICT	MEMBER	OFFICE ADDRESS	AREA CODE	TELEPHONE NUMBER
First	William M. Bennett	1020 N Street, Sacramento 95814	916	445-4081
Second	Conway H. Collis	901 Wilshire Blvd., Suite 210, Santa Monica 90401	213	451-5771
			From LA	213	852-5021
Third	Ernest J. Dronenburg, Jr.	110 West C Street, Suite 1709, San Diego 92101	619	237-7644
Fourth	Paul Carpenter	4040 Paramount Blvd., Suite 103, Lakewood 90712	213	429-5422
EXECUTIVE SECRETARY	Douglas D. Bell	1020 N Street, Sacramento 95814	916	445-3956
SACRAMENTO HEADQUARTERS		**1020 N Street, Sacramento 95814**	**916**	**445-6464**

BUSINESS TAXES FIELD OFFICES

CALIFORNIA CITIES	OFFICE HOURS 8-5 UNLESS OTHERWISE LISTED BELOW	OFFICE ADDRESS	AREA CODE	TELEPHONE NUMBER
Arcadia		20 East Foothill Boulevard, 91006	818	350-6401
			From LA	213	681-6675
Arroyo Grande		1303 Grand Avenue, Suite 115, 93420	805	489-6293
Auburn	8-12 & 1-5 M thru F	550 High Street, Suite 3, 95603	916	885-8408
Bakersfield		525 18th Street, 93301	805	395-2880
Bishop	8-12 & 1-5 M thru F	407 West Line Street, 93514	619	872-3701
Chico	8-12 & 1-5 M thru F	8 Williamsburg Lane, 95926	916	895-5322
Covina		233 North Second Avenue, 91723	818	331-6401
			From LA	213	686-2990
Crescent City	8-12 & 1-5 M thru F	Suite 2, 1080 Mason Mall, 95531	707	464-2321
Culver City		3861 Sepulveda Blvd., 2nd Floor, 90230	213	313-7111
			From LA	213	879-0600
Downey		11229 Woodruff Avenue, 90241	213	803-3471
			From LA	213	773-3480
El Centro	8-12 & 1-5 M thru F	1699 West Main Street, Suite H, 92243	619	352-3431
Eureka	8-12 & 1-5 M thru F	1656 Union Street, 95501	707	445-6500
Fresno		2550 Mariposa Street, State Building, Rm. 2080, 93721	209	445-5285
Hayward		795 Fletcher Lane, 94544	415	881-3544
Hollywood		5110 Sunset Boulevard, 90027	213	663-8181
Lakewood		Suite 101, 4040 Paramount Blvd., 90712-4199	213	421-3295
			From LA	213	636-2466
Marysville		922 G Street, 95901	916	741-4301
Merced	8-12 & 1-5 M thru F	3191 M Street, Suite A, 95340	209	383-2831
Modesto		1020 15th Street, Suite E, 95354	209	576-6361
Nevada City	8-12 & 1-5 M thru F	301 Broad Street, 95959	916	265-4628
Oakland		1111 Jackson Street, 94607	415	464-0347
Ontario		320 West G Street, Suite 105, 91762	714	983-5969
Oroville	8-12 & 1-5 M thru F	2445 Oro Dam Boulevard, Suite 3A, 95966	916	538-2246
Palmdale	8-12 & 1-5 M thru F	37925 6th Street East, 93550	805	947-8911
Placerville	8-12 & 1-5 M thru F	344 Placerville Dr., Ste. 12, 95667	916	622-1101
Pleasant Hill		395 Civic Drive, Suite D, 94523	415	687-6962
Quincy	9-1 M thru F	546 Lawrence Street, 95971	916	283-1070
Rancho Mirage	8-12 & 1-5 M thru F	42-700 Bob Hope Dr., Suite 301, 92270	619	346-8096
Redding		391 Hemsted Drive, 96001	916	225-2725
Sacramento		1891 Alhambra Boulevard, 95816	916	739-4911
Salinas		21 West Laurel Drive, Suite 79, 93906	408	443-3008
San Bernardino		303 West Third Street, Suite 500, 92401	714	383-4701
San Diego		1350 Front Street, Room 5047, 92101	619	237-7731
San Francisco		350 McAllister Street, Room 2262, 94102	415	557-1877
San Jose		100 Paseo de San Antonio, Room 307, 95113	408	277-1231
San Marcos		365 So. Rancho Santa Fe Road, 92069	819	744-1330
San Mateo		177 Bovet Road, Suite 250, 94402	415	573-3578
San Rafael		7 Mt. Lassen Drive, Suite B136, 94903	415	472-1513
Santa Ana		28 Civic Center Plaza, Room 239, 92701	714	558-4051
Santa Barbara		411 East Canon Perdido Street, Room 11, 93101-1589	805	965-4535
Santa Cruz	8-12 & 1-5 M thru F	303 Water Street, Suite 6, 95062	408	458-4861
Santa Rosa		50 D Street, Room 215, 95404	707	576-2100
Sonora	8-12 & 1-5 M thru F	1194 N. Highway 49, 95370	209	532-6979
South Lake Tahoe	8-12 & 1-5 M thru F	2489 Lake Tahoe Boulevard, Suite 7, 95705	916	544-4816
Stockton		31 East Channel Street, Room 264, 95202	209	948-7720
Susanville	9-1 M thru F	63 North Roop Street, 96130	916	257-3429
Torrance		890 W. Knox Street, 90502-1307	213	516-4300
			From LA	213	770-4148
Ukiah	8-12 & 1-5 M thru F	620 Kings Court, Suite 110, 95482	707	463-4731
Vallejo		704 Tuolumne Street, 94950-4769	707	648-4065
Van Nuys		8150 Van Nuys Blvd., Room 205, 91401-3382	818	901-5293
Ventura		2590 East Main Street, Suite 101, 93003	805	654-4523
Visalia		111 South Johnson Street, Suite E, 93291	209	732-5641
Woodland	8-12 & 1-5 M thru F	96 West Main Street, Suite 2, 95695	916	662-7331
Yreka	8-12 & 1-5 M thru F	1217 South Main Street, 96097	916	842-7439

OUT OF STATE FIELD OFFICES

Sacramento (Hqtrs.)	1620 14th Street, 95814	916	322-2010
Chicago, Illinois	150 North Wacker Drive, Room 1400, 60606	312	
New York, N.Y.	675 Third Avenue, Room 520, 10017	212	

State Board of Equalization
Department of Business Taxes

OPERATIONS MEMO

No. 90C
DATE: November 18, 1987

SUBJECT: 1987 Legislation

General

The following is a brief summary of the provisions of the statutes enacted during the 1987 Legislative Session.

Copies of bills containing these statutes are included in the "1987 Business Tax Legislation" pamphlet which will be distributed to Headquarters and District Managers. Refer to that pamphlet for complete provisions of the new statutes.

An index showing sections of the Business Tax Law and other relevant codes affected by newly enacted statutes and corresponding bill numbers will be furnished under separate cover to holders of the Business Taxes Law Guide. This index should be inserted in the Law Guide and affected sections of the existing law noted until revisions to the Law Guide are distributed.

Assembly Bill 57 (1987) Chapter 1352

This act adds Section 6368.2 to the Sales and Use Tax Law to exempt from the sales and use tax the sale of, and the storage, use, or other consumption in this state of, diesel fuel used in operating watercraft in commercial deep sea fishing operations or commercial passenger fishing boat operations by persons who are regularly engaged in these business activities outside the territorial waters of this state.

The operators are considered regularly engaged in such operations if their gross receipts from such operations equal or exceed $5,000 a year.

"Commercial passenger fishing boat operations" means the business of permitting for profit any person to fish from the operator's watercraft.

This exemption will be effective during the calendar year 1988, unless changed by future statutes.

Effective date: January 1, 1988

Assembly Bill 99 (1987) Chapter 384

This act amends Section 6369 of the Sales and Use Tax Law to exempt from the sales and use tax the sale, and the storage, use, or other consumption in this state of, orthopedic shoes and supportive devices for the foot which are custom-made biomechanical foot orthoses.

The act also extends the exemption for orthotic and prosthetic devices, and replacement parts for these devices, when furnished pursuant to the written order of a podiatrist.

Effective date: September 3, 1987

Assembly Bill 229 (1987) Chapter 1144

The act may amend Sections 6471 and 6474 of the Sales and Use Tax Law to raise the prepayment threshold from $17,000 per month to $50,000 per month and may amend Sections 6472 and 6477 to delete obsolete references to Section 6471.5. These amendments will become operative only if 1) the Attorney General certifies to the Legislature and to the Executive Secretary of the Board that the amendments to Section 6203 of the Revenue and Taxation Code made by Assembly Bill 677, Chapter 1145, Statutes of 1987, are legally enforceable under the United States Constitution and 2) the Department of Finance certifies to the Legislature that revenues attributable to the registration of additional out-of-state retailers are being remitted to the Board.

Effective date: January 1, 1988

Assembly Bill 257 (1987) Chapter 1095

This act amends Section 6354 of the Sales and Use Tax Law to delete the January 1, 1988, sunset date for the exemption from sales and use tax for the sale of and the storage, use or other consumption in this state of, commemorative "California Gold" medallions. Therefore, the exemption is effective indefinitely.

Effective date: September 25, 1987

Assembly Bill 293 (1987) Chapter 38

This act does the following:

1. Amends Section 6703 of the Sales and Use Tax Law to provide that the Board's notice of levy on a tax liability has the same effect as a judgment creditor's levy pursuant to a writ of execution,

2. Amends Section 6736 of the Sales and Use Tax Law to extend from three (3) years to ten (10) years the period of time in which the Board may file a certificate to obtain a judgment against a tax debtor,

3. Amends Section 6829 of the Sales and Use Tax Law to provide that personal liability shall be imposed against responsible corporate officers, if the Board can establish that the corporation included use tax on a billing and collected the use tax from customers, or issued a receipt for use tax, and failed to report and pay use tax,

4. Amends Sections 6901.5 and 6904 of the Sales and Use Tax Law to provide that a claim for refund filed for or on behalf of a class of taxpayers must be accompanied by written authorization from each taxpayer sought to be included in the class and that the authorization must be signed by each taxpayer or taxpayer's authorized representative and must state the specific grounds on which the claim is founded.

5. Amends Section 7657 of the Motor Vehicle Fuel License Tax Law to provide that the penalty for late prepayment of motor vehicle fuel license tax may be relieved if the Board finds that a person's failure to make the timely prepayment is due to reasonable cause and circumstances beyond the person's control,

6. Amends Section 8651.7 of the Use Fuel Tax Law to provide that annual flat rate use fuel tax is paid for the annual period from the end of the month in which the tax was paid to the end of the month prior in the following calendar year,

7. Amends Section 41056 of the Emergency Telephone Users Surcharge Act to require a service supplier to maintain for four years any records which are necessary to determine the amount surcharge collected,

8. Amends Section 1.5 of Chapter 825 of the Statutes of 1986 to provide that a transaction regarded under Section 6006.3 of the Sales and Use Tax Law as a sale under a security agreement to any state or local governmental body, or any agency or instrumentality thereof, entered into prior to January 1, 1987, the full term of which has not expired or has not been earlier terminated, is classified as a sale on January 1, 1987 and as a lease for earlier periods. The act also amends the same section to provide that any sales or use tax, but not interest on the sales or use tax previously paid, will be credited against any sales or use tax due on the transaction, and provides that the amendments of this section are declaratory of existing law, and

9. Makes technical changes to Section 7916 of the Motor Vehicle Fuel License Tax Law and Section 41015 of the Emergency Telephone Users Surcharge Act.

Effective date: January 1, 1988

Assembly Bill 320 (1987) Chapter 556

This act amends Section 41007 of the Emergency Telephone Users Surcharge Act to provide that the term "service supplier" includes any person supplying intrastate telephone communications services for whom the Public Utilities Commission, by rule or order, modifies or eliminates the requirement for that person to prepare and file California intrastate tariffs.

Effective date: January 1, 1988

Assembly Bill 386 (1987) Chapter 163

This act repeals Part 22 (commencing with Section 44000) of Division 2 of the Revenue and Taxation Code, the California Universal Telephone Service Act, except that appropriations from the Universal Telephone Service Fund for specified purposes will be continued until July 1, 1988.

The act also continues the Universal Lifeline Telephone Service Program, but the program is now administered by the Public Utilities Commission.

Effective date: July 16, 1987

Assembly Bill 454 (1987) Chapter 921

This act repeals Section 7062 of the Sales and Use Tax Law which required the Board to determine the amount of sales tax in the 1987 tax year attributed to sales to operators of waterborne vessels and to report that amount to the Legislature on or before July 1, 1988.

Effective date: September 22, 1987

Assembly Bill 538 (1987) Chapter 278

This act makes a technical amendment to Section 6363.6 of the Sales and Use Tax Law, retroactive to January 1, 1985, to restore the exemption from sales tax for sales of meals and food products served to and consumed by residents or patients of an alcoholism recovery facility. That exemption was technically repealed when a January 1, 1985 amendment to the Health and Safety Code made the section reference in the Sales and Use Tax Law obsolete.

Effective date: July 30, 1987

Assembly Bill 677 (1987) Chapter 1145

This act amends Section 6203 of the Sales and Use Tax Law to broaden the definition of "retailer engaged in business in this state". The expanded definition includes:

1. Any retailer soliciting orders for tangible personal property by means of a telecommunication or television shopping system which is intended by the retailer to be broadcast to consumers located in this state,

2. Any retailer who contracts with a California broadcaster or publisher for advertising of tangible personal property directed primarily to California consumers,

3. Any retailer who solicits orders for tangible personal property by mail if the solicitations are substantial and recurring and if the retailer benefits from any banking financing, debt collection or other activities occurring in this state,

4. Any retailer owned or controlled by the same interests which own or control any retailer engaged in business in the same or a similar line of business in this state,

5. Any retailer having a franchisee or licensee operating under its trade name if the franchisee or licensee is required to collect the tax under Section 6203, and

6. Any retailer who advertises through cable television home shopping programs.

Effective date: January 1, 1988

Assembly Bill 730 (1987) Chapter 647

This act amends Section 7552 of the Government Code to revise the design requirements of the commemorative "California Gold" medallion. The side which was previously required to show the State Bear may now show any emblem of the State of California. Any new design must be approved by the Department of General Services.

Effective date: January 1, 1988

Assembly Bill 999 (1987) Chapter 1257

This act adds Section 7252.9 and Chapter 2 (commencing with Section 7285) to the Transactions and Use Tax Law to authorize any board of supervisors of any county with a population of 350,000 or less on January 1, 1987 to impose an additional transactions and use tax of one-half of 1 percent if the ordinance or resolution proposing that tax is approved by a 2/3 vote of all members of the board and the tax is approved by a majority vote of the qualified voters.

Effective date: January 1, 1988

Assembly Bill 1087 (1987) Chapter 1103

This act adds Section 6373 to the Sales and Use Tax Law to exempt from the sales and use tax the sale of, and the storage, use, or other consumption of tangible personal property the gross receipts of which are received in the form of food stamp coupons acquired by the purchaser pursuant to the Food Stamp Act of 1977.

The act also provides that, instead of separately accounting for gross receipts exempt by this act, a retailer may take a deduction on each sales tax return equal to two (2) percent of the total amount of food stamp coupons redeemed during the period for which the return is filed.

Effective date: October 1, 1987

Assembly Bill 1308 (1987) Chapter 1417

This act does the following:

1. Amends Sections 25174.02 and 25174.6 of the Health and Safety Code to extend from April 1, 1988 to July 1, 1988 the termination of the adjustment formula for hazardous waste disposal fees and the termination of the criteria for surface impoundments,

2. Amends Section 25174.7 of the Health and Safety Code to exempt from the disposal fee and the generator fee hazardous wastes generated or disposed of by a) state and local agencies operating a household hazardous waste collection program or by b) local vector control agencies or county agricultural commissioners meeting specified requirements,

3. Amends Section 25205.1 of the Health and Safety Code to exclude from the definition of "facility" any facility operated by a local government agency which is used for hazardous wastes which are generated or disposed of by local vector control agencies or county agricultural commissioners meeting specified requirements, and

4. Amends Section 25205.8 of the Health and Safety Code to extend from April 1, 1988 to July 1, 1988 the termination date for the annual facility fee upon operators of specified hazardous waste storage, treatment and disposal facilities.

Effective date: January 1, 1988

Assembly Bill 1389 (1987) Chapter 175

This act amends Section 6103.2 of the Government Code to authorize the sheriff, marshal or constable to require prepayment of fees by public agencies with respect to service of process or official notices.

Effective date: January 1, 1988

Assembly Bill 1542 (1987) Chapter 1483

This act amends Section 25143.6 of the Health and Safety Code to require specified California regional water quality control boards to designate, in accordance with a specified resolution of the State Water Resources Control Board, by February 15, 1988, at least one class III landfill in each region authorized to accept and dispose of shredder waste which does not pose a threat to human health or water quality.

The act also adds Section 25143.8 to the Health and Safety Code to prohibit the department, until January 1, 1989, from prohibiting the disposal of shredder waste in an appropriate class III landfill designated by a regional board if the producer of the waste carries out specified monitoring requirements, maintains records, and tests stored shredder waste, as specified, and the department determines that the waste will not pose a threat to human health or water quality and will be disposed of within a specified time.

The act exempts shredder waste disposed of pursuant to the provisions of the act from any hazardous waste fee or tax imposed pursuant to Chapter 6.5 (commencing with Section 25100) or Chapter 6.8 (commencing with Section 25300) of the Health and Safety Code.

Effective date: January 1, 1988

Assembly Bill 1555 (1987) Chapter 1064

This act adds Section 7153.5 to the Sales and Use Tax Law, Section 9354.5 to the Use Fuel Tax Law, Section 30480 to the Cigarette Tax Law, Section 40187 to the Energy Resources Surcharge Law, and Section 41143.4 to the Emergency Telephone Users Surcharge Law. The act makes it a felony for any person to commit specified violations with intent to defeat or evade the determination of tax liability of $25,000 or more in any 12-month period for those state tax programs.

Effective date: January 1, 1988

Assembly Bill 1637 (1987) Chapter 270

This act authorizes the San Bernardino County Board of Supervisors and the Riverside County Board of Supervisors to adopt and submit to the voters for approval, by majority vote, an ordinance authorizing the county to impose a retail transactions and use tax at a rate which does not exceed one-half of 1 percent.

Effective date: July 28, 1987

Assembly Bill 1855 (1987) Chapter 533

This act amends Section 25353 of the Health and Safety Code to provide that the State Department of Health Services may expend funds from the state account or the Hazardous Substance Cleanup Fund for the costs to oversee the removal or remedial action by another party at a site owned by the federal government or a state agency. If a hazardous substance release site is owned or operated by a local governmental entity and the Department expends funds from the state account or the Hazardous Substance Cleanup Fund to take a removal or remedial action, the funds are considered a loan which must be repaid.

If the local agency does not make adequate progress toward repaying the loan made pursuant to this act, one method of collection provided by the act is that the Department may notify the Board of Equalization of the amount due. The Board will then withhold the unpaid amount of the loan, in increments from the sales and use tax transmittals made to the local governmental entity, in sufficient amounts to result in complete payment within a specified period.

Effective date: January 1, 1988

Assembly Bill 2057 (1987) Chapter 1280

This act adds Section 1793.25 to the Civil Code to amend the "Lemon Law". The added section requires the Board to reimburse the manufacturer of a new motor vehicle for an amount equal to the sales tax which the manufacturer includes in making restitution to the buyer.

The act also amends Section 7102 of the Sales and Use Tax Law to authorize the use of money in the Retail Sales Tax Fund for refunds made pursuant to Section 1793.25 of the Civil Code.

Effective date: January 1, 1988

Assembly Bill 2072 (1987) Chapter 328

This act amends Sections 26721, 26725, 26725.1, 26726, 26727, 26728, 26728.1, 26729, 26730, 26733.5, 26734, 26736, 26738, 26740, 26741, 26742, 26743, 26744, and 26750 of the Government Code to authorize increases of sheriff's fees for various services related to the preparation, serving, execution or delivery of various documents, notices, writs, and certificates.

Effective date: January 1, 1988

Assembly Bill 2446 (1987) Chapter 308

This act amends Section 7262 of the Transactions and Use Tax Law to require all retailers of registered vehicles, undocumented vessels, and licensed aircraft to collect the transactions use tax from any purchaser who registers the vehicle, vessel or aircraft at an address in a district which imposes transactions and use tax. This does not change the retailers' transaction (sales) tax responsibilities.

The act also adds Section 7274 to the Transactions and Use Tax Law to require the board to make available to all affected retailers information concerning the cities and counties located within districts which impose transactions and use tax and the applicable tax rates in those cities and counties.

Effective date: January 1, 1988

Assembly Bill 2448 (1987) Chapter 1319

This act adds Chapter 4 (commencing with Section 66799) to Title 7.3 of the Government Code and adds Part 23 (commencing with Section 450010 to Division 2 of the Revenue and Taxation Code. The added sections establish various regulatory controls and enforcement procedures for the cleanup and maintenance of solid waste landfills.

Section 66799.49 of the Government Code and Section 45151 of the Revenue and Taxation Code provide that every operator of a solid waste landfill required to have a solid waste facilities permit shall pay an annual fee to the Board of Equalization on all solid waste disposed at each disposal site on and after January 1, 1989. Each feepayer shall report, on or before March 1 of each year, the amount of solid waste handled at each disposal site. The fee shall be established by the Board so that total receipts of approximately twenty million dollars ($20,000,000) are collected each calendar year. The Board will mail billings which indicate the amount due, and the fee must be paid on or before July 1 of each year. The other sections of Part 23 of the Revenue and Taxation Code establish the procedures for administration of the fee.

Effective date: September 28, 1987

Assembly Bill 2505 (1987) Chapter 1258

This act creates the San Diego County Regional Justice Facility Financing Agency and authorizes the agency to impose a transactions and use tax at a rate of one-half of 1 percent, upon approval of a majority of the electors of the county voting thereon.

Effective date: January 1, 1988

Assembly Bill 2609 (1987) Chapter 915

This act amends Section 6006 and 6010 of the Sales and Use Tax Law to clarify that the lease of an animated motion picture is excluded from the definitions of "sale" and "purchase" and are therefore exempt from the sales and use tax,

The act also states legislative intent that the Board of Equalization, in promulgating regulations, determine that charges for animation, as used in the production of animated motion pictures, are not taxable.

Effective date: September 21, 1987

Senate Bill 121 (1987) Chapter 1300

This act adds Section 6359.2 to the Sales and Use Tax Law to partially exempt from the sales tax sales of food products (other than hot prepared food products) through vending machines at a sales price greater than $0.15. The following percentages of gross receipts from the retail sale of those food products will be exempt: 23% for the calendar year 1988, 45% for the calendar year 1989, and 67% thereafter.

The act also amends Section 6359.4 of the Sales and Use Tax Law to provide that a vending machine operator is a consumer of, and shall not be considered a retailer of, food products, other than beverages or hot prepared food products, which are sold through a coin-operated bulk vending machine for $0.25 or less. The act defines "bulk vending machine" as "a vending machine containing unsorted food products ...which, upon insertion of a coin, dispenses those food products in approximately equal portions, at random, and without selection by the customer."

Effective date: January 1, 1988

Senate Bill 142 (1987) Chapter 786

This act authorizes any county board of supervisors to create or designate a local transportation authority in the county. Further, the act provides that the authority may, by a 2/3 vote thereof and upon subsequent voter approval, impose a retail transactions and use tax of up to one percent.

The act also requires the Board to prepare an annual report on the costs incurred by it in administering the transactions and use taxes imposed by districts.

Effective date: January 1, 1988

Senate Bill 190 (1987) Chapter 210

This act does the following:

1. Amends Section 6480 of the Sales and Use Tax Law to provide that, for the purposes of the prepayment provisions related to sales of motor vehicle fuel, aviation gasoline is excluded from the definition of "motor vehicle fuel,"

2. Amends Section 6480.1 of the Sales and Use Tax Law to provide that the Board may readjust the rate of the prepayment on sales of motor vehicle fuel more often than once each year, if the price of fuel decreases or increases, and the established rate results in prepayments which consistently exceed or are significantly lower than the retailers' sales tax liability,

3. Amends Section 6480.6 of the Sales and Use Tax Law to provide that a refund may be granted to any person who is unable to collect the prepayment of sales tax on transfers of motor vehicle fuel insofar as the sales of the fuel are represented by accounts which have been found to be worthless and charged off for income tax purposes, and

4. Amends Section 6901 of the Sales and Use Tax Law to provide that a refund of any prepayment of sales tax, interest or penalty paid on a transfer of motor vehicle fuel, as required by Article 1.5 (commencing with Section 6480) of Chapter 5 of the Sales and Use Tax Law, does not require approval of the State Board of Control..

Effective date: July 23, 1987

Senate Bill 312 (1987) Chapter 1213

This act amends Section 6370 of the Sales and Use Tax Law to provide that nonprofit parent cooperative nursery schools are consumers rather than retailers of tangible personal property sold by them, if the profits are used exclusively in furtherance of the purposes of the organization.

Effective date: January 1, 1988

Senate Bill 522 (1987) Chapter 1471

This act amends Section 6369.4 of the Sales and Use Tax Law to exempt from the sales and use tax the sale of, and the storage, use, or other consumption in this state the gross receipts attributable to that portion of a vehicle which has been modified previously for physically handicapped persons. The exemption is valid only when the modified vehicle is sold to a disabled person who is eligible to be issued a distinguishing license plate or placard for parking purposes pursuant to Section 22511.5 of the Vehicle Code.

Effective date: January 1, 1988

Senate Bill 576 (1987) Chapter 1323

This act adds Section 7262.5 to the Transactions and Use Tax Law to authorize the County of Mendocino to impose a transactions and use tax at the rate of one-half of 1 percent or one percent, if an ordinance imposing the tax is approved by the voters.

Effective date: January 1, 1988

Senate Bill 597 (1987) Chapter 1266

This act amends Section 6365 of the Sales and Use Tax Law to exempt from the sales and use tax the sale of, and the storage, use or other consumption in this state of, original works of art purchased by state or local governments for display to the public in public places. These places should be open to the public not less than 20 hours per week for at least 35 weeks of the calendar year.

The act also amends Section 6366.3 of the Sales and Use Tax Law to exempt from the sales or use tax the sale of, and the storage, use or other consumption in this state of, tangible personal property purchased by state or local governments, for display to the public, which has value as a museum piece and is used exclusively for display purposes, to the same extent that such property is exempt when sold to a nonprofit museum.

Effective date: January 1, 1988

Senate Bill 877 (1987) Chapter 1027

This act amends Section 8352.8 of the Motor Vehicle Fuel License Tax Law to revise the purposes for the use of the Off-Highway Vehicle Fund moneys and include enforcement of laws and regulations regarding the use of off-highway vehicles within their purposes.

Effective date: January 1, 1988

Senate Bill 971 (1987) Chapter 868

This act amends Sections 6103.8, 7171 and 7174 of the Government Code to provide that, if a notice of state tax lien which has been recorded reflects an out-of-state address as the last known address of the taxpayer, the agency must pay specified fees relating to the recording, indexing, and release of those liens. Further, the act permits the agency recording the notice of state tax lien to collect from the taxpayer the cost of recording.

Effective date: January 1, 1988

Senate Bill 1573 (1987) Chapter 503

This act amends Section 11614 of the Vehicle Code to provide that licensed lessor-retailers may exclude specified fees and dealer documentary preparation charges from the advertised total price of a vehicle. The amount of the dealer documentary preparation charge which may be excluded is $25.

The act also amends Section 11713.1 of the Vehicle Code to increase from $20 to $25 the amount of dealer documentary charges which may be excluded from the advertised total price of a vehicle.

Although the documentary preparation charges may be excluded from the advertised total price of a vehicle, these charges are taxable as part of the selling price of the vehicle.

Effective date: January 1, 1988

SUNSET PROVISIONS - WATERCRAFT EXEMPTION

The local tax and transit tax exemptions for property sold to or purchased by operators of waterborne vessels to be used directly and exclusively in the carriage of persons or property will expire January 1, 1988. The sections which establish this exemption (Sections 7202 and 7203-partial exemption from local sales and use tax, Sections 7202.5 and 7202.6-exemption from redevelopment agency sales and use tax, and Sections 7261 and 7262-exemption from transactions and use tax) are automatically repealed as of January 1, 1988. A new version of each section, which does not include the watercraft exemption, will become operative as of that date.

Judy A. Agan
Assistant Executive Secretary
Business Taxes

0409F

Distribution 1:D

Appropriations Fiscal Summary

Author: Tanner Amended: 8/25/87 Bill: AB 2057
and as further proposed to be amended (LCR #23062)
Hearing Date: 8/31/87 JUD. vote: 9-0

Summary Prepared By: Jeff Arthur

****

Bill Summary:

AB 2507 would require the Bureau of Automotive Repair to establish a program for certifying dispute resolution processes involving new motor vehicle warranties. BAR would be authorized to impose a fee, up to $1, for each new motor vehicle sold, etc. after 7/1/88 to meet program costs. BOE would be required to reimburse a manufacturer who reimbursed sales tax collected on a defective vehicle. The bill would appropriate $25,334 from funds reserved for the New Motor Vehicle Board in the Motor Vehicle Account to the Dept. of Motor Vehicles for its costs incurred in collecting the fee.

****

Fiscal Impact by Fiscal Year
(Dollars in thousands)

Department	1987-88	1988-89	1989-90	Fund
BAR	$158	$293	$293	Certificat. Acc't
DMV	$25*	$7	$7	Motor Veh. Acc't
	* Offset by fees rec'd in FY 88-89.			
BOE	0	--------Minor-------		General
Revenue	0	$300	$300	Certificat. Acc't
Sales tax	0	----Unknown loss---		General

****

STAFF COMMENTS:

The only costs not offset by fees are BAR's startup costs during FY 87-88.

ASSEMBLY THIRD READING

AB 2057 (Tanner) - As Amended: June 10, 1987

ASSEMBLY ACTIONS:

COMMITTEE G. E. & CON. PRO. VOTE 6-1 COMMITTEE W. & M. VOTE 18-5

Ayes: Chacon, Eastin, Hannigan, Sher, Stirling, Areias

Ayes: Vasconcellos, Bronzan, D. Brown, Calderon, Campbell, Eaves, Ferguson, Hannigan, Hayden, Hill, Isenberg, Leonard, Margolin, O'Connell, Peace, Roos, Seastrand, M. Waters

Nays: Harvey

Nays: Baker, Johnson, Jones, Lewis, McClintock

DIGEST

2/3 vote required.

Existing law provides that a manufacturer who is unable to service or repair consumer goods, including motor vehicles, so that they conform to the applicable warranties after a reasonable number of attempts, must either replace those goods or reimburse the buyer. In 1982, the law was amended by AB 1787 (Tanner), commonly referred to as the lemon law.

Specifically, the lemon law:

1) Defines "reasonable number of attempts" for new motor vehicles as either four or more repair attempts on the same major defect, or more than 30 days out of service for service/repair of one or more major defects within the first year or 12,000 miles of use.

2) Requires a buyer to notify the manufacturer directly of a continuing defect and to use a dispute resolution program meeting specified minimum standards prior to asserting the "lemon presumption" in a legal action to obtain a vehicle replacement or refund.

3) Defines the "lemon presumption" as the "reasonable number of attempts" in the paragraph above.

- continued -

This bill amends and clarifies the lemon law. It specifies a structure for certifying third-party dispute mechanisms, specifies requirements for certification and provides for treble damages and attorney's fees to consumers who obtain a judgment against a manufacturer who does not have a certified lemon law arbitration program. (The bill would become effective July 1, 1988.) Specifically, it:

1) Requires the Bureau of Automotive Repair (BAR) to: certify the arbitration programs for resolution of vehicle warranty disputes as requested; annually recertify those programs or decertify as inspection warrants; notify the Department of Motor Vehicles (DMV) of the failure of a manufacturer, distributor, or their branches to comply with arbitration decisions; investigate consumer complaints regarding qualified programs; and submit a biennial report to the Legislature evaluating the effectiveness of the program.

2) Authorizes BAR to charge fees, to be collected by the New Motor Vehicle Board (NMVB) in DMV beginning July 1, 1988, from specified NMVB licensees, not to exceed $1 for each new motor vehicle sold, leased, or distributed in California. The fees would be deposited into the Certification Account of the Automotive Repair Fund.

3) Requires motor vehicle manufacturers to replace defective vehicles or make restitution if the manufacturer is unable to service or repair the vehicles after a reasonable number of buyer requests. The buyer would be free to take restitution in place of a replacement vehicle.

4) Specifies that the following is included in the replacement and refund option:

   a) In case of replacement, the new motor vehicle must be accompanied by all express and implied warranties. The manufacturer must pay for, or to, the buyer the amount of any sales or use tax, license and registration fees, or other official fees which the buyer is obligated to pay in connection with the replacement, plus any incidental damages the buyer is entitled to including reasonable repair, towing, and rental car costs.

   b) In case of restitution, the manufacturer must pay the actual price paid including any charges for transportation and manufacturer-installed options, sales tax, license fees, and registration fees plus incidental damages. The amount directly attributable to use by the buyer must be determined as prescribed and may be subtracted from the total owed to the buyer.

- continued -

5) Clarifies that the vehicle buyer may assert the "lemon presumption" in any civil action, small claims court action or other formal or informal proceeding.

6) Sets forth a qualified third-party dispute resolution process, which among other things, clarifies that dealer and/or manufacturer participation in the decisionmaking process is not acceptable unless the consumer is allowed equal participation; specifies certain requirements for how arbitration boards should follow up on repair attempt decisions and requires compliance with the minimum requirements of the Federal Trade Commission (FTC) for informal dispute settlement procedures as defined on January 1, 1987.

7) Amends the definition of a "new motor vehicle" which is covered by the lemon law to include dealer-owned vehicles and demonstrator vehicles.

8) Prevents a vehicle repurchased by a manufacturer under the lemon law from being resold as a used car unless the nature of the car's problems are disclosed, the problems are corrected, and the manufacturer warrants that the vehicle is free of those problems for one year.

9) Requires the Board of Equalization to reimburse the manufacturer in an amount equal to the sales tax paid for vehicles for which the manufacturer provides the specified refund to the buyer.

10) Provides for treble damages and reasonable attorney's fees and costs if the buyer is awarded a judgment and the manufacturer does not maintain a qualified third-party dispute resolution process as established by this chapter.

FISCAL EFFECT

According to the Legislative Analyst, this bill:

1) Results in up to $158,000 in costs to the Certification Account in the Automotive Repair Fund (created by this bill) for the last half of 1987-88 and up to $293,000 annually, thereafter, for the BAR to resolve automobile warranty disputes; costs after 1988-890 would be fully offset by fees.

2) Generates up to $300,000 in fee revenues annually to the Certification Account beginning in 1988-89.

3) Results in an unknown revenue loss to the General Fund annually from sales tax reimbursements to vehicle manufacturers.

- continued -

according to the author, strengthens the existing lemon law, to
nequities that have occurred from that law's implementation and
nat owners of seriously defective new cars can obtain a fair,
nd speedy hearing on their complaints.

nner) of the 1985-1986 Session made many of the same changes
the provision in this bill for treble damages. That bill died
te.

and proponents state that, since the effective date of the lemon
ur years ago, there have been numerous complaints from new car
erning its implementation. While these complaints reflect
issatisfaction with the manufacturer's own resolution of
garding defective new vehicles, they have also alleged that the
olution programs financed by the manufacturers are not operated
. Consumers have complained of: long delays in obtaining a
yond the prescribed 40-60 day time limit); unequal access to the
process; unreasonable decisions that do not appear to exhibit
f the lemon law's provisions or provide an adequate amount of
nt even when a refund decision is ordered.

f the bill state that the number of consumers dissatisfied with
arbitration process is small relative to the number of
s. They do not object to most of the provisions which update
aw; however, they strenuously object to the provision of treble
an award of attorney's fees to consumers. They feel this
improper incentive for consumers to hire an attorney to go to
procedural issues. They feel treble damages, usually associated
and willful wrongdoing, would set a dangerous precedent by
umers eligible for a financial windfall by the sole fact that a
ufacturer may not have a certified lemon law arbitration

SENATE COMMITTEE ON JUDICIARY
Bill Lockyer, Chairman
1987-88 Regular Session

AB 2057 (Tanner)
As amended June 11
Hearing date: July 14, 1987
Various Codes
TDT

NEW MOTOR VEHICLE WARRANTIES

HISTORY

Source: Author

Prior Legislation: AB 3611 (1986) - Held in Senate Appropriations Committee
AB 1787 (1982) - Chaptered

Support: California Public Interest Research Group (CALPIRG); Consumers' Union; Motor Votors; Attorney General

Opposition: Ford Motor Co; General Motors Corp; Chrysler Motors; Automobile Importers of America

Assembly Floor Vote: Ayes 54 - Noes 20

KEY ISSUES

SHOULD THE VEHICLE MANUFACTURERS' VOLUNTARY DISPUTE RESOLUTION PROCEDURES BE REPLACED BY A STATE CERTIFIED DISPUTE RESOLUTION PROCESS?

SHOULD A VEHICLE MANUFACTURER BE LIABLE TO A BUYER FOR TREBLE DAMAGES AND ATTORNEY'S FEES?

PURPOSE

Existing law imposes various duties upon manufacturers making express warranties with respect to consumer goods, including the duty to replace the goods or reimburse the buyer, as specified, if the goods are not repaired to conform to those warranties after a reasonable number of attempts. Existing law also prohibits a buyer of such goods from asserting a presumption that a reasonable number of attempts have been made to conform a new motor vehicle, as specified, unless the buyer first resorts to a third party dispute resolution process, as defined, following notice that such a process is available.

(More)

SENATE COMMITTEE ON JUDICIARY
Bill Lockyer, Chairman
1987-88 Regular Session

AB 2057 (Tanner)
As amended June 11
Hearing date: July 14, 1987
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AB 2057

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Prior Legislation: AB 3611 (1986) - Held in Senate Appropriations Committee
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PURPOSE

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(More)

This bill would revise the provisions relating to warranties on new motor vehicles to require the manufacturer or its representative to replace the vehicle or make restitution, as specified, if unable to conform the vehicle to the applicable express warranties after a reasonable number of attempts. The bill would, on July 1, 1988, revise the definitions of "motor vehicle," "new motor vehicle," and "qualified third party dispute resolution process" and define the term "demonstrator" for these purposes, and require the Bureau of Automotive Repair to establish a program for the certification of third party dispute resolution processes pursuant to regulations adopted by the New Motor Vehicle Board, as specified. The bill would prohibit the sale or lease of a motor vehicle transferred by a buyer or a lesser to a manufacturer for a nonconformity, except as specified.

The bill would, on July 1, 1988, create the Certification Account within the Automotive Repair Fund, to be funded by fees imposed on manufacturers and distributors and collected by the New Motor Vehicle Board, to be expended upon appropriation by the Legislature to pay the expenses of the bureau under the bill.

Existing law authorizes the award of court costs and attorney's fees to consumer who prevail in such actions, and would also require the award of civil penalties, including treble damages, against certain manufacturers. Existing law provides for the disposition of moneys in the Retail Sales Tax Fund.

The purpose of this bill is to improve protections for vehicle purchasers under the existing lemon law.

COMMENT

1. Existing lemon law

Existing law provides that a manufacturer who is unable to service or repair consumer goods, including motor vehicles, so that they conform to the applicable warranties after a reasonable number of attempts, must either replace those goods or reimburse the buyer. In 1982, the law was amended by AB 1787 (Tanner), commonly referred to as the lemon law. Specifically, it:

-Defines "reasonable number of attempts" for new motor vehicles as either four or more repair attempts on the same major defect, or, more than 30 days out of service for service/repair of one or more major defects, within the first year or 12,000 miles of use.

(More)

offset by fees established by the bill. According to BAR, a 13 cent charge per vehicle would generate up to $300,000 (13 cents times 2.3 million vehicles estimated to be sold in 1987). The bill, however, does not provide an appropriation to cover program start-up costs in the last half of 1987-88.

The NMVB would incur minor absorbable costs working with the DMV to collect the fees. Additionally, DMV would incur program start-up costs of $25,000 in 1987-88, decreasing to $7,000 annually thereafter. These costs could be absorbed by DMV.

The BOE would incur unknown, probably minor, absorbable costs to reimburse sales taxes to manufacturers in vehicle restitution settlements. Moreover, sales tax reimbursements would result in an unknown revenue loss to the General Fund.

83/s8

-Requires a buyer to notify the manufacturer directly of a continuing defect and to use a dispute resolution program meeting specified minimum standards prior to asserting the "lemon presumption" in a legal action to obtain a vehicle replacement or refund.

-Defines the "lemon presumption" as the "reasonable number of attempts" in the paragraph above.

This bill would amend and clarify the lemon law. It would establish a structure for certifying third-party dispute mechanisms, requirements for certification and provide for treble damages and attorney's fees to consumers who obtain a judgement against a manufacturer who does not have a certified lemon law arbitration program.

2. Need for legislation

The purpose of this bill, according to the author, is to strengthen existing lemon law, to eliminate inequities that have occurred from that law's implementation and to ensure that owners of seriously defective new cars can obtain a fair, impartial and speedy hearing on their complaints.

The author and proponents state that since the effective date of the lemon law over four years ago, there have been numerous complaints from new car buyers concerning its implementation. While these complaints reflect continued dissatisfaction with the manufacturer's own resolution of disputes regarding defective new vehicles, they have also alleged that the dispute resolution programs financed by the manufacturers are not operated impartially. Consumers have complained of: long delays in obtaining a hearing (beyond the prescribed 40-60 day time limit); unequal access to the arbitration process; unreasonable decisions that do not appear to exhibit knowledge of the lemon law's provisions or provide an adequate amount of reimbursement even when a refund decision is ordered.

3. Provisions of the bill

This bill would:

a) Require the Bureau of Automotive Repair (BAR) to: certify the arbitration programs for resolution of vehicle warranty disputes as requested; annually recertify those programs or decertify as inspection

(More)

warrants; notify the Department of Motor Vehicles (DMV) of the failure of a manufacturer, distributor, or their branches to comply with arbitration decisions; investigate consumer complaints regarding qualified programs; and, submit a biennial report to the Legislature evaluating the effectiveness of the program.

b) Authorize BAR to charge fees to be collected by the New Motor Vehicle Board (NMVB) in the Department of Motor Vehicles (DMV), beginning July 1, 1988, from specified NMVB licensees, not to exceed $1 (one dollar) for each new motor vehicle sold, leased, or distributed in California. The fees would be deposited into the Certification Account of the Automotive Repair Fund.

c) Require motor vehicle manufacturers to replace defective vehicles or make restitution if the manufacturer were unable to service or repair the vehicles after a reasonable number of buyer requests. The buyer, however, would be free to take restitution in place of a replacement vehicle.

d) Specify what would be included in the replacement and refund option.

-In case of replacement, the new motor vehicle must be accompanied by all express and implied warranties. The manufacturer would pay for, or to, the buyer the amount of any sales or use tax, license and registration fees, and other official fees which the buyer would be obligated to pay in connection with the replacement, plus any incidental damages the buyer would be entitled to including reasonable repair, towing, and rental car costs.

-In case of restitution, the manufacturer must pay the actual price paid including any charges for transportation and manufacturer-installed options, sales tax, license fees, and registration fees plus incidental damages. The amount directly attributable to use by the buyer would be determined as prescribed and could be subtracted from the total owed to the buyer.

e) Clarify that the vehicle buyer could assert the "lemon presumption" in any civil action, small claims court action or other formal or informal proceeding.

(More)

f) Set forth a qualified third party dispute resolution process and require compliance with the minimum requirements of the Federal Trade Commission (FTC) for informal dispute settlement procedures as defined on January 1, 1987.

g) Amend the definition of a "new motor vehicle" which is covered by the lemon law to include dealer-owned vehicles and demonstrator vehicles.

h) Prevent a vehicle repurchased by a manufacturer under the lemon law from being resold as a used car unless the nature of the car's problems were disclosed, the problems were corrected, and the manufacturer warranted that the vehicle is free of those problems for one year.

i) Require the Board of Equalization to reimburse the manufacturer in an amount equal to the sales tax paid for vehicles for which the manufacturer provided the specified refund to the buyer.

j) Provide for awards of treble damages and reasonable attorney's fees and costs if the buyer were awarded a judgement and the manufacturer did not maintain a qualified third party dispute resolution process as established by this chapter.

4. Opposition

Opponents of the bill state that the number of consumers dissatisfied with the current arbitration process is small relative to the number of arbitrations. They do not object to most of the provisions which update the lemon law, however, they strenuously object to the provisions for treble damages and an award of attorney's fees to consumers. They feel this creates an improper incentive for consumers to hire an attorney to go to court over procedural issues. They feel treble damages, usually associated with gross and willful wrongdoing, would set a dangerous precedent by making consumers eligible for a financial windfall by the sole fact that a new car manufacturer may not have a certified lemon law arbitration program.

a. General Motors

GM opposes the provisions of this bill because it would formalize the manufacturers' heretofore voluntary arbitration procedures to such an extent that the

(More)

arbitrator would need to be trained in the specifics of the lemon Law. They contend the bill would make them liable unreasonably for treble damages and the buyer's attorney's fees if a layman arbitrator untrained in the law, misapplied the lemon Law. GM has approximately 1,000 arbitrators in California, only 250 of whom are attorneys.

b. Automobile Importers of America

AIA which includes most European and Asian vehicle manufacturers selling cars in California, opposes the state certification, treble damages and attorneys' fee award provisions of the bill. They view the certification provisions as creating a new bureaucratic process for the manufacturers' voluntary lemon law programs.

AIA feels the creation of a certification process and imposition of treble damages and attorneys' fees against manufacturers who fail to establish or maintain a certified program, if a consumer wins in court, would be unwarranted and unconstitutional.

In general, opponents of the bill argue that the intent of arbitration programs such as GM's, which predates the lemon law, is that they be voluntary, informal, nonlegal, and easily understood by the consumer procedurally.

5. Possible alternative provisions

As an alternative to the bill's current provisions for mandatory treble damages and attorney's fee awards, the court could be given discretion to award those items where the situation was appropriate and such were warranted. Further, the award of treble damages could be restricted to cases involving "substantial violations". Such a compromise would satisfy the consumer's interests and retain a method to compel the manufacturers meaningful participation in the certification process. Finally, a key issue which should be considered, is whether a manufacturer must have a certified dispute resolution program to avoid the imposition of treble damages and attorneys' fees.

****

AMENDMENTS TO ASSEMBLY BILL NO. 2057
AS AMENDED IN SENATE AUGUST 17, 1987

Amendment 1
On page 5, line 21, after "in" insert:

substantial

Amendment 2
On page 5, line 23, after "in" insert:

substantial

Amendment 3
On page 6, line 14, after "survey" insert:

by the bureau

Amendment 4
On page 7, strike out lines 27 to 29, inclusive, and insert:

preceding calendar year, and shall

Amendment 5
On page 14, line 7, after "orders" insert:

, under the terms of this chapter,

Amendment 6
On page 14, strike out line 17 and insert:

(G) Takes into account, in rendering decisions, all legal and equitable factors, including, but not limited to, the written warranty, the

Amendment 7
On page 14, line 22, strike out "and this chapter" and insert:

this chapter, and any other equitable considerations appropriate in the circumstances

Amendment 8
On page 14, lines 34 and 35, strike out ", or an employee, agent, or dealer for the manufacturer;"

Amendment 9
On page 14, lines 37 and 38, strike out "in formal or informal discussions" and insert:

substantively in the merits of any dispute

Amendment 10
On page 14, line 39, strike out "equally" and insert:

also. Nothing in this paragraph prohibits any member of an arbitration board from deciding a dispute

Amendment 11
On page 14, strike out line 40, on page 15, strike out lines 1 to 12, inclusive, in line 13, strike out "(J)" and insert:

(I)

Amendment 12
On page 15, lines 36 and 37, strike out "as the result of a nonconformity" and insert:

pursuant to paragraph (2) of subdivision (d)

Amendment 13
On page 18, line 1, strike out the comma and insert:

and

Amendment 14
On page 18, line 2, after the second "and" insert:

may recover

- 0 -

Honorable Sally Tanner
Member of the Assembly
State Capitol, Room 4146
Sacramento, CA 95814

DEPARTMENT	AUTHOR	BILL NUMBER
Finance	Tanner	AB 2057

SPONSORED BY	RELATED BILLS	AMENDMENT DATE
	AB 3611 (1986)	August 25, 1987

BILL SUMMARY

AB 2057 requires the Bureau of Automotive Repair (BAR) to certify third party arbitration processes that require manufacturers to replace or provide restitution for manufactured defective vehicles. The New Motor Vehicle Board (NMVB) is required to administer the collection of fees to fund costs incurred by BAR from the certification activity. Fees would be deposited in the Certification Account of the Automotive Repair Fund out of which program costs would be funded.

SUMMARY OF CHANGES

This version of the bill makes minor technical and wording changes from the previous analysis of the RN 87 016489 version which do not change our position.

SUMMARY OF COMMENTS

This bill improves remedies available to dissatisfied new car buyers under current law at nominal increases in costs to the State.

FISCAL SUMMARY--STATE LEVEL

Code/Department Agency or Revenue Type	SO LA CO RV	(Fiscal Impact by Fiscal Year) (Dollars in Thousands) FC	1987-88	FC	1988-89	FC	1989-90	Code Fund
0860/BOE	SO	S	$0.5	S	$1	S	$1	001/GF
1149/Retail Sales and Use Taxes	RV	U	-73	U	-145	U	-145	001/GF
1150/BAR	SO	C	158	C	293	C	293	499/Cont. Acct.
1200/Mis. Fees	RV	U	150	U	300	U	300	499/Cont. Acct.
2740/DMV	SO	C	33	C	7	C	7	054/NMVB

Impact on State Appropriations Limit--Yes

POSITION: Department Director Date

Neutral

Principal Analyst	Date	Program Budget Manager	Date	Governor's Office
(223) R. Baker		Wallis L. Clark		Position noted
				Position approved
				Position disapproved
				by: date:

CJ:BW1/0064A/1045C

BILL ANALYSIS Form DF-43 (Rev 03/87 Buff)

BILL ANALYSIS/ENROLLED BILL REPORT--(Continued) Form DF-43

AUTHOR	AMENDMENT DATE	BILL NUMBER
Tanner	August 25, 1987	AB 2057

ANALYSIS

A. Specific Findings

Under current law, the New Motor Vehicle Board (NMVB) in the Department of Motor Vehicles (DMV) is required to, among other things, hear and consider appeals by a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative, from a decision arising from the department. Current law authorizes the NMVB to require those persons to pay a fee to DMV for the issuance or renewal of a license to do business.

AB 2057 requires every manufacturer of new motor vehicles, beginning July 1, 1988, to report sales or leases annually to the NMVB on forms prescribed by the NMVB. The bill requires the NMVB to administer the collection of fees to fund the certification program and creates the Certification Account within the Automotive Repair Fund for deposit of those fees. The bill requires each applicant for a license to pay a fee determined by BAR, but not to exceed $1 for each motor vehicle sold or leased.

Current law provides for an arbitration process for disputes between manufacturers and consumers of new cars purported to have manufacturing defects. Under current law the BAR in the Department of Consumer Affairs (DCA) is required to enforce and administer the Automotive Repair Act which regulates the automotive repair industry.

AB 2057 requires BAR to certify third party arbitration programs offered by auto manufacturers or other entities pursuant to current "lemon law". The lemon law provides a process for the resolution of disputes between the owner or leasee of a new motor vehicle and the manufacturer or distributor.

AB 2057 requires BAR to certify automobile warranty arbitration programs that substantially comply with criteria adopted by the bureau or decertify those programs which are not in substantial compliance, in accordance with specified regulations. The bill would require the bureau to monitor and inspect the programs on a regular basis to assure continued compliance.

Under current law, a manufacturer who is unable to service or repair goods, including motor vehicles, to conform to applicable express warranties after a reasonable number of attempts, as specified, is required to either replace the vehicle or reimburse the buyer.

AB 2057 provides that the buyer may elect restitution in lieu of replacement. The bill would require that when a vehicle is replaced or restitution is made by the manufacturer, the buyer may be required to reimburse the manufacturer, or the manufacturer may reduce the amount of restitution, by an amount directly attributable to the use of the vehicle by the buyer.

(Continued)

BILL ANALYSIS/ENROLLED BILL REPORT--(Continued) Form DF-43

AUTHOR	AMENDMENT DATE	BILL NUMBER
Tanner	August 25, 1987	AB 2057

ANALYSIS

A. Specific Findings (Continued)

There are a number of bills related to this issue including the following:

- AB 3611 (1986) contained language similar to this bill, including the requirements for reporting vehicles sold and collection of a fee in conjunction with issuance of renewal of the occupational license by DMV to fund a certification program.

- AB 2050 is a current bill that would revise provisions relating to the manufacturer's replacement of, or restitution for, a vehicle including a requirement for the manufacturer to pay sales tax, license and registration fees on the replacement, or an equivalent amount in restitution. It would also provide for reimbursement from the State of the sales tax involved.

- SB 71 is a current bill that would require a manufacturer to pay registration fees and sales tax on a replacement vehicle or to add an equivalent amount in restitution. It would also require the State to reimburse manufacturers for such sales or use tax.

- SB 228 is a current bill that would extend warranty or service contracts on repairs, repaired parts, affected related parts or components which were repaired under the terms of a warranty or service contract.

B. Fiscal Analysis

According to DMV, the volume of vehicles replaced by manufacturers cannot be determined since manufacturers maintain this information in confidence. The DMV has attempted to estimate the fiscal impact of this bill based on the number of serious complaints received by DCA and NMVB. The DMV estimated approximately 242 vehicles will be replaced or restitution will be provided per year.

We have not been able to verify or disprove this estimate. We assume $10,000 would be the average price per vehicle and a 6 percent sales tax will be paid.

Computation:

Manufacturer replacement or restitution	242
Sales tax per vehicle	x $600
Potential Sales Tax Refund	$145,200

On this basis, we estimate an annual $145,000 revenue loss to the General Fund.

CJ:SW3/0064A/1045C

BILL ANALYSIS/ENROLLED BILL REPORT--(Continued)

AUTHOR | AMENDMENT DATE | BILL NUMBER

Tanner | August 25, 1987 | AB

ANALYSIS

B. Fiscal Analysis (Continued)

According to DMV, the NMVB would incur one-time initial costs of $ in 1987-88, and ongoing costs of $7,000 annually thereafter.

According to the Board of Equalization, minor costs (less than $1,000) would be incurred as a result of this bill. These costs can be absorbed within existing resources.

DCA and BAR staff estimate this bill's 1987-88 (half-year) costs at $158,000 and 2 PYs, and annual costs thereafter at $293,000 and 4 PYs. This provides for a program supervisor, one staff each in San Francisco and Los Angeles, and one clerical. Finance, however, has not had an opportunity to review specific workload information related to this proposed program. Therefore, we believe that any additional resources should be justified through the 1988-89 budgetary process.

Based on information provided by staff of DMV, DCA and BAR, we estimate that a fee of $0.15 and $0.13 per vehicle sold in 1987-88 and 1988-89, respectively, or $300,000 annually will be required to fund the costs of this program.

CJ:BW4/0064A/1045C

Sally Tanner

AUG 28 1987

30543
RECORD # 40 BP:

87240 12:29
RN 87 023062 PAGE NO. 1

Substantive

AMENDMENTS TO ASSEMBLY BILL NO. 2057
AS AMENDED IN SENATE AUGUST 25, 1987

Amendment 1
On page 3, line 37, after "in" insert:

substantial

Amendment 2
On page 4, line 12, after "in" insert:

substantial

Amendment 3
On page 4, line 20, after "in" insert:

substantial

Amendment 4
On page 4, line 36, after "in" insert:

substantial

Amendment 5
On page 4, line 39, after "in" insert:

substantial

Amendment 6
On page 5, line 1, after "in" insert:

substantial

Amendment 7
On page 5, line 18, after "in" insert:

substantial

Amendment 8
On page 5, line 35, after "in" insert:

substantial

Amendment 9
On page 6, line 2, after the second "in" insert:

substantial

Amendment 10

On page 17, line 12, strike out "be as follows" and insert:

include the rights of replacement or reimbursement as set forth in subdivision (d) of Section 1793.2, and the following

Amendment 11

On page 19, line 28, after "SEC. 6." insert:

Section 7102 of the Revenue and Taxation Code is amended to read:

7102. The money in the fund shall, upon order of the Controller, be drawn therefrom for refunds under this part, and pursuant to Section 1793.25 of the Civil Code, or be transferred in the following manner:

(a) (1) All revenues, less refunds, derived under this part at the 4 3/4 percent rate, including the imposition of sales and use taxes with respect to the sale, storage, use, or other consumption of motor vehicle fuel which would not have been received if the sales and use tax rate had been 5 percent and if motor vehicle fuel, as defined for purposes of the Motor Vehicle Fuel License Tax Law (Part 2 (commencing with Section 7301)), had been exempt from sales and use taxes, shall be estimated by the State Board of Equalization, with the concurrence of the Department of Finance shall be transferred during each fiscal year to the Transportation Planning and Development Account in the State Transportation Fund for appropriation pursuant to Section 99312 of the Public Utilities Code.

(2) If the amount transferred pursuant to paragraph (1) is less than one hundred ten million dollars ($110,000,000) in any fiscal year, an additional amount equal to the difference between one hundred ten million dollars ($110,000,000) and the amount so transferred shall be transferred, to the extent funds are available, as follows:

(A) For the 1986-87 fiscal year, from the General Fund.

(B) For the 1987-88 and each subsequent fiscal year, from the state revenues due to the imposition of sales and use taxes on fuel, as defined for purposes of the Use Fuel Tax Law (Part 3 (commencing with Section 8601)).

(b) The following percentage of the amount of

all revenues, less refunds, derived under this part attributable to the sale, storage, use or other consumption of aircraft jet fuel used in propelling aircraft the sale or use of which in this state is subject to the tax imposed by Part 2 (commencing with Section 7201) and which are not subject to refund, shall be estimated by the State Board of Equalization, with the concurrence of the Department of Finance, and shall be transferred to the Aeronautics Account in the State Transportation Fund:

(1) For the 1988-89 fiscal year, 20 percent of the amount.

(2) For the 1989-90 fiscal year and each fiscal year thereafter, 100 percent of the amount.

(c) After application of subdivisions (a) and (b), the balance shall be transferred to the General Fund.

~~(c)~~

(d) The estimate required by subdivision ~~(c)~~ subdivisions (a) and (b) shall be based on taxable transactions occurring during a calendar year, and the transfers required by subdivision ~~(c)~~ subdivisions (a) and (b) shall be made during the fiscal year that commences during that same calendar year. Transfers required by paragraphs (1) and (2) of subdivision (a) and subdivision (b) shall be made quarterly.

SEC. 7.

Amendment 12
On page 21, below line 1, insert:

SEC. 8. The sum of twenty-five thousand three hundred thirty-four dollars ($25,334) is hereby appropriated from the funds deposited, pursuant to Section 3016 of the Vehicle Code, in the Motor Vehicle Account in the State Transportation Fund to the New Motor Vehicle Board for the purpose of reimbursing the Department of Motor Vehicles for its expenses in implementing Section 9889.75 of the Business and Professions Code.

(b) The amount appropriated by subdivision (a) shall be repaid, plus interest, from the Certification Account in the Automotive Repair Fund in the 1988-89 fiscal year, as provided in subdivision (c). The interest shall be charged at the rate earned by the Pooled Money Investment Account in the General Fund during the period from January 1, 1988, until the date the transfer of funds required by subdivision (c) takes place and shall be paid for that same period of time. The Bureau of Automotive

Repair shall take into account the requirement to repay the amount appropriated by subdivision (a), plus interest, in determining the dollar amount per vehicle specified in subdivision (c) of Section 9889.75 of the Business and Professions Code.

(c) The sum of twenty-five thousand three hundred thirty-four dollars ($25,334), plus so much more as shall be needed to pay the interest required by subdivision (b), shall be transferred from the Certification Account in the Automotive Repair Fund to the Motor Vehicle Account in the State Transportation Fund during the 1988-89 fiscal year. The transfer shall be in repayment of the amount appropriated pursuant to subdivision (a), plus interest as required by subdivision (b), and shall be deposited in the Motor Vehicle Account to the credit of the funds deposited in that account pursuant to Section 3016 of the Vehicle Code.

If the amount used by the New Motor Vehicle Board to reimburse the Department of Motor Vehicles for its expenses in implementing Section 9889.75 of the Business and Professions Code is less than the amount appropriated by subdivision (a), the unused portion of the appropriation shall revert to the Motor Vehicle Account and the amount transferred by this subdivision shall be reduced to the amount actually used by the New Motor Vehicle Board to reimburse the Department of Motor Vehicles, plus the interest on that amount.

This subdivision shall become operative on July 1, 1988.

SEC. 9. The amendment of subdivision (b) of Section 1794 of the Civil Code made at the 1987-88 Regular Session of the Legislature does not constitute a change in, but is declaratory of, existing law.

SEC. 10. Section 6 of this bill incorporates amendments to Section 7102 of the Revenue and Taxation Code proposed by both this bill and AB 276. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 1988, (2) each bill amends Section 7102 of the Revenue and Taxation Code, and (3) this bill is enacted after AB 276, in which case Section 5 of this bill shall not become operative.

- 0 -

Appropriations Fiscal Summary

Author: Tanner Amended: 8/25/87 Bill: AB 2057
and as further proposed to be amended (LCR #23062)
Hearing Date: 8/31/87 JUD. vote: 9-0

Summary Prepared By: Jeff Arthur

****

Bill Summary:

AB 2507 would require the Bureau of Automotive Repair to establish a program for certifying dispute resolution processes involving new motor vehicle warranties. BAR would be authorized to impose a fee, up to $1, for each new motor vehicle sold, etc. after 7/1/88 to meet program costs. BOE would be required to reimburse a manufacturer who reimbursed sales tax collected on a defective vehicle. The bill would appropriate $25,334 from funds reserved for the New Motor Vehicle Board in the Motor Vehicle Account to the Dept. of Motor Vehicles for its costs incurred in collecting the fee.

****

Fiscal Impact by Fiscal Year
(Dollars in thousands)

Department	1987-88	1988-89	1989-90	Fund
BAR	$158	$293	$293	Certificat. Acc't
DMV	$25*	$7	$7	Motor Veh. Acc't
	* Offset by fees rec'd in FY 88-89.			
BOE	0	--------Minor-------		General
Revenue	0	$300	$300	Certificat. Acc't
Sales tax	0	----Unknown loss---		General

****

STAFF COMMENTS:

The only costs not offset by fees are BAR's startup costs during FY 87-88.

Legislative Analyst
August 28, 1987

ANALYSIS OF ASSEMBLY BILL NO. 2057 (Tanner)
As Amended in Senate August 25, 1987
1987-88 Session

AB 2057 (Am. 8/25/87)

Fiscal Effect:

Cost: Up to $158,000 in last half of 1987-88 increasing to $293,000 annually thereafter to the Certification Account in the Automotive Repair Fund (created by this bill) to implement a dispute resolution certification program; beginning in 1988-89, costs would be fully offset by fees.

Revenue:
1. Up to $300,000 in fee revenues annually to the Certification Account beginning in 1988-89.
2. Unknown revenue loss to the General Fund annually from sales tax reimbursements to vehicle manufacturers.

Analysis:

This bill requires the Bureau of Automotive Repair (BAR) to establish a program to certify third party dispute resolution processes for automobile warranty disputes. The certification program would become operative July 1, 1988 and would primarily involve vehicle manufacturers, distributors, and dealers. Moreover, the bill also would change current law pertaining to vehicle warranty procedures and restitution.

Specifically, the bill:

- Authorizes BAR to revoke or suspend any arbitration program if it does not meet specified standards and requires the bureau to (1) notify the Department of Motor Vehicles (DMV) of failures of manufacturers, distributors, or their branches to comply with arbitration decisions, and (2) provide the Legislature with a biennial report evaluating the effectiveness of the program.

- Authorizes BAR, effective July 1, 1988, to charge fees, up to $1 per new motor vehicle sold, leased or distributed by manufacturers, distributors, or their branches to fund its program costs. These fees would be collected by the New Motor Vehicle Board (NMVB) in the Department of Motor Vehicles and deposited into the Certification Account created by this bill in the Automotive Repair Fund.

- Requires the State Board of Equalization (BOE) to reimburse the manufacturer of a new motor vehicle any sales tax returned to the buyer as part of restitution for a defective vehicle.

Fiscal Effect

We estimate that the BAR would incur program start-up costs of up to $150,000 in 1987-88 (half-year) and increasing to $293,000 annually thereafter. Beginning in 1988-89, program costs would be fully

Legislative Analyst
May 30, 1987

ANALYSIS OF ASSEMBLY BILL NO. 2057 (Tanner)
As Amended in Assembly May 13, 1987 and
As Proposed to be Further Amended by LCR No. 016489
1987-88 Session

Fiscal Effect:

Cost: Up to $158,000 in last half of 1987-88 increasing to $293,000 annually thereafter to the Certification Account in the Automotive Repair Fund (created by this bill) for the Bureau of Automotive Repair to resolve automobile warranty disputes; costs after 1988-89 would be fully offset by fees.

Revenue:
1. Up to $300,000 in fee revenues annually to the Certification Account beginning in 1988-89.
2. Unknown revenue loss to the General Fund annually from sales tax reimbursements to vehicle manufacturers.

Analysis:

This bill requires the Bureau of Automotive Repair (BAR) to establish a program for the resolution of automobile warranty disputes. The program would primarily involve vehicle manufacturers, distributors, and dealers. Moreover, the bill would also change current law pertaining to vehicle warranty procedures and restitution.

Specifically, the bill:

- Requires BAR to (1) certify the arbitration programs for resolution of vehicle warranty disputes, (2) authorizes the bureau to revoke or suspend any arbitration program if it does not meet specified standards, (3) notify the Department of Motor Vehicles (DMV) of failures of manufacturers, distributors, or their branches to comply with arbitration decisions, and (4) provide the Legislature with a biennial report evaluating the effectiveness of the program,

- Authorizes BAR, effective July 1, 1988, to charge fees, up to $1 per new motor vehicle sold, leased or distributed by manufacturers, distributors, or their branches to fund its program costs. Such fees would be collected by the New Motor Vehicle Board (NMVB) in the Department of Motor Vehicles and deposited into the Certification Account created by this bill in the Automotive Repair Fund, and

- Requires the State Board of Equalization (BOE) to reimburse the manufacturer of a new motor vehicle any sales tax returned to the buyer as part of restitution for a defective vehicle.

Fiscal Effect

The BAR indicates it would incur program start-up costs up to $158,000 in 1987-88 (half-year) and increasing to $293,000 annually thereafter. Beginning

in 1988-89, program costs would be fully offset by fees established by the bill. According to BAR, a 13 cent charge per vehicle would generate up to $300,000 (13 cents times 2.3 million vehicles estimated to be sold in 1987). The bill, however, does not provide an appropriation to cover program start-up costs in the last half of 1987-88.

The NMVB would incur minor absorbable costs working with the DMV to collect the fees. Additionally, DMV would incur program start-up costs of $33,000 in 1987-88, decreasing to $7,000 annually thereafter. These costs could be absorbed by DMV.

The BOE would incur unknown, probably minor, absorbable costs to reimburse sales taxes to manufacturers in vehicle restitution settlements. Moreover, sales tax reimbursements would result in an unknown revenue loss to the General Fund.

83/s8

Legislative Analyst
August 28, 1987

ANALYSIS OF ASSEMBLY BILL NO. 2057 (Tanner)
As Amended in Senate August 25, 1987
1987-88 Session

Fiscal Effect:

Cost: Up to $158,000 in last half of 1987-88 increasing to $293,000 annually thereafter to the Certification Account in the Automotive Repair Fund (created by this bill) to implement a dispute resolution certification program; beginning in 1988-89, costs would be fully offset by fees.

Revenue:
1. Up to $300,000 in fee revenues annually to the Certification Account beginning in 1988-89.
2. Unknown revenue loss to the General Fund annually from sales tax reimbursements to vehicle manufacturers.

Analysis:

This bill requires the Bureau of Automotive Repair (BAR) to establish a program to certify third party dispute resolution processes for automobile warranty disputes. The certification program would become operative July 1, 1988 and would primarily involve vehicle manufacturers, distributors, and dealers. Moreover, the bill also would change current law pertaining to vehicle warranty procedures and restitution.

Specifically, the bill:

- Authorizes BAR to revoke or suspend any arbitration program if it does not meet specified standards and requires the bureau to (1) notify the Department of Motor Vehicles (DMV) of failures of manufacturers, distributors, or their branches to comply with arbitration decisions, and (2) provide the Legislature with a biennial report evaluating the effectiveness of the program.

- Authorizes BAR, effective July 1, 1988, to charge fees, up to $1 per new motor vehicle sold, leased or distributed by manufacturers, distributors, or their branches to fund its program costs. These fees would be collected by the New Motor Vehicle Board (NMVB) in the Department of Motor Vehicles and deposited into the Certification Account created by this bill in the Automotive Repair Fund.

- Requires the State Board of Equalization (BOE) to reimburse the manufacturer of a new motor vehicle any sales tax returned to the buyer as part of restitution for a defective vehicle.

Fiscal Effect

We estimate that the BAR would incur program start-up costs of up to $158,000 in 1987-88 (half-year) and increasing to $293,000 annually thereafter. Beginning in 1988-89, program costs would be fully

offset by fees established by the bill. According to BAR, a 13 cent charge per vehicle would generate up to $300,000 (13 cents times 2.3 million vehicles estimated to be sold in 1987). The bill, however, does not provide an appropriation to cover program start-up costs in the last half of 1987-88.

The NMVB would incur minor absorbable costs working with the DMV to collect the fees. Additionally, DMV would incur program start-up costs of $25,000 in 1987-88, decreasing to $7,000 annually thereafter. These costs could be absorbed by DMV.

The BOE would incur unknown, probably minor, absorbable costs to reimburse sales taxes to manufacturers in vehicle restitution settlements. Moreover, sales tax reimbursements would result in an unknown revenue loss to the General Fund.

83/s8

SENATE RULES COMMITTEE

Office of
Senate Floor Analyses
1100 J Street, Suite 120
445-6614

Bill No.	AB 2057
Author:	Tanner (D)
Amended:	9/4/87 in Senate
Vote Required:	2/3

Committee Votes:

COMMITTEE: JUDICIARY		
BILL NO.: AB 2057		
DATE OF HEARING: 8-18-87		
SENATORS:	AYE	NO
Doolittle	✓	
Keene	✓	
Marks	✓	
Petris	✓	
Presley	✓	
Richardson		
Roberti	✓	
Torres	✓	
Watson	✓	
Davis (VC)	✓	
Lockyer (Ch)	✓	
TOTAL:	9	0

COMMITTEE: APPROPRIATIONS		
BILL NO.: AB 2057		
DATE OF HEARING: 8-31-87		
SENATORS:	AYE	NO
Alquist	✓	
Ayala	✓	
Boatwright	✓	
Campbell	✓	
Deddeh		
Dills	✓	
Keene	✓	
Lockyer	✓	
Maddy	✓	
Beverly (VC)		
Presley (Ch)	✓	
TOTAL:	9	0

Senate Floor Vote:

Assembly Floor Vote: 54-20, p. 2929, 6/22/87

SUBJECT: Warranties: new motor vehicles

SOURCE: Author

DIGEST: This bill provides that the vehicle manufacturers' voluntary dispute resolution procedures be replaced by a state certified dispute resolution process.

This bill also provides that should a vehicle manufacturer be liable to a buyer for treble damages and attorney's fees.

ANALYSIS: Existing law imposes various duties upon manufacturers making express warranties with respect to consumer goods, including the duty to replace the goods or reimburse the buyer, as specified, if the goods are not repaired to conform to those warranties after a reasonable number of attempts. Existing law also prohibits a buyer of such goods from asserting a presumption that a reasonable number of attempts have been made to conform a new motor vehicle, as specified, unless the buyer first resorts to a third party dispute resolution process, as defined, following notice that such a process is available.

This bill would revise the provisions relating to warranties on new motor vehicles to require the manufacturer or its representative to replace the vehicle or make restitution, as specified, if unable to conform the vehicle to the applicable express warranties after a reasonable number of attempts. The bill would, on July 1, 1988, revise the definitions of "motor vehicle," "new motor vehicle," and "qualified third party dispute resolution process" and define the term "demonstrator" for these purposes, and require the Bureau of Automotive Repair to establish a program for the certification of third party

dispute resolution processes pursuant to regulations adopted by the New Motor Vehicle Board, as specified. The bill would prohibit the sale or lease of a motor vehicle transferred by a buyer or a lesser to a manufacturer for a nonconformity, except as specified.

The bill would, on July 1, 1988, create the Certification Account within the Automotive Repair Fund, to be funded by fees imposed on manufacturers and distributors and collected by the New Motor Vehicle Board, to be expended upon appropriation by the Legislature to pay the expenses of the bureau under the bill.

Existing law authorizes the award of court costs and attorney's fees to consumer who prevail in such actions, and would also require the award of civil penalties, including treble damages, against certain manufacturers. Existing law provides for the disposition of moneys in the Retail Sales Tax Fund.

This bill provides that $25,334 be appropriated from deposited funds, as specified, in the Motor Vehicle Account in the State Transportation Fund to the New Motor Vehicle Board for the purpose of reimbursing the Department of Motor Vehicles.

This amount will be repaid, plus interest, from the certification account in the Automotive Repair Fund.

The purpose of this bill is to improve protections for vehicle purchasers under the existing lemon law.

Existing law provides that a manufacturer who is unable to service or repair consumer goods, including motor vehicles, so that they conform to the applicable warranties after a reasonable number of attempts, must either replace those goods or reimburse the buyer. In 1982, the law was amended by AB 1787 (Tanner), commonly referred to as the lemon law. Specifically, it:

-- Defines "reasonable number of attempts" for new motor vehicles as either four or more repair attempts on the same major defect, or, more than 30 days out of service for service/repair of one or more major defects, within the first year or 12,000 miles of use.

-- Requires a buyer to notify the manufacturer directly of a continuing defect and to use a dispute resolution program meeting specified minimum standards prior to asserting the "lemon presumption" in a legal action to obtain a vehicle replacement or refund.

-- Defines the "lemon presumption" as the "reasonable number of attempts" in the paragraph above.

-- This bill would amend and clarify the lemon law. It would establish a structure for certifying third-party dispute mechanisms, requirements for certification and provide for treble damages and attorney's fees to consumers who obtain a judgement against a manufacturer who does not have a certified lemon law arbitration program.

CONTINUED

This bill would:

a) Require the Bureau of Automotive Repair (BAR) to: certify the arbitration programs for resolution of vehicle warranty disputes as requested; annually recertify those programs or decertify as inspection warrants; notify the Department of Motor Vehicles (DMV) of the failure of a manufacturer, distributor, or their branches to comply with arbitration decisions; investigate consumer complaints regarding qualified programs; and, submit a biennial report to the Legislature evaluating the effectiveness of the program.

b) Authorize BAR to charge fees to be collected by the New Motor Vehicle Board (NMVB) in the Department of Motor Vehicles (DMV), beginning July 1, 1988, from specified NMVB licensees, not to exceed $1 (one dollar) for each new motor vehicle sold, leased, or distributed in California. The fees would be deposited into the Certification Account of the Automotive Repair Fund.

c) Require motor vehicle manufacturers to replace defective vehicles or make restitution if the manufacturer were unable to service or repair the vehicles after a reasonable number of buyer requests. The buyer, however, would be free to take restitution in place of a replacement vehicle.

d) Specify what would be included in the replacement and refund option.

   -- In case of replacement, the new motor vehicle would be accompanied by all express and implied warranties. The manufacturer would pay for, or to, the buyer the amount of any sales or use tax, license and registration fees, and other official fees which the buyer would be obligated to pay in connection with the replacement, plus any incidental damages the buyer would be entitled to including reasonable repair, towing, and rental car costs.

   -- In case of restitution, the manufacturer would pay the actual price paid including any charges for transportation and manufacturer-installed options, sales tax, license fees, and registration fees plus incidental damages. The amount directly attributable to use by the buyer would be determined as prescribed and could be subtracted from the total owed to the buyer.

e) Clarify that the vehicle buyer could assert the "lemon presumption" in any civil action, small claims court action or other formal or informal proceeding.

f) Set forth a qualified third party dispute resolution process and require compliance with the minimum requirements of the Federal Trade Commission (FTC) for informal dispute settlement procedures as defined on January 1, 1987.

g) Amend the definition of a "new motor vehicle" which is covered by the lemon law to include dealer-owned vehicles and demonstrator vehicles.

h) Prevent a vehicle repurchased by a manufacturer under the lemon law from being resold as a used car unless the nature of the car's problems were disclosed, the problems were corrected, and the manufacturer warranted that the vehicle is free of those problems for one year.

CONTINUED

i) Require the Board of Equalization to reimburse the manufacturer in an amount equal to the sales tax paid for vehicles for which the manufacturer provided the specified refund to the buyer.

j) Provide for awards of treble damages and reasonable attorney's fees and costs if the buyer were awarded a judgement and the manufacturer did not maintain a qualified third party dispute resolution process as established by this chapter, with specified exceptions.

The author worked with the Ford Motor Co., General Motors, and Honda, as well as Automobile Importers of America, to amend this bill to remove their opposition. These companies are now neutral.

Prior Legislation

AB 1787 (Tanner), Chapter 388, Statutes of 1982, passed the Senate 28-4.

AYES (28)—Senators Ayala, Beverly, Boatwright, Campbell, Carpenter, Davis, Dills, Ellis, Foran, Greene, Holmdahl, Johnson, Keene, Marks, Mello, Montoya, Nielsen, O'Keefe, Petris, Presley, Rains, Robbins, Roberti, Russell, Sieroty, Stiern, Vuich, and Watson.
NOES (4)—Senators Richardson, Schmitz, Seymour, and Speraw.

FISCAL EFFECT: Appropriation: Yes Fiscal Committee: Yes Local: No

SUPPORT: (Verified 9/4/87)

Attorney General
Chrysler Corp.
Motor Voters
California Public Interest Research Group
Consumers Union

ARGUMENTS IN SUPPORT: The purpose of this bill, according to the author, is to strengthen the existing lemon law, to eliminate inequities that have occurred from that law's implementation and to ensure that owners of seriously defective new cars can obtain a fair, impartial and speedy hearing on their complaints.

The author and proponents state that since the effective date of the lemon law over four years ago, there have been numerous complaints from new car buyers concerning its implementation. While these complaints reflect continued dissatisfaction with the manufacturer's own resolution of disputes regarding defective new vehicles, they have also alleged that the dispute resolution programs financed by the manufacturers are not operated impartially. Consumers have complained of: long delays in obtaining a hearing (beyond the prescribed 40-60 day time limit); unequal access to the arbitration process; and unreasonable decisions that do not appear to exhibit knowledge of the lemon law's provisions or provide an adequate amount of reimbursement even when a refund decision is ordered.

ASSEMBLY FLOOR VOTE:

Assembly Bill No. 2057 passed by the following vote:

AYES—54

Agnos	Eastin	Hughes	Roos
Areias	Eaves	Isenberg	Roybal-Allard
Bane	Elder	Johnston	Sher
Bates	Farr	Katz	Speier
Bradley	Felando	Kelley	Statham
Bronzan	Floyd	Killea	Stirling
Calderon	Friedman	Klehs	Tanner
Campbell	Frizzelle	Leonard	Tucker
Chacon	Grisham	Leslie	Vasconcellos
Clute	Hannigan	Margolin	Waters, Maxine
Condit	Hansen	Moore	Waters, Norman
Connelly	Harris	O'Connell	Mr. Speaker
Cortese	Hauser	Peace	
Costa	Hayden	Polanco	

NOES—20

Allen	Ferguson	Jones	Mountjoy
Bader	Frazee	Lancaster	Nolan
Baker	Harvey	Lewis	Quackenbush
Brown, Dennis	Hill	Longshore	Wright
Chandler	Johnson	McClintock	Wyman

Bill ordered transmitted to the Senate.

RJG:lm 9/4/87 Senate Floor Analyses

STATE BOARD OF EQUALIZATION - LEGISLATIVE OFFICE

BILL ANALYSIS ACTION

Date: September 10, 1987

Bill No: Assembly Bill 2057 Date Amended: 9/4/87

Author: Tanner Tax: Sales and Use

Position: Neutral Related Bills: AB2050/SB71

[ ] We have no interest in the bill in its present form and will not prepare an analysis.

[ ] We are following the bill but have no comment on its present form.

[X] The current amendments do not affect our previous analysis.

[X] See Comments

COMMENTS:

The September 4, 1987 amendment incorporates certain provisions of Assembly Bill 276 in order to prevent this bill from chaptering out the amendments made by Assembly Bill 276 in the event that it is enacted prior to Assembly Bill 2057.

Please direct further inquiries to: Margaret Shedd Boatwright (322-3276)

0321F

JOHN K. VAN DE KAMP
Attorney General

State of California
DEPARTMENT OF JUSTICE

1515 K STREET, SUITE 511
P.O. BOX 944255
SACRAMENTO 94244-2550
(916) 445-9555

July 13, 1987

Honorable Sally Tanner
Assemblymember, 60th District
State Capitol, Room 4146
Sacramento, CA 95814

Dear Assemblymember Tanner:

Re: AB 2057 - Warranties: New Motor Vehicles

The Attorney General's Office supports AB 2057.

This bill addresses a number of problems which have developed under the "lemon law" regarding defective new cars.

Enacted in 1982, the lemon law basically provides that if a manufacturer is unable to fix a defective new motor vehicle, then the buyer is entitled to either a replacement or reimbursement. One of the major problems to date with the law is that the mechanisms established by many manufacturers for resolving customer disputes have not complied with the minimum statutory criteria for such procedures. Moreover, even where the statutory criteria have been met poor decisions are often rendered because arbitrators are not trained in warranty law or do not have authority to order independent, expert examination of the vehicle.

AB 2057 will make the third-party dispute resolution process a more effective procedure for resolving these cases by: (a) authorizing the Bureau of Automotive Repair to approve the particular approach selected by each manufacturer; (b) requiring arbitrators to be familar with applicable warranty law; and (c) authorize arbitrators to obtain independent, expert inspection of the vehicle.

Additionally, the bill substantially strengthens other areas of the lemon law by: (a) permitting the buyer to request a refund of the purchase price instead of being required to accept a new vehicle from the manufacturer; (b) providing a specific formula for determining the buyer's liability for use of the vehicle prior to discovery of the defect; and (c) providing treble damages in any action where the manufacturer breached the warranty and failed to provide a qualified third-party process for resolving the consumer's dispute.

SFA-2

We have now had five years of experience with the lemon law. AB 2057 address the major problems which have arisen to date, giving consumers who purchase defective new cars effective remedies against manufacturers who either will not or can not comply with their warranties. The bill is important to all of California's consumers. Please let me know if we can be of further assistance in supporting the measure.

Very truly yours,

JOHN K. VAN DE KAMP
Attorney General

Allen Sumner
Senior Assistant Attorney General
(916) 324-5477

AHS:er

SFA-3

STATE BOARD OF EQUALIZATION - LEGISLATIVE OFFICE

BILL ANALYSIS ACTION

Date: June 24, 1987

Bill No: Assembly Bill 2057 Date Amended: 6/11/87

Author: Tanner Tax: Sales and Use

Position: Neutral Related Bills: AB2050/SB71

[ ] We have no interest in the bill in its present form and will not prepare an analysis.

[ ] We are following the bill but have no comment on its present form.

[X] The current amendments do not affect our previous analysis and we have no further comments.

[ ] See Comments

COMMENTS:

Please direct further inquiries to: Margaret Shedd Boatwright (322-3276)

0321F

SFA-4

STATE BOARD OF EQUALIZATION - LEGISLATIVE OFFICE

BILL ANALYSIS ACTION

Date: May 26, 1987

Bill No: Assembly Bill 2057 Date Amended: 5/13/87

Author: Tanner Tax: Sales and Use

Position: Neutral Related Bills: AB2050/SB71

[ ] We have no interest in the bill in its present form and will not prepare an analysis.

[ ] We are following the bill but have no comment on its present form.

[X] The current amendments do not affect our previous analysis and we have no further comments.

[ ] See Comments

COMMENTS:

Please direct further inquiries to: Margaret Shedd Boatwright (322-3276)

0321F

SFA-5

Honorable Sally Tanner
Member of the Assembly
State Capitol, Room 4146
Sacramento, CA 95814

DEPARTMENT	AUTHOR	BILL NUMBER
Finance	Tanner	AB 2057
SPONSORED BY	RELATED BILLS	AMENDMENT DATE
	AB 3611 (1986)	May 13, 1987

BILL SUMMARY

AB 2057 requires the Bureau of Automotive Repair (BAR) to certify third party arbitration processes that require manufacturers to replace or provide restitution for manufactured defective vehicles. The New Motor Vehicle Board (NMVB) is required to administer the collection of fees to fund costs incurred by BAR from the certification activity. Fees would be deposited in the Certification Account of the Automotive Repair Fund out of which program costs would be funded.

SUMMARY OF COMMENTS

This bill improves remedies available to dissatisfied new car buyers under current law at nominal increase in costs to the state.

FISCAL SUMMARY--STATE LEVEL

Code/Department Agency or Revenue Type	SO LA CO RV	(Fiscal Impact by Fiscal Year) (Dollars in Thousands) FC 1986-87	FC 1987-88	FC 1988-89	Code Fund
0860/Bd. of Equal	SO	--	S $0.5	S $1	001/Gen.
1149/Retail Sales and Use Taxes		--	U -$73	U -$145	001/Gen.
1150/BAR	SO	--	C 158	C 293	499/Cont. Acct.
1200/Misc. Reg. Fees	RV	--	U 150	U 300	499/Cont. Acct.
2740/Motor Vehicles	SO	--	C 33	C 7	054/NMVB

Impact on State Appropriations Limit--Yes

ANALYSIS

A. Specific Findings

Under current law, the New Motor Vehicle Board (NMVB) in the Department of Motor Vehicles (DMV) is required to, among other things, hear and consider appeals by a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative, from a decision arising from the department. Current law authorizes the NMVB to require those persons to pay a fee to DMV for the issuance or renewal of a license to do business.

(Continued)

POSITION: Neutral

Department Director Date

Principal Analyst	Date	Acting Prog. Budget Mgr.	Date	Governor's Office
(223) R. Baker		Wallis L. Clark		Position noted
R. Baker 5/27/87		Wallis L. Clark	5/29/87	Position approved
				Position disapproved
				by: date:

CJ:BW1/0064A/1045C

BILL ANALYSIS Form DF-43 (Rev 03/87 Buff)

SFA-6

BILL ANALYSIS/ENROLLED BILL REPORT--(Continued) Form DF-43

AUTHOR	AMENDMENT DATE	BILL NUMBER
Tanner	May 13, 1987	AB 2057

ANALYSIS

A. Specific Findings (Continued)

AB 2057 requires every manufacturer of new motor vehicles, beginning July 1, 1988, to report sales or leases annually to the NMVB on forms prescribed by the NMVB. The bill requires the NMVB to administer the collection of fees to fund the certification program and creates the Certification Account within the Automotive Repair Fund for deposit of those fees. The bill requires each applicant for a license to pay a fee determined by BAR, but not to exceed $1 for each motor vehicle sold or leased.

Current law provides for an arbitration process for disputes between manufacturers and consumers of new cars purported to have manufacturing defects. Under current law the BAR in the Department of Consumer Affairs (DCA) is required to enforce and administer the Automotive Repair Act which regulates the automotive repair industry.

AB 2057 requires BAR to certify third party arbitration programs offered by auto manufacturers or other entities pursuant to current "lemon law". The lemon law provides a process for the resolution of disputes between the owner or leasee of a new motor vehicle and the manufacturer or distributor.

AB 2057 requires BAR to certify automobile warranty arbitration programs that substantially comply with criteria adopted by the bureau or decertify those programs which are not in substantial compliance, in accordance with specified regulations. The bill would require the bureau to monitor and inspect the programs on a regular basis to assure continued compliance.

Under current law, a manufacturer who is unable to service or repair goods, including motor vehicles, to conform to applicable express warranties after a reasonable number of attempts, as specified, is required to either replace the vehicle or reimburse the buyer.

AB 2057 provides that the buyer may elect restitution in lieu of replacement. The bill would require that when a vehicle is replaced or restitution is made by the manufacturer, the buyer may be required to reimburse the manufacturer, or the manufacturer may reduce the amount of restitution, by an amount directly attributable to the use of the vehicle by the buyer.

(Continued)

CJ:BW2/0064A/1045C

SFA 7

BILL ANALYSIS/ENROLLED BILL REPORT--(Continued) Form DF-43

AUTHOR	AMENDMENT DATE	BILL NUMBER
Tanner	May 13, 1987	AB 2057

ANALYSIS

A. Specific Findings (Continued)

There are a number of bills related to this issue including the following:

- AB 3611 (1986) contained language similar to this bill, including the requirements for reporting vehicles sold and collection of a fee in conjunction with issuance of renewal of the occupational license by DMV to fund a certification program.

- AB 2050 is a current bill that would revise provisions relating to the manufacturer's replacement of, or restitution for, a vehicle including a requirement for the manufacturer to pay sales tax, license and registration fees on the replacement, or an equivalent amount in restitution. It would also provide for reimbursement from the State of the sales tax involved.

- SB 71 is a current bill that would require a manufacturer to pay registration fees and sales tax on a replacement vehicle or to add an equivalent amount in restitution. It would also require the State to reimburse manufacturers for such sales or use tax.

- SB 228 is a current bill that would extend warranty or service contracts on repairs, repaired parts, affected related parts or components which were repaired under the terms of a warranty or service contract.

B. Fiscal Analysis

According to DMV, the volume of vehicles replaced by manufacturers cannot be determined since manufacturers maintain this information in confidence. The DMV has attempted to estimate the fiscal impact of this bill based on the number of serious complaints received by DCA and NMVB. The DMV estimated approximately 242 vehicles will be replaced or restitution will be provided per year.

We have not been able to verify or disprove this estimate. We assume $10,000 would be the average price per vehicle and a 6 percent sales tax will be paid.

Computation:

Manufacturer replacement or restitution	242
Sales tax per vehicle	x $600
Potential Sales Tax Refund	$145,200

On this basis, we estimate an annual $145,000 revenue loss to the General Fund.

CJ:BW3/0064A/1045C

BILL ANALYSIS/ENROLLED BILL REPORT--(Continued) Form DF-43

AUTHOR	AMENDMENT DATE	BILL NUMBER
Tanner	May 13, 1987	AB 2057

ANALYSIS

B. Fiscal Analysis (Continued)

According to DMV, the NMVB would incur one-time initial costs of $33,000 in 1987-88, and ongoing costs of $7,000 annually thereafter.

According to the Board of Equalization, minor costs (less than $1,000) would be incurred as a result of this bill. These costs can be absorbed within existing resources.

DCA and BAR staff estimate this bill's 1987-88 (half-year) costs at $158,000 and 2 PYs, and annual costs thereafter at $293,000 and 4 PYs. This provides for a program supervisor, one staff each in San Francisco and Los Angeles, and one clerical. Finance, however, has not had an opportunity to review specific workload information related to this proposed program. Therefore, we believe that any additional resources should be justified through the 1988-89 budgetary process.

Based on information provided by staff of DMV, DCA and BAR, we estimate that a fee of $0.15 and $0.13 per vehicle sold in 1987-88 and 1988-89, respectively, or $300,000 annually will be required to fund the costs of this program.

CJ:BW4/0064A/1045C

LEGISLATIVE ANALYSIS — **Business, Transportation and Housing Agency**

SUBJECT	AUTHOR	BILL NUMBER
Department Of Motor Vehicles	Tanner	AB 2057
Warranties: new motor vehicles		AS AMENDED: Original

SUMMARY: Requires the Bureau of Automotive Repair to establish a program for the certification of third party dispute resolution processes under the "Lemon Law"; Requires each manufacturer, distributor, and their branches to pay an annual fee not exceeding $1 for each motor vehicle sold, leased or otherwise distributed by or for them to fund the program.

DETAILED ANALYSIS: Under the existing "Lemon Law", when a manufacturer is unable to repair or service a new motor vehicle after a reasonable number of attempts, replacement or restitution for the vehicle must be made to the consumer by the manufacturer.

This bill would make several changes to the existing "Lemon Law" replacement or restitution provisions and would require the Bureau of Automotive Repair (BAR) to establish and administer a program for certifying each third party resolution process used for the arbitration of disputes between manufacturers and vehicle purchasers. The program would include establishing standards, application requirements, reporting requirements , certification, decertification, establishing procedures to assist vehicle owners regarding the resolution processes, establishing methods for measuring customer satisfaction and identifying violations, monitoring and inspecting resolution processes and other functions.

This bill would create a Certification Account in the Automotive Repair Fund to exclusively pay BAR's expenses incurred by creating and maintaining the program. The New Motor Vehicle Board (NMVB) is named to administer the collection of fees. The account would be funded by collection of a fee not to exceed $1 from each licensed manufacturer, manufacturer branch, distributor, or distributor branch for each motor vehicle sold, leased or otherwise distributed by or for them during each calendar year. The fee would be required to be paid in conjunction with the application for licensing or renewal of the license,. The application would be accompanied by a report of such vehicles broken down to make, model, and model year and giving any other information the NMVB may require. The amount of the fee to be collected would be determined each year on or before January 1st, based on an estimate of the number of vehicles sold, leased or distributed the year before. It is unclear whether BAR or NMVB would make this determination as the bill implies that each would.

POSITION: NEUTRAL		GOVERNOR'S OFFICE
DEPARTMENT: [signature]	AGENCY: Original signed by Allen Goldstein	POSITION NOTED:
DATE: April 21, 1987	DATE: APR 2 3 1987	POSITION APPROVED: ✓
cc: INV/OL:lm 4-15-87		POSITION DISAPPROVED: SFA-10
DMV 22 (REV. 1/87) [signature]		BY: [signature] DATE: 5/31

This bill would authorize the NMVB to adopt regulations to implement collection of the fee and reports of vehicles on which the fee is based.

COST ANALYSIS: The Department of Motor Vehicles would incur implementation costs of $33,200 to create the programs for collection of the fee from affected occupation licensees. We would require an appropriation of that amount during the 87/88 Fiscal Year. For subsequent years, the annual ongoing cost would be approximately $6,966. A detailed fiscal impact statement is attached.

LEGISLATIVE HISTORY: This bill is sponsored by the author.

This bill will probably be supported by consumer groups who complain that the existing arbitration system does not work well since some arbitrators do not follow Federal Trade Commission guidelines.

Manufacturer and distributor groups will probably oppose the bill because of the time and effort it will take to prepare the reports and compute the fees. They may also object to the sales or use tax reimbursement provisions of this bill. Even though they may be reimbursed by the Board of Equalization for these taxes, this provision would compound the "red tape" in transactions where they would already have spent considerable time, money and effort in dealing with the "lemon" vehicle.

Related legislation: AB 1787, Tanner (CH 388, Stats. 82), established the current "Lemon Law."

AB 3611, Tanner (85/86 RS), contained language similar to this bill, including the requirements for reporting vehicles sold and collection of a fee in conjunction with issuance or renewal of the occupational license by DMV to fund a certification program. The bill died in the Senate Committee on Appropriations.

AB 2050, Tanner, is a current bill that would revise provisions relating to the manufacturer's replacement of, or restitution for a vehicle; including a requirement for the manufacturer to pay sales tax, license and registration fees on the replacement or an equivalent amount in restitution. It would also provide for reimbursement from the State of the sales tax involved.

SB 71, Greene, is a current bill that would require a manufacturer to pay registration fees and sales tax on a replacement vehicle or to add an equivalent amount in restitution. It would also require the State to reimburse manufacturers for such sales or use tax.

SB 228, Greene, is a current bill that would extend warranty or service contracts on repairs, repaired parts, affected related parts or components which were repaired under the terms of a warranty or service contract.

ARGUMENTS FOR: According to the author's office, there have been many complaints by consumers regarding the arbitration process. Many buyers feel the arbitrators are biased toward manufacturers. Requiring BAR to certify and monitor arbitration processes should lessen these complaints.

RECOMMENDED POSITION: The Department of Motor Vehicles recommends a position of NEUTRAL.

The department would be virtually unaffected by the provisions of this bill dealing with the arbitration process and the restitution or replacement made by dealers in the event a new vehicle cannot be repaired.

The provisions of this bill requiring the department to collect the additional fee would not adversely impact the department's programs or policies.

Although consumers would no longer pay registration fees on replacement vehicles, the manufacturer would, so there should be no impact to the registration process.

For further information, please contact:

Lynda Miller
Legislative Liaison Office
732-7574

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FISCAL IMPACT SUMMARY

FOR AB 2057 OPERATIVE 1-1-88

AS INTRODUCED MARCH 6, 1987 PREPARED 4-15-87

IMPLEMENTATION COSTS:	87/88 FY
Programming to establish flag for mailing reporting forms with renewal notices	$11,200 (280 hours)
Programming to deposit fees to special fund	12,000 (300 hours)
Total	$33,200 *

ANNUAL ON-GOING COSTS:	
Maintenance of special fund	$ 5,466
Mailing reporting forms, cashiering, correspondence	1,500
Total	$ 6,900

* The department will require an appropriation of $33,200 to cover the costs for FY 87/88.

ASSUMPTIONS:

1. BAR will develop reporting forms to be used by licensees. DMV will consult of fee-collection aspect for the forms development.
2. DMV will mail reporting forms to affected licensees with their renewal notices and will include these forms with new applications for license.
3. When processing returned applications, DMV will cashier the fee paid for the program from the total shown on the reporting form and deposit it to the Certification Account. DMV will correspond with the applicant or licensee if forms and/or fees are not submitted or if amount due on form does not match amount paid. DMV will not otherwise check the forms for accuracy or validity of reporting.
4. Forms will be forwarded to BAR at intervals to be established.

STATE BOARD OF EQUALIZATION - LEGISLATIVE OFFICE

BILL ANALYSIS ACTION

Date: May 11, 1987

Bill No: Assembly Bill 2057 Date Amended: 4/28/87

Author: Tanner Tax: Sales and Use

Position: Neutral Related Bills: AB2050/SB71

[ ] We have no interest in the bill in its present form and will not prepare an analysis.

[ ] We are following the bill but have no comment on its present form.

[X] The current amendments do not affect our previous analysis and we have no further comments.

[ ] See Comments

COMMENTS:

Please direct further inquiries to: Margaret Shedd Boatwright (322-3276)

0321F

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Honorable Sally Tanner
Member of the Assembly
State Capitol, Room 4146
Sacramento, CA 95814

DEPARTMENT	AUTHOR	BILL NUMBER
Finance	Tanner	AB 2057
SPONSORED BY	RELATED BILLS	AMENDMENT DATE
	AB 3611 (1986)	RN 87 016489

BILL SUMMARY

AB 2057 requires the Bureau of Automotive Repair (BAR) to certify third party arbitration processes that require manufacturers to replace or provide restitution for manufactured defective vehicles. The New Motor Vehicle Board (NMVB) is required to administer the collection of fees to fund costs incurred by BAR from the certification activity. Fees would be deposited in the Certification Account of the Automotive Repair Fund out of which program costs would be funded.

SUMMARY OF CHANGES

This version of the bill makes the following minor changes from the previous analysis of May 13, 1987.

Strengthens the rules for arbitration and makes minor grammatical changes which do not change our position.

SUMMARY OF COMMENTS

This bill improves remedies available to dissatisfied new car buyers under current law at nominal increase in costs to the state.

FISCAL SUMMARY--STATE LEVEL

Code/Department Agency or Revenue Type	SO LA CO RV	(Fiscal Impact by Fiscal Year) (Dollars in Thousands) FC 1986-87	FC 1987-88	FC 1988-89	Code Fund
0860/Bd. of Equal	SO	--	S $0.5	S $1	001/Gen.
1149/Retail Sales and Use Taxes		--	U -$73	U -$145	001/Gen.
1150/BAR	SO	--	C 158	C 293	499/Cont. Acct.
1200/Misc. Reg. Fees	RV	--	U 150	U 300	499/Cont. Acct.
2740/Motor Vehicles	SO	--	C 33	C 7	054/NMVB

Impact on State Appropriations Limit--Yes

POSITION: Department Director Date

Neutral

Principal Analyst	Date	Acting Prog. Budget Mgr.	Date	Governor's Office
(223) R. Baker		Wallis L. Clark		Position noted
R. Baker		Wallis L. Clark	6/1/87	Position approved
				Position disapproved
				by: date:

CJ:BWT/0064A/1045C

BILL ANALYSIS Form DF-43 (Rev 03/87 Buff)

SFA-15

BILL ANALYSIS/ENROLLED BILL REPORT--(Continued) Form DF-43

AUTHOR	AMENDMENT DATE	BILL NUMBER
Tanner	RN 87 016489	AB 2057

ANALYSIS

A. Specific Findings

Under current law, the New Motor Vehicle Board (NMVB) in the Department of Motor Vehicles (DMV) is required to, among other things, hear and consider appeals by a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative, from a decision arising from the department. Current law authorizes the NMVB to require those persons to pay a fee to DMV for the issuance or renewal of a license to do business.

AB 2057 requires every manufacturer of new motor vehicles, beginning July 1, 1988, to report sales or leases annually to the NMVB on forms prescribed by the NMVB. The bill requires the NMVB to administer the collection of fees to fund the certification program and creates the Certification Account within the Automotive Repair Fund for deposit of those fees. The bill requires each applicant for a license to pay a fee determined by BAR, but not to exceed $1 for each motor vehicle sold or leased.

Current law provides for an arbitration process for disputes between manufacturers and consumers of new cars purported to have manufacturing defects. Under current law the BAR in the Department of Consumer Affairs (DCA) is required to enforce and administer the Automotive Repair Act which regulates the automotive repair industry.

AB 2057 requires BAR to certify third party arbitration programs offered by auto manufacturers or other entities pursuant to current "lemon law". The lemon law provides a process for the resolution of disputes between the owner or leasee of a new motor vehicle and the manufacturer or distributor.

AB 2057 requires BAR to certify automobile warranty arbitration programs that substantially comply with criteria adopted by the bureau or decertify those programs which are not in substantial compliance, in accordance with specified regulations. The bill would require the bureau to monitor and inspect the programs on a regular basis to assure continued compliance.

Under current law, a manufacturer who is unable to service or repair goods, including motor vehicles, to conform to applicable express warranties after a reasonable number of attempts, as specified, is required to either replace the vehicle or reimburse the buyer.

AB 2057 provides that the buyer may elect restitution in lieu of replacement. The bill would require that when a vehicle is replaced or restitution is made by the manufacturer, the buyer may be required to reimburse the manufacturer, or the manufacturer may reduce the amount of restitution, by an amount directly attributable to the use of the vehicle by the buyer.

(Continued)

CJ:BW2/0064A/1045C

BILL ANALYSIS/ENROLLED BILL REPORT--(Continued) Form DF-43

AUTHOR	AMENDMENT DATE	BILL NUMBER
Tanner	RN 87 016489	AB 2057

ANALYSIS

A. Specific Findings (Continued)

There are a number of bills related to this issue including the following:

- o AB 3611 (1986) contained language similar to this bill, including the requirements for reporting vehicles sold and collection of a fee in conjunction with issuance of renewal of the occupational license by DMV to fund a certification program.

- o AB 2050 is a current bill that would revise provisions relating to the manufacturer's replacement of, or restitution for, a vehicle including a requirement for the manufacturer to pay sales tax, license and registration fees on the replacement, or an equivalent amount in restitution. It would also provide for reimbursement from the State of the sales tax involved.

- o SB 71 is a current bill that would require a manufacturer to pay registration fees and sales tax on a replacement vehicle or to add an equivalent amount in restitution. It would also require the State to reimburse manufacturers for such sales or use tax.

- o SB 228 is a current bill that would extend warranty or service contracts on repairs, repaired parts, affected related parts or components which were repaired under the terms of a warranty or service contract.

B. Fiscal Analysis

According to DMV, the volume of vehicles replaced by manufacturers cannot be determined since manufacturers maintain this information in confidence. The DMV has attempted to estimate the fiscal impact of this bill based on the number of serious complaints received by DCA and NMVB. The DMV estimated approximately 242 vehicles will be replaced or restitution will be provided per year.

We have not been able to verify or disprove this estimate. We assume $10,000 would be the average price per vehicle and a 6 percent sales tax will be paid.

Computation:

Manufacturer replacement or restitution	242
Sales tax per vehicle	x $600
Potential Sales Tax Refund	$145,200

On this basis, we estimate an annual $145,000 revenue loss to the General Fund.

CJ:BW3/0064A/1045C

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BILL ANALYSIS/ENROLLED BILL REPORT--(Continued) Form DF-43

AUTHOR	AMENDMENT DATE	BILL NUMBER
Tanner	RN 87 016489	AB 2057

ANALYSIS

B. Fiscal Analysis (Continued)

According to DMV, the NMVB would incur one-time initial costs of $33,000 in 1987-88, and ongoing costs of $7,000 annually thereafter.

According to the Board of Equalization, minor costs (less than $1,000) would be incurred as a result of this bill. These costs can be absorbed within existing resources.

DCA and BAR staff estimate this bill's 1987-88 (half-year) costs at $158,000 and 2 PYs, and annual costs thereafter at $293,000 and 4 PYs. This provides for a program supervisor, one staff each in San Francisco and Los Angeles, and one clerical. Finance, however, has not had an opportunity to review specific workload information related to this proposed program. Therefore, we believe that any additional resources should be justified through the 1988-89 budgetary process.

Based on information provided by staff of DMV, DCA and BAR, we estimate that a fee of $0.15 and $0.13 per vehicle sold in 1987-88 and 1988-89, respectively, or $300,000 annually will be required to fund the costs of this program.

CJ:BW4/0064A/1045C

GA-1097-F(1-74)
LEGISLATIVE BILL ANALYSIS

State Board of Equalization
Department of Business Taxes

Bill Number Assembly Bill 2057 Date March 6, 1987

Author Tanner Tax Sales and Use

Board Position Related Bills AB2050/SB71

BILL SUMMARY:

This bill would add Section 1793.25 to the Civil Code to require the board to reimburse the manufacturer of a new motor vehicle for an amount equal to the sales tax which the manufacturer includes in making restitution to the buyer of the new motor vehicle upon receipt of satisfactory proof that the retailer of that motor vehicle has paid the sales tax to the state on the retail sale of that motor vehicle.

Section 1793.2 of the Civil Code would be amended to add paragraph (2) to subdivision (d) to provide that if the manufacturer or its representative in this state is unable to service or repair a new motor vehicle to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer is required, at the option of the buyer, either to replace the new motor vehicle or make restitution to the buyer. Any restitution made to the buyer can be reduced by that amount directly attributable to use by the buyer prior to the discovery of the nonconformity.

The bill would also add Chapter 20.5 to Division 3 of the Business and Professions Code to require the Bureau of Automotive Repair to establish a program for the certification of third party dispute resolution processes pursuant to regulations adopted by the New Motor Vehicle Board. It would also create the Certification Account within the Automotive Repair Fund, to be funded by fees imposed on manufacturers and distributors pursuant to the bill and collected by the New Motor Vehicle Board, to be expended upon appropriation by the Legislature to pay the expenses of the bureau under the bill.

ANALYSIS

In General

Existing law provides that the amount upon which tax is computed does not include the amount charged for merchandise returned by customers if the full sales price, including that portion designated as "sales tax" is refunded either in cash or credit and the customer, in order to obtain the refund or credit, is not required to purchase other property at a price greater than the amount charged for the property that is returned. Refund or credit of the entire amount is deemed to be given when the purchase price, less rehandling and restocking costs, is refunded or credited to the customer.

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Existing law also provides that the amount upon which the tax is computed does not include the amount credited or refunded by the seller to the consumer on account of defects in merchandise sold to the consumer. If, however, defective merchandise is accepted as part payment for other merchandise and an additional allowance or credit is given on account of its defective condition, only the amount allowed or credited on account of defects may be excluded from taxable gross receipts. The amount allowed as the "trade in" value must be included in the measure of tax.

In addition, existing law provides that any overpayment of sales taxes must be refunded to the person who paid those taxes to the state.

BACKGROUND

A similar bill, AB 3611 of the 1985-86 session failed to pass the Legislature.

Effective January 1, 1983, the Legislature amended Section 1793.2 of the Civil Code to incorporate legislation commonly known as the California "Lemon Law". The law provides an arbitration process for disputes between manufacturers and consumers of new cars purported to have major manufacturing defects. If the mediator rules in favor of the consumer, the manufacturer is required by law to either replace the automobile or reimburse the purchase price less an amount attributable to use prior to the discovery of the defect.

This arbitration process raises sales and use tax questions as to the availability of the deduction for returned merchandise and/or defective merchandise. The dealer who sold the defective motor vehicle to the buyer may not be eligible for either of the deductions if the defective motor vehicle is returned to the manufacturer or some other dealer and the manufacturer or some other dealer replaces the motor vehicle or reimburses the buyer for the purchase price, assuming of course that the dealer and the manufacturer are separate legal entities.

COMMENTS

a. Enactment of this bill will result in insignificant administrative costs being incurred by the Board in notifying taxpayers and informing the board staff of the provisions of this bill.

Analysis Prepared by: Darlene Hendrick 322-1637 April 3, 1987
Contact: Margaret Shedd Boatwright 322-2376 0238K

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CONCURRENCE IN SENATE AMENDMENTS

AB 2057 (Tanner) - As Amended: September 4, 1987

ASSEMBLY VOTE 54-20 (June 22, 1987) SENATE VOTE 39-0 (September 8, 1987)

Original Committee Reference: G. E. & CON. PRO.

DIGEST

2/3 vote required.

Existing law provides that a manufacturer who is unable to service or repair consumer goods, including motor vehicles, so that they conform to the applicable warranties after a reasonable number of attempts, must either replace those goods or reimburse the buyer. In 1982, the law was amended by AB 1787 (Tanner), commonly referred to as the "lemon law."

Specifically, the lemon law:

1) Defines "reasonable number of attempts" for new motor vehicles as either four or more repair attempts on the same major defect, or more than 30 days out of service for service/repair of one or more major defects within the first year or 12,000 miles of use.

2) Requires a buyer to notify the manufacturer directly of a continuing defect and to use a dispute resolution program meeting specified minimum standards prior to asserting the "lemon presumption" in a legal action to obtain a vehicle replacement or refund.

3) Defines the "lemon presumption" as the "reasonable number of attempts" in the paragraph above.

As passed by the Assembly, this bill amended and clarified the lemon law. It specified a structure for certifying third-party dispute mechanisms, specified requirements for certification and provided for treble damages and attorney's fees to consumers who obtain a judgment against a manufacturer who does not have a certified lemon law arbitration program. (The bill would become effective July 1, 1988.) Specifically, it:

1) Required the Bureau of Automotive Repair (BAR) to: certify the arbitration programs for resolution of vehicle warranty disputes as requested; annually recertify those programs or decertify as inspection warrants; notify the Department of Motor Vehicles (DMV) of the failure of a manufacturer, distributor, or their branches to comply with arbitration decisions; investigate consumer complaints regarding qualified programs;

- continued -

and submit a biennial report to the Legislature evaluating the effectiveness of the program.

2) Authorized BAR to charge fees, to be collected by the New Motor Vehicle Board (NMVB) in DMV beginning July 1, 1988, from specified NMVB licensees, not to exceed $1 for each new motor vehicle sold, leased, or distributed in California. The fees would be deposited into the Certification Account of the Automotive Repair Fund.

3) Required motor vehicle manufacturers to replace defective vehicles or make restitution if the manufacturer is unable to service or repair the vehicles after a reasonable number of buyer requests. The buyer would be free to take restitution in place of a replacement vehicle.

4) Specified that the following is included in the replacement and refund option:

   a) In case of replacement, the new motor vehicle must be accompanied by all express and implied warranties. The manufacturer must pay the amount of any sales or use tax, license and registration fees, or other official fees which the buyer is obligated to pay in connection with the replacement, plus any incidental damages the buyer is entitled to including reasonable repair, towing and rental car costs, as specified.

   b) In case of restitution, the manufacturer must pay the actual price paid including any charges for transportation and manufacturer-installed options, sales tax, license fees and registration fees plus incidental damages. The amount directly attributable to use by the buyer must be determined as prescribed and may be subtracted from the total owed to the buyer.

5) Clarified that the vehicle buyer may assert the "lemon presumption" in any civil action, small claims court action or other formal or informal proceeding.

6) Set forth a qualified third-party dispute resolution process which, among other things, clarified that dealer and/or manufacturer participation in the decision-making process is not acceptable unless the consumer is allowed equal participation; specified certain requirements for how arbitration boards should follow up on repair attempt decisions and required compliance with the minimum requirements of the Federal Trade Commission (FTC) for informal dispute settlement procedures as defined on January 1, 1987.

- continued -

7) Amended the definition of a "new motor vehicle" which is covered by the lemon law to include dealer-owned vehicles and demonstrator vehicles.

8) Prevented a vehicle repurchased by a manufacturer under the lemon law from being resold as a used car unless the nature of the car's problems are disclosed, the problems are corrected, and the manufacturer warrants that the vehicle is free of those problems for one year.

9) Required the Board of Equalization to reimburse the manufacturer in an amount equal to the sales tax paid for vehicles for which the manufacturer provides the specified refund to the buyer.

10) Provided for treble damages and reasonable attorney's fees and costs if the buyer is awarded a judgment and the manufacturer does not maintain a qualified third-party dispute resolution process as established by this chapter.

The Senate amendments:

1) Authorize rather than require the award of treble damages against certain manufacturers.

2) Exempt a manufacturer from liability for treble damages under specified conditions.

3) Prevent the consumer from collecting treble damages for violations of more than one provision of the law.

4) Provide that auto arbitration programs are certifiable by BAR if they are in "substantial compliance" with specified criteria.

5) Reduce the information which applicants for a license must provide the NMVB to the number of motor vehicles sold, leased, or otherwise distributed in California during the proceeding year and delete the phrase "any other information that the NMVB may require."

6) Allow an employee, agent, or dealer for the manufacturer to serve on the arbitration panel and decide a dispute as long as he or she is not a party to the dispute and clarify that if anyone (e.g., an industry expert) participates substantively in the merits of any dispute, the buyer is allowed to participate also.

7) Delete the requirement that if the arbitration panel decides that a further repair attempt must be made, another panel hearing date must be set no later than 30 days after the repair attempt has been made, to determine whether the manufacturer has corrected the nonconformity.

- continued -

8) Specify that only under the circumstance where a manufacturer has taken a car back which is determined under the definition in the law to be a "lemon" does the nature of the nonconformity experienced by the original buyer or lessee have to be conspicuously disclosed, corrected and warranted for one year.

9) Add the provisions of AB 1367 (Tanner) which specify that remedies to buyers with damaged goods include the right of replacement or reimbursement.

10) Appropriate a loan of $25,334 to DMV from the New Motor Vehicle Board Account to handle the computerizing of the billing system for collecting motor vehicle fees from auto manufacturers.

11) Double-join the bill with AB 276 (Eaves).

12) Make technical and clarifying changes.

FISCAL EFFECT

According to the Legislative Analyst, this bill:

1) Results in up to $158,000 in costs to the Certification Account in the Automotive Repair Fund (created by this bill) for the last half of 1987-88 and up to $293,000 annually, thereafter, for BAR to resolve automobile warranty disputes; costs after 1988-89 would be fully offset by fees.

2) Generates up to $300,000 in fee revenues annually to the Certification Account beginning in 1988-89.

3) Results in unknown, probably minor, absorbable costs to the Board of Equalization to reimburse sales taxes to manufacturers in vehicle restitution settlements. Results in unknown revenue loss to the General Fund annually from sales tax reimbursements.

COMMENTS

1) The purpose of this bill is to strengthen the existing lemon law, to eliminate inequities that have occurred from that law's implementation and to ensure that owners of seriously defective new cars can obtain a fair, impartial and speedy hearing on their complaints.

- continued -

2) Since the effective date of the lemon law over four years ago, there have been numerous complaints from new car buyers concerning its implementation. While these complaints reflect continued dissatisfaction with the manufacturer's own resolution of disputes regarding defective new vehicles, they have also alleged that the dispute resolution programs financed by the manufacturers are not operated impartially. Consumers have complained of: long delays in obtaining a hearing (beyond the prescribed 40-60 day time limit); unequal access to the arbitration process; unreasonable decisions that do not appear to exhibit knowledge of the lemon law's provisions or provide an adequate amount of reimbursement even when a refund decision is ordered.

3) The Senate amendments are the result of negotiations with affected parties. The major impact of these amendments is the removal of the mandatory award of treble damages and the addition of the concept of "substantial compliance" of an auto arbitration program to mitigate against actions based on program details.

Ann Evans
324-2721
9/10/87:ageconpro

CALPIRG
1147 So. Robertson Blvd. #203 Los Angeles CA 90035 (213)278-9244
CALIFORNIA PUBLIC INTEREST RESEARCH GROUP

23 February 1987

The Honorable Sally Tanner
California State Assembly
State Capitol
Sacramento, CA 95814

Dear Assemblywoman Tanner:

Enclosed is a copy of the proposed draft for a "Lemon Law II" bill. As you know, we started a working group in December which includes CALPIRG, the Attorney General's office, Consumers Union, the New Motor Vehicle Board, the Department of Consumer Affairs, Jay DeFuria, and Lemon Law attorneys Donna Selnick, Roger Dickinson, Paul Kiesel and Brian Kemnitzer.

After several meetings in which the full group discussed possible strategies, a smaller group consisting of CALPIRG, the Attorney General's office, and Donna Selnick, drafted this final version. Consumers Union worked closely with the small group on strategy decisions.

We consider this draft to be a workable solution given the highly complex nature of the Lemon Law problem. After consulting with people across the nation who have struggled with these same issues, we believe that the proposed draft represents a reasonable improvement to the law. It was written with an eye towards what can practically be achieved, and therefore does not constitute a "wish list." Please be assured that a tremendous amount of time and effort went into its development.

We appreciate your continued dedication to this issue as well as your patience in working with us. I will be contacting you in the next few days to schedule an appointment to further discuss this proposal.

Please do not hesitate to contact me should you have any immediate questions or if we can offer you support in any way.

Sincerely,

Carmen A. Gonzalez

Carmen A. Gonzalez
Consumer Program Director

The people of the state of California do enact as follows:

SECTION 1. Section 1793.2 of the Civil Code is amended to read:

1793.2. (a) Every manufacturer of consumer goods sold in this state and for which the manufacturer has made an express warranty shall:

(1) Maintain in this state sufficient service and repair facilities reasonably close to all areas where its consumer goods are sold to carry out the terms of such warranties or designate and authorize in this state as service and repair facilities independent repair or service facilities reasonably close to all areas where its consumer goods are sold to carry out the terms of such warranties.

As a means of complying with paragraph (1) of this subdivision, a manufacturer shall be permitted to enter into warranty service contracts with independent service and repair facilities. The warranty service contracts may provide for a fixed schedule of rates to be charged for warranty service or warranty repair work, however, the rates fixed by such contracts shall be in conformity with the requirements of subdivision (c) of Section 1793.3. The rates established pursuant to subdivision (c) of Section 1793.3, between the manufacturer and the independent service and repair facility, shall not preclude a good faith discount which is reasonably related to reduced credit and general overhead cost factors arising from the manufacturer's payment of warranty charges direct to the independent service and

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repair facility. The warranty service contracts authorized by this paragraph shall not be executed to cover a period of time in excess of one year, and may be renewed only by a separate, new contract or letter of agreement between the manufacturer and the independent service and repair facility.

(2) In the event of a failure to comply with paragraph (1) of this subdivision, be subject to the provisions of Section 1793.5.

(3) Make available to authorized service and repair facilities sufficient service literature and replacement parts to effect repairs during the express warranty period.

(b) Where such service and repair facilities are maintained in this state and service or repair of the goods is necessary because they do not conform with the applicable express warranties, service and repair shall be commenced within a reasonable time by the manufacturer or its representative in this state. Unless the buyer agrees in writing to the contrary, the goods must be serviced or repaired so as to conform to the applicable warranties within 30 days. Delay caused by conditions beyond the control of the manufacturer or his representatives shall serve to extend this 30-day requirement. Where such delays arise, conforming goods shall be tendered as soon as possible following termination of the condition giving rise to the delay.

(c) It shall be the duty of the buyer to deliver nonconforming goods to the manufacturer's service and repair facility within this state, unless, due to reasons of size and weight, or method of attachment, or method of installation, or

nature of the nonconformity, such delivery cannot reasonably be accomplished. Should the buyer be unable to effect return of nonconforming goods for any of the above reasons, he or she shall notify the manufacturer or its nearest service and repair facility within the state. Written notice of nonconformity to the manufacturer or its service and repair facility shall constitute return of the goods for purposes of this section. Upon receipt of such notice of nonconformity the manufacturer shall, at its option, service or repair the goods at the buyer's residence, or pick up the goods for service and repair, or arrange for transporting the goods to its service and repair facility. All reasonable costs of transporting the goods when, pursuant to the above, a buyer is unable to effect return shall be at the manufacturer's expense. The reasonable costs of transporting nonconforming goods after delivery to the service and repair facility until return of the goods to the buyer shall be at the manufacturer's expense.

(d) Should the manufacturer or its representative in this state be unable to service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer, less that amount directly attributable to use by the buyer prior to the discovery of the nonconformity.

(e)(1) It shall be presumed that a reasonable number of attempts have been made to conform a new motor vehicle to the applicable express warranties if, within one year from delivery

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to the buyer or 12,000 miles, whichever occurs first, either (A) the same nonconformity has been subject to repair four or more times by the manufacturer or its agents and the buyer has at least once directly notified the manufacturer of the need for the repair of the nonconformity, or (B) the vehicle is out of service by reason of repair of nonconformities by the manufacturer or its agents for a cumulative total of more than 30 calendar days since delivery of the vehicle to the buyer. The 30-day limit shall be extended only if repairs cannot be performed due to conditions beyond the control of the manufacturer or its agents. The buyer shall be required to directly notify the manufacturer pursuant to subparagraph (A) only if the manufacturer has clearly and conspicuously disclosed to the buyer, with the warranty or the owner's manual, the provisions of this subdivision and that of subdivision (d), including the requirement that the buyer must notify the manufacturer directly pursuant to subparagraph (A). This presumption shall be a rebuttable presumption affecting the burden of proof ~~in any action to enforce the buyer's rights under subdivision (d) and shall not be construed to limit those rights~~.

(2) If a qualified third party dispute resolution process exists, and the buyer receives timely notification in writing of the availability of a third party process with a description of its operation and effect, the presumption in paragraph (1) may not be asserted by the buyer <u>in an action</u> until after the buyer has initially resorted to the third party process as required in paragraph (3). Notification of the availability of the third party process is not timely if the buyer suffers any prejudice

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resulting from any delay in giving the notification. The buyer may assert the presumption in paragraph (1) during the third party process. If a qualified third party dispute resolution process does not exist, or if the buyer is dissatisfied with the third party decision, or if the manufacturer or its agent neglects to promptly fulfill the terms of such third party decision, the buyer may assert the presumption provided in paragraph (1) in an action to enforce the buyer's rights under subdivision (d). ~~The findings and decision of the third party shall be admissible in evidence in the action without further foundation.~~ Any period of limitation of actions under any federal or California laws with respect to any person shall be extended for a period equal to the number of days between the date a complaint is filed with a third party dispute resolution process and the date of its decision or the date before which the manufacturer or its agent is required by the decision to fulfill its terms, whichever occurs later.

(3) A qualified third party dispute resolution process shall ~~be one that complies~~ do all of the following:

(A) Comply with the Federal Trade Commission's minimum requirements for informal dispute settlement procedures as set forth in the commission's regulations at 16 Code of Federal Regulations Part 703 in effect on December 31,1975 as modified by this section; ~~that renders decisions which are binding on the manufacturer if the buyer elects to accept the decision; that prescribes a reasonable time not to exceed 30 days, within which the manufacturer or its agents must fulfill the terms of those~~

AB

~~decisions;-and-that-each-year-provides-to-the-Department-of-Motor Vehicles-a-report-of-its-annual-audit-required-by-the commission's-regulations-on-informal-dispute-resolution procedures.~~

(B) Provide arbitrators who are assigned to decide disputes with copies of, and instruction in, the provisions of this section, the Federal Trade Commission's requirements described in subparagraph (A), and any explanatory material prepared by the Department of Consumer Affairs.

(C) Provide each buyer who notifies the third party dispute resolution process of the dispute with a copy of the Department of Consumer Affairs publication describing this section.

(D) Provide the buyer and the manufacturer at least 7 days before the dispute resolution hearing with copies of all written material submitted by the other.

(E) Provide the buyer at least 7 days before the dispute resolution hearing with copies of all technical service bulletins prepared by the manufacturer that relate to the disputed nonconformity.

(F) Conduct a hearing at which the buyer and manufacturer may make an oral presentation including a response to the oral and written statements submitted by the other.

(G) Render decisions which are binding on the manufacturer if the buyer elects to accept the decision.

(H) Render decisions within 60 days from the date the buyer initiated proceedings.

(I) Require the manufacturer to provide an inspection and written report prepared by an independent motor vehicle expert at no cost to the buyer if the arbitrator believes that the inspection and report is necessary to resolve the dispute.

(J) Upon deciding that the manufacturer failed to correct the nonconformity within a reasonable number of attempts, order the manufacturer to repurchase the vehicle as provided in paragraph (5), replace the vehicle if the buyer consents as provided in paragraph (6), or further repair the vehicle as provided in paragraph (7).

(K) Prescribe a reasonable time, not to exceed 30 days, within which the manufacturer or its agents must fulfill the terms of the decision.

(L) Prepare within 90 days after the end of a calendar year, and maintain for five years, a compilation for that year of the number of:

(i) Buyers submitting vehicle repurchase requests.

(ii) Buyers submitting vehicle replacement requests.

(iii) Vehicle repurchase requests satisfactorily settled in arbitration.

(iv) Vehicle replacements awarded in arbitration.

(v) Purchase price refunds awarded in arbitration.

(vi) Purchase price awards rendered in compliance with paragraph (5).

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(vii) Vehicle repurchase awards accepted by the buyer.

(viii) Vehicle repurchase awards complied with by the manufacturer.

(ix) Arbitration awards where additional repairs were the most prominent remedy.

(x) Awards accepted by the buyer.

(xi) Awards complied with by the manufacturer.

(xii) Arbritration decisions where the buyer was awarded nothing.

(xiii) Decisions that were not rendered within 60 days from the date the buyer initiated proceedings.

(xiv) Decision performances that were not satisfactorily carried out within 30 days from the final decision.

(M) Provide the information described in subparagraph (L) and 16 C.F.R. section 703.6 to the Attorney General, Department of Consumer Affairs, and any district attorney, and any member of the public upon written request.

(4) The manufacturer shall submit all technical service bulletins relating to the disputed nonconformity, and the manufacturer and buyer shall submit all written material on which they will rely at the hearing, to the third party dispute resolution process at least 10 days before the scheduled hearing date.

(5) If the arbitrator orders the manufacturer to repurchase the nonconforming motor vehicle, the manufacturer shall be required to pay an amount equal to the following:

(A) The sum of (i) the amount the buyer actually paid or contracted to pay under a conditional sales contract or loan including the value of any trade-in, all charges added by the dealer, and charges for a service contract or extended warranty, (ii) official fees including sales tax and license and registration fees, and (iii) reasonable expenses incurred in connection with the repair of the vehicle and for towing and rental of a similar vehicle; less

(B) An amount attributable to the buyer's use of the vehicle determined by multiplying the total cash price of the vehicle by a fraction having as its denominator one hundred twenty thousand ($120,000) and having as its numerator the number of miles the vehicle traveled at the time the buyer first notified the manufacturer, dealer, or authorized repair facility of the nonconformity.

(6) If the arbitrator orders the manufacturer to replace the vehicle and the buyer consents to this remedy, the manufacturer shall replace the vehicle with a substantially similar new motor vehicle equipped with similar accessories, pay sales tax, license, and registration fees imposed on the new motor vehicle, and reimburse the buyer for the expenses described in paragraph 5(A)(iii). The buyer shall only be liable to pay the manufacturer an amount attributable to the buyer's use of the vehicle as determined in paragraph 5(B). If the buyer does not

consent to this remedy, the arbitrator shall order the manufacturer to repurchase the vehicle.

(7) (A) The arbitrator may order the manufacturer to attempt one further repair of the vehicle if (i) no more than four repair attempts have already been performed, (ii) the nature of the repair work is specifically described in the order, and (iii) the manufacturer, dealer, or authorized repair facility has not already performed the repair procedure described in the order or a substantially similar procedure.

(B) The arbitrator shall establish a hearing date no later than 30 days after the order for repair is served on the manufacturer and the buyer to determine whether the manufacturer has corrected the nonconformity. The buyer and the manufacturer shall schedule an opportunity for the manufacturer to effect the ordered repair before the hearing date.

(C) If the arbitrator determines at the hearing that the manufacturer did not correct the nonconformity, the arbitrator shall order the manufacturer to repurchase the vehicle.

(8) The manufacturer shall inform each buyer in writing made part of or delivered in conjunction with the warranty or owner's manual that a publication describing the requirements and procedures of a qualified third party dispute resolution process is available from the Department of Consumer Affairs.

(~~4~~9) For the purposes of this subdivision the following terms have the following meanings:

(A) "Nonconformity" means a nonconformity which

substantially impairs the use, value, or safety of the new motor vehicle to the buyer or lessee.

(B) "New motor vehicle" means a new motor vehicle which is used or bought for use primarily for personal, family, or household purposes. "New motor vehicle" includes a dealer-owned vehicle and a "demonstrator" or other motor vehicle sold with a manufacturer's new car warranty, but does not include motorcycles, motorhomes, or ~~off-road~~ motor vehicles which are not registered under the Vehicle Code because they are to be operated or used exclusively off the highways. A "demonstrator" is a vehicle assigned by a dealer for the purpose of demonstrating qualities and characteristics common to vehicles of the same or similar model and type.

(f) No person shall sell or lease a motor vehicle transferred by a buyer or lessee to a manufacturer as the result of a nonconformity as defined in subdivision (e) unless the nature of the nonconformity experienced by the original buyer or lessee is clearly and conspicuously disclosed, the nonconformity is corrected, and the manufacturer warrants to the new buyer or lessee in writing for a period of one year that the motor vehicle is free of that nonconformity.

SEC. 2 Section 1794 of the Civil Code is amended to read:

1794. (a) Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this chapter or under an implied or express warranty or service contract may bring an action for the recovery of damages and other legal and equitable relief.

(b) The measure of the buyer's damages in an action under this section shall be as follows:

(1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.

(2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.

(c) If the buyer establishes that the failure to comply was willful, the judgment may include, in addition to the amounts recovered under subdivision (a), a civil penalty which shall not exceed two times the amount of actual damages. This subdivision shall not apply in any class action under Section 382 of the Code of Civil Prodedure or under Section 1781, or with respect to a claim based solely on a breach of an implied warranty.

(d) If the buyer prevails in an action under this section, the buyer ~~may~~ shall be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorney's fees based on actual time expended, determined by the court to have been reasonably incurred by the buyer in connection with the commencement and prosecution of such action~~, unless the court in its discretion determines that such an award of attorney's fees would be inappropriate~~.

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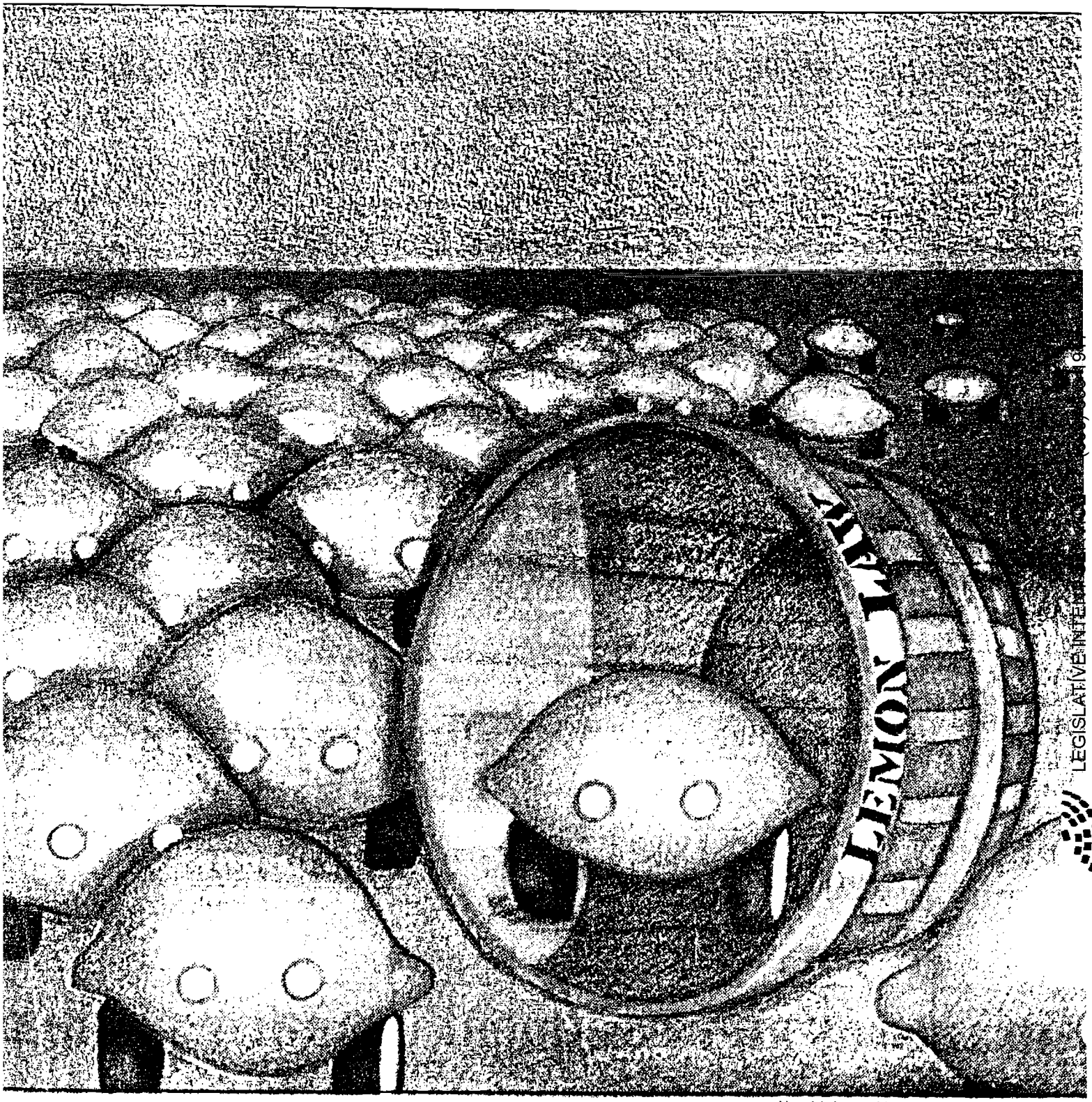
(e) In addition to the recovery of actual damages, the buyer shall recover a civil penalty of two times the amount of actual damages and reasonable attorney's fees and costs if the following occur:

(1) (A) The manufacturer does not maintain a qualified third party dispute resolution process which complies with Section 1793.2(e), or

(B) The manufacturer's qualified third party dispute resolution process fails to comply with Section 1793.2(e) in the buyer's case, and

(2) The manufacturer fails to rebut the presumption established in Section 1793.2(e)(1).



Herald-Journal illustration by Monica Seaberi

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STATE OF CALIFORNIA

OFFICE MEMO
STD. 100 (REV. 11-75)

DATE 3/5/87

TO: Sally

ROOM NUMBER

FROM: Jay

PHONE NUMBER 4-3611

SUBJECT: Lemon Law : revisions

My mother recently sent me the attached article from the local newspaper. Although its written about New York State it sounds just like California.

I highlighted some of the typical problems and some of New York law's existing features and revisions.

The Better Business Bureau's comments in the last (3rd) column about the prospect for turning down car complaints that aren't "true lemons" confuses me — since whether an arbitration/mediation program can handle specific types of car complaints is determined by the manufacturer not the law (at least in California!)

Thought you'd find it interesting & supportive.

Sweetening the 'Lemon Law'

Amended law may be more palatable for consumers

By James T. Mulder
Staff Writer

As far as Jean Lynch is concerned, the new revisions to the state's "lemon law" aimed at giving greater protection o consumers who buy problem-plagued cars ire long overdue.

In May of 1985, Lynch, a teacher in the North Syracuse School District, purchased a Buick Century for about $14,600.

Lynch said the car vibrated so badly at peeds of 30 mph and over that "anything you ut on the front seat would end up on the loor."

After 12 trips to the dealership failed to esolve the problem, Lynch turned to the Syracuse Better Business Bureau's Autoline rbitration program in an effort to get her noney back or her car replaced, as the law llows.

Last July, a BBB arbitrator ruled she was ntitled to have her car bought back by General Motors for about $4,200.

Upset with the arbitrator's figure which she onsidered unacceptably low, Lynch hired a awyer and sued GM under the lemon law.

The case was settled out of court last month. n addition to buying back the car for about 12,000, the automaker paid her attorney's fee f about $1,300.

"A lot of people wouldn't have taken the me to hold out like I did," Lynch said. "But here was a lot of money involved and I tend to e stubborn."

Situations like Lynch's aren't uncommon, ccording to Richard Kessel, executive direcr of the state Consumer Protection Board. e said his office has been inundated with omplaints from consumers who claim they ha-n't been able to get refunds or new cars hrough the arbitration process required by the year-old law.

"Many arbitrators in the past didn't know hat the lemon law was and they didn't apply s provisions," Kessel said.

The law puts all new cars sold in the state nder a warranty against all material defects for two years or 18,000 miles, whichever comes first. It requires problems with the car to be fixed at no charge during the warranty period, unless the problems were caused by abuse, neglect or unauthorized modifications.

If a problem can't be repaired in four attempts, or if a car is out of service for at least 30 days during the warranty period, the law says the consumer is entitled to a comparable car or a refund of the purchase price. The refund can only be lowered if the car has been driven more than 12,000 miles.

Before consumers can get refunds or replacement cars, however, they must first take their complaints to arbitration panels.

Kessel said amendments to the lemon law, some of which took effect Jan. 1 and in August, should go a long way towards correcting problems that arose in the arbitration process.

The revisions require each carmaker's arbitration procedure to be certified by the state attorney general as complying with the lemon law. It also requires arbitrators to be trained and to be familiar with the law. They also extend coverage to vans and leased vehicles.

Those revisions were implemented after the attorney general's office came out with a study showing few arbitration cases statewide resulted in buybacks and many arbitrators were ignoring the lemon law.

Toni Gary, president of the Syracuse BBB, believes arbitration panels like her agency's have been unfairly tarnished by the attorney general's sweeping criticisms.

In 1986, BBB arbitrators in Syracuse closed 1,815 cases through mediation and 194 cases through arbitration. Of the 194 arbitrated cases, 44 resulted in buybacks.

One of them was Anna Hvizdos of Newark Valley in Tioga County. As a result of a BBB arbitration decision in October, GM bought back her 1985 Oldsmobile Cutlass, which she said was plagued by sudden acceleration problems. Hvizdos paid $11,450 for the car and received a check for $10,085, which reflected a deduction for mileage.

"I had no cooperation from the dealer or GM, but the Better Business Bureau was fantastic," Hvizdos said. "I would recommend their p gram to anyone with a car problem."

Of the 44 buybacks awarded in 1986, o four received less than the amount reques including Jean Lynch, Gary said.

"Yes there have been instances where p ple have been unhappy with the arbitrat decision," Gary said. "But that's the beauty the program — if you're not happy with decision, you can go to court and sue."

In Lynch's case, the arbitrator based his back figure on the car's resale value as liste the blue book, minus 22 cents a mile for car's mileage, Gary said.

Although the revised law is intended to vide greater protection for consumers, it m actually prevent some auto owners wh cases don't meet the statute's more rigid f mulas from seeking redress, Gary said.

She pointed out that of the 1,009 new a line cases the BBB opened in 1986, less than percent of them were true "lemon law" c because they didn't fall within the law's constraints.

Gary said she's afraid that many of the c that previously were resolved through me tion will now have to be turned down for sideration by arbitration panels.

The BBB's auto arbitration program, w is voluntary on the part of the manufacte and run by volunteer arbitrators, began in 1 in an effort "to take these types of conflicts of the court system," Gary said.

In the meantime, Lynch's old car which repurchased is back at Roger's Buick, North Syracuse dealership where she nally purchased it.

Despite GM's out of court settlement, Peregoy, the dealership's service dire maintains that the Buick Century is not defe tive.

"It has an ever so slight vibration at spee of 45 to 55 mph," Peregoy said. "If you ro tested the car, you wouldn't even notice it."

He said new tires were installed and mar other steps were taken to satisfy Lynch.

"GM really went the extra mile to satisfy t customer," he said.

H.J. Jan 12, 1987

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Nancy E. Thomas
Attorney at Law

3433 Golden Gate Way
Suite F
Lafayette, California 94549
(415) 283-6008

MAR 11 1987

March 10, 1987

Ms. Sally Tanner
State Capitol, Room 4146
Sacramento, CA 95814

RE: Lemon Law

Dear Ms. Tanner:

Michael Lafferty of the Bureau of Automotive Repair advised me that you are attempting to amend the California Lemon Law again. Part of my practice in Contra Costa County is advising individuals who believe they have "lemons." The present law is so restrictive that almost none of the clients I see are able to qualify their car as a "lemon."

Some areas which I believe would improve the law for the consumer are:

1) Extend the time to two years and 24,000 miles whichever is greater.

2) Reduce the number of times the car must be returned to the Dealer.

3) Bring the manufacturer's representative in earlier.

4) Make it the obligation of the Dealer to notify the manufacturer, not the consumer, as consumers do not know how to do this.

If I can assist you in any way on this legislation, please advise.

Very truly yours,

Nancy E. Thomas

Nancy E. Thomas

NET:kjg

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11.1.1

To: Arnie
From: Jay
Subject: AB 2057 CalPIRG/A.G. proposed amendments

I've checked over the proposed amendments and compared them to their original (February 23rd) draft proposal. They made a few changes but those are essentially refinements. To ease your, Sally's and Legislative Counsel's task of seeing what the amendments would do to the bill I made up a cut & paste mock-up from a printed bill and a photo-reduced copy of the amendments. If you send the amendments to Counsel you can send them the mock-up (or copy thereof) to assist them in expediting their drafting.

Summary of amendments:

The amendments would:

1) Delete the legal requirement for manufacturers to have an arbitration program (amendment 1 on p. 4 of the bill) to eliminate any constitutional problem; and, instead add a civil penalty attorneys fees and litigation costs to a buyer's legal recovery if the manufacturer loses a case and fails to rebut the "lemon" presumption and fails to have a properly operating

qualified arbitration program (amendment 15 additions to Civil Code Section 1794.)

2) Move the specifications for the refund (repurchase) and replacement remedy from Civil Code Section 1793.2(d) to 1793.2(e) and add a limited "one last repair attempt" remedy for arbitrators (amendments 3, 4 and amendment 11 - [redacted] #s (5), (6) & (7))

3) Clarify that the "lemon" presumption can be raised by the buyer in an arbitration. (amendment 6 on p. 12 of the bill)

4) Eliminate the use of an arbitration's findings or decision in a [redacted] subsequent legal action (amendment 7 on p. 12 of the bill)

5) Add a number of duties and specifications with which a qualified arbitration program must comply (amendment 11 on pages 13 & 14 of the bill — pages 13-13e of the mock-up)

Of note are:

- Changing the Federal Trade Commission regulations (16 CFR 703) reference date from 1/1/87 to 12/31/75
- Setting a "good faith"/60 day limit for arbitration decisions

- Requiring the program to conduct a hearing at which both parties may make oral presentations/rebuttals
- ☆ - Establishing a mathematical formula for determining ~~[redacted]~~ the offset for the buyers use (mileage) of the car
- Providing a limited remedy of one more repair attempt instead of a refund or replacement under very narrow circumstances

6) Add a definition of what a "demonstrator vehicle is (Amendment 15 on p. 15 of the bill - p. 15@ of the mockup)

7) Require disclosure and correction of a repurchased vehicle's nonconformity prior to resale (Amendment 15; p. 15(a) of the mock-up)

CalPIRG CALIFORNIA PUBLIC INTEREST RESEARCH GROUP

27 April 1987

Honorable Sally Tanner
California State Assembly
State Capitol
Sacramento, CA 95814

Dear Assemblywoman Tanner:

Enclosed please find suggested language for amendments to AB 2057 which address the issues of follow up on repair attempt decisions and oral presentation at arbitration hearings.

While we are pleased with many of the problem areas which the bill will address, it is our position that both of the above mentioned amendments are extremely important components of a fair arbitration process.

The bill currently requires that arbitration programs must follow the FTC 703 guidelines for third party dispute settlement programs. However, the FTC 703 regulations were written long before Lemon Laws were passed and, in some cases, do not address the unique problems Lemon Law states have come across with regard to fair and impartial hearings.

Specifically, FTC 703 is not clear as to whether or not dealers may participate in the arbitration hearings. In the case of the Ford and Chrysler boards, dealers (and sometimes company representatives) often do participate in discussions of the board which lead to decisions. In addition, these same two boards generally do not allow consumers any oral presentation at the hearings. This creates a prepostorous situation whereby the imbalance in representation at the hearings weighs heavily in favor of the manufacturer.

Since AB 2057 relys on the guidelines in FTC 703 to address the issues of oral presentation and board composition, the bill should be amended to clarify that dealer and/or manufacturer participation in any form is not acceptable unless the consumer is given a chance to participate equally as much.

FTC 703 provides general guidelines for the issue of follow up on decisions made. Unfortunately, the guidelines provide for a follow up to make sure that the repair attempt occurred, but not follow up on whether the repair attempt corrected the problem. This is a serious gap in the requirements, given the frequent occurrence of another repair attempt as a decision and lack of follow-up on those decisions.

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Los Angeles Regional Office
1660 Corinth Avenue
West Los Angeles, CA 90025
(213) 473-8491

San Diego Regional Office
2187 Ulric Street, Suite B
San Diego, CA 92111
(619) 279-5552

Legislative Office
909 Twelfth Street, Suite 205
Sacramento, CA 94814
(916) 448-4516

AB 2057 should be amended to include specific requirements for how boards should follow up on repair attempt decisions.

Consistant with our discussions in February with you and other Lemon Law advocates, we believe these provisions, which were in the draft submitted to you at that time, are necessary and should be added to AB 2057.

We are committed to supporting a Lemon Law reform bill which includes these amendments. We hope that you will agree that these amendments are important and will amend the bill accordingly.

We will be contacting you further regarding your intentions in the next few days. Please do not hesitate to call if you have any questions.

Sincerely,

Carmen Gonzalez
Consumer Program Director

Lynn Nesselbush
Legislative Advocate

cc: Susan Giesberg, State Attorney General's Office

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Amendments to Assembly Bill No. 2057

On page 14, line 29, insert:

(I) Require that no member of the arbitration board deciding a dispute, be a party to a dispute, or an employee, agent or dealer for the manufacturer; and that no other person, including an employee, agent or dealer for the manufacturer, be allowed to participate in formal or informal discussions unless the consumer is allowed to participate equally.

(J) Require that in the case of an order for one further repair attempt, a hearing date shall be established no later than 30 days after the repair attempt has been made, to determine whether the manufacturer has corrected the nonconformity. The buyer and the manufacturer shall schedule an opportunity for the manufacturer to effect the ordered repair no later than 14 days after the ordered repair is served on the manufacturer and the buyer. If the arbitrator(s) determines at the hearing that that the manufacturer did not correct the nonconformity, the arbitrator(s) shall order the manufacturer to repurchase the vehicle.

CONTACT: **ARNIE PETERS**
(916) 445-0991

FOR IMMEDIATE RELEASE
MAY 5, 1987

Assemblywoman Sally Tanner (D-El Monte) today announced that her "lemon law" to protect new car purchasers has passed its first legislative hurdle. The bill -- AB 2057 -- was approved today by the Assembly Committee on Governmental Efficiency and Consumer Protection. It will next be heard in the Assembly Committee on Ways and Means, for a discussion of the measure's fiscal impacts.

Assemblywoman Tanner stated, "AB 2057 amends California's first "lemon law" which I authored in 1982. That original lemon law has been in operation now for over five years and we have substantial experience with its administration. I have introduced AB 2057 because of consumer complaints about the operation of the existing lemon law process. My new bill will make the lemon law fairer."

The new lemon law bill has the following major provisions:

1) It provides that a car owner may choose a replacement vehicle or a refund if a car is found to be a "lemon".

2) It requires the automobile manufacturer to reimburse the owner of a "lemon" for sales tax, license and registration fees and incidental costs such as repair, towing and rental car costs.

3) It requires that the bureau of automotive repair establish a program to certify that manufacturer-run arbitration programs are operated properly and fairly.

4) It provides that if a manufacturer does not provide a certified arbitration program and the consumer is forced to go to court to recover the cost of a "lemon", the court will award triple damages if the consumer wins the lawsuit, plus attorney fees.

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A-25

5) It requires new car manufacturers to pay a fee not to exceed $1 per vehicle sold to fund the certification program.

The El Monte legislator introduced similar legislation last year. That bill, AB 3611, died in the Senate after being approved by the State Assembly. The main distinction between Assemblywoman Tanner's AB 3611 of last year and this year's AB 2057 is the provision to award triple damages to consumers when an automobile manufacturer does not provide a certified arbitration program. According to the Assemblywoman, this provision is intended to help ensure that the automobile manufacturers are more likely to participate in the certification program.

Assemblywoman Tanner concluded, "New car purchases are very significant to consumers. We must have a lemon law process that protects the consumer from the heartbreak of buying a car which turns out, after repeated repair attempts, to be a true lemon. The amendments to the original lemon law which I am proposing with AB 2057 are intended to make the lemon law fairer, and to provide these needed consumer assurances."

End

Lemon arbitration programs under attack

By Helen Kahn
AUTOMOTIVE NEWS STAFF REPORTER

WASHINGTON — Connecticut's attorney general believes the automakers' consumer arbitration programs are lemons that should be recalled and repaired.

Joe Lieberman believes the complaint-handling procedures of most manufacturers "seem designed to frustrate a consumer's ability to obtain a just remedy."

Consumers with new-car problems who try to use the lemon law "face such a labyrinth of dead-ends, trap-doors and unsettling encounters that it all seems designed by the likes of Franz Kafka," he said. Kafka, an Austrian-Czech author (1883-1925), wrote surrealistic, nightmarish tales.

The attorney general's report, required under Connecticut's lemon law, is called Connecticut Consumers and Lemon Law Disputes. The report covers the period from July 1, 1985 to June 30, 1986.

According to Lieberman's report:

- Consumers calling on dealers for help with warranty problems are "routinely misinformed, misdirected and stonewalled." State investigators posing as consumers with problems talked to 126 auto dealers. None provided correct, complete information, the report said.

Of 19 manufacturer/customer relations offices, only two gave accurate information, Lieberman said.

- All four existing arbitration programs (the National Automobile Dealers Association's AUTOCAP, the Better Business Bureau's AUTOLINE, Chrysler Motors' Consumer Arbitration Board and Ford Motor Co.'s Consumer Appeals Board) are "structurally flawed in a manner that stacks the deck in favor of the manufacturers."
- Owner manuals, in general, are "replete with errors" and fail to meet the Federal Trade Commission's standards governing dispute resolution programs. Exceptions are Saab and Ford, whose manuals spell out consumers' rights, and Nissan, whose manuals provide nearly complete information, the report said.

The Connecticut report takes special aim at the dispute resolution programs of Chrysler and Ford. Lieberman said, "Lee Iacocca makes great claims about Chrysler cars on television, but his claims ring hollow because the fact is Chrysler doesn't stand behind what he says."

According to Lieberman's report, problems with Chrysler's Consumer Arbitration Board include:

- The owner's manual appears to divert consumers from arbitration and toward its own internal procedures for handling complaints — a seeming violation of the FTC's regulations.
- Chrysler has sometimes reported to its arbitration board that repairs were successfully made when, in fact, they were not.
- The presence and participation of a dealer representative and a Chrysler customer-relations manager on the Chrysler arbitration board not only does not meet FTC standards but gives an unfair advantage to Chrysler in dispute settlements.

Even though they are non-voting members, they answer questions and can volunteer information.

- Chrysler's arbitration board allows oral presentations by company representatives without the consumer's knowledge and without allowing the same opportunity to the consumer.

Lieberman also criticized the Ford Consumer Appeals Board, which is patterned after the Chrysler board and has similar problems. But he noted that Ford has made improvements, especially in warranty disclosure, since 1985.

Lieberman asserted that although auto manufacturers "tout the AUTOCAP program and AUTOCAP itself proclaims to assist consumers, it is a dead end for Connecticut consumers who need arbitration of lemon-law disputes."

The report said the state AUTOCAP does not have an arbitration board and anyone trying to use AUTOCAP to settle a warranty problem will either be turned away or referred elsewhere.

The report revealed confusion about who used AUTOCAP during the period. Only eight automakers claimed to have used AUTOCAP during the period: Isuzu, Aston Martin-Lagonda, BMW, Fiat, Mitsubishi, Nissan, Rolls-Royce and Subaru. But AUTOCAP claimed 15 had used it: Alfa Romeo, BMW, Fiat, Honda, Isuzu, Jaguar, Mazda, Mitsubishi, Nissan, Peugeot, Rolls-Royce, Saab, Subaru, Toyota and Volvo. Inclusion of some of those raised questions because they overlapped the BBB's AUTOLINE.

The Connecticut report also criticized the BBB AUTOLINE program used by 10 automakers. Among its findings:

- Two pamphlets published by AUTOLINE "needlessly confuse consumers regarding the actual procedures of the program".
- Auto manufacturers and AUTOLINE give consumers conflicting information about the time limits involved in arbitration procedures.
- AUTOLINE has not updated reports on the handling and disposition of warranty disputes since 1984, despite FTC's regulations that say such reports must be updated at six-month intervals.
- Many manufacturers mislead consumers by indicating they must use AUTOLINE before seeking any legal remedies for warranty disputes.

Members of AUTOLINE include Honda, American Motors, Audi, General Motors, Nissan, Peugeot, Porsche, Saab, VW, Volvo and American Honda.

Lieberman concluded that the shortcomings of the automakers' programs are real. He said Connecticut is not being unrealistic in expecting them to at least live up to existing federal standards.

"Based on what I have seen, I would advise consumers to be extremely persistent in their dealings with auto dealers and manufacturers when they experience warranty problems with their new cars," Lieberman said.

"Don't rely on one source's advice, don't necessarily believe what your owner's manual says about arbitration, and keep accurate records of all your contacts with dealers and the manufacturer," he said.

A-27
1385

AB 2057 (S)

MOTOR VOTERS

P.O. BOX 3163
FALLS CHURCH, VA 22043
(703) 448-0002

May 28, 1987

JUN 2 1987

The Honorable Sally Tanner
Assemblywoman, State of California
State Capitol
Sacramento, CA 95816

Dear Sally:

This is a letter in support of your bill AB 2057.

In some states which are considering Lemon Law II's, automakers have been urging legislators to hold off, pending the outcome of our regulatory negotiations ("reg/neg") on the FTC Rule 703. However, the outcome is in serious doubt.

For one, automakers have introduced a controversial amendment which states the new rule will not take effect until states representing two-thirds of the U.S. population adopt the rule. This may not happen within the allotted time (still undefined), so it is quite possible the rule may never take effect. That's assuming we even agree on a new rule, which is doubtful.

Two, the new rule is not a model rule, from the consumer's point of view. It is riddled with compromises, because the way the way the negotiations are structured, there is no agreement unless there is unanimity. That means we are often reduced to the lowest common denominator. Your bill is superior to the draft we are discussing now.

For example, your bill requires decisionmakers to apply your first law. That is a gem. But so far, all the automakers have agreed to in DC is for the arbitrators to "consider" state laws, along with a whole list of other matters. And the automakers want to have exclusive rights to train arbitrators.

Three, the National Congress of State Legislators recently passed a resolution opposing preemption of states' lemon laws. The National Association of Attorneys General already passed a similar resolution. There is widespread concern the FTC negotiations will be used to preempt what you enact at the state level. If automakers use our negotiations to stifle state activity, they will have achieved, de facto, what states want to prevent.

As you know, the whole country looks to you and what you do as an example. If the automakers want uniformity, which they say they do, then they should support bills like yours, which may be adopted as model legislation.

Please get in touch if I can help in any way.

As always,

Rosemary

Rosemary Dunlap, President

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Automotive News 5-25 '1

State legislators oppose pre-emption of lemon laws

By Helen Kahn
AUTOMOTIVE NEWS STAFF REPORTER

WASHINGTON — The National Conference of State Legislatures has passed unanimously a resolution opposing federal pre-emption of state lemon laws.

The action follows the recent adoption of a similar resolution by the National Association of State Attorneys General. The National Association of Civil Administrators is expected to take a similar position at its annual convention next month in Atlanta.

Both domestic and foreign automakers prefer a single federal rule or uniform state laws. They are concerned over differences among the 40-some state lemon laws. Lemon laws specify consumer rights in settling complaints about defective cars.

Automakers say they doubt they can get a federal rule that will pre-empt state lemon laws. Instead, the makers are trying to get some relief through a proposal made to an advisory group considering changes in a Federal Trade Commission rule governing informal dispute settlement procedures. A decision is expected in a month or two.

The legal headaches stem indirectly from passage of the 1975 Magnuson-Moss Act, which defined certain consumer rights if manufacturers offered written warranties. It also encouraged establishment of informal dispute settlement procedures.

The FTC, as required under the law, wrote a rule (known as 703) spelling out obligations of manufacturers and consumers in settling warranty complaints out of court.

Many automakers now use national arbitration programs such as the National Automobile Dealers Association's AUTOCAP or the Better Business Bureau's Autoline. But the FTC has never said whether those programs meet the federal rule's guidelines.

The FTC 703 rule, which does not pre-empt state lemon laws, is now the subject of discussions by an independent advisory group set up by the FTC. The group includes representatives from the auto industry (manufacturers and dealers), consumer groups (Center for Auto Safety, Motor Voters, Consumers Union) and state legislators.

It is to those groups that the automakers are proposing a solution less sweeping than federal pre-emption.

They suggest making the FTC rule effective only after states with two-thirds of the nation's population have enacted lemon laws that:

- Require a consumer to use the manufacturer's arbitration program before going to court.
- Does not place any new obligations on the manufacturer.

In effect, that would mean uniformity in states with two-thirds of the population. But it also would mean that states with tough lemon laws could not qualify as part of the necessary two-thirds.

Connecticut's lemon law, for example, with its own state-run arbitration program, would appear not to qualify. Neither, apparently, could the lemon laws of Florida or Wisconsin.

The FTC staff has scheduled a final meeting in June for the rulemaking group to decide whether agreement can be reached on changing the federal informal dispute settlement procedures rule. The FTC staff has stated no desire for its rule to pre-empt states' rights to legislate or regulate consumer rights for repair/replacement under warranty, but the staff stressed it could not speak for current or future commissioners.

FTC Chairman Daniel Oliver has refused to say whether he favors having the FTC rule pre-empt state laws, and his position has made state legislators and consumer activists somewhat concerned.

The pre-emption issue was recently debated by David A. Collins, a General Motors attorney who has been serving on the FTC advisory committee, and John J. Woodcock, the Connecticut lawmaker most responsible for the strict Connecticut lemon law that has its own state-run arbitration programs.

They debated before the National Conference of State Legislatures prior to a vote opposing pre-emption of lemon laws.

After reviewing some of the court decisions on pre-emption, Collins said, "The bad news from your perspective, and from our perspective, too, is that the laws are taking new and different shapes and forms."

Some of those new varieties, he added, put lemon laws on a "self-destructive collision course with federal law, sooner or later."

Collins said the original lemon laws — allowing a dealer four attempts to repair a car and requiring a manufacturer to buy back the car if it is in a dealer's hands for 30 days — are very hard to assail as a matter of fairness. Collins said it is hard to say "four cracks at a serious problem isn't enough, and we aren't saying that any more."

But, said Collins, it is the new details cropping up in lemon laws that are unfair, sometimes to manufacturers and sometimes to consumers.

He said that one form of lemon-law unfairness insulates dealers from accountability for the poor service they may have provided. Collins admitted some defective cars defy repair. Dealers should not be responsible for fixing them.

But the bulk of the lemons, which the automakers are buying back, according to Collins, are cars that the dealer has let sit for 30 days, or cars for which the dealer has failed to order the necessary parts, or cars with a problem the dealer just has not diagnosed.

Making the dealer accountable under the lemon laws, added Collins, is an incentive to do the job right. Moreover, the consumer should not be caught between the dealer and the manufacturer. Dealers and automakers ought to be the ones to argue it out, according to Collins. As it is now, in some states dealers claim the unsuccessful repair is the manufacturer's fault.

Woodcock, taking his turn in the debate, said the states have taken a leadership role because the FTC failed to do so. He said the Connecticut attorney general has been waiting for four years for FTC to tell him whether the Better Business Bureau arbitration program meets the federal guidelines spelled out in rule 703.

State enforcement is necessary, said Woodcock, because the FTC has been in a "deep coma."

Woodcock said he is concerned that the potential for a pre-emptive initiative is real, and he said he thinks Congress should be warned because that is where the auto industry is going next for help. Woodcock said he believes the automakers have already been to the White House, and Congress is next.

Woodcock warned that pre-emption would create a moratorium on what states have done to supervise and monitor industry arbitration programs. And he viewed that as a big problem because of the track record of the FTC.

In addition, he said pre-emption would create a moratorium on further state initiatives, and by creating a precedent, it would have a chilling effect on what states may want to do.

A-29

CONTACT: DOROTHY RICE
(916) 445-0991

FOR IMMEDIATE RELEASE
JUNE 3, 1987

Assemblywoman Sally Tanner (D-El Monte) today announced that her 1987 "Lemon Law" to protect new car buyers was approved by the Assembly Ways and Means Committee. It will next be voted on by the full Assembly.

Assemblywoman Tanner stated, "I introduced Assembly Bill 2057 this year in response to comments I have received from many consumers in the state that there are problems with the administration of the original "lemon law" which became state law in 1982. The experience of the past four years has shown us that aspects of my 1982 "lemon law" need to be strengthened to assure that owners of "lemon" cars are treated fairly in the process. That is the goal of AB 2057."

The original California "lemon law" was enacted by AB 1787, following three years of effort by Assemblywoman Tanner to secure its passage by the Legislature. That bill specified for the first time that once a consumer has attempted to have the same defect repaired four times within the first year of ownership, or the automobile has been out of service for more than 30 days, the car is presumed to be a "lemon" and the owner is entitled to receive either a new car or a refund for the purchase price from the auto manufacturer. Before passage of the bill, California's warranty laws entitled the consumer to a refund or replacement if the car is not repaired after a "reasonable number of attempts". Because state law provided no standard for determining what was "reasonable", consumers were faced with the uncertainty of what constitutes a reasonable number of repair attempts.

AB 2057 (Tanner) makes the following revisions to the 1982 "lemon law":

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-- It provides that a car owner may choose a replacement or a refund when the car is found to be a lemon.
-- It requires that the manufacturer reimburse the owner of a "lemon" for sales tax, license and registration fees, and for incidental costs such as repair, towing and rental car costs.
-- It requires that the Bureau of Automotive Repair establish a program to certify that manufacturer-run arbitration programs are operated properly and fairly.
-- It provides that if a manufacturer does not provide a certified arbitration program and the consumer is forced to go to court to recover the cost of a "lemon", the court will award triple damages if the consumer wins the lawsuit, plus attorney's fees.

Assemblywoman Tanner concluded, "AB 2057 will provide additional protection for consumers who have the misfortune of purchasing a car which turns out to be a "lemon". The purchase of a new car is the second most significant purchase most people make in their lives; this fact makes "lemon law" protections a consumer necessity."

End

Consumers Union

Publisher of Consumer Reports

June 5, 1987

JUN 12 1987

Assembly Member
State Capitol
Sacramento, CA 95814

Re: Support for A.B. 2057 (Tanner)

Dear Assembly Member:

Consumers Union, non-profit publisher of Consumer Reports magazine, urges you to support A.B. 2057 (Tanner) when it is heard on the Assembly floor. This bill will make important changes in California's "lemon law."

Five years ago, the Legislature enacted the "lemon law." It provides remedies for consumers who purchase defective new cars. It defines the process by which a new car may qualify as a "lemon" and the owner may receive compensation for it. Unfortunately, several areas of the lemon law are problematic. A.B. 2057 will make needed changes to ensure that consumers who purchase "lemons" can receive the compensation they deserve.

Under the current lemon law, owners of alleged lemon vehicles are required to use a "qualified" arbitration process before they may resort to the courts. However, the arbitration programs are either operated or sponsored by the manufacturers and they have not provided a fair and impartial process for consumers. In some cases, these panels have failed to abide by provisions of the lemon law and the Federal Trade Commission's arbitration regulations. The panels often rely on experts supplied by manufacturers. Finally, while the panels frequently require one more repair attempt, they do not follow-up to ensure that the vehicle has been satisfactorily repaired.

There are additional problems with the current lemon law. Costs such as towing and rental car fees are not reimbursed, and the amount the manufacturer may deduct for the use of the vehicle from the replacement value is not specified.

A.B. 2057 addresses these problems. The bill contains strong provisions to ensure that consumers get a fair and impartial hearing in the arbitration process. It also would allow consumers who win in court to recover a civil penalty if the manufacturer has not maintained a certified arbitration program. In sum, A.B. 2057 contains the needed provisions to assure consumers stuck with "lemons" that they can receive the compensation they deserve.

We urge your AYE vote.

Sincerely,

Judith Bell

Judith Bell, Director of Special Projects
West Coast Regional Office
Consumers Union of U.S., Inc.

cc: Carmen Gonzalez, CALPIRG

A-32

ASSEMBLY COMMITTEE ON GOVERNMENT EFFICIENCY & CONSUMER PROTECTION
REPUBLICAN ANALYSIS

AB 2057 (Tanner) -- LEMON LAW - PART II
Version: 6/11/87 Vice Chairman: Larry Stirling
Recommendation: Oppose
Vote: 2/3 (Appropriation)

Summary: Requires Bureau of Auto Repair to "certify" all arbitration panels created by the original "Lemon Law." Requires charge on new cars to pay for process. Also allows treble damages for any consumer who sues and wins against any auto manufacturer who does not have a "certified" arbitration panel; or treble damages for any consumer who proves that his arbitration panel did not follow procedures laid out in this bill. Fiscal effect: Tax of up to $1 per new car sold in state. Estimated revenue: up to $300,000 a year.

Supported by CA Public Interest Research Group (CALPIRG) (Sponsor). Opposed by Automobile Importers of America, FORD, GM. Governor's position: None on file.

Comments: The author claims the present voluntary "lemon law" process is not working. Her answer is to make it better by turning it over to the government -- that paragon of efficiency and consumer protection.

Today, if you have a "lemon," you can go to the manufacturer, who then convenes an arbitration panel. If the panel rules against you, you can still go to court. If the panel rules in your favor, the car company cannot appeal.

But the author is concerned that there is something inherently unfair about the manufacturer paying for the arbitration panel. (Virtually all the manufacturers sub-contract with the Better Business Bureau for arbitration.)

So this bill creates a state system to "certify" that the panels are fair. It also effectively mandates that all companies submit to it -- those companies that don't have a state certified system will be liable for triple damages (plus attorney's fees) for any suit regarding a "lemon" car that is brought before them.

Mandatory certification will turn these informal proceedings into formal court hearings. (This bill also allows consumers to collect triple damages if they can prove that their certified process did not dot all the "i's" and cross all the "t's".) The result will be the same problems we have with our legal system and our regulatory agencies -- an emphasis on detail and procedure, countless appeals over piddley little questions, endless litigation, lots of government employees and huge backlogs. Ironically, this bill comes at a time when the courts and the regulatory agencies are looking into voluntary arbitration as a way to relieve their backlogs.

Assembly Republican Committee Vote
GE & CP -- 5/5/87

A-33

(6-1) Ayes: Stirling
Noes: Harvey
N.V : Frazee
Abs: Grisham

Ways & Means -- 6/3/87

(18-5) Ayes: D. Brown, Ferguson, Hill
Noes: Baker, Johnson, Jones, Lewis, McClintock

Consultant: John Caldwell

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Assembly
California Legislature

SALLY TANNER
ASSEMBLYWOMAN, SIXTIETH DISTRICT
CHAIRWOMAN
COMMITTEE ON ENVIRONMENTAL SAFETY & TOXIC MATERIALS

COMMITTEES:
AGING AND LONG TERM CARE
ENVIRONMENTAL SAFETY & TOXIC MATERIALS
GOVERNMENTAL ORGANIZATION
LABOR & EMPLOYMENT
SUBCOMMITTEES:
HAZARDOUS WASTE DISPOSAL ALTERNATIVES
SPORTS & ENTERTAINMENT
TOXIC DISASTER PREPAREDNESS
MEMBER:
JOINT COMMITTEE ON FIRE, POLICE, EMERGENCY AND DISASTER SERVICES
GOVERNOR'S TASK FORCE ON TOXICS, WASTE & TECHNOLOGY
SELECT COMMITTEE ON LOW LEVEL NUCLEAR WASTE

June 22, 1987

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The purpose of this letter is to request that AB 2057, my bill to revise the operation of the California "Lemon Law", be referred to the Senate Judiciary Committee. I believe that the Judiciary Committee is the most suitable committee to hear the bill for the following reasons:

1) The Senate Judiciary Committee has heard all "Lemon Law" bills that have been introduced since 1981, including my AB 3611 of last year. AB 2057 is almost identical to AB 3611.

2) The bill revises the arbitration procedures which are used under current law to determine whether a car is a "lemon". Dispute resolution in these cases is carried out by arbitration panels run by the auto manufacturers. The bill creates a program administered by the Bureau of Automotive Repair to certify that these arbitration procedures meet the requirements of the "Lemon Law" and Federal Trade Commission regulations. Although the bill does not require that auto manufacturers apply for certification, it does provide that if a manufacturer does not offer a certified arbitration process and the consumer is forced to go to court to recover the cost of a "lemon", the court will award triple damages plus attorney's fees if the consumer wins the lawsuit.

The bill also revises the terms under which "lemon" car owners are compensated to ensure that refunds cover items like sales tax and license fees so that the consumer does not end up having to absorb these costs of owning a "lemon".

A-35

3) The bill does not affect the provisions of new car warranties, their terms or conditions or the consumer's rights or manufacturer's duties under these warranties.

Because the bill is a "due process" bill that seeks to ensure that fair and impartial decisions are made on "lemon" cars, and because the bill does not relate directly to warranties, I believe that a referral to the Senate Judiciary Committee is the most appropriate referral. That committee has the greatest expertise on matters of due process and just compensation and will give the bill an in-depth, substantive and productive hearing.

Thank you for your courtesy.

Sincerely,

SALLY TANNER
Assemblywoman, 60th District

ST:acf

Ts(1 Hon. David Roberti
President Pro Tempore
of the Senate
State Capitol, Room 205
Sacramento, CA 95814

Tsw Dear David:
Tsw Hon. David Roberti
Ts(2 Hon. William Craven
Member, Senate Rules Committee
State Capitol, Room 3070
Sacramento, CA 95814

Tsw Dear Senator Craven:
Tsw Hon. William Craven
Ts(3 Hon. Jim Ellis
Member, Senate Rules Committee
State Capitol, Room 4053
Sacramento, CA 95814

Tsw Dear Senator Ellis:
Tsw Hon. Jim Ellis
Ts(4 Hon. Henry Mello
Member, Senate Rules Committee
State Capitol, Room 5108
Sacramento, CA 95814

Tsw Dear Senator Mello:
Tsw Hon. Henry Mello
Ts(5 Hon. Nicholas Petris
Member, Senate Rules Committee
State Capitol, Room 5080
Sacramento, CA 95814

Tsw Dear Senator Petris:
Tsw Hon. Nicholas Petris
Ts)

NEWS FROM ASSEMBLYWOMAN

SALLY TANNER

60th Assembly District

CONTACT: ARNIE PETERS
(916) 445-0991

FOR IMMEDIATE RELEASE
JUNE 26, 1987

Assemblywoman Sally Tanner (D-El Monte) announced that her 1987 "Lemon Law" to protect new car buyers was approved by the full Assembly on June 22 by a vote of 54-20.

Assemblywoman Tanner stated, "I introduced Assembly Bill 2057 this year in response to comments I have received from many consumers in the state that there are problems with the administration of the original "lemon law" which became state law in 1982. The experience of the past four years has shown us that aspects of my 1982 "lemon law" need to be strengthened to assure that owners of "lemon" cars are treated fairly in the process. That is the goal of AB 2057."

The original California "lemon law" was enacted by AB 1787, following three years of effort by Assemblywoman Tanner to secure its passage by the Legislature. That bill specified for the first time that once a consumer has attempted to have the same defect repaired four times within the first year of ownership, or the automobile has been out of service for more than 30 days, the car is presumed to be a "lemon" and the owner is entitled to receive either a new car or a refund for the purchase price from the auto manufacturer. Before passage of the bill, California's warranty laws entitled the consumer to a refund or replacement if the car is not repaired after a "reasonable number of attempts". Because state law provided no standard for determining what was "reasonable", consumers were faced with the uncertainty of what constitutes a reasonable number of repair attempts.

AB 2057 (Tanner) makes the following revisions to the 1982 "lemon law":

-- It provides that a car owner may choose a replacement or a refund when the car is found to be a lemon.

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-- It requires that the manufacturer reimburse the owner of a "lemon" for sales tax, license and registration fees, and for incidental costs such as repair, towing and rental car costs.
-- It requires that the Bureau of Automotive Repair establish a program to certify that manufacturer-run arbitration programs are operated properly and fairly.
-- It provides that if a manufacturer does not provide a certified arbitration program and the consumer is forced to go to court to recover the cost of a "lemon", the court will award triple damages if the consumer wins the lawsuit, plus attorney's fees.

AB 2057 passed the Assembly with the minimum number of votes required to secure passage. Assemblywoman Tanner was successful in acquiring the necessary 54 votes after the bill had been brought up for vote three times on the Assembly floor. The bill is opposed by numerous auto manufacturers and supported by consumer and public interest groups.

Assemblywoman Tanner concluded, "AB 2057 will provide additional protection for consumers who have the misfortune of purchasing a car which turns out to be a "lemon". The purchase of a new car is the second most significant purchase most people make in their lives; this fact makes "lemon law" protections a consumer necessity."

End

Arnie JUL 6 1987

SENATE COMMITTEE ON JUDICIARY

BACKGROUND INFORMATION

AB 2057

1. Source

(a) What group, organization, governmental agency, or other person, if any, requested the introduction of the bill? Please list the requestor's telephone number or, if unavailable, his address.

Author introduced bill.

(b) Which groups, organizations, or governmental agencies have contacted you in support of, or in opposition to, your bill?

Support: CA Public Interest Group
Consumers Union
Motor Voters
Attorney General

OPPOSITION: Ford Motor Co.
General Motors Corp.
Automobile Importers of America
Chrysler Motors

(c) If a similar bill has been introduced at a previous session of the Legislature, what was its number and the year of its introduction?

AB 3611 (1986)

2. Purpose

What problem or deficiency under existing law does the bill seek to remedy?

1) Ensures that owners of "lemon" cars will be reimbursed for sales tax and license fees when manufacturer buys back the vehicle.
2) Creates a program to ensure that auto manufacturer-run arbitration panels are operated fairly and impartially and in accordance with applicable law and regulations.

If you have any further background information or material relating to the bill, please enclose a copy of it or state where the information or material is available.

Arnie Peters 5-7783

PLEASE COMPLETE THIS FORM AND RETURN IT TO THE SENATE COMMITTEE ON JUDICIARY, ROOM 2187 AS SOON AS POSSIBLE. THE COMMITTEE STAFF CANNOT SET THE BILL FOR A HEARING UNTIL THIS FORM HAS BEEN RETURNED.

A-40

GENERAL MOTORS CORPORATION
1170 PARK EXECUTIVE BUILDING, 925 L STREET, SACRAMENTO, CALIFORNIA 95814

JUL 8 1987

July 8, 1987

Honorable Bill Lockyer, Chairman
Senate Judiciary Committee
State Capitol Building, Room 2032
Sacramento, California 95814

Re: AB 2057 (Tanner) Lemon Law Revision

Dear Bill:

This is to advise you that the General Motors Corporation is opposed to AB 2057 (Tanner), which is scheduled for hearing by the Senate Judiciary Committee on July 14.

AB 2057 would create a new certification process for automobile manufacturers voluntary arbitration programs. In so doing, it would formalize the procedure to the point where an arbitrator would be required to be trained in the specifics of the lemon law. If one of the arbitrators misapplied the principles of the lemon law, the manufacturer would be liable for treble damages and attorney fees. General Motors has about 1,000 arbitrators in California. No more than 250 are attorneys. It seems unreasonable to provide for treble damages based upon the decision of a layman arbitrator, untrained in the law.

The idea of General Motors' arbitration program, which is voluntary and predates California's lemon law, is that it be informal and non-legal, that the process be easily understood by the consumer, and that a lengthy court setting be avoided. AB 2057 would formalize the procedure by attempting to make layman arbitrators judges and then injecting treble damages.

For these reasons we must respectfully oppose AB 2057.

Sincerely,

G. Lee Ridgeway, Regional Manager
Industry-Government Relations

GLR/rp
cc: Members, Senate Judiciary Committee
Assemblywoman Sally Tanner

DEPARTMENT OF JUSTICE
BILL ANALYSIS

DATE: July 9, 1987

BILL NO.: AB 2057 **ANALYST:** Ronald A. Reiter

AUTHOR: Tanner **BRANCH/SECTION:** Consumer

DATE LAST AMENDED: 6-11-87 **TELEPHONE:** (213) 736-2159

I. CURRENT LAW

The Song-Beverly Consumer Warranty Act provides that, if the manufacturer is unable to conform goods to the standards of the manufacturer's express warranty within a reasonable number of service or repair attempts, the manufacturer must either replace the goods or reimburse the buyer for the purchase price less an amount attributable to the buyer's use of the product prior to the discovery of the nonconformity. Song-Beverly creates a presumption that a reasonable number of repair attempts of a motor vehicle have occurred if, within one year from delivery to the buyer or 12,000 miles, whichever occurs first, either the same problem has been subject to repair four or more times by the manufacturer or the vehicle is out of service for repair for a cumulative total of more than 30 days since delivery of the vehicle. A manufacturer is permitted, but not required, to establish a qualified third party dispute resolution process to arbitrate a buyer's claim that a vehicle does not conform to the manufacturer's express warranty. If the manufacturer establishes a qualified process, the buyer must submit his or her claim to the third party process to invoke the presumption regarding what is a reasonable number of repair attempts. The buyer may assert the presumption in court only if (a) a third party process does not exist, (b) the buyer is dissatisfied with the third party decision, or (c) the manufacturer neglects to promptly fulfill the terms of the third party's decision. These statutory provisions are popularly referred to as the "lemon law."

The lemon law establishes that a qualified third party dispute resolution process must (a) comply with minimum requirements established by the Federal Commission for informal dispute resolution procedures, (b) render decisions which are binding on the manufacturer if the buyer elects to accept the decision, and (c) prescribe a reasonable time not to exceed 30 days within which the manufacturer must fulfill the terms of the decision.

II. CHANGE MADE BY BILL

This bill would authorize the Bureau of Automotive Repair to certify that the third party dispute resolution process complies with the minimum requirements established by Song-Beverly. The certification procedure would be funded from a $1 fee for each new vehicle sold, leased, or distributed in this state.

The bill also expands and clarifies some of the provisions of the lemon law. For example, the bill would permit a buyer to elect reimbursement in lieu of replacement if a manufacturer is unable to conform a new vehicle to express warranty specifications. The bill establishes a formula for determining the buyer's obligation to the manufacturer for the use of a vehicle prior to discovery of the defect. The bill also provides for the reimbursement of sales tax, official fees, and incidental damages such as towing and rental car costs. The manufacturer would be able to recover the sales tax from the state.

In addition, modifications are made to the third party dispute resolution process. For example, arbitrators would receive copies of applicable warranty law and would be able to request an expert to provide a written report on the condition of a non-conforming motor vehicle at no cost to the buyer.

Significantly, the bill provides that a buyer may recover treble damages in a breach of warranty action against the manufacturer if the manufacturer fails to rebut the presumption that it did not repair the vehicle in a reasonable number of attempts and if the manufacturer either does not maintain a qualified third party process or its third party process willfully fails to comply with required procedures in the buyer's case.

III. ANALYSIS

The existing lemon law was supposed to provide new car buyers with an efficient and economical forum for the resolution of warranty disputes. The law, however, has not worked well.

Some third party resolution mechanisms established by manufacturers did not comply with minimum statutory criteria. Manufacturers, however, did not violate the law because they were not required to establish any third party dispute resolution processes; the third party procedure is entirely permissive. Even if statutory criteria were met, third party processes often have rendered decisions that were contrary to law because arbitrators are not trained in, and were not even provided copies of, applicable warranty

law. In addition, almost all cases involve technical disputes, and frequently the only expert testimony is provided by the manufacturer in its own behalf. Consumers are usually unable to afford any expert analysis and arbitrators usually have no power to order an independent expert examination of the vehicle.

Furthermore, apparently favorable results to a consumer often were costly and impractical. For example, if a third party process ruled that the manufacturer failed to correct defects, the manufacturer would not refund the purchase price but would attempt to replace the vehicle. The replacement vehicle would be a later model car, and the buyer would be required to pay the price increase between the new model and the originally purchased vehicle. In addition, the buyer would often be required to pay a substantial amount for the use of the non-conforming vehicle prior to the discovery of the defect. Consequently, a consumer might be unable to afford a successful arbitration result.

In recent years, some manufacturers have abandoned the use of third party dispute resolution processes. As a result, the availability of an efficient and economical alternative to court action in new vehicle warranty disputes has largely evaporated. Consequently, the intended salutary effects of the original lemon law have not occurred.

This bill provides some significant improvements to the third party resolution procedure and the substantive law determining the manufacturer's liability for its failure to meet its express warranties. If a buyer is successful in establishing that the manufacturer failed to conform a defective vehicle to express warranties within a reasonable number of attempts, the buyer can insist on a refund of the purchase price instead of a new vehicle. The bill more clearly specifies what must be done if the manufacturer replaces a vehicle and provides a description of items of cost which must be refunded to a buyer if a refund is ordered. In addition, the bill specifies a formula for determining the buyer's liability for vehicle use prior to the buyer's discovery of the nonconforming defect.

The bill, moreover, makes helpful procedural reforms. Arbitrators assigned to decide disputes must be provided with copies of, and instruction in, applicable warranty law. Also, arbitrators can request an inspection and written report on the condition of a nonconforming motor vehicle, at no cost to the buyer, by an automobile expert who is independent of the manufacturer. This report can be critically significant in many cases involving technical disputes. The certification process will remove proof

problems regarding whether a third party process meets statutory criteria.

One of the most significant aspects of the bill is the provision of an incentive to manufacturers to establish a voluntary qualified third party dispute resolution process. The bill provides for treble damages to a buyer who brings an action against a manufacturer which both breaches its warranty to the consumer and fails to provide a qualified third party process for the resolution of the consumer's dispute.

The Legislature could easily provide a treble damage remedy against manufacturers which sell defective vehicles, fail to fix them within a reasonable period of time, and fail to replace the vehicle or reimburse the purchaser for its purchase price. Given the importance of cars to our society and the substantial financial commitment Californians must make to purchase new cars, the failure of a manufacturer to honor its warranties within a reasonable number of repair attempts can easily be viewed as improper. Indeed, the conduct may be oppressive, especially considering the harm caused to new car purchasers from the inconvenience, aggravation, loss of time, possible loss of earnings, and physical hazard from possible safety defects.

The bill, however, does not simply impose treble damages for the manufacturer's failure to meet its warranty obligation. The bill permits the manufacturer to escape the treble damage penalty for its failure to meet its warranty obligations by allowing the manufacturer to establish a qualified third party dispute resolution process. At the very least, this incentive has the laudable objectives of providing an efficient and economical forum for the new car buyer and diverting cases from congested court calendars to an alternative dispute resolution procedure.

The manufacturers contend that the treble damage remedy is unconstitutional because it forces the manufacturer to arbitrate disputes. However, the third party process is voluntary and a manufacturer which does not maintain a third party process is liable for treble damages if the buyer proves that the manufacturer breached its warranty notwithstanding a reasonable number of repair attempts to correct a nonconformity. Thus, the voluntary maintenance of a third party process is a way for manufacturers to escape treble damages for their breach of warranty. While the treble damage remedy will animate manufacturers to adopt a third party process, the remedy is not a penalty which would unconstitutionally coerce mandatory arbitration.

IV. RECOMMENDATION

A. The office should vigorously support this measure which is intensely opposed by motor vehicle manufacturers.

RONALD A. REITER
Deputy Attorney General

RAR:vh

cc: Andrea S. Ordin
Herschel T. Elkins

AB 2057(O)

Regional Governmental Affairs Office
Ford Motor Company

Suite 260 – 925 L Street
Sacramento, California 95814
Telephone: 916/442-0111

July 10, 1987

To: Members, Senate Judiciary Committee

Subject: Opposition to AB 2057

Ford Motor Company is opposed to Assembly Bill 2057, relating to vehicle warranties, which is set for hearing in the Senate Judiciary Committee July 14, 1987. Ford's opposition is based on three main issues:

(1) We feel this bill raises serious constitutional issues as contained in the attached Checklist of Constitutional Problems with AB 2057 prepared by Automobile Importers of America, Inc., dated July 2, 1987.

(2) Ford also opposes the multiple damages provision of the bill as it would encourage litigation. The recovery of damages would place a high premium on prevailing under the statute, rendering "lemons" extremely valuable. A multiple damage provision is particularly unfair if it penalizes the manufacturer for the actions of a third party dispute resolution mechanism over which it does not exert control.

(3) We further oppose the requirement that our voluntary third party lemon law arbitration programs must be certified by a state bureaucratic certification process.

We urge your NO" vote on AB 2057.

Richard L. Dugally

RICHARD L. DUGALLY
Regional Manager
Governmental Affairs

RLD:cme

cc: Honorable Sally Tanner
Consultants, Senate Judiciary Committee

AUTOMOBILE IMPORTERS OF AMERICA, INC.

CHECKLIST OF CONSTITUTIONAL PROBLEMS WITH A.B. 2057

- The failure of A.B. 2057 to afford manufacturers a jury trial is unconstitutional under the California Constitution. The right to a jury trial is guaranteed by the California Constitution.[1] Consumer warranty claims are essentially contract claims,[2] for which the jury trial right is guaranteed.[3] Moreover, under California law, the right to jury trial cannot be infringed by a statute purporting to compel arbitration without the right of trial de novo.[4]

- The civil penalties provision is unconstitutional because it penalizes the manufacturer for exercising its right to a jury trial. Civil penalties are penal in nature.[5] In California, "[i]t is well settled that to punish a person for exercising individual rights [such as the right to jury trial] is a due process violation of the most basic sort."[6]

- The bill is unconstitutional because it delegates judicial power to arbitrators, who are not judicial officers. Under the California Constitution, judicial powers and responsibilities are vested solely in the judicial branch and may not be exercised by any other branch.[7] Thus, "the legislature is without power, in the absence of constitutional provision authorizing the same, to confer judicial functions upon a statewide administrative agency."[8] In the absence of de novo judicial review, the delegation of judicial functions--such as that in the A.B. 2057--to nonjudicial bodies is unconstitutional.[9]

- The bill's requirement that a manufacturer must have a dispute resolution process conflicts with the provisions of the Magnuson-Moss Warranty Act, which encourages voluntary programs, and with specific provisions of 16 C.F.R. Section 703.

- A.B. 2057 is unconstitutional on equal protection grounds because it affords unequal treatment to manufacturers in regards to fundamental rights. Under A.B. 2057, the decision of a dispute resolution process is binding on the manufacturer but not on the consumer, who is free to challenge the decision in court. It is impermissible to grant a fundamental right, such as the right to jury trial, to one class and deny

it to another.[10] Moveover, under California law it is impermissible to discriminate against manufacturers merely because they may have more wealth than consumers.[11]

- The admission of the arbitrator's decision into evidence without providing the right to cross-examine the arbitrator is unconstitutional. In California, "denial of the right to cross-examination [of a non-judicial decision-maker] cannot constitutionally be enforced."[12] Consequently, A.B 2057, which compels the manufacturer into arbitration by the threat of civil penalties and then admits the arbitrator's decision into evidence without cross-examination, is unconstitutional.[13]

- Section 4 of the Bill is unlawful because it (1) impermissibly imposes civil penalties on manufacturers for the acts of third parties and (2) apparently imposes a double penalty for the same offense. The civil penalty of Section 1794(e) is tantamount to a punitive damage award,[14] and thus may only be imposed on the party actually responsible for the wrong,[15] not on a manufacturer for the actions of the "third party dispute resolution process" that must, under FTC rules, be independent of the manufacturer. The civil penalties under Section 1794(e) duplicate the penalties under Section 1794(c) and are, therefore, unlawful.[16]

JOHN K. VAN DE KAMP
Attorney General

JUL 13 1987

State of California
DEPARTMENT OF JUSTICE

1515 K STREET, SUITE 511
P.O. BOX 944255
SACRAMENTO 94244-2550
(916) 445-9555

July 13, 1987

Honorable Sally Tanner
Assemblymember, 60th District
State Capitol, Room 4146
Sacramento, CA 95814

Dear Assemblymember Tanner:

Re: AB 2057 - Warranties: New Motor Vehicles

The Attorney General's Office supports AB 2057.

This bill addresses a number of problems which have developed under the "lemon law" regarding defective new cars.

Enacted in 1982, the lemon law basically provides that if a manufacturer is unable to fix a defective new motor vehicle, then the buyer is entitled to either a replacement or reimbursement. One of the major problems to date with the law is that the mechanisms established by many manufacturers for resolving customer disputes have not complied with the minimum statutory criteria for such procedures. Moreover, even where the statutory criteria have been met poor decisions are often rendered because arbitrators are not trained in warranty law or do not have authority to order independent, expert examination of the vehicle.

AB 2057 will make the third party-dispute resolution process a more effective procedure for resolving these cases by: (a) authorizing the Bureau of Automotive Repair to approve the particular approach selected by each manufacturer; (b) requiring arbitrators to be familar with applicable warranty law; and (c) authorize arbitrators to obtain independent, expert inspection of the vehicle.

Additionally, the bill substantially strengthens other areas of the lemon law by: (a) permitting the buyer to request a refund of the purchase price instead of being required to accept a new vehicle from the manufacturer; (b) providing a specific formula for determining the buyer's liability for use of the vehicle prior to discovery of the defect; and (c) providing treble damages in any action where the manufacturer breached the warranty and failed to provide a qualified third-party process for resolving the consumer's dispute.

We have now had five years of experience with the lemon law. AB 2057 address the major problems which have arisen to date, giving consumers who purchase defective new cars effective remedies against manufacturers who either will not or can not comply with their warranties. The bill is inportant to all of California's consumers. Please let me know is we can be of further assistance in supporting the measure.

Very truly yours,

JOHN K. VAN DE KAMP
Attorney General

Allen Summer
Senior Assistant Attorney General
(916) 324-5477

AHS:er

JUL 13 1987

JOHN K. VAN DE KAMP
Attorney General

State of California
DEPARTMENT OF JUSTICE

1515 K STREET, SUITE 511
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July 13, 1987

Honorable Bill Lockyer
Chairman, Senate Judiciary
State Capitol, Room 2032
Sacramento, California 95814

Dear Senator Lockyer:

AB 2057 (Tanner) - Warranties: New Motor Vehicles

The Attorney General's Office urges you to support AB 2057, which will be heard by the Judiciary Committee on July 14.

This bill addresses a number of problems which have developed under the "lemon law" regarding defective new cars.

Enacted in 1982, the lemon law basically provides that if a manufacturer is unable to fix a defective new motor vehicle, then the buyer is entitled to either a replacement or reimbursement. One of the major problems to date with the law is that the mechanisms established by many manufacturers for resolving customer disputes have not complied with the minimum statutory criteria for such procedures. Moreover, even where the statutory criteria have been met poor decisions are often rendered because arbitrators are not trained in warranty law or do not have authority to order independent, expert examination of the vehicle.

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Additionally, the bill substantially strengthens other areas of the lemon law by: (a) permitting the buyer to request a refund of the purchase price instead of being required to accept a new vehicle from the manufacturer; (b) providing a specific formula for determining the buyer's liability for use of the vehicle prior to discovery of the defect; and (c) providing treble damages in any action where the manufacturer breached the warranty and failed to provide a qualified third-party process for resolving the consumer's dispute.

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We have now had five years of experience with the lemon law. AB 2057 address the major problems which have arisen to date, giving consumers who purchase defective new cars effective remedies against manufacturers who either will not or can not comply with their warranties. The bill is inportant to all of California's consumers; we urge your support.

Very truly yours,

JOHN K. VAN DE KAMP
Attorney General

ALLEN SUMNER
Senior Assistant Attorney General
(916) 324-5477

AHS:er/ckm

AB 2057 - JUDICIARY COMMITTEE STATEMENT

AB 2057 AMENDS CALIFORNIA'S FIRST "LEMON LAW" WHICH I AUTHORED IN 1982. THAT LAW HAS BEEN IN EFFECT FOR OVER FOUR YEARS AND WE HAVE SUBSTANTIAL EXPERIENCE WITH ITS ADMINISTRATION. BECAUSE OF CONSUMER COMPLAINTS ABOUT ITS OPERATION, I INTRODUCED AB 2057 TO MAKE THE "LEMON LAW" FAIRER.

THE BILL HAS TWO MAIN GOALS:

-- FIRST, IT WILL MAKE SURE THAT OWNERS OF "LEMON" CARS WILL RECEIVE FULL REFUNDS.
-- SECOND, IT ESTABLISHES PROCEDURES TO ENSURE THAT ARBITRATION PROGRAMS THAT REVIEW "LEMON" CASES ARE RUN FAIRLY.

BRIEFLY, AB 2057 DOES THE FOLLOWING:

-- PROVIDES THAT A CAR OWNER MAY CHOOSE A REPLACEMENT OR A REFUND WHEN THE VEHICLE IS FOUND TO BE A "LEMON".
-- REQUIRES THE MANUFACTURER TO REIMBURSE THE OWNER OF A "LEMON" FOR SALES TAX, LICENSE AND REGISTRATION FEES AND INCIDENTAL COSTS SUCH AS REPAIR, TOWING AND RENTAL CAR COSTS.
-- REQUIRES THE BUREAU OF AUTOMOTIVE REPAIR TO ESTABLISH A PROGRAM TO CERTIFY THAT MANUFACTURER-RUN ARBITRATION PROGRAMS ARE OPERATED PROPERLY AND FAIRLY. CERTIFICATION WOULD NOT BE MANDATED BUT WOULD BE VOLUNTARY.
-- PROVIDES THAT, IF THE CONSUMER IS FORCED TO GO TO COURT TO RECOVER THE COST OF A "LEMON", THE COURT MAY AWARD UP TO THREE TIMES ACTUAL DAMAGES IFTHE COURT FINDS THAT (A) THE CAR IS A "LEMON" AND (B) THE MANUFACTURER EITHER FAILED TO OFFER CERTIFIED ARBITRATION OR FAILED TO BUY BACK OR REPLACE THE "LEMON".
-- REQUIRES NEW CAR MANUFACTURERS TO PAY A FEE NOT TO EXCEED $1 PER VEHICLE SOLD TO FUND THE CERTIFICATION PROGRAM.

See Hearing Binder

AB 2057 IS BASICALLY THE SAME BILL AS AB 3611 OF LAST YEAR WHICH WAS PASSED BY THIS HOUSE. I BELIEVE THAT THE BILL WILL RESULT IN BETTER TREATMENT OF THE CONSUMER, ENSURE THAT OWNERS OF "LEMONS" GET A FAIR HEARING, AND PROVIDE THEM WITH FULL REFUNDS WHEN THEY ARE SOLD A "LEMON" BY AN AUTO MANUFACTURER.

I ASK FOR YOUR "AYE" VOTE.

SUPPORT:

CA PUBLIC INTEREST RESEARCH GROUP (CALPIRG)
CONSUMERS UNION
MOTOR VOTERS
ATTORNEY GENERAL'S OFFICE

OPPOSITION:

AUTOMOBILE IMPORTERS OF AMERICA
GENERAL MOTORS CORPORATION
FORD MOTOR COMPANY
CHRYSLER MOTORS

07/13/87

A-55

Co. umer's Aid of Shasta, .nc.
2919 Bechelli Lane
Redding, California 96002
Phone (916)221-0294

July 29,1987

Assemblyperson Sally Tanner
State Capitol
Sacramento, CA 95814

Dear Ms. Tanner:

I have just received and read your AB 2057 and think you might be on a winner this time. My only reservation is the Bureau of Automobile Repair--my feeling is if they dont function now, what says they'll function if you place more responsibility on them?

I understand this bill is in the Senate Judiciary now-and certainly has passed some big hurdles. Since I contacted you a year and a half ago--I've given up completely on arbitration either BBB or the Mfgrs. I've been referring all the people who contact me--after they establish their complaints with the manufacturer. to go directly to a lawyer. Boy this hurts, I believe only as a last resort in lawyers! I guess I'm saying the only way the American made cars, which approx. 85% of our calls have been American made, will listen and improve their crappy quality control is through their pocketbooks!

Keep up the good work--let's hope this one passes.

Sincerely,

Jean Clemens

Jean Clemens, Director
Consumers Aid of Shasta, Inc.

cc: Stan Statham, Redding, CA.
John Doolittle, Roseville, CA
Jim Nielsen, Redding, CA

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JOHN K. VAN DE KAMP
Attorney General

State of California
DEPARTMENT OF JUSTICE

1515 K STREET, SUITE 511
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August 11, 1987

Honorable Bill Lockyer
Chairman, Senate Judiciary
State Capitol, Room 2032
Sacramento, California 95814

Dear Senator Lockyer:

AB 2057 (Tanner) - Warranties: New Motor Vehicles

The Attorney General's Office urges you to support AB 2057, which will be heard by the Judiciary Committee on August 18.

This bill addresses a number of problems which have developed under the "lemon law" regarding defective new cars.

Enacted in 1982, the lemon law basically provides that if a manufacturer is unable to fix a defective new motor vehicle, then the buyer is entitled to either a replacement or reimbursement. One of the major problems to date with the law is that the mechanisms established by many manufacturers for resolving customer disputes have not complied with the minimum statutory criteria for such procedures. Moreover, even where the statutory criteria have been met poor decisions are often rendered because arbitrators are not trained in warranty law or do not have authority to order independent, expert examination of the vehicle.

AB 2057 will make the third-party dispute resolution process a more effective procedure for resolving these cases by: (a) authorizing the Bureau of Automotive Repair to approve the particular approach selected by each manufacturer; (b) requiring arbitrators to be familar with applicable warranty law; and (c) authorize arbitrators to obtain independent, expert inspection of the vehicle.

Additionally, the bill substantially strengthens other areas of the lemon law by: (a) permitting the buyer to request a refund of the purchase price instead of being required to accept a new vehicle from the manufacturer; (b) providing a specific formula for determining the buyer's liability for

use of the vehicle prior to discovery of the defect; and (c) providing treble damages in any action where the manufacturer breached the warranty and failed to provide a qualified third-party process for resolving the consumer's dispute.

We have now had five years of experience with the lemon law. AB 2057 address the major problems which have arisen to date, giving consumers who purchase defective new cars effective remedies against manufacturers who either will not or can not comply with their warranties. The bill is important to all of California's consumers.

We urge your support for the measure.

Very truly yours,

JOHN K. VAN DE KAMP
Attorney General

ALLEN SUMNER
Senior Assistant Attorney General
(916) 324-5477

AS:er/ckm

CONTACT: **ARNIE PETERS**
(916) 445-0991

FOR IMMEDIATE RELEASE
AUGUST 19, 1987

Assemblywoman Sally Tanner (D-El Monte) announced that her 1987 "Lemon Law" to protect California consumers who purchase defective new automobiles has been approved by the Senate Judiciary Committee by a vote of 9-0.

Assemblywoman Tanner stated, "I introduced Assembly Bill 2057 this year in response to comments I have received from many consumers in the state that there are problems with the administration of the original "lemon law" which became state law in 1982. The experience of the past four years has shown us that aspects of my 1982 "lemon law" need to be strengthened to assure that owners of "lemon" cars are treated fairly in the process. That is the goal of AB 2057."

The original California "lemon law" was enacted by AB 1787, following three years of effort by Assemblywoman Tanner to secure its passage by the Legislature. That bill specified for the first time that once a consumer has attempted to have the same defect repaired four times within the first year of ownership, or the automobile has been out of service for more than 30 days, the car is presumed to be a "lemon" and the owner is entitled to receive either a new car or a refund for the purchase price from the auto manufacturer. Before passage of the bill, California's warranty laws entitled the consumer to a refund or replacement if the car is not repaired after a "reasonable number of attempts". Because state law provided no standard for determining what was "reasonable", consumers were faced with the uncertainty of what constitutes a reasonable number of repair attempts.

AB 2057 (Tanner) makes the following revisions to the 1982 "lemon law":

SACRAMENTO ADDRESS
State Capitol
Sacramento, CA 95814
(916) 445-7783

DISTRICT ADDRESS
11100 Valley Boulevard, No. 106
El Monte, CA 91731
(213) 442-9100

A-59

-- It provides that a car owner may choose a replacement or a refund when the car is found to be a lemon.
-- It requires that the manufacturer reimburse the owner of a "lemon" for sales tax, license and registration fees, and for incidental costs such as repair, towing and rental car costs.
-- It requires that the Bureau of Automotive Repair establish a program to certify that manufacturer-run arbitration programs are operated properly and fairly.
-- It provides that if a consumer is forced to go to court to recover the cost of a "lemon", the court may award triple damages if it finds that the car is a "lemon" and the manufacturer either failed to offer a certified arbitration program or failed to buy back or replace the "lemon" car.

AB 2057 (Tanner) was strongly opposed by numerous auto manufacturers, and supported by consumer groups and the California Attorney General's office. In lengthy meetings with auto manufacturers immediately preceding Tuesday evening's Senate Judiciary Committee hearing, Assemblywoman Tanner, with assistance from the Attorney General's office, crafted a set of amendments to the 1987 "Lemon Law" which removed much of the opposition while retaining the additional consumer protections of the bill.

Assemblywoman Tanner concluded, "AB 2057 will provide additional protection for consumers who have the misfortune of purchasing a car which turns out to be a "lemon". The purchase of a new car is the second most significant purchase most people make in their lives; this fact makes "lemon law" protections a consumer necessity. The bill will result in better treatment of the consumer, ensure that owners of "lemons" get a fair hearing, and provide them with refunds when they are sold a "lemon" by an auto manufacturer."

End

MOTOR VEHICLE MANUFACTURERS ASSOCIATION
of the United States, Inc.

300 NEW CENTER BUILDING • DETROIT, MICHIGAN 48202 • AREA 313-872-4311
TLX NO. 1009770 AUTOMAKERS DET
1107 9th ST., SUITE 1030 • SACRAMENTO, CALIFORNIA 95814 • AREA 916-444-3767

DONALD E. PETERSEN, *Chairman*
THOMAS H. HANNA, *President and Chief Executive Officer*

August 24, 1987

Mr. Steve Blankenship,
Deputy Legislative Secretary
Governor's Office
State Capitol
Sacramento CA 95814

Dear Steve:

Just a follow-up note to thank you for your time last week regarding AB 2057 (Tanner lemon law bill). As we discussed, there were a number of major concerns we had in the bill as it existed at that time.

Subsequent to our discussion with you, we had several meetings with Assemblywoman Tanner and the proponents of the issue; as a result of those talks, all our concerns were spoken to and amendments were made to remove our objections to the bill. Therefore, we now have a neutral position and are satisfied with the way the bill presently exists.

Again, we appreciate your time and consideration of our concerns but wanted to make sure that the Governor's Office was aware that our opposition has been removed.

Best regards,

James W. Austin
Public Affairs Manager
Pacific Coast Region

JWA/eb

cc: Assemblywoman Sally Tanner ✓
MVMA Member Company Reps
AIA

A-61

George R. Steffes

1121 L STREET SUITE 909

LEGISLATIVE ADVOCATES

SACRAMENTO CALIFORNIA 95814

TELEPHONE 916 444-6034

August 28, 1987

The Honorable Sally Tanner
State Capitol
Sacramento, CA. 95814

SUBJECT: **REMOVAL OF OPPOSITION TO AB 2057 RELATING TO LEMON LAWS**

Dear Sally,

On behalf of the **Automobile Importers of America**, I am pleased to inform you that your August 25, 1987 amendments to AB 2057 remove our opposition to your bill. As you know, the Auto Importers of America include most European and Asian auto manufacturers, and approximately 40 % of the autos sold in California are manufactured by our members.

We appreciate your commitment to work with the automobile industry on amendments to your AB 2057. Your personal involvement in negotiating a resolution of the differences between consumer representatives, the Attorney General's office and the automobile manufacturers was the major factor which secured agreement between the parties.

Again, I am pleased that we reached an accord on this matter and I look forward to working together on important issues in the future.

Sincerely,

Sarah C. Michael

Sarah C. Michael, representing the
Automobile Importers of America

cc: Members, Senate Appropriations Committee
Stephen Blankenship, Governor's Office

A-62

Item# 4

AB 2057 - FLOOR STATEMENT

CONCURRENCE IN SENATE AMENDMENTS

AB 2057 AMENDS CALIFORNIA'S "LEMON LAW" WHICH I AUTHORED IN 1982.

AS PASSED BY THE ASSEMBLY, THE BILL CREATED A PROGRAM IN THE BUREAU OF AUTOMOTIVE REPAIR TO CERTIFY THAT MANUFACTURER-SPONSORED ARBITRATION PROGRAMS ARE RUN FAIRLY, ESTABLISHED CRITERIA THE ARBITRATION PROGRAMS WOULD HAVE TO MEET IN ORDER TO BE CERTIFIED, REQUIRED THE AUTO MANUFACTURER TO PAY A FEE FOR EACH VEHICLE SOLD IN THE STATE IN ORDER TO PAY FOR THE CERTIFICATION PROGRAM, AND PROVIDED THAT IF A MANUFACTURER FAILED TO ESTABLISH A CERTIFIED PROGRAM, THE OWNER OF A "LEMON" WOULD BE AWARDED TRIPLE DAMAGES IF THE OWNER WINS A LAWSUIT AGAINST THE MANUFACTURER.

THE SENATE AMENDMENTS:

1) MODIFY SEVERAL OF THE CRITERIA AN ARBITRATION PROGRAM MUST MEET IN ORDER TO BE CERTIFIED.
2) DELETE THE PROVISION OF THE BILL THAT MAKES IT MANDATORY THAT A COURT AWARD A "LEMON" CAR OWNER TRIPLE DAMAGES IF THE OWNER WINS A LAWSUIT AGAINST THE MANUFACTURER AND THE MANUFACTURER DOES NOT PROVIDE A CERTIFIED ARBITRATION PROGRAM. INSTEAD, THE BILL NOW ALLOWS THE COURT COMPLETE DISCRETION AS TO WHETHER MORE THAN ACTUAL DAMAGES SHOULD BE AWARDED AND EVEN THEN ONLY UNDER SPECIFIED CONDITIONS. (THE SPECIFIED CONDITIONS ARE THAT (A) THE MANUFACTURER DOES NOT OFFER A CERTIFIED ARBITRATION PROGRAM OR (B) THE MANUFACTURER HAS REFUSED THE OPPORTUNITY TO REPLACE THE "LEMON" OR GIVE THE OWNER OF THE "LEMON" A REFUND.)
3) MAKE A $25,000 APPROPRIATION AS STARTUP COSTS TO IMPLEMENT THE FEE COLLECTION SYSTEM THAT WILL FUND THE CERTIFICATION PROGRAM.
4) DOUBLE-JOIN THE BILL TO AB 276 (EAVES).

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THE SENATE AMENDMENTS REMOVE ALL KNOWN OPPOSITION TO THE BILL. IT IS NOW SUPPORTED BY CHRYSLER, THE ATTORNEY GENERAL AND SEVERAL CONSUMER GROUPS. FORD, GENERAL MOTORS, HONDA AND THE AUTOMOBILE IMPORTERS OF AMERICA ARE ALL NEUTRAL.

I ASK FOR CONCURRENCE IN SENATE AMENDMENTS.

SUPPORT:

CHRYSLER MOTORS
ATTORNEY GENERAL
CALIFORNIA PUBLIC INTEREST RESEARCH GROUP (CALPIRG)
CONSUMERS UNION
MOTOR VOTERS

NEUTRAL:

FORD MOTOR COMPANY
GENERAL MOTORS CORPORATION
HONDA MOTOR COMPANY
AUTOMOBILE IMPORTERS OF AMERICA

OPPOSITION:

NONE KNOWN

ADMINISTRATION:

NO POSITION. THE DEPARTMENT OF FINANCE STATED THEY HAD "NO PROBLEMS WITH THE BILL" IN SENATE APPROPRIATIONS COMMITTEE.

September 8, 1987
4:00 p.m.

Sally:

Ms. Donna Selnick called in reference to your AB 2057. She indicated that at this point she remains neutral; pleased with some portions and very concerned about others.

The areas she has expressed grave concern over:

1) The requirement that there is only a substantial compliance as opposed to incompliance for minimum standards.

2) The requirement under Section 1794 (E3); the consumer must provide written notice to the manufacturer.

Sally, Ms. Selnick indicated that she has spoken to you in the past voicing her opinion on AB 2057. As an attorney she has been in and out of the courtrooms with caseloads which have to do with the lemon law.

Ms. Selnick does have many more concerns and would indeed like to discuss them further if time allows you to return this phone call. She did apologize for not calling you sooner; however, she was under the impression that AB 2057 was a two-year bill.

If you care to return this phone message she can be reached at 451-3687.

Mary/

A-65

mab2057

AB 2057 (Tanner)
9/9/87

ASSEMBLY COMMITTEE ON GOVERNMENT EFFICIENCY & CONSUMER PROTECTION
REPUBLICAN ANALYSIS

Ts(fa
AB 2057 (Tanner) -- LEMON LAW - PART II

Version: 9/4/87 Vice Chairman: Larry Stirling
Recommendation: Oppose Vote: 2/3 (Appropriation)

Summary: Requires Bureau of Auto Repair to "certify" arbitration panels created by the original "Lemon Law." Requires charge on new cars to pay for process. Also allows treble damages for any consumer who sues and wins against any auto manufacturer who does not have a "certified" arbitration panel; or treble damages for any consumer who proves that his arbitration panel willfully did not follow procedures laid out in this bill. Fiscal effect: Tax of up to $1 per new car sold in state. Estimated revenue: up to $300,000 a year.

Supported by CA Public Interest Research Group (CALPIRG) (Sponsor); Attorney General, Chrysler. Opposed by None on File (Auto Importers of America, FORD, GM are Neutral.) Governor's position: None on file.

Comments: The author claims the present voluntary "lemon law" process is not working. Her answer is to make it better by turning it over to the government -- that paragon of efficiency and consumer protection.

Today, if you have a "lemon," you can go to the manufacturer, who then convenes an arbitration panel. If the panel rules against you, you can still go to court. If the panel rules in your favor, the car company cannot appeal.

But the author is concerned that there is something inherently unfair about the manufacturer paying for the arbitration panel so she wants the government to "certify" that they are fair. (General Motors and virtually all the importers subcontract with the Better Business Bureau for arbitration.)

This bill will put the state in the business of "certifying" the procedures -- and new car buyers get to pay for this bureaucracy. The result could be the same problems we have with our legal system and our regulatory agencies -- endless litigation, lots of government employees and huge backlogs. Ironically this legislation comes at a time when the courts and the regulatory agencies are turning to voluntary arbitration to alleviate those problems.

In addition to creating a new bureaucracy, this bill also allows unsatisfied customers -- in certain circumstances -- to sue and collect triple damages (and attorney's fees). This is the section the auto companies originally objected to. But in the Senate, the author limited the awarding of triple damages, thus removing opposition from the auto companies. Nevertheless, the triple damage provision is onerous.

Auto company lobbyists admit that this law will cost the auto companies more money in legal and administrative expenses -- a cost that will be passed onto the consumer.

But they are neutral because they think opposing this bill would be bad P.R.

Assembly Republican Floor Vote -- 6/22/87
(54-20) Ayes: Bradley, Felando, Frizzelle, Grisham, Hansen, Kelley, Leonard, Leslie, Statham, Stirling
Noes: (20) All Other Republicans
Senate Republican Floor Vote -- 9/8/87
(39-0) Ayes: All Republicans
Consultant: John Caldwell

ROGER DICKINSON
ATTORNEY AT LAW
801 12TH STREET, SUITE 500
SACRAMENTO, CALIFORNIA 95814

(916) 443-2745

SEP 9 1987

September 9, 1987

HAND DELIVERED

Hon. Sally Tanner
California State Assembly
State Capitol
Sacramento, California 95814

Re: AB 2057

Dear Assemblywoman Tanner:

This letter is to inform you of my concern regard AB 2057 which would amend the Song-Beverly Consumer Warranty Act. The bill seeks primarily to improve the informal "third party" dispute resolution process in warranty disputes, particularly with respect to new motor vehicles. It is my request, on behalf of attorneys around the state who represent consumers in such disputes, that you take no further action regarding AB 2057 until a meeting can be arranged with you to discuss the bill.

At the outset, allow me to note that the late date of this letter is due to our mistaken understanding that AB 2057 had been made a two-year bill following its initial Senate Judiciary Committee hearing. Only late last week did I and my colleagues learn that the bill was, in fact, moving rapidly toward passage.

By way of background, I was a staff counsel with the Department of Consumer Affairs from 1977 to 1984 working in such areas as consumer warranty matters. Since August 1984, I have been in private practice. Approximately 80% to 85% of my cases involve warranty or sales tactics related disputes, and I currently have 45 to 50 active such cases. Just this summer, I have gone to trial against Ford on two lemon cases.

There are several positive and promising elements of AB 2057. The attempt to better define replacement or refund, the specification of standards for dispute resolution programs, and effort to institute stricter state review or certification represent steps in the right direction.

However, the bill also contains several provisions which reduce protections available under current law. They are, in summary:

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Substantial compliance: For continuing certification of dispute resolution programs only substantial compliance with the requirements of section 1793.2(e) is required. This language undesirably opens up the door to allow programs to fail to meet minimum standards, yet retain their certification.

Refund or replacement: In defining these terms, only incidental damages may be recovered beyond the refund or replacement itself. The definitions omit consequential damages such as interest on a loan or loss of use -- damages otherwise recoverable in any contract action. These provisions could cost individual consumers thousands of dollars each.

Notification of Dispute Mechanism Availability: This provision would only require "timely" notification of the availability of a dispute resolution mechanism to a consumer. It weakens the Federal Trade Commission requirement that specfic information be included with warranty materials at the time of sale.

Limits on awards: To obtain certification, a program need not provide for awards of consequential damages, attorney's fees, or "multiple" damages. Again, consumers could lose thousands of dollars if they accept even "favorable" decision or endure the time-consuming and uncertain judicial process.

Mileage subject to presumption: Under current law, the presumption regarding entitlement of a consumer to a refund or replacement of a new motor vehicle applies to the first year or 12,000 miles the consumer has the vehicle, whichever comes first. AB 2057 would change this standard to 12,000 miles on the odometer. This provision would mean a consumer who buys a demonstrator with 4,000 miles on it has the availability of the presumption for only 8,000 miles.

Remedies: The amendments to section 1794 are confusing, but would apparently eliminate any possibility of a civil penalty if there is a qualified dispute resolution program. Thus, even if the manufacturer acts maliciously, a consumer could not recover any civil penalty as long as the manufacturer uses a qualified program. Moreover, a consumer cannot recover any civil penalty if he or she does not make a written demand on the manufacturer for a refund or replacement. Such a requirement is grossly unfair -- again, even if the manufacturer has acted maliciously, it could not suffer a

civil penalty if the consumer does not know that a written demand must be made on the manufacturer. These amendments would also remove valuable bargaining chips for consumers to ensure that they get at least all their actual damages plus attorney's fees and costs reimbursed.

We remain grateful for your untiring efforts to improve the law both through your original legislation as well as AB 2057. We hope that you will take this opportunity to ensure that AB 2057 truly achieves the goals we all desire.

Please let me know if you wish to discuss this matter further.

Sincerely,

ROGER DICKINSON
Attorney at Law

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Assembly
California Legislature

SALLY TANNER
ASSEMBLYWOMAN, SIXTIETH DISTRICT
CHAIRWOMAN
COMMITTEE ON ENVIRONMENTAL SAFETY & TOXIC MATERIALS

COMMITTEES:
AGING AND LONG TERM CARE
ENVIRONMENTAL SAFETY & TOXIC MATERIALS
GOVERNMENTAL ORGANIZATION
LABOR & EMPLOYMENT
SUBCOMMITTEES:
HAZARDOUS WASTE DISPOSAL ALTERNATIVES
SPORTS & ENTERTAINMENT
TOXIC DISASTER PREPAREDNESS
MEMBER:
JOINT COMMITTEE ON FIRE, POLICE, EMERGENCY AND DISASTER SERVICES
GOVERNOR'S TASK FORCE ON TOXICS, WASTE & TECHNOLOGY
SELECT COMMITTEE ON LOW LEVEL NUCLEAR WASTE

September 14, 1987

Honorable George Deukmejian
Governor, State of California
State Capitol
Sacramento, California 95814

Dear Governor Deukmejian:

Assembly Bill 2057 is now before you for your consideration. I introduced the measure to address two problems that arose during the implementation of the original California "Lemon Law" which I authored in 1982.

First, the original legislation did not give adequate direction on the refunds that consumers should be given when they are sold automobiles so defective that they cannot be repaired after a reasonable number of attempts. Because of this, owners of "lemons" now do not receive a refund on sales tax and the unused portion of license and vehicle registration fees -- an amount that is often in excess of $1,000 or more -- when an auto manufacturer buys back a defective product. AB 2057 establishes a reasonable method for fairly compensating "lemon" car owners.

Second, California's original "Lemon Law" allowed for the use of arbitration programs sponsored by auto manufacturers to settle "lemon" cases, but did not establish a means of ensuring that these programs were operated fairly and impartially. Because of this, even though most auto manufacturers offer such arbitration programs, many consumers do not view them as an impartial means of settling easily and fairly disputes concerning defective vehicles. AB 2057 establishes a program in the Bureau of Automotive Repair to certify that arbitration programs are operated in accordance with principles that protect the rights of both the auto manufacturer and the consumer.

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AB 2057, in its enrolled version, has no known opposition. The measure is supported by Chrysler Corporation, the Attorney General, the California Public Interest Research Group, Consumers Union and Motor Voters. General Motors Corporation, Ford Motor Company, American Honda Motor Company and the Automobile Importers of America are all neutral on the bill. The support or neutrality of the auto manufacturers was achieved after amendments were made to the bill in the Senate Judiciary Committee.

Assembly Bill 2057, as it is before you, is a measure that updates consumer law in light of the past four years of experience in implementing the original California "Lemon Law". It accomplishes this by carefully balancing the rights of consumers against the rights and responsibilities of auto manufacturers. The bill is a moderate measure that moves this area of consumer law forward in a reasonable, but significant, manner.

I urge you to sign it into law.

Sincerely,

SALLY TANNER
Assemblywoman, 60th District

ST:acf

A-72

A E
D

A. E. Davis and Company

925 L Street, Suite 390 • Sacramento, CA 95814 • (916) 441-4140

September 15, 1987

Honorable George Deukmejian
Governor of California
State of California
Sacramento, CA 95814

Dear Governor Deukmejian:

I am writing on behalf of Chrysler Motors Corporation to urge you to sign into law AB 2057 by Assemblywoman Tanner.

This bill requires the various automobile manufacturers, foreign and domestic, to submit their consumer arbitration programs to the state for certification that they meet the standards and requirements of the California Song-Beverly Act and the Federal Trade Commission Rule #703 guidelines for such programs.

There has been much criticism of the present manufacturer programs in that some of them don't really address the problems that some vehicle buyers fact when they have purchased a vehicle that runs so poorly that it should be replaced or the buyer be given his or her money back.

Chrysler is proud of its consumer arbitration program that has resulted in a high degree of consumer satisfaction. Chrysler can easily meet the requirements of AB 2057 and does not fear the threat of paying a buyer triple damages which would only be levied against those manufacturers who do not offer a certified arbitration program.

AB 2057 is a good bill for the vehicle buying public and the manufacturers can live with it. The enactment of this bill should resolve the problems of the consumers and will buy peace for both sides for the foreseeable future.

Again, I respectfully request that you sign AB 2057 into law.

Cordially,

Al Davis

A. E. Davis

✓ cc: Assemblywoman Sally Tanner

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SEP 25 1987

JOHN K. VAN DE KAMP
Attorney General

State of California
DEPARTMENT OF JUSTICE

1515 K STREET, SUITE 511
P.O. BOX 944255
SACRAMENTO 94244-2550
(916) 445-9555

September 17, 1987

Honorable George Deukmejian
Governor, State of California
State Capitol, First Floor
Sacramento, California 95814

Attn: Bob Williams

Dear Governor Deukmejian:

AB 2057 (Tanner) - Warranties: New Motor Vehicles

The Attorney General's Office urges you to sign AB 2057.

This bill addresses a number of problems which have developed under the "lemon law" regarding defective new cars.

Enacted in 1982, the lemon law basically provides that if a manufacturer is unable to fix a defective new motor vehicle, then the buyer is entitled to either a replacement or reimbursement. One of the major problems to date with the law is that the mechanisms established by many manufacturers for resolving customer disputes have not complied with the minimum statutory criteria for such procedures. Moreover, even where the statutory criteria have been met poor decisions are often rendered because arbitrators are not trained in warranty law or do not have authority to order independent, expert examination of the vehicle.

AB 2057 will make the third-party dispute resolution process a more effective procedure for resolving these cases by: (a) authorizing the Bureau of Automotive Repair to approve the particular approach selected by each manufacturer; (b) requiring arbitrators to be familar with applicable warranty law; and (c) authorize arbitrators to obtain independent, expert inspection of the vehicle.

Additionally, the bill substantially strengthens other areas of the lemon law by: (a) permitting the buyer to request a refund of the purchase price instead of being required to accept a new vehicle from the manufacturer; (b) providing a specific formula for determining the buyer's liability for

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use of the vehicle prior to discovery of the defect; and (c) providing potential treble damages, in the court's discretion, in any action where the manufacturer breached the warranty and failed to provide a qualified third-party process for resolving the consumer's dispute. If there is an arbitration program, there would be no penalties.

We have now had five years of experience with the lemon law. AB 2057 address the major problems which have arisen to date, giving consumers who purchase defective new cars effective remedies against manufacturers who either will not or can not comply with their warranties. The bill is important to all of California's consumers.

We urge you to sign the measure.

Very truly yours,

JOHN K. VAN DE KAMP
Attorney General

ALLEN SUMNER
Senior Assistant Attorney General
(916) 324-5477

AS:er/ckm/lac

NEWS FROM ASSEMBLYWOMAN

SALLY TANNER

60th Assembly District

CONTACT: ARNIE PETERS
(916) 445-0991

FOR IMMEDIATE RELEASE
SEPTEMBER 29, 1987

Assemblywoman Sally Tanner (D-El Monte) today announced that her 1987 "Lemon Law" to protect California consumers who purchase defective new automobiles has been signed into law by the Governor. The new law will take effect January 1, 1988.

Assemblywoman Tanner stated, "I introduced Assembly Bill 2057 this year in response to comments I received from many consumers in the state that there are problems with the administration of the original "lemon law" which became state law in 1982. In particular, I have received complaints that arbitration programs set up to resolve new car disputes are not always fairly run. AB 2057 sets up a program under the Bureau of Automotive Repair to certify that manufacturer-run arbitration programs are operated properly and fairly."

The original California "lemon law" was enacted by AB 1787 (Tanner), following three years of effort by Assemblywoman Tanner to secure its passage by the Legislature. That bill specified for the first time that once a consumer has attempted to have the same defect repaired four times within the first year of ownership, or the automobile has been out of service for more than 30 days, the car is presumed to be a "lemon" and the owner is entitled to receive either a new car or a refund for the purchase price from the auto manufacturer, if the consumer first attempts to resolve the dispute through the use of a third-party dispute resolution process.

Before passage of the bill, California's warranty laws entitled the consumer to a refund or replacement if the car is not repaired after a "reasonable number of attempts". Because state law provided no standard for determining what was "reasonable", consumers were faced with the uncertainty of what constitutes a reasonable number of repair attempts.

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This year's bill makes the following revisions to the 1982 "lemon law":

-- It provides that a car owner may choose a replacement or a refund when the car is found to be a "lemon".

-- It requires that the manufacturer reimburse the owner of a "lemon" for sales tax, license and registration fees, and for incidental costs such as repair, towing and rental car costs.

-- It requires that the Bureau of Automotive Repair establish a program to certify that manufacturer-run arbitration programs are operated properly and fairly.

-- It provides that, if a consumer is forced to go to court to recover the cost of a "lemon", the court may award triple damages if it finds that the car is a "lemon" and the manufacturer either failed to offer a certified arbitration program or failed to comply with the decision of the arbitrator to buy back or replace the "lemon" car.

Assemblywoman Tanner concluded, "AB 2057 provides important additional protections for consumers who have the misfortune of purchasing a car which turns out to be a "lemon". The new law will result in better treatment of the consumer, ensure that owners of "lemons" get a fair hearing, and provide them with refunds when they are sold a "lemon" by an auto manufacturer."

End

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MARK F. ANDERSON
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OF COUNSEL
DONNA S. SELNICK

SACRAMENTO OFFICE
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SACRAMENTO, CA 95814
(916) 442-3603

MAY 2 1989

May 1, 1989

Assemblywoman Sally Tanner
State Capitol
Assembly Mail Room
Sacramento, CA. 95814

Re: Bureau of Automotive Repair Regulations; Needed Amendments to the Song-Beverly Warranty Act

Dear Assemblywoman Tanner:

As you may recall from previous correspondence, I along with others in my association specialize in warranty law suits. I have prosecuted over 150 such suits over the last 3 years.

I have been tracking the BAR regulation process and can find little merit in the draft regulations. Enclosed is a letter pointing out some of the deficiencies, which is self-explanatory. It appears to me that the BAR has taken the path of least resistance and drafted regulations to fit the existing Ford Consumer Appeals Board, the Chrysler board and BBB to some extent.

Oral Presentations to Boards

The BAR seems to believe that legislation is needed to require the boards to give consumers the opportunity to make oral presentations. You may wish to amend the Song-Beverly Act to make oral presentations a requirement at the consumer's option. This should be the minimum requirement for a fair hearing. It is elementary that due process requires it. Otherwise, the board personnel are easily influenced by the manufacturer and dealer, who are present.

Dealers on Boards

You may also wish to consider banning dealers from the boards. This practice stacks the deck. I know the boards say the dealers do not vote on warranty cases, but their presence has to have a chilling effect on the consumers' interests.

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Civil Penalty Computation

This suggestion is apart from the BAR process. In cases in which General Motors is sued and GMAC is the lienholder, GM has recently been paying off GMAC just before a case goes to trial for the sole purpose of trying to reduce the potential civil penalty to a small figure. GM argues that the payoff reduces the "actual damages" under Civil Code § 1794 thereby reducing the possible civil penalty. The section should be changed to read to "two times the amount of restitution due the buyer at the time the suit was instituted."

Attorneys' Fees' Claims by Dealers

As you know, Civil Code § 1794 (d), is an "one-way" fee statute which provides for mandatory fees for the buyer if he or she prevails. There is no provision for the manufacturer to get fees if it prevails nor should there be. Very few consumers would or could risk going to trial if the manufacturer could get fees (which could be $15,000 or more).

The problem is that Civil Code § 1717 currently allows for attorneys' fees in cases in which a party prevails "on a contract" and dealer purchase agreements do have an attorneys' fees clause. If the buyer loses as against the dealer (even though he wins as against the manufacturer), the dealer may come back at the buyer with a claim for attorneys' fees. This happened in a case I tried against GM; we won against GM but the jury made no award against the dealer. Even though GM had assumed the defense of the dealer, GM is now trying to get $17,000 in fees! The matter is pending and I expect to prevail on various theories because GM lost the case. However, if GM had won as well, my clients would owe the dealer a largue sum of money.

To make the one-way fee statute effective, I ask that you try to amend the Civil Code § 1794(d) to state that Civil Code § 1717 shall not apply in a breach of warranty case brought under the Song-Beverly chapter.

One would think this would be unnecessary since a breach of warranty case is not a straight contract action. However, in the A & M Produce Co. v. FMC Corp., 135 CA3d 473, 186 CR 114 (1982), the Court of Appeal held that a breach of warranty action was on the contract.

Thank you for your attention to this matter.

Sincerely,

Mark F. Anderson

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May 1, 1989

Martin B. Dyer, Chief
Arbitration Review Program
Bureau of Automotive Repair
State of California
1420 Howe Avenue, # 4
Sacramento, CA. 95825

Re: Draft Regulations of April 28, 1989

Dear Mr. Dyer:

As you may recall from previous correspondence, I represent owners of vehicles in warranty law suits against manufacturers and dealers. My interest in the content of the regulations stems from this involvement. If a program is to be certified, it should be fair to consumers. If it is not, yet it is certified, consumers will not be able to take advantage of the new civil penalty provision in the Song-Beverly Warranty Act.

The regulations continue to suffer from important deficiencies. In no particular order, I have these suggestions for changes to the regulations:

Meaningful Statistics Should Be Publicly Available

Section 3399.4 requires reports to the BAR which are detailed enough to be meaningful. In particular, the program must provide BAR data on the nature of the consumer's request (replacement or restitution etc.) and the decision as to each such category. This is essential to determining whether the program is working.

The problem is that there is no provision making this report available to public. Why not? I can conceive of no reason for these reports being publicly available. Without these reports, no one can gauge the effectiveness of the programs.

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In contrast, Section 3398.12, which is publicly available per the next section, does not have this detail. Section 3398.12 (e)(7) requires a quarterly "index" which requires statistics on the number of cases decided "adverse to the consumer." You can be sure this number will be very low because the present programs almost always at least "award" the consumer opportunity to take the vehicle back and try again. The present boards statistically call this a victory for the consumer when in fact it is not. (If the problem is not fixed, the warranty period is tolled anyway). So the index will be meaningless statistics, which is what the programs presently give to the FTC and the DMV.

Insulating the Arbitration Program from the Manufacturer

Section 3397.1 (a) and (b) require the manufacturer to fund and staff the program at sufficient levels and to take steps to ensure that the arbitrators and staff are sufficiently insulated from the manufacturer so that decisions and "performance of the staff" are not influenced by the manufacturer. Section 3398.1 (d) prohibits the program from assigning conflicting manufacturer duties to staff persons.

If the manufacturer uses its own employees to staff the program, is the manufacturer ipso facto in violation of these regulations? It would certainly seem so since the source of one's paycheck powerfully influences one's "performance." Why not just ban the practice of employees being staff?

As you know, Ford Motor Co. currently staffs its program with its own employees. In fact, there are no other staff employees. Would the Ford Consumer Appeals Board pass muster under these regulations?

Oral Presentations

Section 3398.8 (a)(1) states the program "may" allow an oral presentation by the consumer or his or her representative if "both the manufacturer and the buyer agree." This is the present situation with all the manufacturers. If Ford and Chrysler allow it, and they almost never do, they give the consumer a chance to meet the arbitrators and present their case.

Elementary considerations of due process of law require a notice, a hearing, and an opportunity to be heard. You have the opportunity to insert some due process in these procedures, but you haven't done it. Worse, you are putting into law that the manufacturers need not provide oral presentations.

Authority? All you need is due process of law in our state and federal constitutions and the FTC Reg. 703 (and your regulation's) requirement that the consumer be allowed to rebut evidence contrary to what the consumer presented. Without the oral presentation, this cannot effectively be done.

Dealers As Arbitrators

Incredibly, Section 3398.2 continues to allow dealers to serve as arbitrators on 3 or more person boards and to participate in the board decisions. The dealers are by nature anti-consumer and have no place on an arbitration board. Why permit the on these boards? No consumers will or should trust a board with a dealer on it.

This draft section could well have been written by Ford Motor Co. to make the regulations fit the Ford Consumer Appeals Board, which has two dealer members on its 5 person board.

Incidental Damages

Section 3398.5 (12) requires the program to investigate the existence and amount of incidental damages and then lists most of them. You should add to the list "loss of use," which is not an out of pocket item but is important to compensate people for being deprived of their vehicles for lengthy periods.

Loss of use is recognized under California law. The standard jury instruction on the subject is BAJI 14.22, which provides for "reasonable compensation to plaintiff for being deprived of the use of his automobile during the time reasonably necessary for the repairing the damage legally resulting from the accident. In determining that amount you may consider the reasonable rental value of the automobile for the period of time just mentioned."

Loss of use is available to persons deprived of their vehicles even though the vehicles are not commercial vehicles. Malinson v. Black, 83 C.A.2d 375, 381, 188 P.2d 788 1948). Recovery for loss of use may be made even when the plaintiff recovers full value of the goods. Reynolds v. Bank of America, 53 C2d 49, 345 P.2d 926 (1959). In other states in cases brought under the Magnuson Moss Warranty Act, the courts have upheld loss of use claims: Jacobs v.Rosemount Dodge-Winnebago South, 310 N.W.2d 71, 77-78 (1981); McGrady v. Chrysler Motors Corp., 46 Ill.App. 3d 136, 4 Ill. Dec. 705, 360 N.E.2d 818 (1977); Goddard v. General Motors Corp., 60 Ohio St.2d 41, 396 N.E. 2d 761 (1979); Murray v. Holiday Rambler, Inc., 83 Wis.2d 406, 265 N.W.2d 513 (1978).

Thank you for your attention to this matter.

Sincerely,

Mark F. Anderson

Bill No. AB 2057

	SUPPORT		OPPOSE
	CalPIRG	4/20/87	Ford Motor Company neutral
5/12/87	Consumers Union	4/23/87	General Motors Corporation neutral
5/2/87	Motor Voters	4/29/87	Automobile Importers of Americ. neutral
7/13/87	Attorney General's Office	~~5/4/87~~	~~Chrysler Motors~~
	chrysler Motors		Honda Motor Co. Neutral

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Assembly
California Legislature

SALLY TANNER
ASSEMBLYWOMAN, SIXTIETH DISTRICT
CHAIRWOMAN
COMMITTEE ON ENVIRONMENTAL SAFETY & TOXIC MATERIALS

COMMITTEES:
AGING AND LONG TERM CARE
ENVIRONMENTAL SAFETY & TOXIC MATERIALS
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GOVERNOR'S TASK FORCE ON TOXICS, WASTE & TECHNOLOGY
SELECT COMMITTEE ON LOW LEVEL NUCLEAR WASTE

June 3, 1987

Mr. Russ Blewett
Car Buying Magazine
120 No. Fairway Lane
West Covina, CA 91991

Dear Russ:

Enclosed is a brief article concerning my original "Lemon Law" (AB 1787) and the amendments to the law which I am proposing in legislaticn this year. Also enclosed is a photograph for your use.

If you would like further information, please contact me or Dorothy Rice of my staff (916/445-0991).

Thank you for your interest in the "Lemon Law" for new car buyers.

Sincerely,

Sally

SALLY TANNER
Assemblywoman, 60th District

ST:dcf

Enclosures

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CALIFORNIA'S "LEMON LAW" FOR NEW CAR BUYERS

In 1982 Assemblywoman Sally Tanner was successful in securing passage of California's "lemon law". The five-term El Monte Democrat fought for three consecutive years to get the bill through the state Legislature, and is now trying for the second year in a row to strengthen the "lemon law" with new legislation.

Assemblywoman Tanner explained, "I introduced California's original lemon law -- Assembly Bill 1787 -- in response to letters which I received from hundreds of consumers whose new cars wouldn't work properly, despite numerous repair attempts. The purchase of a new car is the second most significant purchase most people make in their lives and it is so important that consumers have some recourse when this major purchase turns out to be a "lemon". My bill specified for the first time that once a consumer has attempted to have the same defect repaired four times within the first year of ownership, or the automobile has been out of service for more than 30 days, the car is presumed to be a "lemon" and the owner is entitled to receive either a new car or a refund for the purchase price from the auto manufacturer."

Before passage of Tanner's "lemon law", California's warranty laws entitled the consumer to a refund or replacement if the car is not repaired after "a reasonable number of repair attempts". Consumers were therefore faced with the uncertainty of what constitutes a reasonable number of repair attempts, because state law provided no standard for determining what was "reasonable".

The 1982 lemon law also provided that before becoming eligible for car replacement or refund, the auto-buyer must first attempt to have the matter resolved by a third-party dispute resolution program if the car manufacturer has established such a program. If the buyer is dissatisfied with the outcome of the manufacturer's arbitration program, then the "lemon law" provisions come into play. In California, such arbitration programs are not state-run as is the case elsewhere in the nation. Ford and Chrysler have their own arbitration programs in California, and the Better Business Bureau and the Automotive Consumer Action Program -- a dealer-run organization known as AUTOCAP -- handle arbitration for a number of other manufacturers.

Many of the problems with today's "lemon law" have to do with the arbitration programs which must be used by consumers before the lemon law

presumption can be exercised. Car owners have complained that the programs are not always run in accordance with Federal Trade Commission guidelines, that consumers face delays in having their cases considered by arbitration panels, and that the arbitration panels themselves are biased in favor of the manufacturer.

In response to consumer concerns about the functioning of the 1982 lemon law, Assemblywoman Tanner has introduced Assembly Bill 2057. Tanner introduced similar legislation last year (AB 3611); last year's bill died in the Senate.

Assemblywoman Tanner noted, "This year's bill -- AB 2057 -- has two main goals: to make sure that owners of "lemon" cars will receive full refunds and to ensure that arbitration programs that review "lemon" cases are run fairly."

AB 2057 (Tanner) makes the following revisions to the 1982 lemon law:

-- It provides that a car owner may choose a replacement or a refund when the car is found to be a "lemon".

-- It requires that the manufacturer reimburse the owner of a "lemon" for sales tax, license and registration fees, and for incidental costs such as repair, towing and rental car costs.

-- It requires that the Bureau of Automotive Repair establish a program to certify that manufacturer-run arbitration programs are operated properly and fairly.

-- It provides that if a manufacturer does not provide a certified arbitration program and the consumer is forced to go to court to recover the cost of a "lemon", the court will award triple damages if the consumer wins the lawsuit, plus attorney's fees.

AB 2057 has cleared its first two legislative hurdles in the Assembly, but must be considered by additional committees before facing final legislative approval.

In conclusion, Assemblywoman Tanner stated, "California's original lemon law has now been in effect for over five years and we have substantial experience with its administration. This experience has shown us that aspects of the law need to be strengthened to assure that owners of "lemon" cars are treated fairly in the process. That is the goal of my legislation this year."

For more information about California's "lemon law", contact Assemblywoman Sally Tanner's Capitol office at 916/445-7783, or her district office at 818/442-9100.

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Assembly
California Legislature

SALLY TANNER
ASSEMBLYWOMAN, SIXTIETH DISTRICT
CHAIRWOMAN
COMMITTEE ON ENVIRONMENTAL SAFETY & TOXIC MATERIALS

COMMITTEES:
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SELECT COMMITTEE ON LOW LEVEL NUCLEAR WASTE

June 26, 1987

Mr. Russ Nichols
KHJ-TV Consumer Reporter
5515 Melrose Avenue
Los Angeles, CA 90038

Dear Russ:

As you can see from the attached press release, AB 2057 (the 1987 "lemon law") has passed the Assembly floor. It was a rough fight; I was only able to get the necessary 54 votes after the bill had been on call three times. It seems very likely that the bill will encounter difficulties in the Senate.

Any assistance you can provide will be greatly appreciated.

Sincerely,

Sally

SALLY TANNER
Assemblywoman, 60th District

ST:cf

Attachment

BGH

MOTOR VOTERS

P.O. BOX 3163
FALLS CHURCH, VA 22043
(703) 448-0002

Arnie

NEWS

BITTER BATTLE OVER AUTO LEMONS ENDS
FEDERAL TRADE COMMISSION FAILS TO GET AGREEMENT

After 9 months of negotiations, auto industry and consumer representatives walked away Tuesday without reaching an agreement.

The group, formed as an Advisory Committee to the Federal Trade Commission, was urged by the FTC to recommend a new rule governing auto industry arbitration programs.

The FTC says it will still issue a new proposed regulation.

Automakers crave relief from the states, which continue to improve legislation to aid owners of lemon cars. They sought a way to preempt state laws with a uniform federal rule. They also insisted on the FTC's "certifying" their programs, saying that would aid them in litigation with people who take them to court.

The consumer side adamantly opposed preemption of state laws.

The National Congress of State Legislators, National Association of Attorneys General, and National Association of Consumer Affairs Administrators, concerned about the possibility of federal preemption, all unanimously passed resolutions opposing it.

Next, automakers are expected to approach Congress for relief. They say they will pursue a law making dealers more accountable. Manufacturers blame dealers for "the bulk of" the cars they buy back.

Ford, Chrysler, General Motors, AMC, auto importers, and dealers were repesented in the negotiations. On the consumer side were Motor Voters, Center for Auto Safety, and Consumers Union; and state consumer protection officials from Massachusetts, New York, Connecticut, Maryland, Georgia, and New Mexico; and Connecticut Representative John Woodcock, author of Connecticut's lemon law. California sent an official to the final meeting, as did the U.S. Public Interest Research Group. Both voiced opposition to a federal attempt to preempt state lemon laws.

Since 1982, 41 states and the District of Columbia have passed lemon laws. Ohio, Alabama, and North Carolina have similar bills pending. Connecticut, Massachusetts, Vermont, New York, Texas, Montana, Washington, and DC have enacted "lemon law IIs" which provide state-run arbitration of disputes. Pennsylvania and California are considering related measures this session.

FOR FURTHER INFORMATION, CONTACT: ROSEMARY DUNLAP (703) 448-0002

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George R. Steffes

1121 L STREET SUITE 909

LEGISLATIVE ADVOCATES

SACRAMENTO CALIFORNIA 95814

TELEPHONE 916 444-6034

July 6, 1987

The Honorable Sally Tanner
State Capitol
Sacramento, CA. 95814

RE: Constitutional Problems with AB 2057 Relating to the Lemon Law

Dear Sally,

Attached for your review is a legal analysis of AB 2057 developed for the Automobile Importers of America (AIA). This concludes that AB 2057 is unconstitutional in its current form.

AB 2057 makes a number of procedural changes to California's Lemon Law which are supported by consumer groups. The bill also creates a new bureaucratic certification process for lemon law programs, and would impose treble damages and an award of attorney fees to consumers when they win a lawsuit against a manufacturer who fails to establish or maintain a certified lemon law arbitration program.

AIA feels that creation of a certification process and imposition of damages and attorney fees against manufacturers who don't have a certified program if a consumer wins in court are unwarranted. AIA is willing to work with you on making statutory changes to California's Lemon Law to achieve your objectives, but must continue to oppose AB 2057 as long as state certification and damages are contained within the bill.

We look forward to meeting with you on July 13 and hope that an agreement can be reached on AB 2057.

Sincerely,

Sarah C. Michael

Sarah C. Michael, representing the Automobile Importers of America

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LEGAL
ANALYSIS OF CALIFORNIA
ASSEMBLY BILL 2057

Prepared by
McCUTCHEN, BLACK, VERLEGER & SHEA
Los Angeles, California

June 30, 1987

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TABLE OF CONTENTS

I. INTRODUCTION

Pending Assembly Bill 2057 is unconstitutional because it violates a number of basic rights. Perhaps foremost, A.B. 2057 violates the right to jury trial: it compels automobile manufacturers either to forego their right to trial by jury in warranty disputes, or to be penalized if they stand on their right and choose not to establish arbitration mechanisms to resolve warranty disputes. In providing that manufacturers "may" establish such systems, but that the failure to do so will result in stiff civil penalties, A.B. 2057 is a transparent attempt to indirectly make manufacturers do that which they cannot be directly compelled to do. This is impermissible, because the constitution prohibits laws purporting to compel the waiver of the right to jury trial, and those purporting to penalize the exercise of a constitutional right.

As amended on May 13, 1987, A.B. 2057 provides that a manufacturer may establish a non-judicial dispute resolution process for warranty claims that is binding only on the manufacturer; requires the state Bureau of Automotive Repair to certify the process and to periodically inspect and audit it; and subjects manufacturers (1) to license revocation if they do not comply with decisions of the non-judicial dispute resolution process and (2) to civil penalties if they do not establish the process or if the process willfully fails to comply with the statutory requirements. (A.B. 2057 at 3-6, 17 (attached).)

The most important of these statutory requirements is that the process must be empowered to "[r]ender decisions which are binding on the manufacturer if the buyer elects to accept the decision." Failure to establish such a process gives rise to civil penalties (Proposed amendment to Civil Code § 1793.2(e)(3)(B) and § 1794(e); A.B. 2057 at 13 and 17). In an action for damages for breach of warranty, a prevailing consumer automatically recovers treble damages and attorney's fees for the manufacturer's failure to have maintained a binding non-judicial process:

> "In addition to the recovery of actual damages, the buyer shall recover a *civil penalty of two times the amount of actual damages and reasonable attorneys fees and costs* if the manufacturer fails to rebut the presumption [of non-conforming goods in] Section 1793.2, and either (1) *the manufacturer does not maintain a third party dispute resolution process which complies with subdivision (e) of Section 1793.2, or* (2) the manufacturer's qualified third party

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dispute resolution process willfully fails to comply with subdivision (e) of Section 1793.2 in the buyer's case."

(Emphasis added.)

This section imposes a penalty of double the compensatory damages *and* double the attorney's fees; a prior section of A.B. 2057 already awards attorney's fees and costs to a prevailing consumer. (Proposed amendment to Civil Code § 1794(d); A.B. 2057 at 16.) Another prior section, already law, also allows for *discretionary* civil penalties for a manufacturer's willful failure to comply with any provision of the Song-Beverly Act. (Cal.Civ.Code § 1794(c).)

A.B. 2057 is invalid legislation for each of the following reasons:

1. A.B. 2057 infringes on the right to jury trial because it (1) compels a party to participate in binding arbitration without also affording that party the right to *de novo* trial; and (2) imposes a civil penalty on the exercise of the right to jury trial.

2. A.B. 2057 contravenes the due process clause and the doctrine of separation of powers, because it impermissibly delegates judicial authority to a non-judicial body.

3. A.B. 2057 violates the Supremacy Clause of the U.S. Constitution because it imposes a dispute resolution system whose features are contrary to the policy judgments expressed under the federal Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.*

4. A.B. 2057 deprives manufacturers of equal protection of the laws because it affords consumers the fundamental right of access to the courts, but denies manufacturers that same access.

5. A.B. 2057 also is unlawful because it: a) permits the decision of an arbitrator to be admitted into evidence in a subsequent civil action even though California law precludes cross-examination of an arbitrator on the basis of his decision; b) in contravention of public policy allows civil penalties to be imposed vicariously if the arbitration process, not the manufacturer, willfully fails to comply with the statute; and c) imposes a double penalty for the same offense.

II. A.B. 2057 IS UNCONSTITUTIONAL BECAUSE IT INFRINGES ON THE RIGHT TO JURY TRIAL GUARANTEED BY THE CALIFORNIA CONSTITUTION

A. A MANUFACTURER HAS A CONSTITUTIONAL RIGHT TO JURY TRIAL UNDER CALIFORNIA LAW FOR A CLAIM FOR BREACH OF WARRANTY

In denying manufacturers a jury trial in warranty disputes, A.B. 2057 violates the state constitution's guarantee of a right to jury trial. As summarized by the California Supreme Court in *C&K Engineering Contractors v. Amber Steel Co., Inc.*, 23 Cal.3d 1, 151 Cal.Rptr. 323, 587 P.2d 1136 (1978):

> "The right to a jury trial is guaranteed by our Constitution. (Cal.Const., Art. I, § 16.) We have long acknowledged that the right so guaranteed, however, is the right as it existed at common law in 1850, when the Constitution was first adopted, 'and what that right is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact'."
>
> 23 Cal.3d at 8 (citation omitted).

Equally well settled is the principle that at common law the jury trial right existed only for actions "at law" and not for actions "in equity". *Id.* at 8. In determining whether an action is "at law" or "in equity" the courts look to the "gist" of the action:

> "As we stated in *People v. One 1941 Chevrolet Coupe, supra*, 37 Cal.2d 283, 'If the action has to deal with ordinary common-law rights cognizable in courts at law, it is to that extent an action of law. In determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case -- the *gist* of the action. A jury trial must be granted where the *gist* of the action is legal, where the action is in reality cognizable at law'."
>
> 23 Cal.3d at 9. (Emphasis in original.)

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The "gist" of a claim against an automobile manufacturer for breach of warranty is breach of contract. *See Keith v. Buchanan*, 173 Cal.App.3d 13, 19, 220 Cal.Rptr. 392 (1985). A "warranty is a contractual term concerning some aspect of [a] sale . . . ." 2 *Witkin*, Summ.Cal.Law (8th ed. 1973), Sales § 48, 1128. An express warranty is a contractual promise (*Keith, supra*, at 19-20; *Stott v. Johnston*, 36 Cal.2d 864, 866, 229 P.2d 348 (1951)), while an implied warranty is a contract term that arises by operation of law (*Keith, supra*, at 24-25; *Holmes Packaging Machinery Corp. v. Bingham*, 252 Cal.App.2d 862, 60 Cal.Rptr. 769 (1967)).

Under California law a claim for damages based on breach of contract undeniably is one for which there is a right to jury trial. *C & K Engineering, supra*, 23 Cal.3d at 9; *Raedke v. Gibralter Savings and Loan Association*, 10 Cal.3d 665, 671, 111 Cal.Rptr. 693, 517 P.2d 1157 (1974); *Abbott v. City of Los Angeles*, 50 Cal.2d 438, 462, 326 P.2d 484 (1958). There are reported cases as early as 1885 in which juries have tried claims for breach of warranty under contract principles. *See Hoult v. Baldwin*, 67 Cal. 610, 8 P. 440 (1885); *Greenleaf v. Stockton Combined Harvester & Agricultural Works*, 78 Cal. 606, 21 P. 369 (1889). Claims for breach of express or implied warranty continue to be tried by juries in recent times. *Fluor Corp. v. Jeppeson & Co.*, 170 Cal.App.3d 468, 216 Cal.Rptr. 68 (1985); *Putensen v. Clay Adams, Inc.*, 12 Cal.App.3d 1062, 91 Cal.Rptr. 319 (1970). Indeed, the issues relevant for determination in a breach of warranty case have been set forth in standard jury instructions prepared by the Committee on Standard Jury Instructions. *See* Bar Association Jury Instructions ("BAJI") Nos. 9.40-9.90.

Furthermore, it is apparent from the damage measures in the existing statute that the claims arising thereunder are those for which a jury is available. Civil Code § 1794 expressly provides for damages based on (1) the "revocation of goods" measure under Cal. Comm. Code §§ 2711 *et seq.* and (2) the "cost of repairs" measure under Cal. Com. Code §§ 2714 *et seq.* (Civ. Code § 1794 (a) (1) and (2).) These remedies are traditional breach of contract damages for which jury trials are available. Moreover, A.B. 2057 expressly refers to the buyer's remedy for breach of warranty as "restitution" or "replacement." (Civil Code § 1793.2(d)(2); A.B. 2057 at 10.) Restitution is a recognized form of legal action for which there is a right to jury trial. *Paularena v. Superior Court*, 231 Cal.App.2d 906, 914, 42 Cal.Rptr. 356 (1965). While "replacement" is analogous to the equitable remedy of specific performance, under the statute the manufacturer has the election of whether to provide restitution or replacement (Civ. Code § 1793.2(d)(2)). Further, the existence of an equitable remedy for a legal claim does not defeat a party's right to jury trial on the legal issues. *Escamilla v. California Insurance Guarantee*

Association, 150 Cal.App.3d 53, 57-58, 197 Cal.Rptr. 463 (1983); 3 *Witkin*, Cal.Proc. (3d ed. 1985), *Actions*, § 94, p. 120.

There are no cases that have challenged the right to jury trial for a breach of a warranty claim. In the one reported decision where a consumer went to trial for an obligation arising under § 1794 of the Civil Code, a jury trial was had. *See Troensegaard v. Silvercrest Industries, Inc.*, 175 Cal.App.3d 218, 220 Cal.Rptr. 712 (1985) (action for damages for willful violation of Civil Code § 1794). There is plainly a right to jury trial for an action based on the breach of express or implied warranty.

B. A STATUTE LIKE A.B. 2057 WHICH COMPELS A PARTY TO ARBITRATE A MATTER FOR WHICH THERE IS A RIGHT TO JURY TRIAL, BUT DOES NOT ALSO AFFORD THE RIGHT TO TRIAL *DE NOVO*, IS UNCONSTITUTIONAL UNDER CALIFORNIA LAW

The United States Supreme Court has unequivocally ruled:

> "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."
>
> *United Steelworkers of America, AFL-CIO v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

This principle has been adopted under California law. In *Wheeler v. St. Joseph Hospital*, 63 Cal.App.3d 345, 133 Cal.Rptr. 775 (1976), the court reversed an order compelling arbitration pursuant to an arbitration clause contained in an adhesion contract because the weaker party's consent was not clearly demonstrated. The court stated:

> "[W]e start with the basic premise that arbitration is consensual in nature. The fundamental assumption of arbitration is that *it may be invoked as an alternative to the settlement of disputes through the judicial process 'solely by reason of an exercise of choice by [all] parties'*."
>
> 63 Cal.App.3d at 355. (Citation omitted, emphasis added.)

Accord, Ramirez v. Superior Court, 103 Cal.App.3d 746, 163 Cal.Rptr. 223 (1980) (Legislature cannot constitutionally establish a presumption that a party who has signed an arbitration agreement has in fact waived the right to jury trial).

Consistent with these principles, under California law the right to jury trial cannot be infringed by a statute purporting to compel arbitration without the right of trial *de novo*. This principle was expressed in *Hebert v. Harn*, 133 Cal.App.3d 465, 184 Cal.Rptr. 83 (1982), which reviewed a California statute that makes arbitration compulsory for claims under $25,000, but preserves to either party the right of trial *de novo*. In *Hebert*, the court invalidated a local court rule that denied a trial *de novo* to a party who did not file a motion for trial after the arbitration hearing. In so doing, the court observed that the constitutionality of the statute depended on the existence of the *de novo* jury trial right:

> "In enacting judicial arbitration as an alternative to the traditional method of dispute resolution, *the Legislature, aware of the constitutional mandate of the right to jury trial, unconditionally provided any party could . . . elect [trial de novo]* upon making a request within twenty days of the award."
>
> 133 Cal.App.3d at 469. (Emphasis added.)

See also, Lyons v. Wickhorst, 42 Cal.3d 911, 915, 231 Cal.Rptr. 738, 727 P.2d 1019 (1986) (lower court erred in dismissing action of party who did not participate in compulsory arbitration).

Hebert cited with approval *In Re Smith*, 381 Pa. 223, 112 A.2d 625, *appeal dismissed*, 350 U.S. 858 (1955), where Pennsylvania's compulsory arbitration system was similarly upheld only because of its provision for *de novo* jury trial. *Id.* at 230. Subsequently, in *Blanton v. Womancare, Inc.*, 38 Cal.3d 396, 212 Cal.Rptr. 151, 696 P.2d 645 (1985), the California Supreme Court emphasized that "[o]pportunity for de novo trial" is the chief feature which distinguishes the compulsory arbitration program from "private arbitration conducted pursuant to the agreement of the parties. . . ." *Id.* at 401. Through these decisions, California has aligned itself with courts in other states which have held that the right to a *de novo* jury trial is necessary to make a compulsory arbitration program constitutional. *See Eastin v. Broomfield*, 116 Ariz. 576, 570 P.2d 744 (1977); *Grace v. Howlett*, 51 Ill.2d 478, 283 N.E.2d 474 (1972); *Attorney General v. Johnson*, 282 Md. 274, 385 A.2d 57, *appeal*

dismissed, 439 U.S. 805 (1978); *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977); *State ex rel. Strykowski v. Wilkie*, 81 Wis.2d 491, 261 N.W.2d 434 (1978).[1]

A.B. 2057 fails under these authorities because it coerces a manufacturer to participate in an arbitration to which there is no right of judicial review, much less a trial *de novo*, if the consumer wishes to bind the manufacturer. The purported choice given to manufacturers to not establish the arbitration process does not save the defect; while A.B. 2057 permits a manufacturer to avail itself of its jury trial right by declining to make available a non-judicial dispute resolution process, the statute punishes a manufacturer who so "elects" by imposing civil penalties in the event the manufacturer does not prevail at trial. Consequently, the statute is also unconstitutional because it impermissibly penalizes the exercise of a constitutional right.

C. THE CIVIL PENALTIES PROVISION OF A.B. 2057 IS UNCONSTITUTIONAL BECAUSE IT PENALIZES THE MANUFACTURER FOR EXERCISING THE CONSTITUTIONAL RIGHT TO JURY TRIAL

In California, "[i]t is well settled that to punish a person for exercising a constitutional right is 'a due process violation of the most basic sort.'" *In Re Lewallen*, 23 Cal.3d 274, 278, 152 Cal.Rptr. 528, 590 P.2d 383 (1979). This rule has

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1 Compulsory arbitration statutes that do not provide for trial *de novo* are likewise impermissible under the jury trial guarantee of the Seventh Amendment of the U.S. Constitution. (The Seventh Amendment, however, has not been made applicable to the States. *Crocker v. First Hudson Assocs.*, 583 F.Supp. 21, 22 (D.N.J. 1983).) The Supreme Court invalidated compulsory arbitration statutes in *Dorchy v. Kansas*, 264 U.S. 286 (1924) and *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522 (1923). These older decisions were more recently followed in *United Farm Workers v. Babbitt*, 449 F.Supp. 449 (D. Az. 1978), which invalidated an Arizona statute requiring an employer to submit to binding arbitration in order to obtain an injunctive order against his employees to prevent certain strikes. *Babbitt* was reversed and vacated on appeal by the Supreme Court on the grounds that the constitutionality of the arbitration provision had not been contested by the parties, thus making the decision an unnecessary advisory opinion, and because the statute was not necessarily compulsory because it afforded the employer other remedies aside from binding arbitration. 442 U.S. at 304, 305 (1979).

been applied to strike down legislation or judicial action which penalizes the exercise of the right to jury trial. The lead case is *Lewallen*, where the Supreme Court reversed a sentence in a criminal case because the trial court "gave consideration to petitioner's election to plead not guilty in imposing sentence." *Id.* at 279. This sentence effectively penalized the defendant for having availed himself of his jury trial right. Citing several decisions by the U.S. Supreme Court prohibiting punishment for the exercise of the right to jury trial, the Court held that the goal of expediting legal actions did not justify penalizing the exercise of the right to jury trial. 23 Cal.3d at 279.

The principle set forth in *Lewallen* has been consistently followed. In *People v. Justice*, 168 Cal.App.3d Supp. 1, 215 Cal.Rptr. 234 (1985), the court held unconstitutional a local court policy permitting the imposition of a harsher sentence on a defendant who pled not guilty and exercised the right to a jury trial. *Id.* at Supp. 4. ("This practice violates the right to trial by jury.") Similarly, in *In Re Javier A*, 159 Cal.App.3d 913, 973, 206 Cal.Rptr. 386 (1984), the court stated that it is an unconstitutional burden on the right to jury trial to offer a juvenile the option of non-jury trial in a juvenile court or jury trial as an adult in criminal court, since "forcing . . . this election would place an unconstitutional burden on the exercise of [the] right to trial by jury." *Id.* at 973, n.59.[2]

The aforementioned authorities apply squarely to the civil penalties imposed under A.B. 2057 on the exercise of the jury trial right. In *Hale v. Morgan*, 22 Cal.3d 388, 149 Cal.Rptr. 375, 584 P.2d 512 (1978) the Supreme Court affirmed that civil penalties are penal in nature. 22 Cal.3d at 405. *Accord, Tos v. Mayfair Packing Co.*, 160 Cal.App.3d 67, 79, 206 Cal.Rptr. 459 (1984). The court in *Silvercrest, supra*, confirmed that the civil penalties in Civil Code § 1794 are designed to punish, thus serving the same purpose as punitive damages. 175 Cal.App.3d at 226. The imposition of civil penalties to punish the exercise of the right to jury trial is equally as offensive as the punishment found impermissable in *Lewallen* and its progeny.

The punitive nature of A.B. 2057 is not saved by the authorities permitting the legislature to require payment of fees and costs which do not punish a party for exercising his right to jury trial. The distinction between punishment on the one hand, and fees and costs on the other, begins with *U.S. v. Jackson*, 390 U.S. 570

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[2] *See also People v. Black*, 32 Cal.3d 1, 9-10, 184 Cal.Rptr. 454, 648 P.2d 104 (1982) (Constitution forbids pressuring juvenile to forego jury trial rather than take risk that if he turns eighteen years old before sentencing, he may suffer imprisonment).

the rule prohibiting punishment for the exercise of the right to jury trial. The court there struck down a provision of the federal Kidnapping Act which permitted a jury to recommend the death sentence for a convicted defendant, but prohibited such penalty for a defendant who waived the right to jury trial or pled guilty. The court ruled as follows:

> "Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. [Citations omitted.] The question is not whether the chilling effect is 'incidental' rather than 'intentional'; the question is whether that effect is unnecessary and therefore excessive. In this case the answer to that question is clear . . . . [T]he goal [of limiting the circumstances under which a death penalty can be imposed] can be achieved without penalizing those defendants who plead not guilty and demand jury trial. . . . Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right. . . ."
>
> *Id.* at 582-83.[3]

Subsequent Supreme Court authorities have made clear that fees or costs are impermissible if they are imposed as a punishment for the exercise of the jury trial right. In *Fuller v. Oregon*, 417 U.S. 40 (1974), the Court upheld the constitutionality of Oregon's recoupment statute under which defendants convicted of criminal offenses could be required to repay the costs of court-appointed counsel. The Court reasoned that this state law involved no "penalty" on the exercise of the jury trial right:

> "This case is fundamentally different from our decisions . . . which have invalidated state and federal laws that placed a penalty on the exercise of a constitutional right. [Citations omitted.] Unlike the statutes found invalid in those cases, where the provisions 'had no other purpose or effect than to chill the assertion of constitutional rights by penalizing

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[3] *People v. Coogler*, 71 Cal.2d 153, 77 Cal.Rptr. 790, 454 P.2d 686 (1969), *cert. denied*, 406 U.S. 971 (1972) refuted a *Jackson* challenge to California's kidnapping statute, Penal Code § 209, on the ground that, unlike the federal Kidnapping Act, either the jury or the trial court could impose the death sentence on a convicted defendant. *Id.* at 160.

> those who choose to exercise them,' . . . Oregon's recoupment statute merely provides that a convicted person who later becomes able to pay for his counsel may be required to do so."
>
> *Id.* at 54.

The distinction between the impermissible imposition of a penalty and the permissible imposition of costs and fees was addressed by the Ninth Circuit in *U.S. v. Chavez*, 627 F.2d 953 (9th Cir. 1980), *cert. denied*, 450 U.S. 924 (1981). *Chavez* upheld a federal statute that required a taxpayer found guilty of willfully filing a false return to pay the costs of prosecution. The Ninth Circuit rejected a claim that the imposition of such costs was an impermissible infringement on the right to jury trial under *Jackson*, finding the court's analysis in *Fuller* to be more on point:

> "It must be emphasized that not every assertion that a statutory scheme has chilled the exercise of a constitutional right results in a finding of unconstitutionality. The Supreme Court, in post-*Jackson* decisions, has not enthusiastically embraced the 'chill' rationale articulated in *Jackson*. In *Fuller v. Oregon*, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974), the Court upheld an Oregon recoupment scheme which required convicted defendants who were indigent at the time of the criminal proceeding against them, but who subsequently acquired the financial means to do so, to repay the costs of their legal defense."
>
> 627 F.2d at 956.

The court concluded that the absence of any punishment arising from the imposition of such costs made the statute constitutional:

> "A defendant, prosecuted for willful failure to file a tax return, is not subject to a substantial risk of greater punishment because of the existence of the costs of prosecution provision. The provision does serve legitimate governmental purposes. We cannot say with any confidence that the costs of prosecution provision . . . does in fact penalize a defendant's exercise of his constitutional rights . . . . The presence of the mandatory costs of prosecution provision does not, with any degree of certainty, substantially increase the threatened punishment. Any encouragement of the waiver of

> constitutional rights that this provision may induce is substantially different from the pressures that undeniably existed in *Jackson*, and cannot be said to be an impermissible burden upon the exercise of constitutional rights."
>
> *Id.* at 957.

See also Ludwig v. Massachusetts, 427 U.S. 618, 627 (1976) ("Due process is violated only by the *vindictive imposition* of an increased sentence." (Emphasis added.))[4]

Fees and costs can be imposed without impermissibly burdening the jury trial right, but punishment cannot. The civil penalty provision to be added to Civil Code § 1794 is not a cost or fee; it is a punishment. First, it is denominated a penalty. Second, it more than covers costs. Third, as noted, the civil penalty provision already found in Civ. Code § 1794(c) -- permitting recovery of treble damages for any willful violation of the Song-Beverly Act -- has been held to perform the same function as punitive damages: to punish. *Silvercrest, supra*, 175 Cal.App.3d at 226-27. A.B. 2057 would make the same kind of civil penalty (only greater) mandatory in a certain class of cases -- those where the manufacturer insists on his right to jury trial. In short, A.B. 2057 would penalize the exercise of a constitutional right.

Moreover, the cases also provide that punishment in the form of punitive damages cannot be imposed if there has been no injury. Since a manufacturer has a right to jury trial in breach of warranty claims, the fact that he exercises that right cannot create legal injury to a consumer. Yet under proposed Civil Code § 1794(e), civil penalties tantamount to punitive damages would be imposed solely because a manufacturer has exercised the right to jury trial, even though the consumer already has been fully compensated; the civil penalties of § 1794(e) are only available to a consumer who has already prevailed and thus recovered all actual damages, costs and expenses under § 1794(d). This is tantamount to imposing punitive damages without any underlying actual damages, a tack forbidden by law.

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[4] Similarly, *Meyers v. Astoria Convalescent Hospital*, 105 Cal.App.3d 682, 164 Cal.Rptr. 495 (1980), a case involving civil penalties, upheld the constitutionality of a statute that permits a health care facility to pay a civil penalty within four days of receiving a citation rather than contest that citation at trial. The court held that this statute "is no more than a statutory offer of settlement of the citation at the earliest possible time in exchange for the least possible penalty," and was thus permissible. 105 Cal.App.3d at 688.

Punitive damages may not imposed absent actual injury The Supreme Court of California stated the rule applicable here in *Mother Cobb's Chicken Tea, Inc. v. Fox*, 10 Cal.2d 203, 204, 73 P.2d 1185 (1937):

> "The foundation for the recovery of punitive or exemplary damages rests upon the fact that substantial damages have been sustained by the plaintiff. Punitive damages are not given as a matter of right, nor can they be made the basis of recovery independent of the showing which would entitle the plaintiff to an award of actual damages. Actual damages must be found as a predicate for exemplary damages. This is the rule announced in many authorities."

Accord, *Esparaza v. Specht*, 55 Cal.App.3d 1, 6, 127 Cal.Rptr. 493 (1976) ("It is well settled in California that punitive damages cannot be awarded unless actual damages are suffered".)

By imposing a civil penalty that constitutes punishment for the exercise of a constitutional right, A.B. 2057 is unconstitutional.

III. A.B. 2057 IS UNCONSTITUTIONAL BECAUSE IT DELEGATES JUDICIAL POWER TO ARBITRATORS

A.B. 2057 also violates the Constitution because it impermissibly delegates judicial authority to non-judicial entities. Two provisions of the California Constitution bar any such attempt. The first, Article III § 3, provides that:

> "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

The second, Article VI, § 1, states that:

> "The judicial power of this State is vested in the Supreme Court, courts of appeal, superior courts, municipal courts, and justice courts. All except justice courts are courts of record."

The constitutional bar posed by these sections to delegation of judicial power has been consistently recognized by the courts. For example, *in Standard Oil Company of California v. State Board of Equalization*, 6 Cal.2d 557, 59 P.2d 119 (1936), petitioner sought a writ of certiorari to review a State Board of Equalization order imposing an additional assessment of retail sales tax. The Supreme Court raised sua sponte the issue of propriety of such review, concluding as follows:

> "Concisely stated, our conclusion that we are without authority or jurisdiction to entertain this proceeding or to issue the writ here sought, is based upon the established premises that a writ of certiorari. . .will lie only to review the exercise of judicial functions . . . *and that the legislature is without power, in the absence of constitutional provision authorizing the same, to confer judicial functions upon a statewide administrative agency of the character of the respondent.*"
>
> 6 Cal.2d 559. (Emphasis added.)

The Court based its conclusion on Article VI, § 1 of the Constitution. *See* 6 Cal.2d at 559-65.

California Supreme Court cases since *Standard Oil* have raised the delegation issue primarily in situations concerning the proper standard of judicial review of decisions of administrative agencies, and have emphasized the impropriety of delegation of judicial powers. For example, in *Laisne v. California State Board of Optometry*, 19 Cal.2d 831, 123 P.2d 457 (1942), appellant argued that he was entitled to *de novo* review of an order of the Board of Optometry revoking his certificate of registration to practice optometry. The Court first restated the doctrine that delegation of judicial power is unconstitutional under Article III, § 3 and Article VI, § 1 of the California Constitution:

> "The powers of the government of the state are divided into three separate departments -- the legislative, executive and judicial. (Article III, section 1, of the state Constitution.) State-wide judicial power may be exercised by only three *enumerated* courts, viz., the Supreme Court, the District Court of Appeal, and the superior courts. (Article VI, section 1, of the state Constitution.) . . .If, therefore, some agency with state-wide jurisdiction, other than one of the enumerated courts, without sanction by constitutional amendment, exercises or attempts to exercise judicial power, such action is in direct violation of the articles of the state Constitution cited above."
>
> 19 Cal.2d at 834-35 (Emphasis in original.)

The Court concluded that failure to accord the appellant *de novo* review of the agency proceeding would violate the bar to delegation of judicial functions. *Id.* at

835. *See also Drummey v. State Board of Funeral Directors & Embalmers*, 13 Cal.2d 75, 87 P.2d 848 (1939); *Bixby v. Pierno*, 4 Cal.3d 130, 93 Cal.Rptr. 234, 481 P.2d 242 (1971).

A.B. 2057 delegates judicial power because it gives arbitrators the power to issue binding decisions in warranty disputes and gives a state agency the authority to "certify" and "verify" a judicial process, functions traditionally left to the courts.

Resolution of disputes between private parties by making binding decisions is a judicial function which cannot be delegated to a non-judicial body. Thus, in *Jersey Maid Milk Products Co. v. Brock*, 13 Cal.2d 620, 91 P.2d 577 (1939), the Court struck down as unconstitutional a section of the Milk Stabilization Act authorizing the Director of Agriculture to determine the amount of damages due in disputes between producers and distributors of milk, and to "make an order directing the offender to make reparation and pay to such person complaining such amount on or before the date fixed in the order." 13 Cal.2d at 651. Similarly, in *Hustedt v. Workers' Compensation Appeals Board*, 30 Cal.3d 329, 178 Cal.Rptr. 801, 636 P.2d 1139 (1981), the Supreme Court struck down as unconstitutional a state statute granting the Worker's Compensation Appeals Board the power to issue "final" orders disciplining attorneys by temporarily or permanently prohibiting them from practicing before the Board. While limited judicial review of such orders was provided by the statute, the Court found that the review was insufficient to allow it to exercise its judicial functions and hence to remedy the unconstitutional delegation of the court's inherent authority. 30 Cal.3d at 339-40.

Numerous other California decisions which uphold delegations of authority emphasize the non-binding nature of the determinations involved and/or the availability of full judicial review. *See, e.g., Collier & Wallis v. Astor*, 9 Cal.2d 202, 70 P.2d 171 (1937) ("While a statute which makes the decision of arbitrators, or of an administrative officer, final and conclusive may not be sustained, if the statute gives to the parties the further right to appeal, or other procedure to carry the case before a regular judicial tribunal and have the issues there tried, it does not operate to deprive the parties of any constitutional right and is therefore valid"); *Cowell v. Clark*, 37 Cal.App.2d 255, 99 P.2d 594 (1940) (court held delegation of power to real estate commissioner was not unconstitutional because "no one of the provisions under attack purports to declare that any one of the administrative determinations of the defendant may not be reviewed by the courts"); *In re Shattuck*, 208 Cal. 6, 279 P. 998 (1929) (delegation of authority to State Bar constitutional where Bar's actions not final and court issues orders on Bar's decision); *Brydonjack v. State Bar*, 208 Cal. 439, 281 P. 1018 (1929) (same).

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A.B. 2057 empowers arbitrators to "[r]ender decisions which are binding on the manufacturer, if the buyer elects to accept the decision." Thus, the proposed amendment does what the authorities prohibit -- it removes from the judicial realm the resolution of disputes through binding decisions -- and hence is unconstitutional.

California decisions also demonstrate that certain matters traditionally adjudicated by the courts cannot be delegated, even where subsequent review by a judicial body exists. For example, in *Reaves v. Superior Court*, 21 Cal.App.3d 587, 99 Cal.Rptr. 156 (1971), petitioners sought a writ of mandate directing the San Joaquin County Superior Court to adopt new procedures for processing extraordinary writ petitions filed by inmates. Under the existing procedure, such petitions were reviewed initially by the presiding judge of the Superior Court, but then were forwarded to the district attorney for verification and/or development of information. The district attorney prepared a proposed order based on the facts, or, if the petition presented unusual facts, the presiding judge reviewed the matter and directed the district attorney to prepare an appropriate order. In either case, orders were reviewed and entered by the court. The court held that the County's procedures improperly delegated judicial power:

> "The question is not whether the district attorney is scrupulously fair in such matters. Rather, *the question is whether the trial court has abdicated its judicial responsibility by delegating this function to the district attorney.* We think this point is well taken regardless of the fact the respondent court declares in its affidavit that in every instance it exercises its own independent discretion in reviewing the petitions and the orders drafted by the district attorney."
>
> 22 Cal.App.3d at 596. (Emphasis added.)

In *Reaves*, it was the nature of the delegated activity itself rather than the lack of later judicial review which compelled the court to find an unconstitutional delegation of judicial function. *Cf. Esteybar v. Municipal Court for the Long Beach Judicial District of Los Angeles County*, 5 Cal.3d 119, 95 Cal.Rptr. 524, 485 P.2d 1140 (1971) (statute requiring consent of prosecutor before magistrate could hold defendant charged with a misdemeanor violated separation of powers); *People v. Tenorio*, 2 Cal.3d 89, 89 Cal.Rptr. 249, 473 P.2d 993 (1970) (requiring court to obtain district attorney's approval before striking prior convictions unconstitutional).

Like the situation in *Reaves*, judicial power under A.B. 2057 is improperly delegated in the first instance. The Bureau of Automotive Repair, an agency of the executive branch, is charged with the responsibility of certifying and auditing judicial processes. Arbitrators are charged with the responsibility of finding facts and, presumably, have the authority to determine questions of law. In *Reaves*, at least a judge gave the matter his independent review, yet the practice still was held unconstitutional. A.B. 2057 makes the same mistakes and should, for the same reasons, be held invalid.

IV. THE STATE STATUTE CONFLICTS WITH POLICIES EXPRESSED IN THE FEDERAL MAGNUSON-MOSS ACT

The Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.* ("Magnuson-Moss"), preempts A.B. 2057. Magnuson-Moss delegates to the Federal Trade Commission ("FTC") the responsibility for establishing standards for informal dispute resolution mechanisms. A.B. 2057, however, requires dispute resolution features that are contrary to those expressed by the FTC.

Any preemption analysis begins with the Supremacy Clause of the U.S. Constitution. Where federal and state laws conflict, federal law is supreme. A federal statute can preempt a state law in three ways. First, the federal law can expressly preempt state law. Second, federal law can occupy the field of regulation such that it is implicit that Congress meant to prevent states from regulating in the field. Third, federal law can implicitly preempt state law if state law actually conflicts with federal law. This last form of preemption exists if it is impossible to comply with both the state and federal statutes, or if the state statute stands as an obstacle to the full accomplishment of the objectives of Congress. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n.*, 461 U.S. 190, 203-04 (1983).

While Magnuson-Moss may not occupy the field, since it states that "[n]othing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law," 15 U.S.C. §2311(b)(1), nevertheless it implicitly preempts A.B. 2057 because of *actual* conflicts between the two statutes. Thus, A.B. 2057 contains state policy choices contrary to those reached by the federal government. The Court in *Chrysler Corporation v. Texas Motor Vehicle Comm'n*, 755 F.2d 1192, 1205-06 (5th Cir.), *reh'g denied*, 761 F.2d 695 (5th Cir. 1985), ruled that "[w]e think it plain that the preclusive effect of section 110 [of Magnuson-Moss] is limited to rules governing informal dispute resolution procedures created by private warrantors. . . ." 755 F.2d at 1206. A.B.

2057 contains exactly those rules governing informal dispute resolution procedures which the Court stated were precluded.

Rather than leaving to the states the authority to make rules in this area, Congress instead gave to the FTC authority to prescribe regulations to implement Congress' policy of encouraging informal dispute resolution mechanisms (15 U.S.C. § 2310(a)(1)):

> "The Commission shall prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this chapter applies. Such rules shall provide for participation in such procedure by independent or governmental entities."
>
> 15 U.S.C. §2310(a)(2).

Under this authority, the FTC has made its judgments about which requirements will encourage manufacturers to establish dispute resolution procedures, and which ones will not. Under A.B. 2057, however, the state has made *contrary* determinations in certain areas.

1. The Binding Nature Of The State Mechanism Conflicts With The FTC Determination That Such Mechanisms Should Not Be Binding

A.B. 2057 conflicts with Magnuson-Moss by providing for *binding* resolution of automobile warranty disputes. Thus, unlike Magnuson-Moss, A.B. 2057 provides that a qualified dispute resolution process must not only comply with the minimum requirements of the FTC (16 C.F.R. § 703 *et seq.*) but also must

> "(B) Render decisions which are binding on the manufacturer if the buyer elects to accept the decision."
>
> A.B. 2057, Sec. 2 at 13 (proposed amendment to Section 1793.2(e)(3)(B) of Civil Code).

However, the FTC in 16 C.F.R. § 703.5(j) has explicitly provided to the contrary:

> "Decisions of the Mechanism shall *not* be legally binding on any person."
>
> (Emphasis added.)

The FTC has stated explicitly that it made this determination because, in the Commission's judgment, it was the most likely way to fulfill Magnuson-Moss'

statutory charge to encourage manufacturers to establish warranty dispute resolution mechanisms:

> "Many consumer representatives stated that Mechanism decisions should be binding on the warrantor alone, because the warrantor is the party who has chosen the Mechanism as the forum for dispute resolution. The Rule presently requires the warrantor to act in good faith in deciding whether, and to what extent, it will abide by Mechanism decisions. Thus, an adverse Mechanism decision will have a far greater impact on a warrantor than it will on a consumer. The Commission is not persuaded that making this impact on the warrantor even greater would benefit consumers more than it would discourage warrantors from adopting Mechanisms."
>
> FTC Statement of Basis and Purpose, 40 Fed. Reg. at 60210-211.

Thus, in an area committed by Congress to the judgment of the FTC, A.B. 2057 has expressed a judgment contrary to that of the FTC.

2. The State Statute Conflicts With The Federal Policy Encouraging National Dispute Resolution Processes

In several ways A.B. 2057 conflicts with the national federal policy of encouraging manufacturers to establish dispute resolution mechanisms. It does so by creating the requirement that mechanisms be local. Thus, the bill vests authority in a state agency, the Bureau of Automotive Repair, requiring the Bureau 1) to determine if a dispute resolution mechanism should be certified; 2) to conduct a periodic review of the procedure; and 3) to investigate consumer complaints and, if necessary, recommend that the Department of Motor Vehicles commence license revocation hearings. In addition, A.B. 2057 vests in civil juries the authority to determine if a dispute resolution procedure willfully fails to comply with the FTC standards. Since a California agency *only* can regulate constitutionally within its own borders, *see Archibald v. Cinerama Hotels*, 73 Cal.App.3d 152, 159, 140 Cal.Rptr. 599 (1977), the only way a manufacturer could comply with the California statute is to have its resolution process operate only *within California*. But this requirement of *local* dispute resolution mechanisms directly conflicts with the determination made by the FTC to encourage national mechanisms.

Thus, in providing that oral presentations in a dispute resolution process only be optional (and then only if both parties agree), 16 C.F.R. § 703.5(f), the FTC concluded that the way to fulfill the statute's mandate of encouraging expeditious mechanisms was to encourage a variety of mechanisms, including *national* mechanisms:

> "It is recognized that several existing mechanisms operate at a national level and do all of their information gathering by telephone or mail. To require an opportunity for an oral presentation at a reasonable time and place would make it impossible for these mechanisms to achieve the expeditious settlement of disputes which is envisioned by Section 110(a) of the Act.
>
> * * *
>
> "Several witnesses suggested that an oral presentation should be allowed when the consumer requests, or when either party requests. These comments did not adequately support the view that the right to an oral presentation is essential at this informal level of dispute settlement. Since the need to foster a variety of Mechanisms, including national ones, is greater than the need for oral presentations at the behest of the parties, the Commission has retained this provision [as it is]."
>
> FTC Statement of Basis and Purpose, *supra*, 40 Fed. Reg. at 60209.

A.B. 2057, however, contradicts this determination of the FTC. Moreover, A.B. contradicts the unequivocal command of Magnuson-Moss which vests the *FTC* with authority to "review the bona fide operation of any dispute settlement procedure" and to take appropriate remedial action if it finds non-compliance with any of the FTC's rules. 15 U.S.C. § 2310 (a)(4). In preferring local determinations over those national judgments reached by Congress and the FTC, A.B. 2057 stands as an obstacle to the full accomplishment of Magnuson-Moss' objectives.

Congress commanded that the FTC be the entity to make judgments regarding the efficacy of dispute resolution mechanisms, and the cases clearly provide that "considerable weight should be accorded to an executive department's construction of a statute it is entrusted to administer." *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). *See also United States v. Shimer*, 367 U.S. 374, 383 (1961). Federal agencies implementing federal

law can preempt state action, just as Congress can. *Fidelity Federal Savings & Loan v. de la Cuesta*, 458 U.S. 141 (1982). A.B. 2057 conflicts with the FTC determinations, and thus is preempted.

V. THE STATUTE AFFORDS CONSUMERS AND MANUFACTURERS UNEQUAL TREATMENT IN REGARDS TO FUNDAMENTAL RIGHTS, AND THUS DENIES MANUFACTURERS THE EQUAL PROTECTION OF THE LAWS

A.B. 2057 provides that the decision in a dispute-resolution mechanism is binding on the manufacturer if the customer elects to make it so. (Civil Code § 1793.2(e)(3); A.B. 2057 at 7.) While parties to a voluntary arbitration may agree to be bound without the right of appeal, A.B. 2057 compels manufacturers to resort to a binding arbitration process through the imposition of civil penalties. (See Section I and II, *supra.*) This compulsion, and the inequality of the appeal process under the bill, violate constitutional guarantees of equal protection under the laws.

The equal protection clause of the United States Constitution provides:

> "No State shall ... deny to any person within its jurisdiction the equal protection of the laws."
>
> U.S. Const. amend. XIV, § 1.

The California Constitution provides:

> "A person may not be ... denied equal protection of the laws;
>
> "A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens."
>
> Cal. Const., Art 1, § 7.[5]

Under the equal protection clauses of the federal and California constitutions there is a basic inquiry: does the law in question treat similarly

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[5] This memorandum analyzes decisions under both the federal and California Constitutions because the equal protection clause of the latter has "independent validity" apart from the Fourteenth Amendment under California law. *Gay Law Students Ass'n v. Pacific Telephone & Telegraph Co.*, 24 Cal.3d 458, 469, 156 Cal.Rptr. 14, 595 P.2d 592 (1979). The California Constitution states explicitly that "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." Cal. Const. Art. I, § 24.

situated persons in a similar manner?[6] In examining this question, both federal and California courts traditionally analyze the equal protection right under a two-tier analysis. Under the first tier, if the legislation in question establishes a "suspect" distinction between classes, such as one based on race or national origin, or if a "fundamental right" (such as speech) is granted to one class of persons and denied another, the legislation is viewed under the "strict scrutiny" test. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 216-17 (1982); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); *Bobb v. Municipal Court*, 143 Cal.App.3d 860, 865, 192 Cal.Rptr. 270 (1983). When strict scrutiny analysis is applied, the statute is invalid unless the state can establish that it has a compelling governmental interest that is precisely served by the classification:

> "The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right.' With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest."
>
> *Plyler v. Doe, supra*, 457 U.S. at 216-17; *accord, Darces v. Woods*, 35 Cal.3d 873, 885-86, 201 Cal.Rptr. 287, 679 P.2d 458 (1984).

The second tier of analysis, employed where neither a suspect classification nor fundamental right is in question, is the "rational basis" test. Under this test, the presumption of constitutionality shifts; state or local legislation will be upheld unless the plaintiff can demonstrate that there is no rational basis for the distinction in the legislation. As the Supreme Court explained in *Vance v. Bradley*, 440 U.S. 93 (1979):

> "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial

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[6] *See, e.g., F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); *Purdy and Fitzpatrick v. State of California*, 71 Cal.2d 566, 578, 79 Cal.Rptr. 77, 456 P.2d 645 (1969).

> intervention is generally un varranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."
>
> 440 U.S. at 97.

Rational basis analysis is most often employed where the legislation at issue has regulated economic relationships, such as statutes involving the licensing of professionals. *See, e.g., Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Brandwein v. California Board of Osteopathic Examiners*, 708 F.2d 1466, 1470 (9th Cir. 1983).

A.B. 2057 violates the equal protection clause by infringing on fundamental rights, without compelling justification.

A. THE STATUTE DENIES ONLY MANUFACTURERS THE RIGHT OF ACCESS TO THE COURTS

A.B. 2057 violates the equal protection clause of the California constitution by denying automobile manufacturers their basic right of access to the courts. The California Constitution separately protects the right to a jury trial, Cal. Const., Art. I, § 16, and where a trial by jury is available, that right may not be denied by statute. *People v. Wardlow,* 118 Cal.App.3d 375, 384, 173 Cal.Rptr. 500 (1981). As the Court noted in *Byram v. Superior Court*, 74 Cal.App.3d 648, 654, 14 Cal.Rptr. 604 (1977), "[t]he right to trial by jury is a basic and fundamental part of our system of jurisprudence (citations omitted)," citing, *inter alia*, the California Constitutional provision guaranteeing the right to jury trial. Since an action for breach of warranty entitles the parties to a jury trial (*see* section IIA, *supra*), A.B. 2057 discriminates against manufacturers with regard to a fundamental right. Strictly scrutinizing A.B. 2057 yields no "precisely tailored" classification to serve a *compelling* state interest in making this discrimination.

B. THE STATUTE DENIES ONLY MANUFACTURERS THE OPPORTUNITY FOR JUDICIAL REVIEW

The second fundamental right impinged by A.B. 2057 is the right of equal judicial review. As noted above, the bill would allow the customer *de novo* judicial review of the decision of the dispute resolution process. With respect to the

manufacturer, however, there is no right to review if the customer elects to bind the manufacturer. This unequal treatment violates the equal protection guarantees.

The Supreme Court has held that, if an appeal process has been provided by the state, that process must be equally available to all parties. The leading case is *Lindsey v. Normet*, 405 U.S. 56 (1972). In *Lindsey*, an Oregon statute required defendants in a forcible entry and detainer ("FED") action to provide, in addition to a normal appeal bond, a second bond for the payment of twice the rental value of the premises during the pendency of the action. 405 U.S. at 76. The Court held that this double-bond requirement violated the equal protection clause of the Fourteenth Amendment by unfairly and arbitrarily burdening FED defendants. 405 U.S. at 76-77. Stated the Court, "[w]hen an appeal is afforded . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." 405 U.S. at 77.

Because A.B. 2057 establishes disparate opportunities of appealing the decision of an arbitrator in an automobile warranty claim, the bill impinges on the right to an equal opportunity of appeal, as set forth in *Lindsey*. Again, no compelling state interest justifies this unequal treatment. While the state may have an interest in ensuring that automobile warranty disputes are handled expeditiously through arbitration, the state can ensure that goal without denying to manufacturers their right to a jury trial or judicial review: the classification is not "precisely tailored" to accomplish its objective.

C. THE ONE DECISION APPLYING A LESSER EQUAL PROTECTION STANDARD FOR A TOTALLY DIFFERENT KIND OF LEMON LAW HAS NO APPLICATION HERE

One court has applied a "minimum rationality" standard in evaluating an equal protection challenge to a lemon law, but that decision has no application to an analysis of A.B. 2057. In *Chrysler Corp. v. Texas Motor Vehicle Commissioner*, 755 F.2d 1192 (5th Cir. 1985), Chrysler made two equal protection challenges to the Texas law: 1) that by providing for fines against a losing manufacturer pending the appeal of an administrative board's decision, the Texas statute treated manufacturers differently than purchasers; and 2) that in allowing purchasers the right to a *de novo* trial after the administrative process, but refusing to attach prejudice to the administrative decision if the consumer lost, the statute treated consumers and manufacturers differently, for manufacturers possessed no corresponding right to a lawsuit free from the prejudice attaching to the administrative decision. The Court rejected both arguments, the first because

Supreme Court of California
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Case Name: **NIEDERMEIER v. FCA US**
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

6/1/2021

Date

/s/Chris Hsu

Signature

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