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
VOLUME 7 OF 9, Pages 1769-2063 of 2617

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DEPARTMENT OF Consumer Affairs
1020 N STREET, SACRAMENTO 5
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July 19, 1989

JUL 28 1989

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

Dear Mrs. Tanner:

FTC Review of Rule 703 (Minimum Standards for Dispute Resolution Programs)

As you may know, the Federal Trade Commission has requested comment on whether it should revise Rule 703. One effect of such a revision could be to preempt state laws which impose requirements on Rule 703 dispute resolution programs which are different than those requirments contained in the Rule. California's recently enacted provision on qualified third party dispute resolution processes (Civil Code section 1793.2(e)(3)) could be subject to such preemption.

This department has submitted the enclosed comments in response to the FTC's request. Knowing of your continuing interest in this area, I am forwarding a copy of our comments for your information.

Please let me know if you would like further information on this issue.

Sincerely,

Michael A. Kelley

MICHAEL A. KELLEY
Director

Enclosure

STATE OF CALIFORNIA—STATE AND CONSUMER SERVICES AGENCY GEORGE DEUKMEJIAN, Governor

DEPARTMENT OF Consumer Affairs

(916) 445-4465

1020 N STREET, SACRAMENTO, CALIFORNIA 95814

July 14, 1989

Division of Marketing Practices
Federal Trade Commission
Washington, D.C. 20580

Ladies and Gentlemen:

Rule 703 Review

The California Department of Consumer Affairs has been involved actively with informal dispute settlement issues since the state's first lemon law bill (AB 2705 (Tanner)) was introduced in 1980. The department believes that Rule 703, despite its shortcomings, has indeed accomplished its purposes by laying the groundwork for industry-sponsored dispute settlement, and is today serving the interests of manufacturers and consumers adequately and effectively. The department therefore respectfully urges the Federal Trade Commission not to disrupt the partnership between state laws and Rule 703 that has developed since 1976.

In particular, the department urges the FTC not to endeavor to preempt state laws on informal dispute settlement. There is nothing in the text or legislative history of the Magnuson-Moss Act that would indicate that any of its purposes were to interfere with the states' efforts to administer justice to their citizens. Therefore, we are of the opinion that the FTC does not have the authority under the Magnuson-Moss Act to preempt state laws which contain different requirements than Rule 703. We believe that any such attempt would be an unwarranted encroachment into an area clearly reserved under both the Constitution and the Magnuson-Moss Act to the states.

Authority to Preempt

The FTC does not have the legal authority it would need to preempt the field of informal dispute resolution. It follows, in our view, that the FTC cannot create either uniform national standards, or a national certification program unless such certification were to accommodate state modifications to the

uniform standards and were to include monitoring and enforcement of the states' modifications.

The FTC does not have the legal authority it would need to preempt the field of informal dispute resolution because of Congress' limited authorization to the FTC in the Act. The Act only gives the FTC power to "prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty...." (15 USC § 2310(a)(2).) Congress also made it explicit that "Nothing in this title shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law." (15 USC § 2311(b)(1).) Only those state standards that relate to "labeling or disclosure with respect to written warranties or performance thereunder" are made inapplicable to written warranties that comply with the federal requirements. (15 USC § 2311(c)(1).)

In summary, Congress authorized the FTC to adopt only minimum regulatory requirements, and clearly intended to permit state supplementation of the federal provisions. As stated by the Eighth Circuit:

> "We find no 'clear statements' of Congressional intent to preempt here.... The fact that Congress gave some regulatory authority to the FTC over informal dispute resolution mechanisms fails, without any other supporting evidence, to demonstrate that Congress mandated national uniformity regarding such mechanisms.
>
> "The language, structure and history of the [Magnuson-Moss] Act emphasize its supplemental, rather than preemptive nature. Congress authorized the FTC to adopt only 'minimum requirements,' implying that it intended to leave room for further state regulation.... By explicitly delineating a limited area of preemption, Congress intended to permit supplemental state regulation in areas outside of that delineation. Congress could have easily included informal dispute resolution mechanisms in its list of areas specifically preempted, but it failed to do so. The savings clause... confirms Congress' intention to permit supplemental state regulation. Moreover, the legislative history supports the view that Congress found it necessary only to supplement present state law and not replace it." (Citations omitted.) (Automobile Importers of America, Inc. v. Minnesota (8th Cir. March 17, 1989) 871 F.2d 717, 720-721.)

The conclusion that Congress did not authorize the FTC to preempt the field is confirmed by the Act's legislative history, which states:

> "The expansion of the FTC's jurisdiction... is not intended to occupy the field or in any way preempt state or local agencies from carrying out consumer protection or other activities within their jurisdiction which are also within the expanded jurisdiction of the Commission." (H.R. Report No. 1107, 93rd Cong., 2d Sess. reprinted in 1974 U.S. Cong. & Admin. News, 7726.)

The difference is striking between the Act's authorization to the FTC and Congress' authorization to agencies in other cases where preemption has been found. (E.g., Ray v. Atlantic Richfield Co. (1978) 435 U.S. 151 (Congress intended uniform national standards and anticipated that the enforcement of federal standards would preempt state efforts; Secretary was charged with issuing all design and construction regulations he deemed necessary); Fidelity Federal Savings and Loan Association v. de la Cuesta (1982) 458 U.S. 141 (Board's regulation preempting state law must be within the scope of the authority delegated to it by Congress; in this case, Congress expressly contemplated and approved promulgation of regulations superseding state law, and the regulations expressly did so); compare, New York State Department of Social Services v. Dublino (1973) 413 U.S. 405 (no preemption where: (1) at the time the federal law was enacted, 21 states had laws on the same subject; (2) Court found that Congress desired to preserve supplementary state programs, not to supersede them; (3) the federal statute, on its face, was not designed to be all embracing; (4) the responsible federal agency historically did not consider the federal legislation to be preemptive; and, (5) coordinate state and federal efforts existed within a complementary administrative framework and in the pursuit of common purposes).)

These authorities and principles convince the department that the FTC cannot preempt the field of informal dispute resolution.

Need for Uniformity

In the department's view, while federal minimum standards have proven their worth, federal uniform national standards for dispute settlement mechanisms are not authorized by the Magnuson-Moss Act, and would be detrimental to consumers and manufacturers.

Consumer protection through warranty law (which includes dispute resolution) is an area that traditionally has been the responsibility of the states. Recognizing the states' traditional role, courts have avoided interpreting the Magnuson-Moss Act so as to significantly affect the balance between federal and state law. (E.g., Chrysler Corporation v. Texas Vehicle Commission (5th Cir. 1985) 755 F.2d 1192.)

Promulgation of national standards by the FTC clearly would affect this balance, which has been preserved since 1975. Such an effort by the FTC most probably would exceed its authorization under the Magnuson-Moss Act. (Automobile Importers, supra, 871 F.2d 720 (Eighth Circuit found no evidence that Congress wanted national uniformity regarding informal dispute settlement mechanisms).)

National standards would be a detriment to both manufacturers and consumers. As the plaintiff, Automobile Importers, argued to the Eight Circuit, one of the Act's goals is to enhance competition. The Eighth Circuit agreed with this contention, and concluded that the Act "attempts to break manufacturer lockstep and force manufacturers to enter into warranty competition." (Automobile Importers, supra, 871 F.2d 724.) Warranty competition includes the features of individual manufacturer's dispute resolution programs, and customer satisfaction with those programs.

It is beyond dispute that manufacturers (as well as consumers) benefit from vigorous competition. By promulgating uniform standards, the FTC would institutionalize the "manufacturer lockstep" which the Act attempts to break. This would decrease competition, to the detriment of manufacturers. In our view, this detriment ultimately would outweigh the short-term benefit to manufacturers of being able to comply with a single set of standards for dispute resolution programs.

The detriment to consumers of decreased competition is obvious. In addition, consumers would suffer erosion of their rights under state laws if uniform standards were promulgated. Presently, the warranty law of each state provides its consumers particular rights and protections. National standards for resolving warranty disputes necessarily would run roughshod over the rights of consumers in each state in order to achieve uniformity, to the detriment of consumers. Depriving consumers of rights also is contrary to Congress' purpose in enacting the Act. (Automobile Importers of America, Inc. v. State of Minnesota (D. Minn. 1988) 681 F.Supp. 1374, aff'd (8th Cir. 1989) 871 F.2d 717 (the Act's overriding intent was to enhance consumer protections, not to convey rights to manufacturers.)

Given the states' traditional regulation of consumer protection through warranty law, and Congress' purpose to permit supplemental state regulation in areas not explicitly preempted in the Act (Automobile Importers, supra, 871 F.2d 720-721), the department concludes that the present regulatory partnership between state law and Rule 703 is consistent with the intent of the Act and the original intent of the Rule.

National Certification

For the same reasons stated in the preceding section, the department believes that national certification of manufacturers' dispute resolution programs by the FTC would decrease competition and erode consumers' rights. In addition, the department believes that national certification would lead to decreased use of dispute resolution programs by consumers.

In our view, any national certification standards, by necessity, would be quite general, and therefore, not meaningful. As a practical matter, it would be virtually impossible for the FTC to take state modifications into account in its certification process. We also believe that adequate enforcement of national standards would be impossible.

The department recently has completed a preliminary regulatory package under which it would certify manufacturers' dispute resolution programs in California. Determining the specific criteria for certifying, monitoring, and decertifying the handful of programs which are expected to apply for certification in California was an immensely difficult task. Based on this experience, the department believes that creating meaningful, workable, and enforceable national criteria would be next to impossible.

Even if it were possible to develop such standards, the FTC would have to enforce them through verification of application information, monitoring, and decertification. In this era of austere spending on government programs, it is unlikely that effective enforcement would be possible. In the department's view, without adequate enforcement, national certification would not serve any legitimate purpose.

If the FTC were to promulgate general national certification standards which it could not enforce, it would serve only to create the perception of legitimacy and government oversight where there is none. Ultimately, this would lead to consumer distrust and avoidance of the programs certified. Clearly, such a result would frustrate a main purpose of the Act.

Conclusion

The department agrees with the Eighth Circuit that Congress intended to permit state supplementation of the Act and the Rule. We believe that states have correctly viewed such supplementation to be within their rights, and we observe that a "cooperative federalism" (see New York State Department of Social Services v. Dublino, supra) has developed since 1976.

Given this mature federal-state partnership and the prevailing philosophy of deregulation, we are skeptical of any proposal to preempt provisions of state law which impose different requirements on dispute resolution programs than those imposed by Rule 703.

We view such an idea as philosophically, practically, and legally unsound.

Sincerely,

MICHAEL A. KELLEY
Director

STATE OF CALIFORNIA—BUSINESS, TRANSPORTATION AND HOUSING AGENCY

NEW MOTOR VEHICLE BOARD
1507 - 21st Street, Suite 330
Sacramento, California 95814
(916) 445-1888

AUG 22 1989

August 21, 1989

Mr. Brian Scott Hoyt
2532 S. Garfield Place
Ontario, CA 91761

Dear Mr. Hoyt:

This is in response to your letter of July 24, 1989, concerning the California "lemon law". I will attempt to respond to your questions in the order they were listed in your letter:

Q: 1. What if any support can the average citizen expect from the government in trying to enforce the lemon law?
A: The Legislature in adopting the California lemon law did not extend jurisdiction for its enforcement to any government agency. I assume this was done with specific intent but would suggest that for an analysis of the legislative intent, you contact the Legislature.

Q: 2. Why was a law enacted that is nearly impossible for the average citizen to enforce against a large manufacturer with a financial base far too superior to make them equal under the law?
A: It could be said that any civil law would have the same argument for when a consumer files a legal action against a large corporation, the financial base of that corporation is almost always larger than that of the consumer.

Q: 3. Even though out of court settlements will not show up in court records; what is the percentage of cases successful in court under the lemon law?
A: This office does not maintain any statistics regarding civil court cases.

Q: 4. What is the number of cases filed under the lemon law? What is the number of cases that actually make it to court?
A: This office does not maintain any statistics regarding civil court cases.

Q: 5. How many people get so frustrated that they give up and just eat their loses?
A: This cannot be determined by our office.

Q: 6. How many manufacturers use their legal, financial and political strength to keep from having to right their wrong?
A: This cannot be determined by our office.

Q: 7. Could you please send me all information concerning the revisions to the lemon law?
A: Enclosed is a copy of legislation which resulted in the most recent amendments to the lemon law. One of the most significant of these amendments is the state certification of manufacturer's arbitration programs (by the Bureau of Automotive Repair within the California Department of Consumer Affairs) to ensure they are operating in compliance with state and federal laws.

Q: 8. Could you please contact a councilwoman (Ms. Tanner) who is the author of the lemon law, and request information concerning some of these questions? I wrote to her personally but have received no reply.
A: We are sending a copy of this letter to Assemblywoman Tanner.

Q: 9. Could you please send me all pertinent information regarding any lemon law cases that were successful in court?
A: This office does not maintain any statistics regarding civil court cases.

Q: 10. Could you please send me any information on any lemon law cases that made it to court that were similar to mine?
A: This office does not maintain any statistics regarding civil court cases.

I know this is not as responsive as you would have wished but our office is not privileged to most of the information you have requested. If you are in fact purusuing a lemon law action against Ford, your attorney would be in a better position to research case law in this area.

Sincerely,

AUDREY BEMOWSKI
Manager, Consumer Program

Enclosures

cc: Assemblywoman Sally Tanner ✓

C-74-90

RECEIVED
New Motor Vehicle Board
JUL 3 1 1989

July 24, 1989

DEAR MR. ROBERT G. SCHLEGEL;

MY NAME IS BRIAN HOYT; I WROTE TO YOU A YEAR OR SO AGO CONCERNING THE TROUBLE I WAS HAVING WITH MY CAR. IT WAS A 1986 FORD MUSTANG, AND I WAS HAVING PROBLEMS WITH A MANUFACTURER DEFECT. I WAS IN THE PROCESS OF INITIATING THE LEMON-LAW. I, AND MY LAWYER FOLLOWED ALL THE STEPS REQUIRED OF THIS LAW. IT IS NOW July 24, 1989 AND I AM NOW JUST GIVING MY DEPOSITION TO THE OPPOSING ATTORNEY'S. I REALIZE THAT THIS IS A CIVIL LAW AND NOT CRIMINAL, BUT THE LENGTH OF TIME CONSUMED SO FAR IS RIDICULOUS. THE MANUFACTURER HOLDS THE UPPER-HAND IN THIS CASE BECAUSE OF THEIR SHEER SIZE, AND FINANCIAL STANDING, AND THEY KNOW IT. I HAVE HAD TO DRIVE A DEFECTIVE CAR FOR OVER THREE YEARS NOW. IT HAS CAUSED A MULTITUDINOUS AMOUNT OF ADVERSITY. THEIR STRATEGY IS TO HARASS US AND WEAR US DOWN IN TIME. THEY ARE NOW IN THE POSITION OF TRYING TO INTIMIDATE US WITH THEIR LEGAL MIGHT, AND LOOP-HOLES. I FEEL THAT THIS IS NO LONGER A MATTER OF COMPENSATION, BUT A MATTER OF PRINCIPLE AS WELL. IT IS MY POSITION THAT THIS IS A GROSSLY UNFAIR, DEMORALIZING, AND IRREFREHENSIBLE SET OF CIRCUMSTANCES FOR MYSELF, AND ANYONE IN A SIMILAR SITUATION TO BE SADDLED WITH JUST TO RECEIVE WHAT IS JUSTLY OURS. BY OUR EXECUTION OF THE LEMON-LAW IT IS APPARENT THAT IT IS A WEAK LAW WITH ABSOLUTELY NO TEETH. THE MANUFACTURERS KNOW THIS AND USE IT TO THEIR ADVANTAGE. THERE IS ABSOLUTELY NO SUPPORT FOR THIS LAW BY ANY ELECTED OFFICIAL, GOVERNMENTAL AGENCIES, OR APPOINTED COMMISSIONS.

I HAVE HEARD ON THE NEWS THAT THERE WAS SOME MODIFICATION TO THE LEMON LAW, BUT THIS WILL NOT TAKE EFFECT FOR SEVERAL MONTH'S THUS OFFERING NO BENEFIT TO ME WHAT SO EVER. WHAT I WOULD CONSIDER A BENEFIT TO ME WOULD BE REPLY'S TO THE QUESTIONS LISTED ON THE FOLLOWING PAGE.

THANK-YOU IN ADVANCE
BRIAN SCOTT HOOT
2532 SO. GARFIELD PLACE
ONTARIO, CA. 91761
(714) 947-3675

1. WHAT IF ANY SUPPORT CAN THE AVERAGE CITIZEN EXPECT FROM THE GOVERNMENT IN TRYING TO ENFORCE THE LEMON-LAW?

2. WHY WAS A LAW ENACTED THAT IS NEARLY IMPOSSIBLE FOR THE AVERAGE CITIZEN TO ENFORCE AGAINST A LARGE MANUFACTURER WITH A FINANCIAL BASE FAR TO SUPERIOR TO MAKE THEM EQUAL UNDER THE LAW?

3. EVEN THOUGH OUT OF COURT SETTLEMENTS WILL NOT SHOW-UP IN COURT RECORDS; WHAT IS THE PERCENTAGE OF CASES SUCCESSFUL IN COURT UNDER THE LEMON-LAW?

4. WHAT IS THE NUMBER OF CASES FILED UNDER THE LEMON-LAW? WHAT IS THE NUMBER OF CASES THAT ACTUALLY MAKE IT TO COURT?

5. HOW MANY PEOPLE GET SO FRUSTRATED THAT THEY GIVE UP AND JUST EAT THEIR LOSES?

6. HOW MANY MANUFACTURER'S US THEIR LEGAL, FINANCIAL, AND POLITICAL STRENGTH TO KEEP FROM HAVING TO RIGHT THEIR WRONG?

7. COULD YOU PLEASE SEND ME ALL INFORMATION CONCERNING THE REVISIONS TO THE LEMON-LAW?

8. COULD YOU PLEASE CONTACT A COUNCILWOMEN; (MS. TANNER); WHO IS THE AUTHOR OF THE LEMON-LAW; AND REQUEST INFORMATION CONCERNING SOME OF THESE QUESTIONS? I WROTE TO HER PERSONALLY, BUT HAVE RECEIVED NO REPLY.

9. COULD YOU PLEASE SEND ME ALL PERTINENT INFORMATION REGARDING ANY LEMON-LAW CASES THAT WERE SUCCESSFUL IN COURT?

10. COULD YOU PLEASE SEND ME ANY INFORMATION ON ANY LEMON-LAW CASES THAT MADE IT TO COURT THAT WERE SIMILAR TO MINE?

I NEED ALL THE SUPPORT, AND INFORMATION THAT I CAN GET IN REGARDS TO MY CASE. ANY HELP THAT YOU CAN GIVE WOULD BE GREATLY APPRECIATED.

National Conference of State Legislatures

1050 17th Street
Suite 2100
Denver, Colorado 80265
303/623-7800

Samuel B. Nunez, Jr.
President Pro Tem
Louisiana Senate
President, NCSL

William T. Pound
Executive Director

MEMORANDUM

TO: Reviewers of Draft of Model Lemon Law

FROM: Brenda Trolin, Senior Staff Associate

DATE: September 17, 1989

RE: Draft of Model Lemon Law

Please find enclosed a draft of a model lemon law which was completed at the NCSL Annual Meeting in August. We appreciate your taking the time to review the draft and make comments.

The draft will be presented to the NCSL AOL Labor Committee in late October. For that reason, we ask that you submit comments by October 6 so that they may be included in the presentation.

With your help, we hope to complete a final model which can be considered in state legislatures in the 1990 sessions.

BT:el
Enclosures

MEMORANDUM

TO: NCSL Model Lemon Law Legislative Working Group

FROM: NCSL Model Lemon Law Technical Advisory Group

RE: Commentary on the History, Basis, and Significance of the Model Lemon Law

DATE: September 14, 1989

In 1982, Connecticut, and then California, passed the first Lemon Laws. Today, 46 states plus the District of Columbia have enacted Lemon Laws. All of these Lemon Laws define a "lemon", specify the relief the consumer is entitled to receive in the event a new motor vehicle is a "lemon", and provide for arbitration as a court-alternative where disputes can be resolved in a fair and expeditious manner.

The first Lemon Laws generally defined a "lemon" as a new motor vehicle with a nonconformity that still exists after four repair attempts, or with one or more nonconformites that results in the vehicle being out of service by reason of repair for a cumulative total of 30 days, within the first year or 12,000 miles of operation, whichever occurs first. If a new motor vehicle is a "lemon", the consumer is entitled to receive either a purchase price refund or a new replacement vehicle, less a reasonable offset for use. To obtain a refund or vehicle replacement, the consumer can go to court or, as a more feasible remedy, utilize an informal dispute settlement program established by the manufacturer if it operates in a fair and expeditious manner according to the requirements of Federal Trade Commission Rule 703.

There is a broad consensus among many state officials and even some industry members that this concept did not work. The coverage period of one year or 12,000 miles is too restrictive, particularly in light of industry assurances of warranty protection for up to several years on many components. The relief the consumer is entitled to receive is also subject to wide variation. Without specification as to what additional costs (e.g., sales tax, trade-in allowance, etc.) constitute a purchase price refund, and what amount constitutes a reasonable offset for use, many refunds are partial, and offsets for use excessive. Finally, mandatory resort by the consumer to a manufacturer-established, Rule 703 program is harmful. The programs ignored the state's lemon law standards which FTC Rule 703 does not explicitly address. Futhermore, programs offered by manufacturers purporting to comply with FTC Rule 703 often failed

to resolve disputes fairly and expeditiously, as required. The FTC ignored its own mandate under the Magnuson-Moss Warranty Act to investigate the operation of these programs. Only in the mid-80's when the Attorneys General in several states conducted evaluations of these programs did this situation come to light.

Today, over 20 states have substantially amended their Lemon Laws. In these states, the lemon law coverage period often exceeds one year or 12,000 miles. Purchase price refunds often include all collateral and incidental charges accrued by the consumer. Offset for the consumer's use of the vehicle is often limited to a reasonable amount per mile. Last, and perhaps most importantly, 14 states police the operation of manufacturer-established programs according to state and federal requirements, while 11 states offer their own state-run arbitration programs. Three of these states, Connecticut, Florida, and New York, both regulate the manufacturer-established programs and offer state-run arbitration.

As the 1980's end, the states find themselves trying to promote fair and effective arbitration of new motor vehicle disputes against a clear and present danger of federal preemption. Automobile manufacturers, for the most part, are reacting negatively to the states' filling of the public policy void created by federal inactivity. The automakers (GM is not a part of this effort) are currently petitioning both federal regulators and federal courts to preempt state regulation of manufacturer-sponsored arbitration programs.

If federal preemption is obtained by the automakers, existing state law would have the anomalous effect of compelling consumers who buy "lemons" to resort to arbitration programs which the states could not regulate. To prevent such a bizarre eventuality, the model law would transform federal preemption into a device that would automatically terminate the prior resort requirement. Consumers who buy "lemons" could go directly to the state-run arbitration program and to state courts for relief. Federal preemption would also trigger a provision in the model law requiring the state's chief legal officer to advise the legislature on whether manufacturer-sponsored arbitration programs, unregulatable through federal preemption, should be completely shut down.

Conversely, if federal preemption does not take place, the model law would react positively to automakers' calls for a reduction in compliance costs through more uniformity in state lemon law regulation, by authorizing and directing cooperation in all phases of regulation among states enacting the model law. As a constructive alternative towards the attainment of uniformity, the model law creates and specifies tailored state standards for operation of automaker-sponsored arbitration programs, and authorizes the states that enact these standards to engage in joint evaluation and certification of these programs. In effect, the model law tells the automakers:

> **"We'll help you offer arbitration programs that resolve lemon law disputes, and at reduced compliance costs, but we won't surrender our obligation to oversee the operation of your programs."**

Of the nation's 47 Lemon Laws, the recently amended Florida Lemon Law provides the best prototype from which to expand this concept. Arguably, the revised Flordia Lemon Law does not afford the consumer the same protections as Connecticut and New York or other states such as Massachusetts, New Jersey, Vermont, and Washington. However, the Florida Lemon Law has a number of distinct provisions concerning certification and administration of the arbitration process and the dissemination of information concerning lemon law rights. It also reflects extensive negotiations among consumer groups, state officials, and industry representatives. To date, it has not been challenged on constitutional grounds.

While the Florida Lemon Law provides an appropriate basis for a model Lemon Law, fine-tuning in several areas is still necessary. Based upon input from industry representatives, and a near consensus opinion of state officials, state legislators, and lemon law experts participating in the NCSL working group in Tulsa, the model Lemon Law contains 12 substantive changes from the Florida Lemon Law. The changes are:

1. The definition of consumer is redefined. In Florida, commercial use of the vehicle is arguably covered if the consumer is a person entitled by the terms of the warranty to enforce its obligations. However, the Florida law also defines consumer as a person who primarily uses the vehicle for personal, family, and household purposes. These criteria were viewed as too exclusive in that the livelihood for many individuals (e.g., florists, salespersons, etc.) is dependent upon reliable transportation, and were therefore eliminated.

2. The coverage period is expanded. In Florida, a consumer must first report the problem at issue within the first year or 12,000 miles of operation, whichever occurs first, to be eligible for lemon law relief. From the end of that period, the consumer then has twelve months to submit his claim to the state-run arbitration board. This period was viewed as too limited. In the model law, the coverage period runs until the first two years or 24,000 miles of operation, whichever occurs first. Only in the few instances when the manufacturer's warranty covers the problem for the first year or 12,000 miles of operation, whichever occurs first, does the consumer have to report the problem within that period. In the model law, the consumer respectively has 27 months and 30 months from the date of delivery to submit the dispute for arbitration before a state-certified program and the state-administered board.

3. The definition of a motor vehicle is redefined. Under the Florida law, a motor vehicle must be sold or leased in Florida and primarily operated on the streets and highways of Florida to be covered. Under various Lemon Laws, because of requirements concerning the place of purchase, the place of registration, and the place of use, some consumers are not covered by any Lemon Law, while other consumers are covered by two Lemon Laws. To be consistent with other commercial and contract law, the view was that the state where the vehicle was purchased or the lease agreement was entered into is the state in which lemon law coverage applies.

4. The definition of a nonconformity was changed and a definition of substantial impairment was created. Under the Florida law, a nonconformity is defined as a defect or condition that substantially impairs the use, value, or safety of the motor vehicle. The view was to remove the terminology concerning substantial impairment from the definition of a nonconformity and to define it outright. Under the model law, substantially impair means to render the motor vehicle unfit, unreliable, or unsafe for ordinary use, or to significantly diminish the value of the motor vehicle.

5. Repair attempts for serious safety defects are addressed. The Florida law does not specifically address serious safety defects. Arguably, under the Florida law, if a nonconformity is likely to cause death or serious bodily injury, it may be presumed that a reasonable number of attempts is fewer than three. The view was to make this recognition explicit in the model law.

6. The lessee's rights are expanded. In the event that a manufacturer repurchases a leased vehicle under the Florida law, the lessor recoups all costs plus 5%. However, the Florida law does not protect a lessee whose vehicle is deemed a "lemon," but whose lessor refuses to provide title to the vehicle until payment by the lessee of early termination costs. Some lease agreements contain early termination penalty costs so high that it is not practical for a lessee to bring an action against the manufacturer. The view was that the Florida law equitably compensates the lessor in the event that the manufacturer repurchases the vehicle. The model law retains the Florida law's compensation provisions. However, when a repurchase occurs, the model law terminates the lease agreement and prohibits the assessment of any early termination costs.

7. Regulations governing the operation of manufacturer-established programs are tailored to lemon law disputes. The Florida law references FTC Rule 703 as the regulation that governs warrantor performance and program operations from which substantial compliance is determined. FTC Rule 703 was adopted in 1975, pursuant to the Magnuson-Moss Warranty Act

and prior to the passage of Lemon Laws. The rule is oriented to dispute resolution for all products stemming from the manufacturer's warranty obligations. The view was to retain many of the rule's procedural requirements, but remove the reference to FTC Rule 703, and tailor other requirements to effectively address lemon law disputes. The procedural requirements under the model law approximate those under Rule 703, but add clarity to such issues as sufficient insulation from warrantor influence, use of technical experts, and prior notice of scheduled meetings to hear and decide disputes. The record-keeping and audit requirements under the model law approximate those under Rule 703, but differ significantly as to the type of information that is pertinent to compile, report, and evaluate.

8. The criteria concerning certification of manufacturer-established programs is vastly expanded. FTC Rule 703 has no provisions for certification or decertification of manufacturer-established programs. The Florida law has some criteria for certification (e.g., training of arbitrators in the provisions of the Florida Lemon Law; submission of copies of settlements reached, decisions rendered, and the annual audit; preparation of an annual report, etc.), but contains no provisions for decertification. The view was to expand the criteria for certification, establish time periods for certification review, create procedures for decertification, and promote joint certification among the states. The model law encompasses all of these concerns.

9. The scope of a manufacturer's appeal of a decision by the state-run board is slightly narrowed. Under the Florida law, a manufacturer has the right to a trial de novo, if it contests a decision rendered by the Florida New Motor Vehicle Arbitration Board. If the court finds that the manufacturer brought the appeal in bad faith or for purposes of harrassment, it shall double and may triple the amount of the total award. The view was that these provisions did not go far enough to discourage unwarranted appeals. Under the model law, the manufacturer is liable for double or treble damages if it brings an appeal without good cause. The model law also encourages parties to limit their appeals to the board's interpretation of a specific standard or application of a certain remedy by authorizing the parties to base their appeals for a trial de novo upon stipulated facts.

10. The manufacturer must brand the title of any vehicle repurchased as a result of a settlement, decision, or determination. Under the Florida law, the nonconformity of a vehicle returned as a result of a decision or determination under the law is to be disclosed to the subsequent buyer. The view was that this provision does not go far enough to protect the rights of subsequent purchasers. Since most "lemon" vehicles are disposed of across state lines, it is unlikely that such a disclosure will ever take place. Since

a large percentage of vehicles that would be deemed "lemons" in arbitration are bought back in settlements prior to arbitration, the next buyer is not protected. Branding the title was seen as a means to increase the likelihood that the next buyer would be made aware of the vehicle's prior condition. The model law incorporates this provision and requires the disclosure of the nonconformity to the next buyer for those vehicles bought back in settlements reached after a consumer has filed a claim with a manufacturer-established program or after the dispute has been approved for arbitration before the state-run board.

11. Only one state agency will administer the model law. Under the Florida Lemon Law, the Office of the Attorney General prepares various forms and materials to make consumers aware of their rights, promulgates all rules to implement the law, administers the state-run arbitration board, and enforces all lemon law violations. The Department of Agriculture mans the toll-free number where information on the Lemon Law is disseminated, screens consumer disputes for eligibility before the state-run arbitration board, and certifies manufacturer-established informal dispute settlement programs. The view was that the implementation of the law would be much more consistent and efficient if administered by one agency. The view was that certification of manufacturer-established programs should be performed by the Office of the Attorney General if joint certification in more than one state is to become a reality. The model law reflects these views.

12. The administration of the law is self-funded through a $5 fee imposed on all new motor vehicle sales and most long-term lease transactions. Under the Florida law, agency implementation of the law is funded through a $2 fee on all covered vehicles and through a $50 charge paid each by the consumer and the manufacturer when a dispute is approved for arbitration before the board. It was the view that a one-time assessment of $5, as under the Washington Lemon Law, would provide the kind of funding necessary for the agency to maximize the effective implementation of the law.

Respectively submitted,

Philip Nowicki _____ 9/14/89

Frank McLaughlin _____ 9/14/89

Evan Johnson _____ 9/14/89

STATEMENT OF JOHN WOODCOCK'S EXCEPTIONS TO
"MEMORANDUM TO LEMON LAW TASK FORCE"

As the author of the first and second "wave" of state lemon laws, I do, for the most part, support the draft model bill as an effective means of strengthening state lemon laws - in particular, I support the provisions strengthening state lemon laws against the clear and present threat of federal preemption. Further, even if the state arbitration board, created in the model, never receives one case for arbitration, its existence is essential to the needed, continuing improvement of industry-sponsored arbitration programs. I do have seven (7) drafting recommendations for the legislators of the Task Force:

1. Appeals from decisions of the state arbitration board should not be so broad as to encompass a trial "de novo". This has the potential to cripple the lemon law protection by putting the consumer back in the Courts.

2. The "not filed in good faith" defense (for car makers) found in Florida law (and in the model), is not justifiable, in my opinion and is not needed.

3. Consumers should have an unequivocal right to an oral hearing in car companies' arbitration programs (as recent state lemon laws provide). This is a major weakness in the model bill.

4. Car companies should not be permitted to delay the 40 day (decision) "clock", by saying that the consumer has not supplied enough data on the complaint. This is too arbitrary.

5. In some cases, the remedy of consequential damages should be obtainable.

6. The reference to "payment of a reasonable offset for use by the consumer" needs to be tightened, to prevent abuse by the industry.

7. The notice requirements (i.e. express mail or certified mail) for the consumer are overly burdensome - notice to the dealer or manufacturer by phone, in person or by regular mail should be sufficient.

This model law will be a major improvement to those states that need to have their lemon laws strengthened and also to those few states presently without lemon laws. It should not however, be used in any way by anyone to dilute or weaken those lemon laws that provide greater protection to the consumer.

9/14/89

DRAFT

NCSL: MODEL LEMON LAW
(SUMMARY)

1. The law applies to new or previously untitled motor vehicles acquired in this state on or after July 1, 1990. The law covers all sales and most long-term leases of automobiles, motor homes, and trucks with a gross vehicle weight rating of 10,000 pounds or less. Problems associated with the living facilities of a motor home are not covered by the law.

2. At the time of vehicle acquisition, consumers receive a publication prepared by the Office of the Attorney General which explains their rights and responsibilities under the Lemon Law. The publication also contains a toll-free number for the Office of the Attorney General where further information on the law can be obtained.

3. The law applies to any substantial problem covered by the manufacturer's warranty that still exists after four repair attempts made within the first two years or 24,000 miles of operation, whichever occurs first.* After three repairs attempts on the same substantial problem, the consumer must notify the manufacturer in writing to afford the manufacturer a final opportunity to fix the problem.

4. The law applies to all problems covered by the manufacturer's warranty resulting in the motor vehicle being out-of-service by reason of repair for a cumulative total of 30 days during the first two years or 24,000 miles of operation, whichever occurs first.* Upon the 20th day out-of-service, the consumer must inform the manufacturer of the situation in writing.

5. If the manufacturer is unable to correct a substantial problem within four repair attempts, or the vehicle is out-of-service by reason of repair for a cumulative total of 30 days, the consumer may receive a purchase price refund or new vehicle replacement. Such relief would also include collateral and incidental charges, less a reasonable offset for use.

* In the few instances when a problem is covered by the manufacturer's warranty for a shorter period, such as one year or 12,000 miles, the problem must first occur within that period for the law to apply. The law applies to all subsequent repairs performed on that problem within the first two years or 24,000 miles of operation, whichever occurs first.

6. If it is the manufacturer's contention that the vehicle is not a "lemon," the consumer can submit the dispute to arbitration. If the manufacturer has established an arbitration program certified by the Office of the Attorney General, the consumer must first submit the dispute to that program.

7. If the manufacturer did not establish a certified program, or if the consumer is dissatisfied with the decision of a certified program, or if a certified program failed to decide the dispute in 40 days, the consumer can utilize the state-administered New Motor Vehicle Arbitration Board, provided that the dispute is deemed eligible for arbitration by the Office of the Attorney General.

8. The New Motor Vehicle Arbitration Board has 60 days to decide the dispute. The Board must hear the dispute at a location that is reasonably convenient to the consumer. If the Board decides that the consumer has a "lemon," the consumer is entitled to a full refund or new vehicle replacement, less a reasonable offset for use. The losing party has 30 days to file a petition to appeal the decision with the court, otherwise the Board's decision is final.

9. After 40 days from the manufacturer's receipt of a Board decision in favor of the consumer, the Office of the Attorney General is authorized to seek imposition of a fine of $1,000 a day--up to twice the purchase price of the vehicle--on a manufacturer who has neither petitioned to appeal nor complied with the Board's decision.

10. If a manufacturer initiates a court appeal and loses, the manufacturer must pay the consumer's attorneys fees and $25 a day for each day beyond the 40-day period following the Board's decision. The court can double or triple the award made to the consumer if it determines the manufacturer's appeal was brought without good cause.

11. If as a result of a settlement, decision, or determination, the vehicle is deemed to be a "lemon," the law mandates that the manufacturer brand the title that the vehicle was returned pursuant to the Lemon Law of this state, and that the existence of the problem or problems at issue be disclosed to the next buyer at the time of sale.

12. Initially, $200,000 will be borrowed from general revenue to administer the law. Thereafter, operating costs will be self-funded through a $5 fee derived on every new motor vehicle sale or lease occurring on or after July 1, 1990. By June 30, 1991, the law requires the return of the $200,000 to general revenue from unencumbered funds.

GM

General Motors Corporation
Legal Staff

Telephone
313/974-1562
FAX: 313/974-0911

January 16, 1990

The Honorable Sally Tanner
California State Assembly
4146 State Capitol
Sacramento, CA 95814

Dear Madam:

Attached is a copy of a letter to the Bureau of Automotive Repair with respect to the certification of the GM/BBB Arbitration Program.

I was personally on hand in your office during the eleventh hour negotiations leading in 1987 to the "Tanner Compromise," which is summarized in GM's cover letter to Mr. Dyer. While the certification process has worked more slowly than most of us anticipated, I wanted you to see that GM has honored the commitment I made to you.

We look forward to operating an entirely successful program under the certification regulations of the revised law you sponsored.

Yours truly,

David A. Collins
Office of the General Counsel

DAC:cjc

Attachment

c: Martin B. Dyer

New Center One Building 3031 West Grand Boulevard P.O. Box 33122 Detroit, Michigan 48232
Facsimile Transceiver: 313-974-1983

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January 16, 1990

Martin B. Dyer, Chief
Arbitration Review Program
1420 Howe Avenue, Suite 4
Sacramento, CA 95825

Dear Mr. Dyer:

We are pleased to enclose the joint application of General Motors and the Council of Better Business Bureaus for certification of BBB AUTO LINE pursuant to the Arbitration Program Certification Regulations.

By this application, General Motors is fulfilling a commitment it made to Representative Sally Tanner in discussions during the 1987 legislative session, when the current lemon law provisions were under consideration. At that time, there was considerable frustration among California officials, including Representative Tanner, at the fact that not a single automotive manufacturer had sought to certify its private arbitration program under the previous lemon law. GM's reluctance to seek certification had been a function of concern that regulation might choke off the vitality of the private arbitration program we have sponsored now for more than ten years, at no expense to California taxpayers. Representative Tanner made the valid point, however, that manufacturers were only guessing at the effects of regulation, since no manufacturer had sought certification, even experimentally.

It was in this context that General Motors joined in a bargain that has come to be known as the "Tanner Compromise." For its part, General Motors expressed willingness to seek certification under revised criteria that would require modification of the private dispute resolution program GM sponsors in California. The program modification would give the same statutory standards which govern the courts a much larger role in the private, informal process we sponsor. Specifically, BBB volunteer-arbitrators would be required for the first time to consider statutory standards and would be permitted to apply those standards and to award the statutory remedies. We pledged to seek certification under criteria embodying these obligations, as long as the criteria also protected the right of arbitrators in our non-binding program to exercise flexibility with respect to the standards they ultimately chose to apply. Thus, while arbitrators would be required to consider statutory standards, they would retain the final authority to decide what standard, statutory or otherwise, to apply in any given case.

Representative Tanner kept her side of the bargain by introducing and securing passage of statutory amendments embodying the compromise. With the attached application for certification, General Motors is now fulfilling its part of the bargain. We are prepared to give the certification concept a fair test.

Operating with a certified program under the elaborate regulatory structure that has emerged in California will be an entirely new experience for General Motors. We have some misgivings as to whether the certification regulations, by placing so many detailed demands on the arbitration process, might jeopardize important features of the program, such as its traditional informality and its ability to attract lay arbitrators from the community to volunteer their time as decision makers. Going forward under the certification we now seek, General Motors will evaluate the costs and manageability of the changes, and we will examine whether these changes provide positive benefits to the owners of General Motors vehicles. In addition, because ours is such a competitive industry, we will be interested in the experience of other manufacturers who secure certification for programs that differ from the one we sponsor.

But the premise of our application is that the experience of offering a certified program will be a positive one for all concerned. As we assess our experience going forward, we hope to conclude that this expectation is fully justified and will warrant remaining certified well into the future.

In the meantime, we look forward to working closely with you to assure that the certification process succeeds.

Sincerely,

David A. Collins
Office of the General Counsel

DAC:cjc

c: Kendall J. Tough
Manager, Service Administration
General Motors Corporation

Robert E. Gibson
Senior Vice President and General Manager
ADR Division
Council of Better Business Bureaus, Inc.

J. CARO & ASSOCIATES

P.O. BOX 7486
LONG BEACH, CA 90807
(213) 428-6972

June 26, 1989

Assemblywoman Sally Tanner
State Capitol
Room # 4146
Sacramento, Ca. 95814

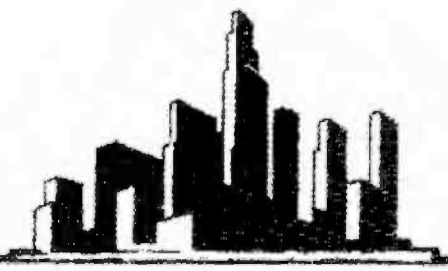
Dear Assemblywoman Tanner:

Enclosed please find a copy of my statements and arguments relevant to the July 21 hearing for the Adoption of Regulations under Title 16. I am somewhat concerned about the existing loop-holes within this proposed adoption, and would seek to remedy some of them.

My major concern is the verification of the training of arbitrators under the new regulations. Under the present draft there is no verification. This, as you can imagine, is the biggest loop-hole of all. Without verification of training and knowledge of the law and the program, how can we expect reasonable results? Please review my comments in this area and see if you agree.

Please keep up the good work in all of your endeavors.

Joseph J. Caro



June 26, 1989

Arbitration Review Program
Bureau of Automotive Repair, California Department of Consumer Affairs
1420 Howe Avenue, Suite #4
Sacramento, Ca. 95825
Mr. Tom Fitzgerald

Dear Mr. Fitzgerald:

The following statements are relevant to the proposed Adoption of Regulations (GCS #11346.5) Arbitration Program Certification. As an experienced arbitrator who has heard many cases under the present regulations, I would like to state the following concerns;

Part 2
Minimum Standards for Manufacturers

3397.3 Resolution of Disputes Directly by Manufacturers

It is my feeling that wording in subchapter (a) is too vague and can be easily misconstrued. The statement that "The manufacturer shall take steps reasonably calculated to make consumers aware", etc. would have a great deal more meaning when structured as;
The manufacturer shall "**provide the consumer information of the existence of an arbitration program**" at the time that the consumer experiences warranty disputes.

Under subchapter (b) the language should recognize "proper consumer notification" within the statement of not limiting the manufacturers option of direct redress. If the manufacturer is not required to adequately notify the consumer under subchapter (a) and attempts direct redress under subchapter (b) the consumer may not have been clearly made aware of their options of arbitration. This can also be addressed in the third line of subchapter (b) after the word "manufacturer" by including the words "**upon compliance with subchapter (a)** (including suggested amendments to that subchapter)

Part 3
Qualification, Selection and Training of Arbitrators

3398.2 (g) Arbitration selection process

Subchapter (g) clearly indicates that not all arbitrators are selected from a list, on a random basis. This may not be in the interests of impartiality. The proposed change would dictate that all arbitrators shall be selected from a list on this basis. **"Arbitrators shall be selected from a list of arbitrators"**, etc. Again, in the interests of fairness and impartiality I suggest that the consumer is sent the list of their arbitrator (s) prior to the hearing which can be so stated following the words "shall be on a random basis" with: **" The consumer shall be provided a list of the selected arbitrator (s) and their qualifications, at least five days prior to the scheduled hearing date".**

3398.2 (i) Arbitrator training

Perhaps the single most important aspect of a meaningful certification program is the knowledge of the law and the arbitration process, by the arbitrator. To this end I am suggesting that while the training of arbitrators is at the hands of each "program" the verification of such training should be upheld by the Arbitration Review Program. This can be accomplished by a mandatory testing process of all arbitrators wishing to act within a "certified" program. The testing would best take the form of a written test designed by the ARP and sent to all arbitrators undergoing a "program" training process. The completed tests would then be returned to the ARP offices where they will be scored and a numbered certificate issued to arbitrators meeting the basic criteria. Arbitrators will be directed to include this certificate number on all cases handled. Suggested wording to 3398.2 (i)
"The arbitration program shall provide each arbitrator" **seeking entry into a certified program** "with relevant training".
Added to the last line of this subchapter..**upon completion of training each arbitrator will undergo a written examination originated by ARP prior to any case assignments.**

3398.7 (f_3) Meetings to decide disputes

In cases involving the request for vehicle repurchase, experience shows that it is in the interests of both parties if the vehicle is inspected by the arbitrator in addition to any inspection of "independent experts". In the event of a repurchase award, the condition of the vehicle at the time of the inspection would be noted as well as overall mileage of that date. Statements in (f_3) could then be changed to read; **The obligation of** "the arbitrator or one or more of the arbitrators, **in cases requesting the repurchase of the vehicle,** "to personally inspect and test drive the vehicle".

3398.8 (a) Oral presentations by Parties to Disputes

No arbitration program should maintain the ability to deny the legitimate request by the consumer and the manufacturer for an oral hearing. I strongly recommend that the word "may" in line one of subchapter (a) be changed to **shall** which would then read; "The arbitration program **shall** allow an oral presentation by a party" etc.

It should also be noted that all Agreement to Arbitrate forms should clearly offer all modes of hearings available under the program and Rule #703 including: oral, written and telephonic. The choice of method should be agreed to by the parties and based on this agreement, implemented by the program in question.

It is my intent to make an oral presentation of these suggestions and comments on July 21, at the Los Angeles Hilton and Towers. In the event that I am not able to do so, please enter these statements into the record of that meeting.

Sincerely,

Joseph J. Caro

Lemon Bill file

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The Arbitration Review Program, Bureau of Automotive Repair, Department of Consumer Affairs proposes to adopt the following regulations in title 16 of the California Code of Regulations:

SUBCHAPTER 2. ARBITRATION PROGRAM CERTIFICATION

Part 1
General Provisions

3396. Scope, Purpose and Organization of Subchapter

(a) This subchapter is organized as follows:

Part 4

Certification Procedure

Appendix A

Application for Certification

(b) This subchapter prescribes the procedure to be used by automobile manufacturers and arbitration programs to request voluntary certification of arbitration programs established to resolve disputes involving written warranties on new motor vehicles (Part 4), and it prescribes the minimum standards

which will be used by the Bureau of Automotive Repair to determine whether an arbitration program qualifies for certification (Parts 2 and 3). [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements Bus. & Prof. Code §§ 9889.71. and 9889.72.]

(c) This subchapter is adopted pursuant to Chapter 20.5 of Division 3 of the Business and Professions Code (commencing with section 9889.70), which requires the Bureau of Automotive Repair to establish a program for certifying "third party dispute resolution processes," herein referred to as "arbitration programs" (Business and Professions Code section 9889.71), and to Chapter 1 of Title 1.7 of Division 3 of the Civil Code (commencing with section 1791), commonly referred to as the "Song-Beverly Consumer Warranty Act," which defines a "qualified third party dispute resolution process" as one that has obtained and maintains certification by the Bureau of Automotive Repair (Civil Code section 1793.2(e)(3)(I)). [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements Civ. Code § 1793.2(e)(3)(I), Bus. & Prof. Code §§ 9889.71 and 9889.72.]

(d) This subchapter is not intended to modify or affect the rules governing the content of written warranties as set forth in the Magnuson-Moss Warranty -- Federal Trade Commission Improvement Act, 15 U.S.C. sections 2301-2312, or the regulations adopted by the Federal Trade Commission pursuant thereto, including but not limited to the regulations at Title 16 of the Code of Federal Regulations, part 701, on disclosure of the terms and conditions of written warranties. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Clarifies that regulations do not violate 15 U.S.C. 2311(c)(1).]

(e) This subchapter is intended to complement and supplement the rules governing informal dispute settlement mechanisms as set forth in the Magnuson-Moss Warranty -- Federal Trade Commission Improvement Act, 15 U.S.C. sections 2301-2312, and the regulations adopted by the Federal Trade Commission pursuant thereto, including the regulations at Title 16 of the Code of Federal Regulations, part 703, on informal dispute settlement mechanisms. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements 15 U.S.C. 2311(b)(1), 15 U.S.C. 2311(c)(1), and Civ. Code § 1793.2(e)(3)(A).]

(f) If any provision of this subchapter or the application thereof to any person or circumstances is held invalid, the remainder of the subchapter and the application of such provision to other persons and circumstances shall not be affected thereby. [NOTE: Authority cited: Bus. & Prof. Code § 9889.74(f).]

3396.1. Definitions

(a) "Applicable law" means the portions of the Song-Beverly Consumer Warranty Act (Civil Code sections 1790-1795.7) that pertain to express and implied warranties on consumer products and remedies for breach; the portions of Division 2 (commencing with section 2101) of the Commercial Code that pertain to express and implied warranties and remedies for breach; the portions of sections 43204, 43205 and 43205.5 of the Health and Safety Code that pertain to automobile emissions warranties; Chapter 20.5 of Division 3 of the Business and Professions Code, pertaining to certification of dispute resolution processes, and this subchapter. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements Civ. Code §§ 1793.2(e)(3)(D) and (G).]

(b) "Applicant" means a manufacturer seeking certification of an arbitration program sponsored and used by the manufacturer, or an independent arbitration program and a manufacturer jointly seeking certification of an arbitration program used by the manufacturer. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements Bus. & Prof. Code § 9889.71(c).]

(c) "Arbitration program" means a "dispute resolution process," as that term is used in Civil Code sections 1793.2(e)(2)-(3) and 1794(e), and Business and Professions Code section 9889.70, established to resolve disputes involving written warranties on new motor vehicles. The term includes an "informal dispute settlement mechanism," as that term is used in 15 U.S.C. 2310(a)(1), and an "informal dispute settlement procedure," as that term is used in section 703.1(e) of Title 16 of the Code of Federal Regulations, established to resolve disputes involving written warranties on new motor vehicles. The term includes those components of a program for which the manufacturer has responsibilities under Part 2 of this subchapter. [NOTE: Authority cited: Bus. & Prof. Code § 9889.74(f). Reference: Bureau.]

(d) "Arbitrator" means the person or persons within an arbitration program who actually decide disputes. [NOTE: Authority cited: Bus. & Prof. Code

§ 9889.74(f). Reference: 16 CFR § 703.1(f), exact text, but substitutes "arbitrator" for "member," and "arbitration program" for "qualified process."]

(e) "Bureau" means the Arbitration Review Program of the Bureau of Automotive Repair. [NOTE: Authority cited: Bus. & Prof. Code § 9889.74(f). Reference: Based on Bus. & Prof. Code § 9889.70(a).]

(f) "Certification" means a determination by the Arbitration Review Program of the Bureau of Automotive Repair, made pursuant to this subchapter, that an arbitration program is in substantial compliance with Civil Code section 1793.2(e)(3), Chapter 20.5 of Division 3 of the Business and Professions Code, and this subchapter. [NOTE: Authority cited: Bus. & Prof. Code § 9889.74(f). Reference: Implements Bus. & Prof. Code §§ 9889.71 and 9889.72(b).]

(g) "Consumer" means any individual who buys or leases a new motor vehicle from a person (including any entity) engaged in the business of manufacturing, distributing, selling or leasing new motor vehicles at retail. The term includes a lessee for a term exceeding four months, whether or not the lessee bears the risk of the vehicle's depreciation. The term includes any individual to whom the vehicle is transferred during the duration of a written warranty applicable to the vehicle, and any other person who is entitled by the terms of the written warranty or under applicable state law to enforce the obligations of the warranty. The name of the registered owner or class of motor vehicle registration does not by itself determine the purpose or use. [NOTE: Authority cited: Bus. & Prof. Code § 9889.74(f). Reference: Based on Civ. Code §§ 1791(a), (b), (g), and 1795.4; and 16 CFR § 703.1(g); and Bureau (last sentence).]

(h) "Days" means calendar days unless otherwise stated. [NOTE: Authority cited: Bus. & Prof. Code § 9889.74(f). Reference: See reference to "calendar" days in Civ. Code § 1793.2(e)(1)(B).]

(i) "Independent automobile expert" means an expert in automobile mechanics certified in the pertinent area by the National Institute for Automotive Service Excellence (NIASE). The expert may be a volunteer, or may be paid by the arbitration program or the manufacturer for his or her services, but in all other respects shall be in both fact and appearance independent of the manufacturer. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements Civ. Code § 1793.2(e)(3)(F).]

(j) "Manufacturer" means a new motor vehicle manufacturer, manufacturer branch, distributor or distributor branch required to be licensed pursuant to Article 1 (commencing with section 11700) of Chapter 4 of Division 5 of the Vehicle Code. [NOTE: Authority cited: Bus. & Prof. Code § 9989.74(f). Reference: Based on Bus. & Prof. Code § 9889.70(c) and 16 CFR § 703.1(d).]

(k) "New motor vehicle" means a new motor vehicle which is used or bought for use primarily for personal, family or household purposes. The term includes a dealer-owned vehicle, a "demonstrator," and any other motor vehicle sold or leased with a manufacturer's new car warranty. The term does not include a motorcycle, or a motor vehicle which is not registered under the Vehicle Code because it is to be operated or used exclusively off the highways. The term "new motor vehicle" also includes the chassis and chassis cab of a motor home, and that portion of a motor home devoted to its propulsion, but does not include any portion of a motor home designed, used or maintained primarily for human habitation. A "motor home" is a vehicular unit built on, or permanently attached to, a self-propelled motor vehicle chassis, chassis cab or van, which becomes an integral part of the completed vehicle, designed for human habitation for recreational or emergency occupancy. 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. [NOTE: Authority cited: Bus. & Prof. Code § 9889.74(f). Reference: Based on Civ. Code §§ 1793.2(e)(4)(B) and (C), and Bus. & Prof. Code § 9889.70(b).]

(l) "Nonconformity" means any defect, malfunction or failure to conform to the written warranty. [NOTE: Authority cited: Bus. & Prof. Code § 9889.74(f). Reference: Based on 15 USC 2304(a).]

(m) "Substantial nonconformity" means any defect, malfunction or failure to conform to the written warranty which substantially impairs the use, value or safety of the new motor vehicle to the consumer. [NOTE: Authority cited: Bus. & Prof. Code § 9889.74(f). Reference: Civ. Code § 1793.2(e)(4)(A), exact text, but substituting language in 15 USC 2304(a) for "nonconformity."]

(n) "Written warranty" means any of the following:

(1) Any written affirmation of fact or written promise made by a manufacturer to a consumer in connection with the sale or lease of a new motor

vehicle which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect-free or will meet a specified level of performance over a specified period of time.

(2) Any undertaking in writing made by a manufacturer to a consumer in connection with the sale or lease of a new motor vehicle to refund, repair, replace, or take other remedial action with respect to the vehicle in the event that the vehicle fails to meet the specifications set forth in the undertaking, which written affirmation, promise or undertaking becomes part of the basis of the bargain. [NOTE: Authority cited: Bus. & Prof. Code § 9889.74(f). Reference: Based on 16 CFR § 703.1(c)(1) and (2); and Civ. Code § 1791.2.]

Part 2.

Minimum Standards for Manufacturers

3397. Purpose of Part

Parts 2 and 3 of this subchapter prescribe the minimum standards to be used by the bureau to determine whether an arbitration program which has applied for certification is in substantial compliance with Civil Code section 1793.2(e)(3), Chapter 20.5 of Division 3 of the Business and Professions Code commencing with section 9889.70, and this subchapter. Parts 2 and 3 implement Business and Professions Code sections 9889.70(c), which requires the bureau to establish minimum standards for arbitration programs, and section 9889.74, which requires the bureau to adopt regulations that are necessary and appropriate to implement Chapter 20.5. Part 2 prescribes the minimum standards that apply to the manufacturer or manufacturers who use the arbitration program, and Part 3 prescribes the minimum standards that apply to the arbitration program.

3397.1. General Duties

(a) The manufacturer shall fund and staff the arbitration program at a level sufficient to ensure fair and expeditious resolution of all disputes. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.3(a), first clause, exact text with minor changes.]

(b) The manufacturer shall take all steps necessary to ensure that the arbitration program, and

its arbitrators and staff, are sufficiently insulated from the manufacturer and the sponsor (if other than the manufacturer), so that the decisions of the arbitrators and the performance of the staff are not influenced by either the manufacturer or the sponsor. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.3(b), first sentence, exact text with minor changes.]

(c) The manufacturer shall comply with any reasonable requirements imposed by the arbitration program to fairly and expeditiously resolve warranty disputes, and shall perform all obligations to which it has agreed concerning the handling and resolution of disputes. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR §§ 703.2(f)(3) and (h), exact text with minor substantive changes.]

(d) The manufacturer shall comply with the provisions of both this part and Part 3 of this subchapter insofar as they impose obligations on the manufacturer. [NOTE: Authority cited: Bus. & Prof. Code § 9889.74(f). Reference: Bureau.]

3397.2. Disclosures by Manufacturer to New Car Consumers

(a) The manufacturer shall include together, either in its written warranty or in a separate section of materials accompanying each vehicle sold or leased in California, the following information about the manufacturer's arbitration program and how to use it:

(1) Either (A) a form addressed to the arbitration program containing spaces requesting the information which the program may require for prompt resolution of warranty disputes, or (B) a telephone number of the arbitration program which consumers may use without charge. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.2(c)(1), exact text with minor changes.]

(2) The name, address and telephone number of the arbitration program. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.2(c)(2), exact text with minor changes (addition of telephone number).]

(3) A brief description of the arbitration program's procedures. [NOTE: Authority cited: Civ.

Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.2(c)(3), exact text with minor changes.]

(4) The time limits adhered to by the arbitration program. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.2(c)(4), exact text with minor changes.]

(5) The types of information which the arbitration program may require for prompt resolution of warranty disputes. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.2(c)(5), exact text with minor changes.]

(6) If applicable, a statement of a requirement that the consumer resort to the arbitration program before invoking rights or remedies conferred by federal law (15 U.S.C. section 2310(a)(3)), together with a disclosure that if a consumer chooses to seek redress by pursuing other rights and remedies, resort to the arbitration program is not required. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Based on 16 CFR § 703.2(b)(3).]

(7) If applicable, a statement explaining that the manufacturer requires the consumer to use the arbitration program before invoking the presumption set forth in Civil Code section 1793.2(e)(1) (Civil Code section 1793.2(e)(2)), with a disclosure that if a consumer chooses to seek redress without asserting the presumption, resort to the arbitration program is not required. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements Civ. Code § 1793.2(e)(2).]

(8) A statement that if the consumer accepts the decision of the arbitration program, both the manufacturer and the consumer will be bound by the decision, and that the manufacturer will comply with the decision within a reasonable time not to exceed 30 days after the manufacturer receives notice of the consumer's acceptance of the decision. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements Civ. Code §§ 1793.2(e)(3)(B)-(C).]

(9) A statement that the decision and any findings will be admissible in any court action. [Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements Civ. Code, § 1793.2(e)(2).]

(b) The form described in subdivision (a)(1)(A) of this section may request any information reasonably necessary to decide the dispute including:

(1) The consumer's name, address and telephone number.

(2) The brand name and vehicle identification number of the vehicle.

(3) The approximate date of the consumer's acquisition of the vehicle.

(4) The name of the selling dealer or the location where the vehicle was acquired.

(5) The current mileage.

(6) The approximate date and mileage at the time the problem was first brought to the attention of the manufacturer or any of its repair facilities.

(7) A brief statement of the nature of the problem and whether the problem is continuing.

(8) The names if known of any other dealers where the vehicle was serviced.

(9) A statement of the relief that is sought. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR §§ 703.2(c)(1) and 703.5(e)(1).]

3397.3. Resolution of Disputes Directly by Manufacturer

(a) The manufacturer shall take steps reasonably calculated to make consumers aware of the arbitration program's existence at the time consumers experience warranty disputes. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.2(d), first sentence, exact text with minor changes.]

(b) Nothing contained in this subchapter shall limit the manufacturer's option to encourage consumers to seek redress directly from the manufacturer as long as the manufacturer does not expressly require consumers to seek redress directly from the manufacturer. The manufacturer shall proceed fairly and expeditiously to attempt to resolve all disputes submitted directly to the manufacturer. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.2(d), second and third sentences, exact text with minor changes.]

(c) Whenever a dispute is submitted directly to the manufacturer, the manufacturer shall, within a reasonable time, decide whether and to what extent it will attempt to satisfy the consumer, and shall inform the consumer of its decision. In its notification to the consumer of its decision, the manufacturer shall include the information specified in subdivision (a) of section 3397.2. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.2(e), exact text with minor changes.]

(d) Disputes settled after the arbitration program has received notification of the dispute shall be subject to sections 3398.9(b) and 3398.12(b). [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR §§ 703.5(d)(4) and 703.5(h).]

3397.4. Manufacturer's Duty to Aid in Investigation

(a) The manufacturer shall respond fully and promptly to reasonable requests by the arbitration program for information relating to disputes. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 703.2(f)(1), exact text with minor changes.]

(b) The manufacturer shall promptly respond to requests by the arbitration program for any pertinent documents in its possession or under its control, such as: (1) technical service bulletins; (2) recall or parts replacement notices; (3) U.S. Department of Transportation publications; (4) repair records for a particular vehicle; and (5) any other documents which it is reasonable that the manufacturer should provide. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements 16 CFR §§ 703.2(h) and 703.5(c).]

3397.5. Manufacturer's Duties Following Decision

(a) The decision shall be binding on the manufacturer if the consumer elects to accept the decision. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Civ. Code § 1793.2(e)(3)(B), exact text with minor changes.]

(b) The manufacturer shall perform any decision of an arbitration program within the time prescribed by the decision, which shall be a reasonable time not to exceed 30 days after the

manufacturer is notified that the consumer has accepted the decision. Delays caused by reasons beyond the control of the manufacturer or its representatives, including any delay directly attributable to any act or omission of the consumer, shall extend the period for performance, but only while the reason for the delay continues. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: First sentence, Civ. Code § 1793.2(e)(3)(C), exact text with minor changes; second sentence, implements Civ. Code § 1793.2(b).]

(c) When the decision of the arbitration program provides that the nonconforming motor vehicle be replaced or that restitution be made to the consumer, the manufacturer shall either replace the vehicle if the consumer consents to this remedy or make restitution, and shall do so in accordance with Civ. Code § 1793.2(d)(2)(A), (B) and (C). [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Based on Civ. Code § 1793.2(e)(3)(E).]

(d) The manufacturer shall not attempt to negotiate a settlement with the consumer between the time a decision of an arbitration program is disclosed to the manufacturer and the time the decision is disclosed to the consumer. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements Civ. Code § 1793.2(e)(3)(B).]

Part 3

Minimum Standards for Arbitration Programs

3398. Purpose of Part

Part 3 of this subchapter prescribes the minimum standards that apply to arbitration programs. It includes requirements which must be observed by the arbitration program, and requirements that must be observed by the manufacturer or manufacturers who use the program.

3398.1. Organization of Arbitration Program

(a) The arbitration program shall be funded and competently staffed at a level sufficient to ensure fair and expeditious resolution of all disputes. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.3(a), first clause, exact text with minor change.]

(b) The arbitration program shall not charge consumers any fee for use of the program. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.3(a), second clause, exact text with minor change.]

(c) The manufacturer, and the sponsor of the arbitration program (if other than the manufacturer), shall take all steps necessary to ensure that the arbitration program, and its arbitrators and staff, are sufficiently insulated from the manufacturer and the sponsor, so that the decisions of the arbitrators and the performance of the staff are not influenced by either the manufacturer or the sponsor. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.3(b), first sentence, exact text with minor changes.]

(d) Steps necessary to insulate the arbitration program from influence by the manufacturer or sponsor shall include, at a minimum (1) committing funds in advance, (2) basing personnel decisions solely on merit, and (3) not assigning conflicting manufacturer or sponsor duties to program staff persons. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.3(b), second sentence, exact text with minor changes.]

(e) Steps necessary to insulate the arbitration program from influence by the manufacturer or sponsor also shall include steps necessary to insulate the program's arbitrators from influence. At the very least, no employee, agent or dealer of the manufacturer shall communicate directly or otherwise participate substantively regarding the merits of any dispute with the arbitrator, except as permitted by section 3398.8. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(H), Bus. & Prof. Code § 9889.71(b), Bus. & Prof. Code § 9889.74(f). Reference: Implements 16 CFR §§ 703.3(b) and (c), and Civ. Code § 1793.2(e)(3)(H).]

(f) The arbitration program shall impose any other reasonable requirements necessary to ensure that the members and staff act fairly and expeditiously in each dispute. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.3(c), exact text with minor changes.]

(g) An arbitration program shall maintain both the fact and appearance of impartiality. [NOTE:

Authority cited: Civ. Code § 1793.2(e)(3)(H), Bus. & Prof. Code § 9889.71(b), Bus. & Prof. Code § 9889.74(f). Reference: Implements 16 CFR § 703.3(b) and Civ. Code § 1793.2(e)(3)(H).]

3398.2. Qualification, Selection and Training of Arbitrators

(a) Arbitrators shall be persons interested in the fair and expeditious resolution of consumer disputes. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.4(c), exact text with minor change.]

(b) No arbitrator deciding a dispute shall be a party to the dispute, or an employee or agent of a party other than for purposes of deciding disputes. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Based on 16 CFR § 703.4(a)(1), and Civ. Code § 1793.2(e)(3)(H).]

(c) No arbitrator deciding a dispute shall be a person who is or may become a party in any legal action, including but not limited to a class action in which the arbitrator is a representative of the class, that relates to the product or complaint in dispute, or an employee or agent of such person other than for purposes of deciding disputes. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.4(a)(2), first sentence, exact text with minor changes.]

(d) For purposes of subdivisions (b) and (c) of this section, a person shall not be considered a "party" solely because he or she acquires or owns an interest in a party solely for investment, and the acquisition of ownership of an interest which is offered to the general public shall be prima facie evidence of its acquisition or ownership solely for investment. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.4(a)(2), second sentence, exact text with minor changes.]

(e) When one or two arbitrators are deciding a dispute, all shall be persons having no direct involvement in the manufacture, distribution, sale or service of any product. When three or more arbitrators are deciding a dispute, at least two-thirds shall be persons having no direct involvement in the manufacture, distribution, sale or service of any product. "Direct involvement" shall not include

acquiring or owning an interest solely for investment, and the acquisition or ownership of an interest which is offered to the general public shall be prima facie evidence of its acquisition or ownership solely for investment. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.4(b), first two sentences, exact text with minor changes.]

(f) A person who is otherwise qualified to serve as an arbitrator under subdivisions (a) through (e) of this section shall not be disqualified solely because the person is a dealer of the manufacturer. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements and clarifies 16 CFR §§ 703.4(a)-(b), and Civ. Code § 1793.2(e)(3)(H).]

(g) Where arbitrators are selected from a list of arbitrators, selection shall be on a random basis. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements 16 CFR § 703.3(b).]

(h) The arbitration program shall provide each arbitrator who is assigned to decide disputes with the text and an explanation of the applicable law (section 3396.1(a)). [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements Civ. Code §§ 1793.2(e)(3)(D) and (G).]

(i) The arbitration program shall provide each arbitrator with relevant training, including periodic updates and refresher courses, which shall include training in the principles of arbitration; training in the applicable law including the rights and responsibilities of arbitrators under this subchapter (including the right to request an inspection or other action under section 3398.7(f)); and training in what a decision must and may include (sections 3398.9 and 3398.10). [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements Civ. Code § 1793.2(e)(3)(D).]

(j) An arbitrator who does not meet the qualifications in this section or who cannot demonstrate both the fact and the appearance of fairness and impartiality in deciding disputes shall disqualify himself or herself. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements 16 CFR §§ 703.3(a)-(b).]

3398.3. Written Operating Procedures

(a) The arbitration program shall establish written operating procedures which shall include all of the arbitration program's policies and procedures that implement the standards set forth in sections 3398.4 - 3398.14 of this subchapter. The written procedures shall be updated at reasonable intervals to reflect the procedures in effect. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Based on 16 CFR § 703.5(a).]

(b) The arbitration program shall provide one copy of the written operating procedures without charge to a consumer who (1) has notified the program of a dispute and (2) either has requested more information about the arbitration program or has requested a copy of the program's written operating procedures, and also to each of the program's arbitrators. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements 16 CFR § 703.5(a), second sentence.]

(c) The arbitration program shall provide one copy of the written operating procedures for a reasonable charge to any other person upon request. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.5(a), second sentence, exact text with minor changes.]

3398.4 Duties on Receipt of Dispute

(a) Upon notification of a dispute, including a dispute over which the program believes it does not have jurisdiction, the arbitration program shall immediately notify both the manufacturer and the consumer of its receipt of the dispute. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Based on 16 CFR § 703.5(b).]

(b) Notification shall be deemed to have occurred when the arbitration program has received notice of the consumer's name and address, the brand name and vehicle identification number of the vehicle (if requested by the program), and a statement of the nature of the problem or other complaint. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Based on 16 CFR § 703.5(e)(1).]

(c) At the time the arbitration program notifies the consumer of its receipt of the dispute, the program shall provide the consumer with the following information:

(1) The information specified in section 3397.2(a) on how to use the arbitration program.

(2) A statement of any other steps that the consumer must take, including the submission of additional information or materials, to enable the arbitration program to investigate and decide the dispute.

(3) A statement of the kinds of additional information and materials, such as copies of repair invoices, reports of inspection, technical service bulletins and other relevant information and documents, that the arbitration program will consider in investigating and deciding the dispute, and of the consumer's right to provide additional information or materials.

(4) A statement of the consumer's right to obtain a copy of the arbitration program's written operating procedures upon request and without charge.

(5) A description of the steps the arbitration program will take and the time periods within which those steps normally are taken. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements 16 CFR § 703.5(b).]

(d) The staff of the arbitration program may decide that the program does not have jurisdiction to decide a dispute. In this event, the program (1) shall explain to the consumer in writing the reasons that the program has so decided, (2) shall inform the consumer that an arbitrator will consider a written appeal of this decision made by the consumer within 30 days after the date the written notification of the decision was transmitted to the consumer, and (3) shall explain how to file a written appeal. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements 16 CFR §§ 703.5(b), (c).]

3398.5 Investigation of Facts

(a) The arbitration program shall investigate, gather and organize all information necessary for a fair and expeditious decision in each dispute. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.5(c), first sentence, exact text with minor change.]

(b) The arbitration program shall request the manufacturer to furnish any pertinent materials described in section 3397.4(b) that the program does

not already have. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements 16 CFR § 703.5(c).]

(c) The arbitration program shall not require from any party any information not reasonably necessary to decide the dispute. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.5(c), last sentence, exact text with minor change.]

(d) To facilitate the resolution of a dispute, the staff of the arbitration program may arrange for a visual inspection and test drive of the vehicle or an inspection and report on the vehicle by an independent automotive expert or a consultation with any other expert at no cost to the consumer. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements Civ. Code § 1793.2(e)(3)(F) and 16 CFR § 703.4(b).]

(e) When the consumer's complaint, or the manufacturer's response, or any evidence gathered by or submitted to the arbitration program, raises any of the following issues, the program shall investigate those issues:

(1) Whether the program has jurisdiction to decide the dispute.

(2) Whether there is a nonconformity (section 3396.1(l)).

(3) Whether the nonconformity is a substantial nonconformity (section 3396.1(m)).

(4) The cause or causes of a nonconformity.

(5) Whether the causes of a nonconformity include unreasonable use of the vehicle.

(6) The number of repair attempts.

(7) The time out of service for repair.

(8) Whether the manufacturer has had a reasonable opportunity to repair the vehicle.

(9) Factors that may affect the reasonableness of the number of repair attempts.

(10) Other factors that may affect the consumer's right to a replacement of the vehicle or restitution under Civ. Code § 1793.2(d)(2).

(11) Facts that may give rise to a presumption under Civ. Code § 1793.2(e)(1).

(12) Factors that may rebut any presumption under Civ. Code § 1793.2(e)(1).

(13) Whether a further repair attempt is likely to remedy the nonconformity.

(14) The existence and amount of any incidental damages, including but not limited to sales taxes, license fees, registration fees, other official fees, prepayment penalties, early termination charges, earned finance charges, and repair, towing and rental costs, incurred or to be incurred by the consumer.

(15) Factors that may affect the manufacturer's right to an offset for mileage under Civ. Code § 1793.2(d).

(16) Facts for determining the amount of any offset for mileage under Civ. Code § 1793.2(d) if an offset is appropriate.

(17) Factors that may affect any other remedy under the applicable law.

(18) Any other issue that is relevant to the particular dispute. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.5(c), second sentence, supplemented by issues relevant in California, added to implement Civ. Code § 1793.2(e)(3)(G).]

3398.6 Resolution of Contradictory Information

(a) When information which will or may be used in the decision, submitted by one party or by a consultant, independent automobile expert or any other source, tends to contradict facts submitted by the other party, the arbitration program shall clearly, accurately, and completely disclose to both parties the contradictory information (and its source), and shall provide to both parties an opportunity to explain or rebut the information and to submit additional information or materials. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.5(c), third sentence, exact text with minor changes.]

(b) If it appears to the arbitrator at any time that one party or a consultant, independent automobile expert or any other person has submitted information that contradicts facts supplied by the other party (whether submitted prior to the meeting or at the meeting), and that this fact has not been disclosed to that other party, the arbitrator shall

defer any decision until the arbitration program has complied with subdivision (a) of this section and both parties have had a reasonable opportunity to explain or rebut the information and to submit additional information or materials. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements 16 CFR § 703.5(c) second sentence, and 16 CFR § 703.3(b) and Civ. Code § 1793.2(e)(3)(H).]

(c) The arbitration program shall develop and implement fair procedures by which any party may correct an error in the proceeding, provided that the other party has a reasonable opportunity to comment on the correction. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Bureau: Implements 16 CFR § 703.5(c).]

(d) The time limit for deciding disputes (section 3398.9(a)) shall not be extended during any exchange, rebuttal or explanation of contradictory information under subdivision (a), but the bureau may take into account circumstances leading to reasonable delays. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements and clarifies 16 CFR § 703.5(c), third sentence.]

3398.7. Meetings to Decide Disputes

(a) Meetings of the arbitrator or panel of arbitrators held to hear and decide disputes shall be open to observers on reasonable and nondiscriminatory terms. The identity of the parties and products involved in disputes need not be disclosed at these meetings. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.8(d), exact text with minor change.]

(b) The arbitration program shall give the consumer and the manufacturer at least five days' advance notice of the date, time and location of any meeting at which their dispute will or may be decided. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements 16 CFR § 703.8(d), first sentence and Bus. & Prof. Code § 9889.74(c).]

(c) The arbitration program shall furnish to each arbitrator, at least five days before the meeting, a copy of all of the program's records pertaining to the dispute that are available to the program at that time. Upon the bureau's request, the program also shall furnish a copy of those records to the bureau. [NOTE: Authority cited: Bus. & Prof. Code

§§ 9889.71(b) and 9889.74(f). Reference: Implements 16 CFR §§ 703.3(a) and 703.5(d)(1).]

(d) Upon request by the bureau, the arbitration program shall notify the bureau of the date, time and location of the meeting or meetings to decide particular disputes or classes of disputes. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b), 9889.71(c) and 9889.74(f). Reference: Implements Bus. & Prof. Code § 9889.74(c).]

(e) Only the arbitration program's staff and the arbitrator may participate in a meeting held to hear and decide disputes, except that the parties to the dispute or their representatives may make oral presentations or correct errors when permitted under section 3398.8. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements 16 CFR §§ 703.3(b) and (c), 703.5(f), and Civ. Code § 1793.2(e)(3)(H).]

(f) At any time after receipt of the records under subdivision (c) of this section, the arbitrator or a majority of the arbitrators may request of the arbitration program any or all of the following at no cost to the consumer:

(1) An inspection and written report on the condition of the vehicle by an independent automobile expert (section 3396.1(i)). [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Civ. Code § 1793.2(e)(3)(F).]

(2) Consultation with any other person or persons knowledgeable in the technical, commercial or other areas relating to the vehicle, provided that the consultation does not violate sections 3398.1(c) and (e). [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements 16 CFR § 703.4(b), last sentence.]

(3) An opportunity for the arbitrator, or one or more of the arbitrators, to personally inspect and test drive the vehicle. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Bureau - implements 16 CFR § 703.5(c).]

(4) Further investigation and report by the arbitration program on any issue relevant to a fair and expeditious decision. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements 16 CFR § 703.5(c), first sentence.]

(g) If a request is made under subdivision (f), the meeting may be continued for a reasonable period not to exceed 30 days; and the arbitration

program, as part of its investigation of the facts (section 3398.5(a)), shall take all steps reasonable and necessary to comply with the request, and shall gather and organize the resulting information for use by the arbitrator in deciding the dispute. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements 16 CFR §§ 703.5(c), first sentence, and 703.2(h).]

3398.8. Oral Presentations by Parties to Disputes

(a) The arbitration program may allow an oral presentation by a party to a dispute (or a party's representative) only if:

(1) Both the manufacturer and the consumer expressly agree to the presentation.

(2) Prior to the agreement, the arbitration program fully discloses to the consumer the following information:

(A) That the presentation by either party will take place only if both parties so agree, but that if they agree, and one party fails to appear at the agreed upon time and place, the presentation by the other party may still be allowed.

(B) That the arbitrator will decide the dispute whether or not an oral presentation is made.

(C) The proposed date, time and place for the presentation.

(D) A brief description of what will occur at the presentation, including, if applicable, the parties' rights to bring witnesses and/or counsel. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.5(f)(2), exact text with minor changes.]

(3) Each party has the right to be present during the other party's oral presentation. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.5(f)(3), first sentence, exact text.]

(b) Nothing contained in this section shall preclude the arbitration program from allowing an oral presentation by one party, if the other party fails to appear at the agreed upon time and place, as long as all of the requirements of subdivision (a) of this section have been satisfied. In that event, the arbitrator may either decide the dispute or give the absent party an opportunity to explain or rebut any

contradictory information and submit additional materials before a decision is made. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.5(f)(3), final sentence, exact text with minor changes.]

(c) Notwithstanding subdivision (a) of this section, a party may correct an error at a meeting if all parties are personally present or represented and all parties expressly consent. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements 16 CFR §§ 703.3(a) and (c).]

3398.9. Decision-Making Timelines and Procedures

(a) If the dispute has not been settled (subdivision (b) of this section), the arbitration program shall, as expeditiously as possible but at least within 40 days after receiving notification of the dispute, and except where extensions are permitted under subdivision (c) of this section, disclose to the consumer and the manufacturer its decision and the reasons therefor (section 3398.10(d)). [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Based on 16 CFR § 703.5(d)(2) and (4).]

(b) For purposes of subdivision (a) of this section, a dispute shall be deemed settled when the arbitration program has ascertained from the consumer that (1) the manufacturer and the consumer have entered into an agreement settling the dispute, (2) the consumer is satisfied with the terms of the settlement agreement, and (3) the agreement contains a specified reasonable time for performance. Section 3398.12(b) on the program's duty to verify performance shall apply in the event of a settlement made after the program has received notification of the dispute. [NOTE:]

(c) The arbitration program may delay the performance of its duties under paragraph (a) of this section beyond the 40-day standard in the following situations:

(1) For a seven-day period in those disputes in which the consumer has made no attempt to seek redress directly from the manufacturer. [NOTE: Authority cited: Civ. Code, § 1793.2(e)(3)(A) and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.5(e)(2), exact text with minor change.]

(2) If and to the extent that the delay is due solely to failure of a consumer to provide promptly his or her name and address, the brand name and model number of the vehicle, and a statement of the nature of the defect or other complaint. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.5(e)(1), exact text with minor changes.]

(3) For a reasonable period not to exceed 30 days to enable the arbitration program to respond to a request made under subdivision (f) of section 3398.7. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements Civ. Code §§ 1793.2(e)(3)(F) and 16 CFR §§ 703.3(c) and 703.4(b).]

3398.10. Content of Decision

(a) The arbitrator shall render a fair decision based upon the information gathered by the arbitration program in its investigation of the facts (section 3398.5) and upon any information submitted by the parties under section 3398.8 at the meeting to decide disputes. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Based on 16 CFR § 703.5(d)(1).]

(b) The decision shall take into account all legal and equitable factors, including but not limited to the written warranty, the applicable law, and any other equitable considerations appropriate in the circumstances. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(G), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Based on Civ. Code § 1793.2(e)(3)(G), first sentence.]

(c) The decision shall include any remedies which the arbitrator finds appropriate under the circumstances, including repair, replacement, refund, reimbursement for expenses, compensation for damages, and any other remedies available under the written warranty or the applicable law, and need not be limited to the specific relief sought by the consumer. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.5(d)(1), exact text of last sentence (other than final phrase) only, with minor changes.]

(d) Nothing in this section requires that decisions must consider or provide remedies in the form of awards of punitive damages or multiple damages under Civil Code section 1794(c); attorney's fees

under Civil Code section 1794(d); or consequential damages other than (1) incidental damages to which the consumer is entitled under Civil Code section 1793.2(d)(2), or (2) any other remedies provided under Civil Code sections 1794(a) and (b). [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Civ. Code § 1793.2(e)(3)(G), last sentence, exact text with several changes.]

(e) The decision shall be in writing and shall include a statement of the reasons therefor. The statement of reasons shall consist of a brief explanation of the basis for the decision, including information required by subdivision (e) of section 3398.11. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Based on 16 CFR § 703.5(d)(2) and (4).]

(f) The decision shall prescribe a reasonable time, not to exceed 30 days after the manufacturer is notified that the consumer has accepted the decision, within which the manufacturer or its agents must perform the terms of the decision. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Based on Civ. Code § 1793.2(e)(3)(C), substituting 30 days after "notification" instead of after consumer's "acceptance;" and also 16 CFR § 703.5(d)(1), last sentence, final clause.]

3398.11. Continuing Substantial Nonconformities

(a) If the dispute involves the fact or allegation of a substantial nonconformity (section 3396.1(m)) that is continuing, this section shall apply.

(b) In determining whether the consumer is entitled to a replacement or refund, the arbitrator shall take into account the standards expressed in Civil Code sections 1793.2(d) and (e), if those standards are applicable under the circumstances of the dispute. For purposes of this section, "take into account" means to be aware of the standards; to understand how they might apply to the circumstances of the particular dispute; and to apply them if it is legally proper and fair to both parties to do so.

(c) If the decision provides for a replacement or refund, the decision shall require the manufacturer to replace the motor vehicle or make restitution in accordance with Civil Code section 1793.2(d)(2)(A),

(B) and (C). The decision shall include payment of incidental damages to the extent authorized by the applicable law including Commercial Code sections 2711 to 2715 inclusive, and Civil Code sections 1793.2(d)(2) and 1794(a) and (b); shall include all reasonable repair, towing and rental car costs, any sales or use tax, license fees, registration fees, other official fees, prepayment penalties, early termination charges and earned finance charges, if actually paid, incurred or to be incurred by the consumer; and shall reflect any offset for mileage in the amount required by Civil Code section 1793.2(d)(2)(C). [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements Civ. Code §§ 1793.2(d)(2), 1793.2(e)(3)(G), and 1794(a) and (b).]

(d) The arbitration program may adopt procedures by which the staff of the program may calculate the exact amount of the mileage offset and any damages in conformance with the decision of the arbitrator and Civil Code section 1793.2(d)(2)(A), (B) and (C). [NOTE: Authority cited: Civ. Code §§ 1793.2(e)(3)(G) and 1793.2(e)(3)(E), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements Civ. Code §§ 1793.2(d)(2), 1793.3(e)(2), 1793.3(e)(3)(G) and 1793.3(e)(3)(E).]

(e) The arbitrator's statement of reasons (section 3398.10(e)) shall include the arbitrator's determination of each issue identified in section 3398.5(e) that is relevant to the particular dispute. [NOTE: Authority cited: Civ. Code §§ 1793.2(e)(3)(G) and 1793.2(e)(3)(E), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements Civ. Code §§ 1793.2(d)(2), 1793.3(e)(2), 1793.3(e)(3)(G) and 1793.3(e)(3)(E).]

3398.12. Acceptance and Performance of Decision

(a) The arbitration program shall inform the consumer, at the time of the disclosure of the decision (section 3398.9(a)), of each of the following:

(1) The consumer may either accept or reject the decision. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Derived from Civ. Code § 1793.2(e)(3)(B) and 16 CFR § 703.5(g)(1).]

(2) If the consumer accepts the decision, then both the manufacturer and the consumer are bound by the decision. [NOTE: Authority cited: Bus. & Prof.

Code §§ 9889.71(b) and 9889.74(f). Reference: Derived from Civ. Code § 1793.2(e)(3)(B) and 16 CFR § 703.5(g)(1).]

(3) If the consumer rejects the decision, or accepts the decision and the manufacturer does not promptly perform the terms of the decision, the consumer may seek redress by pursuing his or her legal rights and remedies, including use of the small claims court. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Derived from Civ. Code § 1793.2(e)(2) and 16 CFR § 703.5(g)(1).]

(4) The consumer has 30 calendar days after the arbitration program transmits the notification described in section 3398.9(a) in which to accept the decision. If no decision is made within that period, the consumer's failure to accept the decision will be considered a rejection of the decision and the manufacturer shall not be bound to perform it. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements Civ. Code § 1793.2(e)(3)(C).]

(5) If the decision provides for a further repair attempt or any other action by the manufacturer, the program will ascertain from the consumer whether performance has occurred. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements 16 CFR § 703.5(h).]

(6) The arbitration program's decision and findings are admissible in evidence in any court action. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Based on 16 CFR § 703.5(g)(2) and Civ. Code § 1793.2(e)(2).]

(7) The consumer may obtain a copy of the arbitration program's written operating procedures upon request and without charge. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements 16 CFR § 703.5(a), second sentence.]

(8) The consumer may obtain copies of all of the arbitration program's records relating to the dispute, at a reasonable cost. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.5(g)(3), exact text with minor changes.]

(9) The consumer may regain possession without charge of all documents which the consumer has submitted to the program. [NOTE: Authority cited:

Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Bureau.]

(10) If the consumer has a complaint regarding the operation of the arbitration program, the consumer may register a complaint with the Arbitration Review Program of the Bureau of Automotive Repair. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements Bus. & Prof. Code § 9889.74(c)(2).]

(11) The address and telephone number of the bureau. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements Bus. & Prof. Code § 9889.74(c)(2).]

(b) If the manufacturer is required to perform any obligations as part of a settlement, or if the manufacturer is obligated to take any action to implement a decision, the program shall ascertain from the consumer, within 10 days after the date set for performance, whether performance has occurred. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.5(h), exact text with minor changes.]

(c) If the consumer asserts that the manufacturer's performance of a further repair attempt has not occurred to the consumer's satisfaction, the arbitration program shall promptly inform the arbitrator who decided the dispute of all of the pertinent facts. In that event the arbitrator (or a majority of the arbitrators) may decide to reconsider the decision. A decision under this subdivision to reconsider a decision may be made at any time and need not be made at a meeting to decide disputes (section 3398.7). [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Bureau -- implements 16 CFR §§ 703.3(a), 703.5(d)(1) and 703.5(h).]

(d) If the arbitrator decides to reconsider the decision, the decision to reconsider shall be deemed to constitute notification of the dispute (section 3398.4), and the program shall investigate the dispute and in all respects treat it as a new dispute, except that the program shall expedite all phases of the process, and the same arbitrator or arbitrators, if reasonably possible, shall decide the dispute. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements 16 CFR §§ 703.3(a), 703.5(d)(1) and 703.5(h).]

3398.13. Recordkeeping by Arbitration Programs.

(a) The arbitration program shall maintain records on each dispute of which it has received notification, which shall include all of the following:

(1) Name, address and telephone number of the consumer. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.6(a)(1), exact text with minor changes.]

(2) Name, address, telephone number and contact person of the manufacturer. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.6(a)(2), exact text with minor changes.]

(3) Make and vehicle identification number of the vehicle involved. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Based on 16 CFR § 703.6(a)(3).]

(4) The date of receipt of the dispute and the date of disclosure to the consumer of the decision. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.6(a)(4), exact text with minor changes.]

(5) All letters and other written documents submitted by either party. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.6(a)(5), exact text with minor changes.]

(6) All other evidence collected by the arbitration program relating to the dispute, including summaries of relevant and material portions of telephone calls and meetings between the program and any other person (including any experts or consultants described in section 3398.7(e)), and any letters and summaries of any oral communications by the program to the parties to resolve contradictory information (section 3398.6). [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.6(a)(6), exact text with minor changes, supplemented by new language beginning with "and any letters".]

(7) A summary of any relevant and material information presented by either party at an oral presentation under section 3398.8. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.6(a)(7), exact text with minor changes.]

(8) The decision of the arbitrator, with information as to date, time and place of meeting, the identity of arbitrators voting, and the reasons for the decision, with the reasons for any dismissal for lack of jurisdiction or decision to reconsider, and information on any voluntary settlement. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Based on 16 CFR § 703.6(a)(8).]

(9) A copy of the disclosure to the parties of the decision. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.6(a)(9), exact text with minor changes.]

(10) The fact and date of completion of any performance required by the decision or by any settlement made after the program has received notification of the dispute. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.5(h).]

(11) Copies of follow-up letters (or summaries of relevant and material portions of follow-up telephone calls) to the manufacturer and the consumer and responses thereto. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.6(a)(11), exact text with minor changes, but adding "manufacturer and the".]

(12) Any other documents and communications (or summaries of relevant and material portions of oral communications) relating to the dispute. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.6(a)(12), exact text with minor changes.]

(b) The arbitration program shall maintain a current index of each manufacturer's disputes grouped under brand name and subgrouped under product model. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.6(b), exact text with minor changes.]

(c) The arbitration program shall maintain a current index for each manufacturer which shows:

(1) All disputes in which the manufacturer has promised some performance (either by settlement or in response to a program decision) and has failed to comply. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b)

and 9889.74(f). Reference: 16 CFR § 703.6(c)(1), exact text with minor changes.]

(2) All disputes in which the manufacturer has refused to abide by a program decision. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.6(c)(2), exact text with minor changes.]

(3) All disputes in which the consumer has registered a complaint regarding the decision, its performance by the manufacturer, or the operation of the program. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements Bus. & Prof. Code § 9889.74(c).]

(d) The arbitration program shall maintain a current index which shows all disputes delayed beyond the time allowed under section 3398.9. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Based on 16 CFR § 703.6(d).]

(e) The arbitration program shall compile semiannually and maintain statistics which show the number and percentage of disputes in each of the following categories:

(1) Resolved by staff of the arbitration program and manufacturer has complied. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.6(e)(1), exact text with minor changes.]

(2) Resolved by staff of the arbitration program, time for compliance has occurred, and manufacturer has not complied. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.6(e)(2), exact text with minor changes.]

(3) Resolved by staff of the arbitration program and time for compliance has not yet occurred. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.6(e)(3), exact text with minor changes.]

(4) Decided by arbitrator and manufacturer has complied. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.6(e)(4), exact text with minor changes.]

(5) Decided by arbitrator, time for compliance has occurred, and manufacturer has not complied. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A),

and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.6(e)(5), exact text with minor changes.]

(6) Decided by arbitrator and time for compliance has not yet occurred. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.6(e)(6), exact text with minor changes.]

(7) Decided by arbitrator with no relief to the consumer. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Based on 16 CFR § 703.6(e)(7).]

(8) No jurisdiction. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.6(e)(8), exact text.]

(9) Decision delayed beyond 40 days under section 3398.9(c)(1). [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.6(e)(9), exact text with minor changes.]

(10) Decision delayed beyond 40 days under section 3398.9(c)(2). [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.6(e)(10), exact text with minor changes.]

(11) Decision delayted beyond 40 days under section 3398.9(c)(3). [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.6(e)(10).

(12) Decision delayed beyond 40 days for any other reason. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.6(e)(11), exact text.]

(13) Decision still pending. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Based on 16 CFR § 703.6(e)(12).]

(14) Decision accepted by consumer. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements Bus. & Prof. Code §§ 9889.74(b) and (c).]

(15) Decision rejected by consumer. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and

9889.74(f). Reference: Implements Bus. & Prof. Code §§ 9889.74(b) and (c).]

(f) The individual dispute records, indexes and statistics required by this section shall be organized and maintained so as to facilitate ready access and review by the bureau at any time, including access to and review of individual dispute files and other program materials. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements Bus. & Prof. Code § 9889.74(c).]

(g) The arbitration program shall retain all records specified in paragraphs (a)-(c) of this section for at least four years after final disposition of the dispute. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.6(f), exact text with minor changes.]

3398.14. Openness of Records and Proceedings

(a) The statistical summaries specified in section 3398.13(e) shall be available to any person for inspection and copying. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.8(a), exact text with minor change.]

(b) Except as provided under subdivisions (a), (d) and (e) of this section, and sections 3398.7(a) and 3399.5, all records of the arbitration program may be kept confidential, or made available only on such terms and conditions, or in such form, as the arbitration program shall permit. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.8(b), exact text with minor changes.]

(c) The policy of the arbitration program with respect to records made available at the program's option shall be set out in the program's written operating procedures (section 3398.3); the policy shall be applied uniformly to all requests for access to or copies of such records. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.8(c), exact text with minor changes.]

(d) Upon request, the arbitration program shall provide to either party to a dispute:

(1) Access to all records relating to the dispute. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.8(e)(1), exact text.]

(2) Copies of any records relating to the dispute, at reasonable cost. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: 16 CFR § 703.8(e)(2), exact text.]

(e) The arbitration program shall make available to any person, upon request, information relating to the qualifications of program staff and the qualifications and method of selection of arbitrators. [NOTE: Authority cited: Civ. Code § 1793.2(e)(3)(A), and Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Based on 16 CFR § 703.8(f).]

3398.15. Compliance by Program

(a) An arbitration program shall promptly take reasonable action to correct violations of the minimum standards prescribed in this subchapter whenever violations become known to the program. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements Bus. & Prof. Code §§ 9889.73(c) and 9889.74(c).]

(b) An arbitration program shall (1) investigate each complaint concerning the operation of the program, whether directed to the program by or for a consumer or by the bureau; (2) furnish the bureau with a copy of every written complaint concerning the operation of the program; and (3) inform both the bureau and the consumer of the facts of the complaint, the results of the investigation, and any corrective steps taken. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements Bus. & Prof. Code § 9889.74(a).]

(c) The manufacturer and the arbitration program shall establish written policies and procedures for referring unresolved complaints from consumers regarding the operation of the program to the bureau. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements Bus. & Prof. Code § 9889.74(a).]

(d) An arbitration program shall cooperate in good faith with the bureau and its staff in all matters within the purview of this subchapter. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements Bus. & Prof. Code §§ 9889.73(c) and 9889.74.]

Part 4.

Certification Procedure

3399. Purpose of Part

This part specifies the procedure to be used by applicants seeking certification. It also pertains to audits, reports and decertification. This part implements Business and Professions Code section 9889.71(c), which requires the bureau to prescribe the information which applicants for certification must provide to the bureau in the application; section 9889.71(a), which requires the bureau to prescribe the form to be used to apply for certification; and section 9889.74(f), which requires the bureau to adopt regulations that are necessary and appropriate.

3399.1. Application for Certification

(a) Upon receiving a request for an application for certification, the bureau will inform the prospective applicant that the bureau is available to confer with the prospective applicant in advance of the filing of an application for the purpose of discussing questions relating to the application. However, no application shall be decided in advance of filing. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(c) and 9889.74(f). Reference: Based on Fin. Code § 360.5.]

(b) An applicant seeking certification of an arbitration program shall file with the bureau an application with all information and materials required by this subchapter. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(c) and 9889.74(f). Reference: Based on Bus. & Prof. Code § 9889.72.]

(c) The application shall consist of (1) a completed "Application for Certification" following in the format prescribed in Appendix A, signed by or on behalf of each party to the application, and (2) the materials required by section 3399.2 and Appendix A. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(c) and 9889.74(f). Reference: Based on Bus. & Prof. Code § 9889.71(c).]

(d) The bureau will acknowledge receipt of the application and notify the applicant whether or not the application is complete. If the application is not complete, the bureau will state what additional information or materials must be provided. If the applicant does not provide the information and materials requested by the bureau within 30 days, the bureau may deem the application withdrawn. [NOTE:

Authority cited: Bus. & Prof. Code §§ 9889.71(c) and 9889.74(f). Reference: Implements Bus. & Prof. Code § 9889.72(c).]

(e) After receipt of the application, the bureau may, in its discretion, schedule an informal conference with the applicant to discuss the application, the accompanying materials and information, and any additional materials and information that may be required by this subchapter. The informal conference is not an evidentiary hearing or a forum for the determination whether certification is appropriate. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Based on Fin. Code § 363.]

(f) After the bureau has accepted the application for certification as complete, the bureau will conduct a review of the arbitration program described in the application, which will include one or more on-site inspections of any program that is already operating, to determine whether the requested certification should be granted. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(c) and 9889.74(f). Reference: Based on Bus. & Prof. Code §§ 9889.71(a) and 9889.72(b).]

(g) The bureau will make a determination whether to certify an arbitration program or to deny certification not later than 90 days after the date the bureau accepts the application for certification as complete. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(c) and 9889.74(f). Reference: Based on Bus. & Prof. Code § 9889.72(c).]

(h) If the bureau determines that the arbitration program is in substantial compliance with Civil Code section 1793.2(e)(3), Chapter 20.5 of Division 3 of the Business and Professions Code and this subchapter, the bureau will certify the arbitration program. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(c) and 9889.74(f). Reference: Based on Bus. & Prof. Code § 9889.72(b).]

(i) If the bureau determines that the arbitration program is not in substantial compliance with Civil Code section 1793.2(e)(3), Chapter 20.5 of Division 3 of the Business and Professions Code, or this subchapter, the bureau will deny certification, and will state, in writing, the reasons for the denial and the modifications in the operation of the program that are required in order for the program to be certified. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(c) and 9889.74(f). Reference: Based on Bus. & Prof. Code § 9889.72(b).]

(j) If the bureau denies certification of the arbitration program, the applicant may either reapply for certification or request a hearing. A request for a hearing shall be filed with the bureau within 30 days after service of the notice of denial. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Implements Bus. & Prof. Code § 9889.72(b).]

3399.2. Materials to Accompany Application

(a) The application shall be accompanied by the following materials:

(1) The arbitration program's written operating procedures (section 3398.3(a)). [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(c) and 9889.74(f). Reference: 16 CFR § 703.5(a).]

(2) All other written manuals, publications and documents prepared by or for the manufacturer or the arbitration program, or either of them, which constitute or describe the arbitration program's operating procedures or any of them, including but not limited to the policies and procedures that implement sections 3398.4-3398.15. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(c) and 9889.74(f). Reference: Bureau.]

(3) All written agreements between the manufacturer and the arbitration program (including exchanges of correspondence) which define the relationship between the manufacturer and the arbitration program, including but not limited to agreements relating to handling and referring disputes; responding to requests from the program, the manufacturer or the consumer for information; implementing the decisions of the program; and responding to complaints about the decision or the operation of the arbitration program. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(c) and 9889.74(f). Reference: Bureau.]

(4) All written warranties on new motor vehicles offered by the manufacturer for sale or lease in California at the time the manufacturer has applied for certification; and all owners' manuals, books, pamphlets and other materials provided by the manufacturer to consumers which describe the manufacturer's current written warranties, the protections and benefits they provide to consumers, the steps which consumers must follow to obtain warranty service, or the procedures used by the manufacturer for handling complaints from consumers regarding vehicles sold or leased in California.

Where documents are substantially similar for several models of vehicles, the applicant need only submit one example of each document, provided that the applicant clearly identifies the models to which the exemplar applies. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(c) and 9889.74(f). Reference: Bureau.]

(5) All published descriptions of the arbitration program, its purposes, or its availability and use, provided to consumers by either the manufacturer or the arbitration program.

(6) Examples of the notices, disclosures and other documents prescribed by sections 3397.2(a), 3398.2(h), 3398.4(c) and 3398.12(a), and of any disclosures given pursuant to Civil Code section 1793.2(e)(1) or (2).

(b) The application shall include an index of the materials that accompany the application. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(c) and 9889.74(f). Reference: Bureau.]

3399.3. Audits of Arbitration Programs

(a) The arbitration program shall have an audit conducted six months after initial certification, and then at least annually, to determine whether the program is in compliance with this subchapter. All records of the arbitration program required to be kept under section 3398.13 shall be available for audit. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(c) and 9889.74(f). Reference: 16 CFR § 703.7(a), exact text with minor change, and Bus. & Prof. Code § 9889.74(c).]

(b) Each audit provided for in paragraph (a) of this section shall include at a minimum the following:

(1) Evaluation of the manufacturer's efforts to make consumers aware of the arbitration program's existence as required in section 3397.3(a). [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(c) and 9889.74(f). Reference: 16 CFR § 703.7(b)(1), exact text with minor changes.]

(2) Review of the indexes maintained pursuant to sections 3398.13(b), (c) and (d). [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(c) and 9889.74(f). Reference: 16 CFR § 703.7(b)(2), exact text with minor changes.]

(3) Analysis of a random sample of disputes handled by the arbitration program to determine the following: [NOTE: Authority cited: Bus. & Prof. Code

§§ 9889.71(c) and 9889.74(f). Reference: 16 CFR § 703.7(b)(3), exact text with minor change.]

(A) Adequacy of the arbitration program's dispute notification and other forms, its investigation, mediation and follow-up efforts, other aspects of dispute resolution, and the handling of complaints concerning the operation of the program. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(c) and 9889.74(f). Reference: 16 CFR § 703.7(b)(3)(i), exact text with minor change.]

(B) Accuracy of the arbitration program's statistical compilations under section 3398.13. (For purposes of this subparagraph "analysis" shall include oral or written contact with the consumers involved in each of the disputes in the random sample.) [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(c) and 9889.74(f). Reference: 16 CFR § 703.7(b)(3)(ii), exact text with minor changes.]

(c) The arbitration program shall provide a copy of each audit to the bureau, and shall provide a copy to any person at a reasonable cost. The arbitration program may direct its auditor to delete from the audit report the names of parties to disputes and the identity of the products involved. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(c) and 9889.74(f). Reference: 16 CFR § 703.7(c), exact text with minor changes, with substitution of "bureau" for "Federal Trade Commission".]

(d) Auditors shall be selected by the arbitration program. No auditor may be involved with the arbitration program as a manufacturer, sponsor or arbitrator, or employee or agent thereof, other than for purposes of the audit. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(c) and 9889.74(f). Reference: 16 CFR § 703.7(d), exact text with minor changes.]

(e) The arbitration program also shall furnish to the bureau, within a reasonable time after submission, a copy of any audit of the program's activities in this state that is submitted by the program or the manufacturer to the Federal Trade Commission. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(c) and 9889.74(f). Reference: 16 CFR § 703.7(c) and Bus. & Prof. Code § 9889.74(c).]

3399.4. Reports to Bureau by Arbitration Programs

(a) The arbitration program shall notify the bureau in writing of any material changes in the information or materials submitted in or with the

application for certification or subsequently at the request of the bureau, and shall do so either before or within a reasonable time after the change becomes effective. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(c) and 9889.74(f). Reference: Bureau.]

(b) The arbitration program shall provide to the bureau, six months after certification and annually thereafter, a report on disputes closed during the reporting period, which shall contain the following information in the case of each dispute (including disputes over which the program did not exercise jurisdiction):

(1) The name, address, and telephone number of the consumer.

(2) The name of the manufacturer of the vehicle.

(3) The office where the dispute was processed.

(4) The number or other identification of the dispute used by the process, if one exists.

(5) With respect to each dispute (A) the date when notification of the dispute was received by the program; (B) the dates of all meetings held to decide the dispute; (C) the date of the decision of the arbitrator; and (D) the elapsed time in days between (A) and (C). [NOTE: Authority cited: Bus. & Prof. Code § 9889.73(a). Reference: Bureau.]

(6) The nature of the consumer's request for relief categorized by one or more of the following: (A) repair, (B) replacement, (C) return and restitution, (D) either replacement or return and restitution, (E) reimbursement of expenses (F) other.

(7) The nature of the decision or decisions categorized by one or more of the following: (A) repair, (B) replacement, (C) return and restitution, (D) either replacement or return and restitution, (E) reimbursement of expenses, (F) no relief, (G) other. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(c) and 9889.74(f). Reference: Implements Bus. & Prof. Code § 9889.71(d).]

(8) Any report of information required by this subchapter (other than the annual audit under section 3399.3), or any portion thereof, may be submitted in electronic form compatible with the bureau's computer system. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(c), (d). Reference: Bureau.]

(c) The period covered by the annual report required by subdivision (b) may coincide with the same period covered by the annual audit required by section 3399.3, and the two reports may be submitted separately or as a single document. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(c), (d). Reference: Bureau.]

3399.5. Review of Program Operations by Bureau

(a) The bureau will conduct a review of the operation and performance of each certified program at least once annually. The review may consist of:

(1) An examination of updates of all information and materials required in the application and periodic reports.

(2) One or more on-site inspections of the program's facilities, records and operations, including meetings held to decide disputes.

(3) Investigation and analysis of complaints from any source regarding the operation of the program.

(4) An evaluation of consumer satisfaction based on the results of an annual random mail or telephone survey by the bureau.

(5) An evaluation of other information obtained through the bureau's monitoring and inspection or which is relevant to continuing certification. [NOTE: Authority cited: Bus. & Prof. Code § 9889.73(a). Reference: Bureau.]

(b) All of the statistical summaries and other records of the arbitration program shall be available for inspection and copying by the bureau. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.73(a) and 9889.74(f). Reference: Bureau.]

(c) The arbitration program, on request by the bureau, shall forward to the bureau, without charge, a copy of all or any portion of the records of any individual dispute or disputes. [NOTE: Authority cited: Bus. & Prof. Code § 9889.74(f). Reference: Implements Bus. & Prof. Code §§ 9889.73(a) and 9889.74(a).]

(d) The bureau may, in its discretion, schedule an informal conference with an arbitration program to discuss an apparent lack of compliance with Civil Code section 1793.2(e)(3), Chapter 20.5 of Division 3 of the Business and Professions Code, or this subchapter, and any modifications in the

operation of the program that the bureau believes may be required in order for the program to be in substantial compliance. The informal conference is not an evidentiary hearing or a forum for the determination whether certification or decertification is appropriate. [NOTE: Authority cited: Bus. & Prof. Code §§ 9889.71(b) and 9889.74(f). Reference: Based on Fin. Code § 363.]

3399.6. Decertification

(a) If it appears to the bureau that an arbitration program is not in substantial compliance with Civil Code section 1793.2(e)(3), Chapter 20.5 of Division 3 of the Business and Professions Code, or this subchapter, the bureau may issue a written notice of causes for decertification. The notice will specify the reasons for the issuance of the notice and prescribe the modifications in the operation of the arbitration program which, if timely made, will enable the program to retain its certification. The written notice will be served upon the party or parties to the original application designated to receive notices from the bureau. [Authority: Bus. & Prof. Code § 9889.74(f). Reference: Implements Bus. & Prof. Code § 9889.73(b).]

(b) No arbitration program shall be decertified unless and until either (1) a decision to decertify the program is made by the bureau pursuant to the notice of causes for decertification after a hearing under subdivision (c) of this section, or (2) the expiration of 180 days after service of the notice of causes for decertification as provided in subdivision (d) of this section. [Authority: Bus. & Prof. Code § 9889.72(f). Reference: Implements Bus. & Prof. Code § 9889.73(c).]

(c) The entity or entities on whom service of the notice of causes for decertification is made, or any of them, shall have a right to a hearing upon written request filed with the bureau within 30 days after service of the notice. The date of service shall be deemed to be the date of transmittal by the bureau. If a request is made, the program will be decertified only if a decision to decertify the program is made by the bureau after a hearing. The bureau will make a reasonable effort to conclude the decertification proceedings within 180 calendar days after service of its written notice of causes for decertification. [Authority: Bus. & Prof. Code § 9889.74(f). Reference: Federal Constitution, 14th Amendment; California Constitution, Art. I, § 7; see Witkin, Calif. Proc., Const. Law, §§ 518-577, and Kash

v. Los Angeles (1977) 19 Cal.3d 294, 138 Cal.Rptr. 53.]

(d) If no hearing is requested by the entity or entities on whom service of the notice is made, the decertification shall become effective 180 days after the notice is served. However, the bureau will withdraw the notice prior to its effective date if the bureau determines, after a public hearing, that the entity or entities have made the modifications in the operation of the program required in the notice of decertification, and the program is in substantial compliance with the requirements of Civil Code section 1793.2(e)(3), Chapter 20.5 of Division 3 of the Business and Professions Code, and this subchapter. [Authority: Bus. & Prof. Code § 9889.72(f). Reference: Bus. & Prof. Code § 9889.73(c).]

(e) Any person may request copies of all notices and decisions issued by the bureau under this section. [Authority: Bus. & Prof. Code § 9889.72(f). Reference: Bureau.]

Appendix A

Arbitration Review Program
Bureau of Automotive Repair
Department of Consumer Affairs

Application for Certification

Pursuant to Title 16, California Code of Regulations, section 3399.1, the undersigned submit(s) to the Arbitration Review Program of the Bureau of Automotive Repair of the California Department of Consumer Affairs, this application for certification of the arbitration program described below, accompanied by the materials described in Title 16, California Code of Regulations, section 3399.2.

1.0 GENERAL INFORMATION

1.1 Please provide the names or titles, with the addresses and telephone numbers, of:

1.11 The manufacturer's principal administrator in charge of the arbitration program.

1.12 The administrator in charge of each area or office of the arbitration program.

1.13 The manufacturer's and the arbitration program's agent to whom all communications and notices from the bureau may be directed.

1.14 The arbitration program's principal place of business, and all other places of business of the arbitration program within California.

1.15 The custodian or custodians of the records which are required to be maintained under section 3399.12 of this subchapter.

1.2 Please provide the names or titles, with addresses and telephone numbers, of the person or persons to whom consumers should give notice of a dispute when consumers are required to directly notify the manufacturer of a dispute, if the manufacturer elects to require that notice under Civil Code section 1793.2(e)(1)(A).

2.0 ARBITRATION PROGRAM

2.1 Please indicate where, in the written operating procedures (section 3399.2(a)(1)) or other materials accompanying this application (section 3399.2(a)(2)), the applicant has set forth the policies and procedures that will implement each of the requirements of this subchapter. Please organize the response to this question by section and subdivision numbers that correspond to each of the sections and subdivisions in Parts 2 and 3 of this subchapter.

2.2 Please describe the steps the applicant has taken and will take to reasonably assure that the policies and procedures to which reference is made in the response to question 2.1 will be implemented.

2.3 Please describe the factors that the applicant requests the bureau to consider in determining whether the arbitration program is competently staffed at a level sufficient to ensure fair and expeditious resolution of disputes. (Section 3398.1(a).)

2.4 Please describe any methods or amounts of payment by the manufacturer to the arbitration program that are affected by the method by which the dispute is resolved (for instance, by mediation, arbitration, or voluntary settlement) or by the nature of the decision (for instance, payment of money, further repair, or replacement or restitution). Specific dollar amounts need not be provided.

2.5 Please describe how arbitrators are selected. (Section 3398.2.)

2.6 Please describe the procedure and criteria for the selection of independent automobile experts so as to ensure their independence. (Section 3396.1(i).)

2.7 Please state the date of your most recent application, and indicate in what respects this application is identical with, or differs from, that application.

Dated:

(NAME OF APPLICANT)

_____
(Signature)

Dated:

(NAME OF APPLICANT)

_____
(Signature)

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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.

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.

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

STATE OF CALIFORNIA—BUSINESS, TRANSPORTATION AND HOUSING AGENCY

NEW MOTOR VEHICLE BOARD
1507 - 21st Street, Suite 330
Sacramento, California 95814
(916) 445-1888

MAY 8 1989

May 3, 1989

Mr. John Waraas, Chief
Bureau of Automotive Repair
10240 Systems Parkway
Sacramento, California 95827

Dear Mr Waraas:

SUBJECT: Certification of Third Party Dispute Resolution Programs

Pursuant to Business and Professions Code Section 9889.75, the New Motor Vehicle Board is required to administer the annual collection of fees to fund the Bureau of Automotive Repair's certification process for manufacturers' third party dispute resolution programs.

As required by statute, we have solicited manufacturers and distributors and have received data concerning the number of vehicles sold or otherwise distributed in California during 1988. We are now prepared to invoice each of these entities for their share of the BAR's certification program costs.

Based on information received on December 22, 1988, from Amparo Garcia, Chief of Support Services for the Bureau of Automotive Repair, the Bureau needs $335,000 to fund the certification program for fiscal year 1989-90. Since the New Motor Vehicle Board has ultimate responsibility for calculating the amount of fees to be collected from manufacturers to fully fund the program, it would be helpful if the Board had information concerning the BAR's allocation of the $698,366.17 collected last year, i.e., how much has spent? how has it been spent? how much remains to be applied toward 1989-90 costs?

It would be appreciated if you could provide us with the requested information as soon as possible so we can proceed with the manufacturer's billing in a timely manner.

Very truly yours,

SAM W. JENNINGS
Chief Administrative Law Judge/
Executive Secretary

SWJ:me

cc: Honorable Sally Tanner

National Conference of State Legislatures

1050 17th Street
Suite 2100
Denver, Colorado 80265
303/623-7800

Samuel B. Nunez, Jr.
President Pro Tem
Louisiana Senate
President, NCSL

William T. Pound
Executive Director

MAY 26 1989

MEMORANDUM

DATE: May 22, 1989

TO: Assemblywoman Sally Tanner

FROM: Brenda A. Trolin
Senior Staff Associate

RE: Federal Trade Commission's Advanced Notice of Proposed Rulemaking

You will find enclosed the notice published in the Federal Register concerning proposed federal pre-emption of state lemon laws. Jon Felde, General Counsel for the National Conference of State Legislatures, is drafting a response to be communicated to the Federal Trade Commission. Please forward to Jon or myself any information (reports, statistics, comments) which should be included in the response. We also suggest that you, or the appropriate person representing the legislature's perspective, write directly to the FTC expressing any concerns that you may have.

The NCSL working group established to draft a model lemon law will meet at the Annual Meeting in Tulsa, Oklahoma, August 6-11. You will receive additional information on this meeting in the next few weeks. The delay in the project has been due to a delay in response from our funding source, The National Institute for Dispute Resolution in Washington, D.C., as to the amount of the award for the project. The scope of the project is dependent upon that figure. However, the importance of the project necessitates that we begin at the Annual Meeting, and we will do so. Hopefully, NIDR will have made a commitment by that time.

Please contact me if you have questions or comments. We appreciate your support and participation in this important project.

BT/el

Enclosure

the FTC should amend Rule 703 in any way, including comment on whether the FTC should adopt any of the proposed amendments to the rule set out in the petition. In order to assist interested persons in focusing their comments, the FTC invites comments on the specific questions listed below.

A. General Policy Considerations

1. Should the achievement of uniformity be one of the purposes of Rule 703? Has the rule accomplished what was intended by paving the way for the development of the current regulatory system? Or, has it failed to facilitate the kind of system that Congress intended to create?

2. Should there be a uniform minimum standards rule for all industries? Or, should 703 procedures be designed to take into account differences among manufacturers and products? (For example, should the process be tiered to take into account smaller businesses or manufacturers who produce lower-cost items; would a "sliding scale" of protections and services encourage additional manufacturers to adopt IDSM procedures?)

3. What are the advantages or disadvantages in permitting consumers a choice of IDSM forums (e.g., warrantor-run mechanisms, state-run mechanisms, privately-run mechanisms, etc.) and a choice of dispute resolution techniques, (e.g., mediation or arbitration, either binding or non-binding)?

4. Does the Commission have the legal authority to preempt state laws that regulate IDSMs which incorporate Rule 703 in some manner? If so, wht limits, if any, exist on that authority to preempt?

5. In what other ways should Rule 703 be amended to encourage greater participation by manufacturers in IDSMs?

6. What reasons prompted those warrantors who no longer participate in IDSMs undr Rule 703 to drop out of Rule 703 programs?

B. Non-Uniformity

(In answering questions, please provide actual or estimated data by specific year, type of mechanism, type of law, and state, where appropriate)

1. Compared with the minimum requirements of a Rule 703 mechanism, what are the costs of non-uniformity imposed by diverse state laws upon warrantors, consumers and mechanisms?

2. Compared with the minimum requirements of a Rule 703 mechanism, what are the benefits of non-uniformity imposed by diverse state laws upon warrantors, consumers and mechanisms?

3. Compared with the minimum requirements of a Rule 703 mechanism, which state requirements increase costs; how and why do these "diverse" requirements impose additional costs?

4. Compared with the minimum requirements of a Rule 703 mechanism, which state requirements increase benefits; how and why do these "diverse" requirements provide additional benefits?

5. Is it more efficient for companies to design mechanisms that conform to that required by the most "stringent" state(s); if so, what are the cost savings from such conformance; if not, what are the additional costs that would be imposed from such conformance?

6. What are the benefits and costs associated with oral presentations to warrantors, consumers and mechanisms?

7. What are the benefits and costs associated with auditing mechanisms to warrantors, consumers, mechanisms and the states?

8. What are the benefits and costs associated with training mechanism personnel to warrantors, consumers and mechanisms?

9. What are the costs to a company of maintaining and administering a mechanism in each state, including company overhead cost for each state; direct costs per case (administrative, legal, etc.) for each state; and length of time to settle (duration of time from complaint to settlement) for each state?

C. Certification

1. What are the likely benefits associated with FTC certification for warrantors, consumers and mechanisms?

2. What specific cost savings to warrantors may be realized from FTC certification?

3. Is there any difference in the time taken to settle disputes in states where certification exists compared to those states where mechanisms are not certified?

4. What are the costs of state certification programs to warrantors, consumers, mechanisms and the states?

5. What are the costs to warrantors of settling disputes in states where mechanisms are certified and in states where certification does not exist?

6. To what extent would an FTC certification program encourage warrantors to change a non-703 mechanism to a 703 mechanism; or adopt any mechanism to resolve disputes, where no such mechanism presently exists?

7. If the FTC were to adopt a certification program how should such a program be set up? For example:

a. What standards or criteria for performance should be established in order for a mechanism to be awarded certification and/or to retain its certification? How would these standards or criteria differ between "operational certification" and "paper certification"?

b. Under what circumstances should certification be denied or revoked? Should there be any sanctions for non-compliance other than denying or revoking certification? If so, what should those sanctions be?

c. What information should a mechanism routinely provide which would be sufficient for the monitoring organization to adequately judge the mechanism's performance?

D. Specific Amendments to the Current Rule

1. Apart from the issues of non-uniformity and certification, should the FTC initiate a rulemaking proceeding to amend Rule 703? If so, which proposed revisions set out in the petition should be adopted? Why? Which ones should not be adopted? Why not?

2. Apart from the proposed revisions set out in the petition, which sections of the current rule should be changed? How should they be revised? Why? Which ones should not be changed? Why not?

By direction of the Commission.

Donald S. Clark.

Secretary.

Dissenting Statement of Commissioner Andrew J. Strenio, Jr.

The Commission majority has decided to publish an Advance Notice of Proposed Rulemaking seeking information with which to decide whether to initiate a rulemaking proceeding that would amend the Commission's Rule on Informal Dispute Settlement Procedures, more commonly known as Rule 703. In so doing, the majority elected to leave pending the petition filed by the Motor Vehicle Manufacturers Association of the United States, Inc. and the Automobile Importers of America, Inc. For the reasons stated below, I dissent from this action.

The petition asks the Commission, among other things, to amend Rule 703 so that it would preempt certain dispute resolution provisions contained in state lemon laws. According to the petitioners, a lack of uniformity at the state level regarding these provisions is burdensome and imposes undue costs. However, the petitioners failed to provide economic or cost data to support these assertions.

Under normal conditions, a petition unaccompanied by supporting evidence would be denied without prejudice by the

Commission. I see no reason to treat this petition differently. Accordingly, I would have denied the petition without prejudice. That way the petitioners could refile without any adverse consequences if and when they assemble supporting evidence. Since the majority has elected not to follow that traditional approach, and since no explanation for this unusual treatment is provided, the public unfortunately can only guess at the rationale for this deviation and what standards will be applied to subsequent petitions to initiate rulemakings by other groups.

[FR Doc. 89-11734 Filed 5-15-89; 8:45 am]
BILLING CODE 6750-01-M

FEDERAL TRADE COMMISSION

16 CFR Part 703

Informal Dispute Settlement Procedures

AGENCY: Federal Trade Commission.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: This notice announces the Commission's decision to request public comment on whether to initiate a review of its Rule Governing Informal Dispute Settlement Procedures, 16 CFR Part 703. The Commission is interested in determining whether Rule 703 should remain unchanged, or whether it should be amended. The Commission has made no determination on these issues and has not decided whether to commence an amendment proceeding.

DATE: Written comments and suggestions must be submitted on or before July 17, 1989.

ADDRESSES: Comments and suggestions should be marked "Rule 703 Review" and sent to the Division of Marketing Practices, Federal Trade Commission, Washington, DC 20580.

Copies of the petition, the petitioners' letters and the NAAG Memorandum have been placed on the public record and may be obtained in person from the Public Reference Section, or by writing or calling: 703 Petition Request, Public Reference Section, Federal Trade Commission, Room 130, 6th Street and Pennsylvania Avenue NW., Washington, DC 20580, (202) 326-2222.

Those commenters who wish copies of these documents or who wish to review them in person should identify the materials as part of FTC File/Binder 209-50.

FOR FURTHER INFORMATION CONTACT:

Carole I. Danielson, Division of Marketing Practices, Federal Trade Commission, Washington, DC 20580, (202) 326-3115.

or

Steven Toporoff, Division of Marketing Practices, Federal Trade Commission, Washington, DC 20580, (202) 326-3135.

SUPPLEMENTARY INFORMATION:

Background

The Magnuson-Moss Warranty Act ("the Act" or "the Warranty Act"), which was passed in 1975, recognized the growing importance of alternatives to the judicial process in the area of consumer dispute resolution. In section 110(a)(1) of the Act, 15 U.S.C. 2310(a)(1), Congress announced a policy of encouraging warrantors of consumer products to establish procedures for the fair and expeditious settlement of consumer disputes through informal dispute settlement mechanisms. To implement this policy, Congress provided in section 110(a)(3) of the Act that warrantors may incorporate into their written warranties a requirement that consumers resort to an informal dispute settlement procedure before pursuing judicial remedies available under the Act for warranty claims. To ensure fairness to consumers, however, Congress directed in section 110(a)(2) that the Commission establish minimum standards for any informal dispute settlement mechanism (IDSM) that is incorporated into a written consumer product warranty. Accordingly, in 1975, the Commission promulgated the Rule on Informal Dispute Settlement Procedures ("Rule 703"), now codified at 16 CFR Part 703.[1]

Rule 703 applies only to those warrantors who place a "prior resort" requirement in their warranty (i.e., who require consumers to use a dispute resolution program prior to exercising any judicial rights under the Magnuson-Moss Warranty Act.) Neither the Act nor the rule requires warrantors to establish an informal dispute settlement mechanism. Moreover, a warrantor is free to set up an IDSM that does not comply with the rule as long as the warrantor does not require consumers to resort to the IDSM before filing claims under the Act. In short, an IDSM must comply with the rule only if the warrantor voluntarily establishes an IDSM and writes into its warranty a requirement that consumers use the IDSM before going to court under the Act.

During the thirteen years that Rule 703 has been in existence, most of the activity in developing mediation and arbitration programs for the resolution of consumer disputes has taken place in the automobile and housing industries. Before 1982, only two warrantors had established IDSMs under Rule 703: Chrysler Corporation and Home Owners Warranty Corporation. With the passage of state lemon laws beginning in 1982, the three domestic automobile manufacturers, as well as numerous importers, began to offer IDSMs under Rule 703. At present, however, only one major domestic automobile manufacturer (Chrysler Corporation) and four importers (Volkswagen, Porsche, Audi and Saab Scania) are participating in some Rule 703 mechanism.[2] In addition, other Rule 703 IDSMs in the housing industry hear disputes between homeowners and builders who offer warranties on new housing. Outside of the housing and automobile industries, no warrantors have established Rule 703 mechanisms. Of course, neither the Magnuson-Moss Warranty Act nor Rule 703 requires the establishment of IDSMs or prohibits warrantors from establishing IDSMs outside the framework of the rule. Some warrantors have, in fact, done so.[3]

Although most automobile manufacturers no longer operate IDSMs under Rule 703, they continue to express interest in participating in informal dispute settlement programs under the rule. This interest has been generated by the passage of "lemon laws" in forty-four states and the District of Columbia. "Lemon laws" entitle consumers to obtain a replacement or a refund for a defective new car if the warrantor is unable to make the car conform to the warranty after a reasonable number of repair attempts.[4] Paralleling section

[1] The Statement of Basis and Purpose for the Rule on Informal Dispute Settlement Procedures appears at 40 FR 60190 (December 31, 1975).

[2] General Motors ceased incorporating an IDSM in its warranty beginning with its 1988 models and no longer operates a 703 program. Ford discontinued operation under Rule 703 with its 1988 model year cars. Similarly, American Honda, Nissan, Volvo, Rolls-Royce and Jaguar have all discontinued operating Rule 703 programs. All of these automobile manufacturers now participate in IDSMs operating outside the framework of the rule.

[3] In particular, non-703 IDSMs have arisen under the sponsorship of trade associations in the furniture industry (Furniture Industry Consumer Action Panel, or FICAP), the home appliance industry (Major Appliance Consumer Action Panel, or MACAP), the funeral industry (Funeral Service Consumer Arbitration Program), and the retail automobile industry (AutoCAP). In addition, a number of automobile manufacturers (including General Motors, Nissan, Toyota, American Honda, and others) participate in non-703 IDSMs operated either by the Better Business Bureau, by AutoCAP, or by the American Automobile Association. In addition, Ford sponsors its own program, the Ford Consumer Appeals Board, which ceased operating under rule 703 as of January 1, 1988.

[4] In most states, it is presumed that a reasonable number of repair attempts have been made if (1) the same defect has been subject to repair four or more times within the first year of ownership, or (2) the car has been out of service for repairs thirty or more days during the first year of ownership.

110(a)(3) of the Magnuson-Moss Warranty Act, most state lemon laws provide that the consumer may not exercise state lemon law rights in court unless the consumer has first presented the claim to the manufacturer's IDSM (if the manufacturer has chosen to establish one). However, those statutes also provide that consumers are required to use the manufacturer's IDSM only if it complies with the FTC standards for IDSMs, as expressed in Rule 703. In addition, some state lemon laws not only require compliance with Rule 703, but also compliance with additional state requirements.

The thirteen years' experience under the existing Rule on Informal Dispute Settlement Procedures has given interested parties, including the FTC, an opportunity to evaluate the effectiveness of Rule 703 in encouraging the establishment of informal dispute settlement procedures and in ensuring that those procedures are fair and easy to use for consumers. This experience has led to criticism of Rule 703 by warrantors, mechanism operators, consumer groups, and state governments. Some have argued that the rule is unduly burdensome and discourages the formation of new mechanisms as well as hindering the efficient operation of existing ones. This criticism particularly notes the costs of compliance with the procedural and recordkeeping obligations imposed by the rule. Others, by contrast, not only have asserted that the rule is insufficiently stringent in many respects, but have also criticized the Commission for failing to enforce the requirements that do exist under the rule in its present form.

Thirteen years ago, when the Federal Trade Commission drafted Rule 703, the field of alternative dispute resolution was still in its infancy and neither the Commission, its staff nor any other party had more than very limited experience in this area. There was a dearth of available knowledge and experience on the use of alternative dispute resolution for consumer disputes. The past decade has witnessed a great expansion of informal dispute resolution activity and knowledge. The large number of experiments and full-fledged programs for informal resolution of consumer disputes provide us with a valuable set of experiences to draw upon in examining Rule 703 and determining whether the rule might be improved and, if so, what revisions should be made in order to maintain the necessary balance between the competing interests of low cost, accessibility, expeditiousness and informality on the one hand, and procedural fairness or "due process" on the other.

In 1986, the Commission decided to reevaluate Rule 703 in an effort to address the criticisms of Rule 703 and to develop proposals for reform. In order to assist in this evaluation, the Commission formed a committee under the Federal Advisory Committee Act, 5 U.S.C. App. I 1-15.[5] The Rule 703 Advisory Committee was made up of persons representing the major interests affected by the rule. The committee met monthly from September, 1986 to June, 1987 in an attempt, through negotiations, to develop a consensus recommendation to the Commission on amendments to Rule 703. If successful, the consensus recommendation would have been incorporated by the Commission in an NPRM initiating a proceeding to amend Rule 703, i.e., a traditional notice-and-comment rulemaking procedure. The advisory committee concluded its meetings in June, 1987, without providing such a consensus recommendation to the Commission. By memorandum dated December 9, 1987, the facilitators of the committee transmitted their final report to the Commission, recommending that the FTC build upon the negotiated rulemaking process to think through various options:

e.g., (1) whether the existing rule should remain in effect, allowing manufacturers to make voluntary improvements in their procedures and consumer groups to take advantage of opportunities for action available to them in other forums, or

(2) whether revisions are possible which will improve the situation, at least partially for all interests.[6]

Although the advisory committee was unable to provide a consensus recommendation, the problems surrounding Rule 703 that were addressed in the regulatory negotiation process still remain and still generate a great amount of interest. Two indications of this continuing interest are a petition filed with the FTC on April 11, 1988, by the Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA") and the Automobile Importers of America, Inc. ("AIA") and a Memorandum in Opposition ("NAAG Memorandum") to the petition filed by the attorneys general of 41 states on June 22, 1988. The petition requests that the FTC initiate a rulemaking proceeding to amend Rule 703, and includes a proposed revision of the rule. In addition to other substantive proposed revisions, the petitioners' proposal would have the FTC institute a national certification program for IDSMs and would have the Commission preempt those provisions of state laws which impose requirements upon Rule 703 mechanisms which are different from those specified in Rule 703. On July 1 and July 15, 1988, petitioners submitted letters which discuss certain cost analyses that should be considered if the Commission initiates a rulemaking proceeding to amend Rule 703. The NAAG Memorandum from the state attorneys general objects to petitioners' proposed amendments to Rule 703, including the proposals to institute a federal certification program and to preempt conflicting state provisions.

Because of the continuing interest in the issues surrounding Rule 703 and because of the filing of the petition and the NAAG Memorandum with many of those issues raised therein, as well as the thirteen years of experience with alternative dispute resolution of consumer complaints, the Commission believes that the time is appropriate to seek comments on which practices are sound dispute resolution practices and could form the basis for possible revisions to Rule 703.

Accordingly, the Commission hereby publishes this Advance Notice of Proposed Rulemaking to determine whether Rule 703 should remain unchanged, or whether it should be amended. This notice sets forth a statement of the Commission's reasons for requesting comment, a list of specific questions and issues upon which the Commission particularly desires written comment, and an invitation for written comments. The comment period on this matter will close July 17, 1989.

Issues for Public Comment

The Commission invites any interested person to comment upon changes which might be made to Rule 703 in order to better achieve the balance the Commission wishes to maintain between the relevant competing interests. The Commission particularly invites comment on two key questions: (1) Whether the costs of non-uniformity in the laws governing the resolution of warranty disputes outweigh the benefits of such non-uniformity; and (2) whether the costs of an FTC certification of IDSMs outweigh the benefits of such a national certification program. In addition, the Commission seeks comment on whether

[5] The notice of intent to form an advisory committee for regulatory negotiation appears at 51 FR 5205 (February 12, 1986). The notice of formation of the advisory committee and notice of the first meeting appears at 51 FR 29666 (August 20, 1986).

[6] The facilitators' final report has been placed on the public record in this matter and can be obtained from the Public Reference Section.

National Conference of State Legislatures

William T. Pound
Executive Director

444 North Capitol Street, N.W.
Washington, D.C. 20001
(202) 624-5400

A C T I O N A L E R T

Federal Trade Commission Eyes Preemption of State "Lemon" Laws May 25, 1989

Please contact the Federal Trade Commission concerning its examination of preemption of state "lemon" laws.

On Tuesday, May 16, 1989, the Federal Trade Commission published an Advance Notice of Proposed Rulemaking seeking comments with respect to the desirability of preempting state consumer protection laws relating to informal dispute settlement mechanisms. A copy of the Notice, published in 54 Fed. Reg. 21070, is enclosed.

The FTC requests comments on general policy questions such as the need for uniformity, minimum standards and preemption. In addition, the Commission poses a series of questions relating to the economic costs and benefits of non-uniformity and state certification.

Until states began passing "lemon" laws in 1982, few warrantors offered informal dispute settlement mechanisms. What had been voluntary because of the belief that warrantors would compete with better dispute settlement mechanisms, became mandatory under many state laws. Now 44 states have "lemon" laws that require manufacturers of automobiles to offer dispute settlement mechanisms and that define what vehicles are subject to such mechanisms. NCSL has established a working group to facilitate uniformity through development of a model law. The group will meet at the NCSL Annual Meeting in Tulsa.

NCSL policy opposes federal preemption of these consumer protection laws, which have remained within the domain of state legislation even after the passage of the Magnuson Moss Act in 1975. The National Association of Attorneys General opposes federal preemption of state "lemon" laws and filed a memorandum with the FTC stating federalism concerns and arguing that a federal rule would adversely affect consumers. The Automotive Trade Association Executives, representing new car dealers, has also notified the FTC of its opposition to federal preemption of state warranty laws.

ACTION

- Prepare a response to the questions posed by the FTC. Discuss federalism concerns and state the reasons for the passage of your lemon laws, including comments about whether consumer interests were being adequately addressed in the marketplace. Comments should be filed with the Federal Trade Commission before July 17, 1989.
- Mark your response "Rule 703 Review" and send to the Division of Marketing Practices, Federal Trade Commission, Washington, DC 20580.
- If appropriate, contact your attorney general for additional information about the implementation of your state "lemon" law.
- Please forward a copy of your FTC filing to Jon Felde in NCSL's Washington Office.

NCSL Contact: Jon Felde, Law and Justice Committee Director.
(202) 624-8667

"Action Alert" is a publication of the NCSL Office of State-Federal Relations requesting lobbying assistance from state legislators and legislative staff.

Authority: 7 U.S.C. 150dd, 150ee, 150ff, 151–167; 7 CFR 2.17, 2.15, and 371.2(c).

Done at Washington, DC, this 10th day of May 1989.

James W. Glosser,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 89-11690 Filed 5-15-89; 8:45 am]

BILLING CODE 3410-34-M

FEDERAL TRADE COMMISSION

16 CFR Part 703

Informal Dispute Settlement Procedures

AGENCY: Federal Trade Commission.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: This notice announces the Commission's decision to request public comment on whether to initiate a review of its Rule Governing Informal Dispute Settlement Procedures, 16 CFR Part 703. The Commission is interested in determining whether Rule 703 should remain unchanged, or whether it should be amended. The Commission has made no determination on these issues and has not decided whether to commence an amendment proceeding.

DATE: Written comments and suggestions must be submitted on or before July 17, 1989.

ADDRESSES: Comments and suggestions should be marked "Rule 703 Review" and sent to the Division of Marketing Practices, Federal Trade Commission, Washington, DC 20580.

Copies of the petition, the petitioners' letters and the NAAG Memorandum have been placed on the public record and may be obtained in person from the Public Reference Section, or by writing or calling: 703 Petition Request, Public Reference Section, Federal Trade Commission, Room 130, 6th Street and Pennsylvania Avenue NW., Washington, DC, 20580, (202) 326–2222.

Those commenters who wish copies of these documents or who wish to review them in person should identify the materials as part of FTC File/Binder 209–50.

FOR FURTHER INFORMATION CONTACT:

Carole I. Danielson, Division of Marketing Practices, Federal Trade Commission, Washington, DC 20580, (202) 326–3115.

or

Steven Toporoff, Division of Marketing Practices, Federal Trade Commission, Washington, DC 20580, (202) 326–3135.

SUPPLEMENTARY INFORMATION:

Background

The Magnuson-Moss Warranty Act ("the Act" or "the Warranty Act"), which was passed in 1975, recognized the growing importance of alternatives to the judicial process in the area of consumer dispute resolution. In section 110(a)(1) of the Act, 15 U.S.C. 2310(a)(1), Congress announced a policy of encouraging warrantors of consumer products to establish procedures for the fair and expeditious settlement of consumer disputes through informal dispute settlement mechanisms. To implement this policy, Congress provided in section 110(a)(3) of the Act that warrantors may incorporate into their written warranties a requirement that consumers resort to an informal dispute settlement procedure before pursuing judicial remedies available under the Act for warranty claims. To ensure fairness to consumers, however, Congress directed in section 110(a)(2) that the Commission establish minimum standards for any informal dispute settlement mechanism (IDSM) that is incorporated into a written consumer product warranty. Accordingly, in 1975, the Commission promulgated the Rule on Informal Dispute Settlement Procedures ("Rule 703"), now codified at 16 CFR Part 703.[1]

Rule 703 applies only to those warrantors who place a "prior resort" requirement in their warranty (i.e., who require consumers to use a dispute resolution program prior to exercising any judicial rights under the Magnuson-Moss Warranty Act.) Neither the Act nor the rule requires warrantors to establish an informal dispute settlement mechanism. Moreover, a warrantor is free to set up an IDSM that does not comply with the rule as long as the warrantor does not require consumers to resort to the IDSM before filing claims under the Act. In short, an IDSM must comply with the rule only if the warrantor voluntarily establishes an IDSM and writes into its warranty a requirement that consumers use the IDSM before going to court under the Act.

During the thirteen years that Rule 703 has been in existence, most of the activity in developing mediation and arbitration programs for the resolution of consumer disputes has taken place in the automobile and housing industries. Before 1982, only two warrantors had established IDSMs under Rule 703: Chrysler Corporation and Home Owners Warranty Corporation. With the passage of state lemon laws beginning in 1982, the three domestic automobile manufacturers, as well as numerous importers, began to offer IDSMs under Rule 703. At present, however, only one major domestic automobile manufacturer (Chrysler Corporation) and four importers (Volkswagen, Porsche, Audi and Saab Scania) are participating in some Rule 703 mechanism.[2] In addition, other Rule 703 IDSMs in the housing industry hear disputes between homeowners and builders who offer warranties on new housing. Outside of the housing and automobile industries, no warrantors have established Rule 703 mechanisms. Of course, neither the Magnuson-Moss Warranty Act nor Rule 703 requires the establishment of IDSMs or prohibits warrantors from establishing IDSMs outside the framework of the rule. Some warrantors have, in fact, done so.[3]

Although most automobile manufacturers no longer operate IDSMs under Rule 703, they continue to express interest in participating in informal dispute settlement programs under the rule. This interest has been generated by the passage of "lemon laws" in forty-four states and the District of Columbia. "Lemon laws" entitle consumers to obtain a replacement or a refund for a defective new car if the warrantor is unable to make the car conform to the warranty after a reasonable number of repair attempts.[4] Paralleling section

[1] The Statement of Basis and Purpose for the Rule on Informal Dispute Settlement Procedures appears at 40 FR 60190 (December 31, 1975).

[2] General Motors ceased incorporating an IDSM in its warranty beginning with its 1986 models and no longer operates a 703 program. Ford discontinued operation under Rule 703 with its 1988 model year cars. Similarly, American Honda, Nissan, Volvo, Rolls-Royce and Jaguar have all discontinued operating Rule 703 programs. All of these automobile manufacturers now participate in IDSMs operating outside the framework of the rule.

[3] In particular, non-703 IDSMs have arisen under the sponsorship of trade associations in the furniture industry (Furniture Industry Consumer Action Panel, or FICAP), the home appliance industry (Major Appliance Consumer Action Panel, or MACAP), the funeral industry (Funeral Service Consumer Arbitration Program), and the retail automobile industry (AutoCAP). In addition, a number of automobile manufacturers (including General Motors, Nissan, Toyota, American Honda, and others) participate in non-703 IDSMs operated either by the Better Business Bureau, by AutoCAP, or by the American Automobile Association. In addition, Ford sponsors its own program, the Ford Consumer Appeals Board, which ceased operating under rule 703 as of January 1, 1988.

[4] In most states, it is presumed that a reasonable number of repair attempts have been made if (1) the same defect has been subject to repair four or more times within the first year of ownership, or (2) the car has been out of service for repairs thirty or more days during the first year of ownership.

110(a)(3) of the Magnuson-Moss Warranty Act, most state lemon laws provide that the consumer may not exercise state lemon law rights in court unless the consumer has first presented the claim to the manufacturer's IDSM (if the manufacturer has chosen to establish one). However, those statutes also provide that consumers are required to use the manufacturer's IDSM only if it complies with the FTC standards for IDSMs, as expressed in Rule 703. In addition, some state lemon laws not only require compliance with Rule 703, but also compliance with additional state requirements.

The thirteen years' experience under the existing Rule on Informal Dispute Settlement Procedures has given interested parties, including the FTC, an opportunity to evaluate the effectiveness of Rule 703 in encouraging the establishment of informal dispute settlement procedures and in ensuring that those procedures are fair and easy to use for consumers. This experience has led to criticism of Rule 703 by warrantors, mechanism operators, consumer groups, and state governments. Some have argued that the rule is unduly burdensome and discourages the formation of new mechanisms as well as hindering the efficient operation of existing ones. This criticism particularly notes the costs of compliance with the procedural and recordkeeping obligations imposed by the rule. Others, by contrast, not only have asserted that the rule is insufficiently stringent in many respects, but have also criticized the Commission for failing to enforce the requirements that do exist under the rule in its present form.

Thirteen years ago, when the Federal Trade Commission drafted Rule 703, the field of alternative dispute resolution was still in its infancy and neither the Commission, its staff nor any other party had more than very limited experience in this area. There was a dearth of available knowledge and experience on the use of alternative dispute resolution for consumer disputes. The past decade has witnessed a great expansion of informal dispute resolution activity and knowledge. The large number of experiments and full-fledged programs for informal resolution of consumer disputes provide us with a valuable set of experiences to draw upon in examining Rule 703 and determining whether the rule might be improved and, if so, what revisions should be made in order to maintain the necessary balance between the competing interests of low cost, accessibility, expeditiousness and informality on the one hand, and procedural fairness or "due process" on the other.

In 1986, the Commission decided to reevaluate Rule 703 in an effort to address the criticisms of Rule 703 and to develop proposals for reform. In order to assist in this evaluation, the Commission formed a committee under the Federal Advisory Committee Act, 5 U.S.C. App. I 1-15.[5] The Rule 703 Advisory Committee was made up of persons representing the major interests affected by the rule. The committee met monthly from September, 1986 to June, 1987 in an attempt, through negotiations, to develop a consensus recommendation to the Commission on amendments to Rule 703. If successful, the consensus recommendation would have been incorporated by the Commission in an NPRM initiating a proceeding to amend Rule 703, i.e., a traditional notice-and-comment rulemaking procedure. The advisory committee concluded its meetings in June, 1987, without providing such a consensus recommendation to the Commission. By memorandum dated December 9, 1987, the facilitators of the committee transmitted their final report to the Commission, recommending that the FTC build upon the negotiated rulemaking process to think through various options:

> e.g., (1) whether the existing rule should remain in effect, allowing manufacturers to make voluntary improvements in their procedures and consumer groups to take advantage of opportunities for action available to them in other forums, or
>
> (2) whether revisions are possible which will improve the situation, at least partially for all interests.[6]

Although the advisory committee was unable to provide a consensus recommendation, the problems surrounding Rule 703 that were addressed in the regulatory negotiation process still remain and still generate a great amount of interest. Two indications of this continuing interest are a petition filed with the FTC on April 11, 1988, by the Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA") and the Automobile Importers of America, Inc. ("AIA") and a Memorandum in Opposition ("NAAG Memorandum") to the petition filed by the attorneys general of 41 states on June 22, 1988. The petition requests that the FTC initiate a rulemaking proceeding to amend Rule 703, and includes a proposed revision of the rule. In addition to other substantive proposed revisions, the petitioners' proposal would have the FTC institute a national certification program for IDSMs and would have the Commission preempt those provisions of state laws which impose requirements upon Rule 703 mechanisms which are different from those specified in Rule 703. On July 1 and July 15, 1988, petitioners submitted letters which discuss certain cost analyses that should be considered if the Commission initiates a rulemaking proceeding to amend Rule 703. The NAAG Memorandum from the state attorneys general objects to petitioners' proposed amendments to Rule 703, including the proposals to institute a federal certification program and to preempt conflicting state provisions.

Because of the continuing interest in the issues surrounding Rule 703 and because of the filing of the petition and the NAAG Memorandum with many of those issues raised therein, as well as the thirteen years of experience with alternative dispute resolution of consumer complaints, the Commission believes that the time is appropriate to seek comments on which practices are sound dispute resolution practices and could form the basis for possible revisions to Rule 703.

Accordingly, the Commission hereby publishes this Advance Notice of Proposed Rulemaking to determine whether Rule 703 should remain unchanged, or whether it should be amended. This notice sets forth a statement of the Commission's reasons for requesting comment, a list of specific questions and issues upon which the Commission particularly desires written comment, and an invitation for written comments. The comment period on this matter will close July 17, 1989.

Issues for Public Comment

The Commission invites any interested person to comment upon changes which might be made to Rule 703 in order to better achieve the balance the Commission wishes to maintain between the relevant competing interests. The Commission particularly invites comment on two key questions: (1) Whether the costs of non-uniformity in the laws governing the resolution of warranty disputes outweigh the benefits of such non-uniformity; and (2) whether the costs of an FTC certification of IDSMs outweigh the benefits of such a national certification program. In addition, the Commission seeks comment on whether

[5] The notice of intent to form an advisory committee for regulatory negotiation appears at 51 FR 5205 (February 12, 1986). The notice of formation of the advisory committee and notice of the first meeting appears at 51 FR 29686 (August 20, 1986).

[6] The facilitators' final report has been placed on the public record in this matter and can be obtained from the Public Reference Section.

the FTC should amend Rule 703 in any way, including comment on whether the FTC should adopt any of the proposed amendments to the rule set out in the petition. In order to assist interested persons in focusing their comments, the FTC invites comments on the specific questions listed below.

A. General Policy Considerations

1. Should the achievement of uniformity be one of the purposes of Rule 703? Has the rule accomplished what was intended by paving the way for the development of the current regulatory system? Or, has it failed to facilitate the kind of system that Congress intended to create?

2. Should there be a uniform minimum standards rule for all industries? Or, should 703 procedures be designed to take into account differences among manufacturers and products? (For example, should the process be tiered to take into account smaller businesses or manufacturers who produce lower-cost items; would a "sliding scale" of protections and services encourage additional manufacturers to adopt IDSM procedures?)

3. What are the advantages or disadvantages in permitting consumers a choice of IDSM forums (e.g., warrantor-run mechanisms, state-run mechanisms, privately-run mechanisms, etc.) and a choice of dispute resolution techniques, (e.g., mediation or arbitration, either binding or non-binding)?

4. Does the Commission have the legal authority to preempt state laws that regulate IDSMs which incorporate Rule 703 in some manner? If so, wht limits, if any, exist on that authority to preempt?

5. In what other ways should Rule 703 be amended to encourage greater participation by manufacturers in IDSMs?

6. What reasons prompted those warrantors who no longer participate in IDSMs undr Rule 703 to drop out of Rule 703 programs?

B. Non-Uniformity

(In answering questions, please provide actual or estimated data by specific year, type of mechanism, type of law, and state, where appropriate)

1. Compared with the minimum requirements of a Rule 703 mechanism, what are the costs of non-uniformity imposed by diverse state laws upon warrantors, consumers and mechanisms?

2. Compared with the minimum requirements of a Rule 703 mechanism, what are the benefits of non-uniformity imposed by diverse state laws upon warrantors, consumers and mechanisms?

3. Compared with the minimum requirements of a Rule 703 mechanism, which state requirements increase costs; how and why do these "diverse" requirements impose additional costs?

4. Compared with the minimum requirements of a Rule 703 mechanism, which state requirements increase benefits; how and why do these "diverse" requirements provide additional benefits?

5. Is it more efficient for companies to design mechanisms that conform to that required by the most "stringent" state(s); if so, what are the cost savings from such conformance; if not, what are the additional costs that would be imposed from such conformance?

6. What are the benefits and costs associated with oral presentations to warrantors, consumers and mechanisms?

7. What are the benefits and costs associated with auditing mechanisms to warrantors, consumers, mechanisms and the states?

8. What are the benefits and costs associated with training mechanism personnel to warrantors, consumers and mechanisms?

9. What are the costs to a company of maintaining and administering a mechanism in each state, including company overhead cost for each state; direct costs per case (administrative, legal, etc.) for each state; and length of time to settle (duration of time from complaint to settlement) for each state?

C. Certification

1. What are the likely benefits associated with FTC certification for warrantors, consumers and mechanisms?

2. What specific cost savings to warrantors may be realized from FTC certification?

3. Is there any difference in the time taken to settle disputes in states where certification exists compared to those states where mechanisms are not certified?

4. What are the costs of state certification programs to warrantors, consumers, mechanisms and the states?

5. What are the costs to warrantors of settling disputes in states where mechanisms are certified and in states where certification does not exist?

6. To what extent would an FTC certification program encourage warrantors to change a non-703 mechanism to a 703 mechanism; or adopt any mechanism to resolve disputes, where no such mechanism presently exists?

7. If the FTC were to adopt a certification program how should such a program be set up? For example:

a. What standards or criteria for performance should be established in order for a mechanism to be awarded certification and/or to retain its certification? How would these standards or criteria differ between "operational certification" and "paper certification"?

b. Under what circumstances should certification be denied or revoked? Should there be any sanctions for non-compliance other than denying or revoking certification? If so, what should those sanctions be?

c. What information should a mechanism routinely provide which would be sufficient for the monitoring organization to adequately judge the mechanism's performance?

D. Specific Amendments to the Current Rule

1. Apart from the issues of non-uniformity and certification, should the FTC initiate a rulemaking proceeding to amend Rule 703? If so, which proposed revisions set out in the petition should be adopted? Why? Which ones should not be adopted? Why not?

2. Apart from the proposed revisions set out in the petition, which sections of the current rule should be changed? How should they be revised? Why? Which ones should not be changed? Why not?

By direction of the Commission.

Donald S. Clark,

Secretary.

Dissenting Statement of Commissioner Andrew J. Strenio, Jr.

The Commission majority has decided to publish an Advance Notice of Proposed Rulemaking seeking information with which to decide whether to initiate a rulemaking proceeding that would amend the Commission's Rule on Informal Dispute Settlement Procedures, more commonly known as Rule 703. In so doing, the majority elected to leave pending the petition filed by the Motor Vehicle Manufacturers Association of the United States, Inc. and the Automobile Importers of America, Inc. For the reasons stated below, I dissent from this action.

The petition asks the Commission, among other things, to amend Rule 703 so that it would preempt certain dispute resolution provisions contained in state lemon laws. According to the petitioners, a lack of uniformity at the state level regarding these provisions is burdensome and imposes undue costs. However, the petitioners failed to provide economic or cost data to support these assertions.

Under normal conditions, a petition unaccompanied by supporting evidence would be denied without prejudice by the

Commission. I see no reason to treat this petition differently. Accordingly, I would have denied the petition without prejudice. That way the petitioners could refile without any adverse consequences if and when they assemble supporting evidence. Since the majority has elected not to follow that traditional approach, and since no explanation for this unusual treatment is provided, the public unfortunately can only guess at the rationale for this deviation and what standards will be applied to subsequent petitions to initiate rulemakings by other groups.

[FR Doc. 89-11734 Filed 5-15-89; 8:45 am]
BILLING CODE 6750-01-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[IA-6-89]

RIN 1545-AN00

Reimbursement to State and Local Law Enforcement Agencies

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: In the rules and regulations portion of this issue of the **Federal Register**, the Internal Revenue Service is issuing temporary regulations to provide guidance to State and local law enforcement agencies in applying for reimbursement of expenses incurred in an investigation where resulting information furnished by the agency to the Service substantially contributes to the recovery of taxes with respect to illegal drug or related money laundering activities. The text of the temporary regulations also serves as the comment document for this notice of proposed rulemaking.

DATES: The regulations are proposed to apply to information first provided to the Service by a State or local law enforcement agency after February 16, 1989. Written comments and request for a public hearing must be delivered or mailed by July 17, 1989.

ADDRESS: Send comments and request for a public hearing to: Internal Revenue Service, Attn: CC:CORP:TR (IA-6-89), Room 4429, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Gail M. Winkler at (202) 566-4442 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The temporary regulations published in the Rules and Regulations portion of this issue of the **Federal Register** add a new temporary regulation § 301.7624-1T to Part 301 of Title 26 of the Code of Federal Regulations (CFR). For the text of the new temporary regulations, see T.D 8255 published in the rules and regulations portion of this issue of the **Federal Register**. The preamble to the temporary regulations explains the regulations.

Special Analyses

These proposed rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required.

Pursuant to section 7805(f) of the Code, the rules proposed in this document will be submitted to the Administrator of the Small Business Administration for comment on their impact on small business.

Comments and Requests for a Public Hearing

Before adopting these proposed regulations, consideration will be given to any written comments that are submitted (preferably a signed original) to the Internal Revenue Service. All comments will be available for public inspection and copying in their entirety. A public hearing will be sc.. ..duled and held upon written request by any person who submits written comments on the proposed rules. Notice of the time and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is Gail M. Winkler of the Office of Assistance Chief Counse (Income Tax and Accounting). Internal Revneue Service and the TreasuryDepartment participated in their development.

Lawrence B. Gibbs,

Commissioner of Internal Revenue.

[FR Doc. 89-11610 Filed 5-15-89; 8:45 am]
BILLING CODE 4830-01-M

26 CFR Parts 301 and 602

[IA-24-89]

RIN: 1545-AN04

Abatement of Penalty or Addition to Tax Attributable to Erroneous Advice

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: In the Rules and Regulations portion of this issue of the **Federal Register**, the Internal Revenue Service is issuing temporary regulations relating to the abatement of a portion of any penalty or addition to tax attributable to erroneous written advice furnished to a taxpayer by the Service. The text of the temporary regulations also serves as the comment document for this notice of proposed rulemaking.

DATES: The regulations are proposed to be effective with respect to advice requested on or after January 1, 1989. Written comments and requests for a public hearing must be delivered or mailed by July 17, 1989.

ADDRESS: Send comments and requests for a public hearing to: Internal Revenue Service, ATTN: CC:CORP:T:R (IA-2489), Room 4429, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Stephen J. Toomey of the Office of Assistant Chief Counsel (Income Tax & Accounting), Internal Revenue Service, 1111 Constitution Ave. NW., Washington, DC 20224 (Attention: CC:IT&A:06) or telephone 202-566-6320 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3504 (h)). Comments on the collection of information should be sent to the Office of Management and Budget, Paperwork Reduction Project, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer TR:FP, Washington, D.C. 20224.

The collection of information requirement in this regulation is contained in section 26 CFR 301.6404-3T. This information is required by the Internal Revenue Service in order to determine whether a taxpayer is entitled to an abatement of a penalty or addition to tax under section 6404(f). The likely respondents are individual taxpayers, businesses or other for-profit organizations, and small businesses or organizations.

J. CARO & ASSOCIATES

P.O. BOX 7486
LONG BEACH, CA 90807
(213) 428-6972

APR 2 5 1989

Assemblywoman Sally Tanner
State Capitol
Room 4146
Sacramento, Calif. 95814

April 23, 1989

Dear Assemblywoman Tanner:

My sincerest apologies for sending you the wrong draft of my manuscript "The Consumers Guide to the California Lemon Law". While similar in content, many copy changes had been made in the draft that you were scheduled to receive.

I also have taken the liberty to enclose a brief resume of my qualifications. Please feel free to destroy the first manuscript copy.

Sincerely,

Joseph J. Caro

Joseph J. Caro

SUMMARY BIOGRAPHY
OF
JOSEPH J. CARO

Mr. Caro has been a practicing arbitrator since 1987. A panel member of the National Consumer Arbitrators Association and the American Arbitration Association, he has heard consumer disputes and is registered to hear commercial cases in the fields of construction and professional appraisal services.

An involved community leader in Long Beach, Ca. Joe has acted in the capacity of Co-Chairman of the Long Beach Environmental Committee and has served as a member of the Long Beach Airport Commission.

A graduate of Seton Hall University, La Salle University and Windsor College, Joe has also served in the United States Marine Corps and as an officer in the U.S. Coast Guard Auxiliary.

Presently employed in a Marketing capacity with the firm of Valuation Counselors, Inc. (a division of Laventhol & Horwath) his background includes positions held with General Motors, Sun Oil Company Robert Bosch Inc., The Elliott Group Inc. and his own firm, J. Caro & Associates.

Joe's interests include photography (he has recently photographed and produced the poster for the Long Beach Centennial) was a member of a centennial event "Long Beach Salutes Local Photographers" and had is work displayed at the Long Beach Plaza and the Long Beach Museum of Art. Joe also collects and restores classic cars and at the present time has five dating from 1941 to 1966.

AS FEATURED IN THE MAY — 84 ISSUE OF
WESTERN BUILDING AND DESIGN

MARKETING FOCUS

PROFESSIONAL SERVICE FIRMS ARE TURNING TO DEFENSIVE MARKETING TO STAVE OFF THE COMPETITION IN A CROWDED MARKETPLACE.

BY JOSEPH J. CARO

Joseph J. Caro is the principal of Joseph J. Caro & Associates, a marketing consulting firm to professional service firms. Caro has served as Executive Vice President for a leading design & build firm dealing with hi-tech aerospace and aviation facilities. He is currently giving a series of seminars and workshops covering specific marketing subjects for firms serving the design and construction industry. Mr. Caro has over 15 years of related experience. For additional information
J. Caro & Associates
P.O. Box 7486
Long Beach, CA 90807

The question facing many professional firms today is not how to develop new clients, but more importantly, how to keep the clients they already have.

During the past several years of business stability and lowering interest rates, California and other "hot spot" areas are enjoying a building industry "boom". A fact, I may add, that has not gone unnoticed by many service firms located elsewhere.

Outside firms and even overseas firms are targeting these "hot" geographic areas in an attempt to establish local credibility. This competition is being felt throughout all service and building disciplines.

Local firms however, should not just stand-by and let valued clients get picked-off one at a time. Many firms are preparing strong defensive measures to minimize client loss. They are using a most effective tactic called Defensive Marketing.

What is Defensive Marketing? Simply stated, defensive marketing as applied to professional service firms, is a structured program designed to build strong client/firm relationships, which are seen to substantially reduce the impact of any competing firms. Used by "product side" marketing professionals for many years, defensive marketing strategies have recently taken hold and are now widely used in many service industries.

Systematically speaking, defensive marketing programs are the easiest to plan and implement, and are generally much less expensive to launch than "development related" or proactive marketing programs. On the negative side however, they are also the most difficult to evaluate, as defensive marketing is considerably subjective and abstract in nature. How can a firm weigh the value of a program designed to avoid losing clients that it already has? It can be done, but it's not easy.

Defensive marketing (loss avoidance) can be best viewed as an insurance policy that many firms today, can't afford not to have.

Building strong client relationships takes effort, time and money. But in the long run, it is the best investment that a firm can make. The single key element and number one rule in relationship building is — monthly client contact. Each and every month some form of contact (in a positive sense) must be made.

This contact can come in the form of a "house organ" mailer, a copy of a recent news release, notice of additional services, a casual phone call, letters, periodic visits, luncheons, or other activities. In no way however, should these "good will" calls be linked with any other activity or scheduled meetings, and never in relationship with potential new business calls.

Conflicting Ideals

Needless to say, not all professional service practitioners agree that any form of marketing should be used — especially one designed for abstract evaluations.
Many practitioners therefore, still catogorize all marketing efforts as simply overt attempts at "sales related activities" that some feel violate professional and ethical business standards. It is my opinion that these "traditionalists" are simply missing the boat. Most all professional associations today allow many forms of marketing (including defensive marketing) as acceptable business practices.

Happily for professional firms and clients alike, many restrictive and regulatory barriers have been eliminated, allowing each firm to participate in the practice of it's discipline to the fullest extent of their capabilities.

Defensive Marketing Defined

If "proactive" marketing can be defined as: "The development of planning and procedural systems for products or services, responding to specific industry or consumer needs, which result in the realization of business goals and objectives" — then we should be able to state that defensive or "reactive" marketing is: "The development of planning and procedural systems resulting in the continued and sustained use of products or services utilized by a known and identifiable client base".

In a word, defensive marketing for professional service firms, boils down to building very strong client relationships and the positive image necessary to be foremost in the clients mind — especially when requests for RFP's are issued!

Many firms today still think that they will survive and grow purely on the strength of providing high quality service. In today's competitive business environment, this is a risky and potentially disasterous concept. High quality service is mandatory for all clients today, but it is no guarantee of consideration for future projects. Without effective client relationship building, a firm has "only one oar in the water".

Strong Client Relationships

While all firms can be said to initially build a strong client relationship during the preselection or postselection of a project award, many firms are remiss of any effort to continue to support the initial client/firm bond after the project has been completed. More often than not, many firms allow clients to fade slowly from sight as their project nears completion. The attention of the firm is usually shifted to the new project or new RFP. Client interest wanes as it is replaced by newer professional challenges.

A close business associate is fond of stating that "all clients are worth keeping — some however, somewhat more than others". When using or forming a defensive marketing program, it is important to place priorities on protecting your key clients. One way to do this is to develop a list of projects and clients over the past five years. Once you have this list, objectively evaluate each one in terms of potential business and rank them accordingly. Personal feelings and subjective evaluations of good and bad clients are of secondary consideration.

High Visibility

Maintaining a high client visibility and a positive image, reinforces and strengthens the client/firm relationship bond. Many firms are led into a false sense of security by allowing themselves to believe that they have dominance over the client's next project. Developing an attitude of: "the client will call me, when they need me", is a 50-50 gamble at best. The firm is running the needless risk that the client may not call them. The best way to avoid this trap is to get to know your client.

Client relationships are based on not only knowing the principal client contact, but the people on all sides of him or her. (People retire, are promoted, transfer, quit or die, with alarming regularity). Keep abreast of your client's business, industry and market. Subscribe to trade publications that will keep you informed of latest developments and trends that may affect your client, as they indirectly may affect you. Taking the time to understand your client can only make your firm more informed and responsive to your clients needs. Once you accomplish this, you have effectively "shut the door" on potential competition. When properly used, client relationship building through defensive marketing, will not only retain the clients that a firm has, but will attract both new clients and projects as well.

Office of the Chairman of the Board
BERT ELLIOTT, AIA

December 10, 1982

TO WHOM IT MAY CONCERN:

It is not often that one has the opportunity to work with a true marketing professional of the caliber of Joseph J. Caro. His efforts on behalf of The Elliott Group Inc. has led to many accomplishments and success over the years of our association.

Joe was more than an employee of the firm, he was a driving force directly responsible for many of our successes. Joe is a good manager, a fine friend and a dedicated executive whose sound judgement we have all come to trust. He will be missed.

Joe Caro has both designed and implemented a hard-hitting marketing and sales program that has worked very well for us. Not only is he the designer of our brochure and collaterial material, his action plan and style of marketing has resulted in many additional clients for the firm. He is a hard worker, there is no doubt.

As a manager of people, Joe has been noted to be somewhat stern at times, but in his defense, his people would produce to the highest of expectations.

We all wish him luck with his new consultancy venture.

Sincerely,

The Elliott Group Inc.

Bert Elliott

Bert Elliott, AIA, Chairman

BE/sn

THE ELLIOTT GROUP INCORPORATED - ARCHITECTS, ENGINEERS, AND CONTRACTORS IN PARTICIPATION
10701 Los Alamitos Boulevard, Suite 200 Los Alamitos, California 90720 (213) 594-6531 (

THE CONSUMERS GUIDE TO THE CALIFORNIA "LEMON LAW"

WRITTEN BY: JOSEPH J. CARO

* DRAFT COPY FOR PURPOSES OF REVIEW ONLY*

CONTENTS

CHAPTER 1

WHAT IS THE "LEMON LAW" AND WHAT DOES IT COVER

THE CONSUMERS GUIDE TO THE CALIFORNIA LEMON LAW

INTRODUCTION

The advancement of technology has given us many wonderful features in today's automobile. Cars are not only safer and more fuel efficient than they ever have been in the past but they pollute less, handle better and have available more comfort options than any other time in history. The 1980's automobile is clearly a sophisticated engineering marvel.

Resplendent with on-board computer systems, climatic control systems, engine monitoring systems, ride control and stability systems, the automobile has evolved into a complex transportation unit. Ergonomically designed for consumer comfort, most cars come equipted with lumbar support seating, voice sensor warnings and stereo systems that makes one ask, is it live ? or is it Memorex ?
The car has truely come along way since the "Tin Lizzie" days.

The American love affair with the automobile is no more alive than it is today. As Americans, our automobiles and motor vehicles mean more to us than almost anything else, that is until they stop working properly. Which is an entirely different story. Nine times out of ten, when your car ceases to properly function in one system or another, you bring it back to the dealer, have the technical or mechanical aberration repaired and you are happily "on the road again". But that one time that the repair dosn't take, or other problems begin to surface out of a sea of technical complexity, you may again wish for the "old days," when standing by your fathers side, under the shade of the backyard tree, you helped him coax life back into the family DeSoto... with a hammer and chisel.

The 1980's version of the" hammer and chisel" method thats used with the greatest effect on faulty cars is the "California Lemon Law"

BACKGROUND

The Lemon Law for new automobiles has existed in one form or another since 1975. In California this law is referred to as: the Tanner Bill, the Song-Beverly Act, Rule #703 or the Magnuson-Moss Act of 1975. The common name which encompasses all of these is of course the "Lemon Law".

When cars progressivly became more complicated in the mid 70's warranty repairs also began getting more difficult to make. In some cases many vehicles were making weekly trips to the dealership for the same problems. The sad truth is that with overlapping and highly technical systems, some problems couldn't be found, much less fixed. It is because these warranty problems affected the safety, the value and the use of so many vehicles that federal and state warranty laws initially came into being.

While federal warranty laws have pretty much remained unchanged since inception, the State of California has periodically revised, reshaped and "fine tuned" its Lemon Law policies to better meet the needs of the consumer. One of the principal objectives of this book is to explain these laws to you in an easily understood manner so that they can be effectively used when you are faced with the frustrating dilemma that you may have purchased a unrepairable or defective vehicle.

WHAT IS THE LEMON LAW?

In the State of California the "Lemon Law" is a description of the legal rights that you, the consumer have under the expressed or implied warranty of any new item that you purchase. In California the meaning of the "Lemon Law" extends well beyond the warranty of new vehicles to all major consumer purchases. In this book however, we will cover the applications of this law specifically relating to motor vehicles.

WHAT DOES THE LAW COVER ?

Simply stated, if you buy or lease a new motor vehicle in the State of California and you find yourself having chronic problems with major or minor "systems" or functions of the vehicle, and the vehicle meets the basic qualifications under the "Lemon Law", you are entitled to a replacement vehicle or a refund of your purchase price. Having stated this, we should now look at exactly what is meant by "basic qualifications".

WHAT VEHICLES DO AND DON'T QUALIFY UNDER THE LAW ?

Under the law the following vehicles do not qualify for consideration:

1. Motorcycles (all)
2. Motorhomes
3. Off-road vehicles or other non-registered vehicles
4. Vehicles used primarily for commercial purposes
5. Any vehicle with a gross weight in excess of 10,000 lbs.
6. Vehicles purchased "used" (unless it can be shown that the problem existed since new or the vehicle remains covered under the new vehicle warranty).

It is therefore reasonable to state that if you purchased or leased a new motor vehicle or a dealer owned demonstrator that was sold with a manufacturers new car warranty, and you operate this vehicle principally for personal or household uses (non-commercial) you meet the basic qualifications of the "Lemon Law" provisions. (The law applies to both foreign and domestic vehicles).

WARRANTY APPLICATIONS UNDER THE LAW

As found in most laws, there are gray areas that are sometimes confusing, even to the lawmakers themselves. In one specific instance the California Lemon Law is no exception. Designed at a time when most warranties were "12 months or 12,000 miles", this single stipulation in the law has come to haunt many consumers who have experienced problems past this period. Based on this "12/12" stipulation there are those who would say you were covered and those who say you were not. Having gone directly to "the source" for clarification of this, we will later review the legal opinions that were found.

It should suffice to say at this time however, that if you have a five year or 50,000 mile warranty <u>you are covered</u> under the law sans the "presumption" of the law. Which we will also define a little later on.

CAR PROBLEMS THAT QUALIFY

Now that you have an general idea of what is necessary to meet the basic qualifications under the "Lemon Law," the next step is to take a look at the various car problems and legal definitions needed for an "actionable" case.

Any problem or group of problems that you are having with your car qualifies under the law, **IF** after a reasonable number of unsuccessful repair attempts the problem(s) still exist, or the vehicle is out of service for the repair of <u>any</u> number of problems for a total of more than 30 calendar days.

In order to more clearly define what is meant by "a reasonable number of repair attempts", certain guidelines have been incorporated into the law:

1. The manufacturer has been unable to repair a <u>specific</u> problem after <u>four or more</u> repair attempts.
2. The vehicle is out of service for the repair of any number of problems for a total of more than 30 calendar days.

Under the "Lemon Law" the manufacturer is obligated to effect the repair of a defective vehicle within 30 days, and also stipulating that after a "reasonable" number of unsuccessful repair attempts, the manufacturer **must either replace the vehicle with a similar make and model or reimburse the consumer the full purchase price**, less the value for the use of the car prior to the initial claim of the chronic problem or defect.

In order for the above mentioned vehicle replacement or refund rules to apply, additional criteria must first be met:

1. The problem or problems stated must be covered by the vehicles written warranty.
2. The vehicle must have been purchased or leased primarily for personal, family or household purposes.
3. The problem or problems must substantially reduce the vehicles; use, value or safety.

In any of the earlier mentioned situations, ie; inability to repair after four or more attempts, or a total of 30 calendar days out of service, the "Lemon Law" raises the presumption that the manufacturer has had a reasonable opportunity to fix it. It is at this point that the "Lemon Law" presumes that the consumer is entitled to a replacement or a refund.

IMPLIED WARRANTY

In addition to the "limited warranty" or written warranty that you receive when you purchase a car, the State of California has an "implied warranty" of merchantability and general fitness that also offers the consumer protection. Whenever you purchase any new product in California you are entitled to these rights.

The State considers the implied warranty as meaning that "all products must be fit for their ordinary purpose and use". For example: a radio must be able to receive and replay audible signals (it must play) and a tape recorder must accurately record and play back, and a motor vehicle must provide safe and reliable transportation of driver and passengers.

While not generally stated within a written warranty, your legal rights as a consumer include all aspects of the implied warranty, and this includes your motor vehicle.

IT'S IN THE BOOK

If you suspect that your new car is not operating properly you should review your warranty to see if the problem is covered. In general, things that are not covered and will void the written warranty include:

Abuse of the vehicle or use for other things than intended. Example; If you use your passenger car for pulling-up tree stumps at the mountain cabin, you have effectively voided your warranty. If on the other hand, you had a transmission failure while towing your travel trailer, which is stated in your owners manual as an acceptable use, the warranty will cover you. Unless of course, you operated the vehicle in an unacceptable manner (towing the trailer at excessive speeds or forgetting to maintain proper vehicle service or allowing the transmission fluid to fall to a damaging low level.

While it's understood that people would rather do most anything than read their warranty book, it is important that you have some idea as what is covered and how it would apply in resolving your present problem. Besides, the forms that you need to file for dispute resolution (arbitration) are obtained by calling the phone number listed someplace in your warranty book, and so is the address of the Customer Relations Department of the manufacturer.

CHAPTER 2

BUILDING A WINNING CASE

PERSONAL EFFORT IS IMPORTANT

If by this point you feel that you meet all of the criteria so far, the chances are good that you have a valid case for a repurchase or refund.

Now that's not to say that you've WON your case, just that you may have one. This is not the time to drive back to the dealership and wave this book under the Service Managers nose demanding your money back in fair trade for his "Lemon". If it was that easy, I wouldn't have wrote this book.

It's going to take a little effort on your part before you can "return to them something which has brought you so much grief!" Hopefully, you realize that the "Lemon Law" process for a replacement vehicle or a full refund involves some degree of effort. Manufacturers, like anyone else, just hate to give money back, even if it is required under the law. Some say that it's easier to get a divorce in California than rid of a defective car. In any case, the journey to your refund check begins with the first step.

DOCUMENT EVERYTHING

Now that you suspect that your vehicle may fall under the provisions of the "Lemon Law" it's time to start preparing your case. **Document everything!** Go back and find all the Repair Orders from the dealership that clearly show that they could not fix the problem after four try's, or to prove that the vehicle was at the repair shop for 30 calendar days or longer, for <u>any</u> number of repair reasons.

START A FILE

If you haven't done so already, begin a file on the car with all the previously mentioned information and then sit down and write a letter to the manufacturer's Customer Service Department, and their dispute resolution program, (which you should find listed in the back of your warranty book or owners manual). If the dispute resolution program is not listed, you can get this information from your contact at the manufacturers Customer Service Department. Requests for this information from your dealership generally aren't very productive, as dealers are seldom, if ever, involved with the dispute process. Please remember to keep copies of all correspondence for the file.

Note: Once you have decided to pursue the "Lemon Law" action put your problems on paper. Don't waste too much time talking about your problems with people at the dealership. If you already qualify under the "four or more try's or the 30 days" there is nothing they can do for you that they haven't already tried. Direct contact to the manufacturer at this time, fulfills one more step in the process of accomplishing your goal ... a replacement vehicle or a refund, the choice is up to you.

LETTER FORMAT

When you write to the Customer Service Department of the vehicle manufacturer and to their Dispute Resolution Program, keep it simple, to the point and above all, civil. The contents of a letter is no place to vent your frustrations when you are trying to accomplish a goal. The following example will serve as a guide:

Overseas Motors USA
Los Angeles, Ca. 90000
Customer Service

Dear Sir or Madam:

This letter is to inform you that I am most unsatisfied with my recently purchased 1989 Turbo-Toad (vin# 12-734b-26-43). After taking delivery of this vehicle from lax Motors on June 5th. and driving it for less than 3,000 miles, I encountered severe problems with: 1. Engine vibrations at freeway speeds 2. Grinding noises when brakes are applied 3. Engine overheating when the air conditioning is turned-on.

The people at Lax Motors have tried to fix these problems four different times without results. As of now, the car has been in the shop for a total of over 30 days, and the existing problems in addition to being an inconvienence, in my opinion affects the safety of this vehicle.

I therefore request under the California Lemon Law, that the purchase price of the vehicle, including transportation charges and factory optional equipment, be refunded to me by the earliest possible date in addition to the incidental damages stemming from : sales tax, registration costs, license fees, towing and rental car costs. An itemized list is enclosed.

Sincerely,

Note: If there is a listed 800 telephone number in the warranty book for customer complaints or "dispute resolution" you should call them in addition to sending a copy of the letter.

THE FIVE POINT PROCESS OF WINNING YOUR CASE

Notifying the manufacturer that you are applying for dispute resolution under the "Lemon Law" in effect, " starts the clock" on your case. The second item is equally easy, as you must notify the dispute resolution program associated with the manufacturer. After the completetion of this element, parts three through five are an automatic series of events dealing with the resolution process. These items are identified as: Mediation, Completing the Agreement To Arbitrate form and the arbitration process. For a better understanding of how these five points will help you win your case, the following pages will require your full attention.

DISPUTE RESOLUTION PROGRAMS

We had earlier identified the federal Magnuson-Moss Warranty Act of 1975 as pretty much laying-out the ground rules for state "Lemon Laws" to follow. When the Federal Trade Commission established Rule #703 the groundwork was complete in setting parameters for the process known as "dispute resolution". Rule #703 had in essence become the "vehicle" that allowed any state government to establish a meaningful program by which to implement this consumer law in a fair and just manner.

Prior to the 1975 consumer laws, the only recourse that a consumer had if found to be the unhappy owner of a defective or unrepairable vehicle, was to take the manufacturer to court, which then, as now, was an expensive and time consuming process. With the advent of the consumer protection and warranty laws, you and I had a good thing going as consumers, but the manufacturers balked, citing (quite accurately) that they were now open for litigation and subject to the consumer laws as well. (sort of a double jeopardy situation)

As it stood, the new consumer laws would be mostly useless unless the manufacturers cooperated. So an all-around compromise was devised that not only assured the manufacturers full cooperation (voluntary) but also had them paying for the consumer programs as well. What was the compromise that effected this change? Simplicity itself;

The agreement that was struck said that if the manufacturer participated and paid for the operation of a third party dispute resolution program for their vehicles, they would be saved from direct consumer litigation or punitive damages in any state where the program was readily available. That isn't to say that consumers couldn't sue the manufacturer, they could. They just had to go through the dispute resolution program in order to do it.

So between the combination of the Magnuson-Moss Act and the F.T.C. Rule #703 informal dispute resolution programs in themselves, are free to all consumers. This is one of those cases where it is a win-win situation for everybody.

Consumer warranty programs are mentioned by several different names throughout this text when relating to diferent programs and manufacturers: "Automotive Dispute Resolution", "Independent Dispute Resolution", "Third Party Dispute Resolution" etc. all mean principally the same thing ...arbitration. Whatever these programs are called, they are perhaps the most effective means to settle product related conflicts between the consumer and the manufacturer outside of the court room.

New changes in the warranty/dispute program laws in this state presently require that every dispute resolution program operating under the existing warranty laws must be approved by the Bureau of Auto Repair Division of the Department of Consumer Affairs. This new program certification rule makes certain that everyone is treated fairly, objectively and that cases are heard and awards are made with the quickest possible speed.

THE LEMON LAW ARBITRATION PROCESS

The F.T.C. in fashioning Rule #703 was concerned that the program and process should not be so complex that individual consumers could not use it without professional help. One overriding intent of this rule was to avoid creating artificial or unnecessary procedural burdens so long as the basic goals of speed, fairness and independent objectiveness continue to be met.

The sole purpose of informal dispute settlement mechanisms then can be said to simplify and to expedite the resolution of warranty disputes.

note: The arbitration program described in Rule #703 can best be defined as follows;

"An independent person or panel (usually 3) who are interested in a fair and expeditious settlement of the dispute, are independent of the parties to the dispute, and if the panel consists of only one or two persons, neither may have any direct involvement in the making, distributing or servicing of any product".

Many arbitrators are both experienced and knowledgeable in "Lemon Law" procedures and the rules governing consumer and commercial arbitration. Because the arbitrator is given the powers of both judge and jury in warranty cases, the consumer has every right to challenge them at the beginning of the hearing.

YOUR RIGHTS UNDER ARBITRATION

Today's consumer warranty laws that are strengthened with the ability to select arbitration as a dispute resolution process, have dramatically increased the resources that were historically available when dealing with product problems. The following example will illustrate:

> You have purchased a new vehicle that soon develops problems with the braking system. When applying the brakes you notice that the steering wheel seems to "pull" to the left. Also when you are driving in traffic, the car seems harder to stop and a "chattering" noise is both heard and felt from the front wheels.
>
> You schedule to take the car back to the dealers repair shop and after servicing, the problem still exists. This cycle repeats again and again. While the dealership has no trouble in fixing other small problems that occur under the warranty, the brake problem continues to plague the vehicle and you begin to worry if the vehicle is safe to operate.
>
> As your frustration builds you contact the Service Manager, who, after having the vehicle for another three days states that he cannot find anything wrong and that he feels the vehicle is operating normally. Your concerns have grown by now, to the extent that you no longer feel that you can trust the vehicle and you doubt that it is safe. You have a total of 6,000 miles on the vehicle of which 4,000 miles were driven <u>after</u> the problem was first reported to your dealer.

ACTION PLAN

Under the "Lemon Law" this is what you action should be:

1. Compile all of the attempted repair information starting with the first visit where you reported the brake problem.

2. Write a letter to the manufacturer and the dispute resolution program (if available) informing them of the problem (see sample letter).

3. You call the 800 number for the dispute resolution program, explain your problem and request the proper forms to file a case.

4. Complete all forms sent to you, paying close attention to the Agreement To Arbitrate form.

5. A meeting may be arranged with the manufacturers local representative or area manager, if this meeting includes a "third party" or referee it is a mediation hearing.

6. If you find that you can't come to an agreement with the manufacturers representative in mediation, you state this to the dispute resolution case administrator and an arbitration hearing will be scheduled within a week or two (depending upon the program case load and the availability of the arbitrator or panel that you selected).

7. When you attend the arbitration hearing one of two things will happen, you will win...or you will lose (we will cover what can be done to increase/decrease your odds accordingly and how to estimate a proper award in the next chapter.) In either case, you still maintain your options in item 8.

DRAFT

8. If you do not agree with the arbitrators decision or the award in your case, there are two avenues which remain available to you. **a.** If you feel that the arbitrator was unfair or did not base his award on the law, you may wish to file for a hearing appeal. **b.** You can hire an attorney and go to court. (Which is exactly where you would be if the "Lemon Law" didn't exist.)

Up to this point you have had a minimum of three different opportunities to resolve your car problems at no cost to you! and you still have maintained your rights to pursue a civil litigation case against the manufacturer.

How good is the Arbitration Process working? Statistics show that seven out of ten cases that go to arbitration are decided in favor of the consumer, and that out of the remaining number only 3% are ever followed-up by a civil suit. (this figure takes into consideration cases that are successfully mediated or worked-out with the manufacturer along the way).

The latest American Arbitration Association figures indicate that a consumer stands a 98% chance of successfully accomplishing their goals of either having the vehicle properly repaired, obtaining a replacement vehicle or getting a full refund.

note: While it has been mentioned that the "Lemon Law" states either an award of a replacement vehicle or reimbursement of the purchase price, when describing the consumers options, this may warrant clarification . In the 1988 amendment to the "Lemon Law" the following statement is made: **" The vehicle buyer shall be free to elect restitution (refund) in lieu of a replacement vehicle, and in no event shall a buyer be required by the manufacturer to accept a replacement vehicle.**

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CHAPTER 3
UNDERSTANDING A PROPER AWARD

In this chapter we will examine the various types of awards that can be made under the "Lemon Law" as well as examples of both good and not-so-good awards. Pay particularly close attention to the sections on **replacement vehicle awards** and **restitution awards**, as there are many arbitration programs that do not automatically grant **incidental damages** and some do not automatically reimburse consumers for sales taxes, license fees or other related expenses.

REPLACEMENT VEHICLE AWARD

In the event that you decide that you would rather have a replacement vehicle than a purchase price refund, here is how the "Lemon Law" explains your rights:

> "In the case of replacement, the manufacturer shall replace the buyers vehicle with a new motor vehicle substantially identical to the vehicle replaced. The replacement vehicle shall be accompanied by all express (written) and implied warranties that normally accompany new motor vehicles of that specific kind. The manufacturer also shall pay for, or to, the buyer the amount of any sales or use tax, license fees, registration fees, and other official fees which the buyer is obligated to pay in connection with the replacement, plus any incidental damages to which the buyer is entitled to under section 1794, <u>including but not limited to, reasonable repair, towing and rental car costs actually incurred by the buyer.</u>

In a recent case that I attended as a member of an Arbitration Panel, the consumer presented a strong case and the award was made for the repurchase of the vehicle. The Panel however, penalized the consumer for the value of the total miles shown on the odometer by a rate of .20¢ per mile, and declined to award her incidental damages for a rental car and would not order reimbursement for sales taxes or other official fees that under the law was owed. This is a good example of how not knowing the "Lemon Law" can affect a valid award.

While this case clearly shows that mistakes frequently happen, the blame in this particular case was with the resolution program and not the arbitration panel. This resolution program does not, as a rule train its arbitrators in applications of the "Lemon Law", even though this program has been in existence in the state for many years. This program instead abides by a more "generalized" training for arbitrators and case administrators and does not take into consideration the more stringent applications of the California law.

How can they get away with this for so long? Easy! If the consumer had read this book before her case, she would never have accepted such a poor award decision. By protesting to both the dispute resolution program and the Bureau of Auto Repair in Sacramento, (the newly assigned program watch-dog). Alarm bells would have gone-off and the consumer would have been assigned another hearing that would consider all aspects of the "Lemon Law" for her award.

One of the principal arguments that the Panel Chairman made when we were considering the award in the above case was: " The consumer did not specifically request reimbursement of incidental damages and taxes or fees in the " Agreement to Arbitrate" form when she filed her original claim".

Was this a valid argument? I certainly didn't think so. How can a consumer be expected to properly complete as important a form as the " Agreement To Arbitrate" unless she is made aware of the impact that the form has on her case? In any event, isn't it the duty of the Arbitration Panel to at least advise her of her rights under the law?

Lets' go a little further and see exactly what the "Lemon Law" states in cases of a "buy-back" or restitution award.

RESTITUTION AWARDS

In the case of restitution awards or awards of refund the "Lemon Law" statements are quite clear:

" The manufacturer shall make restitution in an amount equal to the actual price paid or payable by the buyer, including any charges for transportation and manufacturer installed options, but excluding non-manufacturing items installed by a dealer or the buyer, and including any collateral charges such as sales tax, license fees, registration fees, and other official fees, plus any incidental damages to which the buyer is entitled under Section 1794, including but not limited to, reasonable repair, towing and rental car costs actually incurred by the buyer.

I can't imagine this portion of the law being any clearer. The statement is well defined as to what the consumer shall receive in all fairness. And yet there are perhaps thousands of consumers each year, who walk away from the hearing and then agree to accept thousands of dollars less than they are entitled to!.

DISCOUNTED VALUE OF USE

Several times throughout this book you have seen reference to the term "value of the use of the vehicle by the owner" as dealing with the manufacturer repurchase. This means that you are required to pay for the miles that you drove the vehicle **before** the problem was documented. The following example will clairify:

example:

You took delivery of your new **Zippy - One Special** and drove the car for 3,000 miles before taking it to the dealership for engine problems that led to an arbitration award for repurchase. Under the "Lemon Law" you are expected to pay for that portion of the use that you received **prior** to your registering that complaint to the dealership for repair.

In this example then, you **should** have to only pay for 3,000 miles of use, regardless of how many miles the vehicle has when the repurchase is ordered. In the example stated a few pages ago, you may recall that the consumer had won the award for repurchase, but the award was so structured that she had to pay for **all** the miles registered on the odometer at the date of her hearing. If this wasn't bad enough, she was mandated to accept a charge for that mileage use, of .20¢ per mile.

While the "Lemon Law" is quite specific in these two areas of award, the Arbitration Panel while making the award in her favor, was not well enough versed in the "Lemon Law" to make the proper award to her and thereby causing additional financial hardship. This is a textbook example of "winning the battle but losing the war."

I call this portion of the award decision the **" Discounted value-of-use "** consideration, and when hearing a case, the arbitrator should be most careful to examine this area closely and compare it with the meaning and language of the "Lemon Law". It is an unhappy fact that many arbitrators devise their own systems to "charge-back" miles driven by the owner which in some cases, are as high as .25¢ per mile. It is not uncommon for an arbitrator to accept the manufacturers submitted "Blue Book Value" of the estimated worth of the vehicle as the award amount. (at the end of an arbitration hearing the manufacturer can present to the arbitrator their estimate of what they feel the vehicle is worth, in the event that a decision is made for repurchase.)

By the time that you finish reading this book, you will also be able to make and submit your own estimate of chargeable use.

DISCOUNTED VALUE OF VEHICLE USE CALCULATION

When the manufacturer repurchases a problematic or defective vehicle, the law states: **" The buyer shall only be liable to pay the manufacturer an amount directly attributable to use by the buyer of the replaced vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity.**

When restitution (repurchase) is made, the amount to be paid by the manufacturer to the buyer **may be reduced** by the manufacturer by the amount directly attributable to use by the buyer, prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity.

The amount **directly** attributable to use by the buyer shall be determined by multiplying the actual price of the new motor vehicle paid or payable by the buyer, **including** any charges for transportation and manufacturer installed options, by a fraction having as its denominator 120,000 and having as its numerator, the number of miles traveled by the new motor vehicle **prior** to the time the buyer first delivered the vehicle to the manufacturer, or distributor or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity.

POOR EXAMPLE OF DISCOUNTED VALUE OF USE AWARD

Your newly purchased **"Turbo-Toad II"** is in the repair shop again, with the same problem that has plagued the car since it had 3,000 miles. You could almost kick yourself for spending so much money on the car, in addition to the purchase price of **$12,500.**. You had to order the car with a factory sun-roof and that set you back another **$1,000.** and don't forget those special wheel covers that the dealer sold you for another **$350.**. Ticking it over in your mind, you come to the conclusion that with taxes and assorted fees your "Toad II" came in right around **$14,560.**

You wonder why the dealer can't find the problem with the brakes after having the car four times in the past two months. You hardly put 350 miles on the car since the last trip to the shop, and if anything, the problem seems to have gotten worse.

You are now concerned that the brakes may no longer stop you in an emergency situation.

It would take the dealer another three days to again try to fix the problem, and in the meantime you had to rent a car to the tune of $50. per day. You can't help remembering the first time that the brakes went-out and you had to have it towed to the shop, that set you back $155 "big ones," plus the car rental that time cost you an even $200.

Is it ever going to stop? you think to yourself, after all, there are lemon laws in this state, and I think that I have gone just about as far as I am going to go. There's no way that I'm going to put up with this any longer.

So you file a "Lemon Law" claim and wind up in arbitration. A few weeks go by and you are somewhat surprised when you open the mail and find out that you've won your case. You hardly thought that you could force Lax Motors to repurchase your "Toad II" especially now that it has 4,800 miles on the odometer. But wait a minute! The award that you fought so hard for, is only $12,600. Why, you almost owe that much to the bank! In fact, with the pre-payment penalties that the bank will likely charge you, it looks like it will cost you a couple of hundred dollars out of pocket in order to obtain clear title!

You feel that you have learned quite an expensive lesson, and so in order to cut your losses, you agree with the decision and accept the award. After all, you did get them to take the car back!

This is the calculation that could have been used by an untrained (in "Lemon Law") or inexperienced arbitrator:

Purchase price:	**$12,560.00**
Factory sun roof:	**$ 1,000.00**
Total:	**$13,560.00**
Less Discounted Value of Use:	**$ 960.00**
(4,800 miles x .20¢ per.)	
Total award:	**$12,600.00**

Would this be an acceptable award? I know of many cases where such an award is standard practice even though it does not obviously comply with the law. Why did the consumers accept such an improper award decision as this? **By not knowing the law, they didn't know what they were entitled to!**

If you receive a repurchase award as a result of either your mediation hearings or your arbitration hearing, you are entitled under California law, to specific compensation as outlined within the meaning and intent of the law. Taking the same case example as before, with all other factors considered equal, the award would be as follows:

We will first consider the aspects of the purchase price and accessories:

$12,560.00	purchase price
$ 650.00	transportation cost
$ 1,000.00	factory sun roof
$ 000.00	(no credit for dealer options)
$14,210.00	Total purchase price

Now we will review the incidental damages incurred by the consumer with his "Turbo-Toad II"
The consumer purchased an extended warranty program for the vehicle:$875.00. In addition, there were rental car costs while his "Toad II" was in the repair shop; $600.00. Then there is the cost of the towing charges which were; $155.00. Adding to this we of course have sales tax; $960.00 and license and registration fees; $420.00.

When we add this all up we have; **$3,010.00** but were not finished yet. In addition to these incidental costs, the consumer needs to obtain a clear title from the bank for repurchase by the manufacturer. If the bank charges a pre payment penalty on the outstanding balance of the loan, which in this case is $200.00, so now the consumer has incidental damages totaling; **$3,210.00**. Let's once again review the totals:

Vehicle purchase price: $14,210.00
Incidental damages: $ 3,210.00
Total: $17,420.00

DISCOUNTED VALUE OF USE FORMULA

To accurately determine the value of the use that the consumer incurred prior to documenting the problem with the dealership, we will use the formula contained within the law. You may recall that when the car was inspected at the arbitration hearing it had 4,800 miles. From reading the example we also know that the consumer had driven the car 3,000 miles before taking it in for the problem. Therefore the following Discounted Value of Use formula would apply. (Purchase price times the fraction of the initial miles (3,000) over the mileage life of the vehicle (120,000) equals the Discounted Value of Use D.V.U.

This is numerically displayed as:

$$\$14,210.00 \times \frac{3,000}{120,000} = \$355.25 \text{ DVU}$$

The Discounted Value of Use adjustment is then: $14,210.00
less: $ 355.25
Total Award on Purchase Price: $13,854.75
When we add the incidental damages of: $ 3,210.00
We can now show the total
award due the consumer of: **$17,064.75**

While a repurchase award was made by an arbitrator in each example case, the difference in the award system and formulation of the "Lemon Law" clearly shows a **$4,464.75** award difference to the consumer. This is not saying that all arbitration awards are made improperly, but that the consumer should know what rights they have under the law regarding fair and proper awards.

CHAPTER 4

CLEAR TITLE, LONG TERM WARRANTIES, NEED FOR LEGAL ADVICE

CLEAR TITLE NEEDED FOR REPURCHASE

When an arbitrator makes a repurchase award, it is up to the consumer to provide a "clear and unencumbered" title to the vehicle at the time of exchange with the manufacturer. This provision of the law may create some concern to consumers who had elected to finance their vehicles. In most cases however, you will find that your lender is most understanding when you show them your award decision, and will in one way or another, re-arrange your debt obligation to produce the needed document. In the event that you selected a manufacturers in house financing program (such as GMAC for all General Motors vehicles) your problem is solved as the whole transaction will be handled by the manufacturer.

LONG TERM WRITTEN WARRANTIES

As earlier stated, the "Lemon Law" applies a presumption to the existing warranty with the once standard 12 month/12,000 written warranty of the vehicle. While many new car warranties today exceed the earlier limits by longer coverage, the "presumption" of the law may not apply, but the intent of the law does, and a replacement vehicle or a refund may still be your award. In a 1988 opinion from the Legal Services Unit of the Department of Consumer Affairs, we find this discussion under the heading of: "California Standards For New Car Warranty Arbitration Programs" listed under: "The Scope of Bureau of Auto Repairs (BAR) Certification process".

The scope of a program that is the subject of the bureau's certification process therefore extends to all disputes involving

performance under written warranties on new motor vehicles. These include not only those complaints which are the subject of the presumption of the new car "Lemon Law" (those in which the manufacturer has made four or more repair attempts, or the vehicle has been out of service for a cumulative total of more than 30 calendar days during the first year or 12,000 miles of operation and the nonconformity substantially impairs the vehicles use, value or safety but also complaints involving the manufacturers performance under written warranties whose duration exceeds one year or in which the nonconformity does not substantially impair use, value or safety.

"If an automobile manufacturer offers a longer written warranty (anything more than 12 months/12,000 miles) and during this period is unable to service or repair the vehicle to comply with the warranty after a reasonable number of attempts, the manufacturer is obligated to either replace the vehicle or make restitution!"

This obligation exists without regard to weather the one year or 12,000 warranty has been exceeded. The one year and 12,000 mile limitations only apply to the application of the presumption of the new car "Lemon Law" If the duration of a written warranty is 5 years, and the problem first occurs more than one year after delivery the presumption will not be available, but **the buyer still may have a right to restitution or a replacement vehicle if the manufacturer has been unable to honor the terms of the warranty after a reasonable number of attempts.**

An additional legal opinion voiced regarding the warranty term is quite clear..."**a limitation to the 12 month, 12,000 mile warranty is seen to be arbitrary, and would perhaps exclude the larger part of a typical program's activities,** including not only defective performance involving minor defects, and even defective

performance involving major defects that have not yet resulted in four or more repair attempts or 30 days out of service for repair.."

IS LEGAL ADVICE NEEDED FOR A LEMON LAW CASE ?

One of the most frequently asked questions regarding the "Lemon Law" and consumers rights in arbitration deals with the need for legal advice regarding case review, case preparation and representation at mediation/arbitration hearings. Obviously, this can't be a "yes" or "no" answer that applies to everybody. Each person must realistically weigh their individual ability, time allocations and comfort level in dealing with what can be termed a "negative situation".

My personal comments and observations as a practicing arbitrator, is that in most cases consumers generally do a fine job throughout the process on their own. Remembering that these programs were structured specifically to be informal so that consumers may be encouraged to participate, I don't feel that the average person requires a lawyer for the "Lemon Law" process.

The law however,clearly states that you can select anyone to aid or help represent you if you wish, a friend, relative, neighbor, etc. Again, in most of the arbitration cases that I have heard, the consumer has elected to represent themselves. If self representation is your plan, two main elements that you would be wise to use in structuring a winning case are; 1. proper documentation of your files and, 2. a good understanding of the text of this book.

For consumers who feel that they may require help of a more professional and experienced nature, I suggest that they consider the use of consumer arbitrators as well as lawyers. Calling the local chapter of the American Arbitration Association for a listing of arbitrators that are familiar with "Lemon Law" cases as well as speaking to their family attorney, may offer an additional alternative to "going it alone."

There are three areas where experienced help may be of benefit to a consumer who is not sure that he or she could, or want to, develop their own case. These areas are: **initial case review** (where you would be advised if you did or did not have a case that qualifies) **case preparation,** (help with the detailed documentation necessary) or **representation at mediation** or **arbitration hearings.**

There are no legal restrictions that would prevent a consumer from seeking the help of a consumer arbitrator for a "Lemon Law" case. You must remember however, that unlike lawyers, many consumer arbitrators are not trained in law.

Arbitrators fees: Many people have asked the range of fees that might be expected for various "Lemon Law" consulting tasks. Here again, there is no set format or structure, as each case and each arbitrator is different. As a general guide however, the following range of fees may apply:

Initial case review: $50.00 to $100.00
Case preparation: $200.00 to $300.00
Representation at Mediation/Arbitration $150.00 to $250.00 *
* figures represent aprox. fees per hearing, plus expenses.

CHAPTER 5
THE MEDIATION AND ARBITRATION PROCESS

THE MEDIATION/ARBITRATION PROCESS

The successful outcome of your case is directly related to your effectiveness during the mediation or arbitration phase of the dispute resolution process. The following is an explanation of the procedures in general terms, and a list of "do's and don'ts" to help you prepare yourself.

The next logical step that this book should take to further your understanding as a consumer under the "Lemon Law" is to introduce you to what you can expect at a mediation and arbitration hearing. This "preview" is important as it allows you to become more comfortable with the hearing process, and to know in advance what to expect.

The California "Lemon Law" program requires that proper notification of the problem or problems be made to the manufacturer as earlier discussed. When you send in your letter of complaint in essence, is when you enter into the province of the "Lemon Law. Your letter, when received by the manufacturer, in addition to probably being the first that they have heard about your problem, also obligates their participation. You should be aware however, that the manufacturer strongly shares your concerns and they want to keep you as a satisfied customer and help you resolve the problem that you are having with their product.You should make an effort to try to cooperate with them for an early resolution of the problem.

MEDIATION

For those who are unfamiliar with the term mediation as applied to the "Lemon Law" it can be defined as an informal meeting between both parties of the dispute, in the presence of a "neutral" third party or referee. At this meeting both parties state their positions and see if there is any way they can reach an agreement among themselves. The referee is there to work with both parties to reach the agreement and to witness any agreements made.

It is important to note that while a face-to-face meeting is most desirable, it is not a requirement. Both mediation and arbitration hearings can be conducted by phone or in writing. Mediation meetings are usually brief and always informal. Held in a variety of locations from the dispute program offices to coffee shops, and may last between ½ to 1 hour. These meetings are very useful as they accomplish one of two things; they may present an opportunity to resolve the problem then and there, or they may give you insight to the other sides viewpoint. (which can be an important consideration when you are structuring your case for the arbitration hearing.) Attending a mediation also shows that you are trying to resolve the problem.

ARBITRATION

The dispute resolution program (arbitration) is made available to you at no cost, and is a viable alternative to litigation. While an informal hearing process, arbitration decisions are legally binding and as a rule withstand appeals to have decisions overturned or vacated. The following are commonly asked questions regarding the legal process known as arbitration, as applied to the dispute resolution program.

Q. Is arbitration binding ?

A. Under the "Lemon Law" an arbitration decision is binding on the manufacturer but not on the consumer unless they accept it.

Q. Do I need an attorney for arbitration ?

A. Arbitration is designed as an informal process and under the "Lemon Law", can be effectively handled by the consumer.

Q. What does arbitration cost ?

A. There is no cost to the consumer for the arbitration/mediation hearing. The consumer is obligated to pay for any legal advice or expert witness costs that they may incur.

Q. How long will it take for a decision on my case ?

A. Arbitration program guidelines call for quick results. It should take no longer than 60 days from notification of the hearing date to a written decision by the arbitrator.

Q. Can I use my car during the arbitration process ?

A. You have every right to continue to drive your vehicle throughout the arbitration process until it is repurchased by the manufacturer.

Q. If I am awarded a refund/repurchase of my car, how long does it take before I get the money ?

A. The law states that the manufacturer has 30 days to comply with the decision.

Q. Do I have to accept the arbitrators decision ?

A. Under the California "Lemon Law", you are not bound to the decision unless you want to be. If you do not accept the decision however, the manufacturer is released from the decision as well. If you do not accept the decision there are two alternatives remaining; 1. If you feel that you did not receive a fair hearing, you should make this fact known to the arbitration program and the Bureau of Auto Repair in Sacramento. There is a good chance that you will receive a new hearing if your argument is strong enough. 2. You may wish to consult with legal council at this time and to explore other legal possibilities. If you decide to continue your case to litigation however, you should be

aware that the arbitration decision and your decline of that decision may be brought forward as evidence to the court.

SCHEDULING YOUR HEARING

Most arbitration hearings are heard weekdays, during normal business hours (9to5). For most of us that entails taking time-off from work. While most hearings last 1½ to 2 hours, it would be to your advantage to allow for at least 3 hours to be on the safe side. In high traffic areas such as the Los Angeles basin, try to plan your hearing outside of normal high traffic periods. I suggest that a 1:00pm or 2:00pm hearing time generally works out to everyone's advantage.

ATTIRE

Your arbitration hearing is a business function held within a business environment. While there is no mandatory dress-code, business-like attire is strongly suggested.

THE ARBITRATION AGREEMENT FORM

The single most important document relating to the outcome and award of your case is the Agreement To Arbitrate form. Comprised of two sections; "Nature of Dispute" and "Decisions Sought" this form represents the basis of your entire case to the arbitrator. Your case can only be heard and your award granted, based on the information that you include on this form! Under the dispute resolution process, the arbitrator is limited to deciding only the specific problems listed in the "Nature of Dispute" area and to award only that which is covered under "Decisions Sought".

NATURE OF DISPUTE

On the Agreement To Arbitrate form the "Nature of Dispute" section is where you list the exact problems that you are having with the car that led to your filing the claim. If you are experiencing "engine failure at freeway speeds, hard starting when engine is hot and excessive engine knocking" you must list them all. If you have experienced three transmission failures within a six month period say so. The Arbitrator has no prior knowledge of your case or claim except what you state on the Agreement To Arbitrate form. While you may have told the dealer, the manufacturer and the mediator, if you don't describe the specific problems and the specific award that you seek within this official hearing document, you stand a real good chance of not getting it. On the other hand, this form is not the place to write every single problem that you have ever had repaired on the vehicle, just the specific problems that led to your initial filing and that comply with the "guidelines and qualifiers" as earlier stated.

You also won't be able to use "catch-all" phrases like; "including but not limited to," when describing vehicle problems on the form. Making statements like "excessive engine noise and other related problems" can also be seen as non-admissable as they are too general in nature on which to base a decision.

GOOD EXAMPLE: Consumer states that she had continuous problems since delivery of her "Super Neptune" due to vehicle defects. These problems are: rough engine idle, engine knocking noises, excessive brake squeal and grinding when stopping, noises in the steering wheel and a faulty air conditioner.

BAD EXAMPLE: Customer contends that there are many problems with her 1989 Astro Turf, including but not limited to: engine, transmission, paint and stereo/tape deck.

REMEMBER, YOUR CASE DEPENDS ON YOUR EVIDENCE AND TESTIMONY, BUT CAN ONLY BE HEARD BASED ON WHAT YOU INCLUDE IN THIS FORM!

DECISION SOUGHT

As you read through the "Agreement to Arbitrate" form prior to listing your claim, I suggest that you pay particularly close attention to the area labeled **"Decision Sought."** In my experience, this section is every bit as important as "Nature of Dispute". If you don't clearly ask for the proper decision and award, chances are that you won't get it. The following are a few examples of the right way and the wrong way to complete this area of the form.

Bad example: Decision Sought; Customer requests that Lax Motors repurchase his vehicle for the amount of $12,750.15

Good example: Decision Sought; Customer requests that Snake-Bite Motors USA repurchase his vehicle under the provisions of the California "Lemon Law", for the purchase price of $12,750.15 which includes transportation costs of $745.00 and a factory installed sun roof for $1,000.00. Customer also claims incidental damages under this law in the amount of: $3,130.00 which include; towing: $155.00 rental car: $680.00 sales tax and license & registration fees: $835.00 in addition to recovery of $1,275.00 paid for an extended warranty program and a estimated $275.00 pre payment penalty to release title from the bank. Customer therefore seeks a total award of: **$15,970.15**

Bad example: Decision Sought: Customer seeks to have his 1989 "Wammo" repurchased for the cash price of $18,674.00. This amount excludes sales tax, license fees and finance charges.

SOMETHING TO REMEMBER

When completing the "Decision Sought" area of the Agreement To Arbitrate form do not include your estimate of the **"Discounted value of use"** (miles that you have driven prior to making the problem known) You will have the opportunity to submit these figures at the end of the arbitration hearing following the mandatory vehicle inspection. You should list in this section however, any factory options and transportation/destination /get-ready charges that you paid for within the vehicle purchase price. You must also list any "incidental damages" that you feel you are owed as outlined within the law.

CHAPTER 6
THE ARBITRATION HEARING

WHAT YOU NEED TO BRING TO THE HEARING

Needless to say, it is very important for you to be prepared for the hearing. **You must bring all documentation pertinent to your claim.** Once your at the hearing it's too late to remember the papers that were left on the kitchen table. While the hearing is classed as an "informal process" that doesn't mean that you don't have to substantiate your claim. Remember that the arbitrator hearing your case and making the decision, must account for the decision that he made. If you have poorly organized documentation, it makes it difficult for the arbitrator to decide in your interest. While the arbitrator will hear your verbal testimony, they will weigh that testimony against evidence brought to the hearing. The following check list will help prepare you.

Hearing Check List

Original purchase contract; bring all paperwork that will substantiate when and where you purchased the vehicle and how much was paid. Circle those amounts that you feel may be considered "incidental damages" by the arbitrator (sales tax, registration & license fees, etc.) It is a good idea to make a summary page of those costs that you wish reimbursed including any incidental damages you seek.

RepairOrders; you should know by now how important it is to bring all repair orders (RO's) beginning with the first one in which the main unrepairable problem first occurs, and all subsequent RO's that list that problem or problem's. **Do not bring <u>every</u> RO on the vehicle!** Only the one's that can help you win your case.

Bring all correspondence; Any and all letters that you may have written to the manufacturer regarding your case and any replies that you may have received should be submitted as evidence.

Incidental damages; Bring anything that may prove that you incurred "incidental damages" as a result of your problems with the vehicle; receipts for towing, rental car use, emergency repairs that may have been done, in addition to contacting your bank and finding out how much pre-payment penalties (if any) that you may be assessed to provide clear title in the event of a repurchase.

Statements from witnesses and experts; If you had the vehicle checked by a specialist have him write-out his findings. If you have any witnesses that either drove the car or were in the car when the problem or problems occurred have them write a letter to that effect along with their signature and phone number/address where they can be reached. If you read anything about your particular model vehicle displaying similar problems, bring this information with you.

Proof of insurance; A hearing for a repurchase or replacement vehicle always requires a vehicle inspection by the arbitrator and the manufacturers agent (if present). The vehicle cannot be test driven without a proof of insurance card in your possession. The arbitrator may not even be allowed to ride as a passenger without this proof.

Wash and clean your car; The arbitrator needs to inspect both the exterior and interior of your vehicle to assess wear or damage in the event that a repurchase is ordered. A clean and uncluttered car not only makes his job easier, it also indicates that you are a person who took care of it.

Discounted value of use estimation; The night before your hearing is a good time to calculate what you feel is an adequate deduction for the miles that you drove the car before the problem was registered on the RO. This calculation should be made on a separate piece of paper to be handed to the arbitrator at the end of your hearing. The formula for this calculation appears under the **Discounted value of use** chapter in the book and is based on what the "Lemon Law" allows. Please be realistic in this calculation and use the mileage as it is reported on the first repair order indicating the unresolveable problem.

Develop a repurchase value sheet; Based on what you now know from reading this book you can develop your own figures to submit to the arbitrator (while not exactly matching the claim amount on the Agreement to Arbitrate form, it will show the arbitrator that you've done your homework and you know the "Lemon Law"). These two sheets of paper (**value of use and repurchase value**) are to be given to the arbitrator at exactly the close of the hearing. If you are watching closely you will in all likelihood, see the manufacturers agent submit a similar sheet at the close of the hearing. His sheet probably represents "Blue Book" value of the car in a used condition and that repurchase figure will be much, much lower than yours.

Copy everything; With the exception of the last two sheets mentioned (discounted value of use and the repurchase value) you should have no less than enough copies for the arbitrator or panel members, the manufacturers agent, a file copy for the office and if you wish, a copy for yourself in addition to the originals.

Now that you are properly prepared to present a winning case to the arbitrator, the next step takes us to the hearing day.

THE ARBITRATION HEARING

Attending an arbitration hearing is no cause for undue concern or apprehension on the part of the consumer. In addition to being your right under the law, it is a valuable learning experience and an opportunity for the consumer to be directly involved with a results oriented process. With no intent to wax philosophically at this late point in the book, the hearing process is specifically designed so that every individual has a voice that is strong enough to effect a substantial change.

The hearing is generally held at the offices that manage the dispute resolution program under contract to the manufacturer of your vehicle. When you enter the reception area you will be asked for your case number so have your Agreement To Arbitrate ready in addition to any other forms that may be requested. When your case is called, both you and the manufacturers agent will be led into a conference room by the case administrator and introduced to the arbitrator or arbitration panel. After all introductions, the arbitrator will explain the hearing procedure, read the Agreement To Arbitrate and ask you if it is correct. Everyone involved with the case will be then asked to sign an oath.

The consumer always presents their case first. Generally the best place to begin is the point at which you first noticed the problem or problems that couldn't be repaired. As you explain the situation or immediately beforehand, is a good time to pass out the copies of your case. It is a good idea to refer to specific pages as you make your statements to the arbitrator as this helps reinforce and strengthen your case.

While you are making your statement no one is allowed to interrupt you while you are speaking with the exception of the arbitrator, who may have a question or require clarification on a specific point.

Your opening statement could go something like this: " I first noticed excessive oil consumption and transmission fluid leaks on my 1988 Beehive Special around the 12th. of May. I took it in for repair of this problem on May 16th. Please refer to R.O.# 763-215. I again returned the car to the dealership on May 30th. for the same problem, as indicated on R.O. # 475-987" etc, etc,. You continue your statement until you feel that you have indicated to the arbitrator that you have complied with all necessary requirements of the "Lemon Law" to substantiate your claim for repurchase.

After you have completed your testimony the manufacturers agent or representative will have an opportunity to address the arbitrator. This statement is usually quite brief and upon closing the arbitrator will request that the vehicle in question be inspected and if possible, test driven. All parties to the hearing will then adjourn to the parking lot and the arbitrator will begin the inspection with the overall condition of the vehicle, the mileage and the VIN number. In the case of a standard size vehicle all parties generally attend the test drive. In the case of a two-seater vehicle, the arbitrator will usually drive the vehicle alone as they are not allowed to be alone with either party.

In a test drive with all parties: If you feel that you can reproduce the problems or symptoms related to your claim, you should state your preference to drive first.

After the vehicle inspection all parties will return to the hearing room and the consumer is first asked if there is anything else that they would care to add to their testimony ask questions of the other party or to summarize their claim. At the end of this final testimony is when the consumer should bring forward to the arbitrator both the repurchase computations indicating award value as outlined in previous chapters of this book and the Discounted value of use calculations for the miles driven prior to the problem being recorded. When the consumer has finished their final statements the manufacturers agent is also granted a final summation opportunity at the end of which a sheet of paper is produced with the manufacturers suggested repurchase value of the vehicle in the event that a repurchase award is made.

During the consumers closing statements perhaps the following could be worked in: "I would like to thank you for this opportunity to state my claim under the California Lemon Law.

"In the event that it is your decision to award the repurchase of my vehicle, I have submitted what I feel is a fair repurchase award under the law, including incidental damages that I have incurred while attempting to have the car repaired." "I also have taken the liberty to calculate a fair Discounted Value of Use, as formulated within the "Lemon Law" for my use of the car prior to registering the problem with the dealer".

After all testimony has been given the arbitrator will call the hearing to a close and state that a decision will be made on the case and mailed to both parties within ten days.

CHAPTER 7
THE ARBITRATORS DECISIONS

DECISIONS

There are three decisions that you could receive on your case; a decision in your favor, a decision against you and a Interim Decision. In all three cases, the arbitrator will furnish his "Reasons for Decision" which will describe the basis of his findings. We should now review the scope of these decisions and what they mean.

INTERIM DECISION

In the event that both sides present an equally strong case, or the arbitrator is not totally convinced that the problems are not repairable, he may elect to grant an Interim Decision on the case. In this decision, the manufacturer is given a final opportunity to effect repairs on your vehicle within a specific period of time (usually 30 days). If at the end of that period you still feel that the problem(s) continue to exist, **you must** recontact the arbitration program offices to schedule a re-inspection of the vehicle. If you don't reschedule by the date indicated, the arbitrator will consider the repairs complete and close your case.

A rescheduled hearing after an Interim Decision is always brief. The vehicle is again inspected and test driven. Comments from both sides are duly registered. When the hearing is closed this time, you can generally expect to receive good news in the mail.

SAMPLE INTERIM DECISION

Lax Motors shall effect repair to the Smith's 1989 "Turbo Toad II" as follows:

> The transmission of this vehicle shall be replaced with a new transmission for this model and make vehicle.

Within 30 days of the Company's receipt of the Customers acceptance, Lax Motors shall complete the above repairs.

If the Customer does not recontact the ABC office within 45 days of the completion of the repairs requesting reinspection by the arbitrator, it will be assumed the repairs are satisfactory and this decision will become final.

FAVORABLE DECISION

Lax Motors Corporation shall repurchase Mr. Smith's 1989 "Turbo Toad II" for the price of $14,360.20 within 30 days of the date of their acceptance. At the time of the transaction, Mr. Smith shall deliver the vehicle in similar condition to that inspected and with clear title. Lax Motor Corporation is directed to contact Mr. Smith to arrange the transaction at a mutually agreeable location.

REASONS FOR DECISION

"While Lax Motors Corporation effected repairs to the said vehicle in a noteworthy manner based on the Interim Decision order, I find that the problems have not been resolved. I therefore conclude that after one year of repair attempts the vehicle can not be repaired to normal operating conditions in order to meet warranty guidelines."

UNFAVORABLE DECISION

Repurchase of this vehicle is denied.

Lax Motors Corporation is released from all liability in this matter.

REASONS FOR DECISION

While I did encounter some slight noise in the power steering unit of this vehicle in addition to steering wheel vibration during my test drive of the subject vehicle, it is my opinion that these conditions are considered normal to this vehicle. It is additionally my opinion that the noise and vibration in question, does not constitute a safety hazard to the normal operation of this vehicle as claimed.

AVAILABILITY OF DISPUTE FILES TO PARTIES

If you feel that you cannot accept a decision in your case and you wish to review the dispute file, you have every right to request all records relating to the dispute from the program offices.

SUMMARY

The laws, program and procedures described in this book represent a coordinated and concentrated effort on the part of both the federal and state governments in providing a relief system for consumers with new car problems. As a consumer arbitrator, I felt that the consumers needed a practical guide in which to obtain the relief that by law, is made available. The book was written with this objective in mind.

The success of this book, in my opinion, is not related to how many copies that are purchased, but how many consumers will now use this consumer relief system properly and with a greater understanding of what they deserve and have a right to expect.

While the "Lemon Law" system is far from perfect, The Department of Consumer Affairs and The Bureau Of Auto Repair are constantly working to improve it with the cooperation of all participating auto makers. A certification process is underway for all dispute resolution programs in the state that wish to be "approved" for this process. In some cases, these programs must retrain their arbitrators in a more complete understanding of the laws that apply. This is not going to be an overnight process, to say the least.

The bottom line, dear reader, and perhaps the most difficult objective of all, is informing and educating the consumers to the point by which, based on their understanding of the law and the system, all awards and decisions become equitable, and most importantly, fair.

MAR 13 [illegible]

STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

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

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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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	451-5777
Third	Ernest J. Dronenburg, Jr.	110 West C Street, Suite 1709, San Diego 92101	From LA	213	852-502
Fourth	Paul Carpenter	4040 Paramount Blvd., Suite 103, Lakewood 90712		619	237-7844
EXECUTIVE SECRETARY	Douglas D. Bell	1020 N Street, Sacramento 95814		213	429-5422
SACRAMENTO HEADQUARTERS		1020 N Street, Sacramento 95814		916	445-3956
BUSINESS TAXES FIELD OFFICES		1020 N Street, Sacramento 95814		916	445-6464

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
Arroyo Grande		1303 Grand Avenue, Suite 115, 93420	From LA	213	681-6675
Auburn	8-12 & 1-5 M thru F	550 High Street, Suite 3, 95603		805	489-6293
Bakersfield		525 18th Street, 93301		916	885-8408
Bishop	8-12 & 1-5 M thru F	407 West Line Street, 93514		805	395-2880
Chico	8-12 & 1-5 M thru F	8 Williamsburg Lane, 95926		619	872-3701
Covina		233 North Second Avenue, 91723		916	895-5322
Crescent City	8-12 & 1-5 M thru F			818	331-6401
Culver City		Suite 2, 1080 Mason Mall, 95531	From LA	213	686-2990
Downey		3861 Sepulveda Blvd., 2nd Floor, 90230		707	464-2321
				213	313-7111
El Centro	8-12 & 1-5 M thru F	11229 Woodruff Avenue, 90241	From LA	213	879-0600
Eureka	8-12 & 1-5 M thru F			213	803-3471
Fresno		1699 West Main Street, Suite H, 92243	From LA	213	773-3480
Hayward		1656 Union Street, 95501		619	352-3431
Hollywood		2550 Mariposa Street, State Building, Rm. 2080, 93721		707	445-6500
Lakewood		795 Fletcher Lane, 94544		209	445-5285
		5110 Sunset Boulevard, 90027		415	881-3544
Marysville		Suite 101, 4040 Paramount Blvd., 90712-4199		213	663-8181
Merced	8-12 & 1-5 M thru F			213	421-3295
Modesto		922 G Street, 95901	From LA	213	636-2466
Nevada City	8-12 & 1-5 M thru F	3191 M Street, Suite A, 95340		916	741-4301
Oakland		1020 15th Street, Suite E, 95354		209	383-2831
Ontario		301 Broad Street, 95959		209	576-6361
Oroville	8-12 & 1-5 M thru F	1111 Jackson Street, 94607		916	265-4626
Palmdale	8-12 & 1-5 M thru F	320 West G Street, Suite 105, 91762		415	464-0347
Placerville	8-12 & 1-5 M thru F	2445 Oro Dam Boulevard, Suite 3A, 95966		714	983-5969
Pleasant Hill		37925 6th Street East, 93550		916	538-2246
Quincy	9-1 M thru F	344 Placerville Dr., Ste. 12, 95667		805	947-8911
Rancho Mirage	8-12 & 1-5 M thru F	395 Civic Drive, Suite D, 94523		916	622-1101
Redding		546 Lawrence Street, 95971		415	687-6962
Sacramento		42-700 Bob Hope Dr., Suite 301, 92270		916	263-1070
Salinas		391 Hemsted Drive, 96001		619	346-8096
San Bernardino		1891 Alhambra Boulevard, 95816		916	225-2725
San Diego		21 West Laurel Drive, Suite 79, 93906		916	739-4911
San Francisco		303 West Third Street, Suite 500, 92401		408	443-3008
San Jose		1350 Front Street, Room 5047, 92101		714	383-4701
San Marcos		350 McAllister Street, Room 2262, 94102		619	237-7731
San Mateo		100 Paseo de San Antonio, Room 307, 95113		415	557-1877
San Rafael		365 So. Rancho Santa Fe Road, 92069		408	277-1231
Santa Ana		177 Bovet Road, Suite 250, 94402		619	744-1330
Santa Barbara		7 Mt. Lassen Drive, Suite B136, 94903		415	573-3578
Santa Cruz	8-12 & 1-5 M thru F	28 Civic Center Plaza, Room 239, 92701		415	472-1513
Santa Rosa		411 East Canon Perdido Street, Room 11, 93101-1589		714	558-4051
Sonora	8-12 & 1-5 M thru F	303 Water Street, Suite 6, 95062		805	965-4535
South Lake Tahoe	8-12 & 1-5 M thru F	50 O Street, Room 215, 95404		408	458-4861
Stockton		1194 N. Highway 49, 95370		707	576-2100
Susanville	9-1 M thru F	2489 Lake Tahoe Boulevard, Suite 7, 95705		209	532-6979
Torrance		31 East Channel Street, Room 264, 95202		916	544-4816
		63 North Roop Street, 96130		209	948-7720
Ukiah	8-12 & 1-5 M thru F	690 W. Knox Street, 90502-1307		916	257-3429
Vallejo				213	516-4300
Van Nuys		620 Kings Court, Suite 110, 95482	From LA	213	770-4148
Ventura		704 Tuolumne Street, 94950-4769		707	463-4731
Visalia		6150 Van Nuys Blvd., Room 205, 91401-3382		707	648-4065
Woodland	8-12 & 1-5 M thru F	2590 East Main Street, Suite 101, 93003		818	901-5293
Yreka	8-12 & 1-5 M thru F	111 South Johnson Street, Suite E, 93291		805	654-4523
		96 West Main Street, Suite 2, 95695		209	732-564
OUT-OF-STATE FIELD OFFICES		1217 South Main Street, 96097		916	662-733
Sacramento (Hqtrs.)				916	842-7439
Chicago, Illinois		1820 14th Street, 95814			
New York, N.Y.		150 North Wacker Drive, Room 1400, 60606		916	322-2010
		675 Third Avenue, Room 520, 10017		312	
				212	

LEGISLATIVE INTENT SERVICE (800) 666-1917

DRAFT

CALPIRG
CALIFORNIA PUBLIC INTEREST RESEARCH GROUP
1301 H St., Suite F Sacramento CA 95814 (916) 448-4516

November 1, 1988

Steve Gould
Bureau of Automotive Repair
10240 Systems Parkway Dr.
Rancho Cordova, CA 95827

Dear Steve:

It was a pleasure talking with you on the phone recently. I'm glad to hear the Bureau of Automotive Repair (BAR) has completed draft regulations for Lemon Law arbitration processes. CALPIRG is looking forward to the public hearings your agency will conduct in December to review this important document.

CALPIRG took an active role in the passage of Assemblymember Tanner's bill, AB 2057. While we're dismayed at the amount of time it has taken to compile the draft regulations, we're confident the directives you have prepared for certification and decertification of arbitration processes will enforce the spirit of the Tanner legislation assuring fair and equitable arbitration of Lemon Law disputes.

As you'll recall, we sent a letter to BAR in August outlining our concerns regarding this important matter. I sincerely hope you incorporated some of our recommendations into your first draft. In any case, CALPIRG is prepared to join with the BAR and representatives of other public interest organizations during the December hearings in a cooperative effort to fashion a complete and refined set of rules.

Thank you, Steve, for your attention to this issue that remains a great concern to California motorists. If I can be of any assistance in the logistics or scheduling of the hearings, please give me a call at (916) 448-4516.

Very truly yours,

David Manhart
Legislative Advocate
California Public Interest Research Group

cc: Assemblymember Sally Tanner
CALPIRG Lemon Law Network
Consumers Union
Motor Voters

CALPIRG
Copy.

✓ August 2, 1988

Tom Maddock
Bureau of Automotive Repair
10240 Systems Parkway Dr.
Rancho Cordova, CA 95827

Dear Tom:

I'm writing to share some of our thoughts and concerns regarding the development of regulations for certification and decertification of Lemon Law arbitration processes. I'd first like to compliment you and your agency for conducting a well-run, informative, and thought-provoking Lemon Law workshop recently. Many good ideas and alternative points of view were shared. This begins the process of crafting these important regulations on a very positive note.

As you may know, CALPIRG took an active role in the passage of Sally Tanner's bill, AB 2057. We're looking forward to the development of regulations for certification and decertification of arbitration processes that enforce the spirit of the Tanner legislation assuring fair and equitable arbitration of Lemon Law disputes.

AB 2057 outlines strong standards for arbitration processes to ensure that consumers get a fair and impartial hearing. It requires that the Bureau of Automotive Repair certify and de-certify arbitration processes based on their compliance with the standards outlined in the law.

CALPIRG released a study concerning the Lemon Law during AB 2057's legislative review. I've included a copy of this report for your information. In general, this study revealed that arbitration programs — either operated or sponsored by manufacturers — were not providing a fair and impartial process for consumers seeking relief from defective new cars.

At the time of our study, we found these processes were simply not complying with FTC minimum guidelines for third party dispute resolution processes, nor did they abide by the provisions of the California Lemon Law. Based on the evidence we collected, consumers were subjected to repeated delays and procedural run-arounds. Rather than alleviating problems occurring in auto warranty disputes and representing a final resolution to problems, arbitration processes had become just another hurdle to cross for consumers.

Here are some of the findings of the CALPIRG study:

Arbitration Processes Ignore Lemon Law Provisions and FTC Regulations

Arbitration processes often did not use the criteria set forth in the Lemon Law as a basis for awarding a refund or replacement. On review of consumer complaints, there appeared a lack of adherence to provisions of the Lemon Law and FTC regulations.

Some manufacturers did not even train arbitrators to use or understand the Lemon Law. Many consumers received decisions calling for further inspection, diagnosis, repairs, extended warranties, or simply nothing at all. This was despite the fact that they had already had their car repaired numerous times. Too often it seemed as though arbitrators had no clear understanding of what the Lemon Law was all about.

The arbitration process normally took far longer than the 40-60 days allowed in the FTC 703 regulations. The process became a continuation of an interminable and frustrating experience which required the consumer's aggressive persistence.

In light of these findings, CALPIRG believes consumers should have the opportunity for public airing of disputes in a complete and timely fashion. Whereas the statute and FTC regulations don't call for mandatory public hearings, we believe open proceedings are in the best interest of the consumer. Complete and accurate information about the time and location of all arbitration meetings is a must.

Moreover, consumers should have access to technical information related to disputes They should also have procedural process guidelines. In this and many other consumer transactions and services, consumers often do not know what is available as a resource to assist them. It is, therefore, imperative that they have access to factual information. Hence, by requiring that the process gives them both technical bulletins on the condition of their car and the process guidelines, the consumer will have the framework to be on equal footing with the manufacturer.

Remember, the manufacturer uses the process daily and is fully familiar with its cars. The consumer, on the other hand, is going into the process blind — a novice in the use of the process knowing very little, generally, about the mechanics of the automobile.

Arbitration Panels Rely on Manufacturer's Representatives and Experts

Many arbitration panels relied on mechanics supplied by the manufacturer to evaluate the car in question. These manufacturer representatives had an obvious conflict of interest.

Our complaint record shows that while manufacturers' representatives were most always present during arbitration proceedings, consumers were seldom equally represented.

We're convinced that nothing should restrict a consumer's right to review and correct a manufacturer representative's misstatement of facts if necessary. This provision is fundamental to assuring the basic fairness of the system.

Lack of Follow-up on Arbitration Decisions

Despite the fact that arbitration boards often granted decisions calling for "one more repair attempt," they did not follow up to ensure that the repair attempt resolved the problem. For the consumer in these instances, the arbitration process, although having taken significant time and energy, moved them no closer to resolving their dispute.

Consumers' Costs Not Reimbursed

Consumers were often forced to incur expenses such as towing costs and rental car fees as a result of their inoperative vehicle and the subsequent repair process. These expenses as well as license fees were often not reimbursed.

Deduction For Use Provision Abused

When the manufacturer reimburses the consumer for the purchase price of the vehicle, the manufacture is entitled to deduct an amount directly attributable to use of the car by the consumer prior to the first repair attempt. Arbitration processes, however, often recommended an unreasonable deduction by using commercial car rental rates and an unreasonably late date as the time at which the buyer's use was considered to be ended.

A New Beginning — Certification and Decertification of Arbitration Processes, 1988

From the discussion during the recent meeting hosted by the Bureau of Automotive Repair, it is evident that many of the issues raised in the CALPIRG study remain unresolved. This underscores the importance of developing strong and enforceable regulations for the certification and decertification of warranty arbitration processes. CALPIRG makes the following recommendations to ensure consumers across the state have access to consistent and fair arbitration of disputes:

1. Decision processes should be open and encourage an oral exchange of information. Consumers have the right to know how conclusions are shaped during the fact-gathering process. Any interested party should have the right to listen to fact gathering sessions and the decision process. A procedure for informing all consumers of their process and/or the deficiencies of the process sponsored by the manufacturer should be developed.

   It is crucial that there is some way to notify consumers as to whether the process is certified or not. Because consumers are required to use a certified process before using the presumption, they should be told this in writing. Consumers will not know the important distinctions between certified or not - certified processes. They must have access to this information in plain language in the owner's manual or other literature at the time of sale. Also needed in this literature is the procedure and telephone number of a place to call to check on the status of a process certification. This is especially important as the status may change over time.

2. The Bureau of Automotive Repair review for certification, decertification, and continuing compliance should scrutinize the record of per-mile deductions of a process and the point at which the call for deduction is made. The Lemon Law statute is specific on both these points. CALPIRG is aware of a recent buy back situation where an automobile, originally purchased for $8000, was repurchased by the manufacturer for $5000 based on a deduction determined at a rate of $.25 per mile. Obviously, it is necessary to provide in the statutes a consistent standard for the application of deductions-for-use to avoid misinterpretations by the various processes.

3. The Bureau of Automotive Repair review for certification and continuing compliance should examine whether processes reimburse sales tax, license, and registration fees as well as incidental damages.

   We understand from telephone calls we have received that consumers are not getting reimbursed even though the law allows it.

4. In order to evaluate the effectiveness of any designated Lemon Law arbitration process, these processes should be required to keep detailed records of the Lemon Law cases. These records should be open to public inspection.

5. Finally, the Bureau of Automotive Repair should scrutinize the use of refunds and replacements in award decisions and determine whether the consumers are being given the option of choosing a refund or replacement if the consumer wins the award.

   Even though the law states that it is the consumer's option to chose a refund or replacement, we're not sure how the law is being practically applied. Many consumers who go through the long and grueling repair and arbitration process lose faith in either the vehicle model and/or the manufacturer. These consumers should not be forced to accept a replacement vehicle.

The Lemon Law — despite its original intent — is not fulfilling its promise to protect new car buyers. I sincerely hope these suggestions will be carefully considered as you develop procedural language for certification and decertification arbitration processes.

Please be aware that these issues represent only a partial listing of our concerns regarding the development of regulations for arbitration processes. CALPIRG looks forward to joining representatives of other public interest organizations at the hearings your agency will conduct this summer. I'm sure a more complete set of recommendations will result from these sessions.

Thank you, Tom, for your attention to our concerns. If you have any questions about these comments, please give me a call. I look forward to talking with you soon.

Very truly yours,

David Manhart
Legislative Advocate
California Public Interest Research Group

cc: Assemblymember Sally Tanner
CALPIRG Lemon Law Network
Consumers Union
Motor Voters

STATE OF CALIFORNIA

File

MEMO

To : Stephen L. Gould
Manager, Certification Program
Bureau of Automotive Repair
Department of Consumer Affairs
10240 Systems Parkway
Sacramento, CA 95827

Date: December 5, 1988

DEC 6 1988

From : NEW MOTOR VEHICLE BOARD
(916) 445-1888
ATSS 485-1888

Subject: FEE COLLECTION STATUS REPORT - ARBITRATION CERTIFICATION PROGRAM

Attached is our report of fee collection activity for the period November 12 - 30, 1988.

This represents the bulk of expected receipts as only a very few accounts remain outstanding.

SAM W. JENNINGS
Chief Administrative Law Judge/
Executive Secretary

Enclosure

SWJ:me

cc: Honorable Sally Tanner

DATE: December 1, 1988

STATUS REPORT OF NMVB COLLECTION OF CERTIFICATION FEES

MANUFACTURER/DISTRIBUTOR	# VEHICLES	DATE RECEIVED	DEPOSIT LIST#	AMOUNT
BMW OF NO. AMERICA, INC.	19,894	7-25-88	1	8,355.48
ASTON MARTIN LAGONDA	18	7-26-88	1	7.56
CHRYSLER MOTORS	138,443	8-01-88	1	58,146.06
CHRYSLER MOTORS (JEEP)	26,615	8-01-88	1	11,178.30
CHRYSLER MOTORS (AMC)	3,371	8-01-88	1	1,415.82
MITSUBISHI	36,425	8-01-88	1	15,298.50
FIAT AUTO USA, INC.	294	8-01-88	1	123.48
GRUMMAN OLSON	451	8-01-88	1	189.42
SUZUKI MOTORS	17,670	8-03-88	1	7,421.40
SUBARU OF AMERICA	16,588	8-04-88	1	6,966.96
ROLLS-ROYCE MOTOR CARS, INC.	155	8-04-88	1	65.10
PORSCHE CARS NO. AMERICA INC.	4,130	8-08-88	1	1,734.60
ALFA ROMEO, INC.	1,090	8-08-88	1	457.80
RANGE ROVER OF NO AMER. INC.	449	8-08-88	1	188.58
CADILLAC MOTOR CAR DIV., GMC	30,327	8-08-88	1	12,737.34
YUGO AMERICA	6,043	8-08-88	1	2,538.06
FORD MOTOR COMPANY	330,082	8-11-88	2	138,634.00
SAAB-SCANIA OF AMERICA	3,728	8-12-88	3	1,565.76
MERCEDES-BENZ OF NO AMERICA	21,661	8-15-88	3	9,097.62
EXECUTIVE COACH BUILDERS	32	7-28-88	4	13.44
BLUE BIRD BODY COMPANY	126	7-29-88	4	52.92
NISSAN MOTOR CORP IN USA	130,103	8-16-88	4	54,643.26
VOLKSWAGEN OF AMERICA, INC.	36,836	8-17-88	4	15,741.12
GENERAL MOTORS CORP.	313,734	8-22-88	5	131,768.28
JAGUAR CARS INC.	5,799	8-22-88	5	2,435.58
PEUGEOT MOTORS OF AMERICA	1,096	8-22-88	5	460.32
VOLVO NORTH AMERICA	21,647	8-22-88	5	9,091.74
EXCALIBUR AUTOMOBILE CORPORATION	22	8-29-88	6	9.24
STERLING	4,224	8-29-88	6	1,774.08
AMERICAN HONDA	146,799	9-02-88	6	61,655.58
TOYOTA MOTOR DISTRIBUTORS	203,215	9-06-88	7	85,350.30

A - 274b

DATE: December 1, 1988

STATUS REPORT OF NMVB COLLECTION OF CERTIFICATION FEES

MANUFACTURER/DISTRIBUTOR	# VEHICLES	DATE RECEIVED	DEPOSIT LIST#	AMOUNT
TIGER CORPORATION	8	9-07-88	8	3.36
JOHN W. OSBORN COMPANY	17	9-08-88	8	7.14
HYUNDAI MOTOR AMERICA	64,326	9/09/88	8	27,016.92
ICHIBON MOTORS, INC.	8	9/29/88	9	3.36
THOMAS BUILT BUSES	8	10/17/88	9	3.70
MASERATI AUTOMOBILES, INC.	299	10/17/88	9	138.14
SHELBY AUTOMOBILES, INC.	377	10/21/88	10	174.17
DAIHATSU AMERICA, INC.	170	10/31/88	10	71.40
WHEELED COACH INDUSTRIES	61	10/31/88	11	25.62
LEWIS MFG., INC.	42	10/31/88	11	17.64
MAZDA MOTOR OF AMERICA	56,401	10/31/88	11	23,688.42
LOTUS CARS USA, INC.	22	11/03/88	12	9.24
COLLINS BUS CORPORATION	180	11/03/88	12	75.60
MAGNUM MOTOR COACH	6	11/10/88	13	2.52
TYMCO, INC.	11	11/10/88	13	5.08
AMERICAN ISUZU MOTORS, INC.	12,152	12/01/88	14	5,614.22
			TOTAL	695,974.23

A-275b

National Conference of State Legislatures

444 North Capitol Street, N.W.
Suite 500
Washington, D.C. 20001
202/624-5400

President Ted Strickland
President
Colorado State Senate

Executive Director
William T. Pound

MEMORANDUM

NOV 29

TO : Members and Friends of the Law and Justice Committee

FROM : Jon Felde, Senior Staff Associate and General Counsel

RE : Law and Justice Update

DATE : November 9, 1988

Sally Tanner
Fyi
Regards
Jon

****

CORPORATE TAKEOVERS. The drive to preempt state corporate takeover laws achieved its peak in June after the Senate approved an amendment to Senator Proxmire's bill on corporate takeovers (S.1323) that would have regulated executive compensation, i.e., golden parachutes. Sensing that the Senate was moving in the wrong direction on the preemption question, Senator Proxmire pulled his bill.

NCSL and other state organizations met with Proxmire's staff during this period and pressed our concerns about preemption. The bill never returned for a vote and preemption was avoided during this session. The argument that state laws governing corporate takeovers would impede the takeover market seems to be losing credence as some of the largest takeovers ever are in the works. We can expect some activity next Congress, but pressure to preempt may fade.

LEMON LAW PREEMPTION. The Federal Trade Commission has not yet acted upon the automotive industry petition to preempt state consumer protection laws. Action is anticipated before the end of the year. In the interim, the NCSL effort to facilitate uniformity has begun with the establishment of a task force staffed by Brenda Trolin of the NCSL Denver office.

The states suffered a setback in the courts with a decision in the Southern District of New York on October 13. The holding in *Motor Vehicle Manufacturers' Association v. Abrams* was contrary to several other lower court decisions, and we can expect the issue to be litigated to the Supreme Court.

We can expect the drive to preempt state lemon laws to open on a new front in the Congress next year, particularly if the automobile industry does not receive a satisfactory response from the Commission.

DRUG ENFORCEMENT. An important victory was achieved when Congress agreed to retain the 1986 allocation formula for drug law enforcement grants to states and localities. By retaining the formula, states retain discretion to develop

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:agecompro

REMY and THOMAS
ATTORNEYS AT LAW
801 12TH STREET, SUITE 500
SACRAMENTO, CALIFORNIA 95814

Hon. Sally Tanner
California State Assembly
State Capitol
Sacramento, CA 95814

HAND DELIVERED

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/

SACRAMENTO ADDRESS
STATE CAPITOL
P.O. BOX 942849
SACRAMENTO, CA 94249-0001
(916) 445-7783

DISTRICT OFFICE ADDRESS
11100 VALLEY BOULEVARD
SUITE 106
EL MONTE, CA 91731
(818) 442-9100

Assembly
California Legislature

SALLY TANNER
ASSEMBLYWOMAN, SIXTIETH DISTRICT
CHAIRWOMAN
COMMITTEE ON ENVIRONMENTAL SAFETY & TOXIC MATERIALS

March 14, 1988

COMMITTEES
ENVIRONMENTAL SAFETY & TOXIC MATERIALS
GOVERNMENTAL ORGANIZATION
LABOR & EMPLOYMENT
WATER, PARKS & WILDLIFE

SUBCOMMITTEES
ARTS & ATHLETICS

MEMBER:
JOINT COMMITTEE ON FIRE, POLICE, EMERGENCY AND DISASTER SERVICES
SELECT COMMITTEE ON LOW LEVEL NUCLEAR WASTE
GOVERNOR'S TASK FORCE ON TOXICS, WASTE & TECHNOLOGY

Ms. Elizabeth G. Hill
Legislative Analyst
Legislative Budget Committee
925 "L" Street, Suite 650
Sacramento, CA 95814

Dear Ms. Hill:

Last year, I carried AB 2057 (Chapter 1280, Statutes of 1987) which established a new program in the Bureau of Automotive Repair to certify auto manufacturer-run arbitration processes under the state's "Lemon" law.

Needless to say, if this program is to be successful, it is crucial that it begin promptly and with a minimum of false starts. This in turn requires that the Bureau of Automotive Repair be given adequate personnel and sufficient funds to carefully and speedily implement the new law.

It is my understanding that the proposed budget bill contains four personnel years and $240,000 to implement the certification program. It would be very useful to me if you would review the bureau's budget request and give me your evaluation as to whether the budget proposes sufficient personnel and funding to implement certification properly. I will appreciate it if it is possible for you to do this before the bureau's budget is taken up in the relevant Ways and Means subcommittee, since it will give me a chance to request an augmentation of the request if that is needed.

Sincerely,

Sally Tanner

SALLY TANNER
Assemblywoman, 60th District

ST:acf

cc: Hon. Maxine Waters, Chairwoman
Ways and Means Subcommittee No. 4

August 24, 1987

Honorable John Van de Kamp
Attorney General
1515 K Street, Suite 511
Sacramento, California 95814

Dear John:

I would like to express my appreciation for the immense amount of help that two members of your Los Angeles professional staff - Ms. Susan Giesberg and Mr. Ronald Reiter - are giving me on my AB 2057. The bill revamps the California "Lemon" law and gives purchasers of new automobiles specific rights of redress against auto manufacturers who sell them defective "lemons". It is in my view one of the more important consumer protection bills of this legislative session.

Needless to say, the bill has been controversial and was until recently strongly opposed by the auto manufacturers. Sue Giesberg and Ron Reiter have been invaluable in making suggestions, providing draft language, explaining the implications of the bill to the legislative committees and assisting in negotiations with both the supporters and opponents of the bill.

It is rare to find assistance on a bill that is as professional and competent as that which they have provided. Their assistance has helped me write a bill that is fair, tough and of significant help to the consumer. It has been a genuine pleasure to work with them.

Sincerely,

SALLY TANNER
Assemblywoman, 60th Assembly District

ST:amf

SACRAMENTO ADDRESS
STATE CAPITOL
SACRAMENTO 95814
(916) 445-7783

DISTRICT OFFICE ADDRESS
11100 VALLEY BOULEVARD
SUITE 106
EL MONTE, CA 91731
(818) 442-9100

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 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 legislatien 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

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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GOVERNMENTAL ORGANIZATION
TRANSPORTATION
MEMBER:
SELECT COMMITTEE ON INTERNATIONAL WATER TREATMENT AND RECLAMATION
JOINT COMMITTEE ON FIRE POLICE EMERGENCY AND DISASTER SERVICES
SUBCOMMITTEE ON SPORTS AND ENTERTAINMENT

September 11, 1987

Ψsw
Ψsw

I want to personally thank you for your "aye" vote yesterday on my AB 2057 ("Lemon Law").

I appreciate your support. It will ensure that California consumers who purchase defective new automobiles are given much fairer treatment and more complete protection than they have received in the past.

Sincerely,

SALLY TANNER
Assemblywoman, 60th District

ST:cf

CALIFORNIA ASSEMBLY

SEQ. NO. 58. WAS 25 FILE 41
AYES 55
NOES 22
NV 03

ADOPT TANNER
CONCURRENCE

DATE: 09/10/87
TIME: 2:47 PM

AYES - 55

AGNOS	EASTIN	HAYDEN	ROOS
#ALLEN	EAVES	HUGHES	ROYBAL-ALLARD
AREIAS	ELDER	ISENBERG	#SEASTRAND
BANE	FARR	JOHNSTON	SHER
BATES	FILANTE	KATZ	SPEIER
BRONZAN	FLOYD	#KELLEY	#STATHAM
CALDERON	FRAZEE	KILLEA	STIRLING
CAMPBELL	FRIEDMAN	KLEHS	TANNER
CHACON	GRISHAM	LEONARD	TUCKER
CLUTE	HANNIGAN	MAROOLIN	#VASCONCELLOS
CONDIT	#HANSEN	MOORE	WATERS M
CONNELLY	HARRIS	O'CONNELL	WATERS N
CORTESE	#HARVEY	PEACE	MR SPEAKER
COSTA	HAUSER	POLANCO	

NOES - 22

BADER	FERGUSON	LESLIE	NOLAN
BAKER	FRIZZELLE	LEWIS	QUACKENBUSH
BROWN D	HILL	LONGSHORE	WRIGHT
CHANDLER	JOHNSON	MCCLINTOCK	WYMAN
DUPLISSEA	JONES	MOUNTJOY	ZELTNER
FELANDO	LANCASTER		

NOT VOTING - 03

BRADLEY LA FOLLETTE MOJONNIER

\# VOTE ADDED BY MEMBER AT HIS DESK UPON LIFTING OF CALL.
* VOTE CHANGED FROM FLOOR, ADDED AT MINUTE CLERK'S CONSOLE.
\+ VOTE ADDED BY SIGNUP SHEET.
@ MEMBER ABSENT OR EXCUSED.

Ts(1 Honorable Art Agnos
Member of the Assembly
State Capitol, Room 3151
Sacramento, CA 95814

Tsw Dear Art:
Ts(2 Honorable Doris Allen
Member of the Assembly
State Capitol, Room 4153
Sacramento, CA 95814

Tsw Dear Doris:
Ts(3 Honorable Rusty Areias
Member of the Assembly
State Capitol, Room 4139
Sacramento, CA 95814

Tsw Dear Rusty:
Ts(4 Honorable Tom Bane
Member of the Assembly
State Capitol, Room 3152
Sacramento, CA 95814

Tsw Dear Tom:
Ts(5 Honorable Tom Bates
Member of the Assembly
State Capitol, Room 446
Sacramento, CA 95814

Tsw Dear Tom:
Ts(6 Honorable Bruce Bronzan
Member of the Assembly
State Capitol, Room 448
Sacramento, CA 95814

Tsw Dear Bruce:
Ts(7 Honorable Charles Calderon
Member of the Assembly
State Capitol, Room 2141
Sacramento, CA 95814

Tsw Dear Chuck:
Ts(8 Honorable Robert Campbell
Member of the Assembly
State Capitol, Room 2163
Sacramento, CA 95814

Tsw Dear Bob:
Ts(9 Honorable Peter Chacon
Member of the Assembly
State Capitol, Room 5119
Sacramento, CA 95814

Ψsw Dear Peter:
Ψs(10 Honorable Steve Clute
Member of the Assembly
State Capitol, Room 4167
Sacramento, CA 95814

Ψsw Dear Steve:
Ψs(11 Honorable Gary Condit
Member of the Assembly
State Capitol, Room 4016
Sacramento, CA 95814

Ψsw Dear Gary:
Ψs(12 Honorable Lloyd Connelly
Member of the Assembly
State Capitol, Room 2176
Sacramento, CA 95814

Ψsw Dear Lloyd:
Ψs(13 Honorable Dominic Cortese
Member of the Assembly
State Capitol, Room 6031
Sacramento, CA 95814

Ψsw Dear Dominic:
Ψs(14 Honorable Jim Costa
Member of the Assembly
State Capitol, Room 2111
Sacramento, CA 95814

Ψsw Dear Jim:
Ψs(15 Honorable Delaine Eastin
Member of the Assembly
State Capitol, Room 5175
Sacramento, CA 95814

Ψsw Dear Delaine:
Ψs(16 Honorable Jerry Eaves
Member of the Assembly
State Capitol, Room 2188
Sacramento, CA 95814

Ψsw Dear Jerry:
Ψs(17 Honorable Dave Elder
Member of the Assembly
State Capitol, Room 4126
Sacramento, CA 95814

Ψsw Dear Dave:
Ψs(18 Honorable Sam Farr
Member of the Assembly
State Capitol, Room 3120
Sacramento, CA 95814

Ψsw Dear Sam:
Ψs(19 Honorable Bill Filante
Member of the Assembly
State Capitol, Room 5135
Sacramento, CA 95814

Ψsw Dear Bill:
Ψs(20 Honorable Richard Floyd
Member of the Assembly
State Capitol, Room 3091
Sacramento, CA 95814

Ψsw Dear Dick:
Ψs(21 Honorable Robert Frazee
Member of the Assembly
State Capitol, Room 3141
Sacramento, CA 95814

Ψsw Dear Bob:
Ψs(22 Honorable Terry Friedman
Member of the Assembly
State Capitol, Room 4009
Sacramento, CA 95814

Ψsw Dear Terry:
Ψs(23 Honorable Wayne Grisham
Member of the Assembly
State Capitol, Room 4017
Sacramento, CA 95814

Ψsw Dear Wayne:
Ψs(24 Honorable Tom Hannigan
Member of the Assembly
State Capitol, Room 3104
Sacramento, CA 95814

Ψsw Dear Tom:
Ψs(25 Honorable Bev Hansen
Member of the Assembly
State Capitol, Room 5144
Sacramento, CA 95814

Ψsw Dear Bev:
Ψs(26 Honorable Elihu Harris
Member of the Assembly
State Capitol, Room 6005
Sacramento, CA 95814

Ψsw Dear Elihu:
Ψs(27 Honorable Trice Harvey
Member of the Assembly
State Capitol, Room 4015
Sacramento, CA 95814

Ψsw Dear Trice:
Ψs(28 Honorable Dan Hauser
Member of the Assembly
State Capitol, Room 2091
Sacramento, CA 95814

Ψsw Dear Dan:
Ψs(29 Honorable Tom Hayden
Member of the Assembly
State Capitol, Room 2196
Sacramento, CA 95814

Ψsw Dear Tom:
Ψs(30 Honorable Teresa Hughes
Member of the Assembly
State Capitol, Room 3111
Sacramento, CA 95814

Ψsw Dear Teresa:
Ψs(31 Honorable Phil Isenberg
Member of the Assembly
State Capitol, Room 2148
Sacramento, CA 95814

Ψsw Dear Phil:
Ψs(32 Honorable Patrick Johnston
Member of the Assembly
State Capitol, Room 4112
Sacramento, CA 95814

Ψsw Dear Pat:
Ψs(33 Honorable Richard Katz
Member of the Assembly
State Capitol, Room 3146
Sacramento, CA 95814

Ψsw Dear Richard:
Ψs(34 Honorable David Kelley
Member of the Assembly
State Capitol, Room 4158
Sacramento, CA 95814

Ψsw Dear Dave:
Ψs(35 Honorable Lucy Killea
Member of the Assembly
State Capitol, Room 3173
Sacramento, CA 95814

Ψsw Dear Lucy:
Ψs(36 Honorable Johan Klehs
Member of the Assembly
State Capitol, Room 2013
Sacramento, CA 95814

Ψsw Dear Johan:
Ψs(37 Honorable Bill Leonard
Member of the Assembly
State Capitol, Room 5128
Sacramento, CA 95814

Ψsw Dear Bill:
Ψs(38 Honorable Burt Margolin
Member of the Assembly
State Capitol, Room 4117
Sacramento, CA 95814

Ψsw Dear Burt:
Ψs(39 Honorable Gwen Moore
Member of the Assembly
State Capitol, Room 2117
Sacramento, CA 95814

Ψsw Dear Gwen:
Ψs(40 Honorable Jack O'Connell
Member of the Assembly
State Capitol, Room 2179
Sacramento, CA 95814

Ψsw Dear Jack:
Ψs(41 Honorable J. Stephen Peace
Member of the Assembly
State Capitol, Room 4140
Sacramento, CA 95814

Ψsw Dear Steve:
Ψs(42 Honorable Richard Polanco
Member of the Assembly
State Capitol, Room 6011
Sacramento, CA 95814

Ψsw Dear Richard:
Ψs(43 Honorable Mike Roos
Member of the Assembly
State Capitol, Room 3160
Sacramento, CA 95814

Ψsw Dear Mike:
Ψs(44 Honorable Lucille Roybal-Allard
Member of the Assembly
State Capitol, Room 5140
Sacramento, CA 95814

Ψsw Dear Lucille:
Ψs(45 Honorable Eric Seastrand
Member of the Assembly
State Capitol, Room 4144
Sacramento, CA 95814

Ψsw Dear Eric:
Ψs(46 Honorable Byron Sher
Member of the Assembly
State Capitol, Room 2136
Sacramento, CA 95814

Ψsw Dear Byron:
Ψs(47 Honorable Jackie Speier
Member of the Assembly
State Capitol, Room 5156
Sacramento, CA 95814

Ψsw Dear Jackie:
Ψs(48 Honorable Stan Statham
Member of the Assembly
State Capitol, Room 4098
Sacramento, CA 95814

Ψsw Dear Stan:
Ψs(49 Honorable Larry Stirling
Member of the Assembly
State Capitol, Room 2137
Sacramento, CA 95814

Ψsw Dear Larry:
Ψs(50 Honorable Curtis Tucker
Member of the Assembly
State Capitol, Room 2158
Sacramento, CA 95814

Ψsw Dear Curtis:
Ψs(51 Honorable John Vasconcellos
Member of the Assembly
State Capitol, Room 6026
Sacramento, CA 95814

Ψsw Dear John:
Ψs(52 Honorable Maxine Waters
Member of the Assembly
State Capitol, Room 5016
Sacramento, CA 95814

Ψsw Dear Maxine:
Ψs(53 Honorable Norman Waters
Member of the Assembly
State Capitol, Room 6026
Sacramento, CA 95814

Ψsw Dear Norman:
Ψs(54 Honorable Willie L. Brown, Jr.
Speaker of the Assembly
State Capitol, Room 219
Sacramento, CA 95814

Tsw Dear Willie:
Ts)

Barbara Balzer
Senate Committee on Economics & Consumer Affairs
Senate Office Building, Room 430
Tallahassee, Florida 32301
904/487-5167

Florida's Lemon Law has been in effect since October 1, 1983. A provision was added, effective October 1, 1985, which authorized the Division of Consumer Services in the Department of Agriculture to certify that arbitration programs meet the requirements of FTC 703 and the Florida Lemon Law. That provision has now been in effect for over 1 1/2 years and according to Barbara Balzer, the Division of Consumer Services has not even received any inquiries about how to apply for certification, much less received any applications. Under Florida lemon law, certification is voluntary.

Called Mr. Dick Brown (904/488-2221). He is in the Division of Consumer Services, Department of Agriculture. He said that information was sent to all arbitration programs, giving them notice that certification was available. They either received no reply or the reply was that the program did not wish to apply for certification because it was not needed in that particular case.

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:

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

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

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. 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'*."
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> 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).

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

---

[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

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.

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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 26, 1987

Mr. David Horowitz
Channel 4 News
3000 W. Alameda Avenue
Burbank, CA 91523

Dear David:

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

Regional Governmental Affairs Office
Ford Motor Company

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

June 29, 1987

To: Honorable Sally Tanner

The following people will be attending the meeting in your office on June 29, 1987, regarding Assembly Bill 2057:

KEVIN J. TULLY, Attorney at Law
San Jose, CA (Ford Private Counsel)

JOHN M. LAPLANTE, Attorney at Law
Sacramento, CA (Ford Private Counsel)

CHRISTINE A. KEMEN, Owner Relations Manager
San Jose District Office, Ford Parts & Service Division
Ford Motor Company

RICHARD L. DUGALLY, Governmental Relations
Ford Motor Company

AGENDA

(1) Allowing the manufacturer one repair attempt.

(2) Establishing standards of conduct.

(3) Damages.

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GOVERNOR'S TASK FORCE ON TOXICS, WASTE & TECHNOLOGY
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

MOTOR VOTERS

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FALLS CHURCH, VA 22043
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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

Motor Voters is an independent, nonprofit consumer organization incorporated in 1982 and dedicated promoting auto safety, reducing traffic deaths and injuries, and improving automotive business practices.

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California Legislature

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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

Tsw
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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".

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

Ps(1 Hon. David Roberti
President Pro Tempore
of the Senate
State Capitol, Room 205
Sacramento, CA 95814

Psw Dear David:
Psw Hon. David Roberti
Ps(2 Hon. William Craven
Member, Senate Rules Committee
State Capitol, Room 3070
Sacramento, CA 95814

Psw Dear Senator Craven:
Psw Hon. William Craven
Ps(3 Hon. Jim Ellis
Member, Senate Rules Committee
State Capitol, Room 4053
Sacramento, CA 95814

Psw Dear Senator Ellis:
Psw Hon. Jim Ellis
Ps(4 Hon. Henry Mello
Member, Senate Rules Committee
State Capitol, Room 5108
Sacramento, CA 95814

Psw Dear Senator Mello:
Psw Hon. Henry Mello
Ps(5 Hon. Nicholas Petris
Member, Senate Rules Committee
State Capitol, Room 5080
Sacramento, CA 95814

Psw Dear Senator Petris:
Psw Hon. Nicholas Petris
Ps)

4/8/97

To: Aene
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 - ~~the~~ #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 arbitrator'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" limit for arbitration dec

- 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(c) 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)

4/8/87

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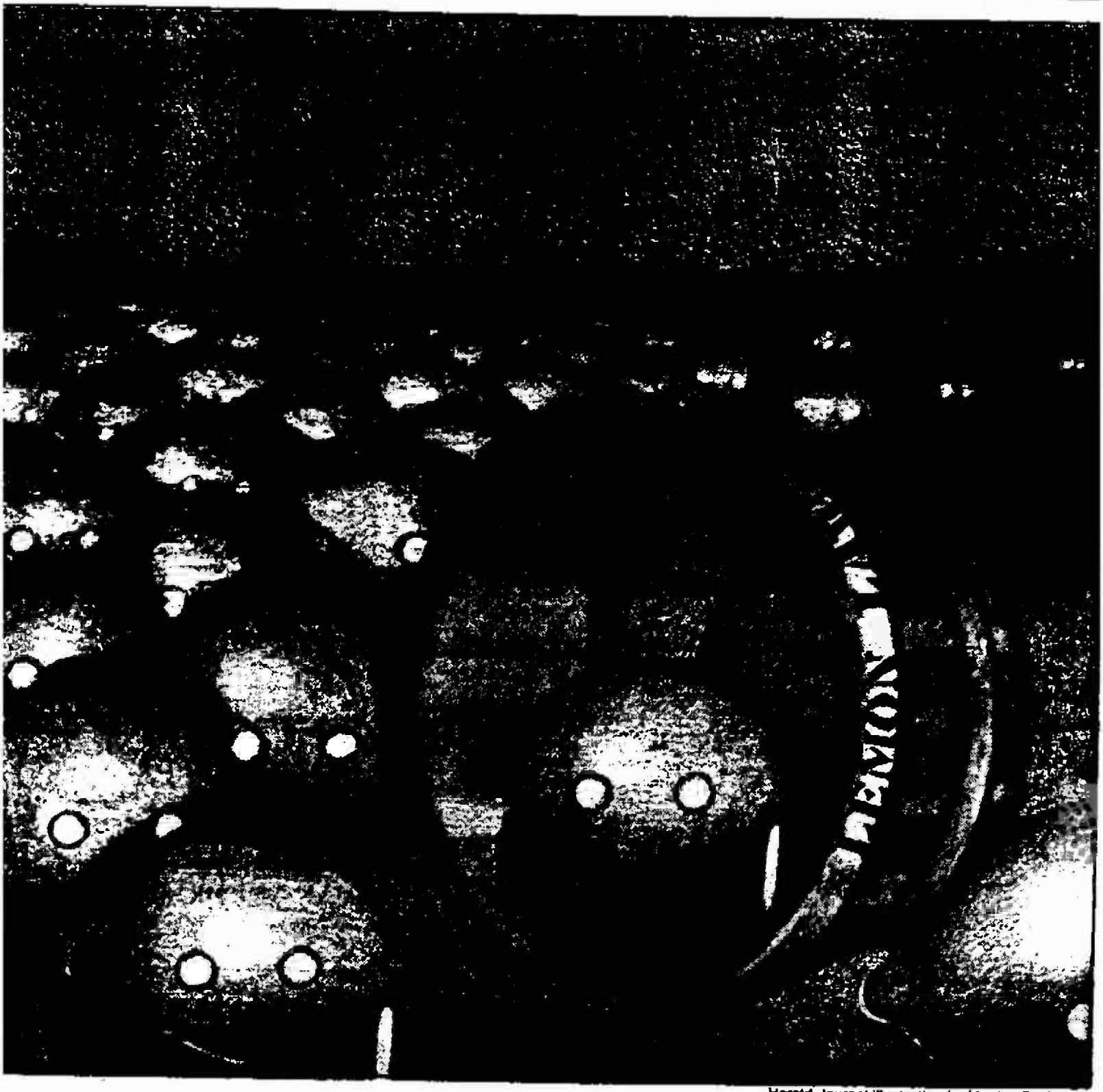

Herald-Journal illustration by Monica Seaberry

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 to consumers who buy problem-plagued cars are 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 speeds of 30 mph and over that "anything you put on the front seat would end up on the floor."

After 12 trips to the dealership failed to resolve the problem, Lynch turned to the Syracuse Better Business Bureau's Autoline arbitration program in an effort to get her money back or her car replaced, as the law allows.

Last July, a BBB arbitrator ruled she was entitled to have her car bought back by General Motors for about $4,200.

Upset with the arbitrator's figure which she considered unacceptably low, Lynch hired a lawyer and sued GM under the lemon law.

The case was settled out of court last month. In addition to buying back the car for about $12,000, the automaker paid her attorney's fee of about $1,300.

"A lot of people wouldn't have taken the time to hold out like I did," Lynch said. "But there was a lot of money involved and I tend to be stubborn."

Situations like Lynch's aren't uncommon, according to Richard Kessel, executive director of the state Consumer Protection Board. He said his office has been inundated with complaints from consumers who claim they haven't been able to get refunds or new cars through the arbitration process required by the 5-year-old law.

"Many arbitrators in the past didn't know what the lemon law was and they didn't apply its provisions," Kessel said.

The law puts all new cars sold in the state under 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 program to anyone with a car problem."

Of the 44 buybacks awarded in 1986, only four received less than the amount requested, including Jean Lynch, Gary said.

"Yes there have been instances where people have been unhappy with the arbitrator's decision," Gary said. "But that's the beauty of the program — if you're not happy with the decision, you can go to court and sue."

In Lynch's case, the arbitrator based his buyback figure on the car's resale value as listed in the blue book, minus 22 cents a mile for the car's mileage, Gary said.

Although the revised law is intended to provide greater protection for consumers, it may actually prevent some auto owners whose cases don't meet the statute's more rigid formulas from seeking redress, Gary said.

She pointed out that of the 1,009 new autoline cases the BBB opened in 1986, less than 50 percent of them were true "lemon law" cases because they didn't fall within the law's time constraints.

Gary said she's afraid that many of the cases that previously were resolved through mediation will now have to be turned down for consideration by arbitration panels.

The BBB's auto arbitration program, which is voluntary on the part of the manufacturer and run by volunteer arbitrators, began in 1980 in an effort "to take these types of conflicts out of the court system," Gary said.

In the meantime, Lynch's old car which GM repurchased is back at Roger's Buick, the North Syracuse dealership where she originally purchased it.

Despite GM's out of court settlement, Rob Peregoy, the dealership's service director, maintains that the Buick Century is not defective.

"It has an ever so slight vibration at speeds of 45 to 55 mph," Peregoy said. "If you road tested the car, you wouldn't even notice it."

He said new tires were installed and many other steps were taken to satisfy Lynch.

"GM really went the extra mile to satisfy the customer," he said.

H-J Jan 12, 1987

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

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.

Bay Area Regional Office
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(415) 642-9952

Los Angeles Regional Office
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West Los Angeles, CA 90025
(213) 473-8491

San Diego Regional Office
2167 Ulric Street, Suite B
San Diego, CA 92111
(619) 279-5552

Legislative Office
909 Twelfth
Sacramento
(916) 448-45

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

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.

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

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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

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

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

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~~

~~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).

(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~~.

(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).

LEGISLATIVE COUNSEL'S DIGEST

Bill No.

as introduced, Tanner.

General Subject: Warranties: new motor vehicles.

(1) 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 revise the definition of "motor vehicle," "new motor vehicle," and "qualified third party dispute resolution process" 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 also make related changes.

The bill would 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, as specified, to be expended upon appropriation by the Legislature to pay the expenses of the bureau under the bill.

(2) Existing law provides for the disposition of moneys in the Retail Sales Tax Fund.

This bill would provide for reimbursement from the Retail Sales Tax Fund to a manufacturer of a new motor vehicle for an amount equal to the sales tax involved when the manufacturer makes restitution to a buyer under the

bill, thereby making an appropriation.

Vote: 2/3. Appropriation: yes. Fiscal committee: yes. State-mandated local program: no.

AUTHOR'S COPY

An act to add Chapter 20.5 (commencing with Section 9889.70) to Division 3 of the Business and Professions Code, to amend Section 1793.2 of, and to add Section 1793.25 to, the Civil Code, to amend Section 7102 of the Revenue and Taxation Code, and to amend Section 3050 of the Vehicle Code, relating to warranties, and making an appropriation therefor.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Chapter 20.5 (commencing with Section 9889.70) is added to Division 3 of the Business and Professions Code, to read:

CHAPTER 20.5. CERTIFICATION OF THIRD PARTY DISPUTE RESOLUTION PROCESSES

9889.70. Unless the context requires otherwise, the following definitions govern the construction of this chapter:

(a) "Bureau" means the Bureau of Automotive Repair.

(b) "New motor vehicle" means a new motor vehicle as defined in subparagraph (B) of paragraph (4) of subdivision (e) of Section 1793.2 of the Civil Code.

(c) "Manufacturer" means a new motor vehicle manufacturer, manufacturer branch, distributor, or distributor branch required to be licensed pursuant to Article 1 (commencing with Section 11700) of Chapter 4 of Division 5 of the Vehicle Code.

(d) "Qualified third party dispute resolution process" means a third party dispute resolution process

which meets the criteria set forth in paragraph (3) of subdivision (e) of Section 1793.2 of the Civil Code and which has been certified by the bureau pursuant to this chapter.

9889.71. The bureau shall establish a program for certifying each third party dispute resolution process used for the arbitration of disputes pursuant to paragraph (2) of subdivision (e) of Section 1793.2 of the Civil Code. In establishing the program, the bureau shall do all of the following:

(a) Prescribe and provide forms to be used for application for certification under this chapter.

(b) Establish a set for minimum standards which shall be used to determine whether a third party dispute resolution process is in compliance with the criteria set forth in paragraph (3) of subdivision (e) of Section 1793.2 of the Civil Code.

(c) Prescribe the information which each manufacturer, or other entity, that uses a third party dispute resolution process, and which seeks to have that process certified by the bureau, shall provide the bureau in the application for certification. In prescribing the information to accompany the application for certification, the bureau shall require the manufacturer, or other entity,

to provide only that information which the bureau finds is reasonably necessary to enable the bureau to determine whether the third party dispute resolution process is in compliance with the criteria set forth in paragraph (3) of subdivision (e) of Section 1793.2 of the Civil Code.

(d) Prescribe the information that each qualified third party dispute resolution process shall provide the bureau, and the time intervals at which the information shall be required, to enable the bureau to determine whether the qualified third party dispute resolution process continues to operate in compliance with the criteria set forth in paragraph (3) of subdivision (e) of Section 1793.2 of the Civil Code.

9889.72. (a) Each manufacturer shall establish, or otherwise make available to buyers or lessees of new motor vehicles, a qualified third party dispute resolution process of the resolution of disputes pursuant to paragraph (2) of subdivision (e) of Section 1793.2 of the Civil Code. The manufacturer, or other entity, which operates the third party dispute resolution process shall apply to the bureau for certification of that process. The application for certification shall be accompanied by the information prescribed by the bureau.

(b) The bureau shall review the application and

accompanying information and, after conducting an onsite inspection, shall determine whether the third party dispute resolution process is in compliance with the criteria set forth in paragraph (3) of subdivision (e) of Section 1793.2 of the Civil Code. If the bureau determines that the process is in compliance with those criteria, the bureau shall certify the process. If the bureau determines that the process is not in compliance with those criteria, the bureau shall deny certification and shall state, in writing, the reasons for denial and the modifications in the operation of the process that are required in order for the process to be certified.

(c) The bureau shall make a final determination whether to certify a third party dispute resolution process or to deny certification not later than 90 calendar days following the date the bureau accepts the application for certification as complete.

9889.73. (a) The bureau, in accordance with the time intervals prescribed pursuant to subdivision (d) of Section 9889.71, but at least once annually, shall review the operation and performance of each qualified third party dispute resolution process and determine, using the information provided the bureau as prescribed pursuant to subdivision (d) of Section 9889.71 and the monitoring and

inspection information described in subdivision (c) of Section 9889.74, whether the process is operating in compliance with the criteria set forth in paragraph (3) of subdivision (e) of Section 1793.2 of the Civil Code. If the bureau determines that the process is in compliance with those criteria, the certification shall remain in effect.

(b) If the bureau determines that the process is not in compliance with one or more of the criteria set forth in paragraph (3) of subdivision (e) of Section 1793.2 of the Civil Code, the bureau shall issue a notice of decertification to the manufacturer, or other entity, which uses that process. The notice of decertification shall state the reasons for the issuance of the notice, enumerate the criteria set forth in paragraph (3) of subdivision (e) of Section 1793.2 of the Civil Code with which the process is not in compliance, and prescribe the modifications in the operation of the process that are required in order for the process to retain its certification.

(c) A notice of decertification shall take effect 180 calendar days following the date the notice is served on the manufacturer, or other entity, which uses the process that the bureau has determined is not in

compliance with one or more of the criteria set forth in paragraph (3) of subdivision (e) of Section 1793.2 of the Civil Code. The bureau shall withdraw the notice of decertification prior to its effective date if the bureau determines, after a public hearing, that the manufacturer, or other entity, which uses the process has made the modifications in the operation of the process required in the notice of decertification and is in compliance with the criteria set forth in paragraph (3) of subdivision (e) of Section 1793.2 of the Civil Code.

9889.74. In addition to any other requirements of this chapter, the bureau shall do all of the following:

(a) Establish procedures to assist owners or lessees of new motor vehicles who have complaints regarding the operation of a third party dispute resolution process.

(b) Establish methods for measuring customer satisfaction and to identify violations of this chapter, which shall include an annual random postcard or telephone survey of the customers of each qualified third party dispute resolution process.

(c) Monitor and inspect, on a regular basis, qualified third party dispute resolution processes to determine whether they continue to meet the standards for

certification. Monitoring and inspection shall include, but not be limited to, all of the following:

(1) Onsite inspections of each certified process not less frequently than twice annually.

(2) Investigation of complaints from consumers regarding the operation of certified third party dispute resolution processes and analyses of representative samples of complaints against each process.

(3) Analyses of the annual surveys required by subdivision (b).

(d) Notify the Department of Motor Vehicles of the failure of a manufacturer to honor a decision of a qualified third party dispute resolution process to enable the department to take appropriate enforcement action against the manufacturer pursuant to Section 11705.4 of the Vehicle Code.

(e) Submit a biennial report to the Legislature evaluating the effectiveness of this chapter, make available to the public summaries of the statistics and other information supplied by certified third party resolution process, and publish educational materials regarding the purposes of this chapter.

(f) Adopt regulations as necessary and appropriate to implement the provisions of this chapter.

9889.75. The New Motor Vehicle Board in the Department of Motor Vehicles shall, in accordance with the procedures prescribed in this section, administer the collection of fees for the purposes of fully funding the administration of this chapter.

(a) There is hereby created in the Automotive Repair Fund a Certification Account. Fees collected pursuant to this section shall be deposited in the Certification Account and shall be available, upon appropriation by the Legislature, exclusively to pay the expenses incurred by the bureau in administering this chapter. If at the conclusion of any fiscal year the amount of fees collected exceeds the amount of expenditures for that purpose during that fiscal year, the surplus in the Certification Account shall be carried over into the succeeding fiscal year.

(b) Beginning July 1, 1988, every applicant for a license as a manufacturer, manufacturer branch, distributor, or distributor branch, and every applicant for the renewal of a license as a manufacturer, manufacturer branch, distributor, or distributor branch, shall accompany the application with a statement of the number of motor vehicles sold, leased, or otherwise distributed by or for the applicant in this state during

the preceding calendar year, together with a breakdown by make, model, and model year and any other information that the New Motor Vehicle Board may require, and shall pay to the Department of Motor Vehicles, for each issuance or renewal of the license, an amount prescribed by the New Motor Vehicle Board, but not to exceed one dollar ($1) for each motor vehicle sold, leased, or distributed by or for the applicant in this state during the preceding calendar year. The total fee paid by each licensee shall be rounded to the nearest dollar in the manner described in Section 9559 of the Vehicle Code. No more than one dollar ($1) shall be charged, collected, or received from any one or more licensees pursuant to this subdivision with respect to the same motor vehicle.

(c) On or before January 1 of each calendar year, the bureau shall determine the dollar amount, not to exceed one dollar ($1) per motor vehicle, which shall be collected and received by the Department of Motor Vehicles beginning July 1 of that year, based upon an estimate of the number of sales, leases, and other dispositions of motor vehicles in this state during the preceding calendar year, in order to fully fund the program established by this chapter during the following fiscal year. The bureau shall notify the New Motor Vehicle Board of the dollar

amount per motor vehicle that the New Motor Vehicle Board shall use in calculating the amounts of the fees to be collected from applicants pursuant to this subdivision.

(d) For the purposes of this section, "motor vehicle" means a new passenger or commercial motor vehicle of a kind that is required to be registered under the Vehicle Code, but the term does not include a motorcycle, a motor home, or any vehicle whose gross weight exceeds 10,000 pounds.

(e) The New Motor Vehicle Board may adopt regulations to implement this section.

SEC. 2. 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~~ this paragraph, a manufacturer ~~shall be permitted to~~ may 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 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~~ shall 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~~ delay arises, conforming goods shall be tended as soon as possible following termination of the condition giving rise to the delay.

(c) ~~It shall be the duty of the buyer to~~ The buyer shall 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 If the buyer cannot return the nonconforming goods for any of ~~the above~~ these 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~~ a buyer cannot return them for any of the above reasons 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~~ (1) Except as provided in paragraph (2), if the manufacturer or its representative in this state ~~be unable to~~ does not 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.

(2) If the manufacturer of its representative in this state is unable to service or repair a new motor vehicle, as that term is defined in subparagraph (B) of paragraph (4) of subdivision (e), to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle in accordance with subparagraph (A) or promptly make restitution to the buyer in accordance with subparagraph (B). However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required by the manufacturer to accept a replacement vehicle.

(A) In the case of replacement, the manufacturer shall replace the buyer's vehicle with a new motor vehicle susbstantially identical to the vehicle replaced. The replacement vehicle shall be accompanied by all express and implied warranties that normally accompany new motor vehicles of that specific kind. The manufacturer also shall pay for, or to, the buyer the amount of any sales or use tax, license fees, registration fees, and other

official fees which the buyer is obligated to pay in connection with the replacment, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer.

(B) In the case of restitution, the manufacturer shall make restitution in an amount equal to the actual price paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, but excluding nonmanufacturer items installed by a dealer or the buyer, and including any collateral charges such as sales tax, license fees, registration fees, and other official fees, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer.

(C) When the manufacturer replaces the new motor vehicle pursuant to subparagraph (A), the manufacturer may require the buyer to reimburse the manufacturer in an amount directly attributable to use by the buyer of the replaced vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the

nonconformity. When restitution is made pursuant to subparagraph (B), the amount to be paid by the manufacturer to the buyer may be reduced by the manufacturer by that amount directly attributable to use by the buyer prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity. Nothing in this paragraph shall in any way limit the rights or remedies available to the buyer under any other law.

(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 to the buyer or 12,000 miles on the odometer of the vehicle, 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~~ proof, and it may be asserted by the buyer in any civil action, including an action in small claims court, or other formal or informal proceeding.

(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 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 resulting from any delay in giving the notification. 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 after the decision is accepted by the buyer, 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 if the decision is accepted by the buyer, whichever occurs later.

~~(3) A qualified third party dispute resolution process shall be one that complies 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, 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 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.~~

(3) A qualified third party dispute resolution process shall meet all of the following criteria:

(A) The process complies with the minimum requirements of the Federal Trade Commission for informal dispute settlement procedures as set forth in Part 703 of Title 16 of the Code of Federal Regulations, as those regulations read on January 1, 1987.

(B) The process renders decisions which are binding on the manufacturer if the buyer elects to accept the decision.

(C) Prescribes a reasonable time, not to exceed 30 days after the decision is acepted by the buyer, within which the manufacturer or its agent must fulfill the terms of its decisions.

(D) The process provides written materials to

those individuals who conduct investigations and who make, or participate in making, decisions for the program which, at a minimum include the Federal Trade Commission's regulations in Part 703 of Title 16 of the Code of Federal Regulations as those regulations read on January 1, 1987, Division 2 (commencing with Section 2101) of the Commercial Code, and this chapter.

(E) The process provides, at the request of the arbitrator or a majority of the arbitration panel, for 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.

(F) The process renders decisions which consider and provide the rights and remedies conferred in regulations of the Federal Trade Commission contained in Part 703 of Title 16 of the Code of Federal Regulations as those regulations read on January 1, 1987, Division 2 (commencing with Section 2101) of the Commercial Code, and this chapter. Nothing in this chapter requires that, to be certified as a qualified third party dispute resolution process pursuant to this section, decisions of the process must consider or provide remedies in the form of awards of punitive damages or multiple damages, under subdivision (c)

of Section 1794, or of attorney's fees under subdivision (d) of Section 1794, or of consequential damages other than as provided in subdivisions (a) and (b) of Section 1794, including, but not limited to, reasonable repair, towing and rental car costs actually incurred by the buyer.

(G) The process has been certified by the Bureau of Automotive Repair pursuant to Chapter 20.5 (commencing with Section 9889.70) of Division 3 of the Business and Professions Code.

(4) For the purposes of subdivision (d) and 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.

(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 vehicles~~ a motorcycle, a motorhome, or a motor vehicle which is not registered

under the Vehicle Code because it is to be operated or used exclusively off the highways.

SEC. 3. Section 1793.25 is added to the Civil Code, to read:

1793.25. (a) Notwithstanding Part 1 (commencing with Section 6001) of Division 2 of the Revenue and Taxation Code, the State Board of Equalization shall 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 subparagraph (B) or paragraph (2) of subdivision (d) of Section 1793.2, when satisfactory proof is provided that the retailer of the motor vehicle for which the manufacturer is making restitution has reported and paid the sales tax on the gross receipts from the sale of that motor vehicle. The State Board of Equalization may adopt rules and regulations to carry out, facilitate compliance with, or prevent circumvention or evasion of, this section.

(b) Nothing in this section shall in any 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 or tangible personal property pursuant to Part 1 (commencing

with Section 6001) of Division 2 of the Revenue and Taxation Code.

(c) The manufacturer's claim for reimbursement and the board's approval or denial of the claim shall be subject to the provisions of Article 1 (commencing with Section 6901) of Chapter 7 of Part 1 of Division 2 of the Revenue and Taxation Code, except Sections 6902.1, 6903, 6907, and 6908 thereof, insofar as those provisions are not inconsistent with this section.

SEC. 4. 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 43/4 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 balance shall be transferred to the General Fund.

(c) The estimate required by subdivision (a) shall be based on taxable transactions occurring during a calendar year, and the transfers required by subdivision

(a) shall be made during the fiscal year that commences during that same calendar year. Transfers required by paragraphs (1) and (2) of subdivision (a) shall be made quarterly.

SEC. 5. Seciton 3050 of the Vehicle Code is amended to read:

3050. The board shall do all of the following:

(a) Adopt rules and regulations in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code governing such matters as are specifically committed to its jurisdiction.

(b) Hear and consider, within the limitations and in accordance with the procedure provided, an appeal presented by an applicant for, or holder of, a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative when the applicant or licensee submits an appeal provided for in this chapter from a decision arising out of the department.

(c) Consider any matter concerning the activities or practices of any person applying for or holding a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor,

distributor branch, or representative pursuant to Chapter 4 (commencing with Section 11700) of Division 5 submitted by any person. A member of the board who is a new motor vehicle dealer may not participate in, hear, comment, advise other members upon, or decide any matter considered by the board pursuant to this subdivision that involves a dispute between a franchisee and franchisor. After such consideration, the board may do any one or any combination of the following:

(1) Direct the department to conduct investigation of matters that the board deems reasonable, and make a written report on the results of the investigation to the board within the time specified by the board.

(2) Undertake to mediate, arbitrate ~~amicably or~~, or otherwise resolve any honest difference of opinion or viewpoint existing between any member of the public and any new motor vehicle dealer, manufacturer, manufacturer branch, distributor branch, or representative.

(3) Order the department to exercise any and all authority or power that the department may have with respect to the issuance, renewal, refusal to renew, suspension, or revocation of the license of any new motor vehicle dealer, manufacturer, manufacturer branch,

distributor, distributor branch, or representative as such license is required under Chapter 4 (commencing with Section 11700) of Division 5.

(d) Hear and consider, within the limitations and in accordance with the procedure provided, a protest presented by a franchisee pursuant to Section 3060, 3062, 3064, or 3065. A member of the board who is a new motor vehicle dealer may not participate in, hear, comment, advise other members upon, or decide, any matter involving a protest filed pursuant to Article 4 (commencing with Section 3060).

- 0 -

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 it's 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.

SACRAMENTO ADDRESS
STATE CAPITOL
SACRAMENTO 95814
(916) 445-7783

DISTRICT OFFICE ADDRESS
11100 VALLEY BOULEVARD
SUITE 106
EL MONTE, CA 91731
(818) 442-9100

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.

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

PE-2

9-15

ENROLLED BILL REPORT **Business, Transportation and Housing Agency**

DEPARTMENT OF	AUTHOR	BILL NUMBER
Motor Vehicles	Tanner	AB 2057
SUBJECT: Warranties: New Motor Vehicles		9-17-87

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 funding of the program through an assessment of not more than $1 for each vehicle sold, leased or distributed by manufacturers, distributors and their branches; provides an appropriation to offset DMV costs; specifies an operative date of July 1, 1988.

SPONSOR: The Author

IMPACT ASSESSMENT: Existing law provides that a manufacturer must make a reasonable effort to repair a motor vehicle when that vehicle is not in substantial conformity with applicable warranties. Under the current statutes, it is the buyers responsibility to notify the manufacturer directly when normal efforts to correct the defect through the dealer have failed. At that point, a dispute resolution process is initiated which is a prelude to any legal action to require replacement of refund.

Consumers have complained that the existing procedures, which are administered by the manufacturers, are subject to lengthy delays and are not conducted with impartiality.

This bill is meant to reduce the inequities purported to exist under the present system so that owners of seriously defective vehicles can achieve a fair and impartial ruling within a reasonable period of time. The proponents indicate that this would be achieved by requiring the Bureau of Automotive Repair (BAR) to both certify and decertify the arbitration programs and to perform a number of verification and reporting tasks in this regard.

The arbitration system would be funded by a fee of up to $1 for each vehicle sold, leased or distributed by a manufacturer or distributor. The fee would be set by the renewal application process for manufacturers and distributors.

FISCAL STATEMENT: The Department would incur implementation costs of $25,334; however the bill provides an appropriation mechanism to cover these costs. There is a delayed operative date of 7-1-88 in the bill; however, there is no mechanism to allow DMV to recoup the nearly $7,000 in on-going costs which will be incurred annually thereafter. A detailed fiscal statement is attached.

SUPPORT AND OPPOSITION: Organizations formally supporting this measure are the California Public Interest Research Group; Consumers Union; Motor Voters; and the Attorney General.

RECOMMENDATION

VETO

PE-3

Department	Date	Agency	Date
[signature]	9-18-87	[signature]	9-18-87

Opposition to the measure has been voiced by Ford Motor Co.; General Motors Corp; Chrysler Motors; and Automobile Importers of America.

VOTE COUNT: Assembly 54-20 Senate 39-0

ARGUMENTS PRO: This dispute resolution process may provide some increased protection for consumers who unwittingly purchase vehicles which later prove to be unrepairable.

ARGUMENTS CON: The introduction of arbitration to resolve consumer complaints regarding faulty vehicles removes from the manufacturer and distributor the responsibility of existing law. Although total consumer satisfaction with existing systems has not been obtained, introducing a third party certified by a governmental agency complicates the system and implies the question of governmental intervention in a market transaction. As it is presented, the system would remove the ability for the manufacturer and distributor and the consumer to negotiate a reasonable settlement by inserting a quasi government element.

The DMV would be forced to establish an accounting system which covers all manufacturers and distributors; however there does not appear to be any means by which the Department can monitor compliance or verify the payments. This would provide the opportunity for unscrupulous persons to misuse the system and underpay their fair share.

Manufacturers/distributors feel that the $1 per vehicle fee required by this bill is unfair since they believe that the existing dispute resolution process is working well.

RECOMMENDATION: VETO

For further information please contact:

A. A. Pierce, Director
Day telephone: (916) 732-0250
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For technical information please contact:

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Rebecca Ferguson
Legislative Liaison Officer
Day telephone: (916) 732-7574
Evening telephone: (916) 989-5030

PE-4

SUGGESTED VETO MESSAGE

To Members of the California Assembly:

I am returning Assembly Bill No. 2057 without my signature.

While the intent of the bill is to enhance the arbitration process used by new vehicle buyers whose vehicles prove to be unrepairable, as drafted AB 2057 will not accomplish that intent. I am concerned that the bill merely establishes another level of governmental intervention without any appreciable benefit to the individuals who may need it the most.

There are no guarantees that intervention by the BAR in the dispute resolution process will achieve the desired results. For example, the BAR can only certify and decertify the arbitration groups. There is no method by which an individual may receive either restitution or review of a poor decision through BAR.

There would also be an overlapping in responsibilities between the Department of Motor Vehicles and BAR. While DMV is supposed to collect the fees from the manufacturers and distributors, it is unclear as to who would be responsible for monitoring compliance and verifying the accuracy of these payments.

I am convinced that these problems would create confusion for both the manufacturers/distributors and the consumer. While the arbitration process may need to be enhanced, I do not believe that this measure will provide the means necessary to accomplish this worthwhile goal.

Cordially,

George Deukmejian
Governor

PE-5

DEPARTMENT	BILL NUMBER
Finance	AB 2057
AUTHOR	AMENDMENT DATE
Tanner	September 4, 1987

SUBJECT

AB 2057 requires the Bureau of Automotive Repair (BAR) to certify third party arbitration processes that require manufacturers to replace or provide restitution for 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. The bill is double joined with AB 276.

SUMMARY OF REASON FOR SIGNATURE

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/Cert. Acct.
1200/Mis. Fees	RV	U	150	U	300	U	300	499/Cert. Acct.
2740/NMVB	SO	A	25		--		--	044/MVA/STF
5300/DMV	RV		--	U	26			044/MVA/STF
1150/BAR	RV		--	U	-26		--	499/Cert. Acct.

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)

RECOMMENDATION: Sign the bill.

Department Director: Richard Tanner — Date: SEP 19 1987

Principal Analyst	Date	Program Budget Manager	Date	Governor's Office
(223) R. Baker	9/16/87	Wallis L. Clark	9/17/87	Position noted PE-6
				Position approved
				Position disapproved
CJ:BW1/0064A/1045C				by: date:

ENROLLED BILL REPORT — Form DF-44 (Rev 03/87 Pink)

AUTHOR	AMENDMENT DATE	BILL NUMBER
Tanner	September 4, 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 a new arbitration 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 for, 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

PE-7

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

AUTHOR	AMENDMENT DATE	BILL NUMBER
Tanner	September 4, 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

PE-8

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

AUTHOR	AMENDMENT DATE	BILL NUMBER
Tanner	September 4, 1987	AB 2057

ANALYSIS

B. Fiscal Analysis (Continued)

According to DMV, the NMVB would incur one-time initial costs of $25,000 in 1987-88, for which the bill contains a $25,000 appropriation from the Motor Vehicle Account, State Transportation Fund. This amount, plus interest at 10 percent per year for six months ($1,250), is to be transferred from the Certification Account, a new account in the Automotive Repair Fund created by the bill, to the Motor Vehicle Account in 1988-99. Ongoing costs will be absorbed within existing resources.

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

PE-9

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 6/1/2021 by Florentino Jimenez, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **NIEDERMEIER v. FCA US**
Case Number: **S266034**
Lower Court Case Number: **B293960**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **ctobisman@gmsr.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
MOTION	Motion for Judicial Notice
ADDITIONAL DOCUMENTS	Exhibits to Motion for Judicial Notice Volume 1 of 9
ADDITIONAL DOCUMENTS	Exhibits to Motion for Judicial Notice Volume 2 of 9
ADDITIONAL DOCUMENTS	Exhibits to Motion for Judicial Notice Volume 3 of 9
ADDITIONAL DOCUMENTS	Exhibits to Motion for Judicial Notice Volume 4 of 9
ADDITIONAL DOCUMENTS	Exhibits to Motion for Judicial Notice Volume 5 of 9
ADDITIONAL DOCUMENTS	Exhibits to Motion for Judicial Notice Volume 6 of 9
ADDITIONAL DOCUMENTS	Exhibits to Motion for Judicial Notice Volume 7 of 9
ADDITIONAL DOCUMENTS	Exhibits to Motion for Judicial Notice Volume 8 of 9
ADDITIONAL DOCUMENTS	Exhibits to Motion for Judicial Notice Volume 9 of 9
BRIEF	Opening Brief on the Merits

Service Recipients:

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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

Tobisman, Cynthia (197983)

Last Name, First Name (PNum)

Greines Martin Stein & Richland LLP

Law Firm