

S274625

**IN THE
SUPREME COURT OF CALIFORNIA**

EVERARDO RODRIGUEZ et al.,
Plaintiffs and Appellants,

v.

FCA US, LLC,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO
CASE No. E073766

**MOTION FOR JUDICIAL NOTICE;
MEMORANDUM OF POINTS AND AUTHORITIES;
DECLARATION OF SHANE H. MCKENZIE**

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MOTION FOR JUDICIAL NOTICE

Pursuant to Evidence Code sections 452, 453, and 459, and rule 8.252(a) of the California Rules of Court, FCA US, LLC requests that this Court take judicial notice of portions of the legislative history of California's Song-Beverly Act and excerpts from the 1980 and 1987 California Vehicle Code, which are listed in the supporting declaration of Shane H. McKenzie and are attached to this request as exhibits A through J. These historical documents shed light on Civil Code section 1793.22, subdivision (e)(2), which is relevant to the central issue presented for review, whether a used vehicle with a remaining balance on its original warranty is a "new motor vehicle" under the Act.

FCA also requests that this Court take judicial notice of the respondent's and cross appellant's brief in *Jensen v. BMW of North America, Inc.*, California Court of Appeal, Third Appellate District, case number C018430. This brief, attached to this request as exhibit K, is relevant to rebut plaintiffs' mischaracterization of *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112 (*Jensen*) in the opening brief on the merits.

FCA also joins in plaintiffs' request that this Court take judicial notice of Volumes 1–6 attached to Petitioners' Motion for Judicial Notice, filed on October 11, 2022.

These documents were not presented to or relied on by the trial court.

This request is being filed concurrently with FCA US, LLC's answer brief on the merits, and is supported by the attached memorandum of points and authorities, and the declaration of Shane H. McKenzie.

February 8, 2023

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This appeal arises from a warranty claim under the Song-Beverly Consumer Warranty Act (the Act) (Civ. Code, § 1790 et seq.),¹ relating to plaintiffs’ purchase of a used Dodge Ram truck from Pacific Auto Center, a used car dealership. The defendant manufacturer, FCA, prevailed on summary judgment because the Act’s repurchase remedy against manufacturers is reserved for buyers of “new motor vehicles,” as defined in the Act. The Court of Appeal affirmed. Plaintiffs argue that this Court should reverse the lower court rulings because their used truck qualifies as a “new motor vehicle” under the Act.

Respondent FCA asks this Court to take judicial notice of the legislative history of relevant provisions of the Civil and Vehicle Codes, as well as an appellate brief filed in *Jensen v. BMW of North America, Inc.* As explained in FCA’s accompanying answer brief on the merits, the Legislature never intended to expand the Act’s refund-or-repurchase remedy for a “new motor vehicle” to a used truck with a transferred manufacturer’s warranty. In addition, the *Jensen* appellate brief establishes that plaintiffs have mischaracterized that case, which the Court of Appeal accurately distinguished. Accordingly, this Court should grant *both* this motion *and* plaintiffs’ motion for judicial notice to take judicial notice of these materials.

¹ All statutory citations are to the Civil Code unless otherwise indicated.

LEGAL ARGUMENT

I. Judicial notice should be taken of legislative and judicial materials that are relevant to the issue presented in this case.

A. Reviewing courts have authority and a duty to take judicial notice.

Under Evidence Code section 452, subdivisions (b), (c), (d), and (h), judicial notice may be taken of legislative acts, court records, and “[f]acts and propositions that are not reasonably subject to dispute.” (See *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 279, fn. 9 (*Soukup*); *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 168, fn. 2; *Arroyo v. Plosay* (2014) 225 Cal.App.4th 279, 284, fn. 4.) Appellate courts have the same right, power, and duty to take judicial notice as trial courts. (Evid. Code, § 459; see *Soukup*, at p. 279, fn. 9 [Supreme Court taking notice of legislative history]; *Cortez*, at p. 168, fn. 2 [Supreme Court taking notice of brief filed in prior action]; *Arroyo*, at p. 284, fn. 4 [taking judicial notice of a pleading in a prior action].)

Under Evidence Code sections 453 and 459, such judicial notice is compulsory if “a party requests it and: [¶] (a) [g]ives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and [¶] (b) [f]urnishes the court with sufficient information to enable it to take judicial notice of the matter” (*id.*, § 453).

B. This Court should take judicial notice of portions of the history of California’s Civil and Vehicle Codes, which are relevant to the statutory interpretation issue in this case.

Both the trial and appellate courts ruled that the Act’s repurchase remedy under section 1793.2, subdivision (d)(2), is limited to “new motor vehicles” as defined by section 1793.22, subdivision (e)(2), which excludes used vehicles sold with transferred original warranties. (See ABOM 24–42.)

As explained in greater detail in the answer brief and in the Court of Appeal’s opinion, the legislative materials provided by both parties support FCA’s position that the California Legislature never intended to include used vehicles with transferred warranties—not when it enacted the Act in 1970, added the “lemon law” provisions in 1982, or amended the definition of “new motor vehicle” in 1987, and not in any other amendments to the Act over the years. (See ABOM 50–59.) In fact, the history shows that the Legislature specifically considered more expansive definitions that would have included subsequent buyers with transferred warranties but decided to retain the Act’s fundamental distinction between the remedies it provides to buyers of new and used products. (*Ibid.*) The Legislature also intended to incorporate the meaning of basic terms from the Vehicle Code, including “new vehicle” and “new motor vehicle dealer.” (See *ibid.*; see also vol. 16, exhs. I, J [excerpts of the 1980 and 1987 California Vehicle Code, including sections 426 and 430].)

Specifically, FCA requests that this Court take judicial notice of the following materials:

- Volumes 1–6 of Petitioners’ Motion for Judicial Notice, which include legislative history materials relating to the original enactment of and amendments to the Song-Beverly Act in 1970, 1971, 1974, 1978, 1982, 1983, 1985, 1987, 1988, 1993, 1998, 2000, and 2007. (See Petitioners’ Motion for Judicial Notice 8–11.)

- Exhibit A to this motion, which contains materials regarding Senate Bill No. 1190 (1979–1980 Reg. Sess.), codified by Statutes 1979, chapter 1023. This bill amended and enacted provisions relating to new and used assistive devices, including sections 1791, subdivision (a), 1792.2, subdivision (b), and 1793.02. These materials show how the Legislature drafts legislation when it intends to add used products to the Act’s remedies against manufacturers. (See ABOM 43, 51.)

- Exhibit B to this motion, which contains materials regarding Assembly Bill No. 2705 (1979–1980 Reg. Sess.). This bill was introduced by Assemblymember Sally Tanner in 1980 and was the precursor to Assembly Bill No. 1787 (1981–1982 Reg. Sess.), codified by Statutes 1982, chapter 388, which added the “lemon law” to section 1793.2, subdivision (e). Assembly Bill No. 2705 included the first draft of the Act’s definition of “new motor vehicle.”

- Exhibit C to this motion, which contains materials regarding Assembly Bill No. 1787 (1981–1982 Reg. Sess.), codified by Statutes 1982, chapter 388. This bill added the

“lemon law” to section 1793.2, subdivision (e), and included the Act’s first definition of “new motor vehicle.” The materials provided to FCA by Legislative History & Intent include *additional* materials not included in exhibit F of Petitioners’ Motion for Judicial Notice, which also includes legislative history pertaining to Assembly Bill No. 1787.

- Exhibit D to this motion, which contains materials regarding Assembly Bill No. 3611 (1985–1986 Reg. Sess.). This bill was introduced by Assemblymember Sally Tanner in 1986 and was the precursor to Assembly Bill No. 2057 (1987–1988 Reg. Sess.), codified by Statutes 1987, chapter 1280, which added the phrase “a dealer-owned vehicle and a ‘demonstrator’ or other motor vehicle sold with a manufacturer’s new car warranty” to the definition of “new motor vehicle” in section 1793.2, subdivision (e)(4)(B). This same phrase was first included as a proposed amendment in Assembly Bill No. 3611.

- Exhibit E to this motion, which contains materials regarding Senate Bill No. 788 (1988–1989 Reg. Sess.), codified by Statutes 1989, chapter 862. This bill enacted former section 1795.8, subdivision (c) (now section 1793.23, subdivision (c)), the Act’s title branding requirements for repurchased vehicles. These materials are relevant to respond to an argument made in the opening brief on the merits. (See ABOM 45.)

- Exhibit F to this motion, which contains materials regarding Senate Bill No. 1762 (1991–1992 Reg. Sess.), codified by Statutes 1992, chapter 1232. This bill enacted the Tanner Consumer Protection Act and moved section 1793.2, subdivision

(e), to section 1793.22, without substantive change. These materials are also relevant to respond to an argument made in the opening brief on the merits. (See ABOM 61.)

- Exhibit G to this motion, which contains materials regarding Assembly Bill No. 1848 (1997–1998 Reg. Sess.), codified by Statutes 1998, chapter 352. This bill revised section 1793.22’s definition of “new motor vehicle” to include vehicles owned by small businesses. The materials provided to FCA by Legislative History & Intent include additional (and/or more legible) materials not included in exhibit H of Petitioners’ Motion for Judicial Notice, which also includes legislative history pertaining to Assembly Bill No. 1848.

- Exhibit H to this motion, which contains materials regarding Assembly Bill No. 1290 (1999–2000 Reg. Sess.), codified by Statutes 1999, Chapter 448. This bill increased the presumption period of section 1793.22, subdivision (b), from 12 months or 12,000 miles to 18 months or 18,000 miles, and shows that the California Legislature is concerned with staying “on pace” with other state lemon laws. (See ABOM 69.)

- Exhibit I to this motion, which contains true and correct excerpts of the 1980 California Vehicle Code. These excerpts include the definitions of “new vehicle” and “new motor vehicle dealer” as they existed when the precursor to the original “lemon law” (Assem. Bill No. 2705) was first introduced.

- Exhibit J to this motion, which contains true and correct excerpts of the 1987 California Vehicle Code. These excerpts include the definitions of “new vehicle” and “new motor

vehicle dealer” as they existed when the Act’s “new motor vehicle” definition was expanded to cover demonstrator vehicles (Assem. Bill No. 2057).

Because the drafting history of the Act sheds light on the proper interpretation of the Act’s definition of “new motor vehicle,” this Court should take judicial notice of the legislative history of the Act, as well as related provisions from the Vehicle Code, attached hereto as exhibits A through J. (See *Soukup*, *supra*, 39 Cal.4th at p. 279, fn. 9 [taking notice of “various versions of the legislation and committee reports, all of which are indisputably proper subjects of judicial notice”]; *Hale v. Southern California IPA Medical Group, Inc.* (2001) 86 Cal.App.4th 919, 927 [“In an effort to discern legislative intent, an appellate court is entitled to take judicial notice of the various legislative materials, including committee reports, underlying the enactment of a statute”].)

C. The Court should also take judicial notice of the respondent’s brief in *Jensen*, which rebuts plaintiffs’ mischaracterization of that case.

Under Evidence Code section 452, subdivision (d), judicial notice may be taken of court records, including “earlier pleadings and positions as well as established facts from both the same case *and other cases.*” (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 877.) While it may be improper to consider the truth of factual matters asserted in court records, pleadings that “reveal the nature of the . . . adjudication are not asserted factual matters beyond the purview of the trial or reviewing court.”

(Pinto Lake MHP LLC v. County of Santa Cruz (2020) 56 Cal.App.5th 1006, 1013, fn. 1 (Pinto Lake); see id. at pp. 1015–1016 [considering arguments made in a prior administrative hearing].)

Plaintiffs rely heavily on *Jensen, supra*, 35 Cal.App.4th at page 127, to argue that used cars such as their own are actually new cars under the Act. (See OBOM 14.) Plaintiffs assert that the Court of Appeal’s opinion “fatally misreads” *Jensen*, arguing that the plaintiff in that case did not receive a “full” warranty, which they claim undermines the opinion’s reasoning. (OBOM 23, fn. 4.) As explained further in the answer brief, it is plaintiffs who are wrong about the facts in *Jensen*. (See ABOM 31–32.)

One argument made by Jensen in her respondent’s and cross appellant’s brief is helpful to understand the “nature of the . . . adjudication” (*Pinto Lake, supra*, 56 Cal.App.5th at p. 1013, fn. 1) in that case. In that brief, Jensen pointed out that “The lease itself is entitled ‘New Motor Vehicle Lease Agreement.’” (Vol. 16, exh. K, pp. 1900–1901.) While there is no need for this Court to determine whether Jensen’s vehicle was *in fact* leased as a new vehicle with a full mileage warranty, the Court may judicially notice that Jensen *argued* it was. The *Jensen* court made no finding to the contrary, and the jury implicitly agreed with Jensen. (See ABOM 31–32.) These details put the decision in context and show that plaintiffs are wrong to conclude that Jensen did *not* receive a “full” warranty. These details also explain why numerous courts have concluded that *Jensen* must be read in light of the facts then before the court.

(See ABOM 32.) Because it helps to clarify the *Jensen* opinion, this Court should take judicial notice of and consider Jensen’s appellate brief. (See *Pinto Lake, supra*, 56 Cal.App.5th at pp. 1012, 1013, fn. 1.)

CONCLUSION

Because the legislative history sheds light on the central issue in this case, this Court should take judicial notice of the history attached hereto as exhibits A through J. The Court should also take judicial notice of the respondent’s and cross appellant’s brief in *Jensen v. BMW of North America, Inc.*, attached hereto as exhibit K, which establishes that plaintiffs have mischaracterized that case.

February 8, 2023

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DECLARATION OF SHANE H. MCKENZIE

I, Shane H. McKenzie, declare as follows:

1. I am an attorney duly admitted to practice law in the State of California and an attorney with Horvitz & Levy LLP, counsel of record for defendant and respondent FCA US, LLC.

2. As FCA explained in its motion for judicial notice filed in the Court of Appeal, my firm was retained in this matter to present oral argument, after the close of briefing. (See FCA's 3/26/21 Motion for Judicial Notice at 8.) At that point, FCA submitted five volumes of Song-Beverly's legislative history that my firm had previously submitted to this Court in *Gavaldon v. DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246. (See Declaration of Shane H. McKenzie in support of FCA's 3/26/21 Motion for Judicial Notice, ¶¶ 2–3.) That history had been gathered and provided to my firm in 2000 by Legislative History & Intent. (*Ibid.*) The Court of Appeal considered this legislative history. (See *Rodriguez v. FCA US, LLC* (2022) 77 Cal.App.5th 209, 222–223.)

3. After review was granted in July 2022, my firm hired Legislative History & Intent to determine whether any additional relevant legislative history materials existed and to gather those materials.

4. Exhibits A through D and F through G in the accompanying appendix are true and correct copies of legislative history materials that Legislative History & Intent provided to my firm. These materials include the following documents:

- Exhibit A contains materials regarding Senate Bill No. 1190 (1979–1980 Reg. Sess.), codified by Statutes 1979, chapter 1023, amending and enacting provisions relating to the Act’s application to new and used assistive devices, including sections 1791, subdivision (a), 1792.2, subdivision (b), and 1793.02.
- Exhibit B contains materials regarding Assembly Bill No. 2705 (1979–1980 Reg. Sess.), introduced by Assemblymember Sally Tanner in 1980. This bill was the precursor to Assembly Bill No. 1787 (1981–1982 Reg. Sess.), codified by Statutes 1982, chapter 388, which added the “lemon law” to section 1793.2, subdivision (e). Assembly Bill No. 2705 included the first draft of the Act’s definition of “new motor vehicle.”
- Exhibit C contains materials regarding Assembly Bill No. 1787 (1981–1982 Reg. Sess.), codified by Statutes 1982, chapter 388, which added the “lemon law” to section 1793.2, subdivision (e), including the Act’s first definition of “new motor vehicle.” The materials provided to FCA by Legislative History & Intent include *additional* materials not included in exhibit F of Petitioners’ Motion for Judicial Notice, which also includes legislative history pertaining to this bill. Accordingly, FCA has provided the entire set of materials regarding Assembly Bill No. 1787 received from Legislative History & Intent.

- Exhibit D contains materials regarding Assembly Bill No. 3611 (1985–1986 Reg. Sess.), introduced by Assemblymember Sally Tanner in 1986. This bill was the precursor to Assembly Bill No. 2057 (1987–1988 Reg. Sess.), codified by Statutes 1987, chapter 1280, which added the phrase “dealer-owned vehicle and ‘demonstrator’ or other motor vehicle sold with a manufacturer’s new car warranty” to the definition of “new motor vehicle” in section 1793.2, subdivision (e)(4)(B).
- Exhibit F contains materials regarding Senate Bill No. 1762 (1991–1992 Reg. Sess.), codified by Statutes 1992, chapter 1232, enacting the Tanner Consumer Protection Act, which moved section 1793.2, subdivision (e), to section 1793.22, without substantive change.
- Exhibit G contains materials regarding Assembly Bill No. 1848 (1997–1998 Reg. Sess.), codified by Statutes 1998, chapter 352, revising section 1793.22’s definition of “new motor vehicle” to include vehicles owned by small businesses. The materials provided to FCA by Legislative History & Intent include *additional* (and more legible) materials not included in exhibit H of Petitioners’ Motion for Judicial Notice, which also includes legislative history pertaining to this bill. Accordingly, FCA has provided the entire set of materials regarding Assembly Bill No. 1848 received from Legislative History & Intent.

We have provided this Court with *all* of the materials that Legislative History & Intent provided to FCA relating to each of these bills. The only alteration we made to those materials was to consecutively paginate the exhibits with “MJN” numbers for ease of reference in the parties’ briefs. The exhibits’ bookmark tab titles (and index titles) are based on the document file names used by Legislative History & Intent.

5. After the plaintiffs filed their opening brief on the merits, my firm obtained additional legislative history materials from different sources. Exhibits E and H through J in the accompanying appendix are true and correct copies and/or excerpts of these materials, from the following documents:

- Exhibit E contains legislative history materials downloaded from Westlaw regarding Senate Bill No. 788 (1988–1989 Reg. Sess.), codified by Statutes 1989, chapter 862, enacting former section 1795.8, subdivision (c) (now section 1793.23, subdivision (c)), the Act’s title branding requirements for repurchased vehicles.
- Exhibit H contains legislative history materials downloaded from Westlaw regarding Assembly Bill No. 1290 (1999–2000 Reg. Sess.), codified by Statutes 1999, chapter 448, which increased the presumption period of section 1793.22, subdivision (b), from 12 months or 12,000 miles to 18 months or 18,000 miles.
- Exhibit I contains excerpts of the 1980 California Vehicle Code, which my firm obtained from an online book seller.

- Exhibit J contains excerpts of the 1987 California Vehicle Code, which my firm obtained from an online book seller.

6. Exhibit K in the accompanying appendix is a true and correct copy of the respondent's and cross appellant's brief in *Jensen v. BMW of North America, Inc.*, California Court of Appeal, Third Appellate District, case number C018430. My firm obtained this brief from the Los Angeles Law Library.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed February 8, 2023, at Burbank, California.


Shane H. McKenzie

S274625

**IN THE
SUPREME COURT OF CALIFORNIA**

EVERARDO RODRIGUEZ et al.,
Plaintiffs and Appellants,
v.
FCA US, LLC,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIV. TWO
CASE NO. E073766

[PROPOSED] ORDER

IT IS HEREBY ORDERED that, pursuant to the pertinent provisions of Evidence Code sections 452, 453, and 459, and rule 8.252(a) of the California Rules of Court, judicial notice is taken of the legislative history of California's Song-Beverly Act, Vehicle Code and the respondent's and cross appellant's brief filed in *Jensen v. BMW of North America, Inc.*, California Court of Appeal, Third Appellate District, case number C018430, true and correct copies of which are attached to FCA's motion for judicial notice as exhibits A through K.

Dated: _____

Presiding Justice

PROOF OF SERVICE

Rodriguez et al. v. FCA US, LLC
Case No. S274625

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

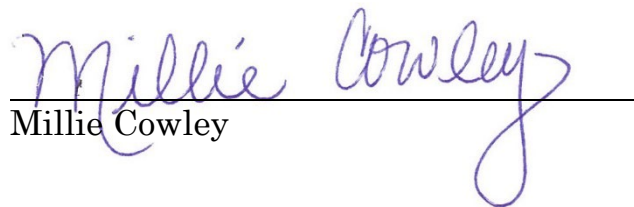
On February 8, 2023, I served true copies of the following document(s) described as **(1) MOTION FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF SHANE H. McKENZIE (2) EXHIBITS TO MOTION FOR JUDICIAL NOTICE (VOLUMES 7-16 • PAGES 1-1937)** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 8, 2023, at Burbank, California.



Millie Cowley

SERVICE LIST
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Case No. S274625

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Motion and Exhibits
Via TrueFiling

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **RODRIGUEZ v. FCA**
US

Case Number: **S274625**

Lower Court Case Number: **E073766**

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: **smckenzie@horvitzlevy.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	S274625_MJN_FCA.PDF
ADDITIONAL DOCUMENTS	Vol. 07 MJN Exhs. 1-256.PDF
ADDITIONAL DOCUMENTS	Vol. 08 MJN Exhs. 257-367.PDF
ADDITIONAL DOCUMENTS	Vol. 09 MJN Exhs. 368-553.PDF
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

2/8/2023

Date

/s/Shane McKenzie

Signature

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