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

PETITIONER'S SECOND MOTION FOR JUDICIAL NOTICE; DECLARATION OF JOSEPH V. BUI; [PROPOSED] ORDER

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SECOND MOTION FOR JUDICIAL NOTICE

Under California Rules of Court, rule 8.252(a)(2), petitioner Lisa Niedermeier moves this Court to take judicial notice of the November 30, 1994 Report from California Legislature Assembly Committee on Consumer Protection, Governmental Efficiency and Economic Development: "Bitter Fruit: Final Report on How Consumers Unknowingly Buy Lemon Vehicles" (the "Report").

The Report is relevant to the parties' dispute about whether the Song-Beverly Consumer Warranty Act (the "Act") requires giving manufacturers an offset for the amount that a consumer is credited when she trades in a lemon while waiting for relief that the manufacturer was supposed to provide "promptly," without the need for suit.

FCA has argued that allowing consumers to retain the proceeds from a trade-in or resale would undermine the Act's mandate that a manufacturer label defective vehicles that a manufacturer repurchases as a lemon. FCA says that allowing consumers to retain the trade-in or resale proceeds would encourage consumers to trade in their vehicles before a case is adjudicated (and when, on losing, a manufacturer may be compelled to buy back a vehicle).

The Report rebuts FCA's position by showing that the Legislature enacted and strengthened the labelling requirements to stop *manufacturers* from getting what FCA seeks here in the form of a trade-in offset—namely, the "higher" prices that defective vehicles can yield on the open market if not "stamped as

lemons," which is what happens when a consumer trades in a lemon vehicle that a manufacturer has failed to repurchase. (SMJN/16.) The Report thus undermines FCA's position that the Legislature sought to make *consumers* hold onto a lemon vehicle for the *years* it can take for a lemon-law case to be tried.

Accordingly, petitioner respectfully requests that this court take judicial notice of this Report, a true and correct copy of which is attached to this motion as Exhibit A. (See Declaration of Joseph V. Bui, ¶ 2.) This Request is based on Evidence Code sections 451, 452, 453, and 459, the accompanying Memorandum of Points and Authorities, the Declaration of Joseph V. Bui, and the briefs filed in this appeal.

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff seeks judicial notice of Exhibit A, which will help the court resolve the parties' dispute over whether the Act permits offsets against a consumer's restitution recovery, where that offset is based on a trade-in credit from a dealer who sold a consumer a new vehicle.

Summary of "Bitter Fruit" Report. Exhibit A is a 1994 investigative report by the California Legislature Assembly Committee on Consumer Protection, Government Efficiency, and Economic Development.

The Committee investigated the "widespread" problem of lemon vehicles in California. (Angela M. Burdine, *Consumer Protection; "Lemon Law Buyback"—Requirements Regarding the Return and Resale of Vehicles* (1996) 27 Pacific L.J. 508, 516–517

& fns. 35, 37.) The Committee then produced its findings in *Bitter Fruit*, which led to the enactment of the Automotive Consumer Notification Act, which strengthened the Act's Labelling Requirements. (*Id*. at pp. 514–517.)

The Committee specifically found that "vehicle manufacturers ha[d] circumvented [the Act's] disclosure law[s]" by (1) "re-acquiring problem vehicles prior to formal arbitration proceedings which could lead to mandated branding of the vehicle's title as 'warranty returned,'" (2) coding them as "good will buy backs without acknowledging the vehicles may have qualified as legal lemons" (presumably for far lower than the original purchase price), and then (3) "resell[ing] these vehicles at higher prices than [they could yield] if the vehicles were described as former lemons."[1] (SMJN/16, 21-22.)

Despite the Legislature's best efforts to end these practices, FCA apparently continues them to this day, having made plaintiff two so-called "good will" buy back offers for $500 and $2,000 (2RT/938, 941) for a $40,000 Jeep that FCA failed to repair after *sixteen attempts* (Opening Br. at p. 22).[2]

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[1] Worse, manufacturers would then impermissibly claim a sales tax for these "goodwill buy backs" that California had made available only when a manufacturer repurchases a vehicle under the Song-Beverly Act. (SMJN/17, 22-23.)

[2] Chrysler (i.e. FCA) was the only major manufacture who refused to "support full disclosure of a vehicle's re-acquisition history of a prospect buyer," declining to testify on the basis that "the Department of Motor Vehicles (DMV) ha[d] an accusation case pending against Chrysler for lemon law disclosure violations." (SMJN/18.)

As we now show, the legislative report is a proper subject of judicial notice and is relevant to this appeal concerning FCA's request for an offset for the value that a *non-branded vehicle* can yield on the market.

I. The Exhibit Is A Proper Subject of Judicial Notice.

Like trial courts, an appellate court's power and obligation to take judicial notice is governed by Evidence Code sections 451 and 452. (*People v. Ouellette* (1969) 271 Cal.App.2d 33, 36, citing Evid. Code, §§ 451, 452, 459.) Section 451 identifies the materials for which judicial notice "must" be taken, and section 452 identifies the materials for which judicial notice "may" be taken. (Evid. Code, §§ 451, 452.) Under section 453, judicial notice of any matter specified in section 452 is compulsory if a party requests judicial notice and (a) "[g]ives each adverse party sufficient notice of the request . . . 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." (Evid. Code, § 453, subds. (a), (b).) The exhibit here is judicially noticeable under all three provisions.

A. Legislative history material provided by the California State Library is a proper subject of judicial notice.

Exhibit A is a true and correct copy of legislative history material provided by the Witkin State Law Library. (See Declaration of Joseph V. Bui ["Bui Decl."], ¶ 2.) Exhibit A is judicially noticeable as legislative material as a result.

Section 451 requires courts to take judicial notice of "[t]he decisional, constitutional, and public statutory law of this state." (Evid. Code, § 451.) The requirement that courts take judicial notice of the law extends to a law's legislative history, which includes committee reports. (See Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (1995 ed.) foll. § 450, p. 93 ["That a court may consider legislative history . . . is inherent in the requirement that it take judicial notice of the law"]; *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 279, fn. 9 ["committee reports . . . are indisputably proper subjects of judicial notice"].)

Courts routinely notice reports by California Legislature Assembly Committees under this provision. (See, e.g., *In re Donovan L.* (2016) 244 Cal.App.4th 1075, 1088, fn. 11; *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 45–46, fn. 9; *Cammack v. GTE California Inc* (1996) 55 Cal.Rptr.2d 837, 551, fn. 10.)

Exhibit A is judicially noticeable under section 451 as legislative history material for these reasons.

B. An official act of a state legislative assembly is a proper subject of judicial notice.

Exhibit A is also judicially noticeable as a legislative report memorializing the acts of its committee—here, the California Legislature Assembly Committee on Consumer Protection, Government Efficiency, and Economic Development's efforts to

strengthen provisions requiring that manufacturers disclose that they have repurchased a lemon vehicle before resale.

Section 452, subdivision (c), allows courts to take judicial notice of the "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." (Evid. Code, § 452, subd. (c).)

Reports issued by California legislative committees are official acts of the Legislature and routinely noticed under this provision. (See, e.g., *Post v. Prati* (1979) 90 Cal.App.3d 626, 634; *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 481, fn. 9; *People v. Ansell* (2001) 25 Cal.4th 868, 881, fn. 20; *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572, fn. 3; *Reilly v. City and County of San Francisco* (2006) 142 Cal.App.4th 480, 487, fn. 3; *Fair Political Practices Com'n v. Californians Against Corruption* (2003) 109 Cal.App.4th 269, 274, fn. 3; *Potter v. Arizona So. Coach Lines, Inc.* (1988) 202 Cal.App.3d 126, 132, fn. 1; *County of Orange v. Superior Court* (2007) 155 Cal.App.4th 1253, 1256, fn. 1; *Medical Bd. Of California v. Superior Court* (2018) 19 Cal.App.5th 1, 8, fn. 6.)

Exhibit A is thus also judicially noticeable under section 452 as an official act of a state legislative committee.

II. Exhibit A Is Relevant To The Parties' Dispute.

There can be no question that Exhibit A is relevant to the parties' dispute about whether the Song-Beverly Act requires providing manufacturers with an offset when the consumer

trades in or re-sells a lemon after the manufacturer has shirked its statutory obligation to promptly buy it back.

FCA argues that allowing consumers to retain a trade-in or resale offset would undermine the Act's labelling requirements by encouraging them to trade it in before the end of a years-long litigation, when FCA is finally willing to buy it back. (See Answering Br. at p. 35.) The Report refutes this argument by showing that the Act's labelling requirements were not enacted to force wronged *consumers* "to hold onto lemons until the end of trial" just "to ensure a manufacturer's compliance with *the manufacturer's own duties*." (Opening Br. at p. 56.) The Report instead shows that—as is true with virtually every amendment to the Act (see Opening Br. at pp. 13-21; *Jensen v. BMW of North America* (1995) 35 Cal.App.4th at pp. 122-126)—the Act's labelling requirements are solely meant to make it harder for *manufacturers* to exploit ambiguities and loopholes to avoid complying with their statutory obligations.

At the time the Report was commissioned, manufacturers were required to brand a car as a lemon after repurchasing a vehicle "that [was] known to have been required by law to be replaced, or accepted for restitution" pursuant to the Act's provisions. (SMJN/16, 20.) The Report specifically finds that manufacturers had widely "circumvented [the Act's prior] disclosure law." (SMJN/16.) Manufacturers would "re-acquire problem vehicles prior to formal arbitration proceeds which could lead to mandated branding of the vehicle's title" (SMJN/16, 21-22)—likely for some trivial amount similar to the $500 and

$2,000 "goodwill" offers FCA made in this very case (2RT/938, 941). They would then label these repurchases as "goodwill buybacks" so they would not have to brand these cars as lemons and then "resell these [unbranded] vehicles [to unsuspecting consumers] at higher prices than [they could yield] if the vehicles were described as former lemons." (SMJN/16, 21-22.)

The Report sought to strengthen the Act's labelling requirements in response, which would ultimately lead to the requirement that manufacturers label vehicles they have repurchased that they know *or should know* to be a lemon. (*Burdine, supra,* 27 Pacific L.J. at p. 514 [discussing various changes, including that manufacturers must now label cars they buy back that they know or should know to be lemons].)

The Report is thus imminently relevant, as it shows that FCA's attempts to read a trade-in or resale offset into the Act is what would undermine the Act's labelling requirements by reviving the very financial incentivize for manufacturer non-compliance that those requirements sought to stamp out. FCA and other manufacturers already "consider[] promptly repurchasing, repairing, labeling as a lemon and selling the vehicle at a deep discount with a one-year warranty, a losing proposition." (*Figueroa v. FCA US, LLC* (2022) 84 Cal.App.5th 708, 714.) Reading an unenumerated trade-in or resale offset into the Act would only further "encourage" them to drag their feet to "force the owner of a defective vehicle to sell it on the open market, or trade it in without a label or warning, and use the cash back on [the higher] trade-value as an offset." (*Ibid*.)

CONCLUSION

We respectfully request that the Court take judicial notice of the legislative report showing that the Legislature strengthened the labelling requirements to try to stop manufacturers from receiving precisely what FCA seeks here: an offset for a defective vehicle that FCA would have had to sell at a deep discount (if sellable at all) had FCA *complied with the Act* by promptly repurchasing it and branding it as a lemon, without the consumer needing to ask, let alone sue.

February 22, 2023

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By */s/* Joseph V. Bui

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DECLARATION OF JOSEPH V. BUI

I, Joseph V. Bui, declare as follows:

1. I am an attorney licensed to practice law in the State of California and am Counsel at the law firm of Greines, Martin, Stein & Richland LLP ("GMSR"), which specializes exclusively in appellate practice. GMSR is appellate counsel of record for petitioner Lisa Niedermeier, along with Leslie a. Brueckner of Public Justice.

2. Exhibit A in the accompanying Motion for Judicial Notice exhibit appendix is a true and correct copy of the November 30, 1994 Report from California Legislature Assembly Committee on Consumer Protection, Governmental Efficiency and Economic Development: "Bitter Fruit: Final Report on How Consumers Unknowingly Buy Lemon Vehicles." GMSR secured the Report from the Witkin State Law Library.

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration was executed on February 22, 2023, at Los Angeles, California.

*/s/*Joseph V. Bui
Joseph V. Bui

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[PROPOSED] ORDER

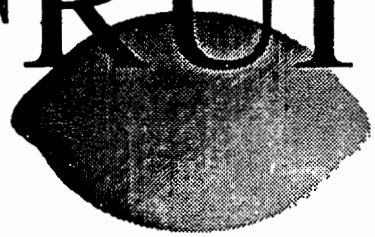
IT IS HEREBY ORDERED that, pursuant to Evidence Code sections 451, 452, 453 and 459, and rule 8.252(a) of the California Rules of Court, judicial notice is taken of Exhibit A submitted with petitioner Lisa Niedermeier's motion for judicial notice.

DATED: _____

_____
Presiding Justice

BITTER FRUIT

Final Report on How Consumers Unknowingly Buy Lemon Vehicles



November 30, 1994

SMJN 13

CALIFORNIA LEGISLATURE
ASSEMBLY COMMITTEE ON
CONSUMER PROTECTION,
GOVERNMENTAL EFFICIENCY
AND ECONOMIC DEVELOPMENT

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SMJN 14

INTRODUCTION

This report finds that vehicle manufacturers and dealers have recycled cars and trucks in California without warning consumers they are buying "lemons" which were bought back from the original owners by the manufacturers. In some cases, lemon defects continue to plague the second and third owners of these vehicles.

Manufacturers, dealers and consumers now agree that current vehicle disclosure law on the resale of manufacturer buy-back vehicles must be strengthened. Therefore, the task at hand is to devise a disclosure law that is enforceable, workable and protects consumers.

This task may be difficult. On October 24, 1994, when the first committee report was released on the buy-back issue, a General Motors (GM) spokesperson, reacting to the report, was quoted by the press as saying, "I don't know why we would tell you that the vehicle's been repaired if it's in good shape." I dare say that every car buyer, if asked, would want to know why a vehicle had been bought back by the manufacturer. In brief, every buy-back transaction should be disclosed.

The committee's first report was entitled, When Lemons Are Packaged As Peaches. This final report is named, Bitter Fruit, in recognition of consumers who have suffered the emotional and economic consequences of buying a product they probably would not have purchased if they had known the vehicle's past history. Unfortunately, for many consumers history was repeated.

The Department of Motor Vehicles (DMV) is to be commended for its investigative work and efforts to enforce current law regarding vehicle sales, or lemon resales. A special tribute is due Gayle Pena, a consumer who alerted the DMV to the unethical and illegal practices of manufacturers and dealers. Ms. Pena embodies the truism: one person can make a difference.

A special thanks is also due Richard Steffen, the committee's chief consultant, whose tireless efforts brought this report to fruition at the conclusion of the 1993-94 Legislative Session. Also, thanks is extended to Glenn Brank, a consultant with the Assembly Office of Research, who assisted in this report and Alvin Gress, Office of Legislative Counsel, who provided legal guidance.

State Assemblywoman Jackie Speier, Chair
November 30, 1994

MAJOR FINDINGS

1. Documents reveal that vehicle manufacturers have circumvented disclosure law by re-acquiring problem vehicles prior to formal arbitration proceedings which could lead to mandated branding of the vehicle's title as "warranty returned" -- the legal term for "lemon" vehicles. By avoiding the stigma of a branded title, manufacturers and dealers can resell these vehicles at higher prices than if the vehicles were described as former lemons.

2. Lemon vehicles may be laundered through auto auctions. While the disclosure papers on the vehicle's lemon history may accompany the vehicle upon sale at the auction, the new owner, a dealer or wholesaler, may not pass on the facts to the next buyer who may be an unsuspecting consumer, or even another dealer. The key element to the laundering equation is the fact that current law does not require the manufacturer or dealer to take title of a re-acquired vehicle. The name of the first buyer, the consumer, remains on the title until it is sold to another consumer. For example, a Los Banos couple won a $150,000 settlement against a car manufacturer who bought back their lemon car in May, 1994. This couple was shocked to learn from the committee that on 11/22/94, they were still listed in DMV records as the registered owners of the vehicle, even though the car is in the legal possession of the manufacturer. The troubling bottom line is this: A consumer cannot rely on an examination of the vehicle's title to prove the vehicle was bought back by the manufacturer.

3. In 1991 the DMV obtained files from GM's Fremont corporate offices on 435 GM buy-back vehicles. Ultimately, 71 of these vehicles were included in a formal accusation by the DMV regarding violations of the "lemon law" by GM. The GM documents show a significant number of safety-related cases in which GM or its dealers made goodwill buy-backs without acknowledging the vehicles may have qualified as legal lemons. The documents reveal that vehicles were repurchased from the original owners only after repeated repairs failed to remedy faulty brakes, stalling engines and other problems that posed a safety hazard. Internal GM memos show that GM representatives urged goodwill repurchases when the number of repair attempts exceeded the limit set by California's lemon law.

4. The DMV was unable to provide the committee with an exact accounting of legally registered warranty returned vehicles on the road in California. DMV's data system shows there are 1.3 million branded titles in California, but this figure includes salvage vehicles, former police vehicles, and former taxis--vehicle categories which require branding of the title.

5. Consumers who bought low-mileage vehicles from dealers and who are having lemon-type problems with their vehicles have frequently supplied the committee with their vehicle's identification number to determine if the vehicle has been branded. However, there is usually no evidence of a brand that would indicate the vehicle had been re-acquired by the manufacturer. Manufacturers have a history of avoiding the branding of a title with "warranty returned." In fact, five vehicles included in a DMV's investigation of GM are not branded, as of 11/22/94, even though the vehicles were included in DMV's accusation and have a history of mechanical problems which resulted in GM's buying back the vehicle.

6. While DMV was able to obtain a settlement of $330,000 from GM and some $97,000 from two other car dealers involved in the GM case, it has been able to do very little for the consumers who are stuck with laundered lemons, according to the consumers of record in these cases. These consumers had to retain private counsel to settle their cases. In a few instances GM has offered consumers cash payments in excess of what was paid for the vehicles. In two cases, consumers filed suit against GM and achieved out-of-court settlements approaching $500,000.

7. The Board of Equalization reports that manufactures are attempting to obtain sales tax refunds improperly for goodwill buy-back vehicles. State law only allows refunds for vehicles repurchased under the lemon law, a legal transaction which leads to branding of the vehicle's title. Manufacturers make goodwill buy-backs, in some cases, to avoid branding of a vehicle's title.

8. From 10/17/88 to 6/3/94, none of the 21 vehicles bought back by manufacturers under the State of Washington's Lemon Law and subsequently shipped and resold in California have branded titles.

UPDATE

On 10/24/94, the Assembly Committee on Consumer Protection, Governmental Efficiency and Economic Development released a report, When Lemons Are Packaged As Peaches, which found that vehicles bought back by the manufacturer from dissatisfied customers are often resold to consumers who are not informed about the vehicle's return history.

This final report, Bitter Fruit, provides more documentation on the problem of nondisclosure sales of buy-back vehicles. The report concludes with a list of legislative options that could be pursued in the next legislative session.

This report contains new information not detailed in the first report as the result of the following:

1) The committee held a hearing at the Capitol on 10/27/94 where several consumers gave graphic accounts of how they had been victimized by the purchase of a low-mileage vehicle which manufacturers had previously re-acquired from the original owners who experienced mechanical problems similar to those that

plagued the second owners. These "lemon" vehicles were resold without disclosure of prior problems, or the fact that the vehicle had been bought back by the manufacturer. One witness, Ms. Gayle Pena, said that she and her husband almost died when the vehicle's brakes failed on a trip over the Sierra Mountains.

2) Manufacturer representatives at the hearing agreed that vehicle manufacturers would support full disclosure of a vehicle's re-acquisition history to a prospective buyer, regardless of the reason, or reasons why the vehicle was bought back. Major manufacturers, foreign and domestic, were represented, except for Chrysler which declined to testify due to the fact that the Department of Motor Vehicles (DMV) has an accusation case pending against Chrysler for lemon law disclosure violations.

3) On 10/27/94 the committee had a subpoena for documents served on Frank Zolin, Director of DMV, for the purpose of obtaining DMV investigative files on General Motors Corp., which DMV had charged with violating the lemon law in 1993. GM ultimately settled with DMV by paying $330,000 to DMV's Consumer Protection Fund. The settlement did not include an admission of guilt, nor did it contain a provision that would prevent DMV from releasing the documents. However, DMV asked that it be served with a subpoena since GM had indicated that it did not want the contents of the file released to other parties for review.

GM sought a temporary restraining order to enjoin DMV from complying with the subpoena. However, Sacramento Superior Court Judge Joe Gray ruled that GM had failed to show that DMV's compliance with the subpoena would violate GM's constitutional rights. Judge Gray stated that the court "must respect the ability of the Legislature to handle its own affairs." The committee obtained the GM files on November 17, 1994. This report, in part, contains information that was gleaned from DMV's GM files.

4) On 11/17/94, a Los Banos car dealer, included in DMV's GM investigation, agreed to pay DMV $32,500 as a settlement; and on 11/21/94, a Santa Rosa car dealer, also implicated in DMV's investigation, agreed to a settlement of $65,000. Both dealers also were required to pay for DMV's investigative costs and to shut down their sales operations for a specified period of time.

5) The committee has been investigating individual cases involving consumers who purchased low-mileage cars and trucks from dealers and who, for a variety of reasons, believe their vehicles were manufacturer buy-back "lemons." This report contains insights garnered from investigations of individual cases.

EXAMPLES OF LAUNDERED LEMON VICTIMIZATION

Case #1

The committee contacted the office of the State Attorney General of Washington for a list of vehicles that had been repurchased by manufacturers under Washington's lemon law and, subsequently, shipped for resale in California. The committee traced the sales of these vehicles and, when appropriate, turned the information over to the DMV for investigation. The following example is a matter currently under investigation.

The vehicle in question was re-acquired by the manufacturer from the consumer in January 1992. The state form used to identify the reason for buy-back indicates "serious safety defect...brakes pulsate and chatter."

The vehicle was subsequently sold at a California auto auction where a licensed dealer purchased it. The sale documents included a disclosure statement from the manufacturer stating that the vehicle was repurchased due to "brake shimmy" and that it was repaired by replacement of "both front brake rotors." The dealer signed a form which stated: "I (name) have purchased the above noted vehicle with full knowledge and understanding that it has been repurchased from the original owner as a result of a non-conformity and the applicable 'Lemon' Law. I agree to disclose this information to any subsequent owners." The dealer, in turn, resold the vehicle to another dealer who alleged to the committee that he was not told about the vehicle's lemon past, nor given any disclosure forms.

Within one week after the vehicle was sold by one dealer to another, a consumer from Huntington Beach purchased it. No lemon disclosure was given. Unfortunately, the vehicle developed "brake chatter" again and the second owner was confronted with the same problems that plagued the original owner.

The dealer who sold the vehicle to the consumer has been in contact with the committee. At this time, the consumer is driving a dealer's loaner car until the DMV investigation is completed.

Case #2

In October, 1994 a vehicle owned by a Ventura couple began to have engine problems and a power steering leak. This vehicle, purchased used from an Oxnard dealer in July, 1994 had been driven 2,000 miles by the new owners.

Several months ago, the original owners of the aforementioned vehicle had contacted the committee to complain about the length of the legal process--the lemon law--which eventually led to the manufacturer's replacement of their problem-plagued vehicle. The previous owners assumed their vehicle had been destroyed, since its record during the warranty period included replacement of four catalytic converters, two power steering pumps, and blown head gaskets and

pistons. But DMV informed the committee that the problem vehicle was now registered, without a "lemon" designation, to the couple in Ventura.

The new owners allege that at the time of sale, the dealer said that the manufacturer had bought the vehicle back from the original owners who were unhappy with the air conditioning and the monthly payments. The dealer had purchased the vehicle at an auto auction.

The DMV is investigating this case.

(Note on terminology: "Lemon" has a common usage that means "doesn't work." A "lemon" car is one that routinely doesn't work; and California's lemon law is designed to provide consumers with a recourse for unloading their "lemons." A buy-back vehicle can be a "lemon," or it could be a vehicle with a very minor cosmetic problem which the manufacturer consents to buy back to keep the consumer satisfied. To further complicate the language, the DMV types-- "brands" -- "WARRANTY RETURN" in the upper right corner of the vehicle title and on the vehicle's registration when that vehicle has been bought back by the manufacturer pursuant to the lemon law. There is no use of "lemon" on the title, nor the color "yellow.")

OVERVIEW OF EXISTING LAWS

Existing state law, The Song-Beverly Consumer Warranty Act, provides that if a manufacturer, or dealer cannot repair a new vehicle as required by the warranty after a "reasonable number of attempts," and the defect substantially impairs the vehicle's use, then the consumer is due a refund of the purchase price, or a replacement vehicle.

Existing state law, The Tanner Consumer Protection Act (lemon law), provides that if the defect on a vehicle cannot be repaired in four attempts within one year from delivery, or 12,000 miles, whichever occurs first, or the vehicle is out of service for more than 30 days, the owner may sue the manufacturer for a refund or replacement with a vehicle of equal value. The law also allows the automaker to reject the claim and submit the case for arbitration under programs certified by the Department of Consumer Affairs but administered by manufacturers.

The Automotive Consumer Notification Act requires a dealer or a manufacturer who sells a vehicle that is known to have been required by law to be replaced, or accepted for restitution to disclose that fact to the buyer in writing prior to purchase. The notice is to read: "THIS MOTOR VEHICLE HAS BEEN RETURNED TO THE DEALER OR MANUFACTURER DUE TO A DEFECT IN THE VEHICLE PURSUANT TO CONSUMER WARRANTY LAW."

The above law also requires the ownership title and registration to be "branded" with the legend: "WARNTY RET."

Finally, the law allows a manufacturer to request a sales tax refund for any vehicle that is bought-back under the state's lemon law. The refund is not granted for goodwill buy-backs.

The California Motor Car Dealer Association issued a "Dealer Alert" to its members on 5/17/93 regarding state law and buy-back vehicles. In part, the memo stressed: "Dealer liability exposure may be dramatically reduced by insisting that your franchiser exclusively handle buy-backs and by adoption of a policy not to purchase factory buy-backs for resale."

MANUFACTURER BUY BACK CASES

To circumvent the law, manufacturers allegedly buy back problem vehicles before they are legally designated as "lemons." The manufacturers contend that these pre-lemon buy-backs are done for customer goodwill purposes; i.e., the paint was not right, so a long-time customer was provided a replacement car.

On 4/29/93 the DMV filed separate accusations against the General Motors Corporation (GM) and 34 Northern California GM dealers alleging that the parties knowingly sold buy-back vehicles to customers without disclosing the repair history or the fact that the vehicles had been bought back. In some cases the buy-backs had been subject to extensive safety repair work (engine stalling, brake failure, etc.), according to the consumers. In fact, one unsuspecting buyer says that she had the brakes fail in her vehicle which, DMV later discovered, had a history of brake problems. Not one of these vehicles had been branded as "lemons."

GM settled the DMV accusation case by paying $330,000 to the DMV's Consumer Protection Fund which pays for state investigations of complaints regarding the sale of vehicles. Thirty-one dealers also settled with DMV with payments averaging about $8,500 each. One dealer is fighting the DMV in court while two other dealers settled with the DMV for payments in excess of $97,000.

In the GM/DMV settlement, GM admits no guilt.

The DMV also filed an accusation case on 8/17/94 against Chrysler Corporation for allegedly selling 118 buy-back vehicles without proper disclosure. The case is still pending with a hearing date of 2/28/95. Chrysler dealers have not been charged.

Additionally, DMV is reviewing documents from Ford Motor Co. regarding resale of buy-back vehicles, but no charges have been filed to date.

The committee chair has asked all vehicle manufacturers to provide the committee with information on the number of buy-backs, reasons for the buy-backs, recalls, etc.. The manufacturers have declined repeatedly to provide any information. James Austin of The American Automobile Manufacturers Association, which represents Ford, Chrysler and GM, wrote in a 10/13/94 letter

to the committee chair that the requested information is "confidential, proprietary." Austin added that when vehicles are bought back, "the reason for repurchase is provided by each of the manufacturers." Therefore, the question is, who is the information disclosed to and when is it disclosed? One car dealer told the committee that disclosures occur at auto auctions where a short announcement is made, but often not heard.

The Washington-based Center for Auto Safety estimates that 50,000 "lemon" vehicles are bought back nationwide each year. There are no estimates on the number of these vehicles that are sold with, or without disclosure.

The Department of Consumer Affairs provided the committee with all available information on Lemon Law buy-backs through state-certified arbitration programs, 1991-1993. These figures are very misleading in that only select manufacturers have arbitration programs. Additionally, the manufacturers do not report the make and model of the buy-back vehicle, or the reason for its return. Finally, the figures do not include pre-arbitration negotiated settlements. The three-year total shows that out of 7,733 disputes there were 1,916 cases where the consumer received a replacement vehicle, or monetary restitution.

SALES TAX INFORMATION IDENTIFIES BUY-BACKS

The committee contacted the Board of Equalization (BOE) to determine the number of vehicles which manufacturers requested sales tax refunds as the result of a buy-back. BOE reported:

*3,925 refund claims from 7/90 to 9/94
*50 to 100 claims per month, on average
*94% of the claims were from domestic manufacturers

The above figures only cover manufacturer requests, not dealer buy-backs; also leased vehicles, about 20% of the sales market, are not eligible for a sales tax refund.

Most significantly, BOE noted that "until recent action taken by DMV against one of the major domestic manufacturers, none of the manufacturers were branding DMV titles." In brief, manufacturers were not "lemonizing" their buy-backs.

Current law only provides for a sales tax refund for vehicles bought back under the state's lemon law. Therefore, manufacturers have been buying cars back and treating them as goodwill buys to avoid branding while applying for sales tax rebates under the lemon law. A recent BOE audit shows that one Northern California dealer, operating under the direction of the manufacturer, owes $55,000 in sales taxes involving buy-back transactions.

Glenn A. Bystrom, deputy director of BOE's Sales and Use Tax Department, writes in a 10/21/94 letter to the committee that "Given the fact that branding of DMV titles has not been required, it is possible that lemon vehicles may have been resold to unsuspecting purchasers."

Bystrom adds, "It is also possible that some of the lemon law transactions which are claimed as lemon law vehicles by dealers and manufacturers are simply adjustments made for customer accommodations: that is, transactions are characterized as lemon law vehicles but in reality they are only characterized in this manner in order to take care of dissatisfied customers. If this is the case, there are transactions that, under the Sales and Use Tax Law, should be treated as a sale of a new vehicle. Since this treatment results in more sales tax when compared to the lemon law treatment, it probably means the State is currently losing sales tax revenues. As an example, while investigating the claims that we have received, our audit field staff has found that the majority of the transactions claimed do not qualify under the lemon law provisions. Some of the more common reasons these claims do not qualify are: the manufacturer charges the purchaser for usage in excess of allowable fees; the manufacturer fails to reimburse the purchaser for sales tax, documentation fee, or license fees; and the customer is not given the option of cash restitution versus vehicle replacement."

LEMON LAUNDERING

While DMV has difficulty keeping tabs on cars that are legally "lemonized" in California, it has little defense against those buy-backs which are imported here from other states. Current law requires the DMV to brand the registration and title if a vehicle is brought into California with a "brand" on it. But few if any titles come into California with the lemon brand.

The State of Washington is considered to have the most effective lemon law in the nation. In fact, 291 vehicles which were bought-back in Washington under its lemon law were subsequently shipped to other states for resale. From 10/17/88 to 6/3/94, 21 Washington "lemons" were exported to California. None of these cars has a lemon branded title, nor were any of the California owners contacted by the committee aware of their car's prior status.

Paul Corning, Washington's Lemon Law Administrator, says that he voluntarily sends a list of "lemons" to be exported to California to the State Attorney General's Consumer Law Division in Los Angeles which, in turn, sends a copy of the information to the DMV which apparently has not pursued these titles. Under Washington law, if a manufacturer of a buy-back vehicle is going to ship it out of state, rather than have it re-titled in Washington, it must identify the state of destination.

WHERE IS THE FEDERAL VEHICLE SAFETY AGENCY WHEN YOU NEED IT?

National Highway Traffic Safety Administration (NHTSA), the federal agency responsible for vehicle recalls, has initiated 1,300 safety recalls from 1988 through 1993. According to NHTSA, 75% of safety hazard recalls have been completed; i.e., the repairs have been made free of charge.

Most defect information comes from the public--12,000 defect calls are received annually on NHTSA's hotline. However, the complaint information cannot be passed on to the manufacturer unless the caller signs the complaint in writing and, apparently, few callers follow up with a written complaint.

NHTSA has only issued seven mandatory recalls over the past 18 years. Most recalls, therefore, are done voluntarily by the manufacturer.

NHTSA does not require manufacturers to provide it with warranty data; consequently, manufacturers do not have to share individual buy-back problems with NHTSA. The federal law does require manufacturers to share information when the defect communication involves more than one dealer or purchaser. But buy-backs are handled on an individual basis and, therefore, do not trigger reports to NHTSA. NHTSA does review service bulletins which manufacturers issue regarding common problems with specific vehicle equipment.

A NHTSA spokesperson informed the committee that it wants to see the safety problems involved in the DMV's investigation information involving the GM buy-backs. DMV said it cannot send that information to NHTSA, but rather, the consumer must undertake that responsibility.

DMV did contact NHTSA for a listing of consumer complaints for the vehicle models involved in the accusation against GM. Additionally, DMV asked for all service bulletins issued by manufacturers for these vehicles.

SAFETY PROBLEMS REVEALED IN GM CASE

The committee's review of the GM documents from the DMV accusation case reveals that engine stalling and hesitation complaints most frequently involved late-model Chevrolet Camaros. Brake problems occurred most frequently with Chevrolet Suburbans and other GM trucks. These findings are consistent with manufacturer service bulletins provided to the DMV by NHTSA. Specifically, at least two GM bulletins have been issued for stalling and/or hesitation in Camaros; and four advisories have been issued for brake problems on GM trucks.

A committee review of 51 lemon cases in the DMV accusation case against GM reveal the following:

--Six cases involving brake problems. According to DMV investigative reports, the original owner complaints, as documented by GM's own files, ranged from "had to use emergency brake to stop once" and "nearly in accident due to

brake failure" to "front brakes failed four times." The Modesto owner of a 1990 Suburban complained that the brake pedal faded in power. In this case the GM representative wrote a note on the vehicle, stating: "Repeat repairs to brakes for soft pedal. Owner concerned over safety of vehicle." The last sentence was highlighted with a yellow marker.

--Thirteen cases involved stalling and/or hesitation problems. One consumer complained the vehicle stalled on the freeway, almost causing an accident. A Fremont man stated that repeated stalling on freeways had made driving "very dangerous."

--Six cases involved steering or front-end problems. These cases included excessive tire wear. One consumer said a malfunctioning four-wheel-drive caused him to strike a tree.

--Twenty-two cases concerned transmission or rear-end defects. Consumers complained that vehicles were hard to drive.

(The cases cited above do not total 51 because some complaints involved non-safety defects such as peeling paint while other complaints involved more than one safety defect.)

--Information in the case files contradict the testimony of a GM official at the committee's October 27 hearing. Specifically, the GM representative said GM repurchased vehicles as a goodwill gesture, not to avoid branding as a lemon.

But in one case a San Mateo man complained that his 1988 Chevrolet Celebrity would stop running when he took his foot off the accelerator. The man stated, "After nine repairs and many near accidents, (dealer) said they do not know the cause, or how to fix it." This file contains a statement by a GM representative who warns that the vehicle should be bought back now to avoid arbitration and branding of the title as the excessive repairs on the vehicle qualify it for the lemon law. Specifically, the internal memo reads: "Avoid BBB (Better Business Bureau--GM's lemon arbitrator in California)--due to the #(number) of times in for stumble or stall on freeway."

The committee has written to the current owners of the lemon vehicles in the DMV accusation to determine to what extent GM and the DMV has assisted them in maintaining the safety of their vehicles.

LEMON LAUNDERING COVER-UP ALLEGED

Finally, the non-profit consumer group, Motor Voters, had alleged that GM is offering buy-back victims $1,000 to have their vehicles properly titled as "warranty returned." In a statement released 10/17/94, Motor Voters contends that "lemon" designation would decrease the value of the vehicle while relieving GM of liability. Motor Voters provided the committee with a release form from GM that was to be signed by a California vehicle owner.

LEGISLATIVE PROPOSALS

1. Require the fact that a vehicle has been bought back by the manufacturer, or dealer be disclosed to any prospective buyer of that vehicle. All buy-backs--goodwill, lemons, etc.--should be disclosed. The disclosure should include every reason why the vehicle was re-acquired. Prospective buyers would have a right to review invoices regarding the repair work done on the buy-back vehicle. Buy-back vehicles should have their status included in any advertising promoting the sale of these specific vehicles. When displayed on a sales lot, the vehicle should be "labeled" with information indicating to a buyer that the vehicle has buy-back status. Buy-back status should also be included in the main sales contract. Required written disclosures should be standardized as specified in statute.

2. Require that any vehicle bought back by a manufacturer or dealer in California be "certified" by the DMV before it could be sold to another party. A copy of repair work to correct the lemon problems should also be submitted to DMV. This certification would establish a record of the vehicle and its status.

3. DMV should work with other states in developing a standardized buy-back certificate that would be recognized in all 50 states. Additionally, NHTSA should establish a national registry of buy-back vehicles.

4. Require DMV to provide NHTSA with any investigative information related to the operational safety of vehicles, including the reason for each and every buy-back by a manufacturer or dealer.

5. Establish penalties for intentional failure to disclose that a vehicle is a factory or dealer buy-back.

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 6420 Wilshire Boulevard, Suite 1100, Los Angeles, California 90048.

On February 22, 2023, I served the foregoing document described as: **PETITIONER'S SECOND MOTION FOR JUDICIAL NOTICE; DECLARATION OF JOSEPH V. BUI; [PROPOSED] ORDER** on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

By Envelope: by placing a true copy thereof enclosed in sealed envelopes addressed as above and delivering such envelopes:

By Mail: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on February 22, 2023, at Los Angeles, California.

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

Chris Hsu

Chris Hsu

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Depublication Requestor

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Clerk of the Superior Court
Department 32, Honorable Daniel S. Murphy
111 North Hill Street
Los Angeles, CA 90012
Case Number: BC638010

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: **jbui@gmsr.com**

3. I served by email a copy of the following document(s) indicated below:

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REQUEST FOR JUDICIAL NOTICE	Motion for Judicial Notice

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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.

2/22/2023

Date

/s/Chris Hsu

Signature

Bui, Joseph (293256)

Last Name, First Name (PNum)

Greines, Martin, Stein & Richland LLP

Law Firm