No. 13-16476

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARGIE DANIEL; MARY HAUSER; DONNA GLASS; ANDREA DUARTE, individually and on behalf of a class of similarly situated individuals,
Plaintiffs—Appellants,

v.

FORD MOTOR COMPANY, a Delaware corporation,
Defendant—Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA
WILLIAM B. SHUBB, DISTRICT JUDGE • CASE NO. 11-02890 WBS EFB

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF FORD'S PETITION FOR REHEARING

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America ("Chamber") is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has ten percent or greater ownership in the Chamber.

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America[1] is the world's largest federation of businesses and associations. It represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size, in every economic sector, and from every geographic region of the country. One important Chamber function is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's businesses.

Here, the question of the duration of the implied warranty applicable to consumer goods sold in California is of importance to the thousands of Chamber members involved in the retail sales of such goods in the state. Each of those members will face increased liability on implied warranty

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[1] The Chamber obtained consent of all parties to file this brief. *See* Fed. R. App. P. 29(a). No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except amicus curiae, its members, or its counsel contributed money intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(c)(5).

claims in federal court actions if the panel decision remains in place. Such extended exposure to implied warranty liability was never intended by the California legislature, as explained below.

SUMMARY OF ARGUMENT

Rehearing should be granted to certify to the California Supreme Court the question of whether an implied warranty claim may be based on a defect that surfaces more than one year after the sale of a consumer product—the limitations period provided in the Song-Beverly Consumer Warranty Act, California Civil Code sections 1790-1795.8.

The panel answered that question by following *Mexia v. Rinker Boat Co.*, 174 Cal. App. 4th 1297 (2009), thereby enshrining *Mexia* as the law of the circuit. That was a mistake. *Mexia* is an outlier opinion in California, and its threadbare analysis will not be adopted by the California Supreme Court when it considers the issue.

We explain below that the approach in *Mexia*—grafting a latent-defect exception onto the legislature's carefully crafted time limitations on implied warranty claims—stands in direct conflict with Song-Beverly's legislative history, which neither the *Mexia* court nor the panel in this case considered. That history establishes that the legislature intended to

confine implied warranty claims to defects that surface within one year of sale. *Mexia* and the panel decision have rendered the one-year limitation meaningless, however. Any defect that is not noticed until *after* the one-year period could be described as a "latent" defect that existed *during* the one-year period.

This Court has rejected the very latent defect theory adopted by the panel in the *express* warranty context. There is no reasoned basis for recognizing it in the *implied* warranty context. That is especially so when Song-Beverly's legislative history confirms that the California Legislature intended to foreclose that means of evading limitations periods applicable to implied warranty claims.

ARGUMENT

I. THE PANEL ERRED IN PREDICTING THAT THE CALIFORNIA SUPREME COURT WOULD FOLLOW *MEXIA* BECAUSE *MEXIA*'S APPROACH IS FORECLOSED BY SONG-BEVERLY'S HISTORY AND STRUCTURE.

A. Song-Beverly's legislative history confirms that defects may not be characterized as latent in order to evade the one-year limitations period for implied warranty claims—precisely the opposite of *Mexia*'s holding.

Song-Beverly provides that "in no event shall [an] implied warranty have a duration of . . . more than one year following the sale of new

consumer goods to a retail buyer." Cal. Civ. Code § 1791.1(c). This language is both plain and categorical. A warrantor is not responsible (under an implied warranty theory) for *any* defects outside the one-year period. It should make no difference whether the defect is latent or patent. The statutory language gives no indication that manufacturers could be liable for *some* defects that surface after the one-year limitation specified in section 1791.1(c).

Nonetheless, the panel adopted a contrary theory by relying exclusively on the *Mexia* decision. (Slip opn. at 8-11.) That reliance was misplaced in light of Song-Beverly's legislative history, which both *Mexia* and the panel failed to consider.

In *Gavaldon v. DaimlerChrysler Corp.*, 32 Cal. 4th 1246 (2004), the California Supreme Court held that, under Song-Beverly, a service contract is not a type of express warranty. In the course of its analysis, the court relied on the legislative history of Song-Beverly. *Id.* at 1257-58. The court focused particular attention on correspondence between the act's sponsoring senator and an association of auto dealers. *Id.*

That correspondence reveals that while Song-Beverly was in draft form, the Northern California Motorcar Dealers Association wrote to

Senator Song to express concern about amendments that added the "duration" language to section 1791.1(c). Letter from Wallace O'Connell, Attorney, Partridge, O'Connell & Partridge, to Sen. Alfred H. Song, Chairman, S. Comm. on Judiciary (Apr. 14, 1971) 2-3.[2] The Association suggested beefing up the amendments to include "a limitation of time within which complaints with respect to breaches of implied warranty may be asserted against a manufacturer or a seller," and further urged Senator Song "to consider revising the cited sections, so that they will not refer to the 'duration of the implied warranty . . . , etc., but, rather, establish a period of limitation within which an action must be brought for the assertion of any such claim." (*Id.*)

In response, Senator Song's staff assured the association that the durational period in section 1791.1 was specifically intended to cut off claims based on defects—latent or otherwise—that did not surface during the specified periods:

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[2] In a concurrently filed motion for judicial notice, the Chamber requests that this Court consider these legislative history documents, as the California Supreme Court would. The materials are also included in the addendum to this brief.

> The periods of duration in Sections 1791.1 and 1795.5 are limitations on the time in which a latent defect may surface and create liability for the warrantor. *After the expiration of these periods the warrantor is no longer responsible for those defects existing at time of sale under the terms of our Act*. This is reinforced by Section 1794.3 which provides that the Act shall not apply to any defect caused by unauthorized or unreasonable use.

Letter from Richard Thomson, Admin. Assistant to Sen. Alfred H. Song, to Wallace O'Connell, Attorney, Partridge, O'Connell & Partridge (Apr. 16, 1971) (emphasis added).

Subsequently, Senator Song lobbied Governor Reagan to sign the bill that added the durational language "so that manufacturers, retailers, and consumers will have a more accurate idea of the nature of their rights and responsibilities." Letter from Sen. Alfred H. Song, Chairman, S. Comm. on Judiciary, to Ronald Reagan, Governor of Cal. (Nov. 5, 1971). Senator Song further explained that specifying "the duration of implied warranties attaching to products also covered by an express warranty" will "permit[] warrantors to cost accurately their warranty obligations." (*Id.*) This purpose could be achieved only if the periods were intended, as Senator Song's staff had previously explained, to limit the time in which a latent defect may create liability for the warrantor.

The California Supreme Court properly relied on this probative correspondence in construing Song-Beverly. *See generally Kern v. County of Imperial*, 226 Cal. App. 3d 391, 401 (1990) ("The statements of the sponsor of legislation are entitled to be considered in determining the import of the legislation."); *accord Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) ("As a statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute."). Yet neither the panel nor *Mexia* considered this correspondence, and both the panel and *Mexia* adopted an approach irreconcilable with this legislative history. That significantly undermines the panel's prediction that the California Supreme Court would follow *Mexia*.

B. Allowing a breach of implied warranty claim based on a latent defect not manifest during the warranty period would defeat Song-Beverly's scheme.

Unaware of Song-Beverly's pertinent legislative history, the panel construed section 1791.1(c) to allow a claim for breach of implied warranty of merchantability based on a "latent" defect that manifests itself *after* the one-year implied warranty period has expired. (Slip opn. at 6-11.) That approach is tantamount to wordplay because almost any defect that

subsequently causes a malfunction or failure may be characterized as a latent defect that existed much earlier:

> [V]irtually all product failures discovered in automobiles after expiration of the warranty can be attributed to a "latent defect" that existed at the time of sale or during the term of the warranty. All parts will wear out sooner or later and thus have a limited effective life. . . . A rule that would make failure of a part actionable based on such "knowledge" would render meaningless time/mileage limitations in warranty coverage.

Abraham v. Volkswagen of Am. Inc., 795 F.2d 238, 250 (2d Cir. 1986); *see also Canal Elec. Co. v. Westinghouse Elec. Co.*, 973 F.2d 988, 993 (1st Cir. 1992) (Breyer, J.) ("It . . . is not surprising that case law almost uniformly holds that time-limited warranties do not protect buyers against hidden defects—defects that may exist before, but typically are not discovered until after, the expiration of the warranty period."). In other words, characterizing a defect as latent has no place in Song-Beverly analysis because it would render the one-year limitation meaningless.

This Court has already acknowledged that point in the *express* warranty context, holding that California law "forecloses" the "latent defect" theory the panel adopted here. *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1023 (9th Cir. 2008) (citing *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 830 (2006)). In *Clemens,* plaintiff's vehicle

functioned throughout the 36,000 miles or three years for which it was warranted; plaintiff sued much later, "arguing that the warranty expressly applies to 'any defective item,' that the defect allegedly existed before the warranty expired, and that DaimlerChrysler had knowledge of the defect at the time of sale." *Id.* at 1022. Rejecting that argument under California law, this Court observed that

> [e]very manufactured item is defective at the time of sale in the sense that it will not last forever; the flip-side of this original sin is the product's useful life. If a manufacturer determines that useful life and warrants the product for a lesser period of time, we can hardly say that the warranty is implicated when the item fails after the warranty period expires.

Id. at 1023; s*ee also Long v. Hewlett-Packard Co.*, No. C 06-02816 JW, 2007 WL 2994812, at *4 (N.D. Cal. July 27, 2007) ("Simply stated, it is clear following *Daugherty* that a plaintiff cannot maintain a breach of warranty claim under California law . . . for a product that fails for the first time after the warranty has lapsed.").

Mexia's flaws therefore run deeper than its failure to consider Song-Beverly's pertinent legislative history. *Mexia* also failed to consider the reasoning of *Daugherty* and its progeny (state and federal), which have rejected end-runs around warranty periods using the "latent defect" theory

asserted by plaintiffs here. In *Hovsepian v. Apple, Inc.*, Nos. 08-5788 JF, 09-1064 JF (PVT), 2009 WL 2591445, at *8 n.7 (N.D. Cal. Aug. 21, 2009), for example, the district court observed that

> the *Mexia* decision appears to be contrary to established California case law with respect to the duration of the implied warranty of merchantability as set forth in . . . the Song-Beverly Act. . . . [A]ny component failure could be characterized as having been caused by a latent defect, and thus if *Mexia* were read broadly the time limitation imposed by § 1791.1(c) would be meaningless.

See Atkinson v. Elk Corp. of Tex., 142 Cal. App. 4th 212, 230 (2006) (holding that "the duration of the implied warranty of merchantability under California law [on new goods] is limited to one year," and that plaintiff had no cause of action for breach of implied warranty where the defect appeared approximately five-and-one-half years after the one-year warranty period expired); *see also Valencia v. Volkswagen Grp. of Am. Inc.*, No. 15-CV-00887-HSG, 2015 WL 4747533, at *7 (N.D. Cal. Aug. 11, 2015) ("the broader reading" of *Mexia* is incompatible "with the Song–Beverly Act's one-year implied warranty period"); *Peterson v. Mazda Motor of Am., Inc.,* 44 F. Supp. 3d 965, 972 (C.D. Cal. 2014) ("*Mexia* would render the duration provision of the Song–Beverly Act meaningless"); *Grodzitsky v. Am. Honda Motor Co.*, No. 2:12-CV-1142-SVW-PLA, 2013 WL 2631326, at

*10 (C.D. Cal. June 12, 2013) ("*Mexia*'s . . . holding 'renders meaningless any durational limits on implied warranties[,]' as '[e]very defect that arises could conceivably be tied to an imperfection existing during the implied warranty period.'"); *Marchante v. Sony Corp. of Am.*, 801 F. Supp. 2d 1013, 1022 (S.D. Cal. 2011) ("the rule that *Mexia* proposes is contrary to existing law"); *Tietsworth v. Sears, Roebuck & Co.*, 720 F. Supp. 2d 1123, 1143 (N.D. Cal. 2010) (rejecting breach of implied warranty of merchantability claim where alleged latent defect did not manifest itself during the implied warranty period); *Butler v. Sears, Roebuck & Co.*, Nos. 06 C 7023, 07 C 412, 08 C 1832, 2009 WL 3713687, at *3 n.4 (N.D. Ill. Nov. 4, 2009) (noting the conflict between *Mexia* and the "majority position . . . that the Song-Beverly Act's implied warranty of merchantability expires after one year").

On issues of California law, this Court "is solely guided by California law as [it] believe[s] the California Supreme Court would apply it." *In re K F Dairies, Inc. & Affiliates*, 224 F.3d 922, 924 (9th Cir. 2000). An intermediate appellate court decision such as *Mexia* is not persuasive if this Court determines "'that the California Supreme Court would decide otherwise.'" *Id.* (quoting *Chemstar, Inc. v. Liberty Mut. Ins. Co.,* 41 F.3d 429, 432 (9th Cir. 1994)). Because *Mexia* is out of step with California law

generally—and with Song-Beverly's legislative history specifically—in accepting a latent defect theory to avoid a statutory warranty period, its analysis would be rejected by the California Supreme Court. The panel erred in concluding otherwise.

C. At minimum, this Court should repudiate the panel's reliance on California Supreme Court orders denying review and depublication of the *Mexia* decision. Such reliance is contrary to circuit precedent and to California law.

In predicting that the California Supreme Court would interpret section 1791.1(c) the same way as *Mexia*, the panel relied on the facts that the "California Supreme Court denied the *Mexia* defendants' petition for review and denied a non-party's request for 'depublication' of the opinion." (Slip opn. at 8.) Those considerations should be off-limits, and it would be appropriate to grant rehearing (or modify the opinion) to clarify that.

The panel opinion is in conflict with applicable state law by relying on the California Supreme Court's denial of review and depublication. In a string of decisions stretching back to *People v. Davis*, 147 Cal. 346, 350 (1905), the California Supreme Court has reiterated that the denial of review (formerly called a "denial of a hearing") implies no approval of the decision below. *See, e.g., Trope v. Katz*, 11 Cal. 4th 274, 287 (1995);

Western Lithograph Co. v. State Bd. of Equalization, 11 Cal.2d 156, 167-68 (1938); *In re Stevens*, 197 Cal. 408, 423-424 (1925). This Court has acknowledged this very point before:

> "It has long been established in California law that a denial of hearing is not an expression of the Supreme Court on the merits of the cause. . . . [D]enial of review will not be an expression of the opinion of the Supreme Court on the correctness of the judgment of the Court of Appeal or on the correctness of any discussion in the Court of Appeal opinion."

In re K F Dairies, Inc. & Affiliates, 224 F.3d at 925 n.3. And a former California Supreme Court justice has explained some of the reasons why denial of review should not be given the meaning ascribed by the panel here:

> What should the [California Supreme Court] do when it considers a court of appeal opinion to be 'wrong,' but the circumstances do not warrant either a grant or grant and retransfer under existing practice and applicable criteria? One answer might be simply to deny hearing, and hope that the error will not be too seriously compounded before another court of appeal gets around to setting things straight. *That is, in fact, what the court often does*.

Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*, 72 Cal. L. Rev. 514, 520 (1984) (emphasis added).[3]

The panel also erred in ascribing legal significance to the California Supreme Court's denial of a depublication request in *Mexia*. The court's rules make clear that an order *granting* a depublication request "is not an expression of the court's opinion of the correctness of the result of the decision or of any law stated in the opinion." Cal. R. Ct. 8.1125(d). If an order actually depublishing an opinion is not an expression of the court's opinion of its correctness, then it would make no sense that an order denying depublication is an expression of approval.

To illustrate that depublication orders and denials of review do not represent the California Supreme Court's views of the merits, one commentator has cited a striking example in which that court simultaneously denied review in one case (leaving it published) and depublished two cases that had taken a contrary position. Later, the court "decided the substantive issue in accord with the *depublished* cases,"

[3] In an analogous context, this Court has held that the "California Supreme Court's denial of our certification request is *in no way* an expression of its opinion on the correctness of the judgments" in the cases to which those orders pertained. *In re K F Dairies Inc. & Affiliates*, 224 F.3d at 925 n.3 (emphasis added).

rather than the one it had allowed to remain published. Jon B. Eisenberg, Ellis J. Horvitz & Howard B. Wiener, California Practice Guide: Civil Appeals & Writs ¶ 11:180.11 (Rutter Group 2015) (discussing *People v. Saunders*, 5 Cal. 4th 580 (1993)).

Yet another indication that the denial of depublication is irrelevant is the fact that, during the 2010 fiscal year when review and depublication in *Mexia* was denied, the California Supreme Court depublished only *four* Court of Appeal decisions among the many hundreds of published decisions issued that year. Judicial Council of California, *2015 Court Statistics Report: Statewide Caseload Trends 2004-2005 Through 2013-2014*, at 15, *available at* http://www.courts.ca.gov/documents/2015-Court-Statistics-Report.pdf. It would be dangerously inaccurate to infer substantial meaning from the judicial equivalent of lightning *not striking*. *See* Ronald M. George, *Chief: The Quest for Justice in California*, 354 (2013) (confirming a steep decline in the depublication rate during that period: "The depublications have fallen from more than 100 in some years in the late 1980s and early 1990s to less than a couple dozen in recent years and as low as four in one recent year.").

II. REHEARING SHOULD BE GRANTED IN ORDER TO CERTIFY THE IMPLIED WARRANTY ISSUE TO THE CALIFORNIA SUPREME COURT.

In *Beeman v. Anthem Prescription Management, LLC*, 689 F.3d 1002, 1005 (9th Cir. 2012) (en banc), this Court called a case en banc for the purpose of certifying a question to the California Supreme Court: "To resolve the classic pre-*Erie* problems of forum shopping and inconsistent enforcement of state law, a majority of the active judges of our court voted to rehear this appeal *en banc*, for the principal purpose of certifying the question to the California Supreme Court."

The panel decision creates a similar problem here, and *Beeman* counsels in favor of the same solution. The limitations period for implied warranty claims under Song-Beverly presents a question of state law that the California Supreme Court ought to address. That court may well have believed *Mexia* was wrongly decided, but that subsequent decisions would "set[ ] things straight." Grodin, *supra*, at 520. The panel decision has prevented that from occurring by breaking from numerous federal district court decisions rejecting *Mexia*'s reasoning. The issue has not arisen within the state court system, thus the supreme court is still waiting for

an opportunity to grant review and decide the issue—an opportunity this Court can provide through certification.

In light of the fact that *Mexia*'s interpretation of California Civil Code section 1791.1(c) is in direct conflict with Song-Beverly's legislative history, the California Supreme Court should be given the opportunity to decide the issue differently.

CONCLUSION

This Court should grant rehearing and certify the latent defect issue for determination by the California Supreme Court.

December 23, 2015

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December 23, 2015
Date

/s/ John A. Taylor, Jr.
ATTORNEY NAME

Addendum

1. Letter from Wallace O'Connell, Attorney, Partridge, O'Connell & Partridge, to Alfred H. Song, Cal. State S. (Apr. 14, 1971).

2. Letter from Richard Thomson, Admin. Asst. to S. Alfred H. Song, to Wallace O'Connell, Attorney, Partridge, O'Connell & Partridge (Apr. 16, 1971).

3. Letter from Alfred H. Song, Chairman, S. Comm. on Judiciary, to Ronald Reagan, Governor of Cal. (Nov. 5, 1971).

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ROBERT G. PARTRIDGE, SR.
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April 14, 1971

The Honorable Alfred H. Song
California State Senate
State Capitol
Sacramento, California 95814

Re: Amendments To Song-Beverly
Consumer Warranty Act
Reg. 6550

My dear Senator Song:

This office represents Northern California Motor Car Dealers Association, Inc., a voluntary, non-profit association of dealers in new motor vehicles.

Previous communications of the views of the Association with regard to the impact of the Song-Beverly Consumer Warranty Act in the field of new and used motor vehicles have played some part in the formulation of the amendments which you have proposed to the Act, and the proposed amendment referenced as above does obviate many points of concern to the retail automobile industry.

However, there are two or three points to which we would ask you to direct your attention:

Duration or Enforcement of
Implied Warranties

Proposed new Section 1791.1 (c) reads as follows:

"(c) The duration of the implied warranty of merchantability and where present the implied warranty of fitness shall in no event be in excess of one year following the sale of new consumer goods to a retail buyer."

Proposed new Section 1795.5 (c) reads as follows:

> "(c) The duration of the implied warranty of merchantability and where present the implied warranty of fitness with respect to used consumer goods sold in this state, where the sale is accompanied by an express warranty, shall in no event be in excess of three months following the retail sale of such used consumer goods."

We consider it extremely desirable that there be a limitation of time within which complaints with respect to breaches of implied warranty may be asserted against a manufacturer or a seller. However, we feel that the two foregoing amendments add a new dimension to the law with regard to implied warranties. The Act adopts, substantially verbatim, most of the implied warranties recognized by Sections 2314 and 2315 of the Commercial Code of the State of California.

It is our understanding of the law with regard to implied warranties that these are applicable only to the condition of the goods at the time of sale. We recognize that a latent defect may appear only at a later date, but it must tend to show that the defective condition existed at the time of sale, and, according to our understanding, the courts have never viewed implied warranties as representing continuing obligations of future duration.

One of the implied warranties is "that the goods are fit for the ordinary purposes for which such goods are used". If we apply the proposed amendments to this implied warranty, it would follow that, if, for reasons not traceable to the condition of the goods at time of sale, the article became unfit for use, within a one-year period in the case of new goods, or within a three-month period in the case of used goods the warrantor could be held liable for this developing condition.

We urge you, therefore, to consider revising the cited sections, so that they will not refer to the

"duration of the implied warranty...", etc., but, rather, establish a period of limitation within which an action must be brought for the assertion of any such claim. We submit that, since such a warranty must be deemed to refer to the condition of the goods at time of sale, there is no disadvantage to the consumer in requiring him to assert failures attributable to the condition of the goods at time of sale in a seasonable fashion.

The expression of duration of the warranty contained in the above-cited amendments does not, in fact, prevent the claimant from bringing an action for asserted breach of an implied warranty for a two- or four-year period after the expiration of the duration, and this seems to us to defeat your intent in propounding these amendments.

Liability for Non-Performance of Express Warranties

Section 1794, both in the original Act and as amended, is unclear with respect to the identity of the person who may be held responsible for the non-performance of an express warranty.

In the case of certain kinds of consumer goods, such as small or major household appliances, manufacturers not infrequently establish their own factory service outlets somewhere in the state. In the case of automobile manufacturers, this is not done; rather, the manufacturer compels all enfranchised dealers to agree to perform warranty work. The customer is then transacting his warranty business with an entity other than the manufacturer.

If the dealer is unable to repair or replace the defect, is he subject to suit for treble damages and attorneys fees by the customer? If the cause of complaint is not capable of repair within thirty days because of unavailability of parts, etc., to the individual dealer for reasons which are not excusable on the part of the manufacturer, is the repairing dealer then to be subject to the extraordinary damage?

We raise these questions and submit that Section 1794 should be clarified to establish the responsibility for treble damages and attorneys fees against the manufacturer, and not against the repairing dealer, but that, if it be the intent to impose direct responsibility, under certain conditions, against the repairing dealer, those conditions should be spelled out and limited to circumstances where he, rather than the manufacturer, is the source of fault. The only circumstances which we can foresee where dealer liability would be justifiable, would be imcompetent performance or inexcusable delay on his part, and we request that clarification of the policy of the Legislature in these regards should be essential to the proper execution of responsibilities and the avoidance of the involvement of dealers in treble damage suits, where the fault is that of the manufacturer.

Warranties On Used Vehicle Sales

The amendments to the Act have removed used goods from the general application of the Act, but reinsert responsibilities on the sale of used goods, where the dealer makes an express warranty of any kind.

We previously pointed out that, while it is readily possible for vehicle dealers to sell all used cars on an "as is" basis and, thus, be free of responsibility for implied warranties, of any kind, it has been common practice to afford to the customer some limited protection, and that this has been to the advantage of the consumer. Most commonly, such protection has been in the form of a limited "guarantee", affording to the customer, for a thirty-day or similar period, a discount or sharing of the cost of parts or services necessary to repair the vehicle.

These used car guarantees have proven useful and advantageous, but the policy of the present Act and the proposed amendments thereto appear to tell both sellers and the buying public that they may not have the advantage of this type of protection in an "as is" sale. We urge again that the Act is not in the best

interest of consumers in this context. In informal discussions with Mr. Thompson, of your staff, we gathered that, in proposing these amendments, you felt that customers would be confused or misled by the use of such limited guarantees, and that the policy of the state should be against their use in an "as is" sale. However, it was suggested that there was nothing inconsistent about a dealer electing to comply with the provisions of Section 1794.4, which permits "the sale of a service contract" to a buyer. It seems to us that the distinction is a purely semantical one, (except for the apparent requirement that the "service contract" be sold to the buyer). Is there any policy reason why the service contract may not be furnished without separate compensation, and, if this is so, is the customer any more or less confused or misled by the semantical distinction between the words "used car guarantee" and "service contract", as long as either of these fully and conspicuously disclose, in simple and readily understandable language, the terms and conditions?

We have commented on the use of the words "duration of the implied warranty..." in Section 1795.5 (c), but we have this additional comment: In the case of a sale of used goods, if the dealer does give any warranty whatsoever, however limited, this extension of the implied warranties compels him to guarantee that the vehicle is, and will remain, fit for use for a period of three months, and we submit that this compounds the problem of furnishing the purchaser of an "as is" vehicle with any protection by discount or sharing of repair costs on a percentage basis, or for a period of time less than that compelled by the implied warranty.

In substance, what we are saying is that, in an effort to protect consumers, the aspects of the law just discussed will force motor vehicle dealers to cut customers adrift by arbitrarily selling every used vehicle on a raw "as is" basis, without any assistance in the event of ensuing defects, and this is not in the interest of the consuming public.

We would invite your consideration of these comments in the further formulation and refinement of

the proposed amendments to the Song-Beverly Consumer Warranty Act.

Very truly yours,

WALLACE O'CONNELL

rfb

SB 742

April 16, 1971

Mr. Wallace O'Connell
Partridge O'Connell & Partridge
Attorneys at Law
2400 Shell Building
100 Bush Street
San Francisco, California 94104

Dear Mr. O'Connell:

Senator Song has asked me to reply to your letter regarding the Song-Beverly Consumer Warranty Act.

You raise some very interesting points with respect to the duration of implied warranties. Perhaps the language we use in the Act and in SB 742 is not sufficiently clear.

We certainly agree with you that under the Uniform Commercial Code the defect, for the purposes of implied warranties, must exist at the time of sale. We intended to retain this concept in our Act, and we would expect that a plaintiff would have to show the defect to have existed at time of sale in order to prevail under our Act.

The periods of duration in Sections 1791.1 and 1795.5 are limitations on the time in which a latent defect may surface and create liability for the warrantor. After the expiration of these periods the warrantor is no longer responsible for those defects existing at time of sale under the terms of our Act. This is reinforced by Section 1794.3 which provides that the Act shall not apply to any defect caused by unauthorized or unreasonable use.

Should we abandon this approach for your suggestion of a statute of limitations, we would, of course, have to greatly extend the specified periods in order to achieve an equitable result. I doubt that this would be welcomed by many manufacturers.

We will, however, continue to examine the sections to improve their wording, and we will continue to welcome any suggestions you may have.

We do not share your views that Section 1794 is unclear with respect to liability, at least as far as the automobile industry is concerned. Automobile dealers certainly qualify as manufacturers' service facilities under the terms of Section 1793.2 (a) (1). Thus, for the purpose of the Act, the dealer is the agent of the manufacturer.

As a practical matter, were a consumer to sue under the Act, he would certainly name both the dealer and the manufacturer. Allocation of the blame between these two parties would, as before, have to be settled between the two of them.

Our basic philosophy in proposing this Act was to limit the processees of our free enterprise system as little as possible. We believe that the relationship between dealer and manufacturer should be determined on the basis of free negotiation, and we see no need to interfere in this process.

Your final point, as to the value of present used car warranties, is to a large extent a question of public policy that will be decided by the Legislature. You may be correct that the distinction between a warranty and a service contract is purely one of semantics, but such is often the most important kind. I believe that the words "guarantee" and "warranty" do possess a meaning that "service contract" does not share.

In short, we think that an "as is" sale, with or without a service contract, will better inform the public as to what they are actually buying than a sale accompanied by the express warranties presently used in the used car trade.

These are our initial feelings. Senator Song has asked me to assure you, however, that his mind is not closed on any of these subjects, and that he finds suggestions such as these most important in the development of good legislation.

Sincerely,

RICHARD THOMSON
Administrative Assistant

RT/ny

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Senate
California Legislature

ALFRED H. SONG
LOS ANGELES COUNTY
TWENTY-EIGHTH SENATORIAL DISTRICT
CHAIRMAN
SENATE COMMITTEE ON JUDICIARY

COMMITTEES
BUSINESS AND PROFESSIONS
HEALTH AND WELFARE
JUDICIARY
LOCAL GOVERNMENT

COMMISSIONS
JOINT COMMITTEE, REVISION OF PENAL CODE
JOINT COMMITTEE, SEISMIC SAFETY
CALIFORNIA LAW REVISION COMMISSION

November 5, 1971

The Honorable Ronald Reagan
Governor of California
State Capitol
Sacramento, California 95814

Re: SB 742

Dear Governor Reagan:

SB 742 has passed the Legislature and has been sent to your office for your approval.

Last year the Song-Beverly Consumer Warranty Act was enacted, containing, like most new pieces of legislation, its share of loop-holes and ambiguities. The present bill, SB 742, is a clean-up bill. Its sole purpose is to clarify what is presently law so that manufacturers, retailers, and consumers will have a more accurate idea of the nature of their rights and responsibilities.

Specifically:

- Section 1791 (a) amends present law to make clear which classes of products fall within the definition of "consumer goods" in the Song-Beverly Act.

- Section 1791.1 specifies the duration of implied warranties attaching to products also covered by an express warranty, thus permitting warrantors to cost accurately their warranty obligations.

- Section 1793.1 clarifies the responsibilities of the warrantors maintaining service and repair facilities to notify their customers of the location of these service and repair facilities.

- Sections 1793.2 and 1793.3 restate the rules determining who is to pay the costs of transporting defective products to and from the facility at which the warranty servicing takes place.

- Sections 1791 and 1795.5 distinguish the differences in the way the Act applies to new and to used goods.

There are numerous other changes sharpening the language, clarifying intent, and making sure that the Song-Beverly Act conforms with definitions in the Uniform Commercial Code.

SB 742 has been examined in detail with representatives of the California Retailers Association, California Manufacturers, General Motors, General Electric, and the Chamber of Commerce. These organizations support the bill. There is no known opposition.

I respectfully request that you sign this bill into law.

Sincerely,

ALFRED H. SONG

AHS/ny

Enclosure

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Signature: s/ John A. Taylor, Jr.