Navigating Today’s Warranty Case and Effectively Managing Pattern Warranty Litigation

Julian Senior
SJL Law

Brian Takahashi
Bowman and Brooke
Manufacturer’s Share of Cases: 2015-2018

- Aston Martin, 14
- BMW, 1231
- FCA, 3972
- Ferrari, 4
- Ford, 8176
- GM, 4715
- Honda, 1129
- Hyundai, 478
- JLR, 350
- Kia, 496
- Mazda, 59
- McLaren, 7
- Mercedes, 620
- Mitsubishi, 20
- Nissan, 2134
- Porsche, 127
- Subaru, 187
- Tesla, 113
- Suzuki, 2
- Toyota, 488
- Volvo, 51
- VW / Audi, 2948

TOTAL: 27,321
Number of Cases by Year

- 2018: 8000
- 2017: 7700
- 2016: 7300
- 2015: 4400
<table>
<thead>
<tr>
<th>FIRM</th>
<th>CASES FILED</th>
</tr>
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<tbody>
<tr>
<td>Knight Law Group</td>
<td>3507</td>
</tr>
<tr>
<td>Romano Stancroff</td>
<td>2177</td>
</tr>
<tr>
<td>Strategic Legal Practices</td>
<td>1929</td>
</tr>
<tr>
<td>Consumer Legal Services</td>
<td>1708</td>
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</table>
## Warranty Complaints Filed Against Auto Manufacturers in California

<table>
<thead>
<tr>
<th>YEAR</th>
<th>CALIFORNIA*</th>
<th>LOS ANGELES COUNTY</th>
<th>% INCREASE IN LA COUNTY</th>
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<tr>
<td>2015</td>
<td>4297</td>
<td>1734</td>
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<tr>
<td>2016</td>
<td>7228</td>
<td>2498</td>
<td>44%</td>
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<tr>
<td>2017</td>
<td>7622</td>
<td>2826</td>
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<tr>
<td>2018</td>
<td>8174</td>
<td>3763</td>
<td>33%</td>
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<tr>
<td>Total</td>
<td>27,321</td>
<td>10,821</td>
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Tanner Act (1982)

AB1787 by Assemblywoman Sally Tanner, D-El Monte, would require that an auto buyer be given another auto or his money back if a defect is not repaired within four attempts or the auto is out of service for more than 20 days.

Tanner said the bill is needed because existing law requiring replacement or reimbursement does not define the “reasonable number” of repair attempts that must be made first.

Industry representatives said they oppose the bill because it would create lawsuits rather than solve the problem.

They said the bill does not deal with the key question of who decides whether the defect is fixed.

Officials from General Motors, Ford, Chrysler and Volkswagen of America said they have recently set up mediation and arbitration programs to resolve new-car disputes.
Specify that, within the first year of ownership or 12,000 miles, whichever comes first, either 4 repair attempts on the same non-conformity (defect) or a cumulative total of 30 calendar days out of service because of repairs or any defect(s), would be presumed to be "reasonable".

This presumption could be asserted by the buyer in a legal action to obtain a refund or replacement vehicle (minus an amount attributable to the buyer's use). The presumption would be one which affects the burden of proof and would be rebuttable by the manufacturer. Once the buyer proves either the 4 times or 30 days, the burden of proof would shift to the manufacturer to rebut the presumption with facts proving that something more should be adjudged reasonable.

Require a buyer to first resort to a third party dispute resolution program before he or she could use the "lemon" presumption in a lawsuit— if a program meeting specified criteria has been established by the manufacturer of the buyer's vehicle.
(d) Should the manufacturer or its representative in this state be unable to service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer, less that amount directly attributable to use by the buyer prior to the discovery of the nonconformity.

(4) For the purposes of this subdivision the following terms have the following meanings:

(A) “Nonconformity” means a nonconformity which substantially impairs the use, value, or safety of the new motor vehicle.
The program to be free to the buyer.

A decision generally be reached within 40 days from receipt of a complaint.

The decision is not binding on the consumer; but, would be on the manufacturer if the consumer chooses to accept it. (Added to Federal criteria by bill).

A party to the dispute be given the opportunity to refute contradictory evidence offered by the other.

The manufacturer complete any work required within 30 days. (Added to Federal criteria by bill).

The time limits on a buyer's right to sue are extended during the period he or she is involved in the dispute program. (Added to Federal criteria by the bill).
“Peaceable Dispute Resolution” as a Goal of the Tanner Act

There is also an industry interest in this particular change, which we would like to explain. Conferring Song-Beverly jurisdiction to resolve disputes in favor of the consumer without a finding of willfulness will also benefit warrantors. Now, in order to proceed under the Song-Beverly Act, consumers and their attorneys must search for proof of "willfulness". Just as a requirement of a finding of fault in divorce cases added to the bitterness and complexity of divorces as well as the length of trials and other personal and social costs, we feel that denying relief without a finding of willfulness tends to force consumers and their attorneys to pursue a less constructive approach to dispute resolution, focusing less on the merits of the problem than on the motivations of the parties. The focus instead ought to be on peaceable dispute resolution, including especially the actual merits of the claim, including the questions of whether there was a defect and whether the defect was covered by the warranty. (Of course, where there is a "willful" breach of warranty, the courts should have the same power that they presently have to award penalty damages.)
Plaintiffs’ Three Approaches in 2019

1. Evaluate and Resolve Case Promptly
2. Death by 1000 Discovery Requests
3. Death by 1000 Trials
The Discovery Approach

- Overbroad Discovery
- Class Action Type Discovery
- No Proportionality to Underlying Claim
The Discovery Approach

- Plaintiffs’ argument is that what the manufacturer/distributor knew about a particular defect is relevant to whether it knew it should repurchase the vehicle (thus whether its liable for a civil penalty)
The Discovery Approach

• Amazingly broad requests… seek emails, other vehicle info, etc.

REQUEST FOR PRODUCTION NO. 19: All DOCUMENTS, including electronically stored information and electronic mails, concerning any internal analysis or investigation by YOU or on YOUR behalf regarding ENGINE DEFECTS in VEHICLES. [This request shall be interpreted to include any such investigation to determine the root cause of such ENGINE DEFECTS, any such investigation to design a permanent repair procedure for such ENGINE DEFECTS, any such investigation into the failure rates of parts associated with such ENGINE DEFECTS, etc.] [This request shall be understood to include reports which may be found or maintained in YOUR Microsoft SQL Database, Proliant ML 570 G2 communications system, Network File Sharing System, Warranty Claims Database, and/or InforCERT Search Engine].

REQUEST FOR PRODUCTION NO. 24: All DOCUMENTS, including electronically stored information and electronic mails, concerning customer complaints, claims, reported failures, and warranty claims related to ENGINE DEFECTS in VEHICLES, including any databases in YOUR possession with information from dealers, service departments, parts departments, or warranty departments, and all documents concerning YOUR response to each complaint, claim or reported failure. [This request shall be understood to include communications and/or reports which may be found or maintained in YOUR Clarify Customer Relationship Management System, Warranty Claims Database, Proliant ML 570 G2 communications system, AS 400 Applications and/or Microsoft SQL Server Database. Please produce these documents in Microsoft Excel format].

6. The term “ENGINE DEFECTS” shall be understood to mean such defects which result in symptoms, including, restriction of oil flow through the connecting engine rod bearings; restriction of oil flow through vital engine areas; accumulation of metal debris in the engine oil; fractured rod bearings; engine failure; “knocking” sounds from the engine area; stalling during operation; rough running; oil leaking from the timing cover; stalling; engine seizure; failure to start; and/or any other similar concern identified in the repair history for the SUBJECT VEHICLE, Recall and/or Technical Service Bulletin.
Discovery Approach Problems/Solutions

• Thin/overworked trial bench

• Sometimes the best defense is a good offense, need to get other side on their back foot
  • Their discovery responses are all objections

• Get past discovery, no continuances

• CCP 998 or Rule 68 Offers early

• Arbitration/Removal to federal court?
Recent Development: LASC Case Management Orders

Addendum to Case Management Conference Order (Song-Beverly Litigation)

Discovery

1. General Orders:
   a. Absent written agreement of the parties to the contrary, any formal discovery propounded and currently pending or outstanding by a party in this matter prior to the date of this CMC Order is stayed pending further order of the Court.
   b. The Court finds under CCP §2019.020(b) that the sequence and timing of discovery in this matter should be the subject of management by the Court in the interests of justice pending a future status conference, given the nature of the allegations in the Complaint and the defenses raised in the Answer.
   c. The parties are free to stipulate, in writing, to modify and/or delete any of these general orders, as they deem appropriate. A party may also seek to modify and/or delete any of these orders, via noticed motion, upon showing of good cause.
Recent Development: LASC Case Management Orders

• Initial exchange within 30 days

2. Production of Documents: Within 30 days of this order both plaintiff and defendant shall provide copies of the following documents, which are in their respective possession, custody and/or control, to the opposing side(s):
   a. Purchase or lease contracts concerning the subject vehicle, including any associated documents reflecting OEM or aftermarket equipment installed at the dealership, ELWs or service contracts, and any other writings signed by the plaintiff at the point of sale.
   b. Work orders, repair orders, and invoices (including accounting and warranty versions) for any maintenance, service and repair activity concerning the subject vehicle.
   c. Rental car or loaner agreements regarding alternate transportation provided during service or repair visits concerning the subject vehicle.
   d. Records of communications with dealer personnel, and/or factory representatives and Defendant’s call center or customer assistance personnel concerning the subject vehicle.
   e. Warranty claims submitted to and/or approved by Defendant concerning the subject vehicle.
   f. Warranty Policy and Procedure Manual or similar policies or claim-handling procedures published by Defendant from the date the subject vehicle was purchased or leased to the date the lawsuit was filed.
   g. Defendant’s written statements of policy and/or procedures used to evaluate customer requests for repurchase or replacement pursuant to “Lemon Law” claims, including ones brought under the Song-Beverly Consumer Warranty Act, from the date the subject vehicle was purchased or leased to the date the lawsuit was filed.
   h. A list or compilation of customer complaints in Defendant’s electronically stored information database that are substantially similar to the alleged defects claimed by plaintiff, in vehicles purchased in California for the same year, make and model of the subject vehicle. A substantially similar customer complaint would be the same nature of reported symptom, malfunction, dashboard indicator light, or other manifestation of a repair problem as the description listed in any work order or repair order for the subject vehicle, other than routine or scheduled maintenance items. The list provided by Defendant may be in the chart or spreadsheet format, and shall include the VIN, date of repair visit, dealer or other location information, and text of the other customers’ reported complaint, but shall not include the other customers’ names, addresses, phone numbers, e-mail addresses, or other personal identifying information.
   i. Technical Service Bulletins and Recall Notices for vehicles purchased or leased in California for the same year, make and model of the subject vehicle.
   j. Copies of any repair instruction, bulletin, or other diagnostic/repair procedure identified in any of the repair order/invoice records for the subject vehicle.
   k. Receipts or other written evidence supporting any incidental or consequential damages claimed by Plaintiff.

If a party believes any of this information should be subject to a protective order, that party shall serve and file a proposed protective order within 5 days of this order and the parties shall meet and confer as to agreeable language for the same. The default will be the standard Protective Order provided by the LASC in its website.

The information may be provided to the opposing party in electronic form as a PDF at the option of the producing party.

Plaintiff and defendant shall serve verifications with the documents they produce.

Any additional requests for documents may only be propounded by stipulation and/or court order (via motion upon showing of good cause).
Recent Development: LASC Case Management Orders

- Limit to 35 interrogatories, 5 deposition, VI requirement

3. **Interrogatories:** Within the time limits allowed by law, both plaintiff and defendant may propound one set of Judicial Council Form Interrogatories and one set of a maximum of 35 special interrogatories. Any additional special interrogatories may only be propounded by stipulation and/or court order (via motion upon showing of good cause).

4. **Depositions:** Within the time limits allowed by law, Defendant may depose plaintiff, and plaintiff may depose the person most knowledgeable (PMK) as to up to 5 categories of information, plus a deposition of the PMK as to why the subject vehicle was not repurchased, in addition to depositions of any experts identified by the parties, after a formal demand and exchange of expert witness information, per CCP § 2034. Parties shall meet and confer as to whether there is a need to take any additional depositions. Any additional depositions may only be noticed and taken by stipulation and/or court order (via motion upon showing of good cause).

If a deponent resides out of state, the deposition may be taken by video conference or telephone. The parties will not be required to travel to California, and the attorneys will not be required to travel out of state.

5. **Vehicle Inspection:** Within the time limits allowed by law, the subject vehicle may be inspected by the parties at a mutual agreeable time and place. Unless otherwise agreed by the parties, the vehicle inspection (VI) process shall be as follows:
   a. Defendant shall show Plaintiff's representative proof of insurance for the person/company who will be road testing the subject vehicle;
   b. The defense VI shall commence at 8:00 a.m. at an authorized service and repair facility closest to Plaintiff's residence, and may continue until no later than 5:00 p.m. that same day;
   c. Plaintiff shall deliver the vehicle to the noticed place of inspection. If the subject vehicle has a dead battery, Plaintiff's counsel shall notify Defendant's counsel at least one court day before the VI, and the VI shall proceed with Defendant paying for the tow or jump start to the place of inspection and taking reasonable steps to retrieve stored diagnostic codes and other onboard data before the battery is recharged or replaced.
   d. Defendant shall provide Plaintiff's representative with duplicate copies of all paper and electronic documents created during and because of the VI, such as test results, the stored codes in the vehicle's internal network or in its control units, alignment sheets, etc.
   e. If the subject vehicle is in then-current use by the Plaintiff, and if requested within a reasonable time, in writing, prior to the VI, Plaintiff shall be provided a loaner or rental vehicle paid for by Defendant for the duration of the VI, conditioned on plaintiff providing standard rental car disclosures such as proof of a current driver's license and insurance coverage, and with plaintiff responsible for the loaner vehicle's fuel. The loaner vehicle need not be the same model or type as the subject vehicle unless Plaintiff agrees to pay for an upgrade;
   f. Defendant shall be permitted to run tests of relevant electronic control units (ECUs) and components, conditioned on Defendant maintaining, downloading, or printing out stored data on the existing condition or historical information stored in an ECU; and
   g. Plaintiff's representative is permitted to conduct video and audio recording of the VI.
The Trial Approach

• Try even the weakest cases

• Focus on Civil Penalty aspect and pretrial evaluation or repurchase

• Emphasize entire repair history, not single complaint/defect

• Ignore settlement offers and 998s?/convince client not to settle

• Argue any presuit repurchase is insufficient or in violation of the statute (no releases, etc.)
The Trial Approach Problems/Weaknesses

• Scripted Trials
• Scripted Experts (over extended)
• Focus on a Defendant not the vehicle
• Attempts to Shift the burden of Proof
Fraud: The Bonus Cause of Action

- CLRA/Fraud by “omission”
  - Alleged reduced pleading requirements
  - Requires duty
  - Economic loss doctrine
- Statute of limitation issues (including tolling, etc.)
- Excessive discovery, demands, motions to compel
Discussion
2019 EMERGING ISSUES IN
MOTOR VEHICLE PRODUCT LIABILITY LITIGATION

RECENT CALIFORNIA
AUTOMOTIVE WARRANTY
APPELLATE UPDATE

April 3-5, 2019
Hotel Del Coronado • San Diego, CA

Lisa Perrochet  
Horvitz & Levy LLP  
Burbank, CA  
www.horvitzlevy.com

Rick Stuhlbarg  
Bowman and Brooke LLP  
Torrance, CA  
www.bowmanandbrooke.com
Current law:
Obligation to Replace Or Reimburse For Failure To Conform After Reasonable Number of Attempts - Civil Code Section 1793.2(d)(2)

If the manufacturer or its representative in this state is unable to service or repair a **new motor vehicle** . . . to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle in accordance with subparagraph (A) or promptly make restitution to the buyer in accordance with subparagraph (B). However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required by the manufacturer to accept a replacement vehicle.
Current law:
Tanner Act Presumption under 1793.22

(a) This section shall be known and may be cited as the Tanner Consumer Protection Act.
(b) It shall be presumed that a reasonable number of attempts have been made to conform a new motor vehicle to the applicable express warranties if, within 18 months from delivery to the buyer or 18,000 miles on the odometer of the vehicle, whichever occurs first, one or more of the following occurs:
(1) The same nonconformity results in a condition that is likely to cause death or serious bodily injury if the vehicle is driven and the nonconformity has been subject to repair two or more times by the manufacturer or its agents, and the buyer or lessee has at least once directly notified the manufacturer of the need for the repair of the nonconformity. [or]
(2) The same nonconformity has been subject to repair four or more times by the manufacturer or its agents and the buyer has at least once directly notified the manufacturer of the need for the repair of the nonconformity. [or]
(3) The vehicle is out of service by reason of repair of nonconformities by the manufacturer or its agents for a cumulative total of more than 30 calendar days since delivery of the vehicle to the buyer.
(e) For the purposes of subdivision (d) of Section 1793.2 and this section, the following terms have the following meanings:

1. “Nonconformity” means a nonconformity which substantially impairs the use, value, or safety of the new motor vehicle to the buyer or lessee.

2. “New motor vehicle” means a new motor vehicle that is bought or used primarily for personal, family, or household purposes. “New motor vehicle” also means a new motor vehicle with a gross vehicle weight under 10,000 pounds that is bought or used primarily for business purposes.

[See additional discussion of business use limitations, motor home characteristics, demonstrator vehicles, motorcycles.]
Preserving issues on *Song-Beverly* warranty duration

- See, e.g., *Nunez v. FCA* (LASC order)
  - Court gave plaintiff’s special instruction – “If a defect exists within the warranty period, the warranty will not expire until the defect has been fixed.”

- But see CACI 3231 – if a defect exists within the warranty period, the warranty will not expire until the defect has been fixed *provided that* the plaintiff notified the defendant of the failure of the repairs within 60 days after they were completed. The warranty period will also be extended for the amount of time that the warranty repairs have not been performed because of delays caused by circumstances beyond the control of plaintiff.
Recent CACI developments – Song-Beverly liability

CACI 3210: Implied Warranty of Merchantability

Plaintiff claims that the vehicle did not have the quality that a buyer would reasonably expect. This is known as “breach of an implied warranty.” To establish this claim, Plaintiff must prove all of the following:

1. That Plaintiff bought a vehicle manufactured by Defendant;
2. That at the time of purchase Defendant was in the business of manufacturing vehicles;
3. That the vehicle [insert one or more of the following:]
   * [was not of the same quality as those generally acceptable in the trade;]
   [or]
   * [was not fit for the ordinary purposes for which the goods are used;] [or]
   * [was not adequately contained, packaged, and labeled;] [or]
   * [did not measure up to the promises or facts stated on the container or label;]
4. That Plaintiff was harmed; and
5. That Defendant’s breach of the implied warranty was a substantial factor in causing Plaintiff’s harm.
CACI 3211: Implied Warranty of Fitness for a Particular Purpose

Parallels CACI 3210 changes made as to instruction for claims that Plaintiff bought a vehicle for a particular purpose; Defendant knew/should have known of the purpose; Defendant knew/should have known Plaintiff was relying on Defendant’s skill/judgment in selecting a vehicle for that purpose; Plaintiff justifiably relied on Defendant’s skill and judgment, **and**:

4. That Plaintiff was harmed; and
5. That Defendant’s breach of the implied warranty was a substantial factor in causing Plaintiff’s harm.
If you decide that Defendant or its authorized repair facility failed to repair the defect(s) after a reasonable number of opportunities, then Plaintiff is entitled to recover the amounts [he/she] proves [he/she] paid for the car, including:

1. The amount paid to date for the vehicle, including finance charges [and any amount still owed by Plaintiff];
2. Charges for transportation and manufacturer-installed options; and
3. Sales tax, use tax, license fees, registration fees, and other official fees.

In determining the purchase price, do not include any charges for items supplied by someone other than Defendant. Plaintiff’s recovery must be reduced by the value of the use of the vehicle before it was submitted for repair. Defendant must prove how many miles the vehicle was driven between the time when Plaintiff took possession of the vehicle and the time when Plaintiff first delivered it to Defendant or its authorized repair facility to fix the defect.

[Instruction offers choice between judge or jury calculating mileage offset]
Plaintiff also claims additional reasonable expenses for [list claimed incidental damages].
To recover these expenses, Plaintiff must prove all of the following:
1. That the expense was actually charged;
2. That the expense was reasonable; and
3. That Defendant’s [breach of warranty/[other violation of Song-Beverly Consumer Warranty Act]] was a substantial factor in causing the expense.
Plaintiff also claims additional amounts for [list claimed consequential damages].

To recover these damages, Plaintiff must prove all of the following:
1. That Defendant’s [describe violation of Song-Beverly Consumer Warranty Act] was a substantial factor in causing damages to Plaintiff;
2. That the damages resulted from Plaintiff’s requirements and needs;
3. That Defendant had reason to know of those requirements and needs at the time of the [sale/lease] to Plaintiff;
4. That Plaintiff could not reasonably have prevented the damages; and
5. The amount of the damages.
Recent case on *S-B* damages caused by mfr.

  18 Cal.App.5th 453, review gr. Feb. 21, 2018, S246444

“The common characteristic among [the items recoverable as incidental damages] is each would be a cost incurred as a result of the vehicle being defective. Such is not the case with vehicle registration renewal fees, which are more accurately characterized as a standard cost of owning any vehicle. Were we to adopt plaintiff’s interpretation, it would open up a ‘Pandora’s box’ of potential costs for which a defendant would need to pay restitution in these types of cases (e.g., costs for gas, car washes, oil changes). Plaintiff provides no authority for such an expansive interpretation.”
Preserving issues on *Song-Beverly* damages

Defendants: consider modifications based on *Kirzhner*:

CACI 3242 (incidental):
3. That Defendant’s [breach of warranty/other violation of Song-Beverly Consumer Warranty Act] was a substantial factor in causing the expense. **Defendant’s conduct was not a substantial factor in causing the damages if Plaintiff would have incurred the same expenses without Defendant’s conduct.**

CACI 3243 (consequential):
2. That the damages resulted from Plaintiff’s requirements and needs, and that **Plaintiff would not have incurred the same expenses without Defendant’s conduct;**
Preserving issues on *Song-Beverly* damages

- See *Crayton v. FCA*
  Favorable LASC order; plaintiff’s appeal pending
  Second District case no. B296241
- Issues on plaintiff’s appeal
  - recovery for registration renewal or insurance?
  - recovery for non-manufacture items installed by dealer?
  - Compensability of residual value after lease?
  - Mileage offset based on Gross Capitalized Cost?
Recent CACI developments – S-B penalties

- CACI 3244 — 2018 version

Plaintiff claims that Defendant’s failure to [describe violation, e.g., repurchase or replace the vehicle after a reasonable number of repair opportunities] was willful and therefore asks that you impose a civil penalty against Defendant. A civil penalty is an award of money in addition to a plaintiff’s damages. The purpose of this civil penalty is to punish a defendant or discourage it from committing such violations in the future.

If Plaintiff has proved that Defendant’s failure was willful, you may impose a civil penalty against it. “Willful” means that knew what it was doing and intended to do it. However, you may not impose a civil penalty if you find that Defendant believed reasonably and in good faith that [describe facts negating statutory obligation].

The penalty may be in any amount you find appropriate, up to a maximum of two times the amount of Plaintiff’s actual damages.
Recent CACI developments – S-B penalties (cont’d)

- **CACI 3244 — 2019 version**

Plaintiff claims that Defendant’s failure to *describe violation, e.g., repurchase or replace the vehicle after a reasonable number of repair opportunities* was willful and therefore asks that you impose a civil penalty against Defendant. A civil penalty is an award of money in addition to a plaintiff’s damages. The purpose of this civil penalty is to punish a defendant or discourage it from committing such violations in the future.

If Plaintiff has proved that Defendant’s failure was willful, you may impose a civil penalty against it. The penalty may be in any amount you find appropriate, up to a maximum of two times the amount of [name of plaintiff]’s actual damages.

“Willful” means that Defendant knew of its legal obligations and intentionally declined to follow them. However, a violation is not willful if you find that Defendant reasonably and in good faith believed that the facts did not require *describe statutory obligation, e.g., repurchasing or replacing the vehicle*.
**Song-Beverly penalties are “akin to punitive damages”**

- **CACI VF-3203**
  - “What amount, if any, do you impose as a penalty? [You may not exceed two times the “TOTAL DAMAGES” that you entered in question 6.]”

- **Unpublished federal district court decisions**
  - Brilliant v. Tiffin Motor Homes (N.D. Cal. 2010) 2010 WL 27221531 (characterizing penalty for willful breach as “punitive damages”)
  - Clark v. LG Elecs. (S.D. Cal. 2013) 2013 WL 5816410 (same)
Recent cases affecting statute of limitations defenses

- **China Agritech, Inc. v. Resh (2018)**
  584 U.S. ____ [138 S.Ct. 1800, 201 L.Ed.2d 123]
  - Held: no “stacking” of *American Pipe* tolling where successive class actions were filed

- **Fierro v. Landry’s Restaurant (Feb. 2019)**
  __ Cal.App.5th __
  - following *China Agritech*

- Pending appeal: **Montoya v. Ford Motor Co.**
  Fourth Dist., Div. Three, case no. G056752
  - Relying on *China Agritech* and *Mexia* to reverse judgment on untimely implied warranty claim
Issues affecting expert testimony

**People v. Sanchez** (2016) 63 Cal.4th 665

- Expert may not recount otherwise inadmissible **case-specific hearsay** (company documents, repair orders) in guise of describing support for expert opinions
- Sanchez has been held to apply equally in civil cases

- See also **People v. Perez** (2018) 4 Cal.5th 421
  - Case-specific out-of-court statement that the expert relied upon (autopsy report) was hearsay, but “an expert may nonetheless ‘rely on hearsay in forming an opinion, and may tell the jury in general terms that he did so’ without violating hearsay rules”
Recent cases on statutory fee awards

  - When a trial court applies a substantial negative multiplier to a lodestar attorney amount, the court must explain its case-specific reasons for the reduction.
  - Trial court erred to the extent it selected a negative multiplier to make the fee award proportionate to the damages award.
  - Prejudgment interest denied, following *Duale v. MBZ* (2007)
Recent cases on costs and fees

  - Trial judge has broad discretion in awarding reasonable attorney fees.
  - CCP 998 was vague and unenforceable. FCA’s CCP 998 offer served shortly after answering did not contain specific amounts because it did have information necessary to compute the amount of restitution. FCA offered restitution in an amount equal to actual price paid or payable. Plaintiffs objected.
Recent cases on costs and fees (cont’d)

  - Who is the prevailing party?
  - “Net Monetary Recovery” vs. “Pragmatic” approach
  - Mercedes had offered to repurchase, but no dealer add-ons
  - Settlements may be confidential as to financial terms
Recent cases on costs and fees (cont’d)

- **Noflin v. Volkswagen Group of America, Inc.** (2018 - unpublished)
  - Reversing summary judgment for VW due to triable issues on whether VW’s 998 offer complied with the statute and the offset amount.

- **Haroun v. BMW** (Sept. 2017 - unpublished)
  - Unsuccessful plaintiff must pay defendant’s costs

  - Following *MacQuiddy*; plaintiff was not prevailing party

- Pending appeals: *Reynolds* and *Smart*
Thinking about removal? Although many federal judges loathe Song-Beverly cases, there are many advantages from being in federal court.

$75,000 amount-in-controversy? The requirement can be satisfied in S-B cases by adding up restitution, reimbursement of the purchase price, incidental and consequential damages, two-times civil penalty, and attorney fees (and punitive damages if fraud or CLRA violation is alleged).

Diversity-busting dealers defendants? Recent experience suggests federal judges are keen to remand when cases involving dealers are removed. The manufacturer must show the dealer has been fraudulently joined—i.e., the claims against the dealer are defective as a matter of law and no amendment could cure the defect.

Federal question jurisdiction? If Mag Moss claims are pleaded and the low $10K amount-in-controversy is satisfied, then removal is possible based on federal question jurisdiction (whether or not a dealer is named).
Recent case law on *Magnuson-Moss* liability

  - 320 F. Supp. 3d 1126
  - Applying Nevada law to a *Magnuson-Moss* case filed in California for a car bought in Las Vegas.
  - MSJ denied
  - 15 USC 2310(a)(3)(C) – Plaintiff must first use informal dispute settlement procedure *if properly disclosed by manufacturer*
  - Disclosure on “face of the warranty”? Availability and requirement to use informal procedure must appear on “the page where the warranty text begins.” Not p. 22 of booklet where warranty text starts on p. 26.
2019 EMERGING ISSUES IN MOTOR VEHICLE PRODUCT LIABILITY LITIGATION

QUESTIONS?

THANK YOU FOR LISTENING!

Lisa Perrochet  
Horvitz & Levy LLP  
Burbank, CA  
www.horvitzlevy.com

Rick Stuhlbarg  
Bowman and Brooke LLP  
Torrance, CA  
www.bowmanandbrooke.com
March 29, 2019

VIA E-MAIL

Mr. Bruce R. Greenlee, Attorney
Judicial Council of California
Advisory Committee on Civil Jury Instructions
455 Golden Gate Avenue
San Francisco, CA 94102

Re: Response to Invitation to Comment on Proposed Revisions to CACI Nos. 3210, 3211, and 3244

Dear Mr. Greenlee:

On behalf of the Association of Southern California Defense Counsel, we offer these comments on the Advisory Committee’s proposed revisions to three of the instructions within the CACI 3200 series, addressing claims under the Song-Beverly Consumer Warranty Act:

- CACI No. 3210, “Breach of Implied Warranty of Merchantability—Essential Factual Elements”;
- CACI No. 3211, “Breach of Implied Warranty of Fitness for a Particular Purpose—Essential Factual Elements”; and
- CACI No. 3244, “Civil Penalty—Willful Violation.”

ASCDC writes to voice its support for the proposed revisions to CACI Nos. 3210 and 3211, and to respectfully request that the Committee modify the proposed revisions to 3244 to clarify the difference between the two penalty provisions in the Act.

ASCDC is the nation’s largest and preeminent regional organization of lawyers who specialize in defending civil actions. Its members include over 1,100 attorneys in Central and Southern California. ASCDC appears frequently as amicus curiae in appellate matters of interest to its members, and has commented on proposed legislation, rules changes, and jury instructions affecting matters of civil procedure and other aspects of ASCDC members’ practices.

The Song-Beverly Consumer Warranty Act, set forth at Civil Code section 1790 et seq., encompasses multiple express and implied warranty provisions applicable generally to consumer goods, and one part of the Act is California’s “lemon law,” which applies specifically to motor vehicles. The lemon law imposes a repurchase or replacement obligation on vehicle manufacturers whose authorized repair facilities (generally, dealers) fail to bring a vehicle in conformity with an express warranty
within a reasonable number of repair attempts. (See Civ. Code, § 1793.2.) Although the Song-Beverly Act is often conflated with the lemon law, most of its provisions apply to all consumer goods sold, not merely vehicles. (E.g., Civ. Code, §§ 1791, subd. (a) [defining “Consumer goods” as “any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables,” 1792 [implied warranty of merchantability applies to all consumer goods sold at retail in this state, unless expressly disclaimed by seller].)

Given the broad application of the various warranties set forth in the Act, and the prevalence of law suits under the lemon law, ASCDC’s members have an interest in ensuring that the CACI instructions correctly set forth the law and do not foster confusion. ASCDC thus offers comments on three of the four proposed revisions to the CACI 3200 series.

Revised Nos. 3210, “Breach of Implied Warranty of Merchantability—Essential Factual Elements” and 3211, “Breach of Implied Warranty of Fitness for a Particular Purpose—Essential Factual Elements”

First, ASCDC supports the Committee’s proposed revisions to CACI Nos. 3210 and 3211. The addition of two elements to each instruction—requiring the jury to find that the plaintiff was harmed, and that the breach of the implied warranty was a substantial factor in causing the harm—are consistent with the requirements of claims for breach of the implied warranty of merchantability and breach of the implied warranty of fitness for a particular purpose. (E.g., Guitierrez v. Carmax Auto Superstores California (2018) 19 Cal.App.5th 1234, 1247; Civ. Code, § 1791.1, subd. (d).) The revisions will therefore more clearly instruct the jury on all the elements they must find in order for plaintiff to prevail on a breach of implied warranty claims.

Revised No. 3244, “Civil Penalty—Willful Violation (Civil Code, § 1794(c))”

ASCDC respectfully suggests that the proposed revisions to CACI No. 3244 might cause confusion about the circumstances under which the instruction applies, and under which a civil penalty can be awarded without a finding of willfulness.

The Song-Beverly Consumer Warranty Act provides for civil penalties under two separate subdivisions: section 1794, subdivision (c), and section 1794, subdivision (e). Although they are housed in the same section of the Act, the two penalty provisions provide for penalties for very different conduct:

- The subdivision (c) penalty is awardable where a manufacturer or seller willfully failed to comply with its obligations under a written warranty sold with any consumer good. (See Civ. Code, § 1794, subd. (c).) The penalty is not limited to cases involving warranties for motor vehicles.
- The subdivision (e) penalty is awardable only in motor vehicle cases covered by the Tanner Consumer Protection Act, a component of the Song-Beverly Consumer Protection Act that addresses vehicles that are presumptively “lemons.” The subdivision provides for a safe harbor, of sorts, for manufacturers that maintain “a qualified third-party dispute resolution process” that substantially meets the requirements of the Tanner Consumer Protection Act. (Civ. Code, § 1794, subd. (e)(1), (2).) The subdivision (e) penalty is awardable only if the vehicle manufacturer failed to replace or repurchase a nonconforming vehicle after a reasonable number of repair attempts—willfully or not—and the manufacturer failed a qualified dispute resolution process.
The proposed new paragraph in the “Directions for Use” section states, correctly, that an automobile buyer may seek penalties under both subdivision (c) and subdivision (e), but may not recover two penalties for the same violation. (See Civ. Code, § 1794, subd. (e)(5).) However, the revised paragraph is somewhat unclear insofar as it does not specify the circumstances under which a penalty can be awarded under subdivision (e). As written, that paragraph might suggest that CACI No. 3244 could be used for subdivision (e) penalties as well as subdivision (c) penalties. ASCDC therefore recommends the following modification to the proposed “Directions for Use” paragraph:

An automobile buyer may also obtain a penalty of two times actual damages without a showing of willfulness for violations of the Tanner Consumer Protection Act, if the manufacturer failed to maintain a third-party dispute resolution process under some circumstances. (See Civ. Code, §§ 1793.22(d), 1794(e).) However, a buyer who recovers a civil penalty for a willful violation under Civil Code section 1794, subdivision (c) may not also recover a second civil penalty under Civil Code section 1794, subdivision (e) for the same violation. (Civ. Code, § 1794(e)(5).) If the buyer seeks a penalty for either a willful or a nonwillful violation in the alternative, the jury must be instructed on both remedies. (See Suman v. BMW of North America, Inc. (1994) 23 Cal.App.4th 1, 11 [28 Cal.Rptr.2d 133]; see also Suman v. Superior Court (1995) 39 Cal.App.4th 1309, 1322 [46 Cal.Rptr.2d 507] (Suman II) [setting forth instructions to be given on retrial].) A special instruction will need to be crafted for cases in which the consumer seeks a civil penalty for violation of the Tanner Consumer Protection Act.

ASCDC believes these minor modifications will make clear that the subdivision (e) penalty that is the subject of CACI 3244 is available only in very specific cases, and that the instruction as drafted cannot be used to instruct the jury on the subdivision (e) penalties simply by removing the references to “willfulness” in the instruction.

Thank you for considering these comments.

Respectfully submitted,

ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

By: Allison W. Meredith

Horvitz & Levy LLP
3601 West Olive Avenue, 8th Floor
Burbank, California 91505-4681
(818) 995-0800
March 1, 2018

VIA EMAIL (Bruce.Greenlee@jud.ca.gov)

Mr. Bruce R. Greenlee, Attorney
Judicial Council of California
Advisory Committee on Civil Jury Instructions
455 Golden Gate Avenue
San Francisco, CA 94102

Re: Response to Invitation to Comment Generally Supporting Changes to CACI No. 3244

Dear Mr. Greenlee:

On behalf of the Association of Southern California Defense Counsel, we offer these comments on the Advisory Committee’s proposed changes to CACI No. 3244. The changes represent a significant improvement over the existing instruction, better capturing the body of law concerning the jury’s task in deciding whether and how much to award in civil penalties for a violation of the Song-Beverly Act. We propose modest refinements to the Sources and Authority citations, to further clarify and supplement the supporting case law.

ASCDC is the nation’s largest and preeminent regional organization of lawyers who specialize in defending civil actions. Its members include over 1,100 attorneys in Central and Southern California. ASCDC appears frequently as amicus curiae in appellate matters of interest to its members, and has commented on proposed legislation, rules changes, and jury instructions affecting matters of civil procedure and other aspects of ASCDC members’ practices.

Civil penalties under the Song-Beverly Act (“Lemon Law”) are available in the event of a “willful” statutory violation, which requires more than a mere intent to do the act which is subsequently found to be a violation of the Act. Penalties are not appropriate in cases of an honest mistake, or a situation in which reasonable minds can differ about the propriety of the defendant’s conduct. (Kwan v. Mercedes Benz of N. Am. (1994) 23 Cal.App.4th 174, 184-185 (Kwan).) Consistent with these principles, the revisions proposed by the Committee are as follows:
[Name of plaintiff] claims that [name of defendant]’s failure to [describe violation of Song-Beverly Consumer Warranty Act, e.g., repurchase or replace the vehicle after a reasonable number of repair opportunities] was willful and therefore asks that you impose a civil penalty against [name of defendant]. A civil penalty is an award of money in addition to a plaintiff’s damages. The purpose of this civil penalty is to punish a defendant or discourage [him/her/it] from committing such violations in the future.

If [name of plaintiff] has proved that [name of defendant]’s failure was willful, you may impose a civil penalty against [him/her/it]. **The penalty may be in any amount you find appropriate, up to a maximum of two times the amount of [name of plaintiff]’s actual damages.**

“Willful” means that [name of defendant] knew of [his/her/its] legal obligations and intentionally declined to follow them what [he/she/it] was doing and intended to do it. However, a violation is not willful you may not impose a civil penalty if you find that [name of defendant] believed reasonably and in good faith believed that the facts did not require [describe facts negating statutory obligation, e.g., repurchasing or replacing the vehicle].

The penalty may be in any amount you find appropriate, up to a maximum of two times the amount of [name of plaintiff]’s actual damages.

We commend the Committee for proposing these revisions, which track in large part the relevant case law, including the leading decision on the matter (Kwan). The revisions do not fully capture key language from Kwan that a lay jury would probably find to be helpful guidance, namely, that a penalty “ordinarily would not be appropriate if [name of defendant’s] actions proceeded from an honest mistake or a sincere and reasonable difference of factual evaluation.” That phrasing is probably more easily understood and applied than the language in the instruction as proposed, which ask the jury to find whether the defendant had a reasonable and good faith belief that the facts did not require certain conduct to meet the defendant’s statutory obligations. However, the Committee’s proposed additions to the Sources and Authority section do include the “honest mistake” language from Kwan, so in an appropriate case, the Sources and Authority materials may aid the trial court and counsel in deciding whether a supplemental special instruction is warranted.

We suggest one small wording change that is in the nature of correcting a typographical error. In the first line of the first paragraph, replacing the word “violation” with “obligation” in the bracketed clause would more clearly explain what information should be added. (It is the failure to meet an obligation, not the failure to commit a violation, that is intended there.)
With respect to the Sources and Authority, ASCDC also suggests adding a few additional case citations so that the CACI materials will be an even more useful resource to courts and counsel. Specifically, at the end of the new paragraph citing Kwan, we suggest adding cases as indicated in bold/underline below, to give a fuller picture of the standard for imposing penalties than appears from the current selection of authorities:

• “[Defendant] was entitled to an instruction informing the jury its failure to refund or replace was not willful if it reasonably and in good faith believed the facts did not call for refund or replacement. Such an instruction would have given the jury legal guidance on the principal issue before it in determining whether a civil penalty could be awarded.” (Kwan v. Mercedes Benz of N. Am. (1994) 23 Cal.App.4th 174, 186–187 [28 Cal.Rptr.2d 371]; accord Lukather v. General Motors, LLC (2010) 181 Cal.App.4th 1041, 1051; Robertson v. Fleetwood Travel Trailers of California, Inc. (2006) 144 Cal.App.4th 785, 815 [relevant inquiry for jury is whether manufacturer had a good faith belief that it could readily repair the vehicle in light of “the nature and details of those prospective repairs”]; Jensen v. BMW of North America, Inc. (1995) 35 Cal.App.4th 112, 136 [“ ‘A violation ‘is not willful if the defendant’s failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present.’ ”]).

Finally, we note that the Committee proposes a new paragraph quoting a passage from Schreidel v. American Honda Motor Co. (1995) 34 Cal.App.4th 1242, 1249-1250. To clarify the import of that decision for jury instruction purposes, we urge that the Committee provide a new paragraph quoting similarly from the subsequent decision in Bishop v. Hyundai Motor Am. (1996) 44 Cal.App.4th 750.

The proposed new quote to Schreidel is from the court’s general description of the Song-Beverly Act at the beginning of the opinion, and is not part of any legal analysis about jury instructions because, as the court specifically noted, defendant Honda in that case “[did] not challenge the correctness of the instruction” that was given on willfulness for purposes of Song-Beverly penalties. (Schreidel, supra, 34 Cal.App. 4th at 1254.)

In contrast, the subsequent decision in Bishop addressed a claim on appeal that an instruction using language very similar to that which the Committee quotes from Schreidel was erroneous. The court express-agreed with the defendant/appellant that the language would be improper as a jury instruction, holding that defendant Hyundai accurately noted that such language, standing alone, “would permit the jurors to make a finding of willfulness even though Hyundai was unaware of its obligations or had a good faith belief it was fulfilling them.” (Bishop, supra, 44 Cal.App.4th at p. 759.) The court added:
Hyundai contends the amalgamation of these conflicting principles in a single instruction necessarily requires reversal here where conflicting evidence was presented on the issue of willfulness. While we recognize the error in the formulation of this instruction and the possibility of misdirection, we conclude Hyundai’s failure to object or request a modification of this instruction to state the law, of which it was well aware, in a more positive manner, amounts to a waiver of this issue on appeal.”

(Ibid.)

In other words, although the Bishop court ultimately found a waiver (id. at p. 760 [counsel waived chance to correct the instruction “by his silence”]), the court’s rationale about the impropriety of language for a jury instruction is still binding on trial courts fashioning instructions. The Schreidel decision, which was not presented with any claim of instructional error on appeal, does not have the same force in that context.

As proposed by the Committee, Bishop appears only at the end of the Schreidel paragraph, with a short parenthetical. And that parenthetical is inaccurate or at least imprecise in saying that the “defendant agreed that the jury was properly instructed with this language.” The defendant in Bishop directly challenged the instruction as improper on appeal, and even at trial the defendant did not affirmatively “agree” the instruction as given was proper. (Bishop, supra, at pp. 759-760.) There is a meaningful difference between agreeing that an instruction is proper, and failing to object to an instruction. (See Code Civ. Proc., § 647.)

ASCDC therefore suggests that Bishop not be relegated to a “see also” cite with a somewhat misleading parenthetical at the end of a quote from Schreidel, and that it instead be placed in a separate paragraph, consistent with the fact that it is a more recent and more relevant case for consideration in crafting jury instructions than Schreidel. We propose this new paragraph, describing the important rationale from Bishop:

- Jury instruction is erroneous if it states that “willfulness” under Song-Beverly Act “‘does not necessarily imply anything blamable, or any malice toward the plaintiff, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: that the defendant knows what it is doing and intends to do what it is doing.’” Such an instruction “would permit the jurors to make a finding of willfulness even though Hyundai was unaware of its obligations and had a good faith belief it was fulfilling them.” The court “recognize[d] the error in the formulation of this instruction and the possibility of misdirection,” but did not reverse on this ground because Hyundai failed to object to the proposed instruction or request a modification. (Bishop v. Hyundai Motor America (1996) 44 Cal.App.4th 750, 758-759.)
At the very least, the Bishop parenthetical should be changed from the proposed description of a procedural matter to a substantive summary of the Bishop court’s reasoning, along the lines of the proposed paragraph above.

Thank you for considering these comments.

Respectfully submitted,

[[[]]]

By: [Signature]

Lisa Perrochet

HORVITZ & LEVY LLP
Lisa Perrochet
Allison W. Meredith

3601 West Olive Avenue, 8th Floor
Burbank, California  91505-4681
(818) 995-0800
LPerrochet@horvitzlevy.com
December 6, 2017

VIA OVERNIGHT MAIL

Justices Richard D. Fybel, David A. Thompson, Raymond J. Ikola
California Court of Appeal, Fourth Appellate District, Division One
601 W. Santa Ana Blvd.
Santa Ana, California 92701

Re: Request for Publication of
Kirzhner v. Mercedes-Benz USA, LLC, G052551 (November 27, 2017)

Honorable Justices,

Pursuant to Rule 8.1120(a) of the California Rules of Court, amicus curiae Association of Southern California Defense Counsel (“ASCDC”) respectfully requests that this Court certify for publication its November 27, 2017 opinion in Kirzhner v. Mercedes-Benz USA, LLC.

ASCDC is the nation’s largest and preeminent regional organization of lawyers whose practices are primarily devoted to defending civil actions, comprised of approximately 1,100 leading civil trial defense and appellate attorneys throughout Southern and Central California. ASCDC is actively involved in assisting courts on issues of interest to its members, the judiciary, the bar as a whole, and the public. ASCDC also affords professional education, fellowship and advancement for its members, and acts as a liaison between the defense bar, and the courts and the Legislature. ASCDC has appeared as amicus curiae in numerous cases before both this court and the California Supreme Court, including such cases as Howell v. Hamilton Meats & Provisions, Inc. (2011) 52 Cal.4th 541, Cassel v. Superior Court (2011) 51 Cal.4th 113, and Reid v. Google, Inc. (2010) 50 Cal.4th 512.

In this case, the Court explains various ambiguities in a highly-litigated statute, the Song-Beverly Consumer Warranty Act, California Civil Code Section 1790 et. seq. The opinion contains thoroughly analyzed sections on collateral charges and incidental damages as they pertain to calculating damages in California lemon law cases. The clarification of ambiguous terms in Section 1790 would make valuable precedent. Moreover, Kirzhner explains with reason an existing law, and clarifies a provision of a statute. Publication of this Court’s
opinion is warranted for at least two reasons, which fall squarely within the standards for publication set forth in Cal. Rules of Court, rule 8.1105(c)(3), and (4).

First, the Court takes an in-depth look at the verbiage utilized in Civ. Code section 1790. Specifically, Kirzhner analyzes what constitutes “collateral charges” under the statute and considers what fees can be included in the ambiguous phrase “registration fees.” The Court starts its analysis by looking at legislative intent, noting that “[t]he Legislature intended to allow a buyer to recover the entire amount actually expended for a new motor vehicle, including paid finance charges, less any of the expenses expressly excluded by the statute.” (Opinion at 5.) The Court reasoned that “[r]egistration fees for future years cannot be considered a “collateral charge” because they are incurred and paid after the initial purchase or lease.” The Court further clarifies that the phrase “payable” in the statute “does not mean the Legislature intended all registration renewal fees to be recoverable as part of restitution. It is simply a recognition that many buyer’s do not pay the full amount due at the actual time of the original transaction.” Id. Lastly, the Court notes that while the Legislature intended the statute to be remedial, restitution should be limited to the cost associated with the new car purchase only. Id. This analysis is crucial for practitioners to correctly assess damages claims in lemon law cases.

Second, the Court considers whether post purchase registration fees could be considered “incidental damage.” The Court clarified that incidental damages are limited to “cost incurred as a result of a vehicle being defective,” not cost that can be characterized as “standard cost of owning any vehicle.” The Court also explains that allowing such an expansive understanding of incidental damages “would open up a ‘Pandora’s box’ of potential costs for which a defendant would need to pay restitution in these types of cases (e.g. cost for gas, car washes, oil charges). A Westlaw search reveals that this Court’s opinion is the only appellate opinion that provides any type of guidance as to what encompasses a “registration fee,” and thus, this Court’s opinion is the only case that analyzes a pertinent component of damage calculations in lemon law cases. Accordingly, the opinion satisfies the criteria for publication because it establishes a new rule of law. (Cal. Rule of Court, rule 8.1115(c)(1).)

Kirzhner satisfies numerous criteria for publication by explaining ambiguous terms in the statute, and clarifying Civ. Code section 1790. Kirzhner would make valuable precedent and the Association urges its publication.

Respectfully submitted,

Association of Southern California Defense Counsel

[Signature]

Lawrence R. Ramsey (Cal. Bar No. 89833)
(310) 380-6518
Secretary-Treasurer, Association of Southern California Defense Counsel

CC: See attached Proof of Service
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      Plaintiff/Appellant
      (a) Address:

      2070 N. Tustin Avenue
      Santa Ana, CA 92705
      (b) E-Mail Address:

   (2) Name of Person served: Jeffrey Kane, Esq., Law Office of Jeffrey Kane

      On behalf of (name or names of parties represented, if person served is an attorney):
      Plaintiff/Appellant
      (a) Address:

      20902 Brookhurst St. Suite 210
      Huntington Beach, CA 92646

      (b) E-Mail Address:
(3) Name of Person served: John David Universal, Universal Shannon, LLP

On behalf of (name or names of parties represented, if person served is an attorney):

Defendant/Respondent

(a) Address:

2240 Douglas Blvd. Suite 290
Roseville, CA 95661

(b) E-Mail Address:

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☒ Additional persons served are listed on the attached page (See page 3).

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

Date: December 6, 2017

Stacy Eikenberry

(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM) (SIGNATURE OF PERSON COMPLETING THIS FORM)
December 7, 2017

VIA OVERNIGHT MAIL

Acting Presiding Justice Richard D. Fybel
Associate Justice David A. Thompson
Associate Justice Raymond J. Ikola
California Court of Appeal, 4th District, Division Three
601 W. Santa Ana Blvd.
Santa Ana, California 92701

Re: Request for Publication (Cal. Rules of Court, rule 8.1105(c))
Kirzhner v. Mercedes-Benz USA, LLC ("Kirzhner")
Fourth District Court of Appeal Case No. G052551
Superior Court of Orange County Case No. 30-2014-00744604
Opinion Filed November 27, 2017

To Acting Presiding Justice Richard D. Fybel and the Associate Justices of the California Court of Appeal, Fourth Appellate District, Division Three:

I am writing on behalf of a number of our firm’s clients in the automotive industry. We respectfully request the Court publish the Kirzhner v. Mercedes-Benz USA, LLC opinion, Court of Appeal Case No. G052551, filed on November 27, 2017. Cal. R. Ct, rule 8.1120(a). A copy of the unpublished opinion is attached. The opinion clearly states a new rule of law or addresses a current apparent conflict of law in the trial courts which meets the standard of publication.

Our clients manufacture and/or distribute new motor vehicles in the United States. California is a particularly active market for them. As a result, they are oftentimes involved in litigation involving claims under California’s Song-Beverly Consumer Warranty Act (Civ. Code Sections 1790, et seq.). Even the simplest of lemon law cases can be over-litigated by plaintiff’s counsel because of the consumer-friendly nature of Civ. Code Section 1790 and its fee shifting provision. Many times, cases are resolved with 998 offers and disputed fees are determined by motion. What constitutes damages covered under the statute in such motions is a very important issue in these cases and trial courts vary significantly about what evidence they will allow plaintiffs to present to a jury about what damages are covered specifically under the statute as well as under the concept of “incidental and consequential damages.”
An opinion "should be certified" for publication in the Official Reports if the opinion meets any of the nine criteria for publication in Rule 8.1105, sub-divisions (c)(1)-(9). The Courts opinion in Kirzhner meets several of the criteria for publication and thus should be certified for publication.

First, the Kirzhner decision is important because it is the first California Court of Appeal decision to explained what the phrase "collateral charge" means under Civ. Code section 1790. More specifically, Kirzhner looks at what constitutes a "registration fee" and limits registration fees to "the one which is paid when the vehicle is purchased or leased (or accounted for in financing), noting that "the ‘registration fees’ mentioned in the statute ‘do not include all registration fees that a buyer pays over the course of the lease[,]’ (Opinion at 3.) The Court reasoned that "[t]he Legislature intended to allow a buyer to recover the entire amount actually expended for a new motor vehicle, including paid finance charges, less any of the expenses expressly excluded by the statute"). Registration fees for future years cannot be considered a ‘collateral charge’ because they are incurred and paid after the initial purchase or lease." (Opinion at 5). Accordingly, publication of Kirzhner would provide valuable guidance to trial courts and practitioners with regard to the application of an ambiguous phrase since the order advances a clarification of the statute. CRC 8.1105(c)(4). In the absence of appellate guidance, plaintiffs' counsel almost always attempts to present evidence of all the registration fees plaintiffs have ever paid since the vehicle was purchased up until the time of trial. Trial courts vary on whether they will allow plaintiffs to present what is irrelevant evidence, and, more importantly, the issue of those registration fees (and the lack of appellate guidance) can become a hindrance to early resolution of these cases.

Second, in Kirzhner, this Court discussed what constitutes an incidental damage under Civ. Code section 1793.2. Although the Court did not provide an exhaustive list, it explained that that incidental damages are those "cost incurred as a result of a vehicle being defective." (Opinion at 6.) The Court additionally clarifies that allowing "standard cost of owning any vehicle" to be considered incidental damages would "open up a ‘Pandora’s box’ of potential costs for which a defendant would need to pay restitution in these cases (e.g. costs for gas, car washes, oil changes)." (Opinion at 5.) The Court noted that there was nothing supporting such an expansive interpretation of incidental damages. Thus, the publication of this holding would result in providing much needed clarification to the trial courts and practitioners on what cost can be calculated in incidental damages. Specifically, the holding "explains . . . with reason given an existing rule of law." CRC 8.1105(c)(3). Even those expenses which are listed as examples by the opinion are sources of significant debate at and before trial. This firm has been forced to file and argue motion in limine about several types of damages which plaintiffs have claimed as incidental and consequential damages which are clearly not arising “as a result of a vehicle being defective” (Opinion at 6.). Plaintiffs have asked for expenses for car washes despite their own testimony that the defect did not case the vehicle to be dirty. Plaintiff uniformly ask for reimbursement of auto insurance even if it was simply insurance
mandated by law, new tires over the life of the vehicle, oil changes and regular maintenance – even if those damages are simply, as the Kirzhner opinion reads, “a standard cost of owning any vehicle.” This opinion gives a clear roadmap to the basis of recovery for any incidental damages.

Finally, the issues in Kirzhner have broad implications due to the volume of these cases in our courts. Looking at lemon law filings alone, an unofficial tally of cases filed against automobile manufacturers in California courts shows that in calendar year 2016 there were 7221 such filings statewide, 550 in Orange County Superior Court alone. It is also worth noting that the incidental fees raised in Kirzhner is not unusual since consumer counsel are incentivized by the fee shifting nature of the statute. Fee motions and motions to tax cost are filed with frequency in lemon law cases. For this reason, the specific ruling in this case involves a legal issue of continuing public interest. CRC 8.1105(c)(6)).

The publication of Kirzhner will help clarify how damages are to be calculated under the Song-Beverly Consumer Warranty Act and resolve disputes in trial courts and during settlement of these cases both before and after lawsuits have been filed. We respectfully request this Court of Appeal certify its opinion for publication.

Sincerely,

Julian Senior
Bowman and Brooke LLP

cc: Plaintiff/Appellant Counsel

Martin W. Anderson
Anderson Law Firm
2070 N. Tustin Avenue
Santa Ana, CA 92705

Jeffrey Kane
Law Office Jeffrey Kane
20902 Brookhurst St. Ste 210
Huntington Beach, CA 92646
Defendant/Respondent Counsel

Jon David Universal
Universal Shannon, LLP
2240 Douglas Blvd. Ste 290
Roseville, CA 95661
PROOF OF SERVICE (Court of Appeal)

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Case Name: Kirzhner v. Mercedes-Benz USA, LLC

Court of Appeal Case Number: G052551

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       Plaintiff/Appellant

       (a) Address:

       2070 N. Tustin Avenue
       Santa Ana, CA 92705

       (b) E-Mail Address:
           firm@andersonlaw.net

       (2) Name of Person served: Jeffrey Kane, Esq., Law Office of Jeffrey Kane

       On behalf of (name or names of parties represented, if person served is an attorney):

       Plaintiff/Appellant

       (a) Address:

       20902 Brookhurst St. Suite 210
       Huntington Beach, CA 92646
(3) Name of Person served: John David Universal, Universal Shannon, LLP

On behalf of (name or names of parties represented, if person served is an attorney):

Defendant/Respondent

(a) Address:

2240 Douglas Blvd. Suite 290
Roseville, CA 95661

(b) E-Mail Address: juniversal@uswlaw.com

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☑ Additional persons served are listed on the attached page (See page 3).

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

Date: December 11, 2017

Stacy Eikenberry

(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)  (SIGNATURE OF PERSON COMPLETING THIS FORM)
September 25, 2017

Associate Justice Brian M. Hoffstadt
Acting Presiding Justice Victoria M. Chavez
Hon. Allan Goodman (Ret.)
California Court of Appeal
Second Appellate District, Division Two
300 S. Spring Street, 2nd Floor, N. Tower
Los Angeles, California 90013

Re: Haroun v. BMW of North America, LLC, B272279
Request for Partial Publication

Dear Justices Hoffstadt and Chavez and Judge Goodman:

Pursuant to rules 8.1105 and 8.1120 of the California Rules of Court, the Association of Southern California Defense Counsel (ASCDC) writes to request that the court order partial publication of its opinion in this case with the exception of Section II.

ASCDC is the nation’s largest and preeminent regional organization of lawyers who specialize in defending civil actions. ASCDC is comprised of over 1,100 attorneys in Central and Southern California. ASCDC is actively involved in assisting courts on issues of interest to its members. In addition to representation in appellate matters, ASCDC provides its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and a forum for the exchange of information and ideas. ASCDC appears as amicus curiae in numerous cases before both the California Supreme Court and the Court of Appeal to express the interests and concerns of the civil litigation attorneys who are its members.

Sections I and III of the court’s opinion readily satisfy the criteria for publication. In Section III the court rejects plaintiff’s argument that, contrary to the plain language of the governing statute, costs can never be awarded to a prevailing defendant in claims brought under the Song-Beverly Act. (Typed opn. 9-10.) No published case has addressed this issue under the Song-Beverly Act, and the court’s straightforward analysis would save lower courts and litigants the trouble of relitigating this issue.
The court properly observes that plaintiff’s argument is contrary to the general rule that a prevailing party is entitled as a matter of right to the recovery of specified costs under Code of Civil Procedure section 1033.5, and that there should be no implied repeal of the right of the prevailing party to recover costs under the Song-Beverly Act. (Typed opn. 10.) Section III of the court’s opinion therefore satisfies the criteria for publication because it “[e]stablishes a new rule of law,” and “[a]pplies an existing rule of law to a set of facts significantly different from those stated in a published opinion.” (Cal. Rules of Court, rule 8.1105(c)(1)-(2).)

Publication of Section III of the court’s opinion would also foster the strong policy in favor of settlement. (Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co. (2010) 50 Cal.4th 913, 930 [“[T]he law favors settlements”].) When each side bears risk if a case goes to trial, cases are more likely to settle. In situations where one side has all “upside” and no “down side”—such as when a losing party is immune from an award of costs, as advocated by the plaintiff here—cases are more difficult to settle. Therefore, publication of Section III of the court’s opinion will provide further incentive for parties to settle claims brought under the Song-Beverly Act.

Section I of the court’s opinion also satisfies the criteria for publication because it addresses two splits of authority regarding recoverable costs. In Section I.A of the opinion, the court addresses the recovery of costs for photocopies of exhibits prepared for trial but not actually introduced into evidence at trial. The court holds that recovery of these costs is permitted under El Dorado Meat Co. v. Yosemite Meat & Locker Service, Inc. (2007) 150 Cal.App.4th 612, 618 and Heppler v. J.M. Peters Co. (1999) 73 Cal.App.4th 1265, 1298. (Typed opn. 5-6.) In doing so, the court rejected the plaintiff’s argument that such costs are not recoverable under Seever v. Copley Press, Inc. (2006) 141 Cal.App.4th 1550, 1557-1558, where the court stated that costs for exhibits “not used at trial” are not recoverable costs. “[T]o the extent ‘not used at trial’ [in Seever] means they were simply not admitted as evidence, Seever is at odds with the case law cited above, and we choose to follow that other case law.” (Typed opn. 6.) Publication is warranted because Section I.A of the court’s opinion will aid lower courts and litigants in resolving any tension between existing cases on this issue. (See Cal. Rules of Court, rule 8.1105(c)(5).)

For similar reasons, Section I.B of the court’s opinion, addressing the recovery of costs for a PowerPoint presentation, also satisfies the criteria for publication. In that section the court holds that costs for projectors and hiring assistants to create and use
PowerPoint presentations during trial are recoverable. (Typed opn. 7-8.) In doing so, the court follows Bender v. County of Los Angeles (2013) 217 Cal.App.4th 968, 990-991, which permitted the recovery of such costs, and declines to follow Science Applications Internat. Corp. v. Superior Court (1995) 39 Cal.App.4th 1095, 1104-1105, where the court held that costs for hiring assistants to create and maintain trial exhibits were not recoverable. “We agree with Bender that Science Applications’ refusal to award costs for technical assistance has been eclipsed by the march of technology, and we decline to follow it.” (Typed opn. 8.) Accordingly, publication of Section I.B of the court’s opinion is warranted because it too addresses and suggests a reasoned resolution of an apparent conflict in the law based on circumstances that have changed since the time of the earlier outdated decision in Science Applications. (Cal. Rules of Court, rule 8.1105(c)(5).)

In contrast, ASCDC is not requesting publication of Section II of the court’s opinion. That section of the court’s opinion does not satisfy the criteria for publication because it does not purport to create any new law or address any split of authority. That section in three sentences draws a distinction between “official superior court reporters” and “private court reporters hired by a litigant” in addressing whether the limitation on court reporter appearance fees contained in the Government Code applies equally to both. (Typed opn. 9.) The question of statutory limits on court reporter rates is, however, the central issue pending before this court in Burd v. Barkley Court Reporters, Inc., B271694 (Burd). That case is fully briefed, including multiple amicus curiae briefs from parties representing differing interests.

In Haroun, it is not clear from the opinion that the parties undertook a searching analysis of the governing statutes to aid the court in its interpretation of the laws governing court reporter fees. In particular, this court cites only Barwis v. Superior Court (1978) 87 Cal.App.3d 239 (Barwis) and Gamage v. Medical Board (1998) 60 Cal.App.4th 936 (Gamage) for the proposition that the statutory fee schedule in Government Code section 69948 does not apply to private court reporters appointed as official reporters for trial court proceedings (typed opn. 9), but neither case contains a holding to that effect. The 1978 decision in Barwis held courts did not have subject matter jurisdiction to order private court reporters to transcribe an administrative proceeding at a fixed price, but the court indicated the rule would be otherwise for reporters appointed to transcribe proceedings related to pending court cases. (Barwis, at p. 242, fn. 4 [distinguishing authority regarding private parties such as notaries who are appointed as “official” court officers: “There is an obvious distinction between discovery proceedings in a superior court action and independent administrative
proceedings subject to review in the superior court. The former arises out of and exists because of the superior court action—it is a part thereof. However, administrative proceedings before a different tribunal do not arise out of and are not a part of a superior court action to review the administrative decision].) The California Supreme Court later confirmed in Serrano v. Stefan Merli Plastering Co., Inc. (2011) 52 Cal.4th 1018 (Serrano II) that private court reporters reporting proceedings connected with a superior court action are, indeed, officers of the court subject to the court’s jurisdiction, notwithstanding briefing in that case arguing that Barwis dictated otherwise. (See id. at p. 1021 [private deposition reporters are “ministerial officer[s] of the court”]; id. at p. 1027 [obligations of private deposition reporters, including what fees they can charge, are “determined by statute”]; see also Serrano v. Stefan Merli Plastering Co., Inc. (2008) 162 Cal.App.4th 1014, 1036 (Serrano I) [not regulating fees charged by private reporters, who have business incentives to inflate charges or unfairly allocate costs to litigants who are not repeat customers, “could very well result in a denial of due process”]; Bar Assn. of San Diego v. Superior Ct. (1923) 64 Cal.App. 590, 593-594 [deposition notary is officer of the court ex officio; “As such officer, he and all proceedings before him are subject to the control of the court”].)

The court in Gamage, meanwhile, partially followed Barwis with respect to courts’ powers over reporters transcribing administrative proceedings, holding an agency must provide a transcript at statutory rates, but could potentially collect higher costs if the agency prevailed in the proceeding. But the court again did not reach the question of statutory construction underlying the question whether private court reporters sworn as the official reporter for specified trial court proceedings are governed by the same fee and transcription standards for court employed reporters. Moreover, the statutory language at issue in Barwis and Gamage regarding administrative hearing transcript rates was repealed in 2005, so the force of those opinions as to other statutes is in question. Finally, as this court notes (citing Chaaban v. Wet Seal, Inc. (2012) 203 Cal.App.4th 49), fees and transcript costs have been treated differently, so the Barwis and Gamage discussions of transcripts does not translate directly to the question before this court regarding fees. (Typed opn. 8-9.)
Accordingly, the court should avoid the potential confusion that would ensue from publication of Section II of its decision, and await the opportunity presented in *Burd* to address these questions based on full and thorough briefing of the issues.

Accordingly, ASCDC respectfully requests that this court order its opinion published with the exception of Section II.

Respectfully submitted,

HORVITZ & LEVY LLP
LISA PERROCHET
STEVEN S. FLEISCHMAN

By: ____________________________
   Steven Fleischman

On behalf of ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

cc: See attached Proof of Service
PROOF OF SERVICE
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, California 91505-4681.

On September 15, 2017, I served true copies of the following document(s) described as REQUEST FOR PARTIAL PUBLICATION on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP’s practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on September 15, 2017, at Burbank, California.

Jill Gonzales
SERVICE LIST
Haroun v. BMW of North America, LLC
B272279

Rene Korper
Thomas E. H. Solmer
Law Offices of Rene Korper
27240 Turnberry Ln., Ste. 200
Valencia, CA 91355

Attorneys for Plaintiff and Appellant
Samir B. Haroun

Kate S. Lehrman
Robert A. Philipson
Lehrman Law Group
12121 Wilshire Blvd., Ste. 1300
Los Angeles, CA 90025

Attorneys for Defendant and Respondent
BMW of North America, LLC
June 4, 2018

The Honorable Arthur Gilbert, Presiding Justice
and Associate Justices
California Court of Appeal
Second District Court of Appeal, Division Six
200 East Santa Clara Street
Ventura, CA 93001

Re: O’Green v. Kia Motors America, Inc.
Court of Appeal Case No. B282366
Request for Publication

Dear Presiding Justice Gilbert and Associate Justices:

We write on behalf of the Association of Southern California Defense Counsel (ASCDC), to request publication of O’Green v. Kia Motors America, Inc. (May 21, 2018, B282366) (O’Green).

ASCDC is the nation’s largest and preeminent regional organization of lawyers who specialize in defending civil actions, comprised of approximately 1,100 attorneys in Southern and Central California. ASCDC is actively involved in assisting courts on issues of interest to its members. ASCDC also provides its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multifaceted support, including a forum for the exchange of information and ideas.

ASCDC members routinely represent clients in the defense of civil actions in which they make, and receive, offers to allow judgment under Code of Civil Procedure section 998 (section 998). Section 998 serves an important purpose in our litigation system: “to encourage settlement by providing a strong financial disincentive to a party—whether it be a plaintiff or a defendant—who fails to achieve a better result than that party could have achieved by accepting his or her opponent’s settlement offer.” (Bank of San Pedro v. Superior Court (1992) 3 Cal.4th 797, 804.) The financial disincentives (shifting expert witness costs and imposing prejudgment interest) are “the stick” of section 998’s “carrot and stick”
approach to encouraging settlement; the “carrot is that by awarding costs to the putative settler the statute provides a financial incentive to make reasonable settlement offers.” (Ibid.)

For section 998 to serve its purpose, it is vital that litigants understand the boundaries of what constitutes a valid offer under that section. Undefined and/or subjective offers are not valid section 998 offers. (E.g., *MacQuiddy v. Mercedes-Benz USA, LLC* (2015) 233 Cal.App.4th 1036, 1050 (*MacQuiddy*).) At the same time, parties should not be able to evade the “stick” of section 998 by claiming, after the fact (and after a negative result at trial), that they found reasonable offers to be too uncertain for them to evaluate.

As set forth below, *O'Green* offers much-needed guidance on several aspects of section 998, including the scope of valid offers. This court should therefore certify *O'Green* for publication. (See Cal. Rules of Court, rule 8.1105(c)(1)-(3.).)

1. *O'Green* clarifies that offers containing options for settlement, between which the offeree may choose, can be valid Civil Code section 998 offers.

Defendants are often at a disadvantage when it comes to identifying the plaintiff’s damages. The amount of damages claimed by the plaintiff is frequently known only to the plaintiff, and all too often, plaintiffs are not forthcoming about sharing the details with defendants during discovery, leaving defendants with insufficient information to determine the value of a reasonable settlement offer in straightforward dollar terms.

This problem can be magnified where, as here, the plaintiff’s claim includes a statutory attorney-fee shifting provision. The more defense counsel work to obtain information through discovery, the meet-and-confer process, and possibly motions to compel, the more they increase their clients’ exposure to the plaintiff’s attorney fees. *O'Green* itself demonstrates the problem, with plaintiff’s counsel seeking $331,817 in fees after obtaining a $28,100.07 verdict. (*O'Green*, typed opn. 3-4.)

*O'Green*’s holding clarifies that a section 998 offer is valid where the defendant, through no fault of its own, cannot reasonably evaluate the plaintiff’s damages and so makes a section 998 offer that allows the plaintiff to choose between objectively clear options: accepting a set dollar figure or an amount to be determined by the court. (See *O'Green*, typed opn. 4-6, 9.) Publishing *O'Green*, which outlines a viable mechanism for making a valid section 998 offer in such circumstances, would help plaintiffs appreciate that they should not advise their clients to pursue wasteful litigation where they have a reasonable means to be compensated out of court. In the experience of ASCDC
members, such guidance is sorely needed, especially in cases based on statutes with fee-shifting provisions.\(^1\)

While the holding in *O’Green* is consistent with prior case law, there is no published case directly on this point. This court should therefore publish *O’Green*, to make clear that parties cannot withhold information needed to enable an opponent to place a reasonable value on the case, in order to effectuate settlement, and parties cannot reject offers that are reasonably definite without risking the effect of section 998 should they fare worse at trial. (See Cal. Rules of Court, rule 8.1105(c)(1)-(3).)

2. *O’Green* clarifies when offers of “statutory damages” are sufficiently clear to be valid.

The law is clear that section 998 offers may include nonmonetary terms and conditions, as long as the offer is unconditional and sufficiently clear to allow the offeree to evaluate it. (*Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, 799.) Of course, the devil is in the details: the boundaries of what constitutes an unconditional and sufficiently clear offer are still being defined by the courts.

In *MacQuiddy*, the Court of Appeal considered a defendant’s section 998 offer that, similar to the offer in *O’Green*, proposed to pay the plaintiff’s statutory damages under the Song-Beverly Act. (*MacQuiddy*, supra, 233 Cal.App.4th at p. 1041.) Unlike the offer in *O’Green*, however, the defendant’s offer required the plaintiff to return the vehicle “‘in an undamaged condition, save normal wear and tear.’” (*Ibid.*) The Court of Appeal held that the section 998 offer was invalid because the term requiring the vehicle to be returned in an undamaged condition was “particularly undefined.” (*Id.* at p. 1050.) Specifically, because the offer did not define “‘undamaged condition,’”

\(^1\) In Song-Beverly cases like *O’Green*, plaintiffs have every reason to drag the defendant to court, with the prospect of obtaining a civil penalty award of two times the plaintiff’s actual damages based on a claim that the defendant’s failure to repurchase the vehicle before litigation was “willful,” and the prospect of obtaining generous legal fees for all the time spent even if the jury does not award a penalty. (See Civ. Code, §§ 1794, subds. (c), (d).) By confirming trial courts’ discretion to recognize the validity of reasonable settlement offers, *O’Green* comports with Song-Beverly’s actual goal of encouraging efficient alternative dispute resolution in lieu of protracted court litigation. Indeed, while Song-Beverly imposes strict remedial measures on manufacturers, including one-way fee shifting, the Act balances those measures with other provisions that what one court described as a “carrot and stick” approach (consistent with that in section 998) to encourage parties to resolve their disputes quickly and efficiently. (*Suman v. Superior Court* (1995) 39 Cal.App.4th 1309, 1318.) Offers to compromise Song-Beverly claims under section 998 should be interpreted to accomplish the same end.
nor did it explain what would happen if the car was damaged, neither the court nor the plaintiff could evaluate the actual value of the offer. (*Ibid.*)

Because *MacQuiddy* relies on the undefined “undamaged condition” term to hold that the section 998 offer was ambiguous and invalid, the opinion does not consider whether the rest of the offer—for statutory damages under the Song-Beverly Act—is sufficiently specific to constitute a binding offer. *MacQuiddy* does suggest that the rest of the offer is certain, stating that “everything besides the condition of the car was at least minimally determined by the [Song-Beverly] Act itself.” (*MacQuiddy*, supra, 233 Cal.App.4th at p. 1050.) But since this is not the holding of *MacQuiddy*, this statement is likely dicta and not binding on the trial courts.

*O’Green* clarifies the reach of the *MacQuiddy* opinion and the two cases read together bookend the circumstances in which an unconditional offer of statutory damages can be sufficiently certain and valid under section 998, particularly where a plaintiff has refused to provide defendant with a dollar figure for the damages sought. (See *O’Green*, typed opn. 6-9.) Publication of *O’Green* is thus warranted to set the bounds of when, and with what conditions, a party may make an offer of statutory damages. (See Cal. Rules of Court, rule 8.1105(c)(2), (3).)

3. *O’Green* helpfully explains how a defendant may frame section 998 offers for statutory damages.

Here, the defendant’s section 998 offer proposed reimbursement for “past amounts paid for the vehicle including charges for transportation and manufacturer-installed options but excluding non-manufacturer items installed by a dealer or appellant,” as set forth in the Song-Beverly Act. (*O’Green*, typed opn. at p. 4.) The plaintiff in *O’Green*, and in other cases litigated by ASCDC members, argued that such offers tracking statutory damage provisions are too vague to be valid section 998 offers. In *O’Green*, the plaintiff’s counsel—a seasoned Lemon Law lawyer—professed to be confused by the definition of “non-manufacturer items,” and the meaning of the defendant’s offer to “ ’repurchase the subject vehicle.’ ” (*O’Green*, typed opn. at pp. 6-7.)

In affirming the trial judge’s ruling, *O’Green* confirms that courts have broad discretion in resolving such disputes: they may invalidate an offer that is confusing, but also may find that, under the circumstances of a particular case, no ambiguity exists so as to create a reasonable claim of confusion. It would thwart the purpose of section 998 to deny courts that discretion, especially where statutory fee shifting provides an incentive to run up attorney fees by continuing to litigate the case.

Note that *O’Green* does not put the onus on the recipient of a section 998 offer to affirmatively seek clarification of an offer that is, in fact, ambiguous or vague. The opinion mentions that the plaintiff’s counsel “did not ask for clarification,” but only as part of describing the overall context that informed the trial court’s exercise of discretion, which context included the fact that plaintiff’s counsel “specializes in Song-Beverly Act claims and should know the difference between
manufacturer and non-manufacturer items.” Accordingly, on the record in this case, the trial court acted within its discretion in finding that claims of confusion were not credible. (Typed opn. at p. 7.)

O’Green’s actual holding—that terms in an offer must be given their straightforward statutory meaning for purposes of evaluating an offer—clarifies the boundaries of valid section 998 offers, and should be published. (See Cal. Rules of Court, rule 8.1105(c)(1)-(3).)

O’Green also comports with the recent Prince v. Invensure Insurance Brokers, Inc. (May 18, 2018, G051996, G052060, G052122) (Prince), decided by the Court of Appeal for the Fourth Appellate District, Division Three. In the published portion of Prince, discussing section 998 offers, the court similarly warned against “allowing the party declining the (as hindsight demonstrated) very reasonable settlement offer to assert a ‘Gotcha!’ defense to the statutory defense to the statutory requirement to pay the offering party’s postoffer costs.” (Prince, typed opn. 23.) O’Green thus complements the holding of Prince, providing helpful guidance that will aid in the resolution of claims without unnecessary litigation. (See Cal. Rules of Court, rule 8.1105(c)(2), (3).)

4. O’Green establishes that a party’s counsel, not the party, may sign a valid section 998 offer.

The court should also publish O’Green because of its holding that a party’s counsel, rather than the party itself, may properly sign a valid section 998 offer. This holding is a straightforward interpretation of the statute: section 998 does not state that a party, rather than a party’s counsel, must sign an offer. Innumerable statutes call for a “party” to take certain action (such as filing documents) in recognition that counsel, acting as the party’s agent, will be the one undertaking those actions. And, as this court recognized in O’Green, section 998 permits a party’s counsel to accept a section 998 offer, and there is no reason to treat the offering party differently than the accepting party. (See Scott Co. v. Blount, Inc. (1999) 20 Cal.4th 1103, 1115.) Additionally, as the court notes in O’Green, the Judicial Council form for section 998 offers provides for the signature of the offering party’s attorney, not the signature of the offering party itself, where the offering party is represented by counsel. (See Judicial Council Forms, form CIV-090.)

While the statute and surrounding law all indicate that a section 998 offer is signed by the offering party’s counsel, there is no published case directly on that point. As ASCDC members can attest, O’Green is not the only case where parties have attempted to avoid the effect of a section 998 offer by challenging attorneys’ authority to sign them. Publication of the O’Green opinion is therefore warranted. (See Cal. Rules of Court, rule 8.1105(c)(1), (3).)
For the foregoing reasons, the court’s opinion readily satisfies the criteria for publication and the Association requests that the court publish its opinion in this case.

Respectfully submitted,

HORVITZ & LEVY LLP
LISA PERROCHET
ALLISON W. MEREDITH

By: [Signature]
Allison W. Meredith

Attorneys for Amicus Curiae
Association of Southern California Defense Counsel

cc: See attached Proof of Service
PROOF OF SERVICE

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, California 91505-4681.

On June 4, 2018, I served true copies of the following document(s) described as @ on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP’s practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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 June 4, 2018, at Burbank, California.

Raeann Diamond
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<thead>
<tr>
<th>Name</th>
<th>Firm</th>
<th>Contact Information</th>
<th>Role</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brian Takahashi</td>
<td>Bowman &amp; Brooke LLP</td>
<td><a href="mailto:Brian.Takahashi@bowmanandbrooke.com">Brian.Takahashi@bowmanandbrooke.com</a></td>
<td>Counsel for Defendant and Respondent Kia Motors America, Inc.</td>
</tr>
<tr>
<td>Joyce Michele Peim</td>
<td></td>
<td><a href="mailto:joyce.peim@bowmanandbrooke.com">joyce.peim@bowmanandbrooke.com</a></td>
<td></td>
</tr>
<tr>
<td>Stephen K. Cho</td>
<td></td>
<td><a href="mailto:stephen.cho@bowmanandbrooke.com">stephen.cho@bowmanandbrooke.com</a></td>
<td></td>
</tr>
<tr>
<td>Hallen D. Rosner</td>
<td>Rosner, Barry &amp; Babbitt, LLP</td>
<td><a href="mailto:hal@rbblawgroup.com">hal@rbblawgroup.com</a></td>
<td>Counsel for Plaintiff and Appellant Danielle Marissa O'Green</td>
</tr>
<tr>
<td>Arlyn L. Escalante</td>
<td></td>
<td><a href="mailto:arlyn@rbblawgroup.com">arlyn@rbblawgroup.com</a></td>
<td></td>
</tr>
<tr>
<td>Steve Borislav Mikhov</td>
<td>Knight Law Group, LLP</td>
<td><a href="mailto:stevem@knightlaw.com">stevem@knightlaw.com</a></td>
<td>Counsel for Plaintiff and Appellant Danielle Marissa O'Green</td>
</tr>
<tr>
<td>Lauren Ungs</td>
<td></td>
<td><a href="mailto:laurenu@omlawllp.com">laurenu@omlawllp.com</a></td>
<td></td>
</tr>
<tr>
<td>Bryan Charles Altman</td>
<td>The Altman Law Group</td>
<td><a href="mailto:bryan@altmanlawgroup.net">bryan@altmanlawgroup.net</a></td>
<td>Counsel for Plaintiff and Appellant Danielle Marissa O'Green</td>
</tr>
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<tr>
<td>Fred J. Hiestand</td>
<td>The Civil Justice Association</td>
<td><a href="mailto:fred@fjh-law.com">fred@fjh-law.com</a></td>
<td>Counsel for Pub/Depublication Requestor Via TrueFiling</td>
</tr>
<tr>
<td></td>
<td>of California</td>
<td><a href="mailto:fhiestand@aol.com">fhiestand@aol.com</a></td>
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| Rosemary Shahan  
Consumers for Auto Reliability and Safety  
1107 9th Street, Suite 560  
Sacramento, CA 95814 | Pub/Depublication Requestor  
Via U.S. Mail |
May 31, 2018

Hon. Arthur Gilbert, Presiding Justice
California Court of Appeal
Second Appellate District, Division Six
Court Place
200 East Santa Clara Street
Ventura, CA 93001

Re: Request to Publish Opinion in Danielle
Marissa O’Green v. Kia Motors America, Inc.,
B282366, pursuant to CRC 8.1105 (c).

Dear Presiding Justice Gilbert and
Associate Justices:

The Civil Justice Association of California
(“CJAC”) asks the Court to publish this opinion
because, inter alia, it “advances a... clarification
and construction of a... statute...” involving “a
legal issue of continuing public interest.” (CRC
8.1105 (c).)

CJAC is a 40-year-old nonprofit organization
representing businesses, professional associations
and financial institutions dedicated to informing the
public about ways to make our civil justice system
more fair, efficient, economical and certain. Toward
this end, CJAC participates as amicus curiae in
cases concerning who pays, how much, and to whom
when the conduct of some is alleged to occasion
injury to others.1 This opinion comports with CJAC’s
objectives and is valuable to courts and counsel for
the following reasons.

1 See, e.g., Sanchez v. Valencia Holding Co., LLC
(2014) 59 Cal.4th 1; and Verdugo v. Target Corp.
(2014) 59 Cal.4th 312.
1. The Opinion Applies an Existing Rule of Law – Code of Civil Procedure section 998 – to a Set of Facts Significantly Different from those Stated in Published Opinions.

A number of issues that can arise in 998 offers involving the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et. seq. (“Act”)) are addressed by this opinion that are not discussed in other published opinions. For instance, the appellant here argued the offer to compromise was invalid because it was “uncertain and incapable of valuation” (Opn., p. 4), citing the condition in the offer that it excluded payment for “non-manufacturer items” making it too vague for plaintiff to evaluate. Your opinion makes clear that in such a case the plaintiff has an obligation to “ask for clarification” rather than simply conclude the offer was not valid.

Similarly, the opinion clarifies that defendant’s condition that appellant return the vehicle “with all the factory installed equipment” does not render it “vague and ambiguous.” (Opn. p. 8.) By tracking specific language of the Act (Civ. Code § 1793.2 (d)(2)(B)), the opinion explains this “is how a Song-Beverly Act buyback works. If the law was otherwise, appellant could take [the amount offered] and strip the vehicle of its factory-installed equipment before returning it.” (Opn., pp. 8-9.)

2. The Opinion Addresses Legal Issues of Continuing Public Interest.

A Westlaw search shows more than 325 appellate opinions discuss the Song-Beverly Act and 674 separately discuss offers to compromise; a substantial number of opinions in both categories are unpublished and cannot be cited for precedent or persuasive guidance. Significantly, however, less than a dozen address 998 offers in the context of Song-Beverly Act claims.

Appellate opinions understandably represent just the “tip of the iceberg” of total claims filed in trial courts. Although the Song-Beverly Act has long been on the books, “it has been amended numerous times to broaden its consumer protection policy, expand the classes of vehicles to which the lemon law applies, lessen the types of defenses that can asserted, and change the statutory text in response to appellate decisions. Appellate decisions have helped to clarify many of the issues developed during the course of hundreds of trials under the law applying the statute to specific facts.” (Judge Ronald F. Frank, Lemon Law (2016) 39-Nov. L.A. LAW. 27, 32.)
Automobile manufacturers and dealers who do business in California tell us Song-Beverly Act claims are growing and that the use of section 998’s cost shifting mechanism to settle them is correspondingly increasing. Litigation spawned by these intersecting statutes underscores a “continuing public interest” for which the opinion in this case makes an important contribution. It deserves to be published.

Respectfully submitted,

Fred J. Hiestand
CJAC General Counsel

Proof of Service attached
PROOF OF SERVICE

I, David Cooper, am employed in the city of Sacramento, Sacramento County, State of California. I am over the age of 18 years and not a party to the within action. My business address is 3418 Third Street, Suite 1, Sacramento, CA 95817.

On May 31, 2018, I served the foregoing document described as: Publication Request of the Civil Justice Association of California in O'Green v. Kia Motors America, Inc., B252366 on all interested parties in this action by placing a true copy thereof electronically as follows:

Hallen D. Rosner
Rosner, Barry & Babbitt, LLP
10085 Carroll Canyon Rd., Suite 100
San Diego, CA 92131
Attorney for Plaintiff/Appellant (Electronic Copy)

Brian Takahashi
Bowman & Brooke LLP
970 West 190th Street
Suite 700
Torrance, CA 90502
Attorney for Defendant/Respondent (Electronic Copy)

Steve B. Mikhov
Knight Law Group, LLP
1801 Century Park E, Suite 2300
Los Angeles, CA 90067
Attorney for Plaintiff/Appellant (Electronic Copy)

Ian Gordon Schuler
Bowman and Brooke, LLP
750 B Street, Suite 1740
San Diego, CA 92101
Attorney for Defendant/Respondent (Electronic Copy)

Bryan C. Altman
The Altman Law Group
6300 Wilshire Blvd., Suite 980
Los Angeles, CA 90048
Attorney for Plaintiff/Appellant (Electronic Copy)

[X](VIA E-SERVICE) I electronically served the foregoing document via the TrueFiling website.
I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed this 31st day of May 2018 at Sacramento, California.

David Cooper
June 6, 2018

Via TrueFiling

Hon. Arthur Gilbert, Presiding Justice
California Court of Appeal
Second Appellate District, Division 6
200 East Santa Clara Street
Ventura, California 93001

Re: Opposition to Civil Justice Association of California’s Request for Publication

Danielle Marissa O’Green v. KIA Motors America, Inc.
Appeal Number: B282366
VCSC Number: 56-2014-00455603-CU-BC-VTA

Dear Presiding Justice Gilbert and Associate Justices:

Strategic Legal Practices, APC (“SLP”) provides skilled legal representation for clients in a range of consumer protection and civil litigation matters with a concentration in lemon law. We respectfully ask this Court to reject Civil Justice Association of California’s (“CJAC”) Request for Publication as it fails to meet the standards set forth in California Rule of Court 8.1105(c).

The purpose of California Code of Civil Procedure §998 (“CCP 998”) offers is to encourage resolution of cases and to encourage parties to accept reasonable settlement offers. The statute and the case law require specific offers that can be fairly evaluated by the recipient and the court. Fassberg Construction Co. v. Housing Authority of Los Angeles (2007) 152 Cal. App. 4th 720, 764; see also Valentino v. Elliott Sav-On Gas Inc. (1988) 201 Cal. App.3d 692, 697-98. An offer made pursuant to CCP §998 must be sufficiently specific to permit the recipient to evaluate the offer. Fassberg, supra. Moreover, CCP §998 offers are strictly construed in favor of the party subjected to the offer. Barella v. Exchange Bank (2000) 84 Cal. App.4th 793, 799. In interpreting statutory offers, California courts have “placed squarely on the offering party the burden of demonstrating that the offer is a valid one under section 998.” Id. (emphasis added)
Accordingly, there is no requirement for the recipient of a CCP 998 offer to request clarification from the offeror. The burden is on the party who makes the offer to provide sufficient specificity to enable the recipient to fairly evaluate the offer.

This decision, if published, could unfairly shift the burden onto Plaintiff which is contrary to existing law. Worse yet, this decision could lead to a slippery slope, weakening consumer protection statutes, and allow large manufacturers to issue increasingly vague and ambiguous CCP 998 offers. Moreover, it is unclear that Plaintiff could recover her attorneys fees spent seeking to clarify Defendants offer (as such clarification efforts would necessarily occur after service of the offer). Publishing this case would increase uncertainty regarding CCP 998 offers, as opposed to creating greater clarity.

Ultimately, California’s legislature has the authority to change or amend CCP 998. They have not. Therefore, SLP respectfully requests this Court to reject CJAC’s Request For Publication.

Respectfully Submitted,

Jacob William Cutler
Strategic Legal Practices, APC
CERTIFICATE OF SERVICE

O'Green v. Kia Motors America, Inc., et al.
Second Appellate District, Division 6 Case No. B282366
Ventura County Case No. 56-2014-00455603-CU-BC-VTA

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is: 10085 Carroll Canyon Road, Suite 100, San Diego, California 92131.

On June 7, 2018, I served the following document(s) described as:

**June 6, 2018 Correspondence to**
Hon. Arthur Gilbert, Presiding Justice and Associate Justices

on the interested parties in this action at San Diego, California addressed as follows:

<table>
<thead>
<tr>
<th>Name and Address</th>
<th>Name and Address</th>
</tr>
</thead>
</table>
| Brian Takahasi, Esq.  
Joyce Peim, Esq.  
Stephen K. Cho, Esq.  
BOWMAN AND BROOKE LLP  
970 West 190th Street, Suite 700  
Torrance, CA 90502  
(310) 768-3068 / F: (310) 719-1019  
brian.takahashi@bowmanandbrooke.com  
joyce.peim@bowmanandbrooke.com  
Stephen.cho@bowmanandbrooke.com |  
KNIGHT LAW GROUP, LLP  
Steve Mikhov, SBN 224676  
Lauren Unger, SBN 273374  
1801 Century Park East, Suite 2300  
Los Angeles, California 90067  
(310) 552-2250 / F: (310) 552-7973  
steve@knighlaw.com  
lauren@knighlaw.com |
| Ian G. Schuler, Esq.  
BOWMAN AND BROOKE LLP  
750 B Street, Suite 1740  
San Diego, CA 92101  
(619) 376-2500 / F: (619) 376-2501  
ian.schuler@bowmanandbrooke.com |  
Bryan C. Altman, Esq.  
ALTMAN LAW GROUP  
6300 Wilshire Boulevard, Suite 980  
Los Angeles, CA 90048  
(323) 653-5581 / F: (323) 653-5542  
bryan@altmanlawgroup.net |
| Fred J. Hiestand, Esq.  
CJAC General Counsel  
3418 Third Avenue, Suite 1  
Sacramento, CA 95817  
(916) 448-5100 / F: (916) 442-8644  
jhiestand@aol.com |  
Rosemary Shahan, Esq.  
CONSUMERS FOR AUTO RELIABILITY AND SAFETY  
1107 9th Street, Suite 560  
Sacramento, CA 95814  
rs@carconsumers.org |
<p>| | |
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<table>
<thead>
<tr>
<th>Allison W. Meredith, Esq.</th>
<th>Kate S. Lehrman, Esq.</th>
</tr>
</thead>
<tbody>
<tr>
<td>ASSOCIATION OF SOUTHERN</td>
<td>Robert A. Philipson, Esq.</td>
</tr>
<tr>
<td>CALIFORNIA DEFENSE COUNSEL</td>
<td>LEHRMAN LAW GROUP</td>
</tr>
<tr>
<td>2520 Venture Oaks Way, Suite 150</td>
<td>12121 Wilshire Boulevard, Suite 1300</td>
</tr>
<tr>
<td>Sacramento, CA 95833</td>
<td>Los Angeles, CA 90025</td>
</tr>
<tr>
<td>(800) 564-6791 / F: (916) 239-4082</td>
<td>(310) 917-4500 /F: (310) 917-5677</td>
</tr>
<tr>
<td><a href="mailto:ameredith@horvitzlevy.com">ameredith@horvitzlevy.com</a></td>
<td><a href="mailto:klehrman@lehrmanlawgroup.com">klehrman@lehrmanlawgroup.com</a></td>
</tr>
<tr>
<td><a href="mailto:rphilipson@lehrmanlawgroup.com">rphilipson@lehrmanlawgroup.com</a></td>
<td></td>
</tr>
</tbody>
</table>

Attorney for Third Party
ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

Attorney for Third Parties
VARIOUS AUTOMOBILE MANUFACTURES AND DISTRIBUTORS

[X] **(BY TRUEFILING ELECTRONIC E-FILING/SERVICE):**

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 court rules.

[X] **(STATE):** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 7, 2018, at San Diego, California.

Lee Anne Garcia
AUTOMOTIVE CLASS ACTIONS UPDATE

APRIL 3, 2018

American Bar Association • Tort Trial & Insurance Practice Section
2019 Emerging Issues in Motor Vehicle Product Liability Litigation

Rachel Straus
Partner
Sidley Austin LLP
1999 Avenue of the Stars 17th Floor
Los Angeles, CA 90067
(310) 595-9487

Troy Yoshino
Partner
Squire Patton Boggs (US) LLP
275 Battery Street, Suite 2600
San Francisco, CA 94111
(415) 743-2441
Automotive Class Actions Update

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Recently Filed Automotive Class Actions
Sampling of Automotive Defect Class Actions Filed in the Past Three Months

- Over 30 class actions filed against OEMs.
  - Almost every major auto manufacturer has been sued in a class action alleging a defect in their vehicles.
  - Majority filed in federal court in California, Florida, Michigan, Illinois and Texas.
- Alleged defects include:
  - Occupant classification system software defect incorrectly classifies passenger seat as empty and deactivates airbag;
  - Electronic stability control system may engage when it should not;
  - LED running lights fail prematurely;
  - Panoramic sunroof explodes or shatters unexpectedly causing shower of glass to fall into vehicle;
  - Front sensor falsely detects objects;
  - Towing capacity of hitch is lower than advertised;
  - Mold in HVAC system produces noxious odors.
The Expanding Role of Manageability in Adjudicating Class Certification
A Recent First Circuit Decision Concisely Summarizes the Modern Manageability Test

- For many years, most class action practitioners have thought of certain issues as standing, ascertainability, or other matters.

- As some courts rule against such arguments in their old “boxes,” other decisions have viewed similar issues as manageability matters.

- On October 15, 2018, the First Circuit held: “to determine whether a class certified for litigation will be manageable, the district court must at the time of certification offer a reasonable and workable plan” as to how a defendant will be allowed to assert defenses at trial such as “genuine challenges to allegations of injury-in-fact.” The plan must be:
  - “[P]rotective of the defendant’s constitutional rights”; and
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Case Study No. 1: “Standing” of Absent Class Members (Asacol)

- The district court certified a class in an antitrust class action where ~10% of the class was not injured, because they would not have bought a lower-priced alternative even if it were available.
  - Court ruled that class members could establish their injury via affidavit about their preferences in the claims process.

- The First Circuit reversed: “Plaintiffs’ proposed claims process provides defendants *no meaningful opportunity* to contest whether an individual would have, in fact, purchased” the lower-priced alternative. 907 F.3d at 53.
  - Preserving defendants’ rights would require “a trial in which thousands of class members testify” would be *unmanageable*.

- *Asacol* shows that *standing is not the only problem* posed by uninjured class members

- A number of circuits—including the First, Third, Seventh, and Tenth—have ruled that not all absent class members need to have standing. Ninth Circuit authority is unclear on the point.
Case Study No. 2: Administrative Feasibility—
“Ascertainability” in Some Courts (Briseno)

- Even in courts where no “administrative feasibility” requirement is encompassed within ascertainability, *Briseno v. ConAgra Foods* shows that the *infeasibility* of determining who is included in a putative class can be a manageability problem. 844 F.3d 1121 (9th Cir. 2017).

- *Briseno* suggests that “manageability concerns” should not be the sole reason to deny class certification (*id.* at 1128)—but like *Asacol*, *Briseno* also recognizes that a defendant must have “opportunities to contest” every aspect of Plaintiffs’ case.” *Id.* at 1131.
  - “Rule 23(b)(3) already contains a specific, enumerated mechanism to achieve that goal [i.e., the goal of the ‘administrative feasibility’ requirement]: the manageability criterion of the superiority requirement.” *Id.* at 1127-28.
  - Focus is on due process issues resulting from trial manageability considerations.

- Defendant ConAgra was faulted for not explaining why certain traditional claims-process “procedures [were] insufficient to safeguard its due process rights” (*id.*)—so parties should not rely merely on their opponents’ burden of proof in this context.
Case Study No. 3—Other Defenses Also Can Cause Manageability Issues

- In *McCleery v. Allstate Ins. Co.*, --- Cal. App. 5th --- (Dec. 14, 2018), the California Court of Appeal enforced a manageability and trial plan requirement similar to the one enforced in federal courts.
  - It assumed, without deciding, that a double-blind survey proffered by plaintiffs was “scientifically valid” evidence—but it nonetheless reversed certification on manageability grounds.

- Although *McCleery* is a wage-and-hour class action, it holds important lessons for automotive class action practitioners.
  - First, scrutiny of surveys and related issues is important, even where *Daubert* admissibility is assumed. The court found that the proffered survey failed to address a number of questions that likely would require individualized proof.
  - Second, “Defendants have the right to defend against plaintiffs’ claims by impeaching the evidence supporting them.” The anonymized survey “unfairly insulated [the] survey from any meaningful examination.”
Ascertainability
Ascertainability…Still Waiting

- **Circuit Split**
  - “Most circuit courts of appeal have recognized that Rule 23 contains an implicit threshold requirement that the members of a proposed class be readily identifiable, often characterized as an ascertainability requirement.” *In re Petrobas Securities*, No. 16-1914 (2d Cir. 2017).
  - “Class action plaintiff must “demonstrate his purported method for ascertaining class members is reliable and administratively feasible.” *Carrera v. Bayer Corp.*, 727 F.3d 300, 308 (3rd Cir. 2013).

- Supreme Court rejected certiorari of cases in which the Circuit Courts rejected the Third Circuit’s heightened standard.
- Supreme Court may be waiting to grant certiorari in a case applying the Third Circuit’s heightened standard.
Class Action Settlements
Class Action Settlements: Recent Developments

- Rule 23 Amendments (December 1, 2018)
- *In re Hyundai and Kia Fuel Economy Lit.*
Overview of *In re Hyundai & Kia Fuel Economy Lit.*

- $200 million nationwide class settlement arising out of alleged misstatements by Hyundai and Kia regarding fuel efficiency of vehicles.
- District Court found that common questions predominated and certified a settlement under Rule 23(b)(3). MDL 13-2424-GW, 2014 WL 12603199.
- 9th Circuit remanded and found that District Court abused its discretion because variations in state law defeated Rule 23’s “predominance” requirement. 891 F.3d 679 (9th Cir. 2018).
- Plaintiffs and Defendants sought an *en banc* hearing, which was held on September 18, 2019. 897 F.3d 1003 (9th Cir. 2018).
- Plaintiffs’ *en banc* petition: “Requiring the parties to engage in detailed choice-of-law and/or multi-state consumer law analysis as a prerequisite to certification of a nationwide class increases both the burden on the district courts and the expense and uncertainty of nationwide settlements and makes such settlements less likely.”
Expert Testimony at Class Certification
Notable Recent Ninth Circuit Decision

- In May 2018, the Ninth Circuit ruled that “inadmissibility alone is not a proper basis to reject evidence in support of class certification.”
  - “Greater evidentiary freedom” is needed at certification.
  - For expert testimony, Daubert still applies, but admissibility problems merely go to the weight of the evidence, not whether it should be considered. Id. at 634.

- Few cases have applied *Sali* yet.
  - A C.D. Cal. judge ruled that disputes as to whether a conjoint analysis relied on erroneous factual assumptions did not “automatically render her methodology and conclusions unreliable.” *Hamilton v. TBC Corp.*, 328 F.R.D. 359, 374 (C.D. Cal. 2018).
The Supreme Court expressed “doubt” about *Daubert* not applying at class certification in *Dukes*, 564 U.S. 338, 354 (2011)—but there is now a significant dispute over how *Daubert* applies.

- The Third, Sixth, Seventh, and Eleventh Circuits require a full *Daubert* analysis at class certification, at least when it is critical to certification issues.

- The Second and Fifth Circuits have indicated that evidence needs to be admissible to be considered at class certification, although they have not specifically addressed *Daubert*.

- The Eighth Circuit has held that evidence need not be admissible at class certification. *Daubert* applies, but courts should focus on “the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence.”
Practice Tips for Dealing with the Uncertain Landscape

- Research your judge and jurisdiction: the federal Circuit split has created **divergent case law** in the district and state courts.

- In the **Eighth and Ninth Circuits**, as well as jurisdictions without binding case law:
  - Be aware that your opponent **and** you can rely on a broader range of evidence.
  - Make sure to preserve all evidentiary objections, in case the Supreme Court (or another binding court) later resolves the dispute in your favor.
  - And—remember that, even in the Eighth and Ninth Circuits, you can **still** argue that admissibility-type problems are reasons why the evidence should be given no weight at all.
Common Defects
The Case Case Study: Is Finding No Evidence of a Common Defect a Merits Determination?

- Class action filed in 2009 in California Superior Court alleging defects in the transmissions of various Honda and Acura vehicles.
- Trial court denied certification, excluded experts, and all other evidence submitted by plaintiffs.
- On July 23, 2018, Court of Appeal reversed denial of certification finding that:
  - the trial court engaged in an improper merits determination;
  - it was sufficient for Plaintiffs to merely allege a “theory” of defect liability;
  - Trial Court “improperly evaluated the admissibility of plaintiffs’ evidence and weighed it against the evidence offered by Honda;”
  - Plaintiffs’ “evidence does not need to be admissible, it only needs to be the “type of classwide evidence that could, if meritorious, establish liability;”

Application of *Bristol-Myers Squibb* to Class Actions
Application of BMS to Class Actions?

- In *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), a mass tort action, the Supreme Court held that a California state court could not exercise personal jurisdiction over the defendant as to claims brought by plaintiffs who did not reside in California because there was no connection between their claims and California.

- **Split in Authority:**
  - A few courts have held that BMS applies to absent class members, requiring dismissal of non-resident members’ claims for lack of personal jurisdiction.
  - The slight majority of other district courts have held the opposite.
  - No Circuit Court has yet ruled on the issue.

- **Personal Jurisdiction Can Be Waived**
  - Thus, if you want to preserve the BMS argument, it must be made:
    - As a Rule 12(b)(2) motion if you make any Rule 12 motion; or
    - Asserted in a responsive pleading, if that is the first filing.
Summary of Arguments Regarding Application of BMS to Class Actions

- **Arguments in favor** of applying BMS to nationwide classes:
  - Article III and concerns expressed in BMS are not abrogated by Rule 23
  - *Shutts* predates *BMS*, which now controls
  - Prevents forum shopping

- **Arguments against** applying BMS to nationwide classes:
  - Rule 23 sufficiently protects due process rights
  - Congress has the authority to shape federal jurisdiction
  - *BMS* left open whether its holding extended to federal courts
A minority of districts have held that BMS *does apply* to non-resident class members.

- Most decisions holding that BMS applies come from N.D. Ill., though some judges in the district disagree.
- Judges in D. Ariz. and E.D.N.Y. have concluded that BMS applies to non-resident class members, but arguably only in dicta.
- The primary basis for each of these decisions is that the federalism concerns expressed in BMS apply equally to the claims by non-resident putative class members.

Numerous other district courts have held BMS *does not apply* to putative class members, including N.D. Cal., C.D. Cal., and D.N.J.

- Each of these decisions contains at least some analysis of the issue, and all of them distinguish BMS by concluding that class action procedures (e.g., opt-outs) provide sufficient *due process protection*.
Recent Developments in Class Action Law
Standards for Issue Certification

- *Martin v. Behr Dayton Thermal Prods.* is a groundwater contamination case involving “old” Chrysler, Behr, and others. On July 16, 2018, the **Sixth Circuit** affirmed class certification by adopting the **“broad” view** of when issue certification under Rule 23(c)(4) is proper. 896 F.3d 405 (6th Cir. 2018).
  - Under this broad view, issue certification is proper “even where predominance has not been satisfied for the cause of action as a whole,” so long as predominance and superiority are satisfied for the issues identified for class treatment.
  - This broad view has been adopted by the Second, Fourth, Seventh, Ninth—and now the Sixth—Circuits.
  - The “narrow” view of issue certification—held by the Fifth and Eleventh Circuits—“prohibits certification if predominance has not been satisfied as to the cause of action as a whole.” *Id.*

- The U.S. Supreme Court requested a response to defendants’ cert petition at the end of last year, and the case is now slated for the March 15 conference.
9th Cir. Rejects C.D. Cal. Certification Deadline

- In Oct. 2018, the Ninth Circuit held that C.D. Cal.’s 90-day deadline to file for class certification is “incompatible” with the flexibility required by Rule 23. *ABS Entm't v. CBS Corp.*, 908 F.3d 40 (9th Cir. 2018)
  - L.R. 23-3 is not *per se* unenforceable; timing must be assessed on a case-specific basis.
  - Parties must be given adequate time to develop a record that will allow a “rigorous analysis” of certification prerequisites.
  - Court must assess whether, e.g., discovery is needed.

- *ABS calls into question* the validity of similar rules in other jurisdictions.

- *Plaintiffs should still comply* with the rule or seek permission to extend the deadline.
  - But it may be more difficult for defendants to seek enforcement of the rule (or to reject requests to extend the deadline).
Rule 23(f) Deadline Cannot Be Extended

- On Feb. 26, 2019, the Supreme Court ruled that the 14-day deadline to file a Rule 23(f) petition **cannot be extended**. *Neutraceutical Corp. v. Lambert*, No. 17-1094.
  - The rule is a mandatory nonjurisdictional claim-processing rule, not subject to tolling or exception for reasons of equity or fairness.
  - Plaintiff had not met the 14-day deadline because he moved the trial court for reconsideration first.
  - The Ninth Circuit allowed him to file his 23(f) petition after the district court ruled on the motion for reconsideration because he had informed the trial court of his intention to seek reconsideration within 14 days and “otherwise acted diligently.”

- Result: **Parties must make sure to meet the 14-day deadline** even if they plan to seek reconsideration.
Next Big Things
Litigation Related to Autonomous and Semi-Autonomous Vehicles

- **Cases Already Being Filed:**
  - *Sheikh v. Tesla*: 17-cv-02193 (N.D. Cal. 2018): Tesla settled autopilot class action alleging Tesla breached its promises related to when certain updates to its Enhanced Autopilot would be available and misrepresented the functionality of the system.
    - Plaintiffs alleged that certain advertisements misrepresented the characteristics of Honda’s Collision Mitigation Braking System (“CMBS”) and omitted material information on its limitations.
    - Honda claimed it properly disclosed the CMBS’ limitations in such things as the owners’ manual; in a DVD that was provided in the glove box of the vehicles and posted on websites for customers and potential customers; and it published an article in Acura Style magazine highlighting the CMBS’s limitations.
Take Aways from Early Autonomous and Semi-Autonomous Class Actions

- OEMs must be careful not to overstate product functionality;
- OEMs must carefully consider product names, scrutinize how product marketing may lead to misinterpretation, and temper promises made about product features;
- owners’ manuals need to include accurate, extensive and prominent explanations about how to use autonomous features and their limitations;
- disclosures about feature limitations should be prominent and written in language an average consumer can comprehend;
- OEMs should consider training of customers and sales associates about features and limitations e.g.,:
  - offering live training or clinics;
  - online training videos;
  - FAQ section of website;
  - dedicated hotline to answer customer questions about autonomous vehicle features.
Recent Litigation Trends

- The rise of class actions/collective redress in other countries, requiring companies to be coordinated globally in risk management, not merely litigation strategy (e.g., Canada, Australia, Israel, South Africa, EU, and others)
- Cases increasingly have industry-wide scope with many different manufacturers (e.g., keyless cars, soy wiring, panoramic sunroofs)
- Increased reliance on RICO claims and inclusion of suppliers as defendants (e.g., diesel emissions cases, Takata, Ford/FCA/GM/Bosch CP4 fuel pumps)
- Securities class actions on the rise, including against automakers
  - E.g., VW diesel emissions, FCA diesel emissions and NHTSA compliance, Tesla Model 3 manufacturing delays
Automotive Class Actions Update

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  *Briseno* suggests that “manageability concerns” should be not be the sole reason to deny class certification (*id.* at 1128)—but like Asacol, *Briseno* also recognizes that a defendant must have “opportunities to contest every aspect of Plaintiffs’ case.” *Id.* at 1131.

- “Rule 23(b)(3) already contains a specific, enumerated mechanism to achieve that goal [i.e., the goal of the ‘administrative feasibility’ requirement]: the manageability criterion of the superiority requirement.” *Id.* at 1127-28.

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Ascertainability…Still Waiting

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  - Trial Court “improperly evaluated the admissibility of plaintiffs’ evidence and weighed it against the evidence offered by Honda;”
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*Case v. American Honda Motor, Co., Inc.*, 2018 WL 3434187
Application of *Bristol-Myers Squibb* to Class Actions
Application of BMS to Class Actions?

- In *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), a mass tort action, the Supreme Court held that a California state court could not exercise personal jurisdiction over the defendant as to claims brought by plaintiffs who did not reside in California because there was no connection between their claims and California.

**Split in Authority:**
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- The slight majority of other district courts have held the opposite.
- No Circuit Court has yet ruled on the issue.

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- **Arguments in favor** of applying *BMS* to nationwide classes:
  - Article III and concerns expressed in *BMS* are not abrogated by Rule 23
  - *Shutts* predates *BMS*, which now controls
  - Prevents forum shopping

- **Arguments against** applying *BMS* to nationwide classes:
  - Rule 23 sufficiently protects due process rights
  - Congress has the authority to shape federal jurisdiction
  - *BMS* left open whether its holding extended to federal courts
District Courts Split on Applicability of *BMS*

- A minority of districts have held that BMS **does apply** to non-resident class members.
  - Most decisions holding that BMS applies come from N.D. Ill., though some judges in the district disagree.
  - Judges in D. Ariz. and E.D.N.Y. have concluded that BMS applies to non-resident class members, but arguably only in dicta.
  - The primary basis for each of these decisions is that the *federalism concerns* expressed in BMS apply equally to the claims by non-resident putative class members.

- Numerous other district courts have held BMS **does not apply** to putative class members, including N.D. Cal., C.D. Cal., and D.N.J.
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  - This broad view has been adopted by the Second, Fourth, Seventh, Ninth—and now the Sixth—Circuits.
  - The “narrow” view of issue certification—held by the Fifth and Eleventh Circuits—“prohibits certification if predominance has not been satisfied as to the cause of action as a whole.” *Id.*

- Unfortunately, the Supreme Court denied certiorari on March 18, 2019—so the circuit split continues to exist.
In Oct. 2018, the Ninth Circuit held that C.D. Cal.’s 90-day deadline to file for class certification is “incompatible” with the flexibility required by Rule 23. ABS Entm’t v. CBS Corp., 908 F.3d 40 (9th Cir. 2018)

- L.R. 23-3 is not *per se* unenforceable; timing must be assessed on a case-specific basis
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**ABS calls into question** the validity of similar rules in other jurisdictions.

**Plaintiffs should still comply** with the rule or seek permission to extend the deadline.

- But it may be more difficult for defendants to seek enforcement of the rule (or to reject requests to extend the deadline).
Rule 23(f) Deadline Cannot Be Extended

- On Feb. 26, 2019, the Supreme Court ruled that the 14-day deadline to file a Rule 23(f) petition cannot be extended. Neutraceutical Corp. v. Lambert, No. 17-1094.
  - The rule is a mandatory nonjurisdictional claim-processing rule, not subject to tolling or exception for reasons of equity or fairness.
  - Plaintiff had not met the 14-day deadline because he moved the trial court for reconsideration first.
  - The Ninth Circuit allowed him to file his 23(f) petition after the district court ruled on the motion for reconsideration because he had informed the trial court of his intention to seek reconsideration within 14 days and “otherwise acted diligently.”

- Result: Parties must make sure to meet the 14-day deadline even if they plan to seek reconsideration.
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- OEMs should consider training of customers and sales associates about features and limitations e.g.:
  - offering live training or clinics;
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  - FAQ section of website;
  - dedicated hotline to answer customer questions about autonomous vehicle features.
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- The rise of class actions/collective redress in other countries, requiring companies to be coordinated globally in risk management, not merely litigation strategy (e.g., Canada, Australia, Israel, South Africa, EU, and others)

- Cases increasingly have industry-wide scope with many different manufacturers (e.g., keyless cars, soy wiring, panoramic sunroofs)

- Increased reliance on RICO claims and inclusion of suppliers as defendants (e.g., diesel emissions cases, Takata, Ford/FCA/GM/Bosch CP4 fuel pumps)

- Securities class actions on the rise, including against automakers
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AUTOMOTIVE CLASS ACTIONS UPDATE

APRIL 3, 2018

American Bar Association • Tort Trial & Insurance Practice Section
2019 Emerging Issues in Motor Vehicle Product Liability Litigation

Rachel Straus
Partner
Sidley Austin LLP
1999 Avenue of the Stars 17th Floor
Los Angeles, CA 90067
(310) 595-9487

Troy Yoshino
Partner
Squire Patton Boggs (US) LLP
275 Battery Street, Suite 2600
San Francisco, CA 94111
(415) 743-2441
Automotive Class Actions Update

2019 Emerging Issues in Motor Vehicle Product Liability Litigation
Recently Filed Automotive Class Actions
Sampling of Automotive Defect Class Actions Filed in the Past 3 Months

- Over 30 class actions filed against OEMs.
  - Almost every major auto manufacturer has been sued in a class action alleging a defect in their vehicles.
  - Majority filed in federal court in California, Florida, Michigan, Illinois and Texas.

- Allocated defects include:
  - Occupant classification system software defect incorrectly classifies passenger seat as empty and deactivates airbag;
  - Electronic stability control system may engage when it should not;
  - LED running lights fail prematurely;
  - Panoramic sunroof explodes or shatters unexpectedly causing shower of glass to fall into vehicle;
  - Front sensor falsely detects objects;
  - Towing capacity of hitch is lower than advertised;
  - Mold in HVAC system produces noxious odors.
The Expanding Role of Manageability in Adjudicating Class Certification
For many years, most class action practitioners have thought of certain issues as standing, ascertainability, or other matters.

As some courts rule against such arguments in their old “boxes,” other decisions have viewed similar issues as manageability matters.

On October 15, 2018, the First Circuit held: “to determine whether a class certified for litigation will be manageable, the district court must at the time of certification offer a reasonable and workable plan” as to how a defendant will be allowed to assert defenses at trial such as “genuine challenges to allegations of injury-in-fact.” The plan must be:

- “[P]rotective of the defendant’s constitutional rights”; and
- “not cause individual inquiries to overwhelm common issues.”

Case Study No. 1: “Standing” of Absent Class Members (Asacol)

- The district court certified a class in an antitrust class action where ~10% of the class was not injured, because they would not have bought a lower-priced alternative even if it were available.
  - Court ruled that class members could establish their injury via affidavit about their preferences in the claims process.
- The First Circuit reversed: “Plaintiffs’ proposed claims process provides defendants no meaningful opportunity to contest whether an individual would have, in fact, purchased” the lower-priced alternative. 907 F.3d at 53.
  - Preserving defendants’ rights would require “a trial in which thousands of class members testify” would be unmanageable.
- Asacol shows that standing is not the only problem posed by uninjured class members
- A number of circuits—including the First, Third, Seventh, and Tenth—have ruled that not all absent class members need to have standing. Ninth Circuit authority is unclear on the point.
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CITATIONS FOR SLIDE 16

Circuits requiring some form of Daubert analysis:

• In re Blood Reagents Antitrust Litig., 783 F.3d 183, 187 (3d Cir. 2015)
• In re Carpenter Co., 2014 WL 12809636 (6th Cir. Sept. 29, 2014) (unpub.)
• Messner v. Northshore Univ. Health Sys., 669 F.3d 802 (7th Cir. 2012)
• Sher v. Raytheon, 419 F. App’x 887 (11th Cir. 2011) (unpub.)

Second and Fifth Circuit opinions:

• In re IPO Secs. Litig., 471 F.3d 24, 40-42 (2d Cir. 2006) (rejecting notion that “an expert’s testimony may establish a component of a Rule 23 requirement simply by being not fatally flawed.” Rather, a “district judge is to assess all of the relevant evidence admitted at the class certification stage . . .”)
• Unger v. Amedisys Inc., 401 F.3d 316, 322-25 (5th Cir. 2005) (in a securities class action, “class certification based on the fraud on the market theory must [be] . . . base[d] . . . on admissible evidence”)

Eighth Circuit opinion: In re Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604 (8th Cir. 2011)

CITATIONS FOR SLIDE 21

• Note: This issue differs from whether BMS requires that there be personal jurisdiction over the claims of named non-resident class plaintiffs, with almost all courts concluding that it does apply in that context. See, e.g., Spratley v. FCA US LLC, 2017 U.S. Dist. LEXIS 147492 (N.D.N.Y. Sept. 12, 2017); Greene v. Mizuho Bank, Ltd., 2017 U.S. Dist. LEXIS 202802 (N.D. Ill. Dec. 11, 2017); Molock v. Whole Foods Mkt., Inc., 2018 U.S. Dist. LEXIS 42582 (Mar. 15, 2018) (but rejecting application of BMS to putative class members).
CITATIONS FOR SLIDE 22

Arguments in Favor

- **Forum Shopping**: “There is also the issue of forum shopping, which was mentioned in the Chinese DryWall case as a basis for distinguishing mass torts from class actions, but possible forum shopping is just as present in multi-state class actions.” *DeBernardis*, 2017 U.S. Dist. LEXIS 7947, at *6-7.

- **Rule 23**: “Rule 23’s [class action] requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that the [federal court] rules of procedure “shall not abridge, enlarge, or modify any substantive right” ’ ’ ” *Practice Management*, 2018 U.S. Dist. LEXIS 39754, at *47. “The Supreme Court held in Bristol-Myers that the Fourteenth Amendments’ due process clause precludes nonresident plaintiffs injured outside the forum from aggregating their claims with an in-forum resident. Under the Rules Enabling Act, a defendant’s due process interest should be the same in the class context.” *Id.*


Arguments Against

- **Rule 23**: “[I]n contrast to a mass action like *Bristol-Myers*, which may—and likely would—present significant variations in the plaintiffs' claims, the requirements of Rule 23 class certification ensure that the defendant is presented with a unitary, coherent claim to which it need respond only with a unitary, coherent defense. Because of the unitary nature of that class claim, the Court perceives no unfairness in halting the defendant into court to answer to it in a forum that has specific jurisdiction over the defendant based on the representative’s claim.” *Sanchez*, 2018 U.S. Dist. LEXIS 28907, at *11.

- **Congressional Authority Allows**: *Chinese Drywall* court surveyed various federal statutes and rules that survived constitutional challenges, including Federal Rules 4 and 23, the Multidistrict Litigation Act and CAFA. The court concluded: “Accordingly, it is clear and beyond dispute that Congress has constitutional authority to shape federal court’s jurisdiction beyond state lines to encompass nonresident parties....” 2018 U.S. Dist. LEXIS 197612, at *53.

- **BMS Left Open Whether It Applies to Federal Courts**: Court left “open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.” Justice Sotomayor in dissent raised issue of whether *BMS* applies to class actions: “The Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there.”
CITATIONS FOR SLIDE 23

N.D. Ill. cases holding that BMS applies:

N.D. Ill. cases holding that BMS does not apply:
Note: list is not exhaustive, but represents each district that has ruled. Some districts have multiple decisions refusing to apply BMS.

D. Ariz & E.D.N.Y cases:

Cases holding BMS does not apply:
Before I was an attorney, all I knew about trials was what I saw in segments of the O.J. Simpson trial. Unlike what the courtroom looked like when Jack McCoy cross-examined a witness, the courtroom in the O.J. trial was packed with people in suits, a judge surrounded by more people in suits, stacks of papers on tables, floors, and leaned against the walls, an old-school projector and even older computers, and what appeared to be old stained 80’s carpet, and college dorm-room furniture. Still, I knew something special was happening in the O.J. courtroom, even though the surroundings suggested otherwise.

Since watching those segments of the O.J. trial, my perspective on trials has come a long way. Maybe it was my two-years as a federal law clerk for Judge Julie Robinson, the now Chief Judge for the District of Kansas, or my more recent appearances in the courts down in the Texas Valley, which have changed and continue to change how I prepare for and try a case. In fact, what I’ve learned since the O.J. trial is that most trials are not like O.J. Simpson’s. Trials are tedious and arduous tasks. As a lawyer, you must be consumed with your case to do what Johnnie Cochran so unabashedly uttered, “[i]f it doesn’t fit, you must acquit.”

Recently, I started reading “Turning Points At Trial.” The author, Shane Read, has gathered some “masters” of the courtroom and distilled lessons they’ve learned from years honing their skills trying cases. Read taps an all-star cast of lawyers such as Alan Dershowitz, David Bernick, and Mark Lanier. From the opening statement to waiting for the jury to return, Read captures some of the finer points of trying a case from these greats. For instance, according to Lanier, stretching
the truth is the worst thing a lawyer can do in opening statements.\(^1\) A close second is not addressing weaknesses in his or her case.\(^2\) Bernick’s view is that a lawyer must be able to tell a consistent story in opening, during witness examinations, and in closing.\(^3\) While voir dire is many times handled by the judge, in Texas, attorneys have the opportunity to talk to the potential jurors. In Bernick’s view, this is a perfect opportunity to begin telling the story and showing jurors a “bigger picture.”\(^4\)

This led me to reach out to some of my mentors, those who have more insights about trials and juries than I do. But first, a little of what I’ve learned in preparing this article and for the presentation at the 2019 Emerging Issues in Motor Vehicle Product Liability Litigation conference.

As lawyers, we are accustomed to the occasional run-away jury. If a lawyer wins a case he thoroughly expected to lose, he praises the jury; but, if the lawyer loses a case with an extraordinary number attached to the verdict (think hundreds of millions), the sentiment is usually “what was the jury thinking?” However, as lawyers, we may be asking the wrong question. Instead of what was the jury thinking, maybe we should be asking was the jury’s conclusion reasonable—not reasonable from a legal perspective, but from a psychological perspective. One author noted that “[b]ecause jury trials are, by definition, close cases—otherwise, they are dropped, settled, or plea bargained—almost all verdicts are going to be reasonable.”\(^5\) So if most jury verdicts are “reasonable,” then how as lawyers can we make sure that that reasonableness works to our clients’ favor?

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\(^2\) *Id.* at 32.
\(^3\) *Id.* at 213.
\(^4\) *Id.*
According to Bornstein and Greene, jurors filter information and make judgments based on their “experiences, expectations, values, and beliefs.” This leads jurors to remember and place more weight on information that is consistent with their preferences. Accordingly, identifying potential jurors’ preferences during voir dire becomes important to lawyers who want jurors who will view the evidence in their clients’ favor.

Another factor psychologists believe impact jury outcomes is the influence the majority of jurors has on the minority. Typically, the majority of jurors will ultimately succeed in persuading the minority. For example, in deliberations, Julie Kiernan Coon quickly found that the dominant personalities on the jury were eager to express their views, which may sometimes prevent those more introverted jurors from even speaking up. Moreover, according to Coon, many jurors had already formed their opinions, even about irrelevant factors.

Importantly, though, what Coon observed was that many of the jurors relied on tried-and-true methods to make judgment calls. For instance, a number of jurors did not believe the victim in the case because he did not make consistent eye contact with jurors while testifying, says Coon. As for the defendant, his consistent eye contact was key to his believability. The jurors also found confounding the information the lawyers did not present at trial. To Coon, this was problematic because it left open parts of the story that jurors fill-in with their experiences instead of the evidence.

As lawyers, our job is not only to identify the potential juror’s preferences and filter those through his or her experiences to determine whether he or she is a fit for our jury panel, but to also

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6 Id. at 65.
8 Id.
9 Id.
locate the leaders in the crowd and speak to them directly. During the presentation of the case, if our witnesses and experts come across genuine and we endeavor to leave little to the jury’s imagination, then those leaders we found in the jury pool will take charge and campaign for our clients. This gives us a better chance of closing trial with the majority on our clients’ side.

Now to the what I learned from my mentors who are in the courts on a daily basis. I tapped Aaron Wiley, Amy Stewart, and two senior Federal Law Clerks, who have asked to remain anonymous. I will refer to these anonymous lawyers as “Jane” and “John.” I posed to them questions about voir dire, opening statements, closing statements, and witness examination, and here’s what I learned.

During my first year as a lawyer, less than 2 months after I passed the Kansas Bar Exam, I was told a lawyer should immediately review the jury instructions applicable to a case when the matter first arises. This makes sense because the jury instructions will ultimately be the document that tells the jurors how to decide the case. However, this act proves illusive for some attorneys. According to John, “the biggest mistake counsel make is not paying enough attention to the jury instructions.” While many lawyers are focused on the elements of the claims or the elements of the defenses, more attention to the jury instructions is necessary early in the case. I’ve found that spending some time on the jury instructions usually drives the direction of the case and helps me identify a theme. Moreover, closer attention to the jury instructions early in the case will help

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10 Aaron Wiley is a seasoned trial lawyer. He is Special Counsel at Orberheiden PC, supervising internal corporate investigations, white-collar defense matters, and complex federal litigations. He has tried over 100 jury trials in federal and state court and currently serves as the Master of the American Inn of Courts. Aaron graduated from the University of California and the University of Michigan School of Law. In and out of the courtroom, Aaron is a poised and polished orator. He carries the swagger of the quintessential “favorite uncle” or the “coolest guy in school,” all while also being the nicest guy in the room. He is the guy everyone likes and wants to be around.

11 Amy Stewart is the founding partner of Stewart Law Group PLLC. She has tried cases all over Texas and spends most of her time these days preparing for trials and arbitrations somewhere in the country. Amy is graduate of Wake Forest University and the University of Missouri Law School. Amy is passionate about trials. She is authentic everywhere and every time, which releases her from any pretense other lawyers might have when in front of a jury. This trait, among others, is why clients want her on their side and why other lawyers want to be around her.
counsel tie the elements of the claims and defenses to the facts in closing arguments. In fact, one of the most important things a lawyer can do in closing, according to Jane, is to “tie the elements together for the jury during closing, so they are not lost when they start to deliberate.”

During voir dire, Wiley likes to “put the panel at ease and to subtly become the authoritative figure in the room.” Although Wiley makes it look easy, this is a skill developed over years. “Making a connection with the jury is key, which I first attempt to do by making them laugh,” says Wiley. “I also encourage outliers on the panel to speak-up and when they say something that hurts my case, I use them to draw out others who have similar thoughts but didn’t initially speak out.” Voir dire is also a good time “to soft sell my case” says Wiley, which begins to establish my theme.

The opening statement is the first time the jury hears the facts of the case. “As a result, the opening statement is the attorney’s opportunity to provide a roadmap for the facts he intends to present,” says Wiley. Stewart believes “an authentic voice” is key from the beginning of the case. “Judges, opposing counsel, witnesses, and most importantly jurors, respond to authenticity,” says Stewart. This means “dealing with the emotions and feelings that are associated with all of the facts in your case,” she says, “instead of a sterilized ‘just the facts ma’am’ manner.” “If you have bad facts or sympathetic parties on the other side, you have to deal with those issues head on” instead of pretending they are not there. In fact, an attorney’s opening and closing must have “candor, particularly about the weaknesses in your case.”

Voir dire, opening, and closing are not the only times a lawyer needs to be mindful of the jury, however. A lawyer must maintain that hypervigilance during the trial even though trials can be long and arduous. When in trial, attorneys usually spend 8-10 hours in court and another 8 hours

12 Turning Points At Trial: Great Lawyers Share Secrets, Strategies and Skills, at 331.
preparing for the next day. These stressors often appear in court when dealing with opposing counsel and the judge.

According to Jane, showing exasperation and frustration is a mistake. “Good attorneys tend to work together to streamline things for trial, and at least appear to be cordial with one another, while bad attorneys snipe at each other and are rude to each other and the judge.” All this, Jane says, “occurs while the jury is watching and impacts the way the jurors reach their decision.” Even during witness examination the lawyer should have an understanding of how his questioning is impacting the judge and jury. John puts it simply, “just be aware that the jury is always watching.” “Counsel often get tunnel-vision during witness examination, or when arguing over an objection that they don’t even look to see how the jury or judge is reacting.”

The final takeaway from my mentors is something we’ve all heard before—the most effective attorneys are good at telling a story. This is especially true if your client is a corporation. The statistics establish that society, in general, and jurors, have negative feelings about corporations. Stewart puts it this way: “In today’s environment, that means trial counsel who understands the substantive legal issues, case facts, and expert issues, but can also humanize the corporate client to create a bond with jurors” are the ones who are successful. That still rings true says Jane. “Presenting the evidence in a digestible way—maybe with a timeline or other demonstratives, even in opening and closing—the best attorneys figure out a way to tell a compelling story,” she says.

Ultimately, the O.J trial, although having no meaningful impact on the law itself, had a resounding impact on my teenage self. The segments I watched feature in my current job as a lawyer. From visiting historical court houses all over the country to sitting in the U.S. Attorneys’ Office on what seemed to be dorm-room furniture, I have come to find thrill in the mundane
appearance of a typical courtroom in the midst of a trial. Moreover, the O.J. trial offered one other think that I presume many trial lawyers dream about doing—coining their own catch phrase.