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December 21, 2006

VIA FEDERAL EXPRESS

The Honorable Ronald M. George
Chief Justice of the State of California
and the Honorable Associate Justices of the California Supreme Court
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Request for Depublication
Daugherty v. American Honda Motor Co.
(2006) 144 Cal.App. 824

Dear Chief Justice George and Associate Justices:

I. Introduction

I am writing on behalf of Consumers for Auto Reliability and Safety (CARS) and the Consumer Federation of California (CFC), to request depublication of *Daugherty v. American Honda Motor Co.* (2006) 144 Cal.App. 824. The Court of Appeals' decision should be depublished because it directly contravenes long-standing California law holding that defect manifestation is *not* a necessary prerequisite to fraud and warranty-based causes of action.

Boiled down to its essence (by the attorneys for American Honda), the Court of Appeals' decision stands for the proposition that "a manufacturer is not liable for an alleged defect that the manufacturer knows of at the time of sale, if the product functions normally within the express warranty period." (*See* http://www.omm.com/webcode/navigate.asp?-nodeHandle=486&idContent=6282, visited December 18, 2006, Ex. A hereto). That is not the law in California, and impermissibly ignores the careful distinction this Court has drawn between damage to persons and property (the province of torts) and frustrated expectations (the province of warranty and fraud).

"The difference between price paid and value received, and deviations from standards of quality that have not resulted in property damage or personal injury, are primarily the domain of contract and warranty law or the law of fraud, rather than of negligence." (*Aas v.*

Superior Court (2000) 24 Cal. 4th 627, 636.) This is true "whatever the product, whether homes or automobiles": while tort law "affords a remedy only when the defective product causes property damage or personal injury," warranty law affords a remedy for "the lost benefit of the bargain, such as the cost of repairing a defective product or compensation for its diminished value." (*Id.* at 639.) This Court concluded in *Aas* that "buyers in California . . . enjoy protection under contract and warranty law for enforcement of builders' and sellers' obligations; under the law of negligence and strict liability for acts and omissions that cause property damage or personal injury; [and] under the law of fraud for misrepresentations about the property's condition." (*Id.* at 652-53.)

If left to stand, the Court of Appeals' decision here would extinguish those important protections for consumers.

II. Statement of Interest

Consumers for Auto Reliability and Safety

Consumers for Auto Reliability and Safety is a national, award-winning non-profit auto safety and consumer advocacy organization dedicated to preventing motor vehicle-related fatalities, injuries, and economic losses.

CARS has spearheaded enactment of numerous landmark measures to protect California consumers that were signed into law by governors from both major political parties. Those measures include provisions to improve and strengthen California's auto "lemon law," expand the law to include protection for small businesses, and prohibit the imposition of "gag" agreements on owners of seriously defective vehicles repurchased by manufacturers or dealers.

CARS has also successfully advocated for restrictions on teenage driving, red light camera enforcement, cell phone safety, improved pedestrian safety, curbing frauds involving unsafe vehicles, and the establishment of national motor vehicle safety standards promulgated by the National Highway Traffic Safety Administration regarding vehicle safety equipment and safety recalls.

The President of CARS serves as a representative of the public on the California Bureau of Automotive Repair Advisory Board and on the Board of Directors of the Consumer Federation of America and the Consumer Federation of California.

CARS is recognized by California lawmakers, legislative analysts, regulators, and the news media as representing the interests of California motorists.

Consumer Federation of California

The Consumer Federation of California is a non-profit organization founded in 1960 that advocates for state and federal consumer protection laws and regulations. CFC is

composed of organizational and individual members and includes among its affiliates senior citizen, labor and consumer organizations.

The Consumer Federation of California has spearheaded legislative campaigns to protect financial privacy, secure telephone subscriber rights, prohibit lawsuit settlements that conceal vital information about product defects and toxic contamination, strengthen food safety disclosures, protect consumer access to civil justice, and increase the affordability and availability of health care services. The Consumer Federation of California intervenes on behalf of consumers in proceeding of the California Department of Insurance and the California Public Utilities Commission. The Consumer Federation of California provides information and referral services to consumers seeking assistance with complaints, and conducts education and research on consumer issues.

III. Argument

A. California Law Recognizes That Defect Manifestation Is Not A Prerequisite To Recovery Under Warranty Causes Of Action.

In *Hicks v. Kaufman and Broad Home Corp.* (2001) 89 Cal.App.4th 908, the Second District traced the history and development of such cases in support of its conclusion that "proof of breach of warranty does not require proof the product has malfunctioned but only that it contains an inherent defect which is substantially certain to result in malfunction during the useful life of the product. The question whether an inherently defective product is presently functioning as warranted goes to the remedy for the breach, not proof of the breach itself." (*Id.* at 918.)

The Court in *Hicks* discussed its prior decision more than thirty years ago in *Anthony v. General Motors Corp.* (1973) 33 Cal.App.3d 699, a case involving allegations that certain GM wheels contained an inherent but unmanifested defect . In *Anthony*, "plaintiffs did not seek to recover for physical injury or property damage *caused* by the defect in the truck wheels. Rather, they sought to recover the cost of replacing the defective wheels. The primary right alleged to have been violated in *Anthony*, as in the case before us, was the right to take a product free from defect. The defect did not *cause* the plaintiffs' injury; the defect *was* the injury." (*Id.* at 922 (emphasis in original).)

The Court in *Hicks* also relied heavily on this Court's decision in *Aas*, citing it in support of the conclusion that "the cost of repairing latent [i.e. unmanifested] construction defects can be recovered under a breach of warranty theory without proof the defects have resulted in property damage." (*Id.* at 918.)

Not only does the Court of Appeals' decision here conflict with the holdings in *Aas, Hicks*, and *Anthony*, the Court does not even acknowledge those cases, much less distinguish or reconcile its holding with them.

B. California Law Recognizes That Defect Manifestation Is Not A Prerequisite To Recovery Under Fraud-Based Causes Of Action.

In *Khan v. Shiley, Inc.* (1990) 217 Cal.App.3d 848, the Fourth District recognized that "For purposes of establishing fraud, it matters not that the [product] is still functioning, arguably as intended. Unlike the other theories, in which the safety and efficacy of the *product* is assailed, the fraud claim impugns defendants' *conduct*." (*Id.* at 857 (emphasis in original).) In other words, in fraud-based causes of action like the CLRA claim asserted here, "a manufacturer of a product may be liable for fraud when it conceals material product information from potential users. This is true whether the product is a mechanical heart valve or frozen yogurt." (*Id.* at 858.) Or, we might add, an oil seal. That holding "neither establishes a new cause of action nor drastically extends existing law." (*Id.*) The CLRA and UCL claims are about what American Honda did – it concealed material facts about a defect in a critical engine part -- not about whether or not the part actually failed prematurely.

Indeed, this Court emphasized the same point in its decision in *Robinson Helicopter Co. Inc. v. Dana* (2004) 34 Cal.4th 979, discussing the application of the economic loss rule to fraud-based claims. Noting that "no rational party would enter into a contract anticipating that they are or will be lied to," this Court stated that "simply put, a contract is not a license allowing one party to cheat or defraud the other." (*Id.* at 992-993 (citation and quotation omitted).)

The mere fact that American Honda contractually warranted its vehicles to perform for a certain period of time does not immunize it from liability for its own fraudulent concealment of a defect in those vehicles, even if that defect never manifests. Indeed, as this Court explained in *Robinson Helicopter*, "California . . . has a legitimate and compelling interest in preserving a business climate free of fraud and deceptive practices." (*Id.* at 992.) Allowing American Honda to avoid liability on the mere fortuity of whether the defect manifests in the contractually warranted period would effectively transform the law into "the end justifies the means." Surely that is not the law in California.

Once again, not only does the Court of Appeals' decision here conflict with the holding in *Robinson Helicopter* and *Khan*, the Court does not even acknowledge them, much less distinguish or reconcile their holdings.

IV. Conclusion

CARS and CFC recognize that the facts of these plaintiffs – several of whom got many times the warranted life out of their vehicles without failure of the oil seal – are not especially compelling. Unfortunately, the Court of Appeals' decisions runs the risk of transforming bad facts into bad law. Whether these or any consumer plaintiffs get what they paid for is a *factual* determination, one that should be decided on a full factual record, not by trial courts at the *demurrer* stage as a matter of law. Consumers who allege that they did not get what they paid for due to a manufacturer's fraudulent concealment of a latent defect are entitled to

state warranty and fraud-based claims under controlling and longstanding California law. The Court of Appeals' decision should be depublished.

Respectfully submitted,

Jonathan D. Selbin

JDS:mm

EXHIBIT A

O'Melveny in the News

News Archive

Events + Seminars

Events + Seminars Archive

Firm History

O'MELVENY IN THE NEWS

Significant Victory for Honda in Nationwide Class Action
November 3, 2006

O'Melveny-Los Angeles partner **Tad Allan** and counsel **Eric Kizirian** recently won an important victory for Honda in the California Court of Appeal, which affirmed the trial court's dismissal of a nationwide class action alleging that hundreds of thousands of Honda Accords and other Honda vehicles from the mid-1990s are defective in that an engine oil seal can become dislodged, causing the loss of all engine oil and catastrophic engine damage.

The plaintiffs brought a nationwide class action after the alleged "defect" came to their attention through Honda's Product Update Campaign -- a voluntary program through which Honda assisted its customers by notifying them of the problem and providing a "fix" (a retainer bracket to hold the seal in place), or reimbursed owners who experienced the problem for their engine repair costs, even though the cars were no longer covered by Honda's warranty. The plaintiffs alleged that Honda did not go far enough, in that the problem supposedly affected more model years than those covered by Honda's Product Update Campaign.

Sustaining Honda's demurrer without leave to amend, the trial court agreed with the O'Melveny team that a manufacturer is not liable for an alleged defect that the manufacturer knows of at the time of sale, if the product functions normally within the express warranty period. On October 31, the California Court of Appeal issued its decision affirming the trial court in all respects. The Court found that there was no breach of Honda's express warranty, no violation of the Magnuson-Moss Act, no violation of the California Legal Remedies Act, and no violation of California's Unfair Competition Law ("UCL").

Addressing the last claim, the Court stated, "[i]n short, the failure to disclose a defect that might, or might not, shorten the effective life span of an automobile part that functions precisely as warranted throughout the term of its express warranty cannot be characterized as causing a substantial injury to consumers, and accordingly does not constitute an unfair practice under the UCL."

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DECLARATION OF SERVICE BY OVERNIGHT DELIVERY

RE: Court of Appeal Case. No. B186402

Case Title: *Daugherty v. American Honda Motor Co.*

I, the undersigned, am a citizen of the United States, over the age of 18 years, working in the City of New York, County of New York, and not a party to this action. My business address is 780 Third Avenue, 48th Floor, New York, New York 10017.

On the date appearing below, I served the items identified below, to the persons identified below, by placing a true and correct copy thereof in a sealed envelope for delivery via Federal Express or first class U.S. Mail.

ITEM SERVED

PETITION FOR REVIEW

PERSONS SERVED

Original and 13 copies via Federal Express to:

Office of the Clerk
California Supreme Court
Ronald Regan Building
300 So. Spring Street, 2nd Floor
Los Angeles CA, 90013

One copy each via first class U.S. Mail to:

The Honorable Victoria G. Chaney
Los Angeles County Superior Court
Central District
Central Civil West Courthouse
600 South Commonwealth Avenue
Los Angeles, CA 90005

Office of the Clerk
Los Angeles County Superior Court
Central District
Central Civil West Courthouse
600 South Commonwealth Avenue
Los Angeles, CA 90005

Office of the Clerk,
Court of Appeal for the State of California
Second Appellate District, Division Two
Ronald Reagan State Building
300 So. Spring St. 2nd Floor
Los Angeles, CA 90013

Office of the District Attorney
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Torrance, CA 90501

I declare under penalty of perjury that the foregoing is true and correct

Executed on December 21, 2006, at New York, New York.

Mark Macatee