No. S_____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ELIZABETH A. DAUGHERTY, THEANNA SERVER, PHILIP J. MONEGO, JR., DUSTIN GUADAN, TONY LAO, MATTHEW ROBBINS, JOHN DWYER, DEANNA DWYER, RICHARD VOELK, CATHY VOELK, DAVID TERRY, AND DAVID HAMMOND, Individually and on Behalf of All Others Similarly Situated, Plaintiffs-Petitioners,

v.

AMERICAN HONDA MOTOR CO., Defendant-Respondent.

On Review of the Decision of the Court of Appeal,
Second Appellate District, No. B186402
Appeal from the Superior Court of Los Angeles County, Civil No. BC308570

PETITION FOR REVIEW

UNFAIR COMPETITION CASE

(See Business & Professions Code section 17209; California Rule of Court 44.5)

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I. ISSUES PRESENTED

A. To state a claim under the Consumers Legal Remedies Act ("CLRA"), Civ. Code §§ 1750-1784, against a manufacturer that willfully conceals a product defect from consumers, must the plaintiff allege (1) that the manufacturer also made affirmative misrepresentations about the defect, and (2) that the defect creates a risk of personal injury or presents safety concerns?

B. To state a claim under the Unfair Competition Law ("UCL"), Bus. & Prof. Code §§ 17200-17209, against a manufacturer that willfully conceals a product defect from consumers, must the plaintiff allege that the product defect became manifest before the product's express warranty expired?

II. NECESSITY AND IMPORTANCE OF REVIEW

For decades, the CLRA and the UCL have been universally recognized as two of the most effective consumer-protection statutes in the nation. Indeed, the Legislature's principal objective in enacting the CLRA was to make it easier for consumers to establish a claim against businesses that engage in deceptive conduct by providing them with an efficient alternative to bringing an action in fraud, which the Legislature recognized as one of the most difficult claims in the law to plead and prove.

Similar objectives have informed the enactment, construction, and application of the UCL. As this Court has explained many times over the past 70 years, "although most precedents under [the UCL] have arisen in a 'deceptive' practice framework, even these decisions have frequently noted

that the section was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable 'new schemes which the fertility of man's invention would contrive.'" *Barquis v. Merchants Collection Ass'n*, 7 Cal. 3d 94, 111-12 (1972) (quoting *American Philatelic So. v. Claibourne,* 3 Cal. 2d 689, 698 (1935)).

Yet, in a decision that directly contradicts these and other well-established judicial opinions, and the legislative imperatives on which they are based, the Court of Appeal has inexplicably held that the answer to both of the questions set forth in Section I, above, is "Yes." Put simply, its decision represents a major step backward for California consumers.

The court below ruled that a manufacturer that conceals the existence of a defect in its product is nonetheless insulated from liability under the CLRA unless the plaintiff can demonstrate that (1) the manufacturer has made an affirmative misstatement of material fact regarding the same defect it is concealing, or (2) that the defendant had a duty**,** external to the CLRA itself**,** to disclose the facts at issue.

But even if a consumer clears the latter hurdle, the Court of Appeal's ruling actually makes it ***harder*** to state a concealment claim under the CLRA than it is at common law — despite the Legislature's explicitly-stated objective of making it easier to establish deceptive conduct in consumer transactions when it enacted the CLRA. Specifically, the Court of Appeal established a new rule for concealment cases brought under the CLRA; namely, that a manufacturer has no duty to disclose the existence of a defect if the risk it poses to consumers is "merely the risk of 'serious potential damages' — namely, the cost of repairs."

Consequently, under the rule established by the court below, a consumer has no claim under the CLRA for the concealment of a product defect unless the plaintiff can prove that the defect the manufacturer has concealed poses a threat of physical injury or raises other safety concerns.

The Court of Appeal reached a similar result regarding the UCL, which produced a particularly harsh iteration of *caveat emptor*: The court ruled that a manufacturer cannot be found liable for violating any of the UCL's three prongs by willfully concealing the existence of a material defect, as long as the defect does not become manifest during the product's limited warranty (in this case, three years or 36,000 miles, whichever comes first).

Recognizing the impact of this ruling, counsel for Defendant-Respondent American Honda Motor Corporation ("Honda") persuaded the Court of Appeal to publish its initially unpublished decision and announced on its website that the case represents a sea change in California consumer protection law. According to Honda's counsel, the net effect of the Court of Appeal's decision is that, in California, "***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***." http://www.omm.com/webcode/navigate.asp?nodeHandle=486&idContent=6282 (emphasis added). *See* Request for Judicial Notice ("RJN"), Ex. 3.

This is a radical and unnecessary departure from established consumer-protection precedent in California. It must be reversed so that manufacturers are not permitted — indeed, ***encouraged*** — to deceive California consumers with impunity. Accordingly, Petitioners hereby request that this Court grant review to resolve the conflict between the

decision the Second District issued in the present case and the decisions issued by other courts that have addressed the same issues, and thereby settle important questions of law that affect all California consumers. Cal. R. Ct. 28(b)(1).

At a minimum, however, Petitioners request that the Court depublish the decision to put a stop to efforts that are already underway to employ it as a means of disposing of a host of valid California consumer-protection cases that are pending before state and federal trial courts, which are based on the same legal theories, but very different underlying facts. Unless the decision is nullified, its impact will spread as the ruling is applied to a variety of factual scenarios. Petitioners respectfully request that this Court put a stop to it now.[1]

III. BACKGROUND AND PROCEDURAL HISTORY

From the 1990 through the 1997 model years, Honda manufactured and sold Accord and Prelude vehicles that were equipped with F22, H22, and H23 Series engines ("Class Vehicles"). *Daugherty v. Am. Honda Motor Corp.*, 144 Cal. App. 4th 824, 827 (2006). Petitioners alleged that the engines Honda installed in each of the Class Vehicles has a latent defect that causes the front balancer shaft oil seal to leak (the "oil seal defect"), which can lead to total engine failure after the three-year/36,000-mile warranty has expired. *Id.* at 827-28.

[1] Petitioners will also file a formal depublication request pursuant to California Rule of Court 979.

Petitioners also alleged that Honda was aware that the oil seal defect existed at the time it sold and leased the Class Vehicles, but it concealed that information from prospective buyers and lessees at the time of sale. *See id.* at 828.

In October 2000, Honda announced that it was conducting a "Product Update Campaign" (*i.e.*, a recall) for the purpose of correcting the oil seal defect by installing a retainer bracket that holds the oil seal in its proper position. *Id.* Honda also offered to replace engine parts that had been damaged as a result of the oil seal defect, and offered to reimburse consumers for repairs that were made as a result of the oil seal defect before the recall was announced. *Id.*

But, as Petitioners have alleged, Honda did not extend this offer to all owners and lessees of Class Vehicles. *Id.* Rather, Honda limited the recall to 1994 through 1997 model-year Class Vehicles. *Id.* Indeed, Petitioners have alleged that Honda not only refrained from extending the recall to ***anyone*** who owned or leased 1990 through 1993 model-year Class Vehicles, it failed to notify many of those who owned the Class Vehicles Honda ***had*** included in the recall. *Id.*

For example, although Petitioner Tony Lao purchased a 1996 model-year Accord when it was new, Honda failed to notify him that it was conducting the recall that applied to his vehicle. Joint Appendix, Volume 2 ("JA2"), Ex. 17 at 253. Moreover, although Mr. Lao's Class Vehicle suffered total engine failure as a result of the oil seal defect in 2001, Honda refused to provide him with reimbursement or any of the other benefits it purportedly offered when it announced the campaign in the preceding October. *Id.*

Similarly, although Petitioner David Hammond's 1997 model-year Accord was among the Class Vehicles that Honda deemed eligible to participate in the recall campaign, Honda failed to tell Mr. Hammond about the recall campaign. *Id.* at 255. Accordingly, Petitioners Lao, Hammond, and nine other owners of Class Vehicles with experiences that are similar to those of Messrs. Lao and Hammond, filed this action in the Los Angeles Superior Court on December 31, 2003. *See* Joint Appendix, Volume 1, Ex. 1 at 7.

The Superior Court sustained Honda's demurrers to the initial Complaint and the First Amended Complaint. *Daugherty*, 144 Cal. App. 4th at 829. In the Second Amended Complaint ("SAC"), Petitioners alleged that Honda was liable for breach of express warranty, for violating the Magnusson-Moss Consumer Warranty Act, 15 U.S.C. § 2301, *et seq.*, and for violating the two provisions of the CLRA (Civ. Code § 1770(a)(5), (7)) and the UCL by willfully concealing the oil seal defect, and by failing to disclose that the defect was likely to become manifest after Honda's limited warranty expired, thereby shifting the costs associated with repairing or replacing those engines from Honda to the unwitting consumers who bought or leased those vehicles. *See id.*

Honda demurred, contending that Petitioners had failed to state a claim under either statute. *Id.* The trial court agreed, sustaining the demurrer as to all causes of action, and dismissing the SAC without leave to amend on the ground that Petitions had not sufficiently alleged that Honda made an affirmative misrepresentation or had a duty to disclose the existence of the oil seal defect. *See id.* Petitioners timely appealed, and the Court of Appeal affirmed. *Id.*

IV. LEGAL DISCUSSION

A. THIS COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEAL'S DECISION IS CONTRARY TO THE CLRA'S LEGISLATIVE HISTORY AND THREE DECADES OF DECISIONS THAT HAVE INVOLVED CONCEALMENT CLAIMS ARISING UNDER THE CLRA

For more than 30 years since it became law, it has been well settled that the CLRA prohibits the concealment of material information in connection with the sale of goods or services. *E.g., Outboard Marine Corp. v. Superior Court*, 52 Cal. App. 3d 30, 36 (1975) ("Where failure to disclose a material fact is calculated to induce a false belief, the distinction between concealment and affirmative misrepresentation is tenuous. Both are fraudulent") (citation and inner quotation marks omitted).

Outboard Marine is in accord with the CLRA's legislative history, which demonstrates that the statute was enacted to provide consumers who had fallen prey to deceptive business practices with a way to hold the perpetrators accountable. RJN, Ex. 1b at 8. Before then, consumers had no practicable means of putting a stop to such conduct. *See id.* ("Existing law provides no satisfactory remedy against such practices. The consumer is forced to sue in an action on the contract — in many of these cases damage is incurred but no contract is consummated — or he must bring an action in fraud, an action which contains some of the most difficult allegations to prove found in our law"). Accordingly, the CLRA was hailed as "the most important legislation passed in California since the Unruh Act." James S. Reed, *Legislating for the Consumer: An Insider's Analysis of the*

Consumer Legal Remedies Act, 2 PAC. L.J. 1, 2 (1971) (hereinafter "*Insider's Analysis of the CLRA*").[2]

To ensure that the importance of this point was not lost on the courts that would later apply the CLRA, its author (then-Chairman of the Assembly Judiciary Committee, James A. Hayes) wrote a report to "indicate more fully the intent of the legislature with respect to this measure." RJN, Ex. 1d at 14. That report provides a list of examples to demonstrate that the subdivisions of Section 1770 are intended to prohibit a wide array of unfair and deceptive practices, ***including the failure to disclose material facts in connection with the sale of goods or services***:

> Section 1770 of the Civil Code provides sixteen specific practices outlawed by the Act. ***By way of illustration and not limitation the following are examples of violations of each subdivision of Section 1770***: . . .
>
> f. It would be a deceptive practice for a salesman to fail to disclose that products are reprocessed even though the reprocessed products are as good as new. *FTC v. Colgate Palmolive Co.*, 85 S. Ct. 1035[, 380 U.S. 374 (1965)].

[2] James Reed, the author of *The Insider's Analysis of the CLRA,* was involved in the preparation of all legislative drafts of the CLRA and he participated in all conferences and hearings as it passed through the legislative process. *Id.* at 1. This Court has relied on *The Insider's Analysis of the CLRA* many times when it has had occasion to construe the provisions of the CLRA. *See Broughton v. Cigna Healthplans of Calif.*, 21 Cal. 4th 1066, 1077 (1999); *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 197 n. 2 (1999) (Kennard, J., concurring and dissenting); *Kagan v. Gilbraltar Sav. & Loan Ass'n*, 35 Cal. 3d 582, 594 (1984).

RJN, Ex. 1d at 15 (emphasis added).[3]

The Legislature also included a statement of legislative policy in the CLRA itself. *See* RJN, Ex. 1d at 15-16 (describing purpose of Civil Code section 1760). That provision states that the CLRA was enacted to "protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure those practices[.]" Civ. Code

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[3] *Kerran v. FTC.*, 265 F.2d. 246 (10th Cir. 1959) is the case to which the *Colgate* court cites for this proposition. *See Colgate*, 380 U.S. at 388 n. 18. In *Kerran*, the court found that defendant's failure to disclose that it was selling previously used, re-refined lubricating oil in containers that appeared identical to those in which lubricating oil refined from virgin crude was sold constituted a "deceptive practice" within the intent and meaning of the Federal Trade Commission Act, even though the two products were arguably identical, and even though the manufacturer had never made a deceptive or misleading statement in connection with the marketing of the used oil. 265 F.2d. at 267-68. According to the court, a consumer is "entitled to know the facts . . . and then make its own choice with respect to purchasing such oil or oil produced from virgin crude, even though the choice is predicated at least in part upon ill-founded sentiment, belief, or caprice." *Id.* at 268.

That Chairman Hayes included this example to illustrate the type of conduct prohibited by the CLRA is illuminating not only because it demonstrates that the CLRA was intended to encompass concealment as well as affirmative misstatements of material fact, but because it underscores that the CLRA is meant to ensure that sellers of consumer goods behave honestly — even if the consumer appears to have received what he or she paid for. Cases decided under the FTC Act are also instructive for another reason: As Justice Kennard has pointed out, the CLRA is California's "little FTC Act." *Cel-Tech*, 20 Cal. 4th at 197 n. 2 (Kennard, J., concurring and dissenting). Under the Court of Appeal's holding in this case, however, if a salesman sold a product and concealed that the product was refurbished (a material fact), liability under the CLRA would only arise through an independent duty between the parties, or if the salesman made affirmative statements suggesting the product was new, or not refurbished. That is not what the Legislature had in mind when it enacted the CLRA.

§ 1760. It also states that the CLRA "***shall*** be liberally construed and applied to promote its underlying purpose." *Id.* (emphasis added).

"This policy statement is the basic thread that ties together the numerous provisions of the Act." *Insider's Analysis of the CLRA* at 8. Accordingly, "[s]trict adherence to the legislative intent by the courts is strongly urged, for without such adherence the Act will not provide that degree of consumer protection intended by the legislature." *Id*.

1. *The Court of Appeal's Ruling That Concealment is Actionable Under the CLRA Only If Accompanied by an Affirmative Misrepresentation Is Directly Contrary to the Legislative Mandate to Construe the Statute Liberally*

As the Second District explained recently, when construing a statute such as the CLRA, courts must

> look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. We construe the language in the context of the statute as a whole and the overall statutory scheme, and we give significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose. In matters of statutory construction, an interpretation which renders a provision nugatory should be avoided.

Aron v. U-Haul Co. of California, 143 Cal. App. 4th 796, 807-08 (2006) (citing *Nolan v. City of Anaheim*, 33 Cal. 4th 335, 340 (2004), and *Curle v. Superior Court*, 24 Cal. 4th 1057, 1063 (2001)) (internal quotation marks omitted).

Had the Second District adhered to its own admonitions in the present case, the outcome would have been very different. Rather than relying on the legislative mandate to construe the statute liberally, however, the court below decided that the CLRA does not prohibit Honda from willfully concealing the existence of a defect in its vehicles simply because neither subdivision (a)(5) nor (a)(7) includes the word "concealment." *Daugherty,* 144 Cal. App. 4th at 834-35.[4]

Reading the CLRA to give rise to liability only for affirmative misrepresentations because the statute does not contain the word "conceal" is the product of a strict and literal construction. A broad, liberal reading of the statute — one that recognizes that misrepresentation can include both affirmative misrepresentation ***and*** concealment — is not only consistent with the legislative mandate codified at Section 1760, it comports with the understanding of that concept as it was (and is) used at common law.

The equivalency between affirmative misrepresentations and fraudulent concealment has been recognized at common law since well before the CLRA was enacted. *See, e.g., Lingsch v. Savage,* 213 Cal. App.

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[4] The Court of Appeal began its analysis of Petitioners' claim that Honda violated the CLRA by concealing the oil seal defect from consumers by observing that Civil Code section 1770(a)(5) prohibits "[r]epresenting that goods . . . have . . . characteristics, ingredients, uses, benefits, or quantities which they do not have . . ." and that 1770(a)(7) prohibits "[r]epresenting that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another." The court explained that Petitioners' concealment claims were properly dismissed, because the SAC "fails to identify any ***representation*** by Honda that its automobiles had any characteristic they do not have, or are of a standard or quality they are not." *Daugherty,* 144 Cal. App. 4th at 834 (emphasis added).

3d 729, 735 (1963) ("The principle is fundamental that deceit may be negative as well as affirmative; it may consist of suppression of that which it is one's duty to declare as well as of the declaration of that which is false") (citations, inner quotation marks, and brackets omitted).

Outboard Marine was the first decision in which an appellate court observed that the same principles apply to the CLRA. *See* 52 Cal. App. 3d at 35-37. In deciding that the same provisions of the CLRA that are at issue in the present case preclude a manufacturer from concealing the existence of a defect from unwitting purchasers of its product (the defendant in Outboard Marine concealed the existence of defective braking and stability control in its off-road vehicle), the *Outboard Marine* court observed that

> ***[t]he offer of goods for sale is a representation of the characteristics, uses, benefits, or qualities of the goods.*** Civil Code section 1770, listing proscribed practices such as 'Representing that goods or services are of a particular standard, quality, or grade, . . . if they are of another,' includes a proscription against a concealment of the characteristics, use, benefit, or quality of the goods contrary to that represented.

52 Cal. App. 3d at 37 (emphasis added). In other words, the *Outboard Marine* Court correctly observed that the mere act of offering goods for sale serves as a representation (unconnected to the product's limited warranty), that the product is free of known defects.

Yet, the court below found that *Outboard Marine* actually established an entirely different rule: that to state a concealment claim under the CLRA, a consumer must show that the defendant also made an affirmative misstatement of fact about the product or part at issue. *Daugherty,* 144 Cal. App. 4th at 834 (citing *Outboard Marine* for the

proposition that Petitioners' CLRA claim failed because "the CLRA proscribes a concealment of characteristics or quality 'contrary to that represented,' but in Daugherty's case, no representation was made to which the alleged concealment was contrary").

To reach this conclusion, however, the Court of Appeal had to overlook some of the more critical aspects of *Outboard Marine,* including a point that went to the very core of that decision: "Substance must prevail over form, ***and the provisions of the Consumers Legal Remedies Act must not be technically confined to pleading allegations couched only in the language of the statute***." 52 Cal. App. 3d at 36 (emphasis added). Yet that is precisely what court below did in the present case. Indeed, the court's reasoning is not only bereft of support from *Outboard Marine*, it is flatly contradicted by it:

> Fraud or deceit may consist of the suppression of a fact by one who is bound to disclose it or who gives information of other facts which are likely to mislead for want of communication of that fact.
>
> In *General Acc. etc. Corp. v. Indus. Acc. Com.* (1925) 196 Cal. 179, in reviewing an award made by the Industrial Accident Commission, the Supreme Court at page 190 stated: "Respondent Commission attempts to point out a distinction between a concealment of a material fact and a misrepresentation as to such fact. ***The legal effect in each instance amounts to the same thing, fraud***.
>
> "Where failure to disclose a material fact is calculated to induce a false belief, ***the distinction between concealment and affirmative misrepresentation is tenuous. Both are fraudulent***. ***An active concealment has the same force and effect as a representation which is positive in form***." (37 *Am.Jur.* 2d, Fraud and Deceit, § 144 p. 197) (Fns. omitted.)

Id. at 37 (emphasis added; citation omitted).

And although the plaintiffs in *Outboard Marine* did happen to plead both fraudulent concealment and affirmative misrepresentation claims, that was ***not*** the raison d'être of *Outboard Marine*. The point is underscored by *Stevens v. Superior Court*, 180 Cal. App. 3d 605 (1986), a case in which the court relied on *Outboard Marine* when it examined the nature of common law fraud and the impropriety of distinguishing between affirmative misrepresentations and fraudulent concealment.

In *Stevens*, the trial court sustained a demurrer without leave to amend on the ground that the plaintiff had failed to state a claim for fraud when she alleged that the defendant (a hospital) had intentionally concealed the fact that it allowed foreign physicians who were not licensed to practice medicine in California to function as hospital staff physicians and surgeons on a daily basis without the supervision required by California law. 180 Cal. App. 3d at 607.

The Court of Appeal reversed on the ground that the "sustaining of the demurrer resulted from ***a fundamental misconception of law***, the belief that actual fraud always requires a direct, affirmative misrepresentation of material fact." *Id.* at 608 (emphasis added). The court went on to observe "that ***intentional concealment of a material fact is an alternative form of fraud and deceit equivalent to direct affirmative misrepresentation***." *Id.* at 608-09 (emphasis added; footnote omitted) (citing, *inter alia*, *Outboard Marine*).

Thus, the *Stevens* court and the court in the present case both relied on *Outboard Marine* to reach polar opposite conclusions: In *Stevens*, the Court of Appeal cited *Outboard Marine* as support for ***reversing*** an order sustaining a demurrer on the ground that the plaintiff had failed to plead

facts supporting a claim of affirmative misrepresentation, whereas in the present case the Court of Appeal relied on *Outboard Marine* as support for ***affirming*** an order sustaining a demurrer for precisely the same reason. *Compare Stevens*, 180 Cal. App. 3d at 609 *with Daugherty*, 144 Cal. App. 4th at 834-35.

The critical difference between the two cases is that the present case involves a ***statutory mandate requiring liberal construction of the CLRA***. Inexplicably, however, the court below construed the CLRA in a ***strict and literal*** manner, which makes it much more difficult (if not impossible) to establish liability for willful concealment under the CLRA than it is at common law. *See Daugherty*, 144 Cal. App. 4th at 835.

This, of course, is the opposite result that the Legislature had in mind when it enacted the CLRA. *See* Civ. Code § 1760; *Insider's Analysis of the CLRA* at 8 ("This policy statement is the basic thread that ties together the numerous provisions of the Act. . . . The message is clear — *when in doubt, decide in the consumers' favor*") (emphasis in original). This Court should grant review — or, at a minimum, depublish — the decision for that reason alone.

2. *This Court Should Grant Review Because the Court of Appeal's Construction of the CLRA is Inconsistent with Other Decisions in Which Disclosure Issues Were Presented*

Just before beginning the legal discussion in its decision, the Court of Appeal discussed with approval the trial court's characterization of Petitioners' legal theories as new and novel that would precipitate a radical shift in the law, and its statement that "if such a change is to come, another court must be its harbinger." *Daugherty*, 144 Cal. App. 4th at 829.

Petitioners' theories are neither new nor novel. *See, e.g.*, *Muehlbauer v. General Motors Corp.*, 431 F. Supp. 2d 847, 861 (N.D. Ill. 2006) ("Case law indicates that a CLRA claim may be based on non-disclosure of material information"); *Trew v. Volvo Cars of No. Am. LLC*, 2006 WL 306904, *6 (E.D. Cal. 2006) (denying motion to dismiss "Trew's claims for concealing the defect in the ETM [electronic throttle module] under : (1) the UCL; (2) the CLRA; (3) fraudulent concealment-nondisclosure; and (4) unjust enrichment . . ."); *Chamberlan v. Ford Motor Co.*, 369 F. Supp. 2d 1138, 1144 (N.D. Cal. 2005) ("pure omissions are actionable under the CLRA . . ."); *Massachusetts Mutual Life Ins. Co. v. Superior Court*, 97 Cal. App. 4th 1282, 1295 (2002) ("there is nothing in the record which shows that Mass Mutual's own assessment of the discretionary dividends was disclosed to any class member. If the undisclosed assessment was material, an inference of reliance as to the entire class would arise, subject to any rebuttal evidence Mass Mutual might offer. [¶] In sum then the trial court did not abuse its discretion in concluding that as to plaintiff's CLRA claim common questions of law or fact would predominate"); *Outboard Marine*, 52 Cal. App. 3d at 34-36.[5]

Yet the court below dismissed Petitioners' reliance on *Chamberlan* on the ground that it did not "purport[] to hold that a nondisclosure was

[5] The very same theory that the lower courts rejected here for fear of being the "harbinger" of change was at the heart of a decision that followed a nine-month bifurcated trial ***six years ago*** in *Howard v. Ford Motor Co.*, No. 763785-2 (Alameda Super. Ct., Oct. 11, 2000). *See* RJN, Ex. 2. In *Howard*, Honda's counsel defended Ford, which the trial court found had violated the CLRA and the UCL by concealing from consumers and government regulators that it had installed defective ignition modules in millions of Ford cars and trucks. *See id.* at 18 (discussing *Outboard Marine*'s application to concealment claims under 1770(a)(5) and (7)).

actionable under the CLRA in the absence of a related representation or disclosure obligation; indeed, [*Chamberlan* did not purport] to address the issue in any way. Cases are not authority for issues they neither discuss nor decide." *Daugherty*, 144 Cal. App. 4th at 835 n. 5. Actually, however, Judge Wilken ***did*** discuss the issue in a fair amount of depth in *Chamberlan*. *See* 369 F. Supp. 2d at 1144 ("Defendant has also shown no grounds for the Court ***to reconsider the conclusions in its previous order, namely that pure omissions are actionable under the CLRA*** and that Plaintiffs who purchased used cars have standing to bring CLRA claims, despite the fact that they never entered into a transaction directly with Defendant") (emphasis added).

In addition to misconstruing *Chamberlan* and *Outboard Marine*, the court below also incorrectly relied on *Bardin v. DaimlerChrysler Corp.*, 136 Cal. App. 4th 1255 (2006), as support for the proposition that a claim for concealment cannot be brought under the CLRA unless the consumer can demonstrate a duty of disclosure independent of the CLRA itself. *See Daugherty*, 144 Cal. App. 4th at 835 ("[t]he court of appeal in *Bardin v. DaimlerChrysler Corp.* (2006) 136 Cal.App.4th 1255, 39 Cal.Rptr.3d 634 (*Bardin*) recently reached precisely the same conclusion"). Nothing in *Bardin* supports the conclusion of the court below.

Although the *Bardin* court made a passing reference to the fact that the plaintiff in that case had not alleged any affirmative misrepresentations, the absence of such allegations in the plaintiffs' complaint was ***not*** the basis on which the *Bardin* decision rests. Rather, the court dismissed the plaintiff's in *Bardin* because the plaintiffs failed to allege material facts that the defendant was obligated to disclose. *See* 136 Cal. App. 4th at 1275-76.

In *Bardin*, the plaintiffs alleged that DaimlerChrysler violated the CLRA by failing to disclose that it had used tubular steel rather than cast iron in the exhaust manifolds it installed in certain vehicles, and that tubular steel did not last as long as cast iron. *See* 136 Cal. App. 4th at 1261-62. The *Bardin* court found that, under the circumstances presented by that case,

> Plaintiffs' claim for violation of the CLRA fails because the second amended complaint neither alleged facts showing DCC was "bound to disclose" its use of tubular steel exhaust manifolds, nor alleged facts showing DCC ever gave any information of other facts which could have the likely effect of misleading the public 'for want of communication' of the fact it used tubular steel exhaust manifolds.

See id. at 1275-76.

In other words, the *Bardin* court did not find, as the court below suggests, that concealment claims are not actionable under the CLRA; the *Bardin* court merely held that the plaintiffs in that case had failed to persuade it that the CLRA required DaimlerChrysler to disclose that it had not used a particular type of metal to construct its exhaust manifolds.

In contrast with *Bardin*, Petitioners have not alleged that Honda is liable for willfully concealing that its F22 engine was not made of a particular metal, nor are Petitioners alleging that Honda is liable for concealing that its F22 engines are less durable than engines installed in other vehicles. Rather, Petitioners have alleged that Honda violated subdivisions (5) and (7) of Section 1770(a) because it was aware of a latent defect in its F22 engines that can cause those engines to fail after the expiration of Honda's limited warranty (resulting in costly repairs), yet it

sold those vehicles to consumers without disclosing that information. This is a distinction with a very significant difference.

State of New York v. General Motors Corp., 466 N.Y.S.2d 124 (N.Y. Sup. Ct. 1985), illustrates that such claims ***are*** actionable. There, the New York Attorney General's office sued General Motors ("GM") after discovering that the Turbo-Hydra-Matic 200 ("THM 200") transmissions GM installed in thousands of vehicles "failed shortly after the expiration of the warranty period." *Id.* at 125. Although the owner's manual in these vehicles indicated that the THM 200 needed no maintenance for 60,000 miles in some of the vehicles and 100,000 in others, GM knew that the THM 200 contained defects that would cause those transmissions to fail before they were to be serviced, but after their warranties had expired. *Id.* at 126. The court articulated the Attorney General's claims as follows:

> In essence the Attorney General alleges that the failure of GM to disclose the defects in the THM 200 to prospective customers was a fraudulent practice and further, that because officers of GM knew of the premature failure rate of the transmission, the new car limited warranty and disclaimer of all other warranties was an unconscionable contract provision. It is alleged that GM is liable for reimbursement to all owners for the cost of repairing or replacing that transmission.

Id. The court found that the Attorney General had stated valid fraud claims, regardless of the existence of the warranty:

> With regard to the allegations of knowledge by GM of the defective nature of the THM 200, the rule is clear that *caveat emptor* is no longer an effective shield. ***If one party has superior knowledge not available to both parties, then he is under a legal obligation to speak and silence would constitute fraud***. . . . The complaint alleges that the responsible employees and officers of GM knew that the THM 200 would fail prematurely, that it required substantial repair or replacement prior to the mileage limits indicated in the owner's manual and that defendant knew that the limited warranty was inadequate. ***Assuming the allegations to be true as the Court must on this motion, the Court finds that a***

> ***cause of action has been stated for suppression and concealment of a material fact.***

Id. at 127 (citations omitted; emphasis added). *Accord Friedman v. GMC*, 1998 U.S. Dist. Lexis 15621, *3 (N.D. Ill. Sept. 16, 1998) ("It may be legally deceptive to fail to mention a known and substantial risk that the paint may peel after the warranty expires. Omission of a material fact can constitute a consumer fraud"); *Ford Motor Co. v. Taylor,* 446 S.W. 2d 521, 526-28 (Tenn. 1969) (numerous defects in tractor rendered Ford's general representations of quality and usefulness actionable as fraud).

Clearly, if a manufacturer can be held liable under the common law for concealing the existence of a defect that is likely to become manifest after its limited warranty expires, the same conduct can support a claim under the CLRA. This Court should grant review — or depublish — the Court of Appeal's decision for that reason as well.

B. LIKE THE CLRA, THE UCL IS BROADER IN SCOPE THAN COMMON LAW CONTRACT AND FRAUD PRINCIPLES

The UCL states that "unfair competition shall mean and include ***any*** unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500 [the false advertising law]) of Part 3 of Division 7 of the Business and Professions Code." Bus. & Prof. Code, § 17200 (emphasis added).

Like the CLRA, the Legislature enacted the UCL in large part because traditional contract and tort law was insufficient to protect consumers from the range of deceptive practices that manufacturers of consumer products might devise. As this Court has held on many

occasions, inherent in California's consumer-protection statutes is the notion that these protections transcend and expand upon those afforded by common law contract and tort principles. *See, e.g., Cel-Tech,* 20 Cal. 4th at 181; *Committee On Children's Television, Inc. v. General Foods Corp*., 35 Cal.3d 197, 211 (1983); *Fletcher v. Sec. Pac. Nat'l Bank,* 23 Cal. 3d 442 (1979).

In *Fletcher*, for example, the Court observed that by enacting the UCL's counterpart, the False Advertising Law (Bus. & Prof. Code § 17535), "the Legislature obviously intended to vest the trial court with broad authority to fashion a remedy that would effectively prevent the use . . . of any practices which violate the chapter proscribing unfair trade practices and deter the defendant, and similar entities, from engaging in such practices in the future." 23 Cal. 3d at 450 (citations, quotation marks, and brackets omitted).

The Court has also made clear that "in drafting the [UCL], the Legislature deliberately traded the attributes of tort law for speed and administrative simplicity. As a result, to state a claim under the act one need not plead and prove the elements of a tort. Instead, one need only show that 'members of the public are likely to be deceived.'" *Chern v. Bank of America,* 15 Cal. 3d 866, 876 (1976). And because a major purpose of the UCL "is to protect consumers from nefarious business practices," the statute "should be read more broadly in consumer cases [than in UCL actions between businesses] because consumers are more vulnerable to unfair business practices than businesses and without the necessary resources to protect themselves from sharp practices." *Progressive West Ins. Co. v. Superior Court*, 135 Cal. App. 4th 263, 284, 286 (2005).

In the present case, however, the Court of Appeal limited the scope of the UCL by holding that the UCL does not apply beyond the terms of Honda's express warranty. *Daugherty*, 144 Cal. App. 4th at 838 ("[t]he only expectation buyers could have had about the F22 engine was that it would function properly for the length of Honda's express warranty"). According to the Court of Appeal, if a defect in a consumer product does not become manifest within the limited express warranty period, California trial courts must sustain demurrers to allegations that the manufacturer willfully concealed an inherent defect that can cause the product to fail after the warranty expires — thereby leaving the consumer, and not the manufacturer, to bear the cost of repair. *Id.* at 838-39.

This is a dangerous precedent. The court's ruling not only thwarts the UCL's principal purpose of providing a remedy for consumers who are misled by deceptive business practices, it actually ***encourages*** manufacturers to conceal product defects from California consumers by prohibiting claims for defects that remain latent until after the expiration of an express warranty. Indeed, manufacturers could essentially insulate themselves from liability under the UCL for selling products they know to be defective by issuing very limited express warranties, which is antithetical to the purpose of the UCL to create broader and greater consumer protection. The court's holding is at odds with the express language of the UCL and the significant body of law from this Court.

C. REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEAL'S RULING PERMITS CONCEALMENT OF PRODUCT DEFECTS UNDER ALL THREE PRONGS OF THE UCL

A violation of the UCL occurs if the defendant has committed an act that is (1) fraudulent, (2) unlawful, or (3) unfair. *See* Bus. & Prof. Code § 17203; *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 561 (1998); *Podolsky v. First Healthcare Corp.*, 50 Cal. App. 4th 632, 647 (1996). Courts have analyzed the UCL's three prongs disjunctively, meaning that a defendant need only engage in one of the proscribed acts to be held liable under the statute. *Stop Youth Addiction*, 17 Cal. 4th at 561; *Podolsky*, 50 Cal. App. 4th at 647. Thus, a practice may be "unfair" — and violative of the UCL — even if it is not unlawful. *Cel-Tech*, 20 Cal.4th at 180; *Committee on Children's Television,* 35 Cal.3d at 210.

In the present case, however, the Court of Appeal found that Honda's concealment of a defect (which ultimately led it to conduct a recall in some of the affected vehicles) did not violate ***any*** of the UCL's three prongs. *See Daugherty*, 144 Cal. App. 4th at 837.

The Court of Appeal found that Honda had not violated the "unlawful" prong because it had not violated the CLRA. *Id.* at 838. As discussed above, however, Petitioners did allege a valid CLRA claim and, therefore, they stated a claim under the unlawful prong of the UCL as well. *See Lazar v. Hertz Corp.*, 69 Cal. App. 4th 1494, 1505 (1999) (under the "unlawful" prong, "the UCL borrows violations of other laws . . . and makes those unlawful practices actionable under the UCL"); *Chamberlan,* 369 F. Supp. 2d at 1146 (valid claim under CLRA also serves as predicate violation of UCL's unlawful prong).

The same is true of Petitioners' claim under the "fraud" prong of the UCL. Unlike under the common law, pleading and proving a fraudulent practice under the UCL simply requires showing that members of the public are likely to be deceived. *Day v. AT&T Corp.*, 63 Cal. App. 4th 325, 332-333 (1998); *Olsen v. Breeze, Inc.*, 48 Cal. App. 4th 608, 618 (1996). The burden of establishing such a claim is a "modest" one. *Prata v. Superior Court*, 91 Cal. App. 4th 1128, 1144 (2001).

Thus, in *Massachusetts Mutual*, the Court of Appeal held that, "to establish liability for a ***nondisclosure*** under either the UCL or the CLRA, plaintiffs need not present individual proof that each class member relied on particular representations made by Mass Mutual or its agents." 97 Cal. App. 4th at 1286 (emphasis added). Indeed, as this Court has recognized, "[t]he Legislature considered this purpose so important that it authorized courts to order restitution without individualized proof of deception, reliance, and injury if necessary to prevent the use or employment of an unfair practice." *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1267 (1992) (citation omitted).

Accordingly, allegations like those Petitioners have alleged here — that Honda was aware of the oil seal defect, but chose to conceal it from unwitting consumers — have led to findings that defendants have violated the UCL in many other, similar cases. *See, e.g.*, *Muehlbauer*, 431 F. Supp. 2d at 861; *Trew*, 2006 WL 306904 at *6; *Chamberlan*, 369 F. Supp. 2d at

1146; *Howard v. Ford Motor Co.,* No. 763795-2 (Alameda Super. Ct., Oct. 11, 2000) (attached to RJN as Ex. 2).[6]

But the court viewed the matter differently. Starting from the premise that consumers cannot be deceived unless they have an expectation or an assumption about the matter in question, the court found — as a matter of law on demurrer — that Petitioners could not reasonably expect ***anything*** more from their cars after the limited warranty expired. *See Daugherty,* 144 Cal. App. 4th at 838 ("The only expectation buyers could have had about the F22 engine was that it would function properly for the length of Honda's express warranty, and it did").

But warranty coverage is only one aspect of consumer expectation. Others include trouble-free operation, performance after warranty expiration and market value for resale. Consumers do not reasonably expect that their cars will begin to experience significant problems after passing the 36,000-mile mark on their odometers.

More important, however, is what Petitioners are ***not*** alleging. Petitioners have never even suggested that they expect their vehicles to last forever without experiencing a problem, or that Honda should continue to provide indefinite coverage notwithstanding the limited nature of its warranty. Rather, Petitioners have alleged that ***Honda was aware of a***

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[6] The Court of Appeal attempted to support its conclusion that Petitioners could not state a claim under the fraud prong of the UCL by relying on *Bardin*. *See Daugherty*, 144 Cal. App. 4th at 838. As discussed above in Section IV.A.2., however, *Bardin* is itself distinguishable because the court found that the plaintiff in that case had failed to identify any material facts that required disclosure in the first place.

defect that could cause Class Vehicles' engines to fail after the warranty expired, thereby shifting the cost of repair from Honda to them, but that Honda concealed that information when it sold those vehicles.

As discussed in Section IV.A.2., above, *State of New York v. General Motors Corp.,* 466 N.Y.S.2d 124 (N.Y. Sup. Ct. 1985), demonstrates that there is a critical difference between claiming that a warranty should provide indefinite coverage and claiming that the manufacturer of the product in question ***knew*** that the product was defective and was likely to fail after the warranty expired, but failed to disclose that information to prospective buyers.

Nor is it enough to say that consumers have no basis for complaining about the existence of a defect simply because it has yet to manifest in a malfunction or outright product failure. That much was made clear over 30 years ago in *Anthony v. General Motors Corp.*, 33 Cal. App. 3d 699 (1973). *Anthony* was a class action that in which the plaintiffs sought an order requiring General Motors ("GM") to replace the wheels that GM installed on thousands of its trucks. 33 Cal. App. 3d at 704. The plaintiffs alleged that the wheels on all the class vehicles were defective because they were prone to break apart when under load. *Id.* at 704-05. The trial court ruled that the case could not proceed as a class action, however, and the Court of Appeal reversed. *Id.* at 702. The Court of Appeal's assessment of the nature of the plaintiffs' claims, and their suitability for adjudication in a class action, has equal application to the present case:

> ***We think it clear that the gravamen of plaintiffs' case is the contention that all wheels of the type involved contain an inherent defect which may cause them to fail at some time,*** even if loaded within the limits of the representations discussed below and even if maintained and driven with due care. It is patent from the record before us that the issue is

> one which will require an elaborate and protracted trial. It is exactly the sort of common issue for which class actions are designed**.**

Id. at 704-05 (emphasis added).

Similarly, in *Khan v. Shiley*, 217 Cal. App. 3d 848 (1990), the court affirmed the dismissal of product liability, warranty, and negligence claims against the manufacturer of a defective heart valve that had not yet failed, each of which were based solely on economic loss, as Petitioners have alleged here. But the court reversed the dismissal of a claim in which the plaintiff had alleged that the manufacturer had committed fraud in connection with the sale of that product, and made clear that the theory that informed the claim was anything but new or novel:

> ***Allegations of fraud . . . are in a class by themselves*** . . . . [¶] For purposes of establishing fraud, it matters not that the valve implanted in Khan's heart 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***. . . . [¶] Thus, the motion was erroneously granted as to that cause of action and, accordingly, summary judgment was improper.
>
> We reach this conclusion notwithstanding defendants' position that the unprecedented cause of action plaintiffs seek to establish is contrary to public policy. We recognize the role public policy has played, and continues to play, in the torts arena. However, ***our decision neither establishes a new cause of action nor drastically extends existing law. It merely confirms that 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.***

217 Cal. App. 3d at 858 (emphasis added).

As these cases demonstrate, concealing a defect that would affect a product's value if its existence had been known at the time of sale is not made permissible simply because the defect has yet to become manifest when the seller's fraud is discovered. And certainly the bar is set no higher for claims brought under consumer-protection statutes than it would be under the common law. Indeed, as discussed above, the opposite is true.

In short, Petitioners stated a claim under the UCL's fraud prong, which means they have stated a claim under the "unfairness" prong as well. *Blakemore v. Superior Court*, 129 Cal. App. 4th 26, 49 (2005) ("Because the allegations are sufficient to state a UCL claim based upon deception, the same allegations necessarily suffice to state a claim under the unfairness prong of the UCL. A practice which is deceptive is necessarily unfair") (footnote omitted).

This is not to suggest, however, that the fraud and unfairness prongs are equivalent; the unfairness prong provides the broadest standard of liability under the UCL. In a consumer case such as this one, determining whether a business practice is "unfair" involves balancing the utility of the defendant's conduct against the gravity of the alleged victim's harm. *Smith v. State Farm Mutual Automobile Ins. Co.*, 93 Cal. App.4th 700, 718-720 (2001).

It is difficult to conceive of how the "utility" of willfully concealing the existence of a defect in a product that one sells to an unwitting consumer can ever outweigh the harm that flows from it. Plainly, though, establishing a rule of law that allows (indeed, encourages) trial courts to resolve that question as a matter of law on demurrer, as the Court of Appeal did here, was patently improper.

V. CONCLUSION

The concept that runs through both of the lower courts' decisions in this case is their observation that permitting Petitioners to proceed with an action against Honda for concealing a material defect in thousands of automobiles it sold to California consumers would usher in a new era of liability that is tantamount to requiring automakers to ensure that their vehicles will last forever. Actually, however, it is the decision by the courts below that will usher in a new era — one that turns back the clock on consumer-protection law to a particularly harsh version of *caveat emptor*.

Indeed, it is already beginning to happen. After trumpeting the Court of Appeal's decision on their website, Honda's counsel began to employ the decision as a means of obtaining dismissal of other consumer-protection cases against other manufacturers, and it will not be long before counsel representing other product manufacturers will begin doing the same. To the extent those efforts succeed, consumer-protection law in California will undergo a radical and bizarre transformation — one in which manufacturers are actually rewarded from concealing the existence of defects in their products from those who purchase and lease them. Accordingly, Petitioners respectfully request that the Court grant review of the Court of Appeal's decision or, at a minimum, depublish it.

Dated: December 18, 2006

ROBINS, KAPLAN, MILLER & CIRESI, LLP
LEVY RAM & OLSON LLP
THE STURDEVANT LAW FIRM, PC
FAZIO | MICHELETTI LLP

by_____
Jeffrey L. Fazio

Attorneys for Petitioners

CERTIFICATE OF WORD COUNT

I, Jeffrey L. Fazio, hereby certify that there are 8,307 words in the foregoing Petition, exclusive of the tables of contents and authorities, declaration of service, and this certificate. I determined the number of words using the Word Count tool in Microsoft Word, the word processing software that was used to prepare this Petition.

Dated: December 18, 2006

Jeffrey L. Fazio

DECLARATION OF SERVICE BY OVERNIGHT DELIVERY

RE: Case. No. _____
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 Pleasanton, County of Alameda, and not a party to this action. My business address is 4900 Hopyard Rd., Ste 290, Pleasanton, CA, 94588.

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 or package provided by an overnight-delivery carrier addressed as set forth below. I placed the envelope or package for collection and overnight delivery at an office or regularly-utilized drop box belonging to the overnight-delivery carrier.

ITEMS SERVED

- PETITION FOR REVIEW

PERSONS SERVED

Original and 8 copies to:

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

One copy each 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

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration of service was executed on December 18, 2006, at Pleasanton, California.

_____
Alissa N. Micheletti