S274625

No. S _____

**IN THE SUPREME COURT**
**OF THE STATE OF CALIFORNIA**

EVERARDO RODRIGUEZ and JUDITH V. ARELLANO,

Plaintiffs and Appellants,

v.

FCA US, LLC,

Defendant and Respondent.

---

California Court of Appeal, Fourth District, Division Two, Civil No. E073766
Appeal from Riverside County Superior Court
Case No. RIC1807727
Honorable Jackson Lucky, Judge Presiding

---

# PETITION FOR REVIEW

---

ROSNER, BARRY & BABBITT, LLP
Hallen D. Rosner, SBN 109740
Arlyn L. Escalante, SBN 272645
10085 Carroll Canyon Road
Suite 100
San Diego, California 92131
(858) 348-1005 / F: (858) 348-1150
hal@rbblawgroup.com
arlyn@rbblawgroup.com

KNIGHT LAW GROUP, LLP
Roger R. Kirnos, SBN 283163
10250 Constellation Boulevard
Suite 2500
Los Angeles, California 90067
(310) 552-2250 / F: (310) 552-7973
rogerk@knightlaw.com

GREINES, MARTIN, STEIN & RICHLAND LLP
Cynthia E. Tobisman, SBN 197983
ctobisman@gmsr.com
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
(310) 859-7811 / Fax (310) 276-5261

Attorneys for Petitioners
EVERARDO RODRIGUEZ and JUDITH V. ARELLANO

## TABLE OF CONTENTS

## TABLE OF CONTENTS

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**PAGE**

**Cases**

## TABLE OF CONTENTS

**PAGE**

## TABLE OF CONTENTS

**PAGE**

## ISSUE PRESENTED

Should consumers who purchase used vehicles with still-pending new-car express warranties be given protections like other consumers who purchase new vehicles with new-car express warranties? Specifically: Does the phrase "or other motor vehicle sold with a manufacturer's new car warranty" in Civil Code section 1793.22's definition of a "new motor vehicle" cover sales of used vehicles still covered by the manufacturer's express new car warranty, or are such used vehicles instead outside the protections of the Song-Beverly Act?

## INTRODUCTION

The published opinion ("Opinion") eliminates rights that consumers have enjoyed for decades. One of the core protections of the Song-Beverly Act is the refund-or-replacement remedy in Civil Code section 1793.2, subdivision (d)(2).[1] When vehicle manufacturers fail to repair vehicles within a reasonable number of repair attempts during the warranty period, they are required to "promptly replace" vehicles or "promptly make restitution to the buyer" for the purchase price of a vehicle (§ 1793.2, subd. (d)(2).) This obligation applies to "a new motor vehicle, as that term is defined in paragraph (2) of subdivision (e) of Section 1793.22." (*Ibid.*) That section defines a "new motor vehicle" as "a dealer-owned vehicle and a 'demonstrator' *or other motor vehicle sold with a manufacturer's new car warranty*…." (§ 1793.22, subd. (e)(2), italics added.) The question is whether a used car purchased from a retail car dealer with an existing new car warranty is "a new motor vehicle" within the meaning of the Act.

Until the Opinion, the answer to this question—based on 27-year-old precedent—was "yes." *Jensen v. BMW of North America, Inc* (1995) 35 Cal.App.4th 112 (*Jensen*) held that "the words of section 1793.22 are reasonably free from ambiguity and cars sold with a balance remaining on the manufacturer's new motor vehicle warranty are included within its definition of 'new motor vehicle.' The use of the word 'or' in the statute indicates 'demonstrator' and 'other motor vehicle' are intended as

[1] Statutory references are to the Civil Code unless indicated.

alternative or separate categories of 'new motor vehicle' if they are 'sold with a manufacturer's new car warranty.'" (*Id.* at p. 123.) The Legislature intended "to make car manufacturers live up to their express warranties, whatever the duration of coverage." (*Id.* at p. 127.) The "conclusion [that] section 1793.22 includes cars sold with a balance remaining on the new motor vehicle warranty is consistent with the Act's purpose as a remedial measure" and "also consistent with the Department of Consumer Affairs' regulations which interpret the Act to protect 'any individual to whom the vehicle is transferred during the duration of a written warranty.'" (*Id.* at p. 126.)

The Opinion breaks with *Jensen* and, in so doing, cuts thousands of vehicles out of the Act's protections.[2] As this Court has remarked, the Act is a "'manifestly a remedial measure, intended for the protection of the consumer; it should be given a construction calculated to bring its benefits into action.'" (*Kirzhner v. Mercedes-Benz USA, LLC* (2020) 9 Cal.5th 966, 972, quoting *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 990 (*Murillo*).) The Opinion plainly doesn't do that.

Whether section 1793.22's "new motor vehicle" definition applies to used cars with unexpired manufacturer-issued new-car warranties is an important, recurring issue. Since 1995,

---

[2] The Opinion already has created a deluge of requests and motions by manufacturers and distributors seeking voluntary and involuntary dismissals of pending used car litigation. (See 5/17/2022 Letter by Knight Law Group Requesting Depublication, pp. 2-4.)

thousands of consumers who purchased unrepairable defective used cars have sued, and settled with, manufacturers under the Act in reliance on *Jensen*. Hundreds of cases involving used vehicles have been pending without any challenge on the basis of the vehicle being a used car—until the Opinion was issued.

*Jensen*'s statutory interpretation has been cited and followed in published[3] and unpublished[4] cases. Until the Opinion, only one other Court of Appeal had held that section 1793.22's "new motor vehicle" definition doesn't apply to a used car purchased with an unexpired manufacturer warranty—and this Court depublished that decision.[5] And the notion that the Act covers used cars sold with still-pending express warranties is

---

[3] See, e.g., *R & B Auto Center, Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 335 (the Act "applies to 'cars sold with a balance remaining on the manufacturer's new motor vehicle warranty,'" quoting *Jensen*); *Leber v. DKD of Davis, Inc.* (2015) 237 Cal.App.4th 402, 408-409 (*Leber*) (*Jensen*'s holding that "a used vehicle sold with a manufacturer's warranty qualified as a new vehicle under [section 1793.22]" applies to manufacturer liability, but not to used car sellers who don't issue their own express warranty].)

[4] See, e.g., *Petrosian v. Mercedes-Benz USA, LLC* (Apr. 30, 2021, B299629) (nonpub opn.); *Harrison v. Rexhall Industries, Inc.* (Feb 14, 2006, B175984 (nonpub. opn.).

[5] *Sherman v. General Motors Corp.* (July 15, 1993, B065854) opn. ordered nonpub. Dec. 17, 1993.

We cite to the unpublished decisions not as precedent but only to demonstrate the issue's important, recurring nature. (*Mangini v. J.G. Durand International* (1994) 31 Cal.App.4th 214, 219 [citing unpublished decisions to show issue's important, recurring nature and need for resolution].)

so well-accepted in this area of law that several manufacturers *admit* used cars are considered a "new motor vehicle" under the Act when responding to requests for admission during discovery. (See 5/17/2022 Letter by Knight Law Group Requesting Depublication, p 4.)

The Opinion upends those settled interpretations by holding that the phrase "or other motor vehicle sold with a manufacturer's new car warranty" merely qualifies the prior clause that identifies dealer-owned vehicles and demonstrators. (Opn:11-12.) Parting with *Jensen*, the Opinion holds that the Act "*unambiguously* refers to cars that come with a new or full express warranty," not used cars with an unexpired manufacturer new car warranty. (Opn:12, 15, italics added; compare *Jensen, supra,* 35 Cal.App.4th at p. 123.)

The Opinion's new interpretation removes thousands of vehicles that are *still subject* to manufacturer express warranties from the Act's protection even if the manufacturer refuses to or fails to repair the vehicle under the warranty—thus massively reducing a manufacturer's duty to replace or provide restitution for non-repairable defective vehicles. Instead, manufacturers are now incentivized to try to get unwitting consumers to trade in their defective vehicles—and, in turn, avoid ever having to brand that vehicle a lemon to advise future purchasers.

Though the Opinion claims to distinguish, rather than conflict with, *Jensen*, its statutory-interpretation analysis directly conflicts with *Jensen* and unravels protections for used-car buyers. Because the Opinion finds the Act's language

unambiguous (where *Jensen* found that the same language was unambiguous the *opposite* way), it never even considers the Act's remedial purpose—which it undermines. Indeed, the Opinion vitiates the Act's requirement that manufacturers "promptly" perform a vehicle repurchase or replacement. And a key component of that repurchase-or-replace remedy is that a manufacturer must *brand* the vehicle with a "lemon" title to provide notice to future purchasers about the vehicle's defective nature. (§§ 1793.23, 1793.24.) But, under the Opinion, if a vehicle is sold or traded into a dealer and then resold, it will *never* be branded as a lemon since nothing in the Commercial Code mandates a manufacturer must brand a vehicle's title.

The Opinion acknowledges that purchasers of used cars with unexpired manufacturer new-car warranties should have recourse against the manufacturer for non-repairable defects, but holds such recourse is limited to suing the manufacturers under the Commercial Code. (Opn:19.) But that holding ignores that the Legislature enacted the Act's enhanced remedies, including its refund-or-replace obligation and the consumer's right to recover attorney's fees, specifically because the Legislature determined that the Commercial Code's remedies had *failed* to sufficiently protect vehicle buyers—ordinary consumers who typically lack the financial resources to battle manufacturers without the Act's protections. "[T]he Act is designed to give *broader* protection to consumers than the common law or [California Uniform Commercial Code] provide." (*Martinez v. Kia*

*Motors America, Inc.* (2011) 193 Cal. App. 4th 187, 198 (*Martinez*), italics added.)

Courts should not construe the Act in a manner that undermines the Act's purpose of having manufacturers promptly buy back non-repairable defective vehicles and label them lemons. "Any interpretation that would significantly vitiate the incentive to comply should be avoided." (*Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, 184 (*Kwan*).) Yet, the Opinion's interpretation incentivizes manufacturers to shirk their duties, hoping the vehicle will end up in the hands of a used car retailer through repossession or a trade in.

Only this Court can conclusively determine the meaning of section 1793.22's reference to "other motor vehicle sold with a manufacturer's new car warranty." Only this Court can determine which statutory-interpretation analysis—the one in *Jensen* or the one in the Opinion—is correct and which best furthers the Act's remedial purpose. Review should be granted.

What's more, because manufacturers are *already* relying on the Opinion in a rapidly increasing number of other pending lawsuits to eliminate claims by buyers of used vehicles, petitioners urge the Court to order that the Opinion is not citable while review is pending. (Cal. Rules of Court, r. 8.1115 (e)(3).)

## STATEMENT OF THE CASE

### A. Factual Background.

#### 1. Petitioners purchase a two-year old vehicle from a used car dealer that remains subject to the manufacturer's five-year new car powertrain warranty.

Everardo Rodriguez and Judith Arellano (petitioners) purchased a two-year old Dodge Truck from a used car dealership, the Pacific Auto Center. (Opn:2-3.) At the time of the purchase, the truck remained subject to a five-year/100,000-mile powertrain warranty issued by the vehicle's manufacturer, FCA USA LLC (hereinafter, "FCA"). (Opn:3.)[6]

Because the truck had 55,000 miles on it at purchase, FCA's three-year/36,000 new-vehicle warranty mile bumper-to-bumper warranty had expired. (Opn:3.) But FCA's powertrain warranty remained in effect, and it covered the truck's engine, transmission and drive system—the components involved in petitioners' breach-of-warranty claim. (*Ibid*.)

[6] FCA is the parent company that oversees the Chrysler and Dodge brands. (Opn:2, fn. 2)

### 2. While the manufacturer's powertrain warranty remains in effect, the vehicle experiences defects covered by the warranty that the manufacturer cannot fix after multiple repair attempts.

While FCA's express powertrain warranty was still in effect, the truck began experiencing repeated engine issues. (Opn:3.) So, petitioners took the vehicle six times to an authorized FCA (Chrysler) dealer for repair. (Opn:3.)

The truck has a defect in the Totally Integrated Power Module, a device in the engine that contains a circuit board and regulates electrical power to the truck's systems. (Opn:4.) FCA performed repairs for petitioners under its express warranty with no charge to petitioners for the warranty work. (Appellant's Appendix filed in E073766, pp. 174-175, 180-192.) FCA could not repair the defects. (Opn:3.)

## B. Procedural History.

### 1. After the manufacturer refuses to comply with the Act's refund-or-replace provisions, petitioners sue the manufacturer under the Act.

After FCA was unable to repair the engine and FCA refused to repurchase the vehicle, petitioners sued FCA under the Act, alleging that FCA violated section 1793.2, subdivision (d)(2). (Opn:4.) Under that statute, if a vehicle manufacturer or its

representative "is unable to service or repair a new motor vehicle, *as that term is defined in paragraph (2) of subdivision (e) of Section 1793.22*, 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)." (§ 1793.2, subd. (d)(2), italics added). (We refer to this obligation as the "refund-or-replace" provision.)

### 2. The trial court enters summary judgment for the manufacturer, concluding the vehicle was not a "new motor vehicle" as defined by Civil Code section 1793.22.

FCA moved for summary judgment, claiming that petitioner's vehicle was not a "new motor vehicle" for purposes of the refund-or-replace provision. (Opn:2.)

The "new motor vehicle" definition that is cross-referenced and incorporated into that refund-or-replace provision (i.e., the definition in § 1793.22, subd. (e)(2)), provides in pertinent part that a "'[n]ew motor vehicle' *includes* the chassis, chassis cab, and that portion of a motor home devoted to its propulsion, but does not include any portion designed, used, or maintained primarily for human habitation, a dealer-owned vehicle and a 'demonstrator' *or other motor vehicle sold with a manufacturer's new car warranty* but does not include a motorcycle or a motor vehicle which is not registered under the Vehicle Code because it

is to be operated or used exclusively off the highways." (§ 1793.22, subd. (e)(2), italics added.)[7]

Even though the vehicle was sold to petitioners with FCA's new-vehicle powertrain warranty still in effect, and even though that warranty was transferred to petitioners when they bought the car, FCA argued that petitioners' claim failed as a matter of law "because the manufacturer's refund-or-replace provision applies to new vehicles only, and it was undisputed [petitioners] purchased the truck used." (Opn:2, 4.)

The trial court granted the summary judgment motion. (Opn:4.) It ruled that "a previously owned vehicle sold with a balance remaining on one of the manufacturer's express warranties does not qualify as a 'new motor vehicle' under the Act." (*Ibid.*)

---

[7] The statute defines a "demonstrator" as "a vehicle assigned by a dealer for the purpose of demonstrating qualities and characteristics common to vehicles of the same or similar model and type." (§ 1793.22, subd. (e)(2).)

The statute also provides that a "new motor vehicle" generally means "a new motor vehicle that is bought or used primarily for personal, family, or household purposes" but also includes "a new motor vehicle with a gross vehicle weight under 10,000 pounds that is bought or used primarily for business purposes by a person, including a partnership, limited liability company, corporation, association, or any other legal entity, to which not more than five motor vehicles are registered in this state." (*Ibid.*)

### 3. The Court of Appeal affirms.

In a published decision, the Court of Appeal (Fourth Appellate District, Division Two), affirmed.

Parting company with decades of statutory analysis in *Jensen*, *supra*, 35 Cal.App.4th 112, the Opinion concludes that the phrase "other motor vehicle sold with a manufacturer's new car warranty" does not cover sales of previously owned vehicles with an existing, unexpired manufacturer's new car warranty but, instead, only covers "sales of essentially new vehicles where the applicable warranty was *issued with* the sale." (Opn:3, original italics.) The Opinion determines that "*in isolation* the phrase 'other motor vehicle sold with a manufacturer's new car warranty' could arguably refer to any car sold with a manufacturer's warranty still in force" but instead "agree[s] with FCA that context requires a more narrow interpretation." (Opn:10, original italics.)

The Opinion emphasizes that "the phrase is preceded by 'a dealer-owned vehicle and demonstrator,'" which according to the Opinion "comprise a specific and narrow class of vehicles" that are used but "have never been previously sold to a consumer and come with full express warranties." (Opn:11.) In contrast to *Jensen*'s reading of the same phrase, the Opinion concludes the text "indicates the Legislature structured the provision as a list of two vehicles (dealer-owned vehicles 'and' demonstrators) followed by an adjectival clause qualifying or describing those vehicles" intended as "a catchall provision to cover a narrow class

vehicle—the previously driven, but basically new (i.e., not previously sold) car." (Opn:11-12.)

Instead of reading the phrase "other motor vehicle sold with a manufacturer's new car warranty" as referring to a vehicle sold with an unexpired manufacturer's new car warranty, the Opinion leaps to the conclusion that the "clear purpose" of the phrase "is to function as a catchall to ensure that manufacturers cannot evade liability under the Act by claiming a vehicle doesn't qualify as new because the dealership hadn't actually used it as a demonstrator." (Opn:12.)

The Opinion never grapples with the fact that such a car would already fall within the reference to a "dealer-owned vehicle," making the so-called catchall superfluous. Nor does the Opinion grapple with the fact that its construction would let manufacturers and dealers avoid liability for dealer-owner vehicles, demonstrators, or any car with a still-effective new-car warranty merely by selling or transferring the defective vehicle to another car dealer. Nor does the Opinion grapple with the branding issues—that its interpretation would lead to sales of already defective vehicles to unwary consumers.

The Opinion, after engaging in a "textual" analysis, concludes "the phrase 'other motor vehicle sold with a manufacturer's new car warranty' *unambiguously* refers to cars that come with a new or full express warranty." (Opn:15, italics added.) The Opinion then states that "even if this meaning weren't readily apparent from the statute," the Act's legislative history supports the same conclusion. (*Ibid.*) The Opinion's

legislative-history analysis relies primarily on the absence of reference to "used vehicles" in the materials regarding the amendment that added the language at issue. (*Ibid.*)

The Opinion largely ignores *Jensen*'s statutory interpretation. (See § I.A, *post*.) The Opinion instead claims *Jensen*'s facts are "distinguishable" and, by disregarding the scope of *Jensen*'s holding, describes the issue as "one of first impression." (Opn:16.)

Instead of following *Jensen*, the Opinion analyzes *Kiluk v. Mercedes-Benz USA, LLC* (2019) 43 Cal.App.5th 334 (*Kiluk*), specifically, dicta in footnote 4 of that decision. (Opn:7-8, 18-19.) Citing that footnote, the Opinion reasons: "*Kiluk* questioned the wisdom of an approach that" follows *Jensen*. (Opn: 18.) But the Opinion wholly *ignores* the end of the *Kiluk* footnote which states: "If a term of the warranty is that it is transferrable, then the manufacturer's duties under the Song-Beverly Act continue posttransfer. This approach enforces the warranty while avoiding the problem of serial implied warranties." (*Kiluk*, *supra*, at p. 340.) Thus, if the Opinion had followed *Jensen* and *Kiluk* instead of attempting in earnest to distinguish them or ignore material portions of their rationale, the result would have been, and could only be, the opposite.

The Opinion concludes that although its interpretation denies "the Act's refund-or replace remedy" to used car buyers such as petitioners, they—as "the beneficiary of a transferrable express warranty"—can still "sue a manufacturer for breach of an

express warranty to repair defects under the California Uniform Commercial Code." (Opn:19.)

The Opinion never addresses the fact that the Legislature enacted the Act's enhanced remedies because Commercial Code remedies had not sufficiently protected consumers.

## WHY REVIEW IS NECESSARY

### I. The Court Should Grant Review To Secure Uniformity Of Decision As To The Meaning Of Section 1793.22's "New Motor Vehicle" Definition And The Extent To Which It Applies To Used Vehicles With Unexpired Manufacturer New Car Warranties.

Review is necessary to secure uniformity of decision, in particular the conflict between the Opinion and *Jensen*, *supra*, 35 Cal.App.4th 112—a 27-year-old decision.

#### A. The Opinion conflicts with *Jensen*.

Although the Opinion purports to distinguish *Jensen*'s facts (Opn:16-17), the holdings in *Jensen* and the Opinion clearly conflict. The holdings rest on fundamentally different—and diametrically opposed—statutory interpretations.

***Plain meaning***. *Jensen* holds that "the words of section 1793.22 are reasonably free from ambiguity and cars sold with a balance remaining on the manufacturer's new motor vehicle warranty are included within its definition of 'new motor vehicle.'

The use of the word 'or' in the statute indicates 'demonstrator' and 'other motor vehicle' are intended as alternative or separate categories of 'new motor vehicle' if they are 'sold with a manufacturer's new car warranty.'" (35 Cal.App.4th at p. 123.) *Jensen rejected* the manufacturer's arguments that (a) the phrase "or other motor vehicle sold with a manufacturer's new car warranty" only "clarifies the word 'demonstrator' and is not intended as a separate category," and (b) the Legislature could not possibly have intended that language to encompass every motor vehicle sold with any remainder of the manufacturer's new car warranty. (*Id.* at p. 122.)

The Opinion, in contrast, holds that the plain language unambiguously indicates *the exact opposite*: The Opinion concludes "the phrase 'other motor vehicle sold with a manufacturer's new car warranty' unambiguously refers to cars that come with a new or full express warranty." (Opn:15.) The Opinion adopts the manufacturer's arguments that *Jensen* rejected, concluding that the text "indicates the Legislature structured the provision as a list of two vehicles (dealer-owned vehicles 'and' demonstrators) followed by an adjectival clause qualifying or describing those vehicles" intended as "a catchall provision to cover a narrow class vehicle—the previously driven, but basically new (i.e., not previously sold) car." (Opn:11-12.)

***Definition of consumer goods***. The manufacturer in *Jensen* argued that construing "section 1793.22's definition of 'new motor vehicles' to include used cars conflicts with the definition of 'consumer goods' found in section 1791, subdivision

(a)," which defines consumer goods as "new" products. (35 Cal.App.4th at p. 126.) *Jensen* rejected that argument, noting that the "consumer goods" definition dates back to 1971, while the Legislature added the more specific definition of "new motor vehicle" in 1987, and therefore "[u]nder well-recognized rules of statutory construction, the more specific definition found in current section 1793.22 governs the more general definition found in section 1791." (*Id.* at p. 126.)

The Opinion, in contrast, emphasizes section 1791's definition of "consumer goods" and its reference to "new" products, and never acknowledges the "specific governs the more general" rule of statutory construction. (See Opn:6.)

***Legislative history.*** *Jensen* concludes that the Act's legislative history and *Jensen*'s plain-meaning construction of section 1793.22's "new motor vehicle" definition are "one and the same." (35 Cal.App.4th at p. 123.) *Jensen* construes the amendments to the "new motor vehicle" definition as "show[ing] the Legislature has systematically attempted to address warranty problems unique to motor vehicles, including transferability and mobility," which would presumably include the "national wholesale market for previously owned cars, including those under manufacturers' warranty." (*Id.* at p. 124.) The manufacturer in *Jensen*, as FCA did here, emphasized language in a Department of Consumer Affairs' Enrolled Bill Report that the bill includes protection for dealer-owned vehicles and demonstrators sold with a manufacturer's new car warranty. (*Ibid.*) *Jensen* did not view that snippet as dispositive. (*Ibid.*)

*Jensen* also rejected the manufacturer's argument that "the *absence* of legislative history means the Legislature did not intend to enact so sweeping an expansion in warranty protection available under the Act," holding that "[g]iven the nature of the [legislative] process, we conclude no inference of legislative intent may be drawn from the lack of legislative history on this particular statutory provision." (*Id.* at p. 125, original italics.)

The Opinion, in contrast, reaches the exact opposite conclusion from reviewing the legislative history, including the exact same Enrolled Bill Report. (Opn:15.) The Opinion treats the absence of legislative history, in particular the lack of "any mention of used vehicles," as dispositive because "[o]ne would assume" an expansion of liability to include used vehicles "would warrant mention if not discussion." (*Ibid.*)

***Act's purpose.*** *Jensen* holds that its "conclusion section 1793.22 includes cars sold with a balance remaining on the new motor vehicle warranty is consistent with the Act's purpose as a remedial measure." (35 Cal.App.4th at p. 126.) Noting that "manufacturers are free to change the terms of express warranties they offer," *Jensen* holds that "[t]he Act merely reflects the Legislature's intent to make car manufacturers live up to their express warranties, *whatever the duration of coverage*." (*Id.* at p. 127, italics added.) "[T]he Act applies to new motor vehicle manufacturers who make express warranties. (§§ 1791.2 and 1793.2.) There is no privity requirement." (*Ibid.*)

The Opinion, in contrast, doesn't address the Act's remedial purpose, including the detrimental impact that the Opinion's

interpretation will have on consumers and how it will encourage manufacturers to avoid their obligation to promptly buy back non-repairable defective vehicles.

***Regulations***. *Jensen* recognizes that its construction of section 1793.22 is "consistent with the Department of Consumer Affairs' regulations which interpret the Act to protect 'any individual to whom the vehicle is transferred during the duration of a written warranty.' (Cal. Code Regs, tit. 16, § 3396.1, subd. (g).)." (*Jensen*, *supra*, 35 Cal.App.4th at p. 126.) "While the ultimate interpretation of a statute is an exercise of the judicial power [citation], when an administrative agency is charged with enforcing a particular statute, its interpretation of the statute will be accorded great respect by the courts 'and will be followed if not clearly erroneous.'" (*Davey Tree Surgery Co. v. Occupational Safety & Health Appeals Bd.* (1985) 167 Cal.App.3d 1232, 1243.)

The Opinion doesn't mention these regulations.

***

The statutory interpretations adopted in *Jensen* and the Opinion are diametrically opposed, drawing opposite conclusions from the same language and same legislative history. By eliminating protections that have existed for decades based on applying diametrically opposed reasoning to existing case law, the Court of Appeal has invited this Court's intervention. Only this Court can resolve which appellate court got it right.

### B. The Opinion's analysis of other cases further muddies California law.

Even ignoring the conflict between the Opinion and *Jensen*, the Court should grant review to resolve the confusion over *Jensen* that is created by dicta in other cases—confusion that the Opinion exacerbates.

FCA relied on that confusion in the appellate proceedings below to argue that a split of authority between *Jensen* and other decisions *already exists* in California and that the Court of Appeal here must pick a side. (See FCA's Motion for Judicial Notice, filed 3/26/2021 in E073766, p. 7 ["To resolve plaintiff's claims in his pending appeal, *this court will need to address the split of authority* over whether a 'new motor vehicle' includes a used car sold with an unexpired, original warranty," italics added].)

In claiming a split, FCA quoted a treatise snippet that "'courts in California are split on the issue of whether California lemon law applies to vehicles . . . sold to a second customer with part of the original warranty in effect." (*Id.* at p. 7, fn. 2, citing 2 Pridgen et al, Consumer Protection and the Law (2020) ed) § 15:4). But that treatise's sole basis for claiming a "split" is a comparison of *Jensen* to an opinion that *this Court depublished*. (See 2 Pridgen et al, Consumer Protection and the Law, *supra*, at § 15:4, contrasting *Jensen* with *Sherman v. General Motors Corp.* (July 15, 1993, B065854) opn. ordered nonpub. Dec. 17, 1993; see p. 11, fn. 4, *ante*.) That's *not* a split.

FCA, in claiming a split in authority, also suggested that *Jensen* conflicts with *Kiluk*, *supra*, 43 Cal.App.5th 334 and *Dagher v. Ford Motor Co.* (2015) 238 Cal.App.4th 905 (*Dagher*). (See FCA's Motion for Judicial Notice, *supra*, pp. 7-8.) The Opinion relies in part on *Kiluk* and *Dagher*. (Opn:17-18.)

Neither *Kiluk* nor *Dagher* holds that *Jensen* was incorrectly decided. FCA's and the Opinion's reliance on *Kiluk* and *Dagher* further demonstrates the need to clarify California law.

***Kiluk***. Although the Opinion emphasizes that *Kiluk, supra,* 43 Cal.App.5th 334, "expressed 'reservations'" about *Jensen* (Opn.-18), those reservations were quite limited—specifically, the *Kiluk* court had "some reservations" about *Jensen*'s interpretation of "new motor vehicle," but ruled it "need not decide whether *Jensen* was correctly decided" because the manufacturer would be liable under section 1795.5 regardless. (43 Cal.App.5th at pp. 339-340.) In comments relegated to a footnote, *Kiluk* mused about a car with a 20-year warranty (an inherently unlikely proposition) still being a "new motor vehicle" under *Jensen* and asserted that "arguably" section 1793.22's reference to "or other motor vehicle sold with a manufacturer's new car warranty" refers to "cars *originally* sold with a new motor vehicle warranty, not subsequent sales." (43 Cal.App.5th at p. 340, fn. 4, original italics.)

*Kiluk*'s footnoted dicta also voiced concerns about the *Jensen* court's "approach" possibly creating problems with *implied* warranties attaching to every subsequent sale of a vehicle. (43 Cal.App.5th at p. 434, fn. 4.) But the "new motor

vehicle" definition only applies to sections 1793.22 and 1793.2, subsection (d), which only regard *express* warranties. (§ 1793.22, subd. (e).) Given the definition's limited application, *Kiluk*'s dicta-expressed concern about serial *implied* warranties is misplaced, as case law makes clear. (See *Dagher*, *supra*, 238 Cal.App.4th at p. 920 [section 1793.22's "new motor vehicle" definition applies only to sections 1793.2(d) and 1793.22]; *Leber*, *supra*, 237 Cal.App.4th at p. 409 ["If the Legislature had intended the definition of 'new' vehicle in section 1793.22, subdivision (e) to apply throughout the Act, it would not have explicitly limited its applicability...."]; *Nunez v. FCA US LLC* (2021) 61 Cal.App.5th 385, 399 ["only distributors or sellers of used goods—not manufacturers of new goods—have implied warranty obligations in the sale of used goods"]; see § 1795.5, subd.(c).)

***Dagher***. In *Dagher*, the Court of Appeal held that the Act's protections do not extend to a plaintiff who bought a used vehicle from another consumer because an individual is not a "retailer" as required for standing under the Act. (238 Cal.App.4th at pp. 912, 924.)

Emphasizing a comment in *Dagher* that *Jensen*'s statements should be read in light of *Jensen*'s facts, the Opinion suggests that *Dagher* "questioned *Jensen*'s statement about express warranties." (Opn:17-18.) But *Dagher* was not challenging *Jensen*'s interpretation of section 1793.22's "new motor vehicle" definition. *Dagher* merely noted that *Jensen*'s remarks shouldn't be twisted out of context as resolving other,

unrelated statutory interpretation questions, such as whether the Act applies to a private sale between individuals. *Dagher* commented on *Jensen* in conjunction with recognizing that the *Dagher* plaintiff lacked standing under the Act because the Act only applies to retail sales: "Where the seller is a retail seller engaged in the business of vehicle selling, the Act contemplates coverage." (38 Cal.App.4th at p. 923; see § 1791, subd. (l) [defining "retail seller," "seller" or "retailer" as "any individual, partnership, corporation, association or other legal relationship that *engages in the business of selling or leasing* consumer goods to retail buyers," italics added].)

*Dagher* recognized that "[w]here the sellers are private parties who are not routinely engaged in such a 'retail' business, the fact that a plaintiff bought a vehicle with its remaining warranty rights *is not alone dispositive* under the Act." (38 Cal.App.4th at p. 923, italics added.) That holding does not undermine *Jensen*'s interpretation of the "new motor vehicle" definition. *Jensen* involved a retail sale, and there is no dispute that the instant matter does too.

***Johnson***. In analyzing the "new motor vehicle" definition, the Opinion discusses only one other case, *Johnson v. Nissan N.Am*, *Inc.* (N.D. Cal. 2017) 272 F.Supp.3d 1168 (*Johnson*). (See Opn:16.) The Opinion describes *Johnson* as "directly on point" and as "reach[ing] the same conclusion we do." (Opn:16.) But neither is true.

The Opinion relies solely on a portion of *Johnson* that concerned whether a plaintiff who purchased a used car from a

reseller could assert an *implied* warranty claim under the Act. (See 272 F. Supp.3d at pp. 1178-1179.) That's not the issue here. *Johnson* did not even mention 1793.22's definition of "new motor vehicle." (*Ibid.*) Nor did *Johnson* even mention *Jensen*. (*Ibid.*) The Opinion errs in asserting—notably, without citation—that *Johnson* dismissed plaintiff's "claim on the ground her car was not a 'new motor vehicle.'" (Opn:16.) *Johnson* did not do so. The district court never even analyzed section 1793.22's "new motor vehicle" definition; it didn't need to because the court was assessing an *implied* warranty claim.

Instead of assessing section 1793.22's "new motor vehicle" definition, the *Johnson* court merely recited *Dagher* as holding that the Act didn't apply to a plaintiff "who purchased a used car from a private party" and then jumped to the conclusion that "Ms. Johnson *similarly* purchased a used car from a third-party, CarMax." (272 F.Supp.3d at p. 1179, italics added.) But that was not a "similar" purchase. CarMax is a "retailer"; an individual is not. *Dagher*'s holding was not about so-called "third-party" sales, whatever that might mean. *Dagher*'s holding was that "the Act contemplates coverage" where "the seller *is a retail seller* engaged in the business of vehicle selling" and not to a sale between two individuals "not routinely engaged" in the business of selling cars (the transaction at issue in *Dagher*). (See *Dagher*, *supra*, 238 Cal.App.4th at p. 923, italics added.)

Thus, the district court may have reached the right conclusion in *Johnson* about whether the plaintiff had an implied warranty claim under the Act, but its reasoning was flawed.

And the Opinion here compounds that confusion by discussing *Johnson*'s implied warranty analysis as though it involved an express warranty claim and then characterizing that analysis as "directly on point" in this express warranty case.

***

The Opinion conflicts with *Jensen*. And its discussion of *Dagher*, *Kiluk* and *Johnson* injects further confusion into California law, including muddying the Act's differing treatment of express and implied warranties. Since 1995, *Jensen* has stood alone as the only Court of Appeal decision actually determining whether section 1793.22's "new motor vehicle" definition applies to cars sold with an unexpired manufacturer's new car warranty. Only this Court, by granting review, can resolve the split in authority and eliminate the confusion that this new opinion creates. (Cal. Rules of Court, rule 8.504(b)(1).)

## II. Even Ignoring The Conflict And Confusion The Opinion Creates, The Court Should Grant Review To Resolve The Important Legal Question Presented.

### A. The meaning of section 1793.22's "new motor vehicle" definition is an important statutory interpretation question.

Putting aside the conflict and confusion the Opinion creates, review should be granted because of the important statutory interpretation issue presented. This Court has not hesitated to grant review to resolve important issues regarding the Act's scope, even issues of first impression. (See, e.g.,

*Neidermeier v. FCA US LLC*, S266034, review granted Feb 10, 2021 [first impression issues regarding traded-in vehicles].)

The refund-or-replace obligation that section 1793.2, subdivision (d)(2), imposes on manufacturers is "'[o]ne of the [Act's] most significant protections ....'" (*Martinez, supra,* 193 Cal.App.4th at p. 191, citation omitted.) And because that obligation applies to "new motor vehicles" as defined in 1793.22, that definition is crucial to applying this most significant protection. The extent to which used cars fall within this definition is an important, recurring issue implicated in sales that occur across California every day. Without question, it is an "important question of law" worthy of review. (Cal. Rules of Court, rule 8.504(b)(1).)

### B. Review is necessary to ensure the definition is construed and applied in a manner that furthers, not undermines, the Act's remedial purpose.

The Act is *not* neutral. As this Court has made clear, "[t]he Act 'is manifestly a remedial measure, intended for the protection of the consumer; it should be given a construction calculated to bring its benefits into action.'" (*Murillo*, *supra*, 17 Cal.4th at p. 990; accord, *Mitchell v. Blue Bird Body Co.* (2000) 80 Cal.App.4th 32, 36 ["The act is remedial legislation intended to protect consumers and should be interpreted to implement its beneficial provisions"].)

But the Opinion doesn't address the Act's remedial purpose, let alone even attempt to reconcile the appellate court's textual analysis with that purpose. As a result, the Opinion breaks dangerous ground because, as shown below, its interpretation directly undermines the Act's remedial purpose. While the Opinion purports to be concerned with an "expansion" of the Act's protections to used cars (Opn:12), those protections have been in full force for almost three decades. The Opinion, instead, materially *narrows* the Act's existing scope. This Court should grant review to analyze whether that decision comports with the Act's public-policy based purposes.

### 1. The Opinion creates a gap in the Act's express warranty coverage that is contrary to the Act's purpose of providing enhanced breach-of-express-warranty remedies that exceed the Commercial Code.

The Act "was enacted to address the difficulties faced by consumers in enforcing express warranties." (*Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 484.)

"The pro-consumer remedies in the Act are *in addition* to those available under the Commercial Code," including a manufacturer's refund-or-replace obligation for breaching express warranties. (*Dagher*, *supra*, 238 Cal.App.4th at p. 916, italics added.) "'The Act does not parallel the [Uniform] Commercial Code; it provides different and more extensive consumer protections.'" (*Martinez*, *supra*, 193 Cal.App.4th at p.

198, quoting *Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235, 1240 (*Jiagbogu*).)

The Opinion, however, creates a gap in the Act's enhanced remedies for express warranties—in particular, the refund-or-replace remedy for non-repairable vehicles and the remedies for non-compliance under section 1794. Under the Opinion:

- If a manufacturer issues an express new-car warranty when a car is first sold, or issues some sort of express warranty when the vehicle is "essentially new," the manufacturer's refund-or-replace obligation under section 1793.2, subdivision (d)(2), applies so long as the original purchaser does not part with the vehicle.

- If a retail seller or distributor of a used car issues its own express warranty at the time of sale, then under section 1795.5 the obligations of that distributor or retail seller are generally "the same as that imposed on manufacturers" under the Act, including the duty to maintain service and repair facilities and to buy back defective vehicles after a reasonable number of repair attempts.

- *But*, if the original purchaser of a new or "essentially new" vehicle eventually parts with the vehicle and it ends up in the hands of a retail seller or distributor of used cars, for example, through the vehicle being repossessed by a lienholder or traded-in, the manufacturer no longer has liability under the Act to the consumer who buys the used car *even if the original new*

*car warranty remains in force* and the vehicle is defective and irreparable.

The Opinion thus creates a gap in the Act's express-warranty protection, even though the Act was enacted to provide enhanced protection for such breaches. This is an especially confounding result since in many cases, the defective vehicle is only available for resale *because the manufacturer breached its statutory duty to promptly buy it back in the first place*. Thus, the Court should grant review to determine whether the Legislature truly intended—as the Opinion effectively assumes—that some express warranty breaches matter more than others and, indeed, that consumers who can only afford a used car with a still-active warranty deserve less *protection* than someone who bought that same car a couple years earlier as a new car.[8]

Under *Jensen*'s interpretation, the manufacturer remains liable under the Act so long as the manufacturer's express new-car warranty remains in effect. Under *Jensen*'s interpretation, the focus is on the existence of a new-car warranty when the car proves defective, not whether the car might be considered "old" or "new" when a warranty breach occurs, or a lawsuit is filed. If the warranty is transferred, the protections are surely transferred, as well. The Opinion eliminates these protections.

---

[8] The Opinion doesn't address what happens to a consumer who initially leases their new car and then purchases that car at the end of the lease. The vehicle's warranty continues to exist but that purchase does not come with a new warranty, so has that consumer just cut-off his own lemon law rights?

The Opinion tries to justify its result by noting that used car buyers can still sue the manufacturer under the Commercial Code for failing to repair the vehicle in breach of the transferred express warranty. (Opn:19.) But "the Act is designed to give *broader* protection to consumers than the common law or UCC provide" after those lesser remedies *failed to induce manufacturers to fully honor their warranties*. (*Jiagbogu*, *supra*, 118 Cal.App.4th at p. 1241, italics added.) And the possible existence of some Commercial Code remedy is no consolation for consumers who cannot afford prosecuting a breach-of-warranty under the Commercial Code. (See *Murillo, supra,* 17 Cal.4th at p. 994 ["the primary financial benefit the Song–Beverly Act offers to consumers who sue thereunder to enforce their rights: their ability, if successful, to recover their "attorney's fees based on actual time expended"].)

The Opinion never grapples with the Legislature's intention to provide enhanced protections.

### 2. The Opinion's interpretation will vitiate the Act's purpose of incentivizing manufacturers to promptly buy back defective vehicles and label them lemons.

The Opinion undermines the Act's purpose in another key respect: It incentivizes vehicle manufacturers to delay or forgo their *affirmative duty* to *promptly* buy back non-repairable defective vehicles.

As a matter of policy, "[i]nterpretations that would significantly vitiate a manufacturer's incentive to comply with the Act should be avoided.'" (*Martinez*, *supra*, 193 Cal.App.4th at p. 195, citation omitted.) This includes interpretations that "would encourage a manufacturer who has failed to comply with the Act to delay or refuse to provide a replacement vehicle or reimbursement" in the hopes that the vehicle will end up being sold or transferred to a third party. (*Id*. at p. 195 [rejecting interpretation that would let manufacturers avoid refund-or-replace liability if a lienholder repossessed the buyer's vehicle]; see also *Jiagbogu*, at p. 1244 [rejecting a manufacturer offset for buyer's total use of a vehicle, because it "would create a disincentive to prompt replacement or restitution by forcing the buyer to bear all or part of the cost of the manufacturer's delay"].)

The Opinion, however, never even acknowledges that the Act is supposed to be liberally interpreted in favor of consumers. This is presumably because the Opinion deems the "new motor vehicle" definition to be unambiguous—a remarkable conclusion given that *Jensen* construed the same language in the opposite manner. By so doing, the Opinion adopts an interpretation that undermines the goal of encouraging manufacturers to promptly buy back non-repairable defective vehicles and label them lemons. The Opinion's interpretation incentivizes manufacturers to forgo or delay buy-backs in the hope that vehicles will end up with a car dealer and then resold to another person who will have no practical recourse if the manufacturer or distributor doesn't honor the warranty.

The Opinion's interpretation shouldn't stand without the Court considering its impact on the Act's remedial purposes, which the Opinion ignores.

### 3. The Opinion's interpretation results in arbitrary distinctions.

The Opinion warrants a fresh look for another reason: Its interpretation of the "new motor vehicle" definition results in arbitrary distinctions that the Opinion itself doesn't address.

Under the Opinion, section 1793.2(d)(2)'s refund-or-replace remedy and right to sue for non-compliance damages under section 1794 only applies to a buyer who purchases an "essentially new" or "basically new" vehicle issued with a manufacturer's brand new car warranty, not anyone who purchases a previously owned vehicle with an unexpired, transferrable manufacturer's new car warranty. (Opn:3, 11.)

The Act's remedies don't depend, however, on whether a vehicle might be considered new or old when the right to sue arises. The Court of Appeal here seemed troubled by the fact that plaintiff's vehicle was over two-years old with 55,000 miles when sold. Yet, the Legislature did not impose any age or mileage cut-off for lemon law liability. Instead, it created "a rebuttable presumption that a reasonable number of attempts have been made to repair the vehicle if, within 18 months or 18,000 miles, whichever comes first," certain alternative conditions are met. (§ 1793.22, subd. (b).) The Legislature did

not bar consumers from suing based on older vehicles or those with more mileage.

The Opinion doesn't deny that a new-vehicle buyer has standing to sue under the Act several years later after a substantial portion of a manufacturer's express new car warranty has run and even though the vehicle no longer would be considered "new" under common parlance. (See *Jiagbogu*, *supra*, 118 Cal.App.4th at p. 1239 [Act applied even though plaintiff requested manufacturer buy back the vehicle at 40,000 miles and sued the manufacturer three years after the purchase when the odometer had 50,000 miles]; *Martinez*, *supra*, 193 Cal.App.4th at p. 191 [Act applied even though the vehicle had been driven for 3½ years and had almost 40,000 miles when repossessed by lienholder].)[9]

Even though such vehicles may no longer be "new," they remain consumer goods subject to the Act's express warranty protections because the vehicles *originally* were new products issued with a manufacturer's express new car warranty. And yet under the Opinion, cars of similar—or indeed far less—age and mileage that were originally sold with a manufacturer's new car warranty lose their coverage under the Act even though that *same* warranty remains in force, if the vehicle happens to end up

---

[9] Admittedly, it may be more difficult to *prove* liability under the Act for older vehicles with more mileage that fall outside the statutory rebuttable presumption. Manufacturers may have stronger arguments in such circumstances that the car's issues stem from abuse, as opposed to a non-repairable defect covered by the express warranty. But the issue here is *standing* to sue.

in the hands of a used car retailer, whether by repossession by a lienholder, or a sale or trade in by an owner, or a sale by another dealer. The Opinion attempts no rationale for such distinctions.

The Opinion would provide standing under the Act to someone who purchased a "demonstrator" or a "dealer-owned vehicle" that had been used for a long time and incurred substantial mileage, such as a company car the dealership used for multiple years or a leased vehicle returned after multiple years, so long as the vehicle was sold by the manufacturer or its affiliated dealership with an express warranty, even if that warranty merely represented the balance on the manufacturer's warranty for a brand new car. Yet, the Opinion would deny standing as to vehicles with low mileage, e.g., 5,000 miles, with almost the entire balance remaining on the manufacturer's new car warranty, if the consumer bought the defective vehicle from a used car retailer. What's the basis for the distinctions? The Opinion offers none.

Likewise, the Opinion offers no basis for distinguishing between a used but "essentially new" demonstrator or dealer-owned vehicle (using the Opinion's terminology) and a used but "essentially new" vehicle with age and mileage comparable to a low-mileage demonstrator but purchased from a third-party reseller.

Nor does the Opinion offer any reason why manufacturers should escape express-warranty obligations and liability merely because the plaintiff happened to purchase the lemon through

a used car dealer. Did the Legislature truly believe and intend that some lemon vehicles matter more than others?

The Opinion's interpretation creates more questions than it does answers—questions the Opinion itself ignores.

#### 4. The Opinion will cause shockwaves in the used car sales market

It's common sense that used-car purchasers place great importance on whether a vehicle remains under warranty. Indeed, used vehicles already come with the implication that they are less reliable than brand-new vehicles. Used car consumers therefore typically want to know whether the manufacturer's new-car warranty remains in effect so they'll be able to tend to problems with the vehicle without substantial out of pocket risk.

Under the Opinion, even though a still-pending warranty may compel the vehicle manufacturer to cover the repairs, the consumer has no real path to genuine relief if the manufacturer shirks its obligations or cannot fix the vehicle. Without the Act's remedial measures, consumers of used cars with existing manufacturer warranties are left out to dry when stuck with lemon vehicles. The ability to sue manufacturers for breach-of-warranty under the Commercial Code is a hollow remedy without the Act's enhanced protections, including the right to recover "attorney's fees based on time actually expended," which this Court has deemed the Act's "primary financial benefit." (*Murillo*, *supra*, 17 Cal.4th at p. 994.)

The predictable result will be for the public to be far less inclined to purchase used vehicles and to be much less willing to spend the extra funds on used vehicles with remaining warranties instead of cheaper used vehicles with expired warranties. And consumers who bought used cars believing they had the Act's protections, and sued recalcitrant manufacturers in reliance, will be blindsided as manufacturers move to strip them of rights under the Act. (See 5/17/2022 Letter by Knight Law Group Requesting Depublication, pp. 2-4.)

## III. Decisions By Other State Supreme Courts Confirm The Importance Of The Issue Presented.

Other state supreme courts have intervened to clarify under their own state's particular lemon law the extent to which a manufacturer remains subject to lemon law liability when a vehicle is sold with an unexpired manufacturer's new car warranty, particularly to ensure the state's lemon law is applied consistent with its remedial purpose.[10]

---

[10] See, e.g., *Subaru of America, Inc. v. Peters* (Va. 1998) 256 Va. 43, 47 [500 S.E.2d 803, 805] (Virginia lemon law applied to car sold three times before being sold to plaintiff with 19,000 miles on the odometer where "[a]t the time of the purchase, the plaintiff was entitled to the benefits of the balance of the [manufacturer's] vehicle warranty"); *Britton v. Bill Anselmi Pontiac-Buick-GMC, Inc.* (Wyo.1990) 786 P.2d 855, 862-865 (under Wyoming lemon law, "a consumer need not be the first owner of a 'new vehicle' to be entitled to the protection of the statute, so long as either the manufacturer gave the first owner of that vehicle an 'express warranty' which *is still in effect at the time of transfer to the*

Petitioners urge this court to do the same.

## CONCLUSION

The Court should grant review to clarify California law and resolve the conflict between the Opinion and *Jensen*, to resolve the important statutory interpretation question presented, and to ensure courts apply the Act in a manner that is consistent with its remedial purpose.

May 17, 2022

ROSNER, BARRY & BABBITT, LLP
Hallen D. Rosner
Arlyn L. Escalante
KNIGHT LAW GROUP, LLP
Roger Kirnos
GREINES, MARTIN, STEIN & RICHLAND LLP
Cynthia E. Tobisman

By */s/ Cynthia E. Tobisman*
Cynthia E. Tobisman

Attorneys for Petitioners
EVERARDO RODRIGUEZ and JUDITH V. ARELLANO

---

*consumer* or the consumer has been given such a warranty by the manufacturer. The crucial fact is not that the vehicle has been previously owned, nor that the vehicle has been driven a substantial number of miles, but rather that the transfer of the vehicle to the consumer occurs *during the term of a prior warranty* or is accompanied by a new warranty," italics added); *Jewell v. Chrysler Corp.* (Wyo. 1999) 994 P.2d 330, 333 (Wyoming lemon law applies because "[a]lthough the [vehicle] was previously owned, it was transferred to the [plaintiffs] while under an express warranty"); *Chrysler Motor v. Flores* (Wash. 1991) 116 Wash.2d 208, 214 [803 P.2d 314, 317] ("while a car with accrued mileage of 23,000 miles may at first blush not seem new, remedial legislation such as the lemon law should be construed broadly").

## CERTIFICATION

Pursuant to California Rules of Court, rule 8.504(d)(1), (d)(3), I certify that this **PETITION FOR REVIEW** contains 8,314 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: May 17, 2022 *\/s\/ Cynthia E. Tobisman*

Cynthia E. Tobisman

## COURT OF APPEAL OPINION

Filed 4/7/22

**CERTIFIED FOR PUBLICATION**

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

| | |
|---|---|
| EVERARDO RODRIGUEZ et al., | |
| Plaintiffs and Appellants, | E073766 |
| v. | (Super.Ct.No. RIC1807727) |
| FCA US, LLC, | OPINION |
| Defendant and Respondent. | |

APPEAL from the Superior Court of Riverside County. L. Jackson Lucky IV, Judge. Affirmed.

Rosner, Barry & Babbitt, Hallen D. Rosner, Arlyn L. Escalante; Knight Law Group, Steve Mikhov, and Roger R. Kirnos for Plaintiffs and Appellants.

Clark Hill, David L. Brandon, Georges A. Haddad; Horvitz & Levy, Lisa Perrochet, and Shane H. McKenzie for Defendant and Respondent.

This appeal from a grant of summary judgment involves the Song-Beverly Consumer Warranty Act (the Act) (Civ. Code, § 1790 et seq.)—also known as California's "Lemon Law"—which provides special consumer remedies to purchasers of new cars covered by express warranties.[1] The remedy at issue here, commonly called the "refund-or-replace" provision, requires a manufacturer to replace a defective "new motor vehicle" or make restitution if, after a reasonable number of attempts, the manufacturer (or its representative) is unable to repair the vehicle to conform to the applicable express warranty. (§ 1793.2, subd. (d)(2).) The Act defines "new motor vehicle" as a new vehicle purchased primarily for personal (nonbusiness) purposes but also specifies that the term includes "a dealer-owned vehicle and a 'demonstrator' or other motor vehicle sold with a manufacturer's new car warranty." (§ 1793.22, subd. (e)(2).)

Plaintiffs Everardo Rodriguez and Judith Arellano purchased a two-year-old Dodge truck from a used car dealership. The truck had over 55,000 miles on it and, though the manufacturer's basic warranty had expired, the limited powertrain warranty had not. After experiencing electrical defects with the truck, plaintiffs sued the manufacturer, FCA US, LLC (Chrysler),[2] for violation of the refund-or-replace provision. FCA moved for summary judgment, arguing the truck was not a "new motor vehicle," and the trial judge agreed.

---

[1] Unlabeled statutory citations refer to the Civil Code.

[2] FCA, or Fiat Chrysler Automobiles, is the parent company that oversees Chrysler and Dodge, among other brands. (*Santana v. FCA US, LLC* (2020) 56 Cal.App.5th 334, 339.)

The sole issue in this case is whether the phrase "other motor vehicle sold with a manufacturer's new car warranty" covers sales of previously owned vehicles with some balance remaining on the manufacturer's express warranty. We conclude it does not and that the phrase functions instead as a catchall for sales of essentially new vehicles where the applicable warranty was *issued with* the sale. We therefore affirm.

## I

## FACTS

In 2013 plaintiffs purchased a 2011 Dodge Ram 2500 from the Pacific Auto Center in Fontana. The truck originally came with a basic three-year/36,000 mile bumper-to-bumper warranty and a five-year/100,000 mile limited powertrain warranty, which covers the engine, transmission, and drive system. At the time of the sale, the truck had over 55,000 miles on it and its basic warranty had expired, though an unspecified balance remained on the powertrain warranty.

A year later, the truck's check engine light came on and plaintiffs took it to an authorized Chrysler dealer in Hemet for repair. The dealer appeared to fix the issue, but over the next year or so (through May 2015), the check engine light came on repeatedly, necessitating five additional trips to the same dealer for service.

On April 30, 2018, plaintiffs sued FCA alleging four causes of action, only one of which is at issue in this appeal—violation of section 1793.2, subdivision (d)(2), the Act's "new motor vehicle" refund-or-replace provision. Plaintiffs alleged the truck suffered defects in its Totally Integrated Power Module (TIPM), an enclosed device in the engine

compartment that contains a circuit board and regulates electrical power to most of the truck's systems. (*Santana v. FCA US, LLC*, *supra*, 56 Cal.App.5th at p. 339.) They alleged they had afforded FCA a reasonable number of attempts to fix the issues with the TIPM and, because FCA failed to do so, they were entitled to a refund of the truck's sale price or a replacement vehicle.

FCA filed a motion for summary judgment, arguing plaintiffs' claim failed because the manufacturer's refund-or-replace provision applies to new vehicles only, and it was undisputed plaintiffs purchased the truck used. FCA presented evidence that the Pacific Auto Center is an unaffiliated, third party reseller and therefore was not one of its representatives at the time of sale. It also presented evidence that no warranties were issued at the time of sale.

After a hearing on the motion, Riverside County Superior Court Judge Jackson Lucky concluded a previously owned vehicle sold with a balance remaining on one of the manufacturer's express warranties does not qualify as a "new motor vehicle" under the Act. The judge entered judgment in favor of FCA, and plaintiffs timely appealed.

## II

## ANALYSIS

### A. *Standard of Review*

A party moving for summary judgment bears an overall burden of persuasion to demonstrate there is no triable issue of material fact and they are entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 845.) "In

reviewing a defense summary judgment, we apply the traditional three-step analysis used by the trial court, that is, we (1) identify the pleaded issues, (2) determine if the defense has negated an element of the plaintiff's case or established a complete defense, and if and only if so, (3) determine if the plaintiff has raised a triable issue of fact." (*Meddock v. County of Yolo* (2013) 220 Cal.App.4th 170, 175.)

Where, as here, we are asked to answer a purely legal question of statutory interpretation based on undisputed facts, we independently construe the relevant statutory provisions. (*Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 749-750.) Because the language of the provision is the most reliable indicator of legislative intent, we start there, giving the words their plain and commonsense meaning within the context in which they appear. (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) "If the language is unambiguous, 'then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.' [Citation.] 'If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy.'" (*Kirzhner v. Mercedes-Benz USA, LLC* (2020) 9 Cal.5th 966, 972 (*Kirzhner*).)

B. *The Song-Beverly Act*

Because we do not read statutory provisions in isolation, we consider the broader statutory context in which the definition of "new motor vehicles" applies before turning to the definition itself.

1. *Statutory framework*

"The Song-Beverly Act is a remedial statute designed to protect consumers who have purchased products covered by an express warranty." (*Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785, 798.) To that end, it regulates warranty terms and imposes service and repair obligations on the parties who issue the warranties. (*Joyce v. Ford Motor Co.* (2011) 198 Cal.App.4th 1478, 1486.)

The Act defines the parties who issue warranties as follows. A manufacturer is an entity "that manufactures, assembles, or produces consumer goods." (§ 1791, subd. (j).) A distributor is an entity "that stands between the manufacturer and the retail seller in purchases, consignments, or contracts for sale of consumer goods." (§ 1791, subd. (e).) A seller or retailer is an entity "that engages in the business of selling or leasing consumer goods to retail buyers." (§ 1791, subd. (*l*).)

The Act requires that where a manufacturer sells "consumer goods" accompanied by an express warranty, it must maintain local repair facilities "to carry out the terms of those warranties." (§ 1793.2, subd. (a)(1)(A).) Importantly, "consumer goods" are defined 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." (§ 1791, subd. (a), italics added.) If, "after a reasonable number of attempts" the manufacturer is unable to conform the consumer goods to the applicable express warranty, the refund-or-replace provision kicks in, and "the manufacturer shall

either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer." (§ 1793.2, subd. (d)(1).)

The Act also provides for implied warranties of merchantability and fitness for "consumer goods"—i.e., new products. (§§ 1791.1, subd. (c), 1792.) These implied warranties may not last less than 60 days or more than one year after the sale of the consumer goods to which they apply, and liability for their breach lies with the manufacturer. (§§ 1791.1, subd. (c), 1792.)

That's not to say the Act has no protections for used goods; it does, but the protections are limited and bind the seller or distributor of the used product. (§ 1795.5.) Section 1795.5 provides express warranty protections for used goods only where the entity selling the used product *issues an express warranty at the time of sale*. The provision states: "Notwithstanding the provisions of subdivision (a) of Section 1791 defining consumer goods to mean "new" goods, the obligation of a *distributor or retail seller* of used consumer goods in a sale in which an express warranty is given shall be the same as that imposed on manufacturers under this chapter." (Italics added.) "It shall be the obligation of the *distributor or retail seller* making express warranties with respect to used consumer goods (*and not the original manufacturer, distributor, or retail seller making express warranties with respect to such goods when new*) to maintain sufficient service and repair facilities within this state to carry out the terms of such express warranties." (§ 1795.5, subd. (a), italics added.)

The Act also provides implied warranties for used products. These are shorter than the implied warranties for new products; their maximum duration is three months. (§ 1795.5, subd. (c).) As is the case with liability for breach of express warranties, "in the sale of used consumer goods, liability for breach of implied warranty *lies with distributors and retailers*, not the manufacturer," unless the manufacturer issues a new warranty along with the sale of the used good. (*Ruiz Nunez v. FCA US LLC* (2021) 61 Cal.App.5th 385, 398 (*Nunez*), italics added; see also *Kiluk v. Mercedes-Benz USA, LLC* (2019) 43 Cal.App.5th 334, 339-340 (*Kiluk*) ["The Song-Beverly Act provides similar remedies in the context of the sale of used goods, except that the manufacturer is generally off the hook"].)

Thus, a hallmark of the Act is that its consumer protections apply against the party who sold the product to the buyer *and* issued the express warranty. With this framework in mind, we turn to the refund-or-replace provision at issue and the definition of "new motor vehicle."

2. *The "new motor vehicle" refund-or-replace provision*

In 1982, the Legislature amended the Act to include provisions specifically applicable to motor vehicles; this amendment became known as the Lemon Law. (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 123 (*Jensen*).) The motor vehicle refund-or-replace provision—section 1793.2, subdivision (d)(2)—is similar to the general, consumer goods refund-or-replace provision, except that it requires the manufacturer to provide the remedy "promptly" and contains vehicle-specific rules

regarding both replacement and restitution. (§ 1793.2, subd. (d)(2).) Like its consumer goods counterpart, section 1793.2, subdivision (d)(2) applies to sales of new vehicles only; specifically, it applies to "a new motor vehicle, as that term is defined in paragraph (2) of subdivision (e) of Section 1793.22."

Initially, the Act's definition of "new motor vehicle" consisted of a single sentence describing the term as any "new motor vehicle which is used or bought for use primarily for personal, family, or household purposes." (Former § 1793.2, subd. (e)(4)(B), Stats. 1982, ch. 388, § 1, p. 1723; *Park City Services, Inc. v. Ford Motor Co., Inc.* (2006) 144 Cal.App.4th 295, 304.) But over the years, the definition underwent several amendments to include certain types of vehicles that didn't obviously or technically satisfy the general definition.

The current definition, located in section 1793.22, subdivision (e)(2) provides: "'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 by a person . . . or any other legal entity, to which not more than five motor vehicles are registered in this state. 'New motor vehicle' includes the chassis, chassis cab, and that portion of a motor home devoted to its propulsion, . . . [and] *a dealer-owned vehicle and a 'demonstrator' or other motor vehicle sold with a manufacturer's new car warranty* . . . . A demonstrator is a vehicle assigned by a dealer

for the purpose of demonstrating qualities and characteristics common to vehicles of the same or similar model and type." (Italics added.)

C. *Plaintiffs' Truck Is Not a "New Motor Vehicle"*

Plaintiffs argue the phrase "other motor vehicle sold with a manufacturer's new car warranty" describes their truck because it still had a balance remaining on an express warranty from the manufacturer—the limited powertrain warranty—when Pacific Auto Center sold it to them. FCA argues the phrase qualifies dealer-owned cars and demonstrators and thus refers to vehicles that, like those two types of vehicles, have not been previously sold and are sold with new or full warranties. FCA argues plaintiffs' interpretation is at odds with the rest of the Act's definition of "new motor vehicles." While we acknowledge that *in isolation* the phrase "other motor vehicle sold with a manufacturer's new car warranty" could arguably refer to any car sold with a manufacturer's warranty still in force, we agree with FCA that context clearly requires a more narrow interpretation. Context is a fundamental aspect of statutory interpretation, and here it's key to discerning the phrase's meaning. (*Kirzhner*, *supra*, 9 Cal.5th at p. 972 ["We do not consider statutory language in isolation; instead, we examine the entire statute to construe the words in context"].)

To begin with, the phrase appears in a definition of *new* motor vehicles. That fact alone strongly suggests the Legislature did not intend the phrase to refer to used (i.e., previously sold) vehicles. But, more importantly, the phrase is preceded by "a dealer-owned vehicle and demonstrator," which comprise a specific and narrow class of

vehicles. Though they have not been previously sold to a consumer, demonstrators and dealer-owned cars are *used* in the sense that they will have been driven for various purposes before sale. As such, they will necessarily have more miles on their odometers than the typical vehicle in a dealer's new car inventory. What makes these vehicles unique is that even though they aren't technically new, manufacturers (or their dealer-representatives) treat them as such upon sale by providing the same type of manufacturer's warranty that accompany new cars.

In other words, demonstrators and dealer-owned vehicles comprise a narrow category of *basically* new vehicles—they have never been previously sold to a consumer and they come with full express warranties. Given this context, we think the most natural interpretation of the phrase "other motor vehicle sold with a manufacturer's new car warranty" is that it, too, refers to vehicles that have never been previously sold to a consumer and come with full express warranties.

Plaintiffs urge us to construe the phrase "other motor vehicle sold with a manufacturer's new car warranty" as a distinct item in a list of three types of vehicles—a standalone category of previously sold vehicles that are conceptually distinct from dealer-owned vehicles and demonstrators. But the provision's grammatical structure signals the list contains two types of vehicles, not three. If the list contained three distinct types of vehicles, we would expect to see commas separating the types. Instead, the use of "and" and "or" to separate the three items indicates the Legislature structured the provision as a list of two vehicles (dealer-owned vehicles "and" demonstrators) followed by an

adjectival clause qualifying or describing those vehicles. This organization reveals that, rather than create a new and different class of vehicles, the phrase was intended to function as a catchall provision to cover a narrow class vehicle—the previously driven, but basically new (i.e., not previously sold) car.

Indeed, nothing about the wording or structure of the provision indicates the Legislature intended to expand the definition of "new motor vehicle" to include used vehicles sold with some part of the manufacturer's warranty still in force. And the expansion would be a significant one, as there is no standard length for the express warranties that manufacturers issue. Some bumper-to-bumper warranties last for one year or 12,000 miles while others for five years and 60,000 miles, and some limited warranties last 10 years or more. Even a warranty like the one here—three years or 36,000 miles—could see several different owners before it expires. We think if the Legislature intended to expand the definition of "new motor vehicle" to include a potentially vast category of used cars it would have done so more clearly and explicitly than tucking it into a reference to demonstrators and dealer-owned vehicles.

As we read the phrase, its clear purpose is to function as a catchall to ensure that manufacturers cannot evade liability under the Act by claiming a vehicle doesn't qualify as new because the dealership hadn't actually used it as a demonstrator. For example, the phrase would cover a car used by the manufacturer or dealer for *any purpose* (say, a service loaner), so long as the car was sold *as if* it were new—that is, with a full new car warranty.

We also note that plaintiffs' interpretation raises more questions than it answers. For example, how would the Act treat a car that was sold by private seller before eventually ending up at a used car dealership? It's clear the Act doesn't cover products purchased in private sales (§ 1791, subd. (*l*)), but if our hypothetical car were purchased from the used car dealership before its warranties expired, would it transform from a used vehicle back to new upon its third sale?

Another question is whether a buyer who purchases a used car with only a few miles remaining on the original warranty would be entitled to the same protection as the original buyer. If so, what would constitute "a reasonable number of attempts" to repair the vehicle? (§ 1793.2, subd. (d)(2).) We would either have to conclude the refund-or-replace remedy is toothless for such buyers or permit them to use previous owners' repair experiences towards their claim. We doubt the Legislature intended to create such confusion when it created the "dealer-owned vehicle/demonstrator" category of "new motor vehicle." (See *Alford v. Pierno* (1972) 27 Cal.App.3d 682, 688 [courts should interpret statutory language to "produce a result that is reasonable" and to "promote rather than defeat the *general purpose and policy* of the law"].)

The problems with plaintiffs' interpretation only increase when we consider the phrase in the broader context of the Act as a whole. As we've seen, the Act makes it clear when a provision applies to used or previously owned products by including the term "used" in the provision. Notably, that term is absent from the definition of "new motor vehicle" as well as from the manufacturer's refund-or-replace provision. Instead, the

Legislature created a separate, seller refund-or-replace provision for used goods. The fact that provision places liability on the party who issues the warranty along with the sale (the seller) and explicitly disclaims any liability on the part of the manufacturer is another strong indication the phrase at issue functions as a catchall for vehicles that have not been previously sold and that come with full warranties. (§ 1795.5.)

Our examination of the entire Act yields two additional reasons for concluding the phrase doesn't cover subsequent sales of vehicles with unexpired manufacturer's warranties. First, the Act defines "express warranty" as any "written statement *arising out of a sale* to the consumer of a consumer good pursuant to which the manufacturer . . . undertakes to preserve or maintain the utility or performance of the consumer good . . . ." (§ 1791.2, subd. (a)(1), italics added.) In plaintiffs' case, the limited powertrain warranty did not "aris[e] out of" the sale, it transferred to plaintiffs by operation of law along with title to the truck. The warranty *arose* from the initial sale to the truck's first buyer.

Second, as part of the Motor Vehicle Warranty Adjustment Programs (§§ 1795.90-1795.93), the Act requires manufacturers to notify all "consumers" of any warranty adjustments regarding safety or emissions-related recalls, and defines "consumer" as "any person to whom the motor vehicle is *transferred* during the duration of an express warranty." (§ 1795.90, subd. (a), italics added.) This definition of "consumer" indicates the Legislature is aware of the distinction between warranties that arise out of a sale and those that transfer to subsequent purchasers as a result of a sale. The lack of reference to transferred warranties in the definition of "new motor vehicle" suggests the Legislature

made a deliberate choice not to include sales of used vehicles accompanied by unexpired express warranties.

Based on all of these textual reasons, we conclude the phrase "other motor vehicle sold with a manufacturer's new car warranty" unambiguously refers to cars that come with a new or full express warranty. But even if this meaning weren't readily apparent from the statute, the Act's legislative history would convince us the phrase refers to vehicles sold with full warranties. The phrase was added to the Act's definition of "new motor vehicle" in 1987 with the enactment of Assembly Bill Number 2057. The enrolled bill report explains that our lawmakers deemed it necessary to add "dealer-owned vehicles and *'demonstrator' vehicles sold with a manufacturer's new car warranty*" to the definition of "new motor vehicles" because "[s]ome buyers [were] being denied the remedies under the lemon law because their vehicle is a 'demonstrator' or 'dealer-owned' car, *even though it was sold with a new car warranty*." (Dept. Consumer Affairs, Enrolled Bill Rep. on Assem. Bill No. 2057 (Sept. 25, 1987) pp. 3, 5, italics added.) This discussion indicates the amendment was intended to provide relief to a narrow class of consumers by targeting a specific type of vehicle—the basically new car. Notably absent from the discussion is any mention of used vehicles. Indeed, we found no reference to used vehicles in any of the legislative materials regarding Assembly Bill Number 2057. One would assume that if the amendment proposed to expand manufacturers' liability under the Act to a large class of used vehicles, such a change to the status quo would warrant mention if not discussion.

As far as we're aware, the issue before us is one of first impression; no California court has addressed whether a used car purchased from a retail seller unaffiliated with the manufacturer qualifies as a "new motor vehicle" simply because there is some balance remaining on the manufacturer's warranty. There is, however, one federal case directly on point, and it reaches the same conclusion we do.

In *Johnson v. Nissan N.Am., Inc.* (N.D. Cal. 2017) 272 F.Supp.3d 1168, the plaintiff sued Nissan under the manufacturer's refund-or-replace provision after the car she purchased from a used car dealership suffered alleged defects. She argued she was entitled to relief because her car was still under Nissan's three-year or 36,000-mile basic warranty. The court disagreed and dismissed her claim on the ground her car was not a "new motor vehicle." The court explained that because the plaintiff "purchased her car through CarMax, a third-party reseller" the only way she would be entitled to the Act's express warranty protections was if CarMax "extended express and implied warranties to her." (*Id.* at p. 1179.) Such is the case here. The record doesn't indicate whether Pacific Auto Center issued any warranties to plaintiffs, but that would be the only way they could seek a refund or replacement under the Act.

Plaintiffs argue *Jensen* is on point, but we find the case easily distinguishable. *Jensen* involved a lease *by a manufacturer-affiliated dealer* who issued a *full new car warranty* along with the lease. The issue was whether the leased car qualified as a "new motor vehicle" under the Act. Plaintiff had learned of the car through a newspaper ad offering leases of "BMW demonstrators." (*Jensen*, *supra*, 35 Cal.App.4th at p. 119.)

When she arrived at the dealership—a BMW-authorized dealership—the car had 7,565 miles on its odometer. The salesperson told her this was because it had previously been used by BMW as a demonstrator. The plaintiff agreed to lease the car and the salesperson gave her BMW's 36,000-mile warranty "on top" of the miles already on the odometer. (*Ibid.*) As it turned out, the salesperson was wrong and the car was not in fact a demonstrator; it had been previously owned by the BMW Leasing Corporation and registered in New Jersey.

BMW tried to use that fact to its advantage in court, arguing the car didn't qualify as a "new motor vehicle" because it wasn't in fact a demonstrator. BMW argued that the car didn't qualify as "other motor vehicle sold with a manufacturer's new car warranty" because the category "clarifies the word 'demonstrator' and is not intended as a separate category." (*Jensen*, *supra*, 35 Cal.App.4th at p. 122.) The court rejected BMW's position and concluded the car qualified as a new vehicle because BMW's representative issued a new car warranty with the lease. (*Ibid.*) The court also rejected BMW's interpretation of the phrase "other motor vehicle sold with a manufacturer's new car warranty," reasoning that the phrase referred to "cars sold with a balance remaining on the manufacturer's new motor vehicle warranty." (*Id.* at p. 123.) Plaintiffs seize on this statement to argue their interpretation is correct.

Though we think *Jensen* was correctly decided, we agree with *Dagher* that its statement about "the Act's coverage for subsequent purchasers of vehicles with a balance remaining on the express warranty must be read in light of the facts then before the court

and are limited in that respect." (*Dagher v. Ford Motor Co.* (2015) 238 Cal.App.4th 905, 923.) Given that those facts included a car leased with a *full* manufacturer's warranty issued by the manufacturer's representative, the court was not asked to decide whether a used car with an unexpired warranty sold by a third party reseller qualifies as a "new motor vehicle."

*Dagher* is not the only opinion to question *Jensen's* statement about express warranties. In *Kiluk*, the court expressed "reservations" about the statement because it implied that "a car accompanied by a 20-year warranty" would qualify as a "new motor vehicle" if it were purchased used "on year 18." (*Kiluk*, *supra*, 43 Cal.App.5th at p. 340, fn. 4.) *Kiluk* questioned the wisdom of an approach that considered "every car sold with any portion of a new-vehicle warranty remaining" to be a new motor vehicle, and stated it was more likely the phrase "*other motor vehicle sold with a manufacturer's new car warranty*" refers to "cars *originally* sold with a new motor vehicle warranty, not subsequent sales." (*Ibid.*)

We agree with *Kiluk* on this point. In other words, we agree with *Jensen's* holding but not all of its reasoning. And the holding hurts, not helps, plaintiffs' argument. BMW's attempt to avoid liability by claiming the vehicle wasn't actually a demonstrator exemplifies the need for a catchall provision covering any not-previously-sold car accompanied by a full new car warranty.

Having examined the statutory provision, its place within the Act as a whole, and its legislative history, we conclude the phrase "other motor vehicles sold with a

manufacturer's new car warranty" refers to cars sold with a full warranty, not to previously sold cars accompanied by some balance of the original warranty. We therefore conclude the trial judge was correct to conclude plaintiffs' truck does not meet the definition of "new motor vehicle" and to dismiss their claim against FCA as a result.

As a final point, we note our conclusion doesn't mean that plaintiffs or others in their position have no legal recourse against a manufacturer who fails to conform a vehicle to an applicable, unexpired express warranty. Though not entitled to the Act's refund-or-replace remedy, the beneficiary of a transferrable express warranty can sue a manufacturer for breach of an express warranty to repair defects under the California Uniform Commercial Code. (Cal. U. Com. Code, §§ 2313, 2714, 2715.)

**III**

**DISPOSITION**

We affirm the judgment. Appellants shall bear costs on appeal.

CERTIFIED FOR PUBLICATION

SLOUGH
J.

We concur:

MILLER
Acting P. J.

RAPAHEL
J.

## PROOF OF SERVICE

I am employed in the County of Los Angeles, California. I am over the age of 18 years and not a party to the within action. My business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On May 17, 2022, I served the foregoing document(s) described as: **PETITION FOR REVIEW** on the interested party(ies) in this action, addressed as follows:

**SEE ATTACHED SERVICE LIST**

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

(X) By Mail: By placing a true copy thereof enclosed in sealed envelopes addressed as above and placing the envelopes for collection and mailing following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that 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.

Executed May 17, 2022 at Los Angeles, California.

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

*/s/ Monique N. Aguirre*
Monique N. Aguirre

**SERVICE LIST**

**VIA TRUEFILING**

Lisa Perrochet (SBN 132858)
lperrochet@horvitzlevy.com
Shane H. McKenzie (SBN 228978)
smckenzie@horvitzlevy.com
HORVITZ & LEVY LLP
3601 West Olive Avenue, 8th Floor
Burbank, CA 91505-4618
(818) 995-0800

Georges A. Haddad (SBN 241785)
ghaddad@clarkhill.com
CLARK HILL LLP
One Embarcadero Center, Suite 400
San Francisco, CA 94111
(415) 984-8500

David L. Brandon (SBN 105505)
dbrandon@clarkhill.com
CLARK HILL LLP
555 S. Flower, 24th Floor
Los Angeles, CA 90071
(213) 891-9100

*Attorneys for Defendant and Respondent FCA US, LLC*

California Court of Appeal
[Electronic Service under Rules 8.44(b)(1); 8.78(g)(2) and 8.500(f)(1)]

**VIA U.S. MAIL**

Hon. Jackson Lucky
Attn: Appeals Department
RIVERSIDE SUPERIOR COURT
4050 Main Street
Riverside, California 92501