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Alliance of Automobile Manufacturers

Statement in Support of AB 200

May 29, 2013

Dear Chairman Ott:

On behalf of the Alliance of Automobile Manufacturers, thank you for the opportunity to express our strong support for Assembly Bill 200. The Alliance is a trade association of twelve passenger car and light truck manufacturers including BMW Group, Chrysler Group LLC, Ford Motor Company, General Motors Company, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche, Toyota, Volkswagen, and Volvo.

AB 200 closes loopholes and amends specific unfair provisions that have been repeatedly abused and led to absurd results. AB 200's changes will fix these problems and make the Lemon Law logical, strong, and effective.

Under current law, if a car is a lemon, the consumer may choose whether to get a replacement vehicle or a refund. The manufacturer must provide either the replacement vehicle or the refund to the consumer within 30 days or else harsh penalties apply. Unfortunately, some claimants have abused the system by taking steps to prevent a manufacturer from meeting the deadline. For example, a claimant could delay giving the manufacturer the information necessary to process a refund (such as who has the title or information needed to calculate the refund).

AB 200 fixes these problems by requiring claimants provide all of the information necessary to provide refunds. In addition, the bill authorizes the Department of Transportation to determine the appropriate form and manner to do that. AB 200 would also continue to give the consumer the option to change his or her mind to choose a refund or replacement. The bill would simply give the manufacturer time to accommodate the consumer's new request.

Wisconsin's Lemon Law is unique. There is no other state whose lemon law requires that a court award *double* damages. The Lemon Law should be about protecting consumers, not setting the stage for windfall damage awards. In one instance, a plaintiff was awarded a total of \$618,000 for a \$56,000 car.¹ These jackpot style awards are unfair and not in the spirit of the Lemon Law. Outrageous awards encourage litigation rather than quick, simple resolutions. AB 200 would eliminate the automatic doubling of damages and make the Lemon Law more similar to the law in other states.

Wisconsin's Lemon Law also requires that courts award attorney's fees to successful plaintiffs (though not for successful defendants). That is a departure from the tradition in American law where parties typically pay their own costs. AB 200 strikes a balance between the two: it would let courts decide whether to award attorney's fees to a plaintiff on a case-by-case basis, rather than requiring them to be awarded in every instance.

¹*Marquez v. Mercedes-Benz USA, LLC*, 2012 WI 57, 815 N.W.2d 314.

Alliance of Automobile Manufacturers

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AB 200 also contains other common sense amendments to the Lemon Law. For example, under the current law, plaintiffs can wait six years before filing a lawsuit under the Lemon Law. There is no reason to wait that long. In such a lengthy time period, evidence can be lost, memories grayed, and witnesses become harder to find. AB 200 would set a more reasonable standard by requiring lawsuits to be filed within two years of the purchase.

AB 200 creates common sense solutions to problems that have surfaced in Wisconsin's Lemon Law. The Alliance respectfully asks this committee to vote in favor of AB 200. Please contact our local representative, Robert Fassbender at (608) 258-9506 or fassbender@hamilton-consulting.com if you would like to discuss this important issue further.

Sincerely,

Renée Wadsworth
Senior Manager, State Affairs

PROBLEMS WITH WISCONSIN'S LEMON LAW

THE *MARQUEZ* CASE

Wisconsin Supreme Court recently awarded Attorney Vince Megna – the self-proclaimed “Lemon Law King” – a victory that allowed him and his client to walk away with a \$618,000 award, including over \$300,000 in attorney fees, for a car purchased for \$56,000. The award was upheld despite the fact that Megna and the owner’s inaction made it impossible for the manufacturer to provide a refund payment within the statutory 30-day deadline. The case is *Marquez v. Mercedes-Benz USA, LLC*, 2012 WI 57.

Facts of the Case

The plaintiff, Marco Marquez, purchased a Mercedes-Benz E-series automobile that had mechanical problems triggering Wisconsin’s Lemon Law. After Mercedes-Benz was alerted that the car was a lemon, it began working with the owner and his attorney, Megna, to provide the owner the proper remedy. Originally, the owner sought a new vehicle, but instead of seeking a similar E-series he requested an S-series. Mercedes-Benz notified the owner that the 2007 S-series he requested had not yet been released to dealers, but told him that the company would work with him to get such a vehicle as soon as possible.

With just five days left remaining under the 30-day statutory deadline, the owner notified Mercedes-Benz that he changed his mind and instead wanted a refund. This was on the Wednesday (November 23, 2005) before Thanksgiving.

The Mercedes-Benz representative, Wade Messing, was not in the office Thursday or Friday because of the holiday, and instead traveled to Wisconsin on Monday, November 28 to issue the refund check to both the owner and his bank, which had issued a loan for the vehicle.

On November 28, Messing contacted the owner’s bank to obtain the auto loan payment information so he could issue the check, but the bank refused to provide the information citing privacy issues. The bank told Messing that if the owner called the bank and authorized the release of the information, it would provide the information to Messing.

Messing then contacted the owner and asked that he call the bank to provide the release. The owner told him he would do so and that he would call Messing back after he contacted the bank. However, the owner called neither the bank nor Messing. The owner further withheld from Messing that he had previously given a loan officer at the bank permission to release the payout figure to Messing.

After not hearing from the owner, Messing called Attorney Megna, who conveniently could not be reached. Megna’s office did not inform Messing that it had the payout number from the bank.

Because Messing did not have the requisite information to issue a refund check to both the owner and the bank, Mercedes-Benz was not able to issue a refund check to the owner within Wisconsin’s 30-day deadline. As a result, the owner’s attorney filed a lawsuit the next day alleging Mercedes-Benz violated Wisconsin’s Lemon Law. The complaint was actually dated November 28, 2005, meaning that Attorney Megna was preparing to seek the damages the very same day that he and his client were withholding information and failing to respond to Messing’s phone calls.

Wisconsin Supreme Court Decision

A jury, ruling in favor of Mercedes-Benz, determined that the owner and his attorney acted in bad faith by failing to call the bank so that Mercedes-Benz could access the bank account information. However, the circuit court judge issued a directed verdict in favor of the owner. The judge determined there was no credible evidence that the owner or his attorney intentionally thwarted Mercedes-Benz's efforts to provide a refund.

On appeal, the Wisconsin Supreme Court affirmed the directed verdict in favor of the owner. According to the majority decision, the "jury's finding that on November 28 the consumer intentionally prevented Mercedes-Benz from complying with the Lemon Law was impermissibly speculative." The majority further stated that the record contained no evidence of any such intentional conduct by the owner or his lawyer that would bar them from taking advantage of the Lemon Law's remedies.

Practical Effect of Decision for Automobile Manufacturers in Wisconsin

In her dissenting opinion, Justice Roggensack explained that under the majority's reasoning, no affirmative defense of thwarting a refund will be allowed unless the manufacturer can prove the owner had knowledge of the legal effect of his conduct on the statutory obligations that the Lemon Law places on the manufacturer.

For example, in its decision, the majority held that the manufacturer had to prove that the owner knew the statutory remedies would be triggered if the manufacturer did not pay him the refund within 30 days. According to the dissent, if this is indeed the new standard, it will be all but impossible for manufacturers to prove the owner acted in bad faith because most automobile purchasers are not attorneys and do not have knowledge of the Lemon Law's requirements and statutory deadlines.

Twice Pecuniary Loss Requirement Less Than 10 Percent of Award.

The double damages provision made up less than a quarter of the total award in the *Marquez* case, while attorney fees amounted to 62.5 percent of the \$408,466 Pre-Supreme Court award.

Award Category	Pre-Supreme Court Decision
Twice Pecuniary Loss	\$117,285.06
Prejudgment Interest	\$5,833.41
Statutory Interest	\$45,423.68
Statutory Costs	\$10,216.72
Litigation Costs	\$2,105.79
Attorney Fees	\$301,707.00
Total Award	\$482,571.66

Allowing for single, not double pecuniary loss would amount to a less than ten percent reduction of the final \$618,000 award in the *Marquez* case.

OTHER CASE EXAMPLES

“Lemon” Freightliner Operates for Two Years

Consumer took possession of a 2007 Freightliner Classic in September 2007. Although the first repair was within the first month at 2,972 miles, the consumer drove the car for two years and 200,000 miles before making his lemon law claim.

The customer requested reimbursement of purchase price. To satisfy reimbursement obligation under Wisconsin’s lemon law, Daimler Trucks North America (DTNA) had to pay off customer’s remaining loan for the vehicle. This totaled \$91,000. Because consumer drove and used the vehicle for two years and made payments under the note, DTNA had to reimburse him for "collateral costs" which included these payments. This amounted to \$56,151.47. Additional collateral costs related to improvements customer made to the vehicle totaled approximately \$6,000. The total cost to DTNA for this lemon law claim was \$153,151. The cost of the vehicle new in 2009 to customer was \$108,651.

\$3,550 Jury Award turns into \$215,000 Lemon Law Jackpot

Consumer brought a lemon law case alleging that it took too long to put gas in the tank and the gas gauge, which was an electronic bar graph, would incrementally jump as less fuel was in the tank. The car never broke down, never had a problem, never ran out of gas and no one else ever had a problem putting fuel in the tank. Nonetheless, the consumer demanded a complete refund under the lemon law. Any reasonable attempts at settlement were impossible by virtue of the fact that Attorney Vince Megna claimed that he had incurred over \$10,000 in attorney’s fees within the first two weeks of filing the case.

At the commencement of trial, the consumer abandoned her Section 2(b) claim under the Wisconsin Lemon Law (which is the section of the lemon law which contains the presumptions and the rights to a full refund or a replacement). Instead, the court allowed the consumer to pursue an action only under Section 2(a) of the lemon law, which allows for "pecuniary damages" if an alleged defect occurs within the first year and continues thereafter. Section 2(a) claims allow a plaintiff to still pursue an action under the lemon law even when the plaintiff cannot show four or more times/30 or more days - an outcome never intended by the framers of the Lemon Law. In any event, the court allowed the case to go to trial.

The jury did not believe that the consumer ever had an issue with putting gas in the car, but because the dealer adjusted the gas gauge to accommodate the consumer two times (once within the first year and then one time thereafter) the jury felt that the consumer had a Section 2(a) claim. The jury awarded \$3,550 to the consumer. Megna petitioned for fees under the lemon law, and the court awarded \$215,000 after a 3-day trial. In other words, the Court awarded fees on a factor approximately 75 times greater than the underlying award.

Plaintiff Disappears making Selection of Comparable Vehicle Impossible

Another case with Vince Megna in Waukesha County involved vehicle pulling claims. Rather than fight the case, the manufacturer decided to settle pre-suit. Plaintiff wanted a comparable vehicle and the manufacturer provided one within the 30-day period. Plaintiff was conveniently absent during the week before the expiration of the 30 days, so he could not pick up the vehicle.

On the 30th day, which was a Sunday, Plaintiff claimed he came back into town and went to the dealership where the comparable replacement had been delivered and that the replacement was unsatisfactory because he could see through the window that the fabric on the seats looked "a little more pinched" than the fabric on his original vehicle. As a consequence, Plaintiff claimed that the manufacturer did not provide a comparable replacement within 30 days, and two days later Vince Megna filed suit.

Rejection of Comparable Vehicle to Bust 30-Day Deadline

Dissatisfaction of Customers with Current System

Vehicle was provided within 30-day period, but lemon lawyer argued it was not a "comparable" new motor vehicle because the customer's original vehicle had pin striping and clear coat (both aftermarket items) and these items were not on the replacement vehicle. The attorney filed suit seeking double damages. After about 60 days of negotiating, the lemon lawyer decided that the vehicle provided would suffice so long as these aftermarket items were added and that manufacturer pay \$1,500 in attorney's fees.

After settlement, the customer contacted the manufacturer to complain that he was required to pay the lemon lawyer \$2,500 in attorney's fees in addition to the manufacturer's fees. He said that he would have accepted the replacement vehicle regardless of the aftermarket items but his attorney advised him otherwise. He stated he regretted ever hiring the lemon lawyer.

Rejection of Comparable Vehicle to Bust 30-Day Deadline

A customer requested a replacement vehicle, and a new vehicle was shipped to the dealer and inspected by the customer. The lemon lawyer refused it, stating that it was not "comparable" because the vehicle had 17" inch alloy wheels when the original had 16" inch wheels. Alleging a violation of the lemon law and seeking double damages and attorney fees, the lemon lawyer sued. While the case was settled out of court, the manufacturer incurred substantial costs, including flying an analyst to Wisconsin for a deposition.

Rejection of Comparable Vehicle Award in ADR

For all of calendar year 2002, and 2003 through September, General Motors had 162 breach of warranty and/or lemon law lawsuits filed in Wisconsin. Thirty-four of those cases had a prior dispute resolution case with the Better Business Bureau. Fourteen of the cases that entered dispute resolution were closed as ineligible, customer withdrew, or no decision for some other reason. Of the 20 cases with a favorable decision, 7 customers or 35 percent, rejected a mandated repurchase and went on to file a lawsuit.

Of the 162 cases, 128 had no dispute resolution record because it is so well known that the ADR process doesn't work in Wisconsin; GM commonly does not require customers to resort to it. That is, requiring the customer who has retained a lemon attorney to proceed through arbitration, and ultimately, rejection of an award only increases the attorney fees and the overall cost of the case, and delays resolution for the customer.

Commercial Inability to Provide Comparable Vehicle Within 30 Days

The customer requested a comparable commercial truck to replace a truck that was several years old. Unfortunately, no new trucks met the older truck's specifications. For example, the old truck

had a Caterpillar engine that was no longer available, and the older truck had various installed items not available from the factory, some of which posed safety concerns.

Because of the customer's insistence on a "comparable" vehicle, there were unavoidable delays in getting a vehicle custom built that met his specifications. After the fact, the customer's attorney acknowledged that the highly customized commercial truck industry made any demands for a comparable vehicle infeasible and that he would never again recommend a customer take that route.

Truck Manufacturers Paying for Problems Related to Improperly Installed Components

A customer had the dealer install a body on a commercial truck that was too big for the original rear suspension. Also installed was a liftable pusher axle without adding reserve air capacity to bring the vehicle to code causing the truck to quickly lose air for the liftable axle and resulting in frequent brake "shutdowns" while the system aired up. In addition, the tire size was increased on the front axle to handle the extra weight from the large dump body and payload causing the tires to rub on suspension components. The manufacturer bought back the vehicle, including the improperly installed components and incurred other costs associated with the problems unrelated to their vehicle.

Lemon Lawyer Taking Steps to Bust the 30-day Deadline

After taking possession of the vehicle, the customer alleged that she experienced a variety of operational problems that were not repaired, which led to her lemon lawyer demanding a replacement vehicle. Upon a diligent search, the manufacturer could not locate a comparable vehicle in Wisconsin, but informed the customer that if she found an acceptable replacement, they would arrange for its delivery. Despite requests for a response, the attorney waited close to three weeks to inform the manufacturer that they had found a replacement at a Wisconsin dealership, but informed the manufacturer the replacement would have to be provided within the 30-day deadline.

The manufacturer contacted that dealership and was informed the vehicle was no longer available, so they explained to the customer that the only way to meet the 30-day deadline was to provide a refund. The refund check was sent to the dealership for customer pick-up. When the dealership called the customer to ask whether she planned to come, she responded that she wanted to pick up the check but that her attorney would not allow it. During this time period, the customer also arbitrated her claim at the Better Business Bureau (as required by Wisconsin law) and was awarded a replacement vehicle. The customer rejected that award. The lemon law attorney then promptly filed suit for double damages and attorney fees.

Opting for Litigation Instead of Accepting Award

In response to the customer's request for a refund, the manufacturer and customer exchanged correspondence, including an agreement that a refund would be provided. The check was sent to a local dealership for pick-up. When the dealer contacted the customer to inform him his check was at the dealership, the customer stated that he should contact his lawyer. The lemon lawyer refused to accept the check since by then the 30-day deadline had passed. In addition, the customer was awarded repurchase through dispute resolution. The lemon lawyer, nevertheless, filed suit requesting a refund, double damages and attorney fees.

Opting for Litigation Instead of Accepting Award

Although the dealership attempted on several occasions to repair alleged leaks (sometimes repaired, sometimes not located, always at different locations), the customer alleged the vehicle to be a lemon. As required before filing suit under the Wisconsin Lemon Law, the customer applied for arbitration through the Better Business Bureau. The BBB ultimately awarded the customer a repurchase. Despite the relief awarded to him, it was rejected and a suit was filed seeking double damages, which were ultimately awarded.

Opting for Litigation Instead of Accepting Award

Consumer was represented by a large law firm specializing in lemon law cases. Her attorney filed a claim with the Better Business Bureau by sending a letter requesting a repurchase of her vehicle. After reviewing the written submissions, the arbitrator awarded the consumer the vehicle's purchase price, taxes, and finance charges. The arbitrator even included an award of \$1200 in attorney fees, although the consumer's lawyer never requested specific amounts and never submitted any bills.

Upon receiving the decision, the consumer's attorney requested that the award be modified to increase the attorney fees. The arbitrator agreed and changed his award to increase the attorney fees to the amount requested. The consumer rejected the arbitrator's award and chose to litigate.

Opting for Litigation Instead of Accepting Award

Consumer was represented by a prominent Wisconsin firm known for representing consumers in lemon law lawsuits. A claim was filed with the Better Business Bureau seeking replacement of the consumer's vehicle. During attempts to mediate the claim, the manufacturer offered the consumer the option of a replacement or a repurchase under the lemon law. This was rejected by the consumer's attorney, and the case went to arbitration. A written hearing was requested.

After reviewing all the submissions, the arbitrator awarded the consumer a replacement under the lemon law. The attorney had not even requested attorney fees, but the arbitrator included attorney fees in the award with a notation that the amount was to be determined. Again, the consumer received everything she was entitled to under the lemon law. The award was rejected and a lawsuit was filed

Inability to Locate Comparable Vehicle

A customer had a 2000 4WD pickup (cab and chassis) with a dump box. During the 30-day period he demanded a replacement. The manufacturer could not locate a vehicle with a dump box (as required by Wisconsin law) within 30 days. The customer's attorney filed suit and changed his demand to a refund. The manufacturer had to settle the case for more than the value of the vehicle, and pay substantial attorney fees.

COMPARISON TO NATIONAL AVERAGES

(GM data –2002)

- Wisconsin overall repurchase rate (lemon law returns) is 45% above national average, 9th highest nationally
- Wisconsin Lemon Law suits filed at a rate 46% above national average, 6th highest nationally
- Wisconsin legal settlements average 38% above national average, 6th highest nationally
- **Wisconsin is the ONLY state to be in the top 10 for all three of the above categories**
- Wisconsin is the ONLY state that mandates automatic double damages merely for defending (and losing) a lawsuit

Note: Ford Motor Company had similar experiences, with a 69% higher litigation rate, resulting in payouts 58% higher than the national average. This data was compiled in 2002 relating to lemon law proposals at that time. The Alliance of Automobile Manufacturers is attempting to compile updated comparisons, but nothing has occurred in Wisconsin since 2002 to suggest the problem has lessened. In fact, recent cases suggest the cost associated with Wisconsin's law is worsening the state's competitiveness.