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VIA HAND DELIVERY

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

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

Dear Chief Justice George and Associate Justices:

I. INTRODUCTION AND STATEMENT OF INTEREST

The Center for Auto Safety ("CAS") respectfully asks the Supreme Court to invoke California Rule of Court 979 and order the depublication of *Daugherty v. American Honda Motor Co., Inc.,* 144 Cal. App. 4th 824 (Cal. Ct. App. 2006). As explained more fully below, CAS opposes the publication of *Daugherty* because it harms consumers by allowing manufacturers to market automobiles and automobile warranties in a deceptive manner, and allows manufacturers to escape the consequences of selling unsafe and unreliable automobiles. Moreover, *Daugherty* creates confusion with respect to California's warranty law, and places an undue burden on consumers who seek to enforce their warranty rights.

CAS's interest in *Dougherty* is directly tied to its mandate. CAS is a national, nonprofit consumer advocacy organization, founded by consumer advocate Ralph Nader and the Consumers Union. For more than 30 years, CAS has been dedicated to promoting motor vehicle safety, ensuring that defective and unsafe vehicles and automotive equipment are removed from the road, and to improving the quality and reducing the cost of automotive repairs. CAS's members reside in California and throughout the United States.

II. ARGUMENT

A. Honda's Ambiguous Warranties Are Not Properly Decided On Demurrer.

The parties did not present either the Superior Court or the Court of Appeal with all of Honda's warranties. Despite lacking all of the relevant documents, the Court of Appeal affirmed the Superior Court's order sustaining Honda's demurrer, and held, "*as a matter of law*, in giving its promise to repair or replace any part that was defective in material or workmanship and stating the car was covered for three years or 36,000 miles, Honda "'did not agree, and *plaintiffs did not understand it to agree*, to repair latent defects that lead to a malfunction after the term of the warranty.'" *Daugherty*, 144 Cal. App. 4th at 832 (emphasis added) (quoting Superior Court order sustaining demurrer).

To reach this conclusion, the Court of Appeal did not consider any evidence of what consumers understood or expected, or the entire text of Honda's warranty. Instead, the Court of Appeal quoted only part of Honda's warranty booklet explaining that "Honda's express warranty to purchasers covered automobiles 'for 3 years or 36,000 miles, whichever comes first,' and [the warranty] stated Honda would 'repair or replace any part that is defective in material or workmanship under normal use ... .'" *Daugherty*, 144 Cal. App. 4th at 830; see also 1995 Honda Warranty Booklet at page 7 ("Warranty") (attached). On the partial text alone, the Court of Appeal also drew conclusions as to what consumers understood or expected with regard to Honda's warranty coverage.

Basing its analysis on only these two sentences, the Court of Appeal rejected the argument that the warranty covered "a defect that exists during the warranty period … where it results from an 'inherent design defect,' if the warrantor knew of the defect at the time of the sale." *Id.* Thus, the Court of Appeal apparently interpreted the Limited Warranty to mean that Honda promised that "*if any part actually fails within 3 years or 36,000 miles of purchase* due to a defect in material or workmanship under normal use, Honda will repair or replace it."

The Court of Appeal should have reviewed the entire set of warranties that Honda offered in its warranty booklet before publishing an opinion that litigants will cite and on which other courts may rely. When interpreting a contract, "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Civ. Code § 1641.[1] In particular, Honda's Replacement Muffler Limited Lifetime Warranty ("the Muffler Warranty") demonstrates why Honda's New Car Limited Warranty ("the Limited Warranty") is ambiguous and should be construed in favor of consumers. Furthermore, "[a] court must view the language in light of the instrument as a whole and not use a disjointed, single-paragraph, strict construction approach. … An interpretation which renders part of the instrument to be surplusage should be avoided." *Appalachian Ins. Co. v. McDonnell Douglas Corp.*, 214 Cal. App. 3d 1, 12 (Cal. Ct. App. 1989) (citations omitted). When the Court of Appeal interpreted only the Limited Warranty, without reviewing the complete contents of the

[1] Even if the warranties constitute separate contracts, "[s]everal contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." Cal Civ Code § 1642.

warranty booklet, it "use[d] a disjointed, single-paragraph, strict construction approach" that rendered parts of the other warranties surplusage.

The Muffler Warranty explains that "[t]he Honda automobile replacement muffler is warranted against defects in material and workmanship for as long as the muffler's purchaser owns the car on which it is installed" and promises that "[i]f the warranted muffler fails due to a defect, Honda will exchange it." Warranty at 38. Thus, the Muffler Warranty illustrates how Honda drafts warranties that promise to repair only those defects that cause a vehicle to fail during a specified period of time, that is, "for as long as the purchaser owns the car."

Honda used different language to construct its Limited Warranty. In doing so, it must have intended its Limited Warranty to convey a different meaning than the Muffler Warranty because it does not limit the scope of the parts that it promises to repair or to replace to those that "fail due to a defect." Instead, Honda covered any part that "is defective" during the warranty period. It chose to phrase its Limited Warranty in such broad, vague terms perhaps because such terms appear to promise a hopeful consumer a great deal of protection at the time of sale, but allow Honda to adopt whatever interpretation of its Limited Warranty allows it to escape liability.[2]

Despite the use of very different language in the same document, the Court of Appeal rendered the specific language of the Muffler Warranty surplusage. If the Muffler Warranty and the Limited Warranty conveyed the same meaning, then the Limited Warranty should have read, "if a part fails due to a defect, Honda will repair or replace it." The dissimilar language should have eliminated the possibility that Honda's Limited Warranty should be interpreted to convey the same meaning as its Muffler Warranty.

In addition, the Court of Appeal should have construed Honda's vague reference to a part that "is defective" in the plaintiffs' favor because California law dictates that "[i]n cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." Civ. Code § 1654. Similarly, a contract provision made in favor of a party "is to be taken which is most favorable to the party in whose favor the provision was made." Code Civ. Proc. § 1864. In this case, Honda controlled the terms of its Limited Warranty and wrote the Limited Warranty to benefit the consumer. Thus, California law requires either a construction of the Limited Warranty strongly against Honda or the introduction of extrinsic evidence to determine what, exactly, "is defective" means in the context of Honda's warranty booklet.

[2] Before warranties became part of the competitive marketplace, vehicle manufacturers used a standard warranty with very precise language. *Henningsen v. Bloomfield Motors, Inc.,* 32 N.J. 358, 367 (N.J. 1960). In that warranty, "[t]he manufacturer warrants each new motor vehicle … to be free from defects in material or workmanship under normal use and service." *Id.* Honda's warranty no longer clearly promises consumers a car free of defects, even though few reasonable consumers would believe that the phrase "is defective" means anything other than the car is not currently defective at the time of purchase.

Construing Honda's Limited Warranty "most strongly against" it could mean adopting the interpretation that the plaintiffs offered: if a part was defective at the time of sale, and Honda knew that it was defective,[3] then Honda was obligated to repair or replace it. The plaintiffs' interpretation was consistent with Honda's use of the "to be" verb in the present tense, i.e., "is." Honda's engines were defective at the time of sale, and Honda was on notice of the defect, according to the allegations in the complaint. Thus, Honda should have been obligated to repair or replace defective parts. When Honda failed to repair or replace defective parts within the three-year warranty period, it breached its promise.

B. The Court Of Appeal Should Have Analyzed Honda's Warranty Under Established California Law, Not The Law Of Other States.

CAS raises the proper construction of the Limited Warranty, not as a legal technicality, but as the basis upon which to analyze California's warranty law under already established precedent. *See, Hicks v. Kaufman & Broad Home Corp.*, 89 Cal. App. 4th 908 (Cal. Ct. App. 2001). In *Hicks*, the defendant expressly warranted its homes "will be free from any defect resulting in or causing tangible damage to the . . . foundation of the home which materially diminishes the structural integrity and load-bearing performance of the home for a period of ten (10) years . . . ." *Hicks,* 89 Cal. App. 4th at 917. Plaintiffs sought class action status for breach of express warranty, among other claims, alleging that the foundations were inherently defective. Like here, some class members had yet to experience a malfunction. The Court of Appeal held that, in such a situation, proof of a defect, not proof of a malfunction, establishes the breach of an express warranty:

> proof of breach of warranty does not require proof the product has malfunctioned but only that it contains an inherent defect which is substantially certain to result in malfunction during the useful life of the product. The question whether an inherently defective product is presently functioning as warranted goes to the remedy for the breach, not proof of the breach itself.

Hicks, 89 Cal. App. 4th at 918 (Cal. Ct. App. 2001).

The Court of Appeal reached this conclusion because: "[t]he primary right alleged to have been violated … in the case before us, was the right to take a product free from defect." *Id.* at 922. Thus, the Court of Appeal concluded, "[t]he defect did not cause the plaintiffs' injury; the defect was the injury." *Id.*

The *Hicks* opinion also distinguished between defects that *shorten* a product's useful life and a product's useful life, explaining that "[f]oundations … are not like cars or tires. Cars and tires have a limited useful life. At the end of their lives they, and whatever defect they may have contained, wind up on a scrap heap. If the defect has not manifested itself in that time span, the buyer has received what he bargained for." *Id.* at 923. Thus, California law already balances the

[3] Honda could either receive notice from a consumer or learn of the defect itself. The source of the knowledge is not legally material because once Honda learns of a defect, a consumer's notice provides no benefit and "[t]he law neither does nor requires idle acts." Civ. Code § 3532.

expectations of consumers and manufacturers by defining a defect as a condition that will cause a product to malfunction within its useful life, not simply a condition that will cause a product to malfunction *at any time in the future*. The allegations in *Daugherty* present even fewer concerns. The plaintiffs did not allege that a particular part would wear out prematurely. They alleged that Honda had simply failed to include a brace in its engines. The lack of a brace would cause other parts to malfunction within their useful life.[4]

The *Daugherty* opinion extinguished the distinction between a product's useful life and a defective product that malfunctions before the end of its useful life because it relied on an opinion issued by the Second Circuit:

> *Abraham* explained: "[V]irtually all product failures discovered in automobiles after expiration of the warranty can be attributed to a 'latent defect' that existed at the time of sale or during the term of the warranty. All parts will wear out sooner or later and thus have a limited effective life. Manufacturers always have knowledge regarding the effective life of particular parts and the likelihood of their failing within a particular period of time. ... [M]anufacturers ... can always be said to 'know' that many parts will fail after the warranty period has expired. A rule that would make failure of a part actionable based on such 'knowledge' would render meaningless time/mileage limitations in warranty coverage." Similarly, *Walsh I* observed that: "[T]o hold that all latent defects are covered under the written warranty, whether they become apparent to the customer before or after the expiration of the written warranty, would place an undue burden on the manufacturer. [The manufacturer] would, in effect, be obliged to insure that a vehicle it manufacturers is defect-free for its entire life."

Daugherty v. American Honda Motor Co., Inc., 144 Cal. App. 4th 824, 830-831 (Cal. Ct. App. 2006) (quoting *Abraham v. Volkswagen of America, Inc.*, 795 F.2d 238, 250 (2d Cir. 1986) and *Walsh v. Ford Motor Co.*, 588 F. Supp. 1513, 1536 (D.D.C. 1984)).

The methods that the *Daugherty* opinion used to uphold the Superior Court's dismissal justify returning the opinion to unpublished status. It relied on a case, *Abraham*, that never quoted the terms of the warranty. Thus, a court attempting to interpret a warranty will never know how analogous *Abraham* actually is and *Daugherty* creates the impression that the actual terms of the warranty do not matter. Furthermore, when analyzing California's warranty law, the *Daugherty* opinion does not cite a single case decided by a court sitting in California.[5] Finally,

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[4] Having no specific interest in the plaintiffs' claims, CAS acknowledges that some of the cars failed only after many thousands of miles of use. Consequently, CAS hesitates to act as advocates on behalf of these particular plaintiffs, but, nevertheless, maintains that the Court of Appeal's legal reasoning may foreclose clearly meritorious claims, which is one of CAS's primary concerns regarding the status of *Daugherty*.

[5] On the other hand, if federal circuit decisions constitute a superior source of authority, the Sixth Circuit interpreted a warranty that, like Honda's Limited Warranty, read, "During this coverage period ['three years or 36,000 miles'], authorized Ford Motor Company dealers will repair, replace, or adjust all parts on your vehicle (except tires) that are defective in factory-supplied

Hicks already provides a decision that not only relies on California case law, it actually reconciles two separate lines of that case law. Thus, *Daugherty* creates inferior, not merely contradictory, precedent. Requiring Superior Courts to compare *Hicks* and *Daugherty* every time a claim arises would tax judicial resources and introduce an unjustified level of uncertainty into a litigation process that is already extremely difficult for the individual consumers CAS seeks to protect.

CAS understands that many of the courts to examine the issues presented by this case have been concerned that manufacturers may lose the ability to limit the guarantees that they make regarding their products. However, the standard articulated in *Hicks* is rather high. A product must be "substantially likely" to fail within its useful life. A few parts wearing out a bit too early does not satisfy the requirement. Several of the class members in this case demonstrate how a product may fail within its useful life. Petitioner Tony Lao purchased a new 1996 model-year Accord. Joint Appendix, Volume 2 ("JA2"), Ex. 17 at 253. The Accord suffered total engine failure as a result of the oil seal defect in 2001. However, Honda not only failed to notify him that it was conducting a recall, it refused to reimburse him for his loss and refused to provide any of the other benefits it purportedly offered when it announced the campaign. Id.[6] The buyer of a new car should expect that its useful life will exceed five years.

Not only does the high standard announced by *Hicks* protect manufacturers sufficiently, those manufacturers always retain the power to draft precise warranties. Honda's Muffler Warranty provides the template for drafting a warranty that could protect a manufacturer from accepting the obligation to repair or to replace parts after expiration of the warranty period. If the courts required manufacturers to draft precise warranties by construing vague warranties against them, the market would discipline those manufacturers whose warranties guaranteed very little. For example, if Honda chose to offer a warranty that did not promise that its new vehicles would be free of defects, any of its competitors could advertise, "unlike Honda, we promise that your new car will be free of defects." Honda could either guarantee that its vehicles contained no defects or risk losing market share. As the market compelled manufacturers to offer more substantive warranties, the cost of honoring those warranties would compel vehicle manufacturers to market safer and more reliable vehicles.

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materials or workmanship." *Daffin v. Ford Motor Co.*, 458 F.3d 549, 551 (6th Cir. 2006). It concluded that "the legal question of whether the warranty contract is properly read to contain a promise to repair the type of common 'defect' in all the 1999 or 2000 throttle body assemblies (regardless of whether or not manifested during the warranty period) is also common to the class." *Id.* at 552. The question of what a warranty means requires analyzing the actual text of the warranty. It is not, as Honda argues, an issue of law regardless of what words the warranty actually uses.

[6] Similarly, although Petitioner David Hammond's 1997 model-year Accord was among the Class Vehicles that Honda deemed eligible to participate in the recall campaign, Honda failed to tell Mr. Hammond about the recall campaign. Id. at 255. The experience of these plaintiffs belies Honda's claim that it voluntarily recalled its vehicles.

III. CONCLUSION

For the foregoing reasons, we oppose the publication of the *Daugherty* decision, and respectfully ask this Court to return it to its unpublished status.

Very truly yours,

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Eric H. Gibbs

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