

MANNING, LEAVER, BRUDER & BERBERICH

JOSEPH E. BERBERICH
ROBERT D. DANIELS
BRENT W. SMITH
PENNY L. REEVES
HALBERT B. RASMUSSEN
TIMOTHY D. ROBINETT
YENYAO HSIEH
GARY H. PRUDIAN
WADE R. KACKSTETTER
FRANJO M. DOLENAC
ARJUN P. RAO
CRYSTAL S. YAGOOBIAN

ATTORNEYS AT LAW
SUITE 655
5750 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90036-3637
TELEPHONE (323) 937-4730
FACSIMILE (323) 937-6727

DEWITT M. MANNING
(1909-1992)

GEORGE E. LEAVER
(1929-2003)

WALTER F. BRUDER, JR.
RETIRED

July 12, 2012

California Court of Appeal
Fourth Appellate District
Division Three
601 W. Santa Ana Blvd.
Santa Ana, CA 92701

**Re: Request for Publication of Opinion (Cal. Rules of
Court, Rule 8.1120(a)(1))**

**Court of Appeal Case Number G044550;
Superior Court Number 30-2010-00369466
Orange County**

**Caron vs. Mercedes-Benz Financial Services USA
LLC at al.**

To The Honorable Justices of the
California Court of Appeal, Fourth
Appellate District, Division Three:

On behalf of the California New Car Dealers Association ("CNCDA"), having an interest in this matter based on its status as a California nonprofit mutual benefit corporation chartered to advance the interests of the new motor vehicle dealer industry in California¹, pursuant to Rule 8.1120(a)(1), California Rules of Court ("CRC"), the undersigned hereby respectfully requests this Court to certify for publication the opinion of this Court in *Caron v. Mercedes-Benz Financial Services USA LLC, et al.* ("*Caron*").

Publication of the opinion is fully supported by the criteria for publication laid out in CRC 8.1105(c). Moreover, publication is extremely important because doing so will ease the burden members of CNCDA face from unrelenting efforts of litigants who continue to resist the enforcement of arbitration agreements on grounds prohibited by the Federal Arbitration Act (9 U.S.C. § 1 et. seq.; "FAA"), as clearly articulated by the U.S.

¹ All of CNCDA's members are associated with new motor vehicle dealerships in California. The vast majority of the State's new vehicle dealers are members of the association.

Supreme Court in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ____ [131 S.Ct. 1740] ("*AT&T Mobility*").

CRC 8.1105(c) Fully Supports Publication of the Opinion

CRC 8.1105(c) provides that an opinion by a court of appeal should be published if the decision meets at least one of the Rule's stated criteria as follows:

- (1) Establishes a new rule of law;
- (2) Applies an existing rule of law to a set of facts significantly different from those stated in published opinions;
- (3) Modifies, explains, or criticizes with reasons given, an existing rule of law;
- (4) Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule;
- (5) Addresses or creates an apparent conflict in the law;
- (6) Involves a legal issue of continuing public interest;
- (7) Makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law;
- (8) Invokes a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision; or
- (9) Is accompanied by a separate opinion concurring or dissenting on a legal issue, and publication of the majority and separate opinions would make a significant contribution to the development of the law.

Application of U.S. Supreme Court precedent to California's jurisprudence is central to the *Caron* decision. Thus, the decision addresses both a change in previously existing California law and the application of existing federal law to new facts. In doing so, several of the CRC 8.1105(c) criteria for publication are satisfied. Specifically, the decision:

- **Applies an existing rule of law to a set of facts significantly different from those stated in published opinions (CRC 8.1105(c)(2)).**

While *AT&T Mobility* also involved a consumer dispute in California, the industry at issue in *AT&T Mobility* was the wireless telephone business. On the other hand, *Caron* involves retail automotive sales made by a new motor vehicle dealer. The *Caron* decision demonstrates that the large footprint of regulation faced by California vehicle dealers under both statutory regulation of motor vehicle sales and finance

transactions and consumer protection statutes cannot be used as a smokescreen to avoid applying federal law in a manner required by the clear precedent of the U.S. Supreme Court.

- **Modifies, explains, or criticizes with reasons given, an existing rule of law (CRC 8.1105(c)(3)).**

The *Caron* decision clearly explains why the relatively recent decision in *Fisher v. DCH Temecula Imports LLC* (2010) 187 Cal.App.4th 601 (*Fisher*, decided prior to the high court's *AT&T Mobility* decision, is no longer good law). This Court was required to undertake this task because the trial court, as reported in the *Caron* decision itself, felt bound by *Fisher* as recent California law on point, and believed the Court of Appeal would need to determine if *Fisher* remained good law following *AT&T Mobility*. As discussed below, by publishing the *Caron* decision, this Court will free future trial courts from the unnecessary burden of navigating between *Fisher* and *AT&T Mobility*.

- **Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule (CRC 8.1105(c)(4)).**

The *Caron* decision provides a very detailed and thorough analysis of the class action and anti-waiver provisions of the Consumer Legal Remedies Act, Civ. Code, § 1750 et seq. ("CLRA") (See p. 14-19, slip opn.), and how those provisions are to be interpreted and, ultimately, treated as preempted by the FAA and federal preemption doctrine.

- **Makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law (CRC 8.1105(c)(7)).**

Significantly, the *Caron* decision clarifies and provides a detailed analysis of how the construct of preemption under federal law would be interpreted under California Supreme Court precedent given the facts of the case, explaining that "obstacle" preemption would be deemed involved where, as here, it would be impossible to concurrently observe the rules in both *Fisher* and *AT&T Mobility* (see p. 10, n. 3, slip opn.).

- **Involves a legal issue of continuing public interest (CRC 8.1105(c)(6)).**

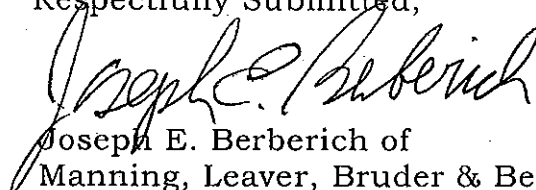
CNCDA has received numerous firsthand accounts reflecting a very large number of lawsuits against its members and other dealers where arbitration provisions *are* being litigated, on issues such as the validity of *Fisher*, and whether there is something inherent in California law that would allow the U.S. Supreme Court's holding in *AT&T Mobility* to be avoided for certain types of California consumer claims. These lingering doubts and expensive litigation forays can be resolved by publication of the *Caron* decision, all to the continuing public benefit.

In summary, without the guidance that publication of the *Caron* decision would provide, the litigation that played itself out in *Caron* will be repeated again and again, and, just as the trial judge felt in *Caron*, judges will feel uncomfortable deeming *Fisher* overruled, and will again – wastefully – kick the case up to the Court of Appeal for the correct decision following a lengthy appeals process. Publication will remove the possibility of such a revolving door and will enhance judicial economy at both the trial and appellate levels.

Conclusion

CNCDA believes the publication of the decision in *Caron* will be beneficial to the public, the bar, and the administration of justice in the important area of recognition of arbitration agreements and applicable federal law. CNCDA therefore respectfully requests the Court to publish the decision.

Respectfully Submitted,


Joseph E. Berberich of
Manning, Leaver, Bruder & Berberich,
Attorneys for California New Car
Dealers Association

PROOF OF SERVICE [C.C.P. § 1013a]

I, the undersigned, declare and say as follows:

I am 18 years of age or older, employed at the business noted above my signature which is in the county where any mailing herein stated occurred, and not a party to the within action.

On July 12, 2012 I caused to be served the document(s) listed below my signature under the heading "Document(s) Served" by placing a copy of the document(s) (or the original, if so noted below) in individual envelopes for each of the parties listed below my signature under the heading "Parties Served" (except for fax-only service), addressed to them at their last known addresses in this action exactly as shown (excepting parenthetical references to their capacity), there being U.S. Mail delivery service to those addresses used for service by mail, and by sealing said envelopes, and on the same day, as marked with "X," by --

☒ placing each envelope for collection and processing for mailing following my firm's ordinary business practice with which I am readily familiar and under which on the same day correspondence is so placed for mailing it is deposited in the ordinary course of business with the U.S. Postal Service at my business address, 1st-class postage fully prepaid.

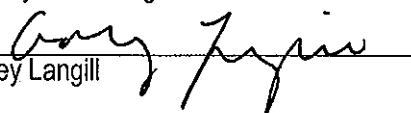
☐ depositing each envelope into the U.S. mail with 1st-class postage fully prepaid at a mail box or collection facility in the city and state of my business address. "Parties Served" lists all parties and counsel served in the within matter, and their respective capacities. [required for federal cases, including bankruptcy, among others]

☐ faxing each page of each document and this proof of service to the parties served at their last known fax numbers as listed below from a fax machine located at my business address which reported no errors and which produced a transmission confirmation report, a true copy of which is attached hereto. [use only if fax service authorized or as a supplement.]

☐ depositing each envelope at a drop box or other facility in the city and state of my business address within the time and pursuant to procedures readily familiar to me necessary for delivery ☐ by Federal Express on the morning of the next business day or ☐ by courier on the same day. [use only if overnight or courier service authorized or as a supplement.]

☐ personal delivery by ☐ travelling to the address shown on the envelope and delivering it there during normal business hours or ☐ handing the documents to the person served.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed on July 12, 2012 at my business address, 5750 Wilshire Blvd., Suite 655, Los Angeles, California 90036, in the County of Los Angeles.


Ashley Langill

"Request for Publication of Opinion (Cal. Rules of Court, Rule 978(a))"

on the parties to the action, and other interested parties, by placing a true copy in an envelope addressed as follows:

Jan T. Chilton
Severson & Werson
One Embarcadero Cntr, 26th Fl.
San Francisco, CA 94111

Robert A. Olson
Greines Martin Stein & Richland LLP
5900 Wilshire Blvd 12th Floor
Los Angeles, CA 90036

Hallen David Rosner
Rosner Barry & Babbitt, LLP
10085 Carroll Cyn Rd Ste 100
San Diego, CA 92131-1100

Erin Saeko Kubota
Severson & Werson
19100 Von Karman Ave Ste 700
Irvine, CA 92612

Kellie Christianson
Callahan, Thompson, Sherman & Caudill
LLP
2601 Main Street
Suite 800
Irvine, CA 92614

Steve Borislav Mikhov
Romano Stancroff & Mikhov PC
640 S San Vicente Ste 350
Los Angeles, CA 90048

California Court of Appeal
July 12, 2012
Page 6

Hon. Thierry Colaw
Judge
Superior Court of Calif.
Central Justice Center
700 Civic Center Drive West
Santa Ana, CA 92701

Mark D O'Connor
O'Connor Law Group PC
384 Forest Ave Ste 17
Laguna Beach, CA 92651