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July 18, 2012

Hon. Presiding Justice O'Leary
and Associate Justices Bedsworth and Aronson
Fourth District Court of Appeal, Division 3
601 W. Santa Ana Boulevard
Santa Ana, CA 92701

Re: Request for publication of opinion in *Caron v. Mercedes-Benz Financial Services USA LLC*,
No. G044550 (June 29, 2012)

Dear Justices O'Leary, Bedsworth and Aronson:

On behalf of American Honda Motor Co., Inc., we request publication of the Court's opinion issued June 29, 2012. The opinion meets several of the criteria for publication set forth in Rule 8.1105(c) of the California Rules of Court. Publication, particularly of Part II.B. of the opinion, would provide substantial guidance to the trial courts and to federal courts applying California law.

The opinion decides several important issues of law that arise with some frequency in trial courts considering petitions to compel arbitration, but as yet have not yet been the subject of a published California decision. The opinion addresses legal issues of continuing public interest by establishing new rules of law or applying recently established rules of law to new sets of facts. See Cal. R. Ct. 8.1105(c)(1), (2), (6).

The first and broadest legal issue is whether, in light of *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740, the Federal Arbitration Act (FAA) preempts a state-law doctrine of unwaivable rights—here, the anti-waiver provision of the the Consumers Legal Remedies Act (CLRA), Civil Code § 1751, in conjunction with the CLRA's provision for class actions, *id.* § 1781(a)—that would override a private agreement to arbitrate disputes on an individual basis. See unpub. opn., pp. 14-19.

The opinion correctly holds that the FAA preempts application of “the CLRA's anti-waiver provision to class-action waivers in arbitration agreements” because applying Section 1751 in that way would “effectively prevent[] CLRA claims from being arbitrated.” Unpub. opn., p. 16. As a consequence, the opinion concludes that *Concepcion* has superseded the contrary decision in *Fisher v. DCH Temecula Imports LLC* (2010) 187 Cal.App.4th 601. See unpub. opn. 16-17. A definitive precedential holding to this effect would provide

Hon. Justices O'Leary, Bedsworth and
Aronson
July 18, 2012
Page 2

important guidance to the trial courts, where efforts to avoid arbitration based on the CLRA sections at issue here persist. Because the opinion asserts a new rule of law, it meets the standard of Rule 8.1105(c)(1). The Court's comprehensive explanation of the principles underlying the decision in *Concepcion* also warrants publication under Rule 1105(c)(3).

The Court also rejected another argument that frequently arises in the trial courts, namely that a "poison pill" nonseverability provision in an arbitration clause somehow permits state-law doctrines that would prevent enforcement of the nonseverable provision to survive FAA preemption. The opinion instead recognizes that the FAA displaces the preempted state-law doctrine and requires enforcement of the agreement to arbitrate. See unpub. opn. 18. To our knowledge, no California published decision has addressed the issue. See Cal. R. Ct. 1105(c)(1), (2), (6).

Finally, disposing of yet another argument that frequently recurs in the trial courts, the opinion recognizes that the individual arbitration forum does not necessarily "prevent [a plaintiff] from vindicating her substantive rights under the CLRA." Unpub. opn. 19. As the Court explains, "[p]reventing [a plaintiff] from obtaining relief on behalf of other consumers or the general public does not prevent [her] from vindicating her rights under the CLRA based on the injuries she suffered." *Ibid.* (quoting *Gilmer v. Interstate/Johnson Lane* (1991) 500 U.S. 20, 32). And, bringing its decision in full accord with the policies underlying the FAA, the opinion states with instructive clarity that "[t]here is nothing inherently improper about requiring a party to arbitrate on an individual basis if the party agreed to that procedure." *Ibid.* See Cal. R. Ct. 1105(c)(1), (2), (3), (6).

In short, the unpublished opinion has much guidance to offer courts and litigants, who would benefit from its publication.

Thank you for your consideration of this request.

Sincerely,



Donald M. Falk

cc: Counsel of record (on attached list)

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