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PERSPECTIVE

Different approaches to CLRA damages

By Austin B. Kenney and Colin T. Murphy

Is a car buyer's ability to recover attorney fees and costs under California's Consumer Legal Remedies Act (CLRA) limited by the seller's timely tender of an attempted "cure"? Three recent cases address the issue in different ways, running the gamut from "no effect" to rejecting any award for attorney fees. *Benson v. S. California Auto Sales Inc.*, 239 Cal. App. 4th 1198 (2015), *Goglin v. BMW of N. Am. LLC*, 4 Cal. App. 5th 462 (2016), and *Gonzales v. CarMax Auto Superstores LLC*, 845 F.3d 916 (9th Cir. 2017).

The CLRA (Cal. Civ. Code Sections 1750 et seq.) allows recovery of money damages and injunctive relief against sellers of consumer goods who commit unfair and deceptive practices. A prevailing consumer can recover attorney fees and costs, while a prevailing seller can do so only if the consumer did not prosecute the action in good faith. "Who prevailed" often turns on whether the seller tendered an offer to "correct, repair, replace, or otherwise rectify" the offending goods within the required 30-day period from the purchaser's pre-litigation notice. These three recent decisions provide some guidance, but their teaching is also somewhat inconsistent.

Benson denied a purchaser's request for $182,273 of attorney fees and costs after the purchaser rejected the seller's pre-litigation tender. Benson sent a 30-day pre-litigation notice related to the defective vehicle. The dealer timely responded, offering to rescind the contract, to satisfy the customer's debt, and to pay $2,500 for incidental damages and attorney fees. But the dealer also required that Benson sign a mutual release and that the release waive Benson's non-CLRA claims, too. Benson rejected the offer. After much litigation, the trial court entered judgment in Benson's favor, but denied his claim for damages, attorney fees and costs because the dealer's tender satisfied the CLRA.

> *Benson* and *Goglin* beg the vexing question — still unanswered — as to whether a trial court should focus in the first instance on the CLRA claim or the non-CLRA claim (such as a Song-Beverly claim) when both are pleaded and a *Benson*-style tender is made.

The 4th District Court of Appeal, Division 3 agreed, applying "a hybrid standard [of review] to evaluate whether the circumstances identified in the statute as criteria for an award exist [and] ... whether substantial evidence supports the exercise of the court's discretion." The Court of Appeal rejected Benson's contention that the dual requirements of a mutual release and giving up non-CLRA claims rendered the seller's cure inadequate. The Court of Appeal found no error in the trial court's conclusion that the non-CLRA claims added no value to Benson's CLRA claim (and found that requiring a mutual release was both routine and wise).

A year later, the same Court of Appeal, Division 1 held in *Goglin* that a pre-litigation *Benson*-type tender had no effect outside the CLRA context. Goglin was awarded $185,214.19 despite the dealer's response to a pre-litigation CLRA letter, offering to rescind the deal, pay off the contract and reimburse Goglin for reasonable attorney fees. Like *Benson*, the tender also required Goglin to sign a mutual release, but, this time, required confidentiality and non-disparagement.

The Court of Appeal affirmed the award, arguing that Goglin moved for fees under the Song-Beverly Act, and not the CLRA. The Court of Appeal held that Benson offered no guidance despite the existence of the CLRA cause of action and the *Benson* tender because the Song-Beverly Act prohibited the confidentiality clause and because Goglin sought attorney fees solely under the Song-Beverly Act, which has no pre-litigation notice requirement like the CLRA.

The 9th U.S. Circuit Court of Appeals also recently distinguished *Benson* in its *Gonzales* decision. As in *Goglin*, the court focused on whether the claim or relief sought required pre-litigation notice. Gonzales served a pre-litigation CLRA notice, even though he technically was not required to because he did not seek damages, only injunctive relief. The dealer made a timely *Benson* tender, which Gonzales rejected. The dealer removed the case to federal court, prevailed on summary judgment, and sought attorney fees. The Court of Appeals instead granted summary judgment to Gonzales on his CLRA claim, and held that the dealer's tender did not protect the dealer against an attorney fees award because Gonzales did not seek damages under the CLRA. The Court of Appeals remanded for the district court "to determine in the first instance whether Gonzales qualifies as a prevailing plaintiff." Unfortunately, the case was settled and dismissed, so there will be no answer on remand.

Benson and Goglin beg the vexing question — still unanswered — as to whether a trial court should focus in the first instance on the CLRA claim or the non-CLRA claim (such as a Song-Beverly claim) when both are pleaded and a *Benson*-style tender is made. *Gonzales*, despite outward appearances, did not bridge the gap left by *Benson*, which had "declined to 'address the requirements for an attorney fee award based on a request for injunctive relief.'" *Gonzales* instead only muddied the waters further by remanding the case to determine whether the purchaser prevailed in the first instance.

Adherence to *Benson* suggests a carrot-and-stick approach, enticing sellers to make prompt curative offers while threatening denial of attorney fees to consumers who reject reasonable ones. *Benson* thus eliminates the unpredictability of judicial draw preserved by the hybrid standard of review adopted by appellate courts. On the other hand, *Goglin* — and (depending on the outcome on remand) *Gonzales* — encourage the worst kind of policy born from the CLRA's notice requirement, which is that consumers armed with favorable attorney fees statutes can continue to litigate cases despite having received make-whole offers. Thus, while *Benson* offers consistency and predictability, its progeny should not be applied in a way that discourages the CLRA's pre-litigation give-and-take or reward those who reject or fail to engage that process.

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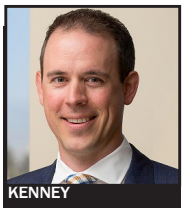
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