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Consumer Protection

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Consumer Protection

Consumer Protection; community care facilities

Health and Safety Code § 1522.01 (new); Penal Code §§ 290, 290.4 (amended).

SB 295 (Peace); 1995 STAT. Ch. 840

Under existing law, community care facilities¹ are prohibited from operating without a valid license or special permit issued by the State Department of Social Services (Department).² In addition, existing law requires the Department, before issuing a license or special permit to any person or persons to operate or manage a community care facility, to secure a copy of the applicant's criminal record for the license or permit.³ Furthermore, the Department must secure a copy of the criminal record of certain persons residing in, or having client contact at, the facility, excluding clients of the facility.⁴

With the enactment of Chapter 840, any person required to be registered as a sex offender must disclose this fact to the licensee of a community care facility

1. See CAL. HEALTH & SAFETY CODE § 1502(a) (West Supp. 1995) (specifying that "community care facility" means any facility, place, or building that is maintained and operated to provide nonmedical residential care, day treatment, adult day care, or foster family agency services for children, adults, or children and adults, including, but not limited to, the physically handicapped, mentally impaired, incompetent persons, and abused or neglected children); *id.* (including the following as community care facilities: residential facilities, adult day care facilities, therapeutic day services facilities, foster family agencies, foster family homes, small family homes, social rehabilitation facilities, community treatment facilities, full-service adoption agencies, noncustodial adoption agencies, and transitional shelter care facilities).

2. *Id.* § 1522(a) (West Supp. 1995).

3. *Id.*; see *id.* (explaining that the criminal record is used to determine if specified persons have been convicted of a crime other than a minor traffic violation, or arrested for any crime specified in California Penal Code §§ 245, 273.5, 273a(b), 290, or for any crime for which the Department cannot grant an exemption if the person was convicted and the person has not been exonerated).

4. *Id.* § 1522(a), (b) (West Supp. 1995); see *id.* § 1522(b) (West Supp. 1995) (providing that criminal convictions of the following persons will prevent the issuance of a license or special permit: (1) adults responsible for the administration of direct supervision of staff; (2) any person, other than a client, residing in the facility; (3) any person who provides client assistance in dressing, grooming, bathing, or personal hygiene; (4) any staff person or employee who has frequent and routine contact with the clients; (5) except for staff members of social rehabilitation facilities serving minors with alcohol or drug abuse problems, certain staff members of social rehabilitation facilities are exempt from fingerprinting requirements; (6) if the applicant is a firm, partnership, association or corporation, the chief executive officer or other person serving in like capacity; and (7) additional officers of the governing body of the applicant, or other persons with a financial interest in the applicant); see also CAL. PENAL CODE § 245 (West Supp. 1995) (describing the crime of assault with a deadly weapon or force likely to produce great bodily injury); *id.* § 273a(b) (West Supp. 1995) (indicating that any person who under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to become injured in such a situation that its person or health is endangered, or inflicts unjustifiable pain or mental suffering on the child, or allows the child to suffer while having care or custody over the child, is guilty of a misdemeanor); *id.* § 273.5(a) (West Supp. 1995) (setting forth penalties relating to willful infliction of corporal injury); *id.* § 290(a) (West Supp. 1995) (setting forth the specific persons who are required to register as sex offenders).

before becoming a client of that facility.⁵ Furthermore, any person who operates a community care facility that accepts as a client a person who is required to be registered as a sex offender must confirm or deny whether any client of the facility is a registered sex offender to specific inquiring persons.⁶ The interested person may also describe the physical characteristics of the client, and the facility must disclose that client's name upon request, if the physical description matches the client.⁷

Chapter 840 imposes certain prescribed criminal and civil penalties for persons who use the information disclosed to commit a felony, misdemeanor, or for certain other unauthorized acts.⁸

5. CAL. HEALTH & SAFETY CODE § 1522.01(a) (enacted by Chapter 840); *see id.* (maintaining that a community care facility client who fails to disclose to the licensee his or her status as a registered sex offender will be guilty of a misdemeanor punishable under California Health and Safety Code § 1540(a)); *id.* (indicating further that the community care facility licensee will not be liable if the client who is required to register as a sex offender fails to disclose this fact to the community care facility licensee; however, this immunity does not apply if the community care facility licensee knew that the client was required to register as a sex offender); *see also id.* § 1540(a) (West 1990) (declaring that any person who violates the community care facilities act, or who willfully or repeatedly violates any rule or regulation set forth, is guilty of a misdemeanor and upon conviction will be punished by a fine to not exceed \$1000, or by imprisonment in the county jail for a period not to exceed 180 days, or by both such fine and imprisonment).

6. *Id.* § 1522.01(b) (enacted by Chapter 840); *see id.* (setting forth that a person may inquire about whether the facility has any registered sex offenders as clients if (1) the person is the parent, family member, or guardian of a child residing within a one-mile radius of the facility; (2) the person occupies a personal residence within a one-mile radius of the facility; (3) the person operates a business within a one-mile radius of the facility; (4) the person is currently a client within the facility or a family member of a client within the facility; (5) the person is applying for placement in the facility, or placement of a family member in the facility; (6) the person is arranging for a client to be placed in the facility; or (7) the person is a law enforcement officer).

7. *Id.* § 1522.01(b) (enacted by Chapter 840); *see id.* (indicating that the facility must also provide the requesting party with the 900 telephone number maintained by the department of justice pursuant to California Penal Code § 290.4); CAL. PENAL CODE § 290.4(a)(1) (amended by Chapter 840) (implementing the information gathering requirements for specified offenses relating to sexual offenders).

8. CAL. HEALTH & SAFETY CODE § 1522.01(c)-(e) (enacted by Chapter 840); *see id.* § 1522.01(c) (enacted by Chapter 840) (declaring that any person who uses information disclosed pursuant to California Health and Safety Code § 1522.01 to commit a felony will be punished, in addition and consecutive to, any other punishment, by a five year term of imprisonment in the state prison); *id.* § 1522.01(d) (enacted by Chapter 840) (indicating that any person who uses information disclosed pursuant to California Health and Safety Code § 1522.01 to commit a misdemeanor will be subject to, in addition to any other penalty or fine imposed, a fine of not less than \$500 and not more than \$1000); *id.* § 1522.01(e) (enacted by Chapter 840) (asserting that except as authorized under another provision of law, or to protect a child, use of any of the disclosed information for the purpose of applying for, obtaining, or denying any of the following is prohibited: (1) health insurance; (2) insurance; (3) loans; (4) credit; (5) employment; (6) education, scholarships, or fellowships; (7) benefits, privileges, or services provided by any business establishment; and (8) housing or accommodations); *id.* § 1522.01(f) (enacted by Chapter 840) (instructing that any use of information for purposes other than those provided by California Health and Safety Code § 1522.01(a), (b) will make the user liable for the actual damages, and any amount that may be determined by a jury or a court sitting without a jury, not exceeding three times the amount of actual damage, and not less than \$250, and attorney's fees, exemplary damages, or a civil penalty not exceeding \$25,000); *id.* § 1522.01(g) (enacted by Chapter 840) (authorizing the Attorney General, any district attorney, city attorney, or any person aggrieved by the misuse of that information, to bring a civil action in the appropriate court requesting preventive relief, including an

Under existing law, persons who have been convicted of specific sex offenses or other crimes committed as a result of sexual compulsion or for purposes of sexual gratification are required to register with state and local police authorities for the rest of their lives.⁹ In addition, existing law requires other persons to

application for a permanent or temporary injunction, restraining order, or other order against the person or group of persons responsible for the pattern or practice of misuse, so long as there is reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of misuse of the disclosed information under California Health and Safety Code § 1522.01); *id.* (stating further that the civil remedies are independent of any other remedies or procedures that may be available to an aggrieved party under other provisions of the law); *id.* § 1522.01(h) (enacted by Chapter 840) (setting forth that the civil and criminal penalty money collected pursuant to California Health and Safety Code § 1522.01 shall be transferred to the Community Care Licensing Division of the State Department of Social Services, upon appropriation by the Legislature).

9. CAL. PENAL CODE § 290(a)(1) (amended by Chapter 840); *see id.* (requiring specific sex offenders to register with respective peace officers of the offender's area of domicile); *id.* § 290(a)(2) (amended by Chapter 840) (listing the specific criminal violations that trigger the registration requirement); *see also id.* § 207(b) (West Supp. 1995) (setting forth the definition of "kidnapping"); *id.* § 208(d) (West Supp. 1995) (indicating that kidnapping is punishable by imprisonment in the state prison for 5, 8, or 11 years if the person is kidnapped with the intent to commit rape, oral copulation, sodomy, or rape by instrument); *id.* § 220 (West 1988) (stating that every person who assaults another with intent to commit mayhem, rape, sodomy, oral copulation, or any violation of California Penal Code §§ 264.1, 288, or 289 is punishable by imprisonment in the state prison for 2, 4, or 6 years); *id.* § 243.4 (West 1988) (describing the crime of sexual battery); *id.* § 261(a)(1)-(4), (6) (West Supp. 1995) (setting forth the crime of rape and relevant punishment); *id.* § 262(a)(1) (West Supp. 1995) (defining "spousal rape" and the accomplishment of such by use of force, violence, menace, duress, or fear of immediate and unlawful bodily injury on the person or another); *id.* § 264.1 (West Supp. 1995) (describing the crime of rape or penetration of the genital or anal openings by foreign object); *id.* § 266 (West 1988) (providing the crime of inveiglement or enticement of an unmarried female under 18 years of age for purposes of prostitution); *id.* § 266c (West Supp. 1995) (specifying that the crime of unlawful sexual intercourse occurs where consent is procured by a false or fraudulent representation with intent to create fear); *id.* § 266j (West 1988) (setting forth the crime of procurement of a child under 16 years of age for lewd or lascivious acts); *id.* § 267 (West 1988) (establishing the crime of abduction of a person under 18 years of age for the purpose of prostitution); *id.* § 272 (West Supp. 1995) (asserting that causing, encouraging, or contributing to delinquency of persons under 18 years is a crime); *id.* § 285 (West 1988) (describing the crime of incest); *id.* § 286 (West Supp. 1995) (defining the crime of sodomy and its punishment); *id.* § 288 (West Supp. 1995) (setting forth the crime of lewd or lascivious acts with a child under age 14); *id.* § 288(a) (West Supp. 1995) (discussing the crime of committing lewd or lascivious acts with a child under age of 14 and its relevant punishment); *id.* (describing the crime of oral copulation); *id.* § 288.2(a) (West Supp. 1995) (defining the crime of sending harmful matter with intent to seduce a minor); *id.* § 288.5(a) (West Supp. 1995) (creating the crime of continuous sexual abuse of a child); *id.* § 289(a) (West Supp. 1995) (establishing the provision relating to penetration of genital or anal openings by foreign or unknown objects and its relevant punishment); *id.* § 290(a)(2)(B) (West Supp. 1995) (providing that any person who since July 1, 1944, has been or hereafter is released, discharged, or paroled from a penal institution where he or she was confined because of the commission or attempted commission of one of the offenses described in California Penal Code § 290(a)(2)(A) must register as a sex offender); *id.* § 290(a)(2)(C) (West Supp. 1995) (insisting that any person who since July 1, 1944 has been or hereafter is determined to be a mentally disordered sex offender must register as a sex offender); *id.* § 290(a)(2)(D) (West Supp. 1995) (requiring any person who since July 1, 1944, has been or is hereafter convicted in any other court, including any federal or military court, of any offense which, if committed or attempted in this state would have been punishable as one or more of the offenses described in California Penal Code § 290(a)(2)(A) must register as a sex offender); *id.* § 290(a)(2)(E) (West Supp. 1995) (stating that any court can order a person to register as a sex offender for an offense not listed, if the court finds at the time of the conviction that the person committed the offense as a result of sexual compulsion or for the purposes of sexual gratification); *id.* § 311.2(b)-(d) (West Supp. 1995) (setting forth the punishment for sending

register as sex offenders, including but not limited to, those who have been released from penal institutions where the persons were confined because of the commission or attempted commission of specified offenses.¹⁰ Existing law authorizes the Department of Justice to operate a "900" telephone number for members of the public to call and inquire whether a named individual is a registered sex offender.¹¹ In addition, existing law prohibits the use of this information other than for described purposes.¹²

With respect to the list of authorized uses of registered sex offender information, Chapter 840 authorizes disclosures to persons inquiring as to whether any clients of community care facilities are registered sex offenders.¹³

or bringing into the state for sale or distribution, printing, exhibiting, distributing, exchanging or possessing within the state any matter depicting sexual conduct by a minor; *id.* § 311.3 (West Supp. 1995) (imposing punishment for sexual exploitation of a child); *id.* § 311.4 (West Supp. 1995) (noting the punishment for employment or use of a minor to perform prohibited acts); *id.* § 311.10 (West 1988) (providing the crime and punishment for advertising for sale or distribution obscene matter depicting a person under the age of 18 years engaging in or simulating sexual conduct); *id.* § 311.11(a) (West Supp. 1995) (listing the crime and punishment for possession or control of matter depicting a minor engaging or simulating sexual conduct); *id.* § 314(1), (2) (West 1988) (describing the crime and punishment for lewd or obscene conduct and indecent exposure); *id.* § 647.6 (West 1988) (stating that annoying or molesting a child under 18 years of age is a crime and listing the relevant punishment); *id.* § 647(d) (West Supp. 1995) (explaining that it is a crime to loiter in or about any toilet open to the public for the purpose of engaging in or soliciting any lewd or lascivious or unlawful acts).

10. *Id.* § 290(a)(2)(B) (amended by Chapter 840); *see id.* (providing that any person who since July 1, 1944, has been or hereafter is released, discharged, or paroled from a penal institution where he or she was confined because of the commission or attempted commission of one of the offenses described in California Penal Code § 290(a)(2)(A) must register as a sex offender); *id.* § 290(a)(2)(C) (amended by Chapter 840) (mandating that any person who since July 1, 1994 has been or hereafter is determined to be a mentally disordered sex offender must register as a sex offender); *id.* § 290(a)(2)(D) (amended by Chapter 840) (requiring any person who since July 1, 1944, has been or is hereafter convicted in any other court, including any federal or military court, of any offense which, if committed or attempted in this state would have been punishable as one or more of the offenses described in California Penal Code § 290(a)(2)(A) to register as a sex offender); *id.* § 290(a)(2)(E) (amended by Chapter 840) (declaring that any court can order a person to register as a sex offender for an offense not listed, if the court finds at the time of the conviction that the person committed the offense as a result of sexual compulsion or for the purposes of sexual gratification).

11. *Id.* § 290.4(a)(3) (amended by Chapter 840); *see id.* § 290.4(a)(1) (amended by Chapter 840) (requiring the Department of Justice to continually compile information regarding any person required to register under California Penal Code § 290 for a conviction of specified crimes); *see also id.* § 290.4(a)(1) (amended by Chapter 840) (indicating that the requirement to register will not apply to a person whose duty to register has been terminated pursuant to California Penal Code § 290(d)(6), (7), or to a person who has been relieved of his or her duty to register under California Penal Code § 290.5); *id.* § 290(d)(6) (amended by Chapter 840) (noting that when a person has his or her record sealed all records will be destroyed); *id.* § 290.5 (West 1988) (providing that a person may initiate a proceeding to have his or her duty to register obviated once they obtain a certificate of rehabilitation).

12. *Id.* § 290.4(f)(1) (amended by Chapter 840); *see id.* (authorizing the use of the information only to protect a child at risk); *id.* § 290.4(f)(2) (amended by Chapter 840) (listing the prohibited uses of the disclosed information for such purposes as the following: (1) health insurance; (2) insurance; (3) loans; (4) credit; (5) employment; (6) education, scholarships, or fellowships; (7) housing or accommodations; (8) benefits, privileges, or services provided by any business establishment).

13. *Id.* § 290.4(f)(1)(B) (amended by Chapter 840); *see id.* (setting forth the authorized uses of the disclosed information as including, but not limited to the following: (1) a person in a position of authority or special trust who by reason of that position is able to exercise undue influence over a minor; a position of

COMMENT

Chapter 840 was enacted to authorize the disclosure to any inquiring party that a registered sex offender resides in a community care facility.¹⁴ Supporters of Chapter 840 argue that it will provide necessary information to the public in order to protect families and children.¹⁵

However, the registration system being used in California is nearly fifty years old and up to seventy-five percent of the registered sex offender addresses are outdated.¹⁶ Furthermore, the registration system is based on the integrity of the criminals and the ability of law enforcement agencies to keep up with the registration process.¹⁷

Opponents of Chapter 840 suggest that the disclosure of registered sex

authority includes, but is not limited to, a natural parent, adoptive parent, stepparent, foster parent, relative, household member, adult youth leader, recreational director who is an adult, adult athletic manager, adult coach, teacher, counselor, religious leader, doctor, or employer; (2) a person possessing a license or holding an employment or volunteer position with supervisory or disciplinary power over a minor or any person under his or her care; (3) a person who supervises a slumber party; or (4) a babysitter; cf. LA. REV. STAT. ANN. § 546A (West Supp. 1995) (providing that criminal justice agencies are authorized to release relevant and necessary information regarding sex offenders to the public when the release of the information is necessary for public protection); WASH. REV. CODE ANN. § 4.24.550(1) (West Supp. 1995) (maintaining that public agencies are authorized to release relevant and necessary information regarding sex offenders to the public when the release of the information is necessary for public protection).

14. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 295, at 2 (May 11, 1995); see Lisa Petrillo, *Molestation Incidents Galvanize Parents 300 Attend Meeting to Ask Police and Schools About Safety*, SAN DIEGO UNION-TRIB., Feb. 16, 1995, at B2 (suggesting that if school districts had the name and description of sex offenders, and if the school districts worked with local police, the children would be ensured of being safer at the schools); *id.* (reporting that there are 66,000 registered sex offenders living in California, but 75% of the addresses are outdated). See generally Julia A. Houston, Note, *Sex Offender Registration Acts: An Added Dimension to the War on Crime*, 28 GA. L. REV. 729, 746 (1995) (noting that without notifying the public of sex offenders, the registration programs are only reactive rather than proactive).

15. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 295, at 3 (May 11, 1995); see *id.* (noting that one supporter fears that stares from sex offenders towards children across the street may lead to an abduction, a molestation, or even a murder); Houston, *supra* note 14, at 732 (citing reports that indicate sex offenders have the highest rates of recidivism of any group of criminals; also, the average rapist has been charged with more than three sex crimes and the average child molester with more than four sex crimes). See generally Beth Daley, *Should Homes of Sex Convicts Be Published? Debate Rages*, BOSTON GLOBE, Mar. 26, 1995, at 1 (reporting that a mother found out that a convicted sex offender had been living on her street for six years, but the mother took comfort in knowing where the convict lives); Neil Gonzales, *Residents Want Sex Offenders to Be Removed*, SEATTLE TIMES, Mar. 3, 1995, at B2 (discussing a neighborhood association which questioned the safety of placing five former sex offenders in a homeless shelter that is near a middle school, several day care centers, and other services for children; the residents want the sex offenders removed from the shelter).

16. See Petrillo, *supra* note 14 (commenting that authorities do not know where most of California's registered sex offenders live, and the whole registration system is based on the honesty of the criminals to update their residences).

17. See Houston, *supra* note 14, at 732-33 (discussing the fact that only 50% of sex offenders in the United States have registered).

offenders could lead to harassment and vigilantism.¹⁸ In addition, opponents question the value of sharing information regarding former sex offenders.¹⁹

Tad A. Devlin

Consumer Protection; credit cards and identification

Civil Code §§ 1725, 1747.8 (amended).

AB 1316 (Bustamante); 1995 STAT. Ch. 458

Existing law prohibits any retailer¹ accepting a negotiable instrument² as payment for goods and services from requiring, as a condition of acceptance, that the person paying with the negotiable instrument provide a credit card³ as a means

18. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF SB 295, at 5 (Apr. 4, 1995); *see id.* (stating that in January of 1995, two men in New Jersey broke into a home and battered a man they incorrectly believed was a sex offender); Michelle Pia Jerusalem, Note, *A Framework for Post-Sentence Sex Offender Legislation: Perspectives on Prevention, Registration, and the Public's "Right" to Know*, 48 VAND. L. REV. 219, 247-48 (1995) (discussing case studies that suggest that public awareness of sex offenders creates an environment of fear and panic, and promotes a desire for retribution); *id.* (reporting that in Washington, a community learned of a dangerous sex offender, and the parties reacted by making threatening phone calls to the man's house, and the man was forced to remain in his home and thus could not find employment); Barry Meier, 'Sexual Predators' Finding Sentence May Last Past Jail, N.Y. TIMES, Feb. 27, 1995, at 2 (noting that in 1993, an unidentified person in Washington burned down the house where a released rapist planned to live; however, since town meetings are now held so that outraged residents can address community issues, episodes of vigilantism have decreased); Joseph Perkins, *Return to Frontier Justice Is an Available Last Resort*, ROCKY MTN. NEWS, Feb. 15, 1995, at 36A (noting that vigilantism is an inevitable consequence when those charged with upholding the law fail to protect the public from those who prey upon them); *id.* (discussing Ellie Nesler and her murder of the man who was accused of sexually assaulting her six-year-old son; Ellie Nesler said the man had only received minimal punishment for his crime against her son, so she shot him).

19. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 295, at 3 (May 11, 1995); *see* Petrillo, *supra* note 14 (reporting that even if a person is labeled as a pervert, the community cannot make him or her wear a placard declaring to all that he or she is a sex offender).

1. *See* CAL. CIV. CODE § 1747.02(e) (West Supp. 1995) (defining "retailer" as every person other than a card issuer who furnishes money, goods, services, or anything else of value when presented with a credit card by a cardholder); *id.* (defining further that a "retailer" does not include the state, a county, city, or any other public agency).

2. *See* CAL. COM. CODE § 3104(a) (West Supp. 1995) (defining "negotiable instrument" as an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges if it: (1) is payable to the bearer at the time it is issued or first comes into possession of a holder, (2) is payable on demand or at a definite time, and (3) does not state any other prerequisite for payment by the person promising or ordering payment).

3. *See* CAL. CIV. CODE § 1747.02(a) (West Supp. 1995) (defining "credit card" as any card, plate, coupon book, or other single credit device existing for the purpose of obtaining money, property, labor, or services on credit).

of identification, and from recording the credit card number.⁴ Existing law does permit the retailer to require a purchaser to produce other reasonable forms of identification, such as a driver's license or a California state identification card, as a condition of acceptance of the negotiable instrument.⁵

Chapter 458 establishes that where one of these forms of identification is not available, this identification requirement may be satisfied by another form of photo identification.⁶

Existing law also prohibits any retailer who accepts credit cards from requesting or requiring and recording personal identification information⁷ concerning the cardholder as a condition of acceptance of the credit card.⁸ Existing

4. *Id.* § 1725(a)(1), (3) (amended by Chapter 458); *see id.* § 1725(a)(2) (amended by Chapter 458) (stating that a retailer may not, as a condition of acceptance, require the person paying with a negotiable instrument to sign a statement agreeing to allow the credit card to be charged to cover the negotiable instrument if returned as insufficient); *id.* § 1725(a)(4) (amended by Chapter 458) (stating further that a retailer may not contact a credit card issuer to determine if the amount of any credit available to the person will cover the amount of the negotiable instrument); *id.* § 1725(c)(2) (amended by Chapter 458) (stating that an exception is established for retailers to request, but not to require, a purchaser to voluntarily display a credit card as proof of creditworthiness, providing that the only information concerning the credit card which is recorded is the type of credit card displayed, the issuer of the card, and the expiration date of the card); *see also id.* § 1725(e) (amended by Chapter 458) (stating that the punishment for violations of this section are subject to a civil penalty not to exceed \$250 for the first violation, and to a civil penalty not to exceed \$1000 for the second, and subsequent violations); Kathleen Pender, *Credit Card, Check Laws to Take Effect*, S.F. CHRON., Dec. 31, 1990, at B1 (stating that small retailers are upset and anxious over the possible losses which may occur through accepting checks with no secondary method of insuring payment, while large retailers, who can afford sophisticated check and credit card authorization procedures, are less worried about the changes); *cf.* MASS. GEN. LAWS ANN. ch. 93, § 105(b)(1) (West Supp. 1995) (stating that no retailer accepting a check in any business or commercial transaction as payment for goods or services can require, as a condition of acceptance of such check, that the person provide a credit card or any other personal identification information, other than a name, address, driver's license number and telephone number); NEV. REV. STAT. ANN. § 597.940(1) (Michie 1993) (instructing that a business cannot, without the customer's consent, record the customer's credit card number on the customer's check as a condition of accepting that check); PA. STAT. ANN. tit. 69, § 2602(b) (1994) (declaring that no person can, as a condition of acceptance of a check for the purchase of goods or services, require the person presenting the check to produce a credit card number); TENN. CODE ANN. § 47-22-104(b) (Special Pamphlet 1994) (prohibiting anyone from requiring, as a means of identification, production of a credit card number for recordation in connection with the acceptance of a check).

5. CAL. CIV. CODE § 1725(c)(1) (amended by Chapter 458).

6. *Id.*; *see also* Telephone Interview with Julie Hoffman, Legislative Consultant to Assemblymember Cruz Bustamante on AB 1316 (July 6, 1995) (notes on file with the *Pacific Law Journal*) (noting that the other forms of photo identification usually accepted by retailers are U.S. passports, military identification, or resident alien registration cards).

7. *See* CAL. CIV. CODE § 1747.8(b) (amended by Chapter 458) (defining "personal identification information" as any information concerning the cardholder, other than the information on the credit card, and including, but not limited to, the cardholder's address and telephone number).

8. *Id.* § 1747.8(a)(1), (2) (amended by Chapter 458); *see id.* § 1747.8(c) (amended by Chapter 458) (stating that retailers may request additional personal information when (1) the credit card is being used as a deposit to secure payment in the event of default, loss, or damage; (2) transacting cash advances; (3) the retailer is contractually obligated to provide personal identification information to complete the credit card transaction; or (4) personal identification information is required for special purposes related to the credit card transaction, like information for shipping or installation of purchased merchandise); *id.* § 1747.8(e) (amended by Chapter 458) (detailing the punishments for any violation of this section as \$250 for the first violation, and \$1000 for

law does allow for a retailer to require a purchaser to produce other reasonable forms of identification, which may include a driver's license or a California state identification, as a condition of acceptance of the credit card.⁹

Chapter 458 provides that where one of these forms of identification is not available, this identification requirement may be satisfied by another form of photo identification.¹⁰ Chapter 458 does allow for the recording of a cardholder's license or identification number when the cardholder does not make the credit card available and purchases goods with only the credit card number.¹¹ Chapter 458 exempts from these requirements any retailers required under federal law to collect and record personal information concerning customers purchasing certain goods with a credit card.¹²

COMMENT

Chapter 458 clarifies existing law by allowing retailers to request other forms of photo identification if the customer does not have a driver's license or a California state identification card.¹³

The primary reason behind existing law is to further enhance protections to consumer privacy laws.¹⁴ The first problem existing law attempted to prevent is that faced with the increased use of computers; specific personal information about a consumer's spending habits are being made available to anyone willing

any subsequent violation); *cf.* KAN. STAT. ANN. § 50-669(a) (1994) (stating that no retailer can require additional personal identification information to complete credit card transactions); MASS. GEN. LAWS ANN. ch. 93, § 105(a) (West Supp. 1995) (instructing that no retailer can write, or cause to be written, personal identification information of a customer using a credit card on a credit card transaction form); NEV. REV. STAT. ANN. § 597.940(2) (Michie 1993) (clarifying that no business can, without the customer's consent, record the customer's telephone number on the credit card sales slip as a condition of accepting the credit card); PA. STAT. ANN. tit. 69, § 2602(a) (1994) (asserting the general rule that no retailer may require additional personal identification information from credit card purchasers as a condition to accept the credit card).

9. CAL. CIV. CODE § 1747.8(d) (amended by Chapter 458).

10. *Id.*; see Telephone Interview with Julie Hoffman, *supra* note 6.

11. CAL. CIV. CODE § 1747.8(d) (amended by Chapter 458); see Telephone Interview with Julie Hoffman, *supra* note 6 (stating that retailers need a method for insuring the identification of their customers when the customer wishes to purchase merchandise, yet does not have the credit card in their possession); *id.* (suggesting further that the credit cards affected by AB 1316 in this section are primarily retail store credit cards, as major credit cards, like Visa and Mastercard, do not allow cardholders to use the card unless they have it in their possession).

12. CAL. CIV. CODE § 1747.8(c)(3) (amended by Chapter 453); see ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1316, at 2-3 (July 30, 1995) (stating that federal law requires the recordation of personal information when consumers buy goods that emit radiation, such as microwaves and certain computer equipment).

13. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1316, at 2 (May 10, 1995); see *id.* (declaring that the sponsor of AB 1316, the California Retailers Association, believes that the bill is an attempt to conform the law to common business practices and remove potential statutory traps for the unwary).

14. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1316, at 3 (June 20, 1995); see *id.* (stating that consumer privacy was the reason for the enactment of the original legislation which created California's credit card protection laws).

to pay credit reporting agencies for it.¹⁵ Second, existing law has attempted to prevent acts of harassment and violence from being committed by malicious store clerks upon consumers after they obtain customers' phone numbers and addresses from credit card transaction forms.¹⁶

While existing laws have been enacted to protect the consumer, the primary purpose of Chapter 458 is to protect retailers by allowing them to require customers to provide another form of photo identification when a driver's license or a California state identification is not available.¹⁷ For example, in the four years since section 1747.8 of the California Civil Code was enacted, there have been twelve civil actions filed in state courts against retailers who requested some other form of identification as a condition of acceptance of a credit card.¹⁸ The first law suit was brought by the Orange County district attorney against Silo, and has since been settled.¹⁹ The remaining lawsuits were brought as class action suits by private litigants, and four of these suits, against Mervyns, Lerner's, Montgomery Ward, and Miller's Outpost, have been settled.²⁰ The remaining class action law suits are still pending against such business as Circuit City, Casual Corner, Zales, Mrs. Gooch's, Mobil Oil, Unocal, and Robinsons-May.²¹ With the passage of Chapter 458, retailers will now be able to request another form of identification, and thus prevent both future lawsuits of this type, as well as protect retailers from possible losses.²²

Ralph J. Barry

15. *Id.*; see Albert B. Crenshaw, *Policies Put Consumers in Credit Card Catch-22; Customers Find Themselves on Merchant's Marketing Lists After Complying with Demands to Produce More than a Driver's License*, L.A. TIMES, Nov. 28, 1989, at D7 (stating that some merchants use information recorded on credit card transaction forms to build marketing lists for mail and phone solicitations).

16. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1316, at 3 (June 20, 1995).

17. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1316, at 2 (May 10, 1995).

18. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1316, at 3 (June 20, 1995).

19. *Id.* at 3; see Anna Cekola, *Silo to Pay Penalty in Credit Card Settlement*, L.A. TIMES, Apr. 20, 1994, at B9 (reporting that Silo had agreed to a settlement in which they will pay a civil penalty of \$100,000 and agree to follow the terms of a statewide injunction prohibiting retailers from requesting or requiring personal identification information when using credit cards).

20. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1316, at 3 (June 20, 1995); see *Mervyn's Sued Over Privacy Law*, S.F. CHRON., June 27, 1991, at C2 (reporting that a class action suit had been filed against Mervyn's for requiring customers to provide their phone numbers when making purchases with a credit cards).

21. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1316, at 3 (June 20, 1995); see Mimi Ko, *Judge Rejects Settlement in Customer Mailing-List Case*, L.A. TIMES, May 18, 1995, at B3 (reporting that Zales had bought 36,000 illegally obtained credit card holders names, addresses, and phone numbers, which were then added to the company's own mailing lists); *id.* (asserting that the judge refused a settlement offer of \$155,000 because the only parties to gain were the three law firms representing the parties to the class action suit).

22. Telephone Interview with Julie Hoffman, *supra* note 6; see *id.* (contending that the primary purpose of AB 1316 is to further protect retailers by allowing them to request another form of identification in certain circumstances, and also to limit the possible lawsuits that can be brought against retailers).

Consumer Protection; gender price discrimination

Civil Code § 51.6 (new).

AB 1100 (Speier); 1995 STAT. Ch. 866

Under existing law, the Unruh Civil Rights Act (UCRA) entitles all persons regardless of sex, race, color, religion, ancestry, national origin, or disability to the full and equal accommodations, advantages, facilities, privileges, or services of any business establishment.¹ Existing law further provides various remedies for violations of the UCRA.²

1. CAL. CIV. CODE § 51 (West Supp. 1995); *see id.* (establishing the provisions of the Unruh Civil Rights Act); *id.* (providing that the UCRA will not require any construction, alteration, repair, or modification to a new or existing structure); *id.* (specifying that the UCRA will not confer on a person any right or privilege which is available to persons of each sex, color, race, religion, ancestry, national origin, or disability); *see also* *Vaughn v. Hugo Neu Proler Int'l*, 223 Cal. App. 3d 1612, 1617, 273 Cal. Rptr. 426, 428 (1990) (observing that the rights protected under the UCRA are not limited to any specific protected classes and, thus, extend to all persons as individuals); 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 748 (2d ed. Supp. 1995) (noting that the UCRA was amended in 1992 in order to strengthen the protection available to persons with disabilities). *Compare* *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 732, 640 P.2d 115, 121, 180 Cal. Rptr. 496, 503 (1982) (providing that the language and history of the UCRA reveal the Legislature's intent to prohibit all arbitrary discrimination by business establishments) with Steven B. Arbuss, Comment, *The Unruh Civil Rights Act: An Uncertain Guarantee*, 31 UCLA L. REV. 443, 470-71 (1983) (arguing that the UCRA was not drafted in a manner broad enough to accommodate society's changing views of equality because its application is limited only to business establishments).

2. CAL. CIV. CODE § 52 (a)-(f) (West Supp. 1995); *see id.* § 52(a) (West Supp. 1995) (establishing the ceiling on damages as actual damages plus an amount, determined by a jury or a court sitting without a jury, of at least \$1000 and up to a maximum of three times actual damages, plus attorney fees); *id.* § 52(b) (West Supp. 1995) (declaring that a person who violates another person's right to be free from violence or intimidation by threat of violence because of his or her actual or perceived race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute is liable for actual damages, in addition to (1) exemplary damages, (2) \$25,000 civil penalty award, and (3) attorney fees); *id.* § 52(c) (West Supp. 1995) (providing that the Attorney General, any district attorney, city attorney, or aggrieved person may file a civil action against persons engaged in gender-based pricing by filing a complaint containing the following: (1) the signature of the officer, his or her agent, or the person aggrieved, (2) the relevant facts, and (3) a request for relief, including injunctive relief, a restraining order, or any other order the complainant deems necessary); *id.* § 52(d) (West Supp. 1995) (allowing the State of California to intervene in any action which seeks relief from the denial of equal protection under the Fourteenth Amendment to the United States Constitution); *id.* § 52(e) (West Supp. 1995) (establishing that any actions available to an aggrieved party pursuant to California Civil Code § 52 are independent of any other remedies or procedures); *id.* § 52(f) (West Supp. 1995) (allowing certain claimants to also file a verified complaint with the Department of Fair Employment and Housing); *id.* § 52(h) (West Supp. 1995) (defining "actual damages" as special and general damages); *see also* *Midpeninsula Citizens for Fair Hous. v. Westwood Investors*, 221 Cal. App. 3d 1377, 1386, 271 Cal. Rptr. 99, 104 (1990) (noting that an aggrieved person pursuant to California Civil Code § 52 refers to the actual victim of the discriminatory acts); *Winchell v. English*, 62 Cal. App. 3d 125, 128-30, 133 Cal. Rptr. 20, 21-22 (1976) (holding that the language of California Civil Code § 52(d) prohibiting discrimination "on account of" color was sufficiently broad to allow a cause of action to stand where a white plaintiff alleged that he was discriminated against because of his association with blacks). *See generally* W. David Corrick, *Review of Selected 1992 California Legislation*, 24 PAC. L.J. 591, 905-07 (discussing the effect of the UCRA on employment opportunities).

Chapter 866 prohibits any business establishment from discriminating with respect to the price charged for services because of a person's gender.³ Chapter 866 authorizes the same remedies as are generally available for violations of the UCRA.⁴ However, health service plans and insurance rating practices are not covered under Chapter 866.⁵

COMMENT

Chapter 866, known as the Gender Tax Repeal Act of 1995, prohibits pricing schemes based solely on a customer's gender.⁶ Additionally, the Equal Protection Clause of the Constitution⁷ guards against gender classifications which disad-

3. CAL. CIV. CODE § 51.6(b) (enacted by Chapter 866); *see id.* § 51.6(c) (enacted by Chapter 866) (providing that price differences based on the amount of time, difficulty, and cost of the service are not violative of the UCRA); *cf.* IDAHO CODE § 48-202(e) (1977) (establishing that it is unlawful for any person participating in commerce, either directly or indirectly, to practice discriminatory pricing among different purchasers of commodities of similar grade and quality); ILL. ANN. STAT. ch. 775, para. 5/1-102(A) (Smith-Hurd 1993) (securing freedom from discrimination because of race, color, religion, sex, national origin, ancestry, age, marital status, physical or mental handicap, or unfavorable discharge from military service in employment opportunities, real estate transactions, access to financial credit, and availability of public accommodations).

4. CAL. CIV. CODE § 51.6(d) (enacted by Chapter 866); *see id.* (providing that any action brought pursuant to this section is independent of any other remedy or procedure available to the injured party); *see also id.* § 52 (West Supp. 1995) (specifying recourse against persons who violate the UCRA).

5. *Id.* § 51.6(e) (enacted by Chapter 866); *see* Telephone Interview with Elise Thureau, Senior Consultant for California Assemblymember Jackie Speier on AB 1100 (June 22, 1995) (notes on file with the *Pacific Law Journal*) (indicating that the sponsors of the bill wanted to avoid confronting the insurance industry with the gender pricing issue at this time, opting to instead concentrate on attaining the same price for similar services in other industries); *see also* Robert H. Jerry, II & Kyle B. Mansfield, *Justifying Unisex Insurance: Another Perspective*, 34 AM. U. L. REV. 329, 341 (1985) (arguing that gender is an actuarially sound basis for classifying life insurance and annuity rates, and that in the absence of gender as a factor in the classification of life insurance premiums, women would pay more for life insurance coverage and men would pay less for life insurance coverage than they currently pay because differences in life expectancy and mortality rates would no longer be considered). *But see* Stephen R. Ryan, Comment, *The Elimination of Gender Discrimination in Insurance Pricing: Does Automobile Insurance Rate Without Sex?*, 61 NOTRE DAME L. REV. 748, 758-59 (1986) (arguing that because gender does not affect a person's driving ability, it is not a valid predictor of risk, and thus, other factors explain the differences between the genders regarding insurable risks).

6. CAL. CIV. CODE § 51.6(a),(b) (enacted by Chapter 866); *see* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1100, at 2 (May 11, 1995) (noting that the gender tax is the additional amount women pay for similar goods and services); *see also* *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 39, 707 P.2d 195, 204, 219 Cal. Rptr. 133, 142 (1985) (holding that gender based "Ladies Day" and "Ladies Night" discount pricing schemes violated the California Unruh Civil Rights Act); *Easebe Enter., Inc. v. Alcoholic Beverage Control Appeals Bd.*, 141 Cal. App. 3d 981, 983-85, 190 Cal. Rptr. 678, 679-80 (1983) (affirming administrative hearing findings that a nightclub selling liquor, featuring male dancers and admitting only female patrons, unlawfully discriminated against male customers). *But see* ASSEMBLY COMMITTEE ON CONSUMER PROTECTION, GOVERNMENTAL EFFICIENCY AND ECONOMIC DEVELOPMENT, COMMITTEE ANALYSIS OF AB 1100, at 2 (Apr. 18, 1995) (outlining the opponents' argument that AB 1100 is unnecessary because discriminatory gender pricing is already incorporated under the Unruh Civil Rights Act prior to the enactment of Chapter 866).

7. U.S. CONST. amend. XIV, § 1.

vantage women.⁸ Gender-based pricing is most prevalent in the sale of services related to haircuts, laundry, dry cleaning, and alterations.⁹ The purpose of Chapter 866 is to repeal this gender tax.¹⁰

J. Scott Alexander

Consumer Protection; "Lemon Law Buyback"—requirements regarding the return and resale of vehicles

Civil Code § 1795.8 (repealed); §§ 1793.23, 1794.24 (new); § 1793.25 (amended); Vehicle Code § 11713.12 (new); § 4453 (amended).
AB 1381 (Speier); 1995 STAT. Ch. 503

Existing law provides for the Song-Beverly Consumer Warranty Act¹ which

8. See *Michelle W. v. Ronald W.*, 39 Cal. 3d 354, 364-65, 703 P.2d 88, 94, 216 Cal. Rptr. 748, 754 (1985) (declaring that men and women may not receive disparate treatment when there is no substantial relationship between the gender classification and an important governmental purpose); see also *Craig v. Boren*, 429 U.S. 190, 197 (1976) (establishing that to withstand constitutional challenge, gender classification must serve important governmental objectives and be substantially related to achieving those objectives); *But see Associated Gen'l Contractors v. City of San Francisco*, 813 F. 2d 922, 939 (9th Cir. 1987) (providing that intermediate, or mid-level, review—classifications that serve important governmental objectives substantially related to achieving those objectives—has proven to be an insufficient standard of review in individual cases involving gender discrimination because of the Court's ad hoc factual inquiries); John Galotto, Comment, *Strict Scrutiny for Gender*, *Via Croson*, 93 COLUM. LAW REV. 508, 545 (1993) (arguing that the strict scrutiny standard of judicial review should be applied to all forms of gender discrimination); see also *Adarand v. Peña*, 115 S. Ct. 2097, 2111 (1995) (holding that the strict scrutiny standard of review is satisfied when an action furthers a compelling governmental interest and is narrowly tailored to address this compelling government interest).

9. ASSEMBLY COMMITTEE ON CONSUMER PROTECTION, GOVERNMENTAL EFFICIENCY AND ECONOMIC DEVELOPMENT, COMMITTEE ANALYSIS OF AB 1100, at 2 (Apr. 18, 1995); see ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1100, at 2 (May 11, 1995) (noting that gender-based pricing discrimination costs each woman in California \$1351 annually, or about \$15 billion annually for all California women); see also ASSEMBLY OFFICE OF RESEARCH, *A Survey of Haircuts & Laundry Services in California* (1994) (providing survey results indicating that in California women pay on average \$5 more than men for a basic haircut, \$.58 more than men for dry cleaning a suit, and \$1.71 more than men per laundered shirt).

10. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1100, at 2 (May 11, 1995); see *id.* (defining gender tax as the additional amount women pay for comparable goods and services because of gender-based pricing); Telephone Interview with Else Thureau, *supra* note 5 (stating that the intent behind Chapter 866 is to send a signal to all California women that the pricing of services based on gender is against the law); ASSEMBLY COMMITTEE ON CONSUMER PROTECTION, GOVERNMENTAL EFFICIENCY AND ECONOMIC DEVELOPMENT, COMMITTEE ANALYSIS OF AB 1100, at 2 (Apr. 18, 1995) (stating that Chapter 866 addresses the Governor's objections to a similar bill he vetoed in 1994 by (1) limiting AB 1100 to include only services, not products; (2) amending the Unruh Civil Rights Act provisions instead of the California Business and Professions Code; and (3) allowing differences in prices if based on differences in services provided).

1. See CAL. CIV. CODE §§ 1790-1795.8 (West 1985 & Supp. 1995) (setting forth the Song-Beverly Consumer Warranty Act). See generally *Jensen v. BMW of North America, Inc.*, 35 Cal. App. 4th 112, 121, 41 Cal. Rptr. 2d 295, 299 (1995) (citing Comments, *Toward an End to Consumer Frustration—Making the*

offers protection for consumers against defective products.² Under this Act, if a manufacturer³ or its representatives⁴ cannot service or repair a new motor vehicle⁵

Song-Beverly Consumer Warranty Act Work, 14 SANTA CLARA L. REV. 575, 580 (1974)) (explaining that the California Legislature enacted the Song-Beverly Consumer Warranty Act in an attempt to curb exploitative advertising of express warranties); *id.* at 123-24, 41 Cal. Rptr. 2d at 301 (reviewing the history of the Song-Beverly Consumer Warranty Act, and concluding that the Legislature has been systematically expanding the scope of the Act and closing the loopholes); *Brown v. West Covina Toyota*, 25 Cal. App. 4th 555, 561, 32 Cal. Rptr. 2d 85, 89 (1994) (affirming interpretations of the Song-Beverly Act set forth in *Kwan v. Mercedes-Benz of North America, Inc.* and *Krieger v. Nick Alexander Imports, Inc.*); *Kwan v. Mercedes-Benz of North America, Inc.*, 23 Cal. App. 4th 174, 184, 28 Cal. Rptr. 2d 371, 377 (1994) (finding that the Song-Beverly Consumer Warranty Act is a remedial statute that is intended to protect consumers, and the statute should be interpreted to benefit them); *Krieger v. Nick Alexander Imports, Inc.*, 234 Cal. App. 3d 205, 213, 285 Cal. Rptr. 717, 721-22 (1991) (finding that the Song-Beverly Consumer Warranty Act “regulates warranty terms, imposes service and repair obligations on manufacturers, distributors, and retailers who make express warranties, requires disclosure of specified information in express warranties, and broadens a buyer’s remedies to include costs, attorney’s fees, and civil penalties”); *id.* at 213, 285 Cal. Rptr. at 722 (noting that the Song-Beverly Consumer Warranty Act “supplements, rather than supersedes, the provisions of the California Uniform Commercial Code”); *People v. Custom Craft Carpets, Inc.*, 159 Cal. App. 3d 676, 682, 206 Cal. Rptr. 12, 16 (1984) (reasoning that the mere fact that the Song-Beverly Consumer Warranty Act is comprised of 38 sections, does not render an injunction vague).

2. CAL. CIV. CODE §§ 1790-1795.8 (West 1985 & Supp. 1995); see SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1381, at 3 (July 18, 1995).

3. See CAL. CIV. CODE § 1791(j) (West Supp. 1995) (defining “manufacturer” as any individual, partnership, corporation, association, or other legal relationship which manufactures, assembles, or produces consumer goods).

4. See *id.* § 1791(e) (West Supp. 1995) (defining “distributor” as any individual, partnership, corporation, association, or other legal relationship that stands between the manufacturer and the retail seller in purchases, consignments, or contracts for sale of consumer goods); *id.* § 1791(i) (West Supp. 1995) (defining “lessor” as a person who regularly leases consumer goods under a lease); *id.* § 1791(l) (West Supp. 1995) (defining “retail seller,” “seller,” or “retailer” as any individual, partnership, corporation, association, or other legal relationship that engages in the business of selling or leasing consumer goods to retail buyers).

5. See *id.* § 1793.22(e)(2) (West Supp. 1995) (defining “new motor vehicle” as a new vehicle that is used or bought primarily for personal, family, or household purposes); *id.* (defining “new motor vehicle” to include the chassis, the chassis cab, and that portion of a motor home devoted to its propulsion, but not including any portion designed, used, or maintained primarily for human habitation); *id.* (including in the definition of “new motor vehicle,” a dealer-owned vehicle and a “demonstrator” or other motor vehicle sold with a manufacturer’s new car warranty, but not including motorcycles or motor vehicles which are not registered under the Vehicle Code because they are to be operated or used exclusively off the highways); *id.* (defining a “demonstrator” as a vehicle assigned by a dealer for the purpose of demonstrating qualities and characteristics common to vehicles of the same or similar model and type); see also *id.* § 1793.22(e)(3) (West Supp. 1995) (defining “motor home” as a vehicular unit built on, or permanently attached to, a self-propelled motor vehicle chassis, chassis cab, or van, which becomes an integral part of the completed vehicle); *Jensen*, 35 Cal. App. 4th at 119-26, 41 Cal. Rptr. 2d at 298-303 (holding that a BMW with 7565 miles on the odometer that was previously owned by the BMW Leasing Corporation, and was then leased to a customer with a new car warranty, was to be included within the definition of new motor vehicle); *id.* at 123, 41 Cal. Rptr. at 300 (concluding that the plain language of Civil Code § 1793.22(e)(2) is sufficiently unambiguous, and it intends that cars sold with the balance of a manufacturer’s new car warranty are to be included within the definition of new motor vehicle); *id.* (finding that the word “or” in § 1793.22(e)(2) (“... a ‘demonstrator’ or other motor vehicle sold with a manufacturer’s new car warranty . . .”) was intended to demarcate two distinct categories of new motor vehicles as long as such vehicles are sold with a manufacturer’s new car warranty) (emphasis added)).

in conformance with the applicable express warranties⁶ after a reasonable number of attempts,⁷ the manufacturer must either promptly replace⁸ the vehicle or promptly make restitution⁹ to the buyer¹⁰ for the vehicle.¹¹

6. See CAL. CIV. CODE § 1791.2(a)(1) (West 1985) (defining "express warranty" to mean a written statement arising out of a sale to a consumer of a consumer good pursuant to which a manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance); *id.* § 1791.2(b) (West 1985) (stating that it is not necessary to the creation of an express warranty that formal words such as "warrant" or "guarantee" be used, but if such words are used then an express warranty is created); *id.* (explaining that an affirmation merely of the value of the goods or a statement purporting to be merely an opinion or commendation of the goods does not create a warranty); see also *id.* § 1791(a) (West Supp. 1995) (defining "consumer goods" as any new product or part thereof that is used, bought, or leased for primarily personal, family, or household purposes, except for clothing and consumables); *id.* § 1795.5(a) (West 1985) (stating that when a distributor or retail seller makes an express warranty, that distributor or retail seller—not the original manufacturer, distributor, or retail seller—has the obligation to maintain sufficient service and repair facilities within the state of California in order to carry out the terms of the express warranty); *Jensen*, 35 Cal. App. 4th at 133, 41 Cal. Rptr. 2d at 307 (affirming that the four-year statute of limitations of the Uniform Commercial Code applies to the discretionary civil penalty in California Civil Code § 1794(c)); *Krieger*, 234 Cal. App. 3d at 213-14, 285 Cal. Rptr. at 722-23 (finding all of the following: (1) The Song-Beverly Consumer Warranty Act does not expressly provide for a statute of limitations period; (2) the Legislature intended that the Act only supplement the Uniform Commercial Code, and not supersede it; and (3) in following the rules of statutory construction, the specific provision of the U.C.C. is controlling over the general provision of California Code of Civil Procedure § 338(a)); *id.* at 215, 285 Cal. Rptr. at 723 (concluding that the four-year statute of limitations period provided for in § 2725 of the California U.C.C. applies to suits brought for breach of warranty under the Act).

7. See *infra* notes 14-15 and accompanying text.

8. See CAL. CIV. CODE § 1793.2(d)(2)(A) (West Supp. 1995) (explaining that if the vehicle is to be replaced, the manufacturer must replace it with a substantially similar new motor vehicle); *id.* (requiring that the replacement vehicle be accompanied by all express and implied warranties that normally accompany a new motor vehicle of that specific kind); *id.* (mandating that the manufacturer also pay for, or to the buyer, the amount of any sales or use tax, license fees, registration fees, and other official fees which the buyer is obligated to pay in connection with the replacement, plus any incidental damages to which the buyer is entitled under California Civil Code § 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer); *id.* § 1793.2(d)(2)(C) (West Supp. 1995) (providing that when the manufacturer replaces the new motor vehicle pursuant to California Civil Code § 1793.2(d)(2)(A), the buyer shall only be liable to pay the manufacturer an amount directly attributable to use by the buyer of the replaced vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity); see also *id.* § 1794 (West Supp. 1995) (setting forth provisions governing actions by buyers, including measure of damages, civil penalties, costs and expenses, and attorney's fees).

9. See *id.* § 1793.2(d)(2)(B) (West Supp. 1995) (mandating that if restitution is to be made, the manufacturer must make restitution in an amount that is equal to the actual price paid or payable by the buyer, including charges for transportation and manufacturer-installed options, but excluding nonmanufacturer items installed by a dealer or the buyer, and also including any collateral charges such as sales tax, license fees, registration fees, and other official fees, plus incidental damages that the buyer is entitled to under California Civil Code § 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer).

10. See *id.* § 1791(b) (West Supp. 1995) (defining "buyer" or "retail buyer" as any individual buying consumer goods from a person engaged in the business of manufacturing, distributing, or selling consumer goods at retail); *id.* (stating that as used in California Civil Code § 1791(b), "person" means any individual, partnership, corporation, limited liability company, association, or other legal entity which engages in any of these businesses); see also *id.* § 1791(a) (West Supp. 1995) (defining "consumer goods" as any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes).

Existing law also provides for the Tanner Consumer Protection Act¹² (Tanner Act) which clarifies and expands lemon law protections available to consumers under the Song-Beverly Consumer Warranty Act.¹³ Under the Tanner Act it is presumed¹⁴ that a reasonable number of attempts¹⁵ have been made to conform a vehicle to a manufacturer's express warranty if, within one year or 12,000 miles, whichever occurs first, either of the following occur: (1) The manufacturer or its agents have attempted to repair the same nonconformity¹⁶ at least four

In a number of states, lemon laws apply only to vehicles used for personal, family, or household purposes. *See* LA. REV. STAT. ANN. § 51:1941(2)(a) (West 1987); MISS. CODE ANN. § 16-17-155(c) (1989); N.Y. GEN. BUS. LAW § 198-a(a)(1) (McKinney Supp. 1995); N.D. CENT. CODE § 51-07-16 (1) (Supp. 1995); VA. CODE ANN. § 59.1-207.11 (Michie 1992); W. VA. CODE § 46A-6A-2(1) (1995). *But see* Results Real Estate, Inc. v. Lazy Days R.V. Center, Inc., 505 So. 2d 587, 588, 589 (Fla. Dist. Ct. App. 1987) (holding that the remedies provided for in Florida's lemon law are "available to all consumers of new motor vehicles," including corporations). Many states have enacted lemon laws that protect both purchasers and lessees of new motor vehicles. *See* ARK. CODE ANN. § 4-90-403 (4) (Michie Supp. 1993); CONN. GEN. STAT. § 42-179(a) (West Supp. 1995); FLA. STAT. ANN. § 681.102 (4) (West Supp. 1995); LA. REV. STAT. ANN. § 1941(a), (c) (West 1987); N.Y. GEN. BUS. LAW § 198-a(1) (McKinney Supp. 1995); N.C. GEN. STAT. § 20-351.1 (Michie 1993); N.D. CENT. CODE § 51-07-16 (1) (Supp. 1995); OHIO REV. CODE ANN. § 1345.71(A) (Anderson 1993); TENN. CODE ANN. § 55-24-201(1) (1993); WIS. STAT. ANN. § 218.015(b)(1),(4) (West 1994); *Pertuset v. Ford Motor Co.*, 645 N.E.2d 1329, 1331 (Ohio Ct. App. 1994) (holding that a "lessee" is a person under the definition of "consumer," and a "lessee" may enforce any warranties that "consumers" may enforce).

11. CAL. CIV. CODE § 1793.2(d)(2) (West Supp. 1995); *see id.* (explaining that the buyer is free to choose restitution instead of replacement, and that the buyer shall not be required to accept a replacement vehicle); *cf.* ALASKA STAT. § 45.45.305 (1994); FLA. STAT. ANN. § 681.104(2)(a) (West Supp. 1995); MASS. GEN. LAWS ANN. ch. 90, § 7N½ (West 1989); MISS. CODE ANN. § 63-17-159(1) (1989); N.Y. GEN. BUS. LAW § 198-a(c)(1) (McKinney Supp. 1995); N.C. GEN. STAT. § 20-351.3(b) (1993); OHIO REV. CODE ANN. § 1345.72(B) (Anderson 1993); PA. STAT. ANN. tit. 73, § 1955 (1993) (providing that the manufacturer must, at the buyer's option, replace the vehicle, or refund the buyer's money). *But cf.* LA. REV. STAT. ANN. § 51:1944(A) (West 1987) (stating that the manufacturer may, at its option, replace the vehicle with a comparable new vehicle, or accept the return of the vehicle and refund the full purchase price); W. VA. CODE § 46A-6A-3(b) (Supp. 1995) (providing that if a manufacturer is unable to conform the new motor vehicle to any applicable express warranty, the manufacturer shall replace the new motor vehicle with a comparable new motor vehicle which does conform to the warranties).

12. *See* CAL. CIV. CODE § 1793.22(a) (West Supp. 1995) (declaring that California Civil Code § 1793.22 shall be known and cited as the Tanner Consumer Protection Act).

13. *Id.*; SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1381, at 3 (July 18, 1995).

14. *See* CAL. CIV. CODE § 1793.22(b) (West Supp. 1995) (explaining that this presumption is a rebuttable presumption affecting the burden of proof, and it may be asserted by the buyer in any civil action, including an action in small claims court, or other formal or informal proceeding).

15. *See* *Ibrahim v. Ford Motor Co.*, 214 Cal. App. 3d 878, 886, 263 Cal. Rptr. 64, 68 (1989) (finding that neither four attempts to repair, nor 30 days in a service facility, conclusively establish that a reasonable number of attempts have been made to conform a new motor vehicle to applicable express warranties); *id.* (stating that the criteria adopted by the statute "simply embody the Legislature's decision to declare presumptive standards of what is 'reasonable'"); *id.* (noting that a finding of "unreasonableness" is possible where a new motor vehicle has been in the shop for less than the presumptive 30 days or fewer than four attempts have been made to conform it to applicable express warranties).

16. *See* CAL. CIV. CODE § 1793.22(e)(1) (West Supp. 1995) (specifying that for the purposes of California Civil Code §§ 1793.2(d) and 1793.22, "nonconformity" is defined as something which substantially impairs the use, value, or safety of the new motor vehicle to the buyer or lessee); *see also* *Schreidel v. American Honda Motor Co.*, 34 Cal. App. 4th 1242, 1250, 40 Cal. Rptr. 2d 576, 579-80 (1995) (concluding that a jury was justified in finding that the value of the purchaser's new car was substantially impaired where

times, and the buyer has notified the manufacturer of the need to repair the non-conformity, or (2) the vehicle has been out of service for a cumulative total of more than thirty calendar days.¹⁷

The Tanner Act also provides that a vehicle transferred to a manufacturer under the provisions of the Song-Beverly Act, or a similar law of another state, may not be transferred, leased, or sold, unless the nature of the nonconformity is

the purchaser would avoid using the car for long trips, where there was a shifting problem similar to stalling which is "a dangerous situation on the highway," where the problems only got worse, and where the purchaser "lost confidence in the car," and felt as though she never owned a new car); *id.* at 1250, 40 Cal. Rptr. 2d at 580 (ruling that the trier of fact decides the issue of whether a problem constitutes substantial impairment); *id.* at 1253, 40 Cal. Rptr. at 581 (finding that the purchaser does not have "to pinpoint the exact mechanical detail within the slave cylinder of the clutch system" in order to prove that the clutch caused substantial impairment of value to the vehicle, rendering it defective); *Ibrahim*, 214 Cal. App. 3d at 887, 263 Cal. Rptr. at 69 (holding that the use of the word "defect" when addressing the jury, instead of the word "nonconformity," was not sufficient ground for reversal because the "two words are in effect synonyms"). For examples of states that define "nonconformity" as a defect which substantially impairs the use, value, or safety of a motor vehicle, see FLA. STAT. ANN. § 681.102(15) (West Supp. 1995); MASS. ANN. LAWS ch. 90, § 7N½ (West 1989); OHIO REV. CODE ANN. § 1345.71(E) (Anderson 1993); PA. STAT. ANN. tit. 74, § 1952 (West 1993); R.I. GEN. LAWS § 31-5.2-1(9) (1994); VA. CODE ANN. § 59.1-207.11 (Michie 1992); WIS. STAT. ANN. § 218.015(f) (West 1994).

17. CAL. CIV. CODE § 1793.22(b) (West Supp. 1995); *see id.* (providing that the 30-day limit will be extended only if repairs cannot be performed due to conditions beyond the control of the manufacturer or its agents); *id.* (stating that the buyer is required to directly notify the manufacturer in accordance with California Civil Code § 1793.22(b)(1) only if the manufacturer has clearly and conspicuously disclosed to the buyer, with the warranty or the owner's manual, the provisions of California Civil Code §§ 1793.22 and 1793.2(d)); *see also id.* § 1793.22(c) (West Supp. 1995) (instructing that if a qualified third-party dispute resolution process exists, and the buyer receives timely notification in writing of the availability of it, along with a description of its operation and effect, the presumption in § 1793.22(b) may not be asserted by the buyer until after the buyer has initially resorted to the dispute resolution process); *id.* (providing that notification of the availability of the qualified third-party dispute resolution process is not timely if the buyer suffers any prejudice resulting from any delay in giving the notification); *id.* (providing that if a qualified third-party dispute resolution process does not exist, or if the buyer is dissatisfied with decision rendered by the process, or if the manufacturer or its agent neglects to promptly fulfill the terms of the decision after the decision is accepted by the buyer, the buyer may assert the presumption provided for in § 1793.22(b) in an action to enforce the buyer's rights under § 1793.2(d)); *id.* (noting that the findings and decision of a qualified third-party dispute resolution process are admissible into evidence in an action to enforce buyer rights without further foundation); *id.* § 1793.22(d)(1)-(9) (West Supp. 1995) (listing the requirements of a qualified dispute resolution process); *Ibrahim*, 214 Cal. App. 3d at 890, 263 Cal. Rptr. at 71 (holding that it was an error for the court to instruct the jury that the plaintiff purchaser of the new car carried the burden of proving that the extension of the 30-day period was not beyond the control of the manufacturer or its agents); *id.* at 891, 263 Cal. Rptr. at 71 (finding that the requirement that the buyer notify the manufacturer of the need for repair or the nonconformity is a contingent requirement, and must be met only if the manufacturer has clearly and conspicuously disclosed to the buyer the provisions it is required to disclose by statute); *cf.* KY. REV. STAT. ANN. § 367.842(3) (Baldwin 1993); LA. REV. STAT. ANN. § 51:1943(A) (West 1987) (presuming that a reasonable number of attempts have been made to conform a vehicle to applicable express warranties when the same nonconformity has been the subject of repair four or more times or the vehicle has been out of service due to the nonconformity for a cumulative total of 30 or more calendar days). Several states presume that a reasonable number of attempts have been made to conform a vehicle to warranties after three repair attempts or 30 days out of service. *See* ALASKA STAT. § 45.45.320 (1994); VA. CODE ANN. § 59.1-207.13(B) (Michie 1992); W. VA. CODE § 46A-6A-5(a) (1995). For examples of states which presume that one attempt constitutes a reasonable number to cure nonconformities when the nonconformity is safety related, *see* MD. CODE ANN., COM. LAW § 14-1502(d)(3) (Supp. 1994); VA. CODE ANN. § 59.1-207.13(B)(2) (Michie 1992); W. VA. CODE § 46A-6A-5(b) (1995).

disclosed to the transferee, the nonconformity is corrected, and the manufacturer warrants to the transferee in writing that the vehicle will be free of the nonconformity for a period of one year.¹⁸

Chapter 503 reaffirms previous legislative findings, and declares all of the following: (1) The expansion of state warranty laws has afforded valuable protection to consumers; (2) in states without such warranty laws, irreparable vehicles are being resold without notice to subsequent consumers; (3) other states have addressed this problem by requiring notices on the title to the vehicles and by instituting other notice procedures to warn consumers that the vehicle was repurchased by a dealer or manufacturer because it could not be repaired in a reasonable length of time or after a reasonable number of attempts; (4) these warning notices serve the interests of consumers who have a right to information that affects their buying decisions; and (5) the disappearance of these notices upon the transfer of titles from other states to the state of California encourages the transport of lemons to this state.¹⁹

Chapter 503 repeals the Automotive Consumer Notification Act, which was codified as California Civil Code § 1795.8.²⁰ Under this prior law Act, when any person, including a dealer or a manufacturer, sold a vehicle that was known or should have been known to have been required by law to be replaced, or accepted for restitution due to a manufacturer's inability to conform the vehicle to applicable warranties, that person was required to disclose such information in writing to the buyer prior to the buyer purchasing the vehicle.²¹ Additionally, dealers and manufacturers were required to issue a disclosure statement as a separate document and have it signed by the buyer.²²

18. CAL. CIV. CODE § 1793.22(f)(1) (West Supp. 1995); *see id.* § 1793.22(f)(2) (West Supp. 1995) (stating that the requirement in California Civil Code § 1793.22(f)(1) that the nature of the nonconformity be disclosed to the transferee does not apply to the transfer of a motor vehicle to an educational institution if the purpose of the transfer is to make the motor vehicle available for use in automotive repair courses).

19. *Id.* § 1793.23(a) (enacted by Chapter 503); *see also* 1989 Cal. Stat. ch. 862, sec. 1, at 2831 (reflecting similar legislative findings and declarations).

20. 1995 Cal. Legis. Serv. ch. 503, sec. 4, at 3075 (repealing CAL. CIV. CODE § 1795.8).

21. 1989 Cal. Stat. ch. 862, sec. 1, at 2832 (enacting CAL. CIV. CODE § 1795.8(c)); *see id.* at 2831-32 (enacting CAL. CIV. CODE § 1795.8(b)) (defining "dealer," for the purposes of California Civil Code § 1795.8, to mean any person engaged in the business of selling, offering for sale, or negotiating the retail sale of used motor vehicles or selling motor vehicles as a broker to agent for another, including the officers, agents, and employees of the person and any combination or association of dealers); *id.* (stating that "dealer" does not include a bank or other financial institution, or the state, its agencies, bureaus, boards, commissions, authorities, or any of its political subdivisions); *id.* (providing that a person shall be deemed to be engaged in the business of selling used motor vehicles if the person has sold more than four used motor vehicles in the preceding 12 months).

22. *Id.* at 2832 (enacting CAL. CIV. CODE § 1795.8(c)); *see id.* (requiring the disclosure statement to read, "THIS MOTOR VEHICLE HAS BEEN RETURNED TO THE DEALER OR MANUFACTURER DUE TO A DEFECT IN THE VEHICLE PURSUANT TO CONSUMER WARRANTY LAWS"); *id.* (enacting CAL. CIV. CODE § 1795.8(d)) (providing that the disclosure requirement in California Civil Code § 1795.8(c) is cumulative with all other consumer notice requirements, and does not relieve any person, including any dealer or manufacturer, from complying with any other applicable law).

Chapter 503 enacts a new Automotive Consumer Notification Act.²³ Under this act, when a manufacturer reacquires, or assists a dealer²⁴ in reacquiring, a vehicle that the manufacturer knows or should know is required by law to be replaced or accepted for restitution pursuant the Song-Beverly Act, or other similar laws, the manufacturer must take title to the vehicle in its own name before the vehicle may be resold, leased, or transferred in this state, or shipped to another state for sale, lease or transfer.²⁵ Chapter 503 also requires the manufacturer to request the Department of Motor Vehicles to inscribe the notation "Lemon Law Buyback" on the ownership certificate of the vehicle, and to affix a decal to the left door frame of the vehicle that notifies consumers that the title to the vehicle has been inscribed with said notation before the vehicle may be resold, leased, or transferred in this state, or exported to another state for such purposes.²⁶

Under Chapter 503, when a vehicle's ownership certificate has been inscribed with the notation, "Lemon Law Buyback," any person that sells, leases, or transfers that vehicle must provide the transferee with a disclosure statement that reads, "THIS VEHICLE WAS REPURCHASED BY ITS MANUFACTURER DUE TO A DEFECT IN THE VEHICLE PURSUANT TO CONSUMER WARRANTY LAWS. THE TITLE TO THIS VEHICLE HAS BEEN PERMANENTLY BRANDED WITH THE NOTATION 'LEMON LAW BUYBACK'," and must have the transferee sign the specified disclosure statement.²⁷

In addition to the ownership title and a decal on the left doorframe providing notice that a vehicle was required by law to be replaced or accepted by the manu-

23. CAL. CIV. CODE §§ 1793.23, 1793.24 (enacted by Chapter 503); *see id.* § 1792.23(b) (enacted by Chapter 503) (stating that California Civil Code §§ 1793.23 and 1793.24, together, shall be known, and may be cited as, the Automotive Consumer Notification Act); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1381, at 4 (July 18, 1995) (explaining that AB 1381 repeals the prior Automotive Consumer Notification Act and enacts two new sections which constitute the new Automotive Consumer Notification Act).

24. *See* CAL. CIV. CODE § 1793.23(h) (enacted by Chapter 503) (defining "dealer," for the purpose of California Civil Code § 1793.23, to mean any person engaged in the business of selling, offering for sale, or negotiating the retail sale of, a used motor vehicle or selling motor vehicles as a broker or agent for another, including the officers, agents, and employees of the person and any combination or association of dealers).

25. *Id.* § 1793.23(c) (enacted by Chapter 503).

26. *Id.*; *see* CAL. VEH. CODE § 11713.12(a) (enacted by Chapter 503) (stating that the decal required by California Civil Code § 1793.23(c) that is to be affixed by a manufacturer to a motor vehicle, must be affixed to the left front doorframe of the vehicle, or, if the vehicle does not have a left front doorframe, the decal must be affixed in a location designated by the department); *id.* (requiring that the decal must specify that the title to the motor vehicle has been inscribed with the notation "Lemon Law Buyback" and must be affixed to the vehicle in a manner prescribed by the department); *see also id.* § 290 (West Supp. 1995) (specifying that "department" refers to the Department of Motor Vehicles); *id.* § 11713.12(b) (enacted by Chapter 503) (forbidding any person from knowingly removing or altering any decal affixed to a vehicle pursuant to California Vehicle Code § 11713.12(a), whether or not the vehicle has been licensed under the California Vehicle Code).

27. CAL. CIV. CODE § 1793.23(f) (enacted by Chapter 503).

facturer for restitution, Chapter 503 requires that such a vehicle be identified as a "Lemon Law Buyback" on the face of its registration form.²⁸

Under existing law, a manufacturer is to be reimbursed by the State Board of Equalization for an amount equal to the sales tax that the manufacturer includes when it makes restitution to a buyer when the manufacturer provides satisfactory proof that the retailer that sold the vehicle had reported and paid the sales tax on the gross receipts from the sale.²⁹ Chapter 503 adds that a manufacturer will also be reimbursed for the sales tax that it pays to or for the buyer when it provides the buyer with a replacement vehicle, as long as the manufacturer provides satisfactory proof that the retailer that sold the vehicle reported and paid the sales tax on the gross receipts from the sale, and when it provides satisfactory proof that it has complied with other provisions of Chapter 503.³⁰

Under Chapter 503, if a manufacturer reacquires or assists a dealer in reacquiring a vehicle in response to a request by a buyer or lessee that a manufacturer replace the vehicle or make restitution for it, the manufacturer must, before it sells, leases, or transfers the vehicle, notify the transferee and obtain the transferee's written acknowledgment of receiving such notice.³¹ Further, any person, including a dealer, who acquires such a vehicle for resale must comply with the same notice requirements.³²

When a buyer or lessee requests that a manufacturer replace or make restitution for a vehicle, Chapter 503 requires that the notice to be given to the transferee must be prepared by the manufacturer of the reacquired vehicle, and must disclose all of the following: (1) the year, make, model and vehicle identi-

28. CAL. VEH. CODE § 4453(b)(7) (amended by Chapter 503); *see id.* (mandating that the notation, "Lemon Law Buyback" be made on the face of the registration under any of the following circumstances: (1) A vehicle has been reacquired pursuant to the provisions of California Civil Code § 1793.23(c); (2) a vehicle has out-of-state titling documents reflecting a warranty return; or (3) a vehicle has been identified by an agency of another state as requiring a warranty return title notation, pursuant to the law of that state).

29. CAL. CIV. CODE § 1793.25(a) (amended by Chapter 503).

30. *Id.*; *see id.* (specifying that the manufacturer must provide satisfactory proof that it has complied with California Civil Code § 1793.23(c), which was enacted by Chapter 503).

31. *Id.* § 1793.23(d) (enacted by Chapter 503); *see id.* (stating that any manufacturer who reacquires or assists a dealer or lienholder to reacquire a motor vehicle in response to a request by the buyer or lessee that the vehicle be either replaced or accepted for restitution because the vehicle did not conform to express warranties shall, prior to the sale, lease, or other transfer of the vehicle, execute and deliver to the subsequent transferee a notice and obtain the transferee's written acknowledgment of a notice, as prescribed by California Civil Code § 1793.24); *see also id.* § 1793.23(g) (enacted by Chapter 503) (stating that the disclosure requirements in California Civil Code § 1793(d)-(f) are cumulative with all other consumer notice requirements and do not relieve any person, including any dealer or manufacturer, from complying with any other applicable law).

32. *Id.* § 1793.23(e) (enacted by Chapter 503); *see id.* (providing that any person, including a dealer, who acquires a motor vehicle for resale and knows or should have known that the vehicle was reacquired by the vehicle's manufacturer in response to a request by the last retail owner or lessee of the vehicle that it be replaced or accepted for restitution because the vehicle did not conform to express warranties shall, prior to the sale, lease, or other transfer, execute and deliver to the subsequent transferee a notice and obtain the transferee's written acknowledgment of a notice, as prescribed by California Civil Code § 1793.24).

fication number of the reacquired vehicle; (2) whether the title was inscribed with the notation, "Lemon Law Buyback"; (3) the nature of the nonconformity or defect reported by the original buyer or lessee; and (4) what repairs, if any, have been made in an effort to correct the nonconformity.³³

Chapter 503 specifies that its provisions apply only to vehicles reacquired by a manufacturer on or after January 1, 1996.³⁴

COMMENT

The problem of lemon vehicles is widespread.³⁵ Chapter 503 was enacted in

33. *Id.* § 1793.24(a)(1)-(4) (enacted by Chapter 503); *see id.* § 1793.24(b) (enacted by Chapter 503) (requiring that the notice be on a form 8½ by 11 inches in size and printed in black ink in at least 10 point typeface on a white background); *id.* (stating that the form must be titled, "WARRANTY BUYBACK NOTICE"); *id.* (setting forth both of the following options, with instructions to manufacturers to check the one that applies: (1) "This vehicle was repurchased by the vehicles's manufacturer after the last retail owner or lessee requested its repurchase due to the problem(s) listed below"; and (2) THIS VEHICLE WAS REPURCHASED BY ITS MANUFACTURER DUE TO A DEFECT IN THE VEHICLE PURSUANT TO CONSUMER WARRANTY LAWS. THE TITLE TO THIS VEHICLE HAS BEEN PERMANENTLY BRANDED WITH THE NOTATION 'LEMON LAW BUYBACK.' Under California law, the manufacturer must warrant to you, for a one year period, that the vehicle is free of the problem(s) listed below"); *id.* (directing the manufacturer to fill in various information including the year, make, model, vehicle identification number, problems reported by the original owner, and repairs made, if any); *id.* (instructing the manufacturer, dealer, and buyer or lessee to sign the form); *id.* (requiring the manufacturer to provide an executed copy of the notice (described above) to the manufacturer's transferee); *id.* (instructing that each transferee, including a dealer, to whom the motor vehicle is transferred prior to its sale to a retail buyer or lessee, must be provided with an executed copy of the notice (described above) by the previous transferor).

34. 1995 Cal. Legis. Serv. ch. 503, sec. 7, at 3076.

35. *See* Beth Reinhard, *Do You Own a Lemon?*, PALM BEACH POST, June 18, 1995, at 1A (reporting that the Center for Auto Safety, a nationwide consumer group, believes that approximately 50,000 lemons are resold nationwide every year, and most of these are resold without disclosure papers); *id.* (noting that over \$60 million in the form of refunds or new vehicles has been issued to consumers under Florida's lemon law since it was enacted in 1987); *id.* (stating that Consumer Reports has documented evidence of manufacturers reselling lemon vehicles in states with weaker lemon laws); *see also* ASSEMBLY COMMITTEE ON CONSUMER PROTECTION, *Governmental Efficiency and Economic Development, Bitter Fruit: How Consumers Unknowingly Buy Lemon Vehicles*, at 7 (1994) [hereinafter *Bitter Fruit*] (stating that in April of 1993, the California DMV filed accusations against General Motors and 34 GM dealers, alleging that they resold vehicles without disclosing to the buyers the repair history of the vehicles, or that the vehicles had been bought back by the manufacturer); *id.* (reporting that GM settled with the DMV by agreeing to pay \$330,000 into the DMV's Consumer Protection Fund, that 31 of the dealers settled by making payments to the DMV, averaging \$8,500, that two of the dealers settled by making payments of over \$97,000 to the DMV, and that only one dealer is fighting the DMV in court); *id.* (noting that GM did not admit guilt in its settlement and reporting that the DMV has filed charges against Chrysler Corporation, and is investigating Ford Motor Co.); *id.* at 9 (reporting that 291 of the vehicles that were bought back under Washington's lemon law between October 17, 1988 and June 3, 1994 were shipped to other states to be sold, and that of the 21 shipped to and sold in California, none had branded titles to notify consumers, and that of all of the California consumers contacted by the Committee, not one had received notice of the lemon status of the car purchased); Heather Newton, *Commercial Law: When Life Gives You Lemons, Make a Lemon Law: North Carolina Adopts Automobile Warranty Legislation*, 66 N.C. L. REV. 1080, 1080 (1988) (reporting that the North Carolina Attorney General's Office received 1155 consumer complaints regarding new cars in 1986, and that most of the complaints involved cases in which manufacturers were unable to conform the new cars to express warranties); Julian B.

response to the findings of an investigation by the California Legislature Assembly Committee on Consumer Protection, Governmental Efficiency and Economic Development.³⁶ This committee issued a report in 1994 revealing deficiencies in the prior California lemon law.³⁷ Specifically, the committee found that although the prior Automotive Consumer Notification Act mandated that a disclosure statement accompany all vehicles that were required to be replaced or accepted for restitution, it did not afford adequate protection to consumers because manufacturers were able to circumvent the disclosure provisions in two ways.³⁸ First, if car manufacturers agreed to replace or make restitution for a vehicle before a consumer instituted formal arbitration proceedings, there would be no disclosure papers accompanying the vehicle to warn future buyers that the car could be a lemon.³⁹ Under this scheme, the manufacturers claimed that the vehicles were bought back for goodwill purposes, the vehicles escaped being

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Bell III, Comment, *Ohio's Lemon Law: Ohio Joins the Rest of the Nation in Waging War Against the Automobile Limited Warranty*, 57 U. CIN. L. REV. 1015, 1015 n.1 (1989) (citing Vogel, *Squeezing Consumers: Lemon Laws, Consumer Warranties, and a Proposal for Reform*, 1985 ARIZ. ST. L.J. 589, 590-91) (estimating that in 1981, approximately one-third of all new foreign cars, and one-half of all new cars that were manufactured domestically, had at least one defect, and that of these, an estimated 34% were plagued by recurring defects); Clifford P. Block, Note, *Arkansas's New Motor Vehicle Quality Assurance Act—A Branch of Hope for Lemon Owners*, 16 U. ARK. LITTLE ROCK L.J. 493, 493-94 (1994) (finding that all 50 states have enacted lemon laws to protect consumers); "Lemon Law" Litigation—Existence of Substantial Defect, 11 AM. JUR. 3d *Proof of Fact* 343, § 2 (1991) (noting that in 1977 the Federal Trade Commission reported that 33.6% of all new vehicles in its study had a substantial defect during the first year of use, and that in 14.5% of the vehicles, multiple substantial defects were present); *id.* (reporting the results of a study, based on the marketing data of J. D. Power & Associates, which found that between two and eight percent of all cars sold violate the average state lemon law, and that since the price of the average car at the time of the study was \$15,000, lemon vehicles theoretically constitute a \$5 billion problem per year); Denise Gellene, *DMV Seeks Suspension in "Lemon" Case*, L.A. TIMES, Mar. 11, 1995, at D1 (reporting that in August of 1994, the California Department of Motor Vehicles charged Chrysler with selling 118 lemon vehicles without disclosing to consumers that the vehicles were bought back from previous consumers because of defects); Arthur M. Louis, *DMV Claims Chrysler Resold 118 "Lemons"*, S.F. CHRON., Sept. 1, 1994, at F1 (reporting that Chrysler was accused, by the Attorney General of New York, of selling more than 300 lemons without disclosure paperwork, and that it settled by refunding \$2 million to consumers); Beth Reinhard, *Carmakers Subpoenaed About Returned Lemons*, PALM BEACH POST, June 21, 1995, at 1A (reiterating the findings of an investigation conducted in Florida which reveals that only six percent of 3400 buyers of used lemon vehicles are known to have received the disclosure forms that are mandated by law); *id.* (reporting further that over 3000 vehicles which were bought back under Florida's lemon law were sold without disclosure forms, and that an estimated 60% of these vehicles were resold in states outside of Florida); Blair S. Walker, *Laws Serve Lemon-Aid to Car Buyers*, USA TODAY, May 23, 1994, at 1B (stating that in 1993, approximately 100,000 people benefitted from lemon law protections, and that since the average price of a new car in 1993 was \$18,500, lemon vehicles were a \$1.9 billion dollar problem for vehicle manufacturers).

36. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1381, at 3 (Sept. 6, 1995).

37. See *Bitter Fruit*, *supra* note 35 (discussing the major findings of an investigation of the flow of lemon vehicles in California, reviewing legislative history, detailing how lemon vehicles are being "laundered" in California, and giving examples of persons who have been victimized by laundered lemon vehicles).

38. *Id.*

39. *Id.* at 2, 7.

officially designated as "lemons," and the manufacturers were able to resell the vehicles at prices higher than would have been possible if the vehicles were stamped as lemons.⁴⁰

Second, the committee's report revealed that under the prior Act, when a vehicle was designated as a lemon, manufacturers, wholesalers, and dealers laundered⁴¹ lemon vehicles through auto auctions.⁴² Manufacturers sold lemon vehicles at auctions to wholesalers or dealers, who, in turn, sold them to other dealers and to consumers.⁴³ Although the disclosure paperwork would usually accompany the vehicle when it was sold at an auction, it was often not passed on to future transferees, namely consumers.⁴⁴ Since the prior Act did not require

40. *Id.* at 2; *see id.* (describing an investigation of General Motors conducted by the Department of Motor Vehicles which revealed numerous instances in which General Motors bought back vehicles as a goodwill gesture, and failed to label the vehicles as lemons even though a "significant number" of the buybacks involved safety related problems such as faulty brakes and stalling engines that were not corrected after repeated attempts); *id.* (finding that internal General Motors memos "urged goodwill repurchases when the number of repair attempts exceeded the limit set by California's lemon law"); *id.* at 11 (reporting that a General Motors representative testified at a committee hearing that GM buys back cars as goodwill gestures, and not as attempts to avoid official labeling as lemons); *id.* at 10-11 (reporting further that the committee found that among GM's "goodwill buybacks," were cases involving brake problems, stalling and/or hesitation problems, steering or front-end problems, and transmission or rear-end defects); *id.* at 11 (citing to a particular case where GM made nine attempts to fix an engine stalling problem, and a note was made in the car's file that it should be bought back before the case was subjected to binding arbitration under which the title could be branded under California's lemon law); Louis, *supra* note 35 (stating that a spokesperson for the DMV said that "Chrysler told the department that it took the vehicles back without formally acknowledging that they were lemons, and that therefore it could re-sell them without disclosing their dubious pedigree"); *see also* Jerry Gillam, *Resale of 'Lemons' as New Cars Criticized*, L.A. TIMES, Oct. 28, 1994, at A30 (reporting the story of a woman whose brakes failed while she was towing a 6000 pound trailer down a mountain road, and who later found out that the vehicle had been bought back by the manufacturer because "it had been in the shop at least 20 times for brake problems that could not be fixed"). *But see* Reinhard, *supra* note 35 (reporting that auto industry representatives argue that they fix all lemons before vehicles are resold to other consumers, and many cars that are bought back do not even have any defects, but rather, "the problem is just customer perception"); *id.* (reporting that a Toyota dispute resolution manager has bought back cars just because "the owner didn't like the wind noise when the rear windows were rolled down"); *Unknown Drivers May Own "Lemons,"* PROPRIETARY TO THE UPI, Oct. 24, 1995 (relaying a statement made by a spokesperson for General Motors that GM buys back cars when there are mechanical problems, and when a customer is unhappy with the color of the paint); *id.* (stating further that since lemons are fixed before they are resold, he doesn't know why GM "would tell you that the vehicle's been repaired if it's in good shape").

41. *See* Reinhard, *supra* note 35 (explaining that "lemon laundering" is "the practice of reselling lemons without disclosure forms").

42. *Bitter Fruit*, *supra* note 35, at 2.

43. *Id.*

44. *Id.*; *see id.* at 5-6 (providing examples of lemon laundering); *id.* at 5 (tracing the history of a car that was reacquired by a manufacturer under Washington's lemon law, shipped to California and sold at an auction to a dealer who in turn, sold it to another dealer who finally sold it to a consumer in California; this particular car was bought back due to a "serious safety defect . . . brakes pulsate and chatter," but the history of the car's safety defect was never disclosed to the California buyer, and the California buyer "was confronted with the same problems that plagued the original owner"); *id.* at 5-6 (reporting the history of a 1994 car that was bought back from the original owners because the car, which only had 2000 on the odometer, had a repair record which included the replacement of four catalytic converters, two power steering pumps, and blown head gaskets and pistons; the car was sold at an auction to a dealer who sold it to buyers without disclosing the car's

manufacturers or dealers to take title to reacquired vehicles, an examination of a vehicle's title would not have alerted a consumer to the fact that a vehicle had been bought back by the manufacturer, or to the potential problems associated with manufacturer buybacks.⁴⁵

Chapter 503 is sponsored by the California Motor Car Dealers Association.⁴⁶ Their stated goal is to "revise, reform, and expand" the disclosure requirements under California's lemon law.⁴⁷ The dealers assert that under prior law, they were not provided with enough information about cars' histories to know if a particular car was a lemon requiring disclosure forms.⁴⁸ The dealers believe that since Chapter 503 requires manufacturers to take title to lemons, it will be easier for them to track lemon vehicles, as they are normally transferred several times before eventually being sold to a second consumer.⁴⁹ As a result, it is asserted that it will be easier for the dealers to comply with disclosure requirements, and that consumers will benefit because they will be provided with more information.⁵⁰

Chapter 503 faced a considerable amount of opposition.⁵¹ A number of consumer groups assert that, rather than broadening and clarifying disclosure requirements, Chapter 503 further weakens and confuses already inadequate disclosure provisions.⁵² Under Chapter 503, a vehicle may be bought back or accepted for restitution under one of two provisions, each of which provides for different

repair history, and the dealer had told the new buyers that the car was bought back because the original owners "were unhappy with the air conditioning and the monthly payments"; *id.* at 8 (citing an auto dealer who explained that although lemon disclosures are made at auto auctions, they usually consist of a short announcement that is not heard by many); Gellene, *supra* note 35 (reporting that at a hearing in Sacramento, Chrysler asserted that it provides paperwork to its dealers about the status of used vehicles, but that the dealers are not passing that information along to consumers).

45. 1992 Cal. Legis. Serv. ch. 1232, sec. 11, at 4981 (amending CAL. CIV. CODE § 1795.8); *Bitter Fruit*, *supra* note 35, at 2.

46. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 1381, at 3 (Aug. 30, 1995).

47. *Id.*

48. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1381, at 5 (July 18, 1995).

49. *Id.*

50. *Id.*

51. *See id.* at 8 (listing organizations and individuals opposed to its enactment, including the Center for Auto Safety, Motor Voters, Consumers Union, Consumer Action, Consumer Federation of America, Association of International Automobile Manufacturers, Toyota Motor Sales, and 35 individuals, most of whom are owners or previous owners of lemon vehicles). *But see id.* at 6 (stating that Toyota raises concerns about the language in California Civil Code § 1793.23(c) which requires the manufacturer to "request" the DMV to brand the title of the vehicle with the notation "Lemon Law Buyback," and to affix a decal to the left doorframe); *id.* (questioning what happens if the manufacturer makes the request but the DMV fails to follow through, or if the DMV does not comply with the request in a timely manner); *id.* (questioning whether the manufacturer is prohibited from transferring the lemon vehicle before the DMV complies with the request); *id.* (expressing concern because the DMV's "'infamously sophisticated' computer system . . . is notoriously slow"); Letter from Scott Keene, *Keene & Associates*, to Richard Steffen, Consultant to Assemblymember Jackie Speier (Sept. 5, 1995) (copy on file with the *Pacific Law Journal*) (asserting that Toyota's position on AB 1381 is neutral).

52. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1381, at 5 (July 18, 1995).

consequences for the reacquired vehicle.⁵³ If a vehicle is reacquired pursuant to California Civil Code § 1793.32(c), it will be labeled a lemon.⁵⁴ If a vehicle is repurchased⁵⁵ pursuant to California Civil Code § 1793.23(d), it escapes being designated as a lemon, and manufacturers are required to provide the disclosure form specified in California Civil Code § 1793.24(b) only if three conditions are met: (1) The vehicle was reacquired in response to a request by a buyer or lessee; (2) the request was made by the last retail owner; and (3) the request was made because the vehicle did not conform to express warranties.⁵⁶

Dealers contend that Chapter 503 expands notification requirements.⁵⁷ They assert that in addition to requiring that notice be provided to buyers when a vehicle is a lemon, Chapter 503 requires that buyers be notified when a vehicle has been bought back as a result of a request by the last retail owner made because the vehicle failed to conform to express warranties.⁵⁸

Consumer advocate groups do not agree with the dealers' interpretation.⁵⁹ Under prior law, notice was to be given to the consumer in writing prior to the

53. CAL. CIV. CODE § 1793.23(c), (d) (enacted by Chapter 503).

54. *Id.* § 1793.23(c) (enacted by Chapter 503).

55. See Memorandum from Peter Welch, California Motor Car Dealers Association, to Members of the Assembly (Sept. 11, 1995) (copy on file with the *Pacific Law Journal*) (stating that a vehicle that is "simply repurchased by the manufacturer at the request of the original owner" is "known in the industry as a 'goodwill' buyback").

56. CAL. CIV. CODE § 1793.23(d) (enacted by Chapter 503); SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1381, at 4 (July 18, 1995); see Memorandum from Peter Welch, *supra* note 55 (stating that AB 1381 "does not require manufacturers to brand the title of all vehicles repurchased from dissatisfied consumers") (emphasis in original); see also SENATE JUDICIARY COMMITTEE, *supra*, at 5 (reporting that the Association of International Automobile Manufacturers opposes AB 1381 because it is against imposing additional obligations on manufacturers concerning lemon law violations "unless a bright line test is adopted for determining what a lemon is"). Compare CAL. CIV. CODE § 1793.23(d) (enacted by Chapter 503) (requiring a manufacturer that reacquires a vehicle in response to a consumer's request to execute and deliver to subsequent transferees the notice form as prescribed by § 1793.24(b)) and *id.* § 1793.24(b) (enacted by Chapter 503) (providing the disclosure form referred to by California Civil Code § 1793.23(d)) with *id.* § 1793.23(c) (enacted by Chapter 503) (requiring a manufacturer take title to the vehicle, request the DMV to brand the title with the notation, "LEMON LAW BUYBACK," and to affix a decal in the left doorframe that indicates that the car is a lemon, if the manufacturer knew or should have known that the vehicle is required by law to be replaced or accepted for restitution, due to the failure of the manufacturer to conform the vehicle to applicable warranties pursuant to California Civil Code § 1793.2(d), or accepted for restitution by the manufacturer due to the failure of the manufacturer to conform the vehicle to warranties required by any other applicable law of the state, any other state, or federal law) and *id.* § 1793.23(f) (enacted by Chapter 503) (requiring any person who transfers ownership of a vehicle that has been designated as a lemon to provide the transferee with a disclosure statement that reads "THIS VEHICLE WAS REPURCHASED BY ITS MANUFACTURER DUE TO A DEFECT IN THE VEHICLE PURSUANT TO CONSUMER WARRANTY LAWS. THE TITLE TO THIS VEHICLE HAS BEEN PERMANENTLY BRANDED WITH THE NOTATION 'LEMON LAW BUYBACK'"); *id.* (requiring that the transferor must have the transferee sign the statement).

57. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1381, at 7 (July 18, 1995).

58. *Id.*; see *supra* note 31 and accompanying text (discussing the requirements of California Civil Code § 1793.23(d)).

59. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1381, at 7 (July 18, 1995).

purchase of the vehicle, and notice was required to be part of titling documents, whenever any vehicle was reacquired because it did not conform to warranties provided by any law.⁶⁰ Consumer groups assert that by providing two alternatives, and drawing the distinction between *lemons* and *vehicles bought back at the request of the last retail owner due to the vehicle's failure to conform to express warranties*, Chapter 503 "dilutes the effectiveness of the warning" to future buyers, and is "misleading because dealers may voluntarily buyback the worst vehicles, because the defects are so obvious," and vehicles may therefore escape being designated as lemons.⁶¹ For this reason, consumer groups oppose the standard form which Chapter 503 provides for manufacturers and dealers to complete in order to provide notice to consumers when a vehicle has been reacquired pursuant to California Civil Code section 1793.23(d).⁶²

Opponents of Chapter 503 argue that the prior Automotive Consumer Notification Act was broader than the new Act enacted by Chapter 503 for three reasons.⁶³ First, under the prior law, the consumer did not have to *request* the manufacturer to reacquire the vehicle in order for subsequent consumers to be provided with notice that the vehicle was bought back.⁶⁴ Motor Voters asserts that the new Act "invites manufacturers to evade disclosure" by requiring consumers who own vehicles that could be designated as lemons to sign a statement, as a condition to the buyback, that the manufacturer *voluntarily and generously offered* to reacquire the vehicle as a goodwill buyback to promote customer satisfaction.⁶⁵ The car dealers assert that such arguments are "overly picky," and that the provisions of Chapter 503 will cover any car that is reacquired due to allegations that it is defective.⁶⁶

Second, under prior law, it was not required that a vehicle must have been *returned by the last retail owner* in order to subject it to future disclosure requirements.⁶⁷ Opponents of Chapter 503 argue that the limitation included in Chapter 503, which provides that notice must be given to future buyers only when a vehicle was required due to a request by the *last retail owner* because the vehicle failed to conform to express warranties, is illogical, and that a dealer should not

60. 1989 Cal. Stat. ch. 862, sec. 1, at 2832 (amending CAL. CIV. CODE § 1795.8(c)); see SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1381, at 6 (July 18, 1995) (explaining that the requirement that the notice be part of the titling documents was implemented, in practice, as branding the title with the notation, "warranty return").

61. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1381, at 8 (July 18, 1995).

62. *Id.*; see *supra* note 31 and accompanying text (discussing the requirements of California Civil Code § 1793.23(d)).

63. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1381, at 7 (July 18, 1995).

64. 1989 Cal. Stat. ch. 862, sec. 1, at 2832 (amending CAL. CIV. CODE § 1795.8(c)).

65. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1381, at 7 (July 18, 1995).

66. *Id.*

67. 1989 Cal. Stat. ch. 862, sec. 1, at 2832 (enacting CAL. CIV. CODE § 1795.8(c)).

be able to conceal knowledge that a vehicle was reacquired by a manufacturer as a result of a warranty complaint just because the original owner reported the problems, rather than the last retail owner.⁶⁸

Third, prior law did not require that a vehicle violate *express* warranties before notification would be provided to subsequent transferees.⁶⁹ Under Chapter 503, if a manufacturer buys back a vehicle at the request of a consumer because it does not conform to *implied* warranties,⁷⁰ the manufacturer is not under any obligation to provide any notice at all to any future transferee that the vehicle was bought back due to warranty disputes.⁷¹ Consumers Union asserts that manufacturers should be required to disclose to a future transferee the fact that a vehicle was reacquired by a manufacturer due to a violation of an implied warranty, in addition to a violation of an express warranty.⁷²

Consumer groups also oppose the provisions in Chapter 503 which require manufacturers to affix a decal to the left doorframe of any vehicle reacquired pursuant to California Civil Code § 1793.23(c).⁷³ They argue that the decal is a "meaningless warning," and that it will only be used against consumers, as manufacturers and dealers will argue that the consumer was provided with notice by the presence of the decal.⁷⁴ The Association of International Automobile Manufacturers also opposed the provision requiring the affixation of the decal.⁷⁵ It asserts that the requirement is "impractical" and that Chapter 503 should have been amended to preclude manufactures' liability if the decal is removed, as long as it was in place when the vehicle was sold to a consumer.⁷⁶

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68. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1381, at 7 (July 18, 1995); see CAL. CIV. CODE § 1793.23(e) (enacted by Chapter 503) (indicating that any person, including any dealer, who acquires a motor vehicle for resale and knows or should know that the vehicle was reacquired by the vehicle's manufacturer in response to a request by the last retail owner or lessee of the vehicle that it be replaced or accepted for restitution because the vehicle did not conform to express warranties shall, prior to the sale, lease or transfer of the vehicle, provide notice to the transferee).

69. 1989 Cal. Stat. ch. 862, sec. 1, at 2832 (enacting CAL. CIV. CODE § 1795.8(c)).

70. See SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1381, at 7 (July 18, 1995) (clarifying that the applicable implied warranties under the California Uniform Commercial Code include the implied warranty of merchantability and the implied warranty of fitness).

71. CAL. CIV. CODE § 1793.23(d) (enacted by Chapter 503); see *id.* (applying only to express warranties).

72. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1381, at 7 (July 18, 1995). But see *id.* (stating that the dealers assert that since implied warranties are almost never used for automotive purposes, there is no reason to include them in AB 1381, and that the use of express warranties provides a clear test).

73. *Id.* at 6.

74. *Id.*

75. *Id.*

76. *Id.*

Consumer Protection; state lottery prize assignments

Code of Civil Procedure § 708.750 (new); Government Code §§ 8880.321, 8880.325, 8880.326, 8880.327 (new), § 8880.32 (amended and repealed).

AB 218 (Richter); 1995 STAT. Ch. 363
(Effective August 3, 1995)

Under prior law, California State Lottery prizes were not assignable, except that payment could be made to another person, paid to a person designated pursuant to an appropriate judicial order, or assigned as collateral for an obligation as owed to another.¹ Certain assignments will still be governed by these provisions.²

Under Chapter 363, California State Lottery prizewinners are also prohibited from assigning rights to prizes, except that payment may be paid to a revocable trust established by the prizewinner for the benefit of the prizewinner, paid to a person designated pursuant to an appropriate judicial order appointing a conservator or guardian for the protection of the winner, or assigned as collateral for an obligation as owed to another, as specified.³

Additionally, Chapter 363 allows voluntary assignment of payments to another person when designated pursuant to an appropriate judicial order, if the

1. 1994 Cal. Legis. Serv. ch. 890, sec. 2, at 3803 (amending CAL. GOV'T CODE § 8880.32); CAL. GOV'T CODE § 8880.32(g) (amended and repealed by Chapter 363); *see* ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 3542, at 1 (Apr. 12, 1994) (noting the California State Lottery's objection to assignments of lottery prizewinnings for reasons other than estate planning, despite statutory language indicating winner's right to assign annuitized winnings). *But see* R & P Capital Resources, Inc. v. California State Lottery, 31 Cal. App. 4th 1033, 1040, 37 Cal. Rptr. 2d 436, 440 (1995) (reasoning that California Government Code § 8880.32(g) does not allow the voluntary assignment of lottery prize payments); *cf.* Walker v. Rogers, 650 N.E.2d 272, 276 (Ill. App. Ct. 1995) (holding that a similar Illinois statute does not allow the voluntary assignment of lottery prize payments in exchange for lump sum payments and only allows judicially ordered assignments when necessary as a remedy in separate proceedings or for creditor attachment); *Lottery Prizes—Assignments of Winnings*, CHI. DAILY L. BULL., June 2, 1995, at 1 (detailing state courts' opinions that language similar to California Government Code § 8880.32(g) did not allow assignments and only allowed judicial orders regarding lottery payment winnings as remedies in separate proceedings, such as creditor attachments).

2. CAL. GOV'T CODE § 8880.32(j) (amended and repealed by Chapter 363); *see id.* (specifying that California Government Code § 8880.32 applies to assignments executed by all parties on or before August 3, 1995, which is the effective date of Chapter 363); *id.* § 8880.32(k) (amended and repealed by Chapter 363) (providing that California Government Code § 8880.32 is inoperative as of December 1, 1995 and is repealed as of January 1, 1996).

3. *Id.* § 8880.325(a)-(c) (enacted by Chapter 363) (incorporating 1994 Cal. Legis. Serv. ch. 890, sec. 2, at 3804).

court makes specified findings and states them in its order.⁴ However, an

4. *Id.* § 8880.325(d) (enacted by Chapter 363); *see id.* § 8880.325(d)(1) (enacted by Chapter 363) (stating that the court must find the prizewinner was represented by independent legal counsel); *id.* § 8880.325(d)(2) (enacted by Chapter 363) (declaring that the court must find that the prizewinner reviewed and understood the assignment terms and specific payments assigned); *id.* § 8880.325(d)(3) (enacted by Chapter 363) (specifying it is the prizewinner's responsibility to inform the court if he or she has a spouse and whether the spouse consents to the assignment); *id.* § 8880.325(d)(4) (enacted by Chapter 363) (stating the court's findings must include the specific payments assigned, the prizewinner's name, the assignor's full legal name if different than the prizewinner's, the assignor's social security or taxpayer identification number, the assignee's full legal name and social security number or taxpayer identification number, and the citizenship or resident alien number of naturalized assignees); *id.* § 8880.325(d)(5) (enacted by Chapter 363) (declaring the court's order must identify any amounts owed to the State of California or other persons from the prize payments); *id.* § 8880.325(d)(6) (enacted by Chapter 363) (establishing that the court order must state the Lottery and the State of California are not parties to the order and may rely on the order); *id.* § 8880.325(d)(7) (enacted by Chapter 363) (stating that the prizewinner or assignee must provide written confirmation to the court of any liens, levies, or claims reported to the Lottery or the California Controller's office at the time of the assignment); *id.* § 8880.325(j) (enacted by Chapter 363) (establishing that no prizewinner will have the right to assign prize payments as allowed in California Government Code § 8880.325(d) or direct the payment of prize money as allowed in California Government Code § 8880.325(c)(4) if the Internal Revenue Service rules such payment of assignments affect the tax circumstances of all prizewinners or a court of competent jurisdiction's ruling of the same); *id.* § 8880.327(a) (enacted by Chapter 363) (incorporating 1994 Cal. Legis. Serv. ch. 890, sec. 2, at 3805) (allowing the California State Lottery Commission to charge a reasonable fee which may be deducted from lottery prizewinnings to recover expenses necessary to comply with the assignment provisions of California Government Code §§ 8880.325-8880.326); *id.* § 8880.327(b) (enacted by Chapter 363) (discharging any liability on the part of the California State Lottery, its director, its commission, its employees, and the State upon the payment of lottery prize monies pursuant to a judicial order); *id.* § 8880.327(c) (enacted by Chapter 363) (incorporating 1994 Cal. Legis. Serv. ch. 890, sec. 2, at 3806) (requiring the California State Lottery Commission to adopt regulations necessary to implement the assignment provisions of California Government Code §§ 8880.325-8880.326 and that these regulations must further the Legislature's intent to allow lottery prizewinners to enjoy more of their winnings); *see also* 1994 Cal. Legis. Serv. ch. 890, sec. 1, at 3803 (amending CAL. GOV'T CODE § 8880.32) (articulating legislative intent to allow California State Lottery prizewinners, particularly elderly winners interested in acquiring small businesses, to enjoy their winnings sooner); Conference between Assemblymember Bernie Richter; Skip Muir, California Lottery Legislative Liaison; Catherine Van Aken, California Lottery Chief Legal Counsel; Deborah L. Maddux; Michael Demore; Robin Shapiro; and Mark W. Owens, Editor-in-Chief, *Pacific Law Journal* (June 21, 1995) (notes on file with the *Pacific Law Journal*) (hereinafter Conference) (noting the median age of lottery prizewinners as 48 years old); *cf.* ARIZ. REV. STAT. ANN. § 5-513(A)(3)(a) (Supp. 1994) (allowing lottery prize assignments if the winner is of sound mind, not acting under duress, and has received independent financial and tax advice regarding the assignment); 1995 Colo. Legis. Serv. SB 133, sec. 1 (West) (stating the Colorado Legislature's intent in allowing voluntary assignments of lottery winnings is to allow lottery winners maximum flexibility to use and enjoy their prizes); Howard Fischer, *Option to Assign Lottery Winnings to Others OK'd*, ARIZ. BUS. GAZETTE, Mar. 10, 1994, at 25 (stressing Arizona lawmakers' intent to allow lottery winners authority over their winnings by allowing assignments). Compare CAL. GOV'T CODE § 8880.32(g), (j) (amended and repealed by Chapter 363) (providing certain types of assignments, made prior to August 3, 1995 and paid to prizewinners no later than December 1, 1995, will be governed by California Government Code § 8880.32(g)) with CAL. GOV'T CODE § 8880.325(d) (enacted by Chapter 363) (mandating that assignments be made to another person pursuant to a judicial order). But see James Bradshaw, *Lottery Tries to Stop Bill that Allows Selling Annual Payments*, COLUMBUS DISPATCH, June 14, 1995, at 5B (indicating Ohio Lottery officials' objections to similar legislation allowing assignment of lottery winnings due to possible widespread prizewinner tax liability, prizewinner protection issues, and increased administrative costs necessary to track these assignments, thereby decreasing funds designated for schools); Nancy Weaver, *Lottery Winners of Big Bucks Discover Wealth Isn't Instant*, FRESNO BEE, Mar. 6, 1994, at A3 (quoting California State Lottery's Chief Legal Counsel Catherine Van Aken's belief that few lottery winners seek assignments without the

assignee's right to receive a prize payment is conditioned on certain nonwaivable prizewinner rights.⁵

Furthermore, Chapter 363 creates an enforcement procedure for judgement creditor liens against annual prize payments.⁶

COMMENT

The Legislature wishes to allow lottery prizewinners, at their option, the chance to enjoy more of their winnings at an earlier time.⁷ With the enactment of Chapter 363, the Legislature intends to clarify legal protections for lottery prizewinners who seek these options.⁸ In exchange for the benefit of these options,

intervention of companies seeking to buy annual lottery payments in exchange for lump sum payments to the winners).

5. CAL. GOV'T CODE § 8880.325(e) (enacted by Chapter 363); *see id.* § 8880.325(e)(1), (2) (enacted by Chapter 363) (providing for the following nonwaivable rights: (1) The consideration for the assignment must be paid prior to the first lottery payment or in two installments, the first occurring prior to the first lottery payment, and the latter within 11 months; and (2) If the consideration is paid in two installments, the lottery winner has a special lien for the balance due without taking any special actions); *id.* § 8880.325(e)(3) (enacted by Chapter 363) (declaring that the Legislature believes a statutory lien in favor of prizewinners is essential to protect prizewinners from creditors, assignees' subsequent bankruptcy trustees, and subsequent assignees when prizewinners have not been fully paid for their assignments).

6. CAL. CIV. PROC. CODE § 708.750 (enacted by Chapter 363); *see id.* § 708.750(a) (enacted by Chapter 363) (declaring a judgment creditor, in order to keep its judgment lien in effect, must do the following: (1) file an affidavit with the California State Lottery indicating the judgment has not been satisfied; and (2) file a certified copy of the judgement lien renewal application, if the lien is renewed); *id.* § 708.750(b) (enacted by Chapter 363) (providing judgement liens will expire if the lien creditor does not file annual statements, judgement renewals, or abstract renewals; however, the creditor may initiate a new proceeding to enforce the judgement).

7. *See* 1994 Cal. Legis. Serv. ch. 890, sec. 1, at 3803 (articulating legislative intent); Lois Gould, *Ticket to Trouble*, N.Y. TIMES, Apr. 23, 1995, at 38 (commenting on a myriad of legal and financial problems experienced by lottery winners and aggravated by the winners inability to control their capital and earn interest on it like ordinary millionaires); Weaver, *supra* note 4 (noting the plight of one California Lottery winner who is on disability waiting for Medi-Care to help pay for needed surgery, yet he still cannot access future lottery payments to aid with his extensive medical expenses); *see also Panel OKs Bill Giving Lottery Winners Voice in Investment Path*, DENV. POST, Jan. 31, 1995, at B3 (emphasizing that lottery winners receiving lump sum payments may be able to get a better rate of return than state-designated investment firms that manage lottery annuities). *But see* Conference, *supra* note 4 (broaching the possibility that prizewinners may sell lottery payments to avoid child support or other obligations); *cf.* County of Contra Costa v. Lemon, 205 Cal. App. 3d 683, 685, 252 Cal. Rptr. 455, 456 (1988) (affirming that lottery proceeds are considered income when determining child support obligations).

8. *See* 1995 Cal. Legis. Serv. ch. 363, sec. 7, at 1663 (enacting CAL. CIV. PROC. CODE § 708.750, CAL. GOV'T CODE §§ 8880.321, 8880.325-8880.327, and amending and repealing CAL. GOV'T CODE § 8880.32) (asserting that Chapter 363 is necessary to provide lottery winners additional consumer protection and to properly enforce Chapter 890 of the Statutes of 1994); ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 218, at 2 (July 21, 1995) (declaring Chapter 363 is necessary to address implementation issues regarding court ordered assignment of lottery prizes in order to protect prizewinners); ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 218, at 1 (May 8, 1995) (stating Chapter 363 makes technical changes to the State Lottery Act of 1984 in order to protect prizewinners); ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 3542, at 2 (Apr. 12, 1994) (noting the Legislature's fear that unscrupulous companies will take advantage of prizewinners when offering

however, certain tax liability issues may arise for the lottery prizewinner.⁹

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Consumer Protection; subdivision map act—mergers

Government Code §§ 66451.11, 66451.13, 66451.20, 66451.21
(amended).

AB 555 (Aguiar); 1995 STAT. Ch. 162

Existing law provides that a local agency may merge a parcel of land with a

immediate cash payouts); Conference, *supra* note 4 (mentioning the California State Lottery's desire to protect winners from unscrupulous lenders who would cheat them from their winnings); *see also* Telephone Interview with Robin Shapiro, Morrison & Foerster (June 21, 1995) (notes on file with the *Pacific Law Journal*) (discussing Chapter 363's codification of recent California State Lottery regulations which have become necessary since the 1994 assignment provision); *cf.* Gould, *supra* note 7 (recognizing that purchasers of lottery annuities generally only pay approximately 40 cents on the dollar). *But see* Letter from Robin M. Shapiro, Attorney, Morrison & Foerster, to Assemblymember Bernard Richter (June 9, 1995) (copy on file with the *Pacific Law Journal*) (criticizing AB 218 due to its failure to address prizewinners' need for independent legal counsel, spousal consent, and court approval when engaging in loan transactions and its urgency clause which does not allow the California State Lottery Commission sufficient time to develop regulations regarding assignments).

9. *See* 26 C.F.R. § 1.451-2 (1995) (explaining income not actually received by a taxpayer is constructively received by the taxpayer, unless receipt of the funds is subject to substantial limitations or restrictions, if the funds are credited to his or her account, set aside for the taxpayer, or he or she may draw upon the funds during the taxable year, and giving as examples uncashed mature interest coupons and accrued interest on unwithdrawn insurance policy dividends); CAL. GOV'T CODE § 8880.325(j) (enacted by Chapter 363) (establishing that no prizewinner will have the right to assign prize payments, as allowed in California Government Code § 8880.325(d) or direct the payment of prize money as allowed in California Government Code § 8880.325(c)(4), if the Internal Revenue Service rules such assignment of payments affects the tax circumstances of all prizewinners or a court of competent jurisdiction's ruling of the same); Letter from Robin M. Shapiro, *supra* note 8 (criticizing AB 218's language, which might allow a low level or regional Internal Revenue Service office's determination that lottery prize assignment by one lottery prizewinner is constructive receipt of lottery prize monies for all lottery prizewinners, because it destroys prizewinners' ability to assign lottery prize payments); Bradshaw, *supra* note 4 (suggesting the possibility that if some lottery winners convert lottery annuities to lump sum payments, the Internal Revenue Service may treat all winnings in this manner due to all winners' constructive receipt of winnings, thereby causing increased tax liability for winners not seeking assignment options); Conference, *supra* note 4 (debating the possibility that the Internal Revenue Service will treat all Lottery winnings as lump sum payments if assignments are allowed, because all winners will have the right to the present value of the income stream, which is constructive receipt of those funds); *cf.* COLO. REV. STAT. § 24-35-212(1.6) (Supp. 1995) (providing a similar Colorado statute, which also allows assignments, will not go into effect unless the Internal Revenue Service determines that election to receive a lump sum payment does not affect the tax liability of those who do not make such an election). *But see* ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 3542, at 2 (Apr. 12, 1994) (reporting that tax experts, employed by companies offering lump sum payments in exchange for annual lottery payments, do not believe increased income tax problems exist for persons seeking lump sum payments).

contiguous parcel of land held by the same owner.¹ The specific property must meet certain requirements in order to qualify as land capable of such a merger.² Additionally, prior law gave the local agency the option of notifying the owner of the land whose property could potentially be merged.³ Under prior law the local agency also had an optional notice requirement with respect to amending the merger ordinance as well as adopting a new merger ordinance.⁴

Chapter 162 requires that the owner of land proposed to be merged be given notice of the proposal and makes mandatory the mailing and filing of the notice

1. CAL. GOV'T CODE § 66451.11 (amended by Chapter 162); *see id.* (providing that the land to be merged must be owned by the same person and that either of the two parcels which are to be merged must not conform to the standards for minimum parcel size under local zoning ordinances); *see also* *Morehart v. County of Santa Barbara*, 7 Cal. 4th 725, 760, 872 P.2d 143, 165, 29 Cal. Rptr. 2d 804, 826 (1994) (noting that the provisions in California Government Code § 66451.11 provide the exclusive means by which a government entity can achieve nonconsensual eradication of lot lines of commonly owned contiguous parcels); *Lakeview Meadows Ranch v. County of Santa Clara*, 27 Cal. App. 4th 593, 596, 32 Cal. Rptr. 2d 615, 616 (1994) (providing an example of a parcel which did not conform to the merger requirements because the land was created prior to the 1893 enactment of regulations governing subdivision of land); *Stell v. Jay Hales Dev. Co.*, 11 Cal. App. 4th 1214, 1225 n.7, 15 Cal. Rptr. 2d 220, 226 n.7 (1992) (discussing the various merger provisions and how they relate to the local agencies' duties; for example a local agency has discretion to create ordinances and the procedures which are used to carry out the particular merger ordinance); *cf.* GA. CODE ANN. § 44-6-2 (1991) (indicating that if two parcels are to unite in the same person, then the lesser estate shall be merged into the greater estate).

2. CAL. GOV'T CODE § 66451.11(a), (b) (amended by Chapter 162); *see id.* (requiring that the parcel be undeveloped, or developed with only an accessory structure, or a single structure other than an accessory structure that is partially on a contiguous parcel, and any affected parcel must contain one or more of seven listed conditions, including among other things, a lot size of less than 5000 acres, noncompliance with sewage disposal or water supply, or development would create health or safety hazards); *cf.* D.C. CODE ANN. § 5-424(d) (1994) (permitting an application for variances which allow a property owner to depart from the literal requirements of the zoning laws where strict adherence to such regulations would cause undue hardship). *See generally* Norman Marcus, *Air Rights in New York City: TDR, Zoning Lot Merger and the Well-Considered Plan*, 50 BROOK. L. REV. 867, 871-72 (1984) (noting that the New York Department of Buildings defined a "lot" to include contiguous parcels that were held in common or held in separate ownership provided that the air rights benefitted the adjoining parcel).

3. 1983 Cal. Stat. ch. 845, sec. 2, at 3098 (amending CAL. GOV'T CODE § 66451.13); *see id.* (providing that the local agency, prior to recording a notice of merger, may give notice by mail to the then current owner of its intention to determine status, that the parcels may be merged pursuant to the local merger ordinance, and that the owner has a right to request a hearing in opposition to any such merger); *see also* Lynda G. Cook, Comment, *Lucas and Endangered Species Protection: When "Take" and "Takings" Collide*, 27 U.C. DAVIS L. REV. 185, 186 n.4 (1993) (asserting that the primary goals of the Subdivision Map Act was to encourage orderly community development, insure proper improvement of areas dedicated to public purposes, and to protect the public from fraud and exploitation).

4. 1983 Cal. Stat. ch. 845, sec. 2, at 3100 (enacting CAL. GOV'T CODE § 66451.20); *see id.* (containing language which indicates that if the local merger ordinance does not conform to California Government Code § 66451.11, then the local agency can amend the ordinance and may publish its intention to do so); *see also id.* (providing that prior to adopting a merger ordinance which complies with California Government Code § 66451.11, the local agency must adopt a resolution of intention to adopt a merger clause and the local agency may cause notice of the hearing to be published).

of intention to determine the land's status.⁵ It also requires notice for an amendment to the merger ordinance as well as notice of the proposed adoption of a new merger ordinance.⁶

COMMENT

Chapter 162 will prevent the merger of contiguous parcels of land without the owner's knowledge.⁷ Chapter 162 reinstates the mandatory notice requirement which existed prior to the 1993 budget problems.⁸ Proponents argue that property owners have a right to know whether their land is affected by governmental action, while those opposed argue that property owners still get notice of the merger, but without the state having to pay the bill for the notice.⁹ Though

5. CAL. GOV'T CODE § 66451.11(c) (amended by Chapter 162); *see id.* (providing that prior to any merger, the owner of the contiguous parcels must have been notified of the merger proposal pursuant to California Government Code § 66451.13); *see also id.* § 66451.13 (amended by Chapter 162) (eliminating the optional notice requirement and replacing it with mandatory language, providing that the local agency must mail to the current owner of the parcels a notice of intention to determine status, notice that the parcels may be merged pursuant to the local merger ordinance, and advising the owner that he or she may request a hearing in opposition to such a merger).

6. *Id.* §§ 66451.20, 66451.21 (amended by Chapter 162); *see id.* § 66451.20 (amended by Chapter 162) (providing that prior to amending any merger ordinance so that it is in compliance with current California Government Code § 66451.11, the local agency must adopt a resolution of intention, and the agency must cause the resolution to be published in order to notify those who may be affected); *id.* § 66451.21 (amended by Chapter 162) (establishing notice requirements for the adoption of a new merger ordinance rather than the amendment of an old merger ordinance).

7. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 555, at 2 (May 24, 1995); *see Carlos V. Lozano, Old West Spirit Lives for Those in the Knolls*, L.A. TIMES, June 27, 1993, at B8 (citing an example of a community which uses merger guidelines as a way to limit development of lots, which when originally zoned, were zoned much smaller than the current board would approve); *see also Iannucci v. Trumbull Zoning Bd. of Appeals*, 592 A.2d 970, 973 (Conn. App. Ct. 1991) (describing a statute that allows subdivisions which have been approved and recorded to avoid conformity with subsequent amendments to subdivision or zoning regulations). *See generally Wilkinson v. Pitkin County Bd. of Comm'rs*, 872 P.2d 1269, 1274 (Colo. Ct. App. 1993) (indicating that if two parcels are contiguous and commonly owned and then subsequently merged, the larger parcel is subject to county subdivision regulation).

8. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 555, at 2 (June 1, 1995); *see id.* (commenting on the fact that at one time, local agencies were under an obligation to give notice to owners of contiguous parcels, however, due to budget problems and the cost of such notice, the requirement became optional); *see also Sinclair & Valentine Co. v. County of Los Angeles*, 201 Cal. App. 3d 1021, 1026, 247 Cal. Rptr. 563, 571 (1988) (citing *Mullane v. Central Hanover Tr. Co.* 339 U.S. 306, 314 (1950)) (providing the well settled rule that a person's property may not be taken without due process of law, which has been interpreted as requiring notice reasonably calculated to apprise interested parties of pending proceedings in order to give them an opportunity to be heard).

9. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 555, at 2 (July 6, 1995); *see id.* (arguing that the elimination of the notice requirement in order to save money does not make sense in light of depriving owners of their property rights); *id.* at 2 (noting that the cost of the mandate to the state will be minimal because all the merger ordinances are already on the books, unlike the first time the mandate was initialized where the cost was higher due to start-up costs). *But see id.* at 1 (responding to proponents arguments by noting that the notice requirement did not come into existence until the mid-80's). *Cf. Molic v. Redding Zoning Bd. of Appeals et al.*, 556 A.2d 1049, 1051-52 (Conn. App. Ct. 1989) (noting that the requirement that parcels owned by one person be merged is reasonable only when it furthers the general zoning purpose of eliminating nonconforming lots).

repealing the mandate for notifying property owners may have saved the state money, opponents argued that it was at the expense of the owner's property rights.¹⁰

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Consumer Protection; telecommunications

Public Utilities Code § 495.5 (repealed); § 495.7 (new); §§ 489, 495 (amended and repealed).
AB 828 (Conroy); 1995 STAT. Ch. 809

Existing law provides that every public utility¹ other than a common carrier² must file with the Public Utilities Commission and make available to the public all rates, tolls, rentals, and charges, as well as rules, privileges, and contracts which relate to the rates, tolls, and charges.³ Additionally, prior law contained

10. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 555, at 2 (July 6, 1995); *see id.* (arguing that when property owners' rights are at stake, the owners ought to be informed about what is to happen to their property); *see also Morehart*, 7 Cal. 4th at 752, 872 P.2d at 160, 29 Cal. Rptr. 2d at 821 (explaining that the statewide merger provisions reflect the concern of giving landowners substantial procedural safeguards and an opportunity to be heard prior to their lots being involuntarily merged). *See generally* SENATE COMMITTEE ON HOUSING AND URBAN AFFAIRS, COMMITTEE ANALYSIS OF AB 555, at 2 (July 19, 1995) (noting that the California Association of Realtors, the California Land Title Association, and the Consulting Engineers and Land Surveyors of California all support this bill).

1. *See* CAL. PUB. UTIL. CODE § 216(a) (West Supp. 1995) (defining a "public utility" as, among other things, an electrical corporation, telephone corporation, or telegraph corporation where the service is performed for, or the commodity is delivered to, the public or any portion thereof); *see also* Ivan H. Shefrin & Daniel W. Edwards, *Telecommunications Services; Industry Overview*, U.S. INDUS. OUTLOOK, Jan. 1993, at 28 (indicating that the Federal Communications Commission regulates interstate common carrier communications, while each state's own Public Utility Commission regulates communications within its jurisdiction).

2. *See* CAL. CIV. CODE § 2168 (West 1985) (defining a "common carrier" as anyone who offers to the public to carry persons, property, or messages).

3. CAL. PUB. UTIL. CODE § 489(a) (amended by Chapter 809); *see id.* § 489(b) (amended by Chapter 809) (requiring every telephone corporation to fully inform potential subscribers of the basic services available to that subscriber and noting the Commission's authority to adjust the phone company's rates, or impose penalties for the failure to comply with the notice requirement); *see also id.* § 454(a) (West Supp. 1995) (indicating that prior to any rate change, the Commission must make a determination that the new rate is justified, and if the reason for the rate change is other than new costs to the corporation, then the corporation must notify affected subscribers of the request made to the Commission); *id.* (providing that the notice must state the amount of the change, both relative and absolute, the reason the change is sought, and the Commission's address where customer inquiries can be made); *id.* § 491 (West 1975) (providing that any changes in rate or classification can be made only after 30 days notice, stating the changes to occur and time when they will occur, to the Commission and the public); *id.* § 729.5 (West Supp. 1995) (noting that no group of customers can be changed from one rate schedule to another, without first being notified, if the change will be greater than 10%). *See generally* Linda Goldstein, *800 Presubscription Charges Come Under Attack; Calls for Stricter Rules on 800 Telephone Services*, TELEMARKETING, Oct. 1994, at 22 (discussing the desire by both

provisions which authorized the Commission to waive the filing requirements, in full or in part, for enhanced service providers.⁴

Chapter 809 allows telephone or telegraph corporations to apply for exemptions of certain telecommunications services from tariffing requirements, but does not provide a tariff exemption for residential basic exchange services.⁵ Additionally, Chapter 809 requires the Commission to establish consumer protection rules for the exempted services.⁶ Finally, Chapter 809 allows the Commission to revoke any of the exemptions provided by Chapter 809, yet does not apply to cellular services.⁷

the government and telephone companies for more regulation of 800 numbers in order to better protect the consumer and the image of the telephone companies).

4. 1992 Cal. Legis. Serv. ch. 980, sec. 2, at 4007 (amending CAL PUB. UTIL. CODE § 489); *see id.* (providing that a waiver would be justified if the Commission determines the provider of enhanced services lacks significant market power in the market for that service); *id.* (defining "enhanced services" as services offered over telephone or telegraph lines employing computer processing applications that act on format, content, code, protocol, or similar aspects of the subscriber's transmitted information); *cf.* CONN. GEN. STAT. ANN § 16-247f (West Supp. 1995) (providing the classification system used to categorize a telecommunication service as either competitive, emerging competitive, or noncompetitive, and using criteria such as number, size and geographic distribution of other providers, availability of functionally equivalent services, and existence of barriers to enter the market). *See generally* Christy C. Kunin, Comment, *Unilateral Tariff Exculpation in the Era of Competitive Telecommunications*, 41 CATH. U. L. REV. 907, 908 n.9 (1992) (discussing the Federal Communication Commission's increased reliance on the market to regulate activities of nondominant carriers in competitive markets); *id.* (distinguishing dominant and nondominant on the basis of market power; those lacking market power are nondominant).

5. CAL. PUB. UTIL. CODE § 495.7(a), (b) (enacted by Chapter 809); *see id.* § 495(a) (West Supp. 1995) (giving the Commission the authority to establish rules and procedures for phone corporations to apply for exemptions of certain telecommunication services from the tariffing requirements); *see also id.* § 495.7(b)(1), (2) (enacted by Chapter 809) (providing two conditions, either of which must be satisfied to qualify for the tariffing exemption: (1) the telephone corporation lacks significant "market power" for that service for which an exemption is being requested; defining market power by company size, market share, type of service for which an exemption is requested, as well as other rules the Commission promulgates; or (2) sufficient consumer protections exist which minimize the risk to consumers from anticompetitive behavior); *cf.* HAW. REV. STAT. § 269-16.9(a) (Supp. 1994) (providing the Commission with the authority to exempt a telecommunications provider from the provisions in this chapter if found to be in the public's interest); WASH. REV. CODE ANN. § 80.36.320(2) (West 1991) (noting that minimal regulation will be imposed on competitive telecommunications companies; for example, the companies may file price lists instead of tariffs, which are effective 10 days after notice to the Commission and customers). *See generally* Spencer W. Waller, *The Modern Antitrust Relevance of Oliver Wendell Holmes*, 59 BROOK. L. REV. 1443 (1994) (describing different economists' views regarding market power); *id.* (discussing one economist's theory against the prohibition of collusive agreements on the basis that it provides no restraints on large powerful corporations who do not need such tactics to maintain market power).

6. CAL. PUB. UTIL. CODE § 495.7(c) (enacted by Chapter 809); *see id.* (providing a list of rules, including notice of rate ownership changes, rules regulating fraudulent marketing practices, consumer grievance avenues, assurance of informational privacy, and rules assuring a phone corporation's cooperation with the Commission's investigations); *cf.* OR. REV. STAT. § 756.040(1) (1993) (indicating that the Commission must represent the customers of any public utility or telecommunications utility in all controversies respecting rates, valuations, service, and all matters over which the Commission has jurisdiction).

7. CAL. PUB. UTIL. CODE § 495.7(f), (i) (enacted by Chapter 809); *see id.* § 495.7(f) (enacted by Chapter 809) (providing that there is no requirement that the Commission grant an exemption and that no section of the code limits the authority of the Commission to require contemporaneous information about

COMMENT

The purpose of Chapter 809 is to enhance competition through the reduction of regulations that impede the attainment of full competition, and to encourage new telecommunications companies to enter the market.⁸ Increasingly, the telecommunications industry is being deregulated, which allows providers greater flexibility in meeting the demands of their subscribers.⁹ The only opposition to Chapter 809—from *Time Warner*—has been due to the use of the term “significant” when referring to market power.¹⁰

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current terms, conditions, and prices); *id.* § 495.7(i) (enacted by Chapter 809) (indicating that the provisions of Chapter 809 do not apply to commercial mobile services); *cf.* OHIO REV. CODE ANN. § 4927.03(D) (Anderson 1991) (indicating that, after notice and a hearing, the Commission may abrogate or modify any exemption if it finds that the conditions which led to the exemption no longer exist).

8. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 828, at 2 (May 17, 1995); *see id.* (citing to two bills which went through the legislature in 1994, AB 3606 and AB 3720, enacted in Chapters 1260 and 934, respectively, both of which exemplified the Legislature's desire to streamline regulatory requirements and to open telecommunications markets to competition); *cf.* S.D. CODIFIED LAWS ANN. § 49-31-3.2 (1993) (providing the Commission with the authority to waive or modify any rules or orders affecting telecommunications services if it finds that the service is fully competitive or an emerging competitive service); VT. STAT. ANN. tit. 30, § 227a(a) (Supp. 1994) (determining whether a competitive market exists by looking to see if any corporation has enough market power to set prices, quantity and quality of competitors, ease of entry into the market, and public protection). *See generally* Jonathan P. Hobbs, *Review of Selected 1994 California Legislation*, 26 PAC. L.J. 215, 698 (1995) (describing provisions of Assembly Bill 3606); Owen W. Dukelow, *Review of Selected 1994 California Legislation*, 26 PAC. L.J. 215, 700 (1995) (providing a description of Assembly Bill 3720).

9. Kunin, *supra* note 4, at 908; *see id.* at 933 (noting that the marketplace, not rate and service regulation, maintains reasonable nondiscriminatory rates and practices for nondominant carriers that lack market power); *see also* SENATE COMMITTEE ON ENERGY AND PUBLIC UTILITIES, COMMITTEE ANALYSIS OF AB 828, at 2 (July 11, 1995) (indicating that competition ensures reasonable rates and fair prices). *See generally* E. Ashton Johnston, *Regulatory Treatment of Mobile Services: The FCC Attempts to Create Regulatory Symmetry*, 2 COMM. L. CONSPECTUS 1 (1994) (providing the Federal Communication Commission determination that regulatory burdens should be lowered for nondominant carriers because they lack market power and the ability to set prices); Shefrin & Edwards, *supra* note 1, at 28 (giving a detailed analysis of the telecommunications services industry, including information regarding amount of investment, current regulatory conditions, major trends, and policy developments).

10. ASSEMBLY COMMITTEE ON UTILITIES AND COMMERCE, COMMITTEE ANALYSIS OF AB 828, at 2 (Apr. 17, 1995); *see* Letter from Peter Casciato, Law Offices of Peter A. Casciato, to Assemblymember Mickey Conroy, (Mar. 31, 1995) (copy on file with the *Pacific Law Journal*) (representing *Time Warner* and noting its opposition to AB 828); Telephone Interview with Robert Becker, Legislative Consultant to Assemblymember Mickey Conroy on AB 828 (notes on file with *Pacific Law Journal*) (indicating that *Time Warner* is opposing the bill because it does not feel the term “significant” is structurally defined by statute or decision); *id.* (asserting that the word “significant” is ambiguous and that using the word in the bill will lead to legions of lawyers arguing over the word and meaning).

Consumer Protection; telephone corporations—solicitation

Public Utilities Code § 2889.5 (amended).
AB 1465 (Morrissey); 1995 STAT. Ch. 664

Under existing law, the Public Utilities Commission has the authority to supervise and regulate every public utility in the state.¹ Chapter 664 mandates that specific requirements must be met before a telephone corporation can authorize a different telephone corporation to make any changes in a residential telephone subscriber's presubscribed long-distance carrier services.² For instance, if the subscriber is solicited by telephone or by some method other than by contact in person, by a telephone corporation or its independent representative, other than an employee of the telephone corporation, the corporation or its representative must satisfy certain criteria.³

Furthermore, under existing law, if the subscriber intends to make changes in his or her telephone corporation in person, the telephone corporation or its representative must comply with specific requirements.⁴ With the enactment of Chapter 664, if a residential subscriber or a business that has not signed an authorization notifies the telephone corporation within ninety days that he or she

1. CAL. PUB. UTIL. CODE § 701 (West 1975); *see id.* (authorizing the Commission to supervise and regulate every state public utility and to do all things, necessary and convenient in the exercise of such power and jurisdiction); *cf.* OHIO REV. CODE ANN. § 4905.37 (Anderson 1994) (granting the Ohio commission the discretion to change the rules and regulations of public utilities at its discretion).

2. CAL. PUB. UTIL. CODE § 2889.5(a) (amended by Chapter 664); *see id.* (enumerating prerequisites which must be completed before a telephone corporation or its representative may make any change or authorize a different telephone corporation to make any change in a residential telephone subscriber's presubscribed telephone until specific steps have been completed).

3. *Id.* § 2889.5(a)(1)(A) (amended by Chapter 664); *see id.* (requiring the subscriber to be thoroughly informed of the nature and extent of the service being offered); *id.* § 2889.5(a)(1)(B) (amended by Chapter 664) (listing the following methods by which the telephone corporation may verify the subscriber's decision to make a change in his or her corporation: (1) where a representative is acting on behalf of the corporation, a follow-up call by the telephone corporation or a representative who does not receive a commission for that sale, must be made to verify the subscriber's intent; (2) the subscriber must be mailed an information package seeking confirmation of the change in telephone corporation and describing the new service, as soon as possible; the corporation must then wait 14 days after mailing before making the change, and may do so only if the subscriber does not cancel the change; (3) the corporation must obtain the subscriber's signature on a separate document whose sole purpose is to fully explain the nature and extent of the action; and (4) the corporation must obtain the subscriber's authorization via electronic means that takes the information including the calling number and confirms the change to which the subscriber consented); *id.* § 2889.5(a)(1)(C) (amended by Chapter 664) (requiring the telephone corporation or its independent representative to retain a record of the verification of the sale for at least one year, and to make these records available to the subscriber or the Commission upon request).

4. *Id.* § 2889.5(a)(2) (amended by Chapter 664); *see id.* (enumerating the requirements as follows: (1) thoroughly inform the subscriber of the nature and extent of the service being offered; (2) specifically establish the subscriber's intent to make any change in his or her telephone corporation, and explain any associated charges; (3) obtain the subscriber's signature on a document which fully explains the nature and extent of the action; the signature shall indicate a full understanding of the relationship being established with the telephone corporation; and (4) furnish the subscriber with a copy of the signed document).

does not want to change telephone corporations, the subscriber will be switched back to his or her original long-distance carrier at the expense of the telephone corporation that initiated the change.⁵

Chapter 664 extends the application of these requirements to any telephone service of a telephone subscriber and does not limit the provisions to just presubscribed telephone corporations.⁶ In addition, Chapter 664 authorizes these provisions to be applicable to both residential and business subscribers.⁷

COMMENT

Chapter 664 was enacted as a direct response to incidents where thousands of telephone consumers have had their long-distance telephone services switched to another carrier without their knowledge or informed consent.⁸

Proponents of Chapter 664 argue that the enactment of the law will protect those minorities who do not speak English well, as well as those consumers who

5. *Id.* § 2889.5(e) (amended by Chapter 664); *see id.* § 2889.5(c) (amended by Chapter 664) (providing that when a written customer solicitation or other document contains a letter of agency authorizing a change in service provider in combination with other information including, but not limited to, inducements to subscribers to purchase service, the solicitation must include a separate document to explain the nature and extent of the action); *id.* § 2889.5(d) (amended by Chapter 664) (stating that if any part of a mailing to a prospective customer is in language other than English, any written authorization included in the mailing must be in the same language).

6. *Id.* § 2889.5(a) (amended by Chapter 664).

7. *Id.* § 2889.5(e) (amended by Chapter 664).

8. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1465, at 1 (June 1, 1995); *see id.* (using "slamming" as a term of art to describe the unauthorized switching of long distance telephone carriers); *id.* at 2 (stating that in California, Pacific Bell switches about 300,000 customers each month, and the customers who dispute those switches are between 6000 and 9000 subscribers, or about three percent); *see also FCC Plans New Rules for Phone Services Promos*, L.A. TIMES, June 13, 1995, at D2 (noting that the Chief of the Federal Communications Commission's (FCC) Common Carrier Bureau said that the FCC receives more than 700 complaints a month on the topic of unauthorized long-distance carrier switching, and further stating that these are the most common complaints); *id.* (stating that many people do not know that they are switching carriers by signing a contest form or making a charitable donation); Mark Landler, *Phone Giants Applauding F.C.C. Rules*, N.Y. TIMES, June 16, 1995, at D4 (citing a spokesman for the AT&T corporation who asserts "tens of thousands of their customers have our long-distance service switched every month without their authorization). *See generally* BLACK'S LAW DICTIONARY 610 (6th ed. 1990) (specifying that the FCC was created by the Communications Act of 1934 to regulate interstate and foreign communications by wire and radio in the public interest, and further stating that the scope of the regulatory powers includes radio and television broadcasting, telephone, telegraph, and cable television operation; two-way radio and radio operators; and satellite communication); *FCC Plans New Rules for Phone Services Promos*; *supra* at D2 (highlighting the deception inherent in long-distance carrier switching); David Flaum, *Telephones, Tenn. Hits Company Over Long-Distance Switching*, COM. APPEAL (Memphis), June 3, 1995, at 4B (explaining that phone customers typically report their phone service was switched after they received calls telling them they could win a prize by answering a question, and that normally the question was a simple one, such as asking for the last state admitted to the union); *id.* (stating further that the callers then asked for the customer's social security number, which is an essential source of information in order to switch carriers; however, the long-distance service was never mentioned).

are charged higher fees as a result of being switched without authorization.⁹

Opponents of Chapter 664 argue that it is an unnecessary piece of legislation because it essentially duplicates Federal Communications Commission rules which already require a comprehensive process to verify a subscriber's authorization to switch long-distance carriers.¹⁰ Furthermore, Chapter 664 is viewed as anti-competitive because it imposes an additional barrier before a consumer may switch long-distance carriers.¹¹ Finally, those who oppose Chapter 664 suggest that smaller sized long-distance carriers will suffer the most because their primary method of advertising is telemarketing.¹²

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9. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1465, at 2 (June 1, 1995); see *Landler, supra* note 8 (stating that the promotional brochures that are mailed to prospective customers contain descriptions of the prizes in the recipients' native language, but the agreement by the customers to switch long-distance carriers is written in English); see also ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1465, at 2 (June 1, 1995) (noting that the California Public Utilities Commission has ordered the withholding of all revenue collected by Sonic Communications for the purpose of restitution to customers who have been potentially harmed by Sonic's actions as a long-distance carrier).

10. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1465, at 2 (June 1, 1995); see Policies and Rules Concerning Unauthorized Changes of Consumer's Long Distance Carriers, 59 Fed. Reg. 63,750 (1994) (to be codified at 47 C.F.R. § 64) (defining "letter of agency" (LOA) as a document, signed by the customer, which states that a particular carrier has been selected as that customer's primary interexchange carrier); *id.* (stating further that the LOA must contain clear and unambiguous language that confirms specific information pertaining to the customer); see also *FCC Tightens Phone 'Slamming' Rules*, AUSTIN AM.-STATESMAN, June 16, 1995, at D7 (reporting that the FCC adopted rules to protect consumers from having their long-distance services switched without their knowledge or authorization, and that the long-distance companies are now required to provide consumers a clearly marked piece of paper, separate from other promotional material, to sign in order to authorize a change in service). See generally Telephone Interview with Wilbert E. Nixon, Jr., Enforcement Division, Common Carrier Bureau, Federal Communications Commission (June 27, 1995) (notes on file with the *Pacific Law Journal*) (indicating that the FCC adopted the restrictions on long-distance carrier switching to curtail unauthorized slamming on June 14, 1995, and the rule was to be in effect 60 days after it is published in the Federal Register); *id.* (stating that the only exception to the requirement of a separate piece of paper signed by the subscriber is a check written in a non-confusing manner that authorizes the service switch to another carrier).

11. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1465, at 2 (June 1, 1995). See generally Charles Boisseau, *Dialing for Dollars*, HOUSTON CHRON., May 14, 1995, at 2 (reporting that industry experts estimate the Big Three—AT&T, MCI and Sprint—combined to spend more than \$1 billion in advertising during 1994); *id.* at 3 (noting that many consumers view shopping for long-distance in the same light as calculating taxes or weeding the garden, and the chore is frustrating enough to make a caller want to "reach out and smack someone").

12. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1465, at 2 (June 1, 1995); see *id.* (arguing that small and medium size long-distance carriers cannot afford expensive media advertising and direct mail campaigns). See generally Greg McCracken, *Effects of Communications Advances Debated*, BILLINGS GAZETTE, Oct. 24, 1990, at C3 (indicating that telemarketing is a \$55 billion-a-year industry and is one of the fastest growing businesses in the United States); *id.* (adding that the only tools in telemarketing are an office and a telephone; thus the costs are low and there is no damage to the environment); *No More Slamming, FCC Cracks Down on Long-Distance Carriers*, SAN DIEGO UNION-TRIB., June 16, 1995, at B6 (asserting that the biggest offenders of unauthorized long-distance switching have been the several hundred smaller long-distance companies throughout the country that are often overzealous in their pursuit of customers); *id.* (stating that there are several hundred carriers vying for a slice of the \$60 billion-a-year industry, so it is almost inevitable that some competitive abuses will occur).