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What Manufacturers Need to Know About Express Warranties, Arbitration in California

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The Song-Beverly Consumer Warranty Act (the “Song Beverly Act,” Cal. Civ. Code §§ 1790 to 1795.8) was enacted in 1970 to provide additional protections to buyers of consumer goods beyond those provided in other states or by the Uniform Commercial Code (“UCC”). The Song-Beverly Act (1) requires all manufacturers who provide an express warranty to maintain sufficient California service/repair facilities (or designate/authorize independent facilities) reasonably close to all areas where its products are sold (so that consumers may obtain the benefit of that express warranty); (2) strictly limits the disclaimer of any implied warranties (such as the warranty of merchantability and the warranty of fitness for a particular purpose, which in many other states may be disclaimed); and (3) establishes remedies for consumers which may include monetary damages, equitable relief, civil penalties, and recovery of litigation costs, expenses, and attorneys’ fees.

In recent years, the number of claims filed against manufacturers for breach of express/implied warranties—so-called “Lemon Law” litigation—has soared. These numbers are even more dramatic in California due to the Song-Beverly Act and its fee-shifting provisions (which creative plaintiffs’ attorneys may use as leverage against manufacturers). For example, in the auto industry—which comprises the bulk of Song-Beverly Act claims—in 2022 nearly 15,000 warranty complaints were filed in California, with those numbers increasing to date in 2023.

This has occurred even though cars and trucks have generally become more reliable and dependable.[1] But the Song-Beverly Act extends well beyond just cars and trucks; it applies to any product that is used, bought, or leased for personal, family, or household purposes, ranging from cars/trucks, recreational vehicles, and boats to consumer electronics and household appliances; it excludes only

clothing and consumables (i.e., food and drink, cosmetics, cleaning products, etc.). The Song-Beverly Act has become particularly challenging for manufacturers—either those located in California or those who sell to consumers in California—and two recent issues may make things even more challenging.

First, a July 1, 2023 amendment will affect how manufacturers must track the starting date of express warranties (date of delivery vs. date of sale, the prior standard). Second, while recently manufacturers have had some success in enforcing arbitration provisions when they were non-signatories to the consumer sale contract, the California Supreme Court appears poised to perhaps put a stop that manufacturers' ability to do so.

July 1, 2023 Song-Beverly Act Amendment: Express Warranty Must Begin on Date of Delivery, Not on Date of Sale

Effective July 1, 2023, a recent amendment to the Song-Beverly Act changed the starting date for warranties provided by manufacturers due to COVID-era supply chain complications which led to often-significant delivery delays. Previously, warranties would begin on the date of sale, even if delivery occurred later (or, during the pandemic, much later). Now, for products sold in California (the first state in the country to impose such a global restriction on all consumer goods), warranties must begin on the date of delivery (if that date is later than the date of sale).

This adds yet another level of complexity for manufacturers, who now must (1) review the language in their warranties to ensure they comply with the amendment; (2) properly track sale/delivery dates (if they are different), which is difficult for manufacturers who sell through distributors/retailers; and (3) be sure to communicate the proper term of the warranty period to the customer. Manufacturers will also need to determine whether to apply this amended warranty period (for consistency, if nothing else) nationally, or only in California, and decide if/how it must notify any impacted consumers.

As with all aspects of Song-Beverly Act claims, any failure to comply will likely be met with lawsuits. Manufacturers will want to address

these issues promptly so that what may seem a minor paperwork/documentation issue does not become litigation subject to the imposition of civil penalties and attorneys' fees.

Non-Signatory Manufacturers' Enforcement of Mandatory Arbitration Provisions May Be in Jeopardy

Given the Song-Beverly Act's fee-shifting provisions (and the abuse of those provisions by plaintiffs' attorneys), manufacturers may seek to enforce binding arbitration provisions in the limited express warranty. Depending of course on the particulars of each case, arbitration can often be quicker and more limited in scope than litigation, which may help decrease the exorbitant later demands for attorneys' fees. The problem, however, was that although manufacturers may provide the warranty that contains the arbitration provision, typically they are not signatories to the sale contract between the consumer and retailer/dealer.

This exact issue was deliberated in *Felisilda v. FCA US LLC*, 53 Cal. App. 5th 486, 496, 266 Cal. Rptr. 3d 640, 647 (2020), where the California Court of Appeals (Third District) decided that FCA (the manufacturer) could enforce the arbitration provision even though it did not sign the vehicle sale contract (which was between the buyer and the dealer). Under the facts of the case, Felisilda's breach of warranty (and other) claims were "founded on or intimately connected with the sales contract." FCA could enforce the arbitration agreement even though it didn't sign that contract. The Court held that under the theory of equitable estoppel, the plaintiff could not seek to enforce certain terms of the warranty while simultaneously avoiding those he did not like (i.e., the arbitration provision).

Since *Felisilda* in 2020, California courts have been split on whether it was correctly decided. An example of this is *Kielar v. Superior Ct. of Placer Cnty.*, 94 Cal. App. 5th 614, 312 Cal. Rptr. 3d 426 (2023), review filed (Sept. 21, 2023). The trial court, following *Felisilda*, granted Hyundai's motion to compel arbitration of Kielar's Song-Beverly Act and fraudulent inducement claims arising from alleged vehicle defects.

Upon review, the California Court of Appeals joined other recent decisions that disagreed with *Felisilda* and held that the trial court erred in ordering arbitration. *Felisilda* and *Kielar* were both decided by the Third District of the California Court of Appeals, albeit by different panels; so while the same court essentially abandoned its own prior position, *Felisilda* technically remains good law (at least, for now). Recently, the California Supreme Court granted review on *Ford Motor Warranty Cases* (2023) 89 Cal.App.5th 1324, 1333–1336, 306 Cal.Rptr.3d 611, review granted July 19, 2023, S279969 (denying the manufacturers’ attempts to force arbitration) and is expected to decide the issue.

Manufacturers should know that while it is possible to enforce a mandatory arbitration provision in the contract between the consumer and retailer, courts do not always agree on whether the manufacturer can enforce that provision. It is quite possible that the California Supreme Court will affirm decisions denying manufacturers’ ability to force arbitration in such a situation.

Conclusion

The recent amendment to the Song–Beverly Act with its changes to the express warranty starting date, as well as California courts’ recent decisions restricting manufacturers’ ability to enforce arbitration provisions in their warranties, continue to shift the playing field. Manufacturers should continue to monitor the situation closely, ensure that their practices are consistent with the Song–Beverly Act changes, and understand the Court rulings to adapt responses to the ever–growing number of Song–Beverly Act lawsuits being filed today.

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[1] [2021 U.S. Vehicle Dependability Study \(VDS\) | J.D. Power \(jdpower.com\)](#).

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