HAWKINS PARNELL
Hawkins Parnell & Young, LLP

445 S. Figueroa, Suite 3200
Los Angeles, CA 90071

Direct: 213-486-8035
Email: bschirm@hpylaw.com

May 5, 2020

Presiding Justice Lui
Associate Justice Ashmann-Gerst
Associate Justice Chavez
Court of Appeal
Second Appellate District – Division Two
300 S. Spring Street
Second Floor, North Tower
Los Angeles, California 90013

Re: ***Waller v. FCA US, LLC***
Court of Appeal Case No. B292524
Opinion filed April 16, 2020

Dear Presiding Justice Lui, Associate Justice Ashmann-Gerst and Associate Justice Chavez:

Pursuant to *California Rules of Court*, rule 8.1120(a), FCA US, LLC respectfully requests this Court to publish its opinion issued on April 16, 2020 in *Waller v. FCA, LLC. Et al.*, which addresses a recurring issue with expert testimony in the expanding number of lemon law cases pending in trial courts throughout the state. Additionally, the Court's opinion is instructive in other expert-reliant cases.

FCA US, LLC (commonly known as Fiat Chrysler Automobiles, hereinafter "FCA") is one of the world's largest automobile manufacturers. FCA manufactures vehicles under the brand names Chrysler, Dodge, Jeep, Ram, and Fiat among others worldwide. FCA distributes its vehicles for sale throughout the United States, including California.

FCA, like every automobile manufacturer, has seen an exponential increase in its consumer "lemon law" litigation docket based on California's Song-Beverly Consumer Warranty Act in the past five years. While lemon law claims have long been a presence in California, the clear majority were previously resolved without litigation through the payment of general statutory remedies. However, more recently, offers for reimbursement of the full purchase price of the vehicle and more have been rejected in favor of a push to trials. Additionally, these claims

are now regularly being pursued with an additional fraud/concealment-based causes of action in which issues regarding causation and expert testimony are tantamount.

Lemon law cases have become a significant part of the superior court dockets in cases throughout California, especially in Los Angeles. As one judge has explained in early 2019, "lunchroom wisdom" shows that close to half of the cases on the docket of individual calendar judges in Los Angeles Superior Court's Mosk courthouse involve a fee-shifting statute, with 30-35 percent consisting of employment cases, and "another 10 percent are motor vehicle warranty claims brought under the Song-Beverly Act."……"Assuming IC judges at the Mosk Courthouse carry an average 500 case inventory . . . the average judge has in his/her inventory ...50 vehicle warranty cases."[1]

Publication of the Court's decision in *Waller* would give California trial courts and litigants much needed instruction and guidance regarding the admissibility of expert testimony under *Sargon Enterprises, Inc. v. University of Southern Cal.* (2012) 55 Cal.4th 747, 700-771 (Evidence Code section 801 prohibits an expert witness from opining on matters based on speculation, conjecture, or devoid of foundation) for several reasons.

First, and most importantly, the opinion "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions." *Cal. Rules of Court*, rule 8.1105(c)(2). The Court's decision affirms the trial court's exclusion of expert testimony that a component part was only a possible, not probable, cause of a claimed failure and product defect and thus was too speculative to assist the trier of fact. *Typed opn.* 2, 9-10. While the subject matter of the *Waller* matter was the fuel pump relay on a 2013 Dodge Durango, the same scenario frequently arises in lemon law cases throughout California arising from alleged vehicle defects. Experts in the litigation have repeatedly attempted to offer causation opinions that follow the same speculative process as the one that played out in *Waller*. Despite the prevalence of such improper opinions, FCA is not aware of a single published opinion in the lemon law case law that addresses the exclusion or limitation of expert testimony under *Sargon*. On this basis alone, and given the prevalence of such litigation in California, the trial courts need guidance on both what is and what is not acceptable expert testimony in lemon law litigation.

Second, the Court's decision also makes clear "circular reasoning" is not a proper basis for an admissible expert opinion. *Typed opn.* 2, 12. In the *Waller* matter, this Court reasoned the opinions of the expert (Mr. Micale) were inadmissible because the only evidence he identified supporting his opinion that the new relay was failing and causing a loss of power was the loss of power itself. The Court reasoned this type of circular argument is not the proper basis for an

[1] Richard Fruin, 2019 Motion Statistics for an Individual Calendar Civil Court (Jan. 29, 2020) Daily Journal, available at https://www.dailyjournal.com/articles/356060-2019-motion-statistics-for-an-individual-calendar-civil-court.

expert opinion. Lemon law cases are replete with similar circular arguments. Experts, and especially Mr. Micale, repeatedly opine the cause of an issue is evidenced simply by the existence of the condition. For example:

- In one recent case, Mr. Micale was permitted to testify for four days about issues with a vehicle he attributed to the vehicle's software. Mr. Micale offered these opinions to the jury without having even seen the coding for the software or having performed any tests of the software. Mr. Micale simply opined the software of the vehicle must be bad because of the symptoms the vehicle exhibited. Additionally, Mr. Micale does not have any advanced degrees in software development or testing. Due to the absence of clear guidance on the admissibility of expert testimony in the lemon law arena, this testimony was permitted.

- Mr. Micale has also repeatedly offered opinions that the cause of a vehicle's alleged loss of power is the engine overheating because the radiator fan is not operating properly. Mr. Micale's opinion is not based on any evidence the radiator fan is malfunctioning, other than the loss of power. He has nonetheless offered this opinion despite evidence the vehicles exhibited no other signs of overheating, including any warning indicator lights or audible chimes, coolant leaks, or steam from under the hood.

- Mr. Micale regularly opines that a vehicle is defective because it is not recording Diagnostic Trouble Codes (DTCs are codes used by technicians to diagnosis an issue with a vehicle). As a result, a DTC is never found and according to Mr. Micale the vehicle therefore must be defective. No evidence supports his opinion on this issue except the absence of a DTC. Mr. Micale adds a further level of speculation by opining this issue is intermittent. He dismisses even the possibility that in fact nothing is actually wrong with the vehicle.

Mr. Micale's habit of offering unsubstantiated and improper expert opinions is not limited to cases against FCA. He routinely testifies he has performed no testing and has not developed any testing protocol to determine the validity of his theories. For example, in a Ford Motor Company case[2]:

- Mr. Micale offered an opinion regarding the risk of fire cause by an oil leak. Mr. Micale opined there was a risk of fire to the plaintiff's vehicle even though he had never inspected or even seen the vehicle. He also offered this opinion despite being

[2] Cousyn v. Ford Motor Company, USDC Case No. 5:17-CV-2051-DOC; Deposition of Anthony Micale, May 15, 2019.

> unable to identify the auto-ignition temperature of oil. He also could not recall the skin/surface temperature of any of parts the oil may have encountered and admitted he did not have any test data for this information. Mr. Micale had no evidence the subject vehicle had oil on any of the parts he identified could be the catalyst for a fire, and he admitted he had never done any testing to confirm his theory that this type of oil leak could lead to a fire. He also testified he had never conducted a single fire investigation involving the subject model line. Mr. Micale opined that, despite his lack of testing and evidence, the potential for fire must be presumed until proven otherwise.

This type of "circular reasoning" improperly requires defendants to accomplish the impossible - proving the existence of a negative. While *Sargon* does discuss this type of improper argument, the publication of this Court's opinion would give clear guidance to trial courts and litigants regarding the proper framework for expert testimony in a lemon law case, allowing them to properly value such cases at an earlier stage. and leading to an earlier resolution short of trial.

Third, the Court's opinion would provide useful guidance in lemon law matters that also contain a fraud cause of action. As in *Waller*, there has been an increase in the number of lemon cases that include a fraud-concealment cause of action and a resulting claim for punitive damages. Unsupported expert testimony based on "circular reasoning" like Mr. Micale's opinions regularly provide the underlying basis for the added fraud-concealment causes of action. Understandably, a fraud cause of action further complicates the ability to accurately value cases and, thus, a disproportionate number of these cases proceed to trial and consume court resources.

The *Waller* opinion is novel and distinct from other currently published appellate decisions, as the Court undertook a thorough and complete analysis of the necessary requirements to establish causation through expert testimony. The Court not only affirmed that speculative opinions are not proper, but also explained how circular arguments and general causation opinions cannot be extrapolated to specific causation and thus are improper. This guidance is invaluable and fills the void in the current case law that will assist consumers, the public, and trial courts when assessing lemon law cases. Such an analysis and guidance are a matter of public interest. *Cal. Rules of Court*, rule 8.1105(c)(6).

FCA respectfully requests that this Court order publication of the *Waller* decision as it meets the standards of the *California Rules of Court* due to the overarching public policy issues prevalent in the opinion, as well as the further guidance the trial courts need to analyze proper and admissible expert testimony.

Very truly yours,

Barry R. Schirm
Hawkins Parnell & Young, LLP

BRS:sm
Enclosure

cc: All Counsel of Record (via TrueFiling)