

## PRODUCT LIABILITY

DECEMBER

## ALERT

2016

EXTRA TERMS AND UNRESPONSIVENESS MAY JEOPARDIZE  
YOUR LEMON LAW SETTLEMENT OFFER*By Jeffrey P. Wilson*

On October 21, 2016, the California Court of Appeal for the Fourth Appellate District announced the decision of *Goglin v. BMW of North America, LLC, et al.* (Oct. 21, 2016, No. D068442) \_\_\_ Cal. App. 5th\_\_\_ [2016 Cal. App. LEXIS 887, at \*1].

The *Goglin* court affirmed a judgment awarding a plaintiff over \$185,000 in attorney fees and costs for successfully settling her claims under the California Song-Beverly Consumer Warranty Act ("Song Beverly Act") (Civ. Code, § 1790 et seq.) and other consumer protection statutes against a manufacturer (BMW North America) and a local dealership (BMW San Diego).

The main issue in this case involved whether a vehicle buyer was entitled to attorney fees and costs under the Song-Beverly Act after refusing to accept a local dealership's pre-litigation settlement offer before she filed her complaint. The plaintiff had rejected the offer on the grounds that it required her to agree to a broad release of claims and a confidentiality clause.

After litigation commenced, the parties settled the case through mediation (defendants agreed to repurchase the subject vehicle) and agreed to have the attorney fees determined by a motion to the court. Plaintiff filed a motion for award of \$200,249 in attorney fees and costs. The lower court granted plaintiff's motion in part, but reduced the hourly rate for her counsel from \$625 to \$575 because her counsel had previously

represented as part of an opposition to a motion for protective order that his hourly rate was \$575. The lower court awarded plaintiff attorney fees and costs for a total of \$185,214.19. Defendants appealed.

**The Facts**

Before filing a complaint, plaintiff sent both defendants a letter asserting that defendants had violated the Consumers Legal Remedies Act ("CLRA") (Civ. Code, § 1750 et seq.) in multiple respects. BMW San Diego responded to plaintiff within a month of receiving her letter, offering to resolve the matter by repurchasing the vehicle for all costs incurred by plaintiff, including reimbursement of her reasonable attorney fees. Among its terms, the proposed settlement and release agreement included a waiver of the provisions of Civil Code § 1542, as well as a confidentiality and non-disparagement clause.

Plaintiff responded with a letter indicating she would accept the offer to the extent it reimbursed her in full for the vehicle without offsets. She declined to sign the proposed settlement and release agreement "with its contingencies, waivers, denial of liability, and confidentiality requirements." There was no indication in the record that either defendant responded to this letter from plaintiff. Plaintiff then filed a complaint that asserted multiple causes of action, including a

prayer for attorney fees solely under the Song-Beverly Act.

Several months after the litigation commenced, defendants made another settlement offer to plaintiff. This second settlement offer included the same conditions, even though they knew plaintiff objected to the conditions. Plaintiff's counsel unambiguously communicated in a letter that plaintiff was unwilling to agree to a general release or a confidentiality clause. Neither defendant ever responded to this second letter.

### **The Appeal**

On appeal, defendants asserted that plaintiff could have avoided litigation and settled the matter earlier had she negotiated at the outset. They argued that plaintiff should not be entitled to any attorney fees or costs because she unreasonably refused to accept BMW San Diego's pre-litigation settlement offer. Plaintiff countered that she repeatedly and consistently objected to several extraneous provisions contained in defendants' pre-litigation settlement offer, including requiring plaintiff to agree to a broad release of claims and a confidentiality clause.

In siding with the plaintiff, the *Goglin* Court held that a vehicle buyer was entitled to attorney fees and costs under the Song-Beverly Act because she had not unreasonably refused to accept the local dealer's settlement offer before she filed her complaint. The Court emphasized that the pre-litigation settlement offer contained unfavorable extraneous terms, including a requirement that the buyer agree to a broad release of claims and a confidentiality clause - which the buyer repeatedly and consistently objected to - and which were not included in the parties' final settlement agreement.

The Song-Beverly Act prohibits an automobile manufacturer or dealer from conditioning reacquisition of a vehicle on the buyer's agreement not to disclose the vehicle's problems or the nonfinancial terms of the reacquisition. (Civ. Code, § 1793.26(a)). Thus, the requirement for plaintiff to agree to a confidentiality provision

was unlawful as to her Song-Beverly claims. (*McKenzie v. Ford Motor Co.* (2015) 238 Cal.App.4th 695, 700.)

### **Summary**

There are two items of caution for manufacturers to take away from this case. First, be careful with the terms contained in any pre-litigation settlement offers made to a plaintiff. The court may rule that it is not unreasonable for a plaintiff to object to extraneous terms of a pre-litigation settlement offer such as a general release or confidentiality clause.

Second, if a plaintiff rejects your pre-litigation settlement offer in writing, you should follow up with a response to any such letters from the plaintiff. The *Goglin* court repeatedly emphasized the defendants' failure to respond to either of plaintiff's rejection letters to reject their argument that the failure to resolve the case earlier was attributable solely to the plaintiff's obstinacy or a desire on her counsel's part to generate fees. Perhaps if the defendants had responded to either of plaintiff's letters to continue the effort at settlement negotiation, it would have helped to support their argument that the plaintiff and/or her counsel were to blame for a failure to settle before litigation.

The best course of action for manufacturers to employ in trying to settle Lemon Law cases early remains the same: Promptly serving a reasonable and well-calculated CCP 998 offer on a plaintiff as soon as possible in the litigation. This forces the plaintiff and his/her counsel to make a judgment call about whether spending further resources to litigate the matter is worth it. ♦

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