IN THE SUPREME COURT OF FLORIDA

CHRYSLER CORPORATION,

Petitioner,

vs.

SPIRO PITSIRELOS,

Respondent.

Case Number 90,533
Circuit Court Case No. 90-3084-CA-17
Fourth DCA Case Nos. 96-00514 and 96-00215

INITIAL BRIEF OF AMICI CURIAE

THE AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION
AND
THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS

GEORGE N. MEROS, JR.
Florida Bar No. 0263321
MARY W. CHAISSON
Florida Bar No. 948683
RUMBERGER, KIRK & CALDWELL, P.A.
Post Office Box 10507
Tallahassee, Florida 32302

CERTIFICATE OF MEMBERSHIP OF AMICI CURIAE

Alphabetical List of Members of the American Automobile Manufacturers Association:

Chrysler Corporation

Ford Motor Company

General Motors Corporation

Alphabetical List of Members of the Association of International Automobile Manufacturers:

American Honda Motor Co., Inc.

American Suzuki Motor Corporation

BMW of North America, Inc.

Fiat Auto U.S.A., Inc.

Hyundai Motor America

Isuzu Motors America, Inc.

Kia Motors America, Inc.

Land Rover North America, Inc.

Mazda Motor of America, Inc.

Mercedes-Benz of North America, Inc.

Mitsubishi Motor Sales of America, Inc.

Nissan North America, Inc.

Porsche Cars North America, Inc.

Rolls-Royce Motor Cars Inc.

Subaru of America, Inc.

Toyota Motors Sales, U.S.A., Inc.

Volkswagen of America, Inc.

Volvo Group North America Corporation

TABLE OF CONTENTS

CERTIFICATE OF MEMBERSHIP OF AMICI CURIAE i

TABLE OF CONTENTS ii

TABLE OF CITATIONS iii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND OF THE FACTS 3

SUMMARY OF THE ARGUMENT 4

ARGUMENT 6

I. THE COURTS BELOW ERRED IN PLACING THE BURDEN OF PROOF ON CHRYSLER. 6

II. INTERPRETING THE STATUTE TO PLACE THE BURDEN OF PROOF ON THE MANUFACTURER RENDERS THE STATUTE INVALID AS VIOLATIVE OF DUE PROCESS. 9

III. THE $25 PER DAY CONTINUING DAMAGE PROVISION UNCONSTITUTIONALLY BURDENS A MANUFACTURER'S RIGHT OF ACCESS TO FLORIDA'S COURTS. . . . 10

IV. THE ACT DID NOT CREATE A NEW CAUSE OF ACTION. 18

CONCLUSION 21

CERTIFICATE OF SERVICE 22

TABLE OF CITATIONS

CASES **Page**

Ady v. American Honda Fin. Corp., 675 So. 2d 577 (Fla. 1996) 8

Aguiar v. Ford Motor Co., 683 So. 2d 1158 (Fla.3d DCA 1996) 6

Airtech Serv., Inc. v. McDonald Constr. Co., 150 So. 2d 465 (Fla. 3d DCA 1963) 16

Alamo Rent-A-Car, Inc. v. Mancusi, 632 So. 2d 1352 (Fla. 1994) 17

BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589 (1993) 12

Campbell v. Government Emp. Ins. Co., 306 So. 2d 525 (Fla. 1974) 17

Conner v. Alderman, 159 So. 2d 890 (Fla. 2d DCA 1964) 8

Dade County v. Eastern Air Lines, Inc., 207 So. 2d 13 (Fla. 3d DCA), opinion adopted, 212 So. 2d 7 (Fla. 1968) 7

Dr. P. Phillips & Son, Inc. v. Kilgore, 152 Fla. 578, 12 So. 2d 465 (1943) 17

Florida State Racing Comm'n v. Bourquardez, 42 So. 2d 87 (Fla. 1949) 6

Ford Motor Co. v. Barrett, 800 P.2d 367 (Wash. 1990) 16

G.B.B. Investments, Inc. v. Hinterkopf, 343 So. 2d 899 (Fla. 3d DCA 1977) 13

Hanna v. Martin, 49 So. 2d 585 (Fla. 1950) 16

Harris v. Beneficial Fin., 338 So. 2d 196 (Fla. 1976) 17

Heard v. Mathis, 344 So. 2d 651 (Fla. 1st DCA 1977) 8

Hoskins v. Jackson Grain Co., 63 So. 2d 514 (Fla. 1953) 18

Kluger v. White,
281 So. 2d 1 (Fla. 1973) 14

Lasky v. State Farm Ins. Co.,
296 So. 2d 9 (Fla. 1974) 13

Manheim v. Ford Motor Co.,
201 So. 2d 440 (Fla. 1967) 18

Mason v. Porsche Cars of N. Am.,
621 So. 2d 719 (Fla. 5th DCA 1993) 6

McLeod v. Continental Ins. Co.,
591 So. 2d 621 (Fla. 1992) 16

North Am. Van Lines v. Roper,
429 So. 2d 750 (Fla. 1st DCA 1983) 16

Ocasio v. Bureau of Crimes Comp. Div'n of Workers' Comp.,
408 So. 2d 751 (Fla. 3d DCA 1982) 6

Ovadia v. CRH Props.,
586 So. 2d 440 (Fla. 3d DCA 1991),
aff'd, 610 So. 2d 418 (Fla. 1992) 13

Psychiatric Assocs. v. Siegel,
610 So. 2d 419 (Fla. 1992) 13-15

Rehurek v. Chrysler Credit Corp.,
262 So. 2d 452 (Fla. 2d DCA 1972) 18

Smith v. Department of Ins.,
507 So. 2d 1080 (Fla. 1987) 14

State v. Egan, 287 So. 2d 1 (Fla. 1973) 7

Tampa v. Thatcher Glass Corp.,
445 So. 2d 578 (Fla. 1984) 6

Travelers Indem. Co. v. Parkman,
300 So. 2d 284 (Fla. 4th DCA 1974) 16

TXO Prod. Corp. v. Alliance Resources Corp.,
509 U.S. 443 (1993) 12

Waja Bakery, Inc. v. Carolina Freight Corp.,
177 So. 2d 544 (Fla. 3d DCA 1965) 16

FLORIDA STATUTES

Chapter 681 . . . . 1, 2, 4

Section 681.101 19

Section 681.102(16) 19

Section 681.1095(1) 9

Section 681.1095(3) 9

Section 681.1095(8) 9

Section 681.1095(9) 9, 15

Section 681.1095(12) 4, 6

Section 681.1095(13) 5, 9-12, 15, 17

Section 681.112 11

Section 681.112(1) 11

CONSTITUTION OF THE STATE OF FLORIDA

Article I, Section 21 . . . . 13, 18-20

MISCELLANEOUS

Black's Law Dictionary 6, 11

PRELIMINARY STATEMENT

Members of the American Automobile Manufacturers Association (the AAMA) and members of the Association of International Automobile Manufacturers (the AIAM) are adversely affected by the provisions of Florida's Motor Vehicle Warranty Enforcement Act being challenged in this brief. The AAMA's members manufacture over eighty percent of the motor vehicles manufactured in the United States. The AIAM is comprised of manufacturers, distributors, and importers of motor vehicles manufactured in the United States and abroad. Together, the members of the two Associations (hereinafter referred to as "manufacturers") market ninety-nine percent of the motor vehicles sold in Florida. They market their products in Florida to Florida consumers and are subject to the Act's provisions and its penalties.

Each member, as a price of selling its products in Florida, must submit to binding arbitration before the Florida New Motor Vehicle Arbitration Board, if a purchaser of one of its products chooses to pursue that avenue. Ch. 681, Fla. Stat. To obtain judicial review of an unfavorable Arbitration Board decision, each member must risk imposition of a $25.00 per day continuing damage award on top of a pecuniary loss award. The continuing damage award alone can be several times more than the cost of the product in each particular case. Under current interpretations, it must also shoulder the burden of proving a negative.

The AAMA and the AIAM are interested in procedures and laws that are fair to manufacturers and consumers alike and that

provide some degree of certainty to their transactions in Florida. Because the provisions of the Motor Vehicle Warranty Enforcement Act (the Act), Chapter 681, Florida Statutes, challenged in this brief will be and have been used against the members to their detriment, the Associations have requested permission to appear as amici curiae and to file this brief on behalf of their members and in support of Chrysler's position.

STATEMENT OF THE CASE AND OF THE FACTS

Amici curiae, the AAMA and AIAM, adopt the Statement of the Case and the Statement of the Facts in the Brief of Petitioner CHRYSLER CORPORATION.

SUMMARY OF THE ARGUMENT

Several provisions of Florida's Motor Vehicle Warranty Enforcement Act (the Act), Chapter 681, Florida Statutes, are unconstitutional under the Constitution of the State of Florida and the United States Constitution and should be invalidated.

Subsection 12 of section 681.1095 is unconstitutional as it has been interpreted and applied by the District Courts of Appeal. The Fourth District Court of Appeal, in the decision which is the subject of this petition, and other district courts, have interpreted the section so as to place the burden of proof upon the manufacturer, rather than on the consumer, in judicial proceedings to determine whether the consumer's vehicle conforms to the manufacturer's warranties. The courts have required the manufacturer to prove that a nonconformity in the vehicle does not exist, even though the statute expressly mandates a "trial de novo" in the circuit court.

This interpretation, which conflicts with the most firmly entrenched principles of statutory construction, renders the statute unconstitutional. Such a result clothes the Arbitration Board's decision with precedential value, an unwarranted result. The Board's proceedings are and are intended to be informal, without the procedural protections afforded by the rules of evidence and civil procedure available to protect the parties in court proceedings. Requiring the manufacturer to shoulder the burden of proof on the basis of the decision of such an informal body violates the Constitutions. Additionally, requiring the

manufacturer to shoulder the burden of proof, which burden requires the manufacturer to prove a negative, in conjunction with the admissibility of the Board's decision in favor of the consumer under the statute, also violates the Constitutions.

Subsection 13 of section 681.1095 violates a manufacturer's constitutional right of access to Florida's courts. The subsection unnecessarily restricts a manufacturer's access by exposing a manufacturer to a $25.00 per day continuing damage judgment as a cost of seeking judicial review. The provision requires the manufacturer to pay the consumer these damages on top of complete compensatory damages, attorney's fees, and costs, without any proof of loss or inconvenience to the consumer or bad faith of the manufacturer. Because of the long periods of time which court actions can take (this case is a perfect example), a manufacturer's exposure under the provision can amount to a substantial sum of money, many times more than the original cost of the vehicle at issue. Thus, the $25.00 per day continuing damage award operates as a punitive damage award against the manufacturer. It punishes the manufacturer for seeking judicial intervention and review and deters manufacturers from seeking it, even where there are meritorious grounds for such intervention and review.

ARGUMENT

Amici curiae hereby adopt Chrysler's arguments with regard to the constitutionality of the provisions of Florida's Motor Vehicle Warranty Enforcement Act (the Act). As a complement to those arguments, amici present the following argument.

I. THE COURTS BELOW ERRED IN PLACING THE BURDEN OF PROOF ON CHRYSLER.

The trial court forced Chrysler, the defendant, to shoulder the burden of proof at trial despite the Act's express provision that judicial review of an Arbitration Board's decision is by "trial de novo." § 681.1095(12). This was error, as was the Fourth District's affirmation of that decision.[1]

The legal term "trial de novo" has a clear, unmistakable meaning. Black's Law Dictionary defines it as "[a] new trial or retrial had in which the whole case is retried as if no trial whatever had been had in the first instance." Id. at 1349 (5th ed. 1979). The Legislature is presumed to know and intend words to have their plain and ordinary meaning. Florida State Racing Comm'n v. Bourquardez, 42 So. 2d 87 (Fla. 1949). Technical legal words are deemed to have been statutorily used as they are legally defined. Tampa v. Thatcher Glass Corp., 445 So. 2d 578 (Fla. 1984); Ocasio v. Bureau of Crimes Comp. Div'n of Workers' Comp., 408 So. 2d 751 (Fla. 3d DCA 1982). The Legislature, by using the term "trial de novo" clearly intended for the

[1]Other district courts have made the same mistake. See Aguiar v. Ford Motor Co., 683 So. 2d 1158 (Fla.3d DCA 1996); Mason v. Porsche Cars of N. Am., 621 So. 2d 719 (Fla. 5th DCA 1993).

proceedings to be a completely new trial of the issue--whether the vehicle has a nonconformity. The "whole case is retried as if no trial had been had in the first instance"--meaning the burden of proof stays where it was, with the consumer. The Legislature's use of the word "appeal" in subsection 12 does not change the fact that the Legislature intended for an entirely new trial to be held, as the term "trial de novo" includes a retrial as well as an initial trial.

Furthermore, interpreting the provision to shift the burden of proof from the plaintiff/consumer to the defendant/ manufacturer renders the provision unconstitutional. When courts are called upon to interpret statutes, their interpretation should be in accord with the plain meaning of the statute's words unless such an interpretation is unreasonable or would result in the statute being unconstitutional. Dade County v. Eastern Air Lines, Inc., 207 So. 2d 13 (Fla. 3d DCA), opinion adopted, 212 So. 2d 7 (Fla. 1968). The courts' refusal to give meaning and substance to the words "trial de novo" makes this provision of the Act unconstitutional.

The rules of statutory construction mandate an interpretation placing the burden of proof on the plaintiff/consumer. Initially, no statute is to be construed to alter the common law farther than its words and circumstances import. State v. Egan, 287 So. 2d 1 (Fla. 1973). Courts will infer that a statute in derogation of the common law was not intended to make any alteration other than what was specified and

plainly pronounced in clear, unequivocal terms. Ady v. American Honda Fin. Corp., 675 So. 2d 577 (Fla. 1996). Where a particular remedy is conferred by statute, it can be invoked only to the extent and in a manner prescribed by the statute. Heard v. Mathis, 344 So. 2d 651 (Fla. 1st DCA 1977). Statutes providing for summary remedies are strictly construed, and nothing is to be presumed that is not given by the statute. Conner v. Alderman, 159 So. 2d 890 (Fla. 2d DCA 1964).

The statute here is in derogation of the common law. Whereas before the enactment of the Act, a consumer was limited to breach of contract and warranty claims against the manufacturer, the Act provided the consumer with a summary remedy--an informal hearing before an appointed board.

The admissibility into evidence of the Arbitration Board's decision in the trial de novo in the circuit court is further proof that the Legislature intended for the plaintiff, the consumer, to shoulder the burden of proof in the circuit court. Indeed, the fact that the Board's decision is admissible as evidence of a nonconformity justifies the extra procedural step of the arbitration prior to court action. It would be inherently unfair to give the consumer the benefit of evidence of the Board's decision in his favor and to require the manufacturer to shoulder the burden of proof, which in effect is a burden to prove a negative--that a nonconformity does not exist.

Placing the burden of proof on the manufacturer is unnecessary to discourage frivolous appeals. The Act makes the

manufacturer liable for the consumer's attorney's fees and costs if it loses at trial, an amount likely to substantially exceed the cost of the vehicle at issue, which is more than enough to discourage frivolous appeals. § 681.1095(13) Moreover, the court is required to double and is empowered to triple the total amount of the award if it finds that the manufacturer acted in bad faith in seeking the court's intervention. § 681.1095(13).

The courts below erred in placing the burden of proof on Chrysler. The mandate and judgment should be vacated and Chrysler should be granted a new trial in which Plaintiff will have the burden of proving his vehicle does not conform to the manufacturer's warranty.

II. INTERPRETING THE STATUTE TO PLACE THE BURDEN OF PROOF ON THE MANUFACTURER RENDERS THE STATUTE INVALID AS VIOLATIVE OF DUE PROCESS.

The trial and district courts' interpretation of the statute, if correct, renders the statute unconstitutional as violative of due process. Proceedings before the Arbitration Board are informal. The rules of civil procedure and the rules of evidence do not apply. Witnesses may testify to hearsay statements and offer opinions. The arbitrators, who are appointed by the Attorney General, are not required to have any legal experience or training. § 681.1095(1) & (3). There is no jury. § 681.1095(8) & (9). Despite these procedural inadequacies, Plaintiff's (and the lower courts') interpretation would imbue the Board's decision with the same precedential value as a court proceeding. The manufacturer, in effect, would be

deprived of its right to a full and fair trial of the vehicle's alleged nonconformities with the procedural protections of the rules of evidence and civil procedure, a trial in which the plaintiff is required to prove the existence of the alleged nonconformities before the manufacturer is required to repurchase the vehicle.

The Act is in derogation of the common law. Prior to its enactment, a consumer could sue a manufacturer, the warrantor, for breach of product warranties. The consumer had certain rights, but so did the warrantor. The warrantor was entitled to defend itself in a court of law. The rules of evidence and civil procedure ensured that the proceedings were fair and balanced. The warrantor was not required to pay a fee for the right to appear and defend. Above all, it was not subjected to liability until after the plaintiff had proved a breach. The Act changed all that. In doing so, it deprived the manufacturer of the due process of law. It is unconstitutional and should be invalidated.

III. THE $25 PER DAY CONTINUING DAMAGE PROVISION UNCONSTITUTIONALLY BURDENS A MANUFACTURER'S RIGHT OF ACCESS TO FLORIDA'S COURTS.

Subsection 13 of section 681.1095 offends the Constitution of the State of Florida by placing undue burdens on a manufacturer's right of access to the courts. The subsection requires a manufacturer who seeks judicial intervention and review of an Arbitration Board decision and fails to prevail to pay the consumer "continuing damages" of $25 per day for every

day the judicial intervention took.[2] These damages are awarded in addition to the full, compensatory damages awarded and in addition to the manufacturer shouldering the consumer's attorney's fees and costs.

Section 681.112 identifies what the recoverable damages are. "The court shall award a consumer who prevails in such action the amount of <u>any pecuniary loss</u>, litigation costs, reasonable attorney's fees, and appropriate equitable relief." § 681.112(1) (emphasis added). The pecuniary loss award provision allows the court to award the consumer an amount sufficient to reimburse him for any expenses incurred in obtaining alternative transportation as a result of the subject vehicle's nonconformance. <u>Black's Law Dictionary</u> defines "pecuniary loss" as a "loss of money, or of something by which money or something of money value may be acquired." <u>Black's Law Dictionary</u> 1018 (5th ed. 1979). This demonstrates that the cost of a replacement vehicle is recoverable as part of the consumer's compensable damages.

To obtain the "continuing damages" award, the consumer need not present any evidence that the delay him in any way caused

---

[2]The provision reads:

> If a decision of the board in favor of the consumer is upheld by the court, recovery by the consumer shall include the <u>pecuniary value</u> of the award, <u>attorney's fees</u> incurred in obtaining confirmation of the award, and <u>all costs</u> and <u>continuing damages in the amount of $25 per day</u> for each day beyond the 40-day period following the manufacturer's receipt of the board's decision.

§ 681.1095(13) (emphasis added).

inconvenience. Indeed, if the consumer presented evidence that expense for a replacement vehicle was incurred, the court could award compensatory damages for the expense and the consumer could still recover the continuing damages of $25 per day.

Neither does the consumer need to present any evidence that the manufacturer acted in bad faith in seeking judicial intervention before the continuing damages provision applies. In fact, the statute requires the court to double and allows it to triple--the amount of the total award if the court determines that the manufacturer acted in bad faith. § 681.1095(13). This could result in the consumer recovering triple compensatory damages <u>and</u> $75 per day in "continuing damages."

In effect, the continuing damages are a punitive damage award against the manufacturer as a punishment for exercising its right to judicial intervention and review of the Arbitration Board's decision. As such, it violates the United States Constitution. <u>See</u> <u>BMW of N. Am., Inc. v. Gore</u>, 116 S. Ct. 1589 (1993); <u>TXO Prod. Corp. v. Alliance Resources Corp.</u>, 509 U.S. 443, 454 (1993). It cannot reasonably be argued that the provision is intended to deter frivolous court action, especially since there is no need for a showing of bad faith and there is a separate, express provision requiring the court to double the award if it finds the manufacturer acted in bad faith. The provision is enough to deter all but the most intrepid

manufacturer from availing itself of judicial intervention.[3] The "continuing damages" provision places an undue burden on and unnecessarily restricts a manufacturer's right of access to the courts. Consequently, it is unconstitutional.

Article I, section 21 of the Constitution of the State of Florida guarantees: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." Statutory provisions which unnecessarily burden or restrict a party's right of access to Florida's courts offend section 21 and are invalid. See e.g., Psychiatric Assocs. v. Siegel, 610 So. 2d 419 (Fla. 1992); Lasky v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974); Ovadia v. CRH Props., 586 So. 2d 440 (Fla. 3d DCA 1991), aff'd, 610 So. 2d 418 (Fla. 1992); G.B.B. Investments, Inc. v. Hinterkopf, 343 So. 2d 899 (Fla. 3d DCA 1977).

The constitutional right of access to Florida's courts sharply restricts the Legislature's power to create financial barriers to asserting claims or defenses in court. "Although courts have upheld reasonable measures, such as filing fees, financial preconditions that constitute a substantial burden on a litigant's right to have his case heard are disfavored." Siegel, 610 So. 2d at 424; G.B.B., 343 So. 2d at 901. Fundamentally, the Legislature may abrogate or restrict a party's right of access to the courts only if it provides:

---

[3] The risk is compounded by the lower courts' interpretation of subsection 12, which requires the manufacturer to prove a negative.

> 1) a reasonable alternative remedy or commensurate benefit, or 2) a showing of an overpowering public necessity for the abolishment of the right, and finds that there is no alternative method of meeting such public necessity.

Siegel, 610 So. 2d at 424 (emphasis in original) (citing Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973), and Smith v. Department of Ins., 507 So. 2d 1080, 1088 (Fla. 1987)).

Psychiatric Associates v. Siegel, 610 So. 2d 419 (Fla. 1992), is determinative. In Siegel, the Court declared three statutes unconstitutional because they unnecessarily restricted a party's right of access to the courts. The statutes required physicians who wanted to sue members of medical review boards to post security for the opposing parties' attorney's fees and costs before a responsive pleading would be due. Id. at 421. Although the Court found the bond requirement did not totally abrogate the right of access, it nevertheless held the statutes impermissibly restricted the plaintiff's right of access to the courts. Id. at 423-24. The statutes were unconstitutional because the bond requirement infringed on the plaintiff's fundamental right of access to the courts without providing an alternative remedy or commensurate benefit and without requiring a showing that no alternative method existed for meeting the medical malpractice crisis. The requirement also infringed on the plaintiff's due process rights by not being reasonably related to the legislative goal of preventing frivolous lawsuits and was arbitrarily and capriciously applied. Id. at 421.

Subsection 13, like the statutes in Siegel, restricts an auto manufacturer's right of access by exposing a manufacturer to what are essentially punitive damages although other measures are already in place to fulfill the legislative goal of protecting the consumer from frivolous judicial intervention. Here, the manufacturer is left with no reasonable alternative remedy or commensurate benefit. Neither has there been a showing of an overpowering public necessity for abolishing a manufacturer's right to defend itself in a court of law.[4] To the extent there is a need to "level the playing field," as Plaintiff will argue, the other provisions in the Act which are not being challenged here are sufficient. For example, the Arbitration Board decision is admissible into evidence. § 681.1095(9). Additionally, an unsuccessful manufacturer must pay the consumer's attorney's fees and costs. § 681.1095(13). Finally, the trial court shall double and may triple the full award if it finds the manufacturer acted in bad faith in seeking judicial intervention. § 681.1095(13). Consequently, the "continuing damages" provision cannot be justified on public policy grounds.

Plaintiff may argue that the continuing damage provision is necessary as a liquidated damages provision because the consumer is inconvenienced by being without a vehicle during the period of

[4]Plaintiff's pro-consumer arguments ignore the reality that the costs of doing business, including the costs of buying back vehicles which may or may not be nonconforming, are passed on to all consumers in the form of higher product costs. It is poor public policy to unjustly benefit a few consumers at the expense of all consumers.

judicial intervention and will be unable to recover for this inconvenience unless liquidated damages are awarded. This argument is without merit. Florida has long recognized the right to recover damages for loss of the use of a chattel. See North Am. Van Lines v. Roper, 429 So. 2d 750, 752 (Fla. 1st DCA 1983); Travelers Indem. Co. v. Parkman, 300 So. 2d 284, 285 (Fla. 4th DCA 1974); Waja Bakery, Inc. v. Carolina Freight Corp., 177 So. 2d 544, 546 (Fla. 3d DCA 1965); Airtech Serv., Inc. v. McDonald Constr. Co., 150 So. 2d 465 (Fla. 3d DCA 1963). Neither should it be too difficult to establish a reasonable amount to compensate the consumer for loss of the use of a vehicle during the period of judicial review, where some evidence of inconvenience is presented.

The Florida "continuing damages" provision, unlike similar provisions which have been upheld in other jurisdictions, does not tie the award of "continuing damages" to any conceivable injury which is not otherwise compensable as part of the pecuniary damages portion of the award. See Ford Motor Co. v. Barrett, 800 P.2d 367 (Wash. 1990). The continuing damages here serve only to punish the manufacturer.

In general, there are two types of damages--compensatory and punitive. McLeod v. Continental Ins. Co., 591 So. 2d 621, 623 (Fla. 1992). Compensatory damages are for "the loss, injury or deterioration caused by negligence, design or accident of one person to another." Id. at 624 (quoting Hanna v. Martin, 49 So. 2d 585, 587 (Fla. 1950)). Amounts awarded over and above actual

or compensatory damages are punitive or exemplary damages. Dr. P. Phillips & Son, Inc. v. Kilgore, 152 Fla. 578, 12 So. 2d 465, 467 (1943). Punitive damages are assessed not as compensation to the injured party, but as punishment against a wrongdoer. Alamo Rent-A-Car, Inc. v. Mancusi, 632 So. 2d 1352, 1358 (Fla. 1994). They also serve as a deterrent to others. Campbell v. Government Emp. Ins. Co., 306 So. 2d 525, 531 (Fla. 1974).

It is significant that the $25 per day award mandated in subsection 13 is not tied to any particular item of damage. Cf. Harris v. Beneficial Fin., 338 So. 2d 196 (Fla. 1976) (upholding $25.00 per day liquidated damages provision where they were compensatory in nature and actual damages would be difficult, if not impossible to determine). Indeed, the consumer does not need to show any damage at all in order to recover it. It is awarded on top of all of the other damages awarded. In addition, the award is not tied to any "loss of use" and there is no provision which would allow a manufacturer to avoid the award by providing the consumer with the use of another vehicle.[5]

Because the damage award is not tied to any item of damage and is imposed on top of and in addition to a damage award which fully compensates the consumer for all items of damage and expense, it is in the nature of a punitive damage award designed to punish a manufacturer for having the temerity to seek judicial review of an Arbitration Board's decision. Where such damages

[5]Indeed, the continuing damages can amount to several times the purchase price for a brand new luxury vehicle, a windfall to the consumer.

can amount to significant sums of money several times more than the total cost of the vehicle at issue, a manufacturer is deterred from seeking judicial review of many Board decisions even where there are meritorious grounds for such review. It therefore unconstitutionally restricts an auto manufacturer's fundamental right of access to Florida's courts.

IV. THE ACT DID NOT CREATE A NEW CAUSE OF ACTION.

Article I, Section 21 of the Constitution of the State of Florida is offended because the Act robs auto manufacturers of their pre-existing rights of judicial intervention. Plaintiff may argue that the Legislature may restrict an auto manufacturer's right of access to the courts because it created a new cause of action with the Act. This is incorrect. Florida has long recognized a consumer's right to sue the manufacturer of a product for breach of warranties. These causes of action existed before the adoption of the Constitution of the State of Florida in 1968. See e.g., Manheim v. Ford Motor Co., 201 So. 2d 440 (Fla. 1967); Hoskins v. Jackson Grain Co., 63 So. 2d 514 (Fla. 1953); Rehurek v. Chrysler Credit Corp., 262 So. 2d 452 (Fla. 2d DCA 1972) (and cases cited therein).

Manufacturers had rights in these earlier actions. They had the right to defend themselves in a court of law, with all of the procedural protections of the rules of evidence and civil procedure. They were not required to pay a fee in order to appear and defend. The consumer had to prove a breach of the

warranty or other claim he had made. These rights are also protected by the Florida Constitution.

The Act did not create a new cause of action. Rather, it created an administrative means of resolving a consumer's claims without court intervention. Nevertheless, the root of every claim under the Act is still basically a breach of warranty claim.

Section 681.101 provides: "It is further the intent of the Legislature to provide the statutory procedures whereby a consumer may receive a replacement motor vehicle, or a full refund, for a motor vehicle which cannot be brought into conformity with <u>the warranty provided for in this chapter</u>." § 681.101, Fla. Stat. (emphasis added). "Warranty" is defined as

> any written warranty issued by the manufacturer, or any affirmation of fact or promise made by the manufacturer, excluding statements made by the dealer, in connection with the sale of a motor vehicle to a consumer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is free of defects or will meet a specified level of performance.

§ 681.102(16), Fla. Stat.

Because the Act did not create a new cause of action, but only created an administrative means of resolving disputes without court intervention, Section 21 of Article I of the Constitution applies. The $25.00 per day continuing damages provision unnecessarily restricts manufacturer's right of access to Florida courts by subjecting the manufacturer to punitive damages for seeking judicial intervention and losing. The

provision offends section 21 and is unconstitutional. It should be declared invalid.

CONCLUSION

The Lemon Law is riddled with unconstitutional provisions. It unconstitutionally restricts a manufacturer's right of access to Florida's courts for trial and appellate review of Board decisions. It does so by exposing a manufacturer to liquidated punitive damage awards for seeking judicial review of Board decisions. It also violates a manufacturer's right to due process of law by affording precedential value to the Arbitration Board's decisions without the usual judicial procedural protections and by putting the burden of proof on the manufacturer. To the extent the Act has been interpreted by the courts below to place the burden of proof on the manufacturer, it is unconstitutional as violative of the Due Process Clause of the Florida and United States Constitutions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to **GREGORY A. ANDERSON and JOHN J. GLENN**, One Enterprise Center, 225 Water Street, Suite 2100, Jacksonville, Florida 32202; **RUSSELL S. BOHN**, Phillips & Gale, P.A., 514 S.E. Port St. Lucie Blvd, Port St. Lucie, Florida 34984; and **JANET L. SMITH**, Assistant Attorney General, Office of the Attorney General, Lemon Law Arbitration Program, The Capitol, Tallahassee, Florida 32399-1050; and this 22nd day of August 1997.

Respectfully submitted,

____

GEORGE N. MEROS, JR.
Florida Bar No. 0263321
MARY W. CHAISSON
Florida Bar No. 0948683
RUMBERGER, KIRK & CALDWELL, P.A.
Post Office Box 10507
Tallahassee, Florida 32302
(904) 222-6550

Attorneys for The American Automobile Manufacturers Association and the Association of International Automobile Manufacturers