



## Consumers for Auto Reliability and Safety

April 7, 2014

Assembly Member Jim Frazier, Chairperson  
Assembly Transportation Committee  
California State Assembly  
1020 N Street, Room 112  
Sacramento, CA 95814

**Re: AB 287 (Gordon)**  
**Position: OPPOSE**

Dear Chairperson Frazier:

Consumers for Auto Reliability and Safety (CARS) is a national, award-winning non-profit auto safety and consumer advocacy organization dedicated to preventing motor vehicle-related fatalities, injuries and economic losses. CARS has successfully sponsored and actively supported numerous laws enacted in California to improve protections for new and used car buyers, and the entire motoring public.

CARS recently joined with U.S. Secretary of Transportation Anthony Fox and the Administrator of the National Highway Traffic Safety Administration, Dr. Mark Rosekind, Ph.D., and representatives of the rental car industry in calling upon Congress to enact legislation to prohibit rental car companies from renting recalled cars to consumers, and prohibit dealers from selling recalled used cars until the recall repairs have been performed. Federal legislation to prohibit dealers from selling recalled used cars is currently pending in both the U.S. Senate and U.S. House of Representatives.

CARS is opposed to AB 287 because, among its many fundamental flaws, it would weaken existing consumer protections against unscrupulous car dealers who sell unsafe, recalled used cars to consumers; undermine progress being made at the federal level in addressing rental car and used car safety; create even more confusion among owners of recalled cars regarding the seriousness of lethal safety defects; and set a harmful precedent for allowing retailers to foist unsafe products onto consumers.

While the increase in safety recalls and repairs to defective cars is improving overall safety on

our nation's highways, and helping to reduce fatalities and injuries, AB 287 threatens to reverse that progress. Among its serious flaws:

**AB 287 is based on a false, misleading and dangerous premise  
regarding “Stop Sale – Stop Drive” recalls**

As the National Highway Traffic Safety Administration, the federal agency that has the mandate and expertise to protect the American public from unsafe motor vehicles, has stated:

**"All safety recalls resulting from defects present an unreasonable risk to safety, and we believe it is inappropriate to suggest that some defects are not risky enough to require repair. For the safety of the motoring public, all recalled vehicles should be fixed promptly."**

However, this bill would create a new, unprecedented, dangerous and misleading distinction among auto safety recalls – based not on science, or any federally-established standard, or on any other objective criteria, such as the results of federal defect investigations, analyses regarding fatalities or injuries caused by a safety defect, consumer complaints about defects, or the level of risk posed to the motoring public.

Instead, it would expressly allow dealers to sell any used vehicle, no matter how imminent the threat to public safety, or how many deaths and injuries the safety defect has caused, or will cause, unless the auto manufacturer – in its sole, subjective discretion – has chosen to designate the recall as a “Stop Sale – Stop Drive” recall.<sup>1</sup>

This would create the false, misleading, and dangerous impression that only “Stop Sale – Stop Drive” safety recalls need to be addressed promptly. It would contradict existing public policy among auto safety regulators and the entire auto safety community, and efforts by the news media, to raise awareness about the seriousness of safety recalls and to urge owners of recalled cars to ensure that ALL safety recalls are performed without delay.

By creating this false distinction, the bill would essentially entrust auto manufacturers with the sole decision-making authority over whether dealers in California could deliberately and knowingly sell their unsafe, defective products to consumers without getting them repaired first. Clearly this would be unwise, particularly in light of voluminous evidence presented to the U.S. Congress, the National Highway Traffic Safety Administration, and the U.S. Department of Justice, that manufacturers such as General Motors, Toyota, Chrysler, and Ford have repeatedly, over a period of decades, engaged in illegal conduct and concealed safety defects from federal regulators, in violation of federal law, while their customers died and suffered debilitating injuries, and they continued to manufacture millions of vehicles with lethal safety defects.

According to a letter the Alliance of Automobile Manufacturers submitted last November to the National Highway Traffic Safety Administration, on behalf of over a dozen leading auto manufacturers, during the years 2000- 2013, only approximately 1% of recalled vehicles involved a blanket warning from the manufacturer advising owners not to drive their cars. In some years, no manufacturer issued such a warning. However, that does not mean that the other recalls during those years did not involve safety defects that pose a serious risk to the American public. In fact, during that time, the other 99% of

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<sup>1</sup> Regarding recalled vehicles of the same brand as a franchised dealer, please see below, page 7 .

recalled vehicles during included cars with obviously life-threatening safety defects, many of which did claim lives and cause debilitating injuries, including:

- Catching on fire
- Brake failure
- Axles that break
- Steering loss
- Gas pedals that stick
- Wheels that fall off
- Instability leading to rollover collisions
- Seat belts that come unlatched in a crash
- Shifting out of “park” and rolling away

Auto manufacturers are reluctant to proclaim a “do not drive” warning. It is very costly to provide individualized towing and loaner or rental cars to customers, who usually need alternative transportation pending repairs. Advising owners not to drive their cars also raises alarm. That can erode trust in a manufacturer's brand, particularly when a vehicle is in the process of being launched, and is subject to a higher level of media scrutiny.

Drawing this false distinction between “do not drive” recalls and other safety recalls would also inevitably send a confusing, contradictory message to consumers, telling them that, according to the state of California, recalled cars are safe enough for a dealer to sell, while expecting the buyers to get the recall repairs performed themselves.

While dealers point to recalls involving missing warning stickers, or other types of defects they deem insignificant, those are a distraction from the core issues. Such recalls are typically due to technical violations of federal motor vehicle standards. They represent only a tiny fraction of safety recalls, and are often quickly addressed with minimal costs or delay, since they usually do not require retooling and manufacturing repair parts. In fact, it is common for safety recall notices involving missing stickers to include the stickers with the safety recall notice.

In addition, it is already illegal under California law for dealers to sell vehicles that fail to comply with a federal motor vehicle safety standard, regardless whether a safety recall has been issued. (Vehicle Code Section 24011: “Whenever a federal motor vehicle safety standard is established under federal law (49 U.S.C. Sec. 30101 et seq.), no dealer shall sell or offer for sale a vehicle to which the standard is applicable, and no person shall sell or offer for sale for use upon a vehicle an item of equipment to which the standard is applicable, unless: (a) The vehicle or equipment conforms to the applicable federal standard.”)

### **AB 287 Fails to Recognize Broader Public Interest in Ensuring Vehicles Are Safe**

It is important to keep in mind that the safety of the individual used car buyer is not all that is at stake. Even when vehicles are properly maintained, and free from lethal safety defects, driving involves significant risk. For the vast majority of Californians, the riskiest activity they engage in during the day is to drive their cars. According to the California Highway Patrol, during 2012, 2,995 people were killed, and another 226,544 people were injured in motor vehicle traffic collisions.<sup>2</sup>

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<sup>2</sup> “Statewide Integrated Traffic Records System (SWITRS), California Highway Patrol, 2012. (This is the most recent year for which the CHP provides complete data.)

By allowing dealers to sell unsafe, recalled cars to consumers with “disclosure,” AB 287 fails to recognize the broader public interest in ensuring that cars are safe to operate on public roads. Even if a consumer happens to see the recall notice prior to completing the sale, reads it, fully understands the risks involved, and decides to drive the car anyway, there is a strong public interest in protecting the safety of their passengers, others who share the roads, pedestrians, bicyclists, and potentially many other individuals.

In addition to placing others at risk of death or injury, allowing dealers to sell unsafe, recalled used cars to consumers without repairing them first threatens to further increase the staggering costs California bears due to motor vehicle crashes. “According to the U.S. Department of Transportation's National Highway Traffic Safety Administration (NHTSA), motor vehicle crashes impose a staggering human economic toll in the United States. The price tag for crashes comes at a heavy burden for Americans at **\$871 billion** in economic loss and societal harm. This includes \$277 billion in economic costs – nearly \$900 for each person living in the United States based on calendar year 2010 data — and \$594 billion in harm from the loss of life and the pain and decreased quality of life due to injuries.” California bears approximately 12% of that burden, or over **\$104 billion** annually.

### **AB 287 would shift the burden for safety recall repairs from dealers onto consumers**

As this bill states in the findings, “about one-third of all recalled vehicles are never repaired by the vehicle's owner.” This is actually an argument against the bill, which would rely upon the owners of the defective vehicles to get them repaired, instead of requiring the professionals in the business of selling cars – the dealers – to do their job and get the repairs done prior to handing the keys to a car buyer.

It is well-documented that particularly as vehicles age, the owners are far less likely to have the safety recall repairs performed. Among the reasons for non-compliance with safety recalls: 1) the lack of availability of repair parts, 2) shortages of qualified, trained automotive technicians to perform the safety recall repairs, 3) consolidation of new car dealerships in areas with high population density, and 4) lack of time off from work, alternative transportation, or resources involved in obtaining repairs.

Unfortunately, the bill does nothing to address these problems or other barriers to repairs, such as requiring dealers to provide access to recall repairs during evenings or weekends, or to provide roving repairs where owners of recalled cars live or work. Instead, the bill would put the burden on individual consumers to take time off from work, perhaps having to lose desperately needed pay, to drive their car to a new car dealership for servicing. For many car owners, that would also entail spending money on gas and managing the complex logistics of leaving their car – often their only means of transportation – for repairs, then returning to work and taking their children to school, and picking them up again, then returning to the dealership – all without their car.

The bill also fails to take into account the fact that under federal law, there is a 10-year limit on when auto manufacturers are required to pay for safety recall repairs. In addition, California's Vehicle Code has even narrower limits regarding when a manufacturer is required to cover the cost of a safety recall repair.<sup>3</sup> As a result, owners of older vehicles sometimes face having to pay out of pocket for

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<sup>3</sup> Vehicle Code Section 9975: “Every manufacturer of a motor vehicle who furnishes notification to the registered owner of the motor vehicle of any defect in the motor vehicle or motor vehicle equipment which relates to motor vehicle safety, shall, notwithstanding any limitation in any warranty relating to the motor vehicle, correct such defect without charge to the registered owner of the vehicle or, at the manufacturer's election, reimburse the registered owner for the cost of making such correction....**The manufacturer of such motor vehicle shall not be liable for the cost of such**

repairs. There are also often shortages of repair parts for older vehicles.

### **Disclosure about safety recalls is inadequate to provide protection**

According to a scientifically researched report recently cited by *Pro Publica* and the *New York Times*, disclosure is of extremely limited effectiveness in complex transactions such as purchasing a car: " 'We are doing disclosure as a regulatory move all over the board,' says Adam J. Levitin, a law professor at Georgetown, 'The funny thing is, we are doing this despite very little evidence of its efficacy.' .... Companies prefer such rules, especially in lieu of actual regulations that would curtail bad products or behavior....it really works only when things are simple. As soon as transactions become complex, disclosure starts to stumble. Buying a car, for instance, turns out to be several transactions: the purchase itself, the financing, maybe the trade-in of an old car and various insurance and warranty decisions. These are all subject to various disclosure rules, but making the choices clear and useful has proved nigh impossible....What to do instead? Hard and fast rules. If lawmakers want to end a bad practice, ban it. Having [the company] admit it is not enough."<sup>4</sup>

Adding to the odds disclosure regarding safety recalls will fail to provide any meaningful protection to California consumers:

1. The bill calls for dealers to provide a copy of the federally mandated safety recall notice as a separate document. However, the notices are typically written in legalistic English and include technical jargon, so would be of questionable value, particularly for car buyers who are not proficient in reading abstruse English. In fact, the language employed in recall notices is one of the shortcomings of the federal recall system, which under this bill would be replicated in California. For example: "SAFETY RISK: The timing of the key movement out of the run position, relative to the activation of the sensing algorithm of the crash event..." (Recall notice regarding the GM ignition switch defect)
2. Consumers have a reasonable expectation that car dealers, who are licensed professionals regulated by the state, are not allowed to sell them unsafe vehicles. Consequently, they are not on guard and looking for such disclosures.
3. There is no other consumer product where retailers are permitted to sell a product once the manufacturer has issued a safety recall. Under the federal Consumer Product Safety Act, it is illegal for recalled consumer products to be sold at retail. So it is entirely counter-intuitive that car dealers, who are selling the most risky consumer product of all, would be the one exception to that rule.
4. By spending millions in advertising, and investing more millions in impressive showrooms, new car dealers and large used car chains such as CarMax project the image that they are responsible, well-established businesses that can be trusted to ensure that the products they are selling are safe. While dealers tend to rank low in terms of public perceptions of honesty and integrity, consumers don't expect such dealers to knowingly sell vehicles with lethal safety defects. This is particularly true when the dealers advertise, as CarMax does, that all their vehicles must pass a rigorous "125+ point inspection," or are "in top condition."

In essence, the bill would require consumers – if they do happen to see the notices and actually

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**correction if the registered owner of the motor vehicle does not seek to have the correction made within 45 days after receipt of the notification or within the warranty period of the motor vehicle, whichever is longer."**

4 "The Trouble with Disclosure: It Doesn't Work," by Jesse Eisenberg, published by *Pro Publica* in cooperation with the *New York Times* (February 11, 2015).

read them – to make life-or-death decisions under pressure, with little time to deliberate, on the basis of incomplete information. For example, someone who reads that a car has a defect involving the floor mat may conclude that is not safety-related, and would present a low risk, without realizing that the floor mat defect could cause the car to suddenly accelerate to speeds of 120 mph or more, without their being able to stop it.

In addition, allowing dealers to sell unsafe vehicles with 'disclosure' could have the effect of shifting liability from the manufacturers who produced the defective products, and the dealers who profit from selling them, onto consumers – creating a new "safe harbor" and jeopardizing public safety.

As the author of the meticulously researched book, *More Than You Wanted to Know: The Failure of Mandated Disclosure*, Professor Omri Ben-Shahar,<sup>5</sup> noted, "That's the harm of disclosure....It provides a safe harbor for practices that smell bad. It sanitizes every bad practice."<sup>6</sup>

### **AB 287's disclosure requirement is unenforceable**

Verbal representations are difficult or impossible to prove, particularly if the car buyer was killed as a result of relying on misleading information at the time of sale. It may not be feasible for consumers to prove that disclosure was not provided, as it is generally difficult or impossible to prove a negative. In addition, it is common for unscrupulous dealers to forge signatures on documents. Proving forgery is expensive and can take years of litigation.

### **AB 287 would be weaker than existing law**

AB 287 would be far worse than existing law in our state, which outright prohibits dealers from selling used vehicles that fail to meet federal motor vehicle safety standards, and from violating laws against engaging in unfair and deceptive practices, committing fraud, bait-and-switch, false advertising, or violating express or implied warranties; or if someone is injured or killed as a result of the dealer's malfeasance, existing laws against reckless endangerment or negligence.<sup>7</sup>

Instead of strengthening and clarifying the law, and protecting the motoring public by prohibiting dealers from selling unsafe, recalled used cars to consumers, this bill threatens to make California a dumping ground for ticking time-bomb cars with lethal safety defects.

### **AB 287 would allow rental car companies to rent unsafe, recalled cars to consumers**

Regarding rental cars, AB 287 would be far worse than the prevailing practices in the rental car industry (with the exception of Rent-a-Wreck). This bill would *allow* rental car companies to rent approximately 99% of unsafe recalled cars to consumers, regardless how unsafe the cars are, unless the manufacturer has, in its sole discretion, chosen to warn its customers not to drive the car, pending repairs.

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<sup>5</sup> Professor Ben-Shahar is the Leo and Eileen Herzel Professor of Law at the University of Chicago.

<sup>6</sup> Ibid.

<sup>7</sup> Some of the existing statutes that prohibit such practices are attached as an addendum to this letter. While they are of broad applicability, and not as specific as SB 686 (Jackson), which would have created a "bright line" specifically prohibiting dealers from selling recalled used cars to consumers, they nonetheless offer some level of consumer protection, and have helped serve as a deterrent to dealers who may have been tempted to engage in such prohibited acts.

CARS has been working closely with U.S. Senators Schumer, Boxer, Feinstein, McCaskill, and other U.S. Senators, U.S. Representative Capps and other U.S. Representatives, along with Carol (“Cally”) Houck, of Ojai, California, for enactment of federal legislation, the Raechel and Jacqueline Houck Safe Rental Car Act (S 2819), which would prohibit rental car companies from renting or selling recalled cars to the public until the safety recall repairs have been performed.

The rental car industry, including all of the major rental car companies, including Enterprise, Hertz, Avis, and many smaller rental car companies, as well as the American Car Rental Association, are actively supporting the federal legislation and lobbying with CARS and other consumer groups in Congress seeking enactment.<sup>8</sup> General Motors has also announced its support for the legislation. We anticipate that the federal legislation will be re-introduced soon in both the U.S. Senate and the House of Representatives.

Meanwhile, all of the major rental car companies, including Enterprise, Hertz, Avis, Dollar-Thrifty, and many smaller rental car companies have already voluntarily adopted policies that are more consumer-friendly and safety-oriented than AB 287. For years, they have been grounding recalled cars until they are repaired, rather than renting or selling them to the public. Therefore, AB 287 would represent a giant step backwards in terms of safety, and reward dealers who own rental businesses on the side, and seek to increase their profits by renting vehicles that are not fit to drive – playing recalled car roulette with their customers' lives and the lives of others who have the misfortune of being at the wrong place at the wrong time.

This bill would do NOTHING to save the lives of innocent victims such as Raechel and Jacqueline Houck, who perished in a tragic crash in Santa Cruz, due to the safety defect in a 2004 Chrysler PT Cruiser that was being recalled by Chrysler. In fact, all this bill would accomplish would be to shift liability from the culpable companies – Chrysler and the rental car company – onto their victims.

Chrysler did not issue a “do not drive” warning to its customers regarding the safety defect that killed Raechel and Jacqueline. Under AB 287, if the rental car company merely “disclosed” the defect to them, renting them the fatally defective car would have been perfectly legal. Because they perished in the crash, they would not be able to testify about any verbal representations that were made at the time by the rental car company clerks, who in any case would lack the training or expertise to explain the risks involved.

**AB 287's restriction on selling recalled used vehicles of the same brand--  
any benefit is largely illusory**

Typically, auto manufacturers already prohibit new car dealerships that sell the same brand from selling recalled cars until they have been repaired, particularly if they are advertised and offered for sale as so-called “certified” cars, which generally include a factory warranty. Therefore, any additional benefit from an added restriction on new car dealers is questionable, unless one assumes that the dealers are violating their own franchise agreements.

In addition, many new car dealerships in California are part of large dealership chains, such as AutoNation, which advertises that it owns over 225 dealerships that sell over 30 brands. Many others are part of mega-dealership empires such as Dave Wilson Automotive Group or Keyes Automotive

<sup>8</sup> Except some small rental car companies owned or controlled by car dealers, such as “Rent-a-Wreck,” which represent only a tiny percentage of the rental car market.

Group.

By allowing dealers to sell recalled used cars of a different brand to the public, the bill would do nothing to stop the owners of dealership chains and groups from transporting recalled vehicles from dealerships of the same brand as the manufacturer of the recalled car, to other dealerships under the same corporate umbrella, that sell different brands – engaging in an automotive “shell game.” Under such a scheme, few, if any, recalled vehicles would be repaired by new car dealers who are part of chains or groups, before they are sold to the public. These chains and groups tend to sell large volumes of used vehicles, so allowing this behavior would be a particularly serious threat to public safety.

### **AB 287 provision regarding loaner cars would not protect consumers or the public**

AB 287 would require manufacturers to provide loaner cars or rental cars to consumers while they wait for the completion of safety recall repairs. However, this would do little to protect consumers or the public from unsafe cars, because it would do nothing to ensure that the loaners or rental cars are any safer, and are not themselves being recalled for the same safety defect, or a different one.

This totally defeats the entire purpose of providing a loaner in the first place – to mitigate the risks to the vehicle owner, their family and other passengers, and others who share the roads.

In addition, the bill would provide no funding to educate consumers about the availability of loaner or rental cars. There is also no requirement for dealers to provide the cars to consumers or make them aware that they are available. Many owners of recalled GM vehicles have experienced difficulty obtaining loaners from GM dealers, despite the manufacturer's promises to provide them to owners of vehicles with the notorious ignition module defect.

In addition to the flaws analyzed above, there are additional flaws in the bill, including in the findings, some of which are false or misleading. The section that would give the DMV the authority to deny registrations to consumers who do not sign a document indicating that any open safety recalls have been disclosed to them is of questionable value and raises questions about how consumers would be made aware of the obligation to check the safety recall status of vehicles prior to sale, and how the disclosures would be made, particularly by consumers who are not proficient in English and / or lack access to the internet. We are concerned about consumers signing such a document based on faulty or incomplete information, or on inadvertent mistakes such as the wrong VIN being entered, or in the belief that the form refers to a recall for emissions, a “service campaign,” or other repair, which could be easily confused with a safety recall.

Finally, we are also concerned that the bill would enable unscrupulous dealers to discriminate regarding which consumers they offer to sell unsafe, recalled used cars, by steering them to certain vehicles or refusing to offer affordable financing on other cars without safety defects. We believe that all car buyers who purchase vehicles from auto dealers licensed by the state of California deserve to get a car that is safe to operate, from the moment it leaves the lot. Also, as discussed above, all Californians have a strong interest in ensuring that all cars operated on our State's roads are safe to drive.

In sum, we strongly urge the Legislature to reject this unprecedented anti-consumer, anti-safety measure. Thank you for your consideration of our views.



Sincerely,

A handwritten signature in black ink that reads "Rosemary Shahan". The signature is written in a cursive style with a large, prominent 'R' at the beginning.

Rosemary Shahan  
President

CC: Assemblymembers Stone, Eggman, Wilk, and Jones  
Members, Assembly Committee on Transportation  
Manny S. Leon, Senior Consultant, Assembly Committee on Transportation