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Memorandum in Opposition

S7545A (Funke)/A8268B (Pheffer Amato) Relates to safety recalls on used motor vehicles

Consumers for Auto Reliability and Safety (CARS) is a national, award-winning auto safety and consumer advocacy organization dedicated to preventing motor vehicle-related fatalities, injuries, and economic losses. CARS worked closely with U.S. Senator Schumer and Cally Houck, mother of Raechel and Jacqueline Houck, for enactment of the federal law named in honor of the two sisters, who were ages 20 and 24 when they were killed by an unrepaired recalled rental car, the Raechel and Jacqueline Safe Rental Car Act. That vehicle, a 2004 Chrysler P.T. Cruiser, was not subject to a manufacturer's "Do Not Drive" warning, for which there is no objective standard.

That federal Act prohibits rental car companies with fleets of 35 or more vehicles from renting, loaning, or selling them until the safety recall repairs have been performed. There are no exceptions. That Act passed with widespread bi-partisan support, and was also supported by the National Highway Traffic Safety Administration and the U.S. Department of Transportation, and was signed into law by President Obama.

CARS opposes S7545A (Funke) / A8268B (Pheffer Amato) because these bills would drastically weaken New York's existing protections against car dealers knowingly and deliberately selling unsafe recalled used cars, with potentially disastrous results.

Currently, New York auto dealers who knowingly or negligently sell unsafe vehicles with defects that cause fatalities or injuries face serious liability for violations of various state laws, including the common law duty of care, negligence, or wrongful death. Depending on various factors, they may also face criminal sanctions, including loss of their license to conduct business, fines, or imprisonment. If dealers misrepresent the condition of the cars they offer for sale, they are also liable for violations of New York's laws that prohibit unfair and deceptive practices, and / or fraud.

In addition, New York also requires auto dealers to "certify" that all of the used cars they offer for sale to consumers are "roadworthy." New York City's Department of Consumer Affairs cited that law when it cracked down on dealers under their jurisdiction over their sales of unrepaired recalled used cars, announcing that:

"Fortunately, City law, which DCA enforces, requires dealers to certify that their vehicles are 'roadworthy,' and prohibits dealers from misleading consumers as to the safety of their vehicles. Under City Law, **a car with recalled parts that are unrepaired is not deemed to be roadworthy.**"¹

The Director of New York's Department of Consumer Affairs also cautioned against adoption of legislation such as these proposed bills, warning that: "We anticipate that the industry will urge the Council to simply require disclosure of a vehicle's recall status prior to sale, an approach which we think is inadequate to protect the lives of consumers who buy cars, as well as those who use the roads."²

This bill is very similar to other bills that car dealers attempted to get enacted in other states, including New Jersey, California, Maryland, Virginia, that failed to pass and were rejected because they posed an immediate and direct threat to public safety. The bills were extremely unpopular with the voters in each of those states. Polling conducted by Public Policy Polling has found, in state after state, that typically 85--95% of voters oppose allowing dealers to sell recalled vehicles with "disclosure."

To date, the only state to enact such a law was Tennessee, which enacted the car dealers' bill in the waning hours of the legislative session, with no public hearings, as a substitute for a bill that, as introduced, would have regulated rickshaws. More information about that bill is posted at: <http://stopkillercars.org/>.

Basically, these bills are tantamount to granting car dealers license to kill. They endanger not only the purchasers of the defective cars and their passengers, but others who share the roads, particularly when the recalls were issued due to defects such as brake failures, loss of steering, hoods that fly up when vehicles are being driven in traffic, wheels that fall off, sticking accelerator pedals, catching on fire, and transmissions that allow the vehicles to roll away after they are parked.

1 NEW YORK CITY'S DEPARTMENT OF CONSUMER AFFAIRS
LAUNCHES INVESTIGATION INTO THE SALE OF UNREPAIRED
RECALLED USED CARS, AGGRESSIVELY PROTECTING NEW
YORKERS FROM POTENTIALLY FATAL DEFECTS," News release, issued July 30, 2014. Posted at:
https://www1.nyc.gov/assets/dca/downloads/pdf/media/Media_News_PR073014.pdf

2 "Testimony of Commissioner Julie Menin, New York City Department of Consumer Affairs. Before the New York City Council Committee on Consumer Affairs. Oversight Hearing on Used Car Sales in New York City: Ensuring Consumer Protections and Safety in the State of Used Vehicles Recalled by the Manufacturer," October 28, 2014, Posted at:
<https://www1.nyc.gov/assets/dca/downloads/pdf/partners/Advocacy-Used-Car-Sales-102814.pdf>

There is no other recalled product where retailers, or even members of the general public, are permitted to sell the recalled product in its defective state. To the contrary, under federal law, it is illegal for anyone to sell a recalled product, such as a baby crib. In one high-profile case, the owner of a food product company in Georgia that knowingly sold peanut butter contaminated with salmonella, resulting in numerous illnesses and deaths, was sentenced to prison.

According to the National Highway Traffic Safety Administration, vehicle “crashes continue to kill tens of thousands of Americans and injure millions more every year. Motor vehicle crashes remain a leading cause of death for Americans of all ages and drain more than \$230 billion from the economy annually.”³ Therefore, of all the dangerously defective consumer products to unleash upon the public, motor vehicles may be the absolute most irresponsible and reckless.

As the car dealers themselves have admitted publicly, the only reason they seek to get such bills enacted is not to improve protection from unsafe vehicles, but to shift legal liability for the resulting deaths and injuries onto their victims. For example:

Automotive News: "[Honda pushes dealers for buyers' signatures on airbag liability](#)"

"...Laurie McCants, managing partner of Honda of Covington in suburban New Orleans, says she believes the signed document helps protect dealers. "If there is a process and we follow the process, **I don't feel liable,**" she says....Neither does Joe Wagner, operating partner of Winter Haven Honda in Florida. He says he is getting no pushback from consumers about signing the document. '**I believe it takes away the liability,**' he said about the document..." [Emphasis added.]

Automotive News: "[Recall bill cruises, but will it help?](#)"

"The California bill – **which dealers see as a potential defense against lawsuits** – would require used-car dealers and rental companies to notify their customers of any outstanding recalls, though they wouldn't have to undertake any repairs... dealers have faced new liability risk since the creation of an internet database that allows a customer or a dealer to check for recalls by entering a vehicle identification number." [Emphasis added.]

Courier-Post in New Jersey: "[Auto-related bills roll through Assembly](#)"

"The safety recall disclosure bill has the backing of the New Jersey Independent Automobile Dealers Association, which believes it offers **protection to the dealer,** said Paula Frenzel, the association's executive director." [Emphasis added.]

By insulating New York car dealers from liability for knowingly and deliberately selling unsafe vehicles with unrepaired safety recall defects, these bills threaten to make New York into a dumping ground for unsafe recalled cars, including tens of millions of dangerous vehicles with exploding Takata airbags, which have claimed at least 22 lives and caused hundreds of debilitating injuries.

While a sub-category of vehicles with Takata airbags that pose an exceptionally high risk of exploding are subject to manufacturers' voluntary "do not drive" warnings, tens of millions of vehicles with the hazardous Takata airbags are NOT subject to those warnings, but are nevertheless extremely dangerous. Auto manufacturers, NHTSA, mayors of cities, law enforcement agencies, and consumer advocates have been going to great lengths, including going door-to-door to warn the owners, to get more of them repaired. However, due to severe shortages of repair parts, millions of consumers are unable to obtain repair parts.

³"This is NHTSA, People Saving People," posted at: [DOT - NHTSA](#)

Further, the methods and forms of disclosure required by the bill would not be effective. The bill would allow dealers to make blanket disclosures, in English only, that the vehicles they offer for sale “MAY” have open recalls. This would inevitably lead to even those consumers who notice those disclosures being extremely likely to discount them entirely, in effect misleading consumers about the risks involved.

As noted by a Pulitzer-Prize winning journalist published in the New York Times, disclosure “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 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... ‘That’s the harm of disclosure,’ Professor Ben-Shahar [Omri Ben-Shahar, co-author of a *More Than You Wanted to Know: The Failure of Mandated Disclosure*] said. “It provides a safe harbor for practices that smell bad. It sanitizes every bad practice.’ ”⁴

In sum, these bills are anti-consumer, anti-safety. They are a recipe for disaster. We urge their defeat, in the strongest possible terms.

Thank you for your consideration of our views. Should you or your staff have any questions regarding our position, please do not hesitate to contact me directly.

⁴ “In an Era of Disclosure, an Excess of Sunshine but a Paucity of Rules,” *The New York Times*, February 11, 2015. By Jesse Eisinger. Posted at: <https://dealbook.nytimes.com/2015/02/11/an-excess-of-sunlight-a-paucity-of-rules/>