

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

GEORGE DEUKMEJIAN
Attorney General

| | | |
|----------------------------|---|-------------------|
| OPINION | : | No. 79-808 |
| | : | |
| of | : | November 30, 1979 |
| | : | |
| GEORGE DEUKMEJIAN | : | |
| Attorney General | : | |
| | : | |
| Warren J. Abbott | : | |
| Assistant Attorney General | : | |
| | : | |

SUBJECT: AUTO MANUFACTURER AND NEW CAR DEALER SERVICE AGREEMENTS—Business and Professions Code section 17048.5, relating to warranty service agreements between, among others, a manufacturer and a person performing warranty services, does not apply to reimbursement under such agreements between an automobile manufacturer and a new car dealer.

The Honorable David A. Roberti, Senator, Twenty-third District, has requested an opinion on the following question:

Do the provisions of section 17048.5 of the Business and Professions Code relating to warranty service agreements between, among others, a manufacturer and a person performing the warranty service apply to reimbursement under such an agreement between an automobile manufacturer and a new car dealer?

CONCLUSION

In light of the provisions of Vehicle Code sections 3050 and 3065 giving authority to the New Motor Vehicle Board to regulate and hear complaints concerning warranty

reimbursement agreements between an automobile manufacturer and a new car dealer, the provisions of section 17048.5 of the Business and Professions Code relating to warranty service agreements between, among others, a manufacturer and a person performing warranty services do not apply to reimbursement under such agreements between an automobile manufacturer and a new car dealer.

ANALYSIS

In 1977 (Stats. 1977, ch. 787, § 2), the Legislature added to the Unfair Practices Act (Bus. & Prof. Code, § 17000 *et seq.*), section 17048.5:

‘It is unlawful for any manufacturer, wholesaler, distributor, jobber, contractor, broker, retailer, or other vendor, or any agent of any such person, to enter into a contract with any service or repair agency for the performance of warranty service and repair for products manufactured, distributed, or sold by such person, below the cost to such service or repair agency of performing the warranty service or repair.’¹

On its face, the use of the term “manufacturer” and the phrase “service or repair agency” in this section would appear to encompass a warranty service and repair agreement between an automobile manufacturer and a new car dealer, thus prohibiting such agreements below the cost to the dealer of performing the warranty service or repair. Our concern here is with reimbursement of new car dealers by the manufacturer for warranty services or repairs performed by the dealer under such agreements. An examination of three separate statutory schemes dealing with warranty service agreements, of which section 17048.5 is one, and the application of usual rules of statutory construction leads us to the conclusion that only the provisions of another one of these schemes, relating to the duties and authority of the New Motor Vehicle Board, apply to the reimbursement aspects of warranty service agreements between an automobile manufacturer and a new car dealer.

1. The Unfair Practices Act

The Unfair Practices Act (Bus. & Prof. Code, § 17000, *et seq.*), to which section 17048.5 was added is, as declared by the Legislature, designed “. . . to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented.” (Bus. & Prof.

¹ The same act (Stats. 1977, ch. 787, § 1) amended Business and Professions Code section 17026 to define cost as applied to warranty service agreements to include “. . . the cost of parts, transporting the parts, labor, and all overhead expenses of the service agency. . . .”

Code, § 17001.) The Act lists certain actions or activities which are declared unlawful, such as locality discrimination in the production, manufacture, distribution or sale of any article or product (Bus. & Prof. Code, § 17040) and sales below cost. (Bus. & Prof. Code, § 17043.) Section 17048.5, prohibiting below cost warranty service agreements with service or repair agencies, is the latest of the offenses to be added to this Act.

The Act also provides a variety of civil and criminal remedies. The civil remedies (Bus. & Prof. Code, §§ 17070–17087) provide for injunctions and damages (Bus. & Prof. Code, § 17070); these include treble damages and attorney’s fees. (Bus. & Prof. Code, § 17082.) A violation of the Unfair Practices Act is made a misdemeanor for each single violation, punishable by a fine of not less than \$100, but not more than \$1,000, or by imprisonment not exceeding six months, or by both fine and imprisonment. (Bus. & Prof. Code, § 17100.) In addition, the endorsement provisions of Business and Professions Code sections 17200–17208 (formally part of Civ. Code, § 3369) are applicable for a violation of the Unfair Practices Act. These remedies are available to public prosecutors and in some cases to private parties for acts of “. . . unlawful, unfair or fraudulent business practice . . .” (Bus. & Prof. Code, § 17200), and include injunctive relief and civil penalties. (Bus. & Prof. Code, §§ 17203, 17206.)²

Thus, in the context of this opinion, a manufacturer who has entered into a contract with a dealer for the performance of warranty service and repair of products of the manufacturer which provides for reimbursement below the cost to the dealer of performing the warranty service or repair, has violated the Unfair Practices Act. As noted, costs include all the dealer’s overhead expenses³ Such a violation could make the manufacturer or his agent (Bus. & Prof. Code, §§ 17095, 17101), liable for treble damages, attorney’s fees, injunctions, civil penalties of \$2,500 and prosecution for a misdemeanor.

2. Song-Beverly Consumer Warranty Act

The Legislature in 1970 enacted a comprehensive consumer warranty protection scheme known as the Song-Beverly Consumer Warranty Act. (Civ. Code, §§ 1790–1797.5.) This Act, among other provisions, sets forth certain implied warranties in sales of consumer items (Civ. Code, §§ 1792–1792.2), and requires a manufacturer of consumer

² The remedies of this Enforcement Chapter are specifically made cumulative to each other and to any other provision of law. (Bus. & Prof. Code, § 17205.)

³ The factor of including overhead costs of the dealer in section 17048.5 was designed to eliminate a practice of manufacturers to include discounts in the reimbursement to the repairer thus reducing the costs to the manufacturer in warranty service and repair agreements, allegedly resulting in the repair service being performed below the cost to the repairer. (See (1977) 9 Pacific L.J. 334–335, and see discussion of Song-Beverly Consumer Warranty Act, *infra*.)

goods sold in California for which the manufacturer has made an express warranty to maintain service and repair facilities directly or through contract in this state reasonably close to all areas where such goods are sold. (Civ. Code, § 1793.2.)

As to reimbursement by the warrantor to the persons providing the warranty service or repairs, section 1793.6 provides:

“Except as otherwise provided in the terms of a warranty service contract, as specified in subdivision (a) of Section 1793.2, entered into between a manufacturer and an independent service and repair facility, *every manufacturer* making express warranties whose consumer goods are sold in this state *shall be liable as prescribed in this section to every independent serviceman who performs services or incurs obligations* in giving effect to the express warranties that accompany such manufacturer’s consumer goods whether the independent serviceman is acting as an authorized service and repair facility designated by the manufacturer pursuant to paragraph (1) of subdivision (a) of Section 1793.2 or is acting as an independent serviceman pursuant to subdivisions (c) and (d) of Section 1793.3. *The amount of such liability shall be an amount equal to the actual and reasonable costs of the service and repair, including any cost for parts and any reasonable cost of transporting the goods or parts, plus a reasonable profit.* It shall be a rebuttable presumption affecting the burden of producing evidence that the reasonable cost of service or repair is an amount equal to that which is charged by the independent serviceman for like services or repairs rendered to service or repair customers who are not entitled to warranty protection. Any waiver of the liability of a manufacturer shall be void and unenforceable.” (Emphasis added.)

A new car dealer would appear to be operating an “independent service and repair facility” within the meaning of this Act.⁴ A new car dealer would also appear to be operating within the provisions of subdivision (a) of section 1793.2,⁵ that is, pursuant warranty service

⁴ Civil Code section 1791(f) defines the term “independent repair or service facility” or “independent service dealer” as “. any individual, partnership, corporation, association, or other legal entity, not an employee or subsidiary of a manufacturer or distributor, which engages in the business of servicing and repairing consumer goods.”

⁵ Civil Code section 1793.2(a)

“(a) Every manufacturer of consumer goods sold in this state and for which the manufacturer has made an express warranty shall:

“(1) Maintain in this state sufficient service and repair facilities reasonably close to all areas where its consumer goods are sold to carry out the terms of such warranties or

contract with an independent service and repair facility. This section allows the manufacturer to impose “. . . a good-faith discount which is reasonably related to reduced credit and general overhead cost factor, arising from the manufacturer’s payment of warranty charges direct to the independent service and repair facility. . . .”

Civil Code section 1794.1 provides a remedy for the “independent serviceman of consumer goods”:

“(a) Any retail seller of consumer goods injured by the willful or repeated violation of the provisions of this chapter may bring an action for the recovery of damages. Judgment may be entered for three times the amount at which the actual damages are assessed plus reasonable attorney fees.

“(b) Any independent serviceman of consumer goods injured by the willful or repeated violation of the provisions of this chapter may bring an action for the recovery of damages. Judgment may be entered for three times the amount at which the actual damages are assessed plus reasonable attorney fees.”

In addition, Civil Code section 1790.4 provides:

“The remedies provided by this chapter are cumulative and shall not be construed as restricting any remedy that is otherwise available, and, in

designate and authorize in this state as service and repair facilities independent repair or service facilities reasonably close to all areas where its consumer goods are sold to carry out the terms of such warranties.

“As a means of complying with paragraph (1) of this subdivision, a manufacturer shall be permitted to enter into warranty service contracts with independent service and repair facilities. The warranty service contracts may provide for a fixed schedule of rates to be charged for warranty service or warranty repair work, however, the rates fixed by such contracts shall be in conformity with the requirements of subdivision (c) of Section 1793.3. The rates established pursuant to subdivision (c) of Section 1793.3, between the manufacturer and the independent service and repair facility, shall not preclude a good-faith discount which is reasonably related to reduced credit and general overhead cost factors arising from the manufacturer’s payment of warranty charges direct to the independent service and repair facility. The warranty service contracts authorized by this paragraph shall not be executed to cover a period of time in excess of one year.

“(2) In the event of a failure to comply with paragraph (1) of this subdivision, be subject to the provisions of Section 1793.5.”

particular, shall not be construed to supplant the provisions of the Unfair Practices Act.”

Thus, the injunctive and civil penalties remedies of Business and Professions Code section 17200, *et seq.*, outlined above, are available for a violation of the Song Beverly Consumer Warranty Act, and if a violation of that Act also constitutes a violation of the Unfair Practices Act, those remedies, civil or criminal, will be available. There is, however, no separate criminal remedy for a violation of the Song-Beverly Consumer Warranty Act.

Again, in the context of this opinion, a manufacturer is liable to reimburse an “independent repair or service facility” for the actual and reasonable costs of the service and repair, including any cost for parts and any reasonable costs of transporting the goods or parts, plus a reasonable profit (Civ. Code, § 1793.6), subject, however, to the manufacturer’s permissible discount under Civil Code section 1793.2(a)(1). The manufacturer would be liable for injunctive relief and civil penalties for a violation. Repeated or willful violations would subject the manufacturer to treble damages and attorneys fees.

3. New Motor Vehicle Board

In 1967, the Legislature created what is now called the New Motor Vehicle Board as part of the Department of Motor Vehicles. (Veh. Code, § 3000 *et seq.*) the board’s duties include:

“(d) Hear and consider, within the limitations and in accordance with the procedure hereinafter provided, a protest presented by a franchisee pursuant to Sections 3060, 3062, 3064, or 3065. . . .”⁶

⁶ Vehicle Code section 3050:

“The board shall:

“(a) Adopt rules and regulations in accordance with the provisions of Chapter 4.5 (commencing with Section 11371), Part 1, Division 3, Title 2 of the Government Code governing such matters as are specifically committed to its jurisdiction.

“(b) Hear and consider, within the limitations and in accordance with the procedure hereinafter provided, an appeal presented by an applicant for, or holder of, a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative when any such applicant or licensee submits such an appeal provided for in this chapter from a decision arising out of the department.

“(c) Consider any matter concerning the activities or practices of any person applying for or holding a license as a new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative pursuant to

Section 3065 provides:

“(a) Every franchisor shall properly fulfill every warranty agreement made by it and adequately and fairly compensate each of its franchisees for labor and parts used to fulfill such warranty when the franchisee has fulfilled warranty obligations of repair and servicing and shall file a copy of its warranty reimbursement schedule or formula with the board. The warranty reimbursement schedule or formula shall be reasonable with respect to the time and compensation allowed the franchisee for the warranty work and all other conditions of such obligation. The reasonableness thereof shall be subject to the determination of the board; provided that a franchisee files a notice of protest with the board.

“(b) In determining the adequacy and fairness of such compensation, the franchisee’s effective labor rate charged to its various retail customers may be considered together with other relevant criteria.

“(c) If any franchisor disallows a franchisee’s claim for a defective part, alleging that such part, in fact, is not defective, the franchisor shall return such part so alleged not to be defective to the franchisee at the expense

Chapter 4 (commencing with Section 11700) of Division 5 submitted by any person; and after such consideration, the board may do any one or any combination of the following:

“(1) Direct the department to conduct such investigation of such matter as the board deems reasonable, and make a written report on the results of such investigation to the board within the time specified by the board;

“(2) Undertake to arbitrate amicably or resolve any honest difference of opinion or viewpoint existing between any member of the public and any new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative;

“(3) Order the department to exercise any and all authority or power that the department may have with respect to the issuance, renewal, refusal to renew, suspension or revocation of the license of any new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative as such license is required under Chapter 4 (commencing with Section 11700) of Division 5.

“(d) Hear and consider, within the limitations and in accordance with the procedure hereinafter provided a protest presented by a franchisee pursuant to Section 3060, 3062, 3064, or 3065. However, no member of the board who is a new motor vehicle dealer may participate in, deliberate on, hear or consider, or decide, any matter involving a protest filed pursuant to Article 4 (commencing with Section 3060) of this chapter.”

of the franchisor, or the franchisee shall be reimbursed for the franchisee's cost of the part, at the franchisor's option.

“(d) All such claims made by franchisees hereinunder shall be either approved or disapproved within 30 days after their receipt by the franchisor. When any such claim is disapproved, the franchisee who submits it shall be notified in writing of its disapproval within such period, and each notice shall state the specific grounds upon which the disapproval is based. All claims made by franchisees under this section and Section 3064 for such labor and parts shall be paid within 30 days following approval. Failure to approve or pay within the above specified time limits, in individual instances for reasons beyond the reasonable control of the franchisor, shall not constitute a violation of this article.”

This section, through the definitions of franchisee and franchisor,⁷ clearly applies and governs reimbursement under warranty service and repair agreements between automobile manufacturers and new car dealers and only between those types of businesses. It requires the automobile manufacturer to compensate, adequately and fairly, each of its franchisees for labor and parts used to fulfill the manufacturer's warranty obligations. The mandatory warranty reimbursement schedule or formula must be reasonable, which reasonableness is subject to the determination of the board. The dealer's effective labor rate is relevant to

⁷ A franchisee is defined as “. . . any person who, pursuant to a franchise, receives new motor vehicles subject to registration under this code from the franchisor and who sells such vehicles at retail.” (Veh. Code, § 331.1.)

A franchisor is defined as “. . . any person who manufactures, assembles, or distributes new motor vehicles subject to registration under this code and who grants a franchise.” (Veh. Code, § 331.2.)

Franchise is defined as:

“. . . a written agreement between two or more persons having all of the following conditions:

“(a) A commercial relationship of definite duration or continuing indefinite duration.

“(b) The franchisee is granted the right to offer and sell at retail new motor vehicles manufactured or distributed by the franchisor.

“(c) The franchisee constitutes a component of the franchisor's distribution system.

“(d) The operation of the franchisee's business is substantially associated with the franchisor's trademark, trade name, advertising, or other commercial symbol designating the franchisor.

“(e) The operation of a portion of the franchisee's business is substantially reliant on the franchisor for a continued supply of new vehicles, parts, and accessories.”

determining the adequacy and fairness of the compensation. This administrative determination of the reasonableness of the warranty service compensation schedule, upon protest by a dealer, and subsequent judicial review of that determination (Veh. Code, § 3068), is the only civil remedy provided by this Act. A violation of the Act, however, would constitute an infraction (Veh. Code, § 40000.1), for which the penalty, for a first offense, is a maximum fine of \$50. (Veh. Code, § 42001.)

4. The Controlling Act

An automobile manufacturer is, by the above three acts, confronted with three different standards of compensation to new car dealers pursuant to warranty service and repair contracts or agreements. Thus, for one item of work provided by one new car dealer, the manufacturer (a) under the Unfair Practices Act may not contract to pay below the cost to such dealer to perform the work, including all the dealer's overhead costs, (b) under the Song-Beverly Consumer Warranty Act, is liable for the amount equal to the actual and reasonable cost of the service and repair, including any cost for parts and any reasonable cost for transporting the goods or parts, plus a reasonable profit, but subject to a manufacturer's good faith discount, and (c) must fairly and adequately compensate new car dealers pursuant to a warranty reimbursement schedule or formula which must be reasonable with respect to time and compensation allowed to the dealer, the reasonableness of which is to be determined by the New Motor Vehicle Board. The precise amount of money required to be paid to the dealer could well be substantially different under each of these standards. Further, the manufacturer would be liable for a variety of civil and criminal remedies depending on which standard was violated.

While a manufacturer and a dealer obviously could agree on a reimbursement schedule which would meet all three standards, the fact remains that a particular schedule permitted under one act might violate one or both of the other acts. For example, a schedule permitted under the Song-Beverly Consumer Warranty Act might contain a permissible manufacturer's discount which results in a reimbursement amount less than the dealer's costs as computed under the Unfair Practices Act. Further, the New Motor Vehicle Board might find that schedule is or is not reasonable and thus constitutes adequate and fair compensation to the dealer under the circumstances. Conversely, a schedule lawful under the Unfair Practices Act as reimbursing the dealer for his defined costs might not contain a "reasonable profit" as required by the Song-Beverly Consumer Warranty Act and therefore violate that Act. Moreover, the New Motor Vehicle Board could well find that lack of a "reasonable profit" resulted in the denial of adequate and fair compensation to the dealer. As a final example, a fixed schedule of rates to be charged for warranty services as permitted under the Song-Beverly Consumer Warranty Act (Civ. Code, § 1793.2(a)) might be consistent with the dealer's defined costs under the Unfair Practices Act, but not be based on the dealer's "effective labor rates charged to its various retail customers" (Veh.

Code, § 3065(b)), and thus be found by the New Motor Vehicle Board to constitute inadequate or unfair compensation.

The courts of California have frequently enunciated a rule of statutory construction that when a special and a general statute on the same subject are in conflict, the special controls, and this obtains irrespective of whether the special statute was enacted first or last.

“It is the general rule that where the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment. Where the special statute is later it will be regarded as an exception to or qualification of the prior general one; and where the general act is later the special statute will be considered as remaining an exception to its terms unless it is repealed in general words or by necessary implication.’” (*In re Williamson* (1954) 43 Cal. 2d 651, 654.)

“It is well settled, also, that a general provision is controlled by one that is special, the latter being treated as an exception to the former. A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates.” (*Rose v. State of California* (1942) 19 Cal. 2d 713, 723–724. See also, *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal. 3d 392, 420 *People v. Ruster* (1976) 16 Cal. 3d 690, 694; *Warne v. Harkness* (1963) 60 Cal. 2d 579, 588; *Div. of Labor Law Enforcement v. Moroney* (1946) 28 Cal. 2d 344, 346; *English Manor Corp. v. Vallejo Sanitation & Flood Control Dist.* (1974) 42 Cal. App. 3d 996, 1000–1001.)

“In the construction of a statute the intention of the Legislature, is to be pursued, if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. . . .” (Code Civ. Proc., § 1859.)

We have no doubt that the provisions of the New Motor Vehicle Board statute relating to warranty reimbursement constitute a special statute and those of the Unfair Practices Act and the Song-Beverly Consumer Warranty Act are general statutes.⁸ The

⁸ We express no opinion as to which, if either, of the Unfair Practices Act and the Song. Beverly Consumer Warranty Act would prevail in the area of manufacturer’s warranty reimbursement obligations.

latter two acts apply to all manufacturers and their warranty service contracts or agreements with any repair facility. In contrast, the New Motor Vehicle Board Act in this area clearly applies to automobile manufacturers and new car dealers, the two businesses which are under consideration in this opinion, and only to those types of businesses. Further, the two general acts do conflict with the Vehicle Code provisions, both as to substantive liability standards and as to remedies for warranty reimbursement. We conclude, therefore, that the provisions of the New Motor Vehicle Board Act prevail over and are an exception to the other two acts, and only the provisions of the New Motor Vehicle Board Act apply to disputes between an automobile manufacturer and a new car dealer concerning reimbursement to the dealer under a warranty service and repair agreement.⁹

⁹ We have only examined and compared the reimbursement aspects of warranty service and repair agreements under the three statutes in question. We express no opinion as to whether any conflict exists as to any other aspect of the three acts.