Filed 1/31/05 Consumer Advocates v. DaimlerChrysler CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CONSUMER ADVOCATES,	
Plaintiff and Appellant,	G029811
v.	(Super. Ct. No. 785866)
DAIMLERCHRYSLER CORPORATION,	O P I N I O N
Defendant and Appellant.	

Appeal from a judgment of the Superior Court of Orange County, David C. Velasquez, Judge. Reversed; motion to dismiss denied.

Anderson Law Firm, Martin W. Anderson and Ivy Tsai; Lerach Coughlin Stoia Geller Rudman & Robbins, Sanford Svetcov, Timothy Blood, Kevin K. Green and Tami Hennick, for Plaintiff and Appellant.

Horvitz & Levy, Lisa Perrochet and John A. Taylor, Jr.; Gates, O'Doherty, Gonter & Guy, Douglas D. Guy and Matthew M. Proudfoot for Defendant and Appellant.

This case was brought by an association, Consumer Advocates, as a representative action "on behalf of the general public" against DaimlerChrysler Corporation. Consumer Advocates alleged DaimlerChrysler violated the unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.) in numerous ways in its handling of new vehicle warranty repairs so as to comply with the Song-Beverly Consumer Warranty Act (Song-Beverly) (Civ. Code, § 1790 et seq.). Although the trial court rejected most of the plaintiff's contentions, it found DaimlerChrysler committed "unfair" business practices within the meaning of the UCL by either failing to have appropriate procedures and policies in place to ensure it and its dealers "promptly" complied with the "replacement or restitution" remedy contained in Song-Beverly, or by requiring consumers to take steps to obtain the replacement or repurchase remedy not specifically required by Song-Beverly. The trial court issued a judgment permanently enjoining DaimlerChrysler from engaging in the "unfair" acts.

In its appeal, DaimlerChrysler contends the specific acts do not constitute unfair business practices and granting injunctive relief was an abuse of the trial court's discretion for various equitable reasons. In its cross-appeal, the plaintiff contends the trial court erred by refusing to order DaimlerChrysler to pay restitution or disgorge its profits.

We agree with DaimlerChrysler that equitable considerations militate against the injunctive relief granted in this case. A consumer has an adequate remedy at law for violations of Song-Beverly under the act, including damages, costs and attorney fees, and a civil penalty in egregious cases. Furthermore, the injunction improperly places the trial court in the position of ongoing supervision of all of DaimlerChrysler's new car warranty practices within the state and will lead to a multiplicity of suits. Accordingly, the judgment must be reversed.

I

STATUTORY CONTEXT

We depart from our usual custom of beginning with the facts. We start instead with a discussion of Song-Beverly and the UCL as relevant to this case, so as to put the facts in the proper context.

Song-Beverly

"[Song-Beverly] 'regulates warranty terms, imposes service and repair obligations on manufacturers, distributors, and retailers who make express warranties, requires disclosure of specified information in express warranties, and broadens a buyer's remedies to include costs, attorney's fees, and civil penalties. . . . [¶] In 1982, the Legislature added a provision designed to give recourse to the buyer of a new automobile that suffers from the same defect repeatedly, or is out of service for cumulative repairs for an extended period. [Citations.]' [Citation.] [¶] Popularly known as the automobile 'lemon law' [citation], the Song-Beverly Act is strongly pro-consumer, ... The Act 'is manifestly a remedial measure, intended for the protection of the consumer; it should be given a construction calculated to bring its benefits into action. [Citation.]' [Citation.]" (*Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 989-990.)

Primarily at issue in this case are the provisions relating to the replacement or restitution (sometimes called repurchase) remedy. The heart of the remedy lies in Civil Code section 1793.2, subdivision (d)(2), which provides, "If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle, as that term is defined in paragraph (2) of subdivision (e) of Section 1793.22, to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle in accordance with subparagraph (A) or promptly make restitution to the buyer in accordance with subparagraph (B). However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required by the manufacturer to accept a replacement vehicle."

Civil Code section 1793.22, subdivision (b), establishes certain rebuttable presumptions as to what constitutes a "reasonable number of attempts . . . to conform a new motor vehicle to the applicable express warranties . . . ." (E.g., subject to repair four or more times; vehicle out of service more than 30 days.) A "nonconformity" is one "which substantially impairs the use, value, or safety of the new motor vehicle to the buyer or lessee." (Civ. Code, § 1793.22, subd. (e)(1).)

Song-Beverly provides a consumer with a private right of action against a manufacturer who has not complied with its requirements to recover "damages and other legal and equitable relief." (Civ. Code, § 1794, subd. (a).) A successful consumer is entitled to costs and attorney fees, and in appropriate cases a civil penalty of up to two times the damages. (Civ. Code, § 1794, subd. (e)(1).)

Finally, Song-Beverly also envisions and encourages the use of arbitration to resolve disputes. Specifically, if a manufacturer maintains a "qualified third-party dispute resolution process" (which DaimlerChrysler does), then a buyer may not assert Civil Code section 1793.22's "reasonable number of attempts" presumptions unless he or she has initially resorted to arbitration. (Civ. Code, § 1793.22, subd. (c).) Additionally, a manufacturer who maintains a "qualified third-party dispute resolution process" cannot be subject to civil penalties in a legal action. (Civ. Code, § 1794, subd. (e)(2).)

Unfair Competition Law

The UCL prohibits "any unlawful, unfair or fraudulent business act or practice[.]" (Bus. & Prof. Code, § 17200.) Business and Professions Code section 17200 is written in the disjunctive. "[I]t establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent. "'In other words, a practice is prohibited as "unfair" or "deceptive" even if not "unlawful" and vice versa.' [Citation.]" (*Podolsky v. First Healthcare Corp.* (1996) 50 Cal.App.4th 632, 647.) The remedies for violation of the UCL are equitable in nature, i.e., injunction and restitution. (Bus. & Prof. Code, § 17203.)

II

FACTS

Consumer Advocates' complaint alleged one cause of action against DaimlerChrysler for unfair business practices by engaging in a practice of violating Song-Beverly.[1] Specifically, it alleged DaimlerChrysler had a practice of: (1) failing to voluntarily offer to replace or repurchase motor vehicles that had not been repaired so as to conform with DaimlerChrysler's express warranties after a reasonable number of attempts to repair the vehicle had been made; (2) failed to monitor the service and repair records of its authorized service and repair facilities (so as to ascertain which vehicles qualified for replacement or restitution); (3) failed to maintain appropriate service and repair facilities; (4) inadequately reimbursed authorized repair facilities for warranty repairs; (5) failed to maintain policies ensuring that defective vehicles would be repaired within 30 days; and (6) unfairly refused to acknowledge that service contracts providing for repairs beyond the normal warranty period were also express warranties triggering the replacement or restitution remedy for defects arising after the normal warranty period had expired. Among other things, in its prayer for relief Consumer Advocates sought an accounting and disgorgement of DaimlerChrysler's profits that might have resulted from its unfair acts, "restor[ation] to the general public [of] any money . . . [DaimlerChrysler] may have acquired as a result of any [unfair] acts[,]" and permanent injunctive relief.

---

[1] Originally, the plaintiffs included Consumer Advocates and William and Rosemarie Gavaldon. The Gavaldons separately alleged six causes of action for breach of warranty, etc. Their causes of action were severed from Consumer Advocates' and tried separately. They prevailed at trial on the theory that a service contract they purchased was an express warranty entitling them to the replacement or restitution remedy after the normal warranty period had expired. We disagreed and reversed the judgment in the Gavaldons' favor holding a service contract is not an express warranty. (*Gavaldon v. DaimlerChrysler Corp.* (2002) 95 Cal.App.4th 544, review granted May 15, 2002, S104477.) Recently, the California Supreme Court agreed with our conclusion. (*Gavaldon v. DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246.)

There was extensive evidence on how warranty repair issues are supposed to be handled by its personnel at the Chrysler Customer Center (CCC), by its authorized dealers, who are required to provide warranty repairs on DaimlerChrysler vehicles, and by its local zone offices, where the persons with actual authority to replace or repurchase a vehicle are located.

At the time of purchase, a customer is given several documents advising of consumers' rights under Song-Beverly. Customers are told DaimlerChrysler has an arbitration process for resolving customer complaints, but the customer is not required to use that process and it does not take the place of any state or federal legal remedies. Customers are advised they should first attempt to resolve warranty issues with the dealership and the CCC, before filing a request for arbitration, but they are free to go directly to arbitration. The work order signed by the customer whenever a vehicle is presented to a dealer for repair, contains a notice that "if after a reasonable number of attempts, the defect has not been fixed, the buyer may return this product for a replacement or refund subject, in either case, to deduction of a reasonable charge for usage."

DaimlerChrysler dealerships are required to perform warranty repairs, but are not authorized to grant a customer's request that a vehicle be replaced or repurchased. Dealerships are supposed to notify DaimlerChrysler when it becomes aware a vehicle may qualify for replacement or restitution. Dealers are supposed to contact DaimlerChrysler when a vehicle comes in multiple times for repair of the same defect. DaimlerChrysler recommends dealers keep a "comeback" log to track repeat repairs, although many do not. There was evidence dealers do not always notify DaimlerChrysler when multiple repair attempts have been unsuccessful, but there was also evidence of instances where dealerships did notify DaimlerChrysler and DaimlerChrysler replaced the vehicle.

When a customer contacts the CCC with an inquiry, the call is documented in the computer system by a "CAIR" (Customer Assistance Inquiry Record). Between October 1993 and August 1998, CCC received about 250,000 inquires from customers; 1,233 were marked as lemon law inquires. The CCC is supposed to open a "Direct-to-Dealer" CAIR when a customer complaint involves an unresolved warranty issue, a possible lemon law issue, or when there have been multiple attempts to repair an undriveable vehicle.

Dealers are supervised by DaimlerChrysler local zone offices, which are responsible for handling lemon law issues and for deciding if the replacement or restitution remedy is appropriate. Neither CCC employees nor dealers have authority to offer replacement or restitution. Direct-to-Dealer CAIRs are supposed to be sent to the dealer and to the local zone office for monitoring. When there has been a customer demand for replacement or restitution, the CAIR is supposed to be issued directly to the local zone office.

DaimlerChrysler maintains a certified arbitration program. Arbitration is free to customers, and customers are not bound by the arbitrator's decision. The arbitration process takes about 40 days from when the application is received. Sometimes the customer's arbitration application is the first notice DaimlerChrysler or a dealer gets that a customer seeks replacement or restitution. In about 20 percent of the cases in which arbitration is requested, DaimlerChrysler will settle with the customer before an arbitration decision is reached. Since 1993, about 150 arbitrations have resulted in replacement or restitution awards. Between 1993 and trial, DaimlerChrysler replaced or repurchased almost 10,000 California vehicles, mostly for "customer satisfaction" and not due to actual lemon law issues. In the same time, less than 10 judgments have been entered against DaimlerChrysler in Song-Beverly actions.

DaimlerChrysler's procedures are not always followed and sometimes produce unsatisfactory results for the consumer. DaimlerChrysler does not specifically

monitor dealers to ensure that all repairs are successful. When a customer calls CCC with a complaint, employees generally refer the customer to a dealership. If the customer makes a lemon law inquiry, the CCC employee will sometimes mail the customer an arbitration application and close the CAIR without making further investigation into whether replacement or restitution is appropriate.

DaimlerChrysler does not have a written policy requiring dealers to contact the local zone office if a vehicle has been brought in three or more times for the same problem. Dealers sometimes do not report their inability to repair a vehicle after a "reasonable number of attempts" to DaimlerChrysler. DaimlerChrysler does not provide formal training to its dealers' employees on lemon law requirements.

DaimlerChrysler's CCC policy manual advises CCC personnel that "In order for the customer to apply for protection under a state's lemon law, they would have to pursue the matter through that state's legal system, or a State administered arbitration process (where applicable). **A customer cannot apply for protection by calling Chrysler Corporation.**" On occasion, CCC personnel have told customers DaimlerChrysler does not replace or repurchase defective vehicles. That advice is contrary to DaimlerChrysler policy as set forth in the CCC manual: "**Do not tell a customer that [DaimlerChrysler] does not replace or repurchase vehicles. We do comply with all state lemon laws, and replace vehicles for a number of different reasons.**" DaimlerChrysler's manager of warranty litigation testified he was aware of about a dozen instances when a customer demanded replacement or restitution and the CCC employee advised the customer to pursue arbitration.

There was testimony that in some cases, a customer's written notification to DaimlerChrysler that a vehicle had not been repaired was not forwarded to a local zone office until the customer instituted litigation or arbitration. Local zone office personnel are not formally trained on Song-Beverly and do not fully understand the law. Sometimes, even when replacement or restitution was appropriate, the local zone office

employee first offered the customer a service contract. In some cases, the customer was offered replacement of the vehicle and not told about the repurchase option.

The files of approximately 300 DaimlerChrysler arbitration proceedings were entered into evidence. Consumer Advocates reviewed 26 of those files with the consumer involved in the particular arbitration. The majority of the consumers who testified were aware of the existence of the lemon law; few fully understood their rights under the law. Each made numerous trips to a DaimlerChrysler dealer for warranty repairs, which were unsuccessful. None were directly contacted by DaimlerChrysler or voluntarily offered the replacement or restitution remedy. In some cases, the customer contacted DaimlerChrysler's CCC and was advised to file for arbitration. In other cases, the customer filed for arbitration without first contacting DaimlerChrysler. In some cases, after the customer filed an arbitration demand, he or she was contacted by DaimlerChrysler local zone office personnel and offered replacement or restitution. In other cases, replacement or restitution was ordered by the arbitration board after a hearing. In some cases, DaimlerChrysler at first only offered to replace the defective vehicle and did not tell the customer about the repurchase option. In other cases, DaimlerChrysler at first only offered the customer a service contract on the defective vehicle.

Statement of Decision

Following a lengthy court trial, the court issued a detailed statement of decision ruling against Consumer Advocates on many of its claims, but finding DaimlerChrysler had engaged in "unfair" business practices within the meaning of Business and Professions Code section 17200 with respect to how it handles its replacement or restitution obligations under Song-Beverly. DaimlerChrysler's unfair business practices fall into five general categories:

1. Failure to Volunteer the Replacement or Restitution Remedy

The court found DaimlerChrysler commits an unfair business practice by failing to promptly inform customers a nonconformity has not been corrected, and offer the customer replacement or restitution, when there is evidence known to DaimlerChrysler that its dealer is unable to service or repair the vehicle to conform to the applicable express warranties after a reasonable number of attempts. The court concluded DaimlerChrysler commits an unfair business practice by failing to instruct its dealers to promptly inform the owner of the vehicle the dealer cannot correct the nonconformity and the owner may have the right to choose replacement or restitution. DaimlerChrysler also commits an unfair business practice by failing to instruct its customer service and warranty personnel the owner of a vehicle need not request replacement or restitution before DaimlerChrysler is obligated to offer both of those remedies.

2. Failure to Simultaneously Offer Replacement or Repurchase

The court found DaimlerChrysler commits an unfair business practice by sometimes offering the customer only replacement of the vehicle without first informing the customer of the right to choose between replacement and restitution.

3. Unnecessarily Referring Customers to Arbitration

The court found that although DaimlerChrysler maintains an "excellent arbitration process," DaimlerChrysler commits an unfair business practice by referring the owner of a new motor vehicle to arbitration in cases where it cannot "reasonably contradict" evidence the vehicle cannot be repaired to conform to the applicable express warranties after a reasonable number of attempts. It also commits an unfair business practice by failing to instruct its dealers and warranty personnel an owner need not avail himself of arbitration in order to obtain replacement or restitution of the vehicle when there is no reasonable dispute the vehicle cannot be repaired.

4. Referring Customers to Dealers

The court found DaimlerChrysler commits an unfair business practice by instructing its own customer service and warranty personnel to direct customers with replacement or restitution issues back to dealers who are not authorized to provide those remedies.

5. Service Contract Issues

The court rejected Consumer Advocates' contention that service contracts are express warranties subject to the replacement or restitution remedy (see *Gavaldon v. DaimlerChrysler Corporation, supra,* 32 Cal.4th 1246), and rejected Consumer Advocates' claim DaimlerChrysler commits an unfair business practice by refusing to acknowledge service contracts as express warranties. However, the court found DaimlerChrysler commits an unfair business practice because sometimes its employees or dealers referred to service contracts as "extended warranties." Thus, DaimlerChrysler and its dealers sometimes misled customers into believing the service contract extended all of the express warranty remedies under Song-Beverly (i.e., replacement or restitution).

Judgment: Permanent Injunction

The trial court entered a final judgment granting DaimlerChrysler nonsuit on most of Consumer Advocates' claims, including its claim for restitution or disgorgement of profits. The court issued a permanent injunction prohibiting conduct by DaimlerChrysler with regard to handling new car warranty claims that potentially involve the lemon law, which we summarize as follows:

(1) DaimlerChrysler is prohibited from referring consumers to arbitration, or requiring the consumer to resort to arbitration, when DaimlerChrysler cannot "reasonably contradict" evidence the replacement or restitution remedy is appropriate;

(2) DaimlerChrysler is prohibited from failing to "promptly offer" consumers replacement or restitution when it cannot "reasonably

contradict" evidence the replacement or restitution remedy is appropriate;

(3) DaimlerChrysler is prohibited from failing to "promptly inform" consumers (or failing to instruct its dealers to "promptly inform" consumers) a vehicle's nonconformity has not been corrected once DaimlerChrysler cannot "reasonably contradict" evidence the nonconformity has not been corrected after a reasonable number of attempts;

(4) DaimlerChrysler is prohibited from offering consumers replacement of a vehicle without first advising them of their right to choose between replacement or restitution;

(5) DaimlerChrysler is prohibited from failing to have written statewide procedures for promptly offering replacement or restitution without resort to arbitration in cases where it cannot "reasonably contradict" evidence the replacement or restitution remedy is appropriate;

(6) DaimlerChrysler is prohibited from failing to instruct dealers a consumer need not demand replacement or restitution—DaimlerChrysler must offer the remedy whenever it cannot "reasonably contradict" evidence that the replacement or restitution remedy is appropriate;

(7) DaimlerChrysler is prohibited from failing to instruct dealers to "promptly inform" consumers they may have the right to choose replacement or restitution if the vehicle cannot be made to conform to applicable express warranties after a reasonable number of attempts;

(8) DaimlerChrysler is prohibited from failing to instruct its employees that a consumer need not demand replacement or restitution before DaimlerChrysler is obligated to offer both alternatives;

(9) DaimlerChrysler is prohibited from failing to instruct its employees a consumer need not avail himself or herself of arbitration to obtain replacement or restitution when there is no reasonable dispute the remedy is appropriate;

(10) DaimlerChrysler is prohibited from referring consumers who call the CCC with lemon law-related complaints to DaimlerChrysler dealers, unless it has authorized dealers to offer the replacement or restitution remedy (i.e., DaimlerChrysler may only refer customer lemon law complaints to personnel with direct authority to offer replacement or restitution); and

(11) DaimlerChrysler is prohibited from referring to service contracts as "extended warranties," or suggesting to consumers a service contract entitles them to the same legal remedies (i.e., replacement or restitution) as an express warranty.

The judgment contains additional injunctive provisions. DaimlerChrysler is prohibited from selling service contracts or "refusing to repurchase or replace any vehicle sold in . . . California" until it is in compliance with the following: DaimlerChrysler must draft, implement, and distribute new "written policies and procedures and written promotional and sales materials" bringing its conduct into compliance with the permanent injunction. Those materials must be provided to Consumer Advocates' attorney of record, and whenever they are revised, Consumer Advocates' attorney of record must be informed. After preparing the written materials, DaimlerChrysler must commence a training program on all of its new materials, procedures, and polices, for not only its own employees, but all of its dealerships' employees who are involved in service related to new vehicle warranties. DaimlerChrysler must then provide Consumer Advocates' attorney with "a list of all persons who received such training and instruction and the written personal

acknowledgment of each person trained, including the name of the dealer which employed such person if applicable." DaimlerChrysler must provide a copy of the permanent injunction to all management personnel and all dealerships within the State of California. And DaimlerChrysler must provide consumers with a guide explaining the rights under any vehicle warranty and service contract at the time of purchase for postjudgment new car purchases or for older vehicles at the time the vehicle is presented for a warranty-related repair. The injunction is enforceable by contempt and the trial court retained jurisdiction "to hear and resolve any matter or proceeding to enforce this Judgment despite the entry of this Judgment."

III

PRELIMINARIES

Before we address the merits of the appeals, we must address several preliminary points raised by Consumer Advocates seeking either dismissal of DaimlerChrysler's appeal or affirmance of the judgment without reaching the merits.

1. Motion to Dismiss Due to Failure to Appeal Original Judgment

Consumer Advocates filed a motion to dismiss DaimlerChrysler's appeal because it appealed from the court's modified judgment, entered pursuant to Code of Civil Procedure section 662 after DaimlerChrysler's motion for new trial was denied, rather than from the original judgment. The motion is frivolous and is denied.

The original judgment entered on August 17, 2001, failed to address the court's numerous rulings in DaimlerChrysler's favor. Consumer Advocates served notice of entry of judgment on DaimlerChrysler on August 28, 2001. DaimlerChrysler filed a motion for new trial asking, among other things, that the court modify the judgment pursuant to Code of Civil Procedure section 662 to include the rulings in DaimlerChrysler's favor. Although DaimlerChrysler's motion for new trial was denied, the court ordered the judgment "modified pursuant to Code of Civil Procedure section 662 and *a new and different judgment is entered* . . . ." (Italics added.) The

modified judgment repeated the same rulings from the original judgment pertaining to the injunction against DaimlerChrysler, but added additional rulings in DaimlerChrysler's favor. The modified judgment was entered on October 11, 2001. DaimlerChrysler filed its notice of appeal from the modified judgment on October 15, 2001.

Consumer Advocates argues that because the relief granted to it in the original judgment was not altered by the modified judgment, DaimlerChrysler was required to appeal from the original judgment. We disagree. "'The rule is established that where an amended judgment is entered after proceedings on a motion for a new trial and pursuant to the provisions of section 662 of the Code of Civil Procedure, which second judgment is a material departure from the first one entered, an appeal lies *solely* from the second judgment, the first judgment thus being nonappealable. [Citations.]'" (*Avery v. Associated Seed Growers, Inc.* (1963) 211 Cal.App.2d 613, 622.) Here, the original judgment was vacated and an entirely new judgment was entered pursuant to Code of Civil Procedure section 662. DaimlerChrysler's appeal lies from the modified judgment. The cases Consumer Advocates relies upon, *Stone v. Regents of University of California* (1999) 77 Cal.App.4th 736, and *People v. Landon White Bail Bonds* (1991) 234 Cal.App.3d 66, are inapposite as neither involved a new judgment entered pursuant to Code of Civil Procedure section 662.

Furthermore, even if there was merit to Consumer Advocates' contention, Consumer Advocates was not harmed or misled by DaimlerChrysler's appeal of the modified judgment. The notice of appeal was timely as to the original and the modified judgment (i.e., this is not a case where by appealing the modified judgment DaimlerChrysler is attempting to salvage an untimely appeal). Thus, under rules of liberal construction, we would decline to dismiss the appeal. (Cal. Rules of Court, rule 1(a)(2); *D'Avola v. Anderson* (1996) 47 Cal.App.4th 358, 361 [a notice of appeal is liberally construed in favor of its sufficiency]; *Luz v. Lopes* (1960) 55 Cal.2d 54, 59 [liberal construction appropriate where it is clear respondent has not been misled].)

2. Failure to Include Exhibits in Appellant's Appendix

Consumer Advocates next contends the appeal must be dismissed because DaimlerChrysler did not include trial exhibit 42—comprised of the 300 DaimlerChrysler arbitration files admitted into evidence—in the appellant's appendix. The contention is completely without merit. California Rules of Court, rule 5.1(b)(5) provides, "All exhibits admitted in evidence or refused are deemed part of the appendix, whether or not it contains copies of them." An appellant's failure to include copies of exhibits in the appellant's appendix simply is not grounds for dismissing the appeal. Had Consumer Advocates wanted us to consider the exhibits, it could have included them in a respondent's appendix (Cal. Rules of Court, rule 5.1(b)(6)), but it did not. Furthermore, California Rules of Court, rule 18 places the burden on the party wanting the appellate court to consider exhibits to serve notice designating the exhibits to be transmitted by the superior court. Consumer Advocates filed no such notice and cannot now complain about the absence of the exhibits.

3. Failure to Attack all Grounds for Judgment

Consumer Advocates contends we should affirm the judgment because DaimlerChrysler has failed to address *all* the legal bases for the court's rulings under the UCL. Specifically, it argues the trial court found DaimlerChrysler's practices to be not only unfair, but unlawful and fraudulent as well. (See *Podolsky v. First Healthcare Corp., supra,* 50 Cal.App.4th at p. 647 [statute written in disjunctive and refers to three types of prohibited conduct].) In its opening brief, DaimlerChrysler addresses only whether the practices were unfair, not whether they were also unlawful or fraudulent. Accordingly, Consumer Advocates urges, we must affirm the judgment without addressing the merits.

Consumer Advocates' argument is without merit and is based on a blatant failure to explain the record. Consumer Advocates highlights two minute orders containing the court's tentative rulings in which it did indeed refer to DaimlerChrysler's

practices as being "unlawful, unfair and fraudulent business practice[s] . . . ." From this, Consumer Advocates argues that when the court, in its statement of decision and judgment only labeled the practices as "unfair" it was simply omitting superfluous "prefatory language," and the court meant each practice was unfair, unlawful, and fraudulent.

What Consumer Advocates omits from its analysis is that after the initial minute order was issued, DaimlerChrysler filed a request for a statement of decision in which it specifically asked the court "as to each violation found, identify whether it is 'unlawful,' 'unfair,' or 'fraudulent,' and explain the factual and legal basis for each such finding." The statement of decision (which apparently was prepared by the court, not the parties) labeled the practices only as "unfair," with the exception of its finding regarding service contracts in which it found DaimlerChrysler's practice (of sometimes using the term "extended warranty" in reference to service contracts) to be "unfair and deceptive . . . ." Consumer Advocates did not object to the statement of decision.

Consumer Advocates then submitted a proposed judgment containing a preamble in which it stated each of the practices were "unlawful, unfair, and/or fraudulent . . . ." DaimlerChrysler objected to the proposed judgment arguing, among other things, that the statement of decision had only identified the practices as "unfair" and the preamble was an attempt at "re-injecting ambiguity regarding the basis for the court's finding. Any judgment entered should track the language of the Statement of Decision, which clarifies DaimlerChrysler did not commit any *unlawful* or *fraudulent* practice under the UCL." The final judgment (again, prepared by the court) only stated the practices were "unfair." From the foregoing, it is apparent the trial court rejected Consumer Advocates' alternative bases for liability, i.e., unlawful or fraudulent.

IV

DAIMLERCHRYSLER'S APPEAL

We turn to the merits of DaimlerChrysler's appeal. Much time is devoted by both sides on the issue of whether the specific practices identified by the trial court constitute "unfair" business practices within the meaning of the UCL. Furthermore, DaimlerChrysler advocates that we should extend the test articulated by our Supreme Court in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180, for determining what is "unfair" in the context of a UCL action between business competitors to UCL actions brought by consumers. We find it unnecessary to resolve these points in this case. Even were we to agree that some or all of DaimlerChrysler's practices in handling its warranty obligations under Song-Beverly are "unfair" business practices (a point upon which we take no position), we conclude the issuance of injunctive relief (the only available remedy in this case) was inappropriate.

Business and Professions Code section 17203 sets forth the remedies for violations of the UCL: "Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments . . . as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition . . . or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition."

In *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163 (*Cortez*), our Supreme Court confirmed that inasmuch as the UCL provides only equitable remedies, equitable considerations enter into disposition of a UCL action. "We agree that equitable defenses may not be asserted to wholly defeat a UCL claim since such claims arise out of unlawful conduct. It does not follow, however, that equitable considerations may not guide the court's discretion in fashioning the equitable remedies authorized by section 17203. . . . UCL remedies are cumulative to remedies available

under other laws (§ 17205) and, as section 17203 indicates, have an independent purpose—deterrence of and restitution for unfair business practices. [Citation.] Therefore, what would otherwise be equitable defenses may be considered by the court when the court exercises its discretion over which, if any, remedies authorized by section 17203 should be awarded. [¶] The court's discretion is very broad. Section 17203 does not mandate restitutionary or injunctive relief when an unfair business practice has been shown. . . . [¶] . . . [¶] Therefore, in addition to those defenses which might be asserted to a charge of violation of the statute that underlies a UCL action, a UCL defendant may assert equitable considerations. In deciding whether to grant the remedy or remedies sought by a UCL plaintiff, the court must permit the defendant to offer such considerations. In short, consideration of the equities between the parties is necessary to ensure an equitable result." (*Id.* at pp. 179-181.)

1. Adequacy of Legal Remedy

It is fundamental that "[a] party seeking injunctive relief must show the absence of an adequate remedy at law. [Citation.]" (*Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist.* (1992) 8 Cal.App.4th 1554, 1564.) "Mr. Witkin describes the situation where adequacy of a legal remedy is at issue: 'The usual statement of this factor is in terms of "inadequacy of the legal remedy" or, even more narrowly, "inadequacy of damages." The idea, which dates from the time of the early courts of chancery, is that an injunction is an unusual or extraordinary equitable remedy which will not be granted if the remedy at law (usually damages) will adequately compensate the injured plaintiff. [Citation.] [¶] Our statutes cover this factor in the following language: "When pecuniary compensation would not afford adequate relief." [Citations.] "Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief." [Citations.]'" (*Id.* at pp. 1564-1565; see also 6 Witkin, Cal. Procedure (4th ed. 1996) Provisional Remedies, § 297, pp. 236-237.)

In *Prudential Home Mortgage Co. v. Superior Court* (1998) 66 Cal.App.4th 1236 (*Prudential*), this court extended that concept to actions under the UCL. In *Prudential,* borrowers brought actions against real estate lenders for violation of Civil Code section 2941, which requires the beneficiary/trustee (i.e., the lender) to record a reconveyance of the deed of trust after a borrower pays off a secured loan. The statute also provided for a $300 penalty against a lender (subsequently increased to $500) for failure to comply with its mandates. The borrowers sought recovery of the statutory forfeiture amount and alleged an unfair business practice under Business and Professions Code section 17200 seeking equitable relief. The trial court refused the lenders' request to strike the claim for equitable relief. We directed the court to strike the claim because the borrowers had an adequate remedy at law. (*Prudential*, *supra,* 66 Cal.App.4th at p. 1230.) We agreed the availability of the statutory relief for violation of the UCL "is subject to fundamental equitable principles, including inadequacy of the legal remedy." (*Id.* at p. 1249.) We further agreed the consumers' legal remedies under Civil Code section 2941 were adequate because the statute contained a backup method of obtaining a recorded reconveyance (e.g., a title insurance company may record a release of obligation), and lender remained liable for failing to perform its statutory obligations even if the backup method was used. "'This provision, which continues to hold lenders/beneficiaries and trustees liable for nonperformance regardless of the circumstances which prevented performance, indicates the Legislature intended these parties to be primarily responsible for issuing reconveyances. Presumably trustees, and especially lenders/beneficiaries, expose themselves to the risk of at least civil penalties and damages in the event a trustor suffers damages from, for example, lost opportunities during the 75-day period a title insurer holds the necessary documentation for reconveying before recording a release of obligation.' [Citation.]" (*Prudential, supra,* 66 Cal.App.4th at pp. 1249-1250.) "Because the Legislature has prescribed these backup

methods . . . we must assume the statutory remedies are adequate, thus precluding equitable relief under the Business and Professions Code." (*Id.* at p. 1250.)

Song-Beverly "is strongly pro-consumer . . . ." (*Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 990.) It "'is manifestly a remedial measure, intended for the protection of the consumer . . . .'" (*Ibid.*) To this end, Song-Beverly provides the consumer who has been denied prompt replacement or repurchase the right to "bring an action for the recovery of damages and other legal and equitable relief." (Civ. Code, § 1794, subd. (a).) If the consumer prevails, "the buyer shall recover damages and reasonable attorney's fees and costs, and may recover a civil penalty of up to two times the amount of damages." (Civ. Code, § 1794, subd. (e)(1).)

Many cases have emphasized the adequacy of the Song-Beverly remedy to redress a consumer's harm. *Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, denying tort damages, rejected the buyer's assertion that because the manufacturer's violation of Song-Beverly was the willful violation of a statute intended to protect consumers, he should be entitled to remedies beyond those provided for in the act—specifically damages for emotional distress. The court "reject[ed] this interpretation of damages available for violations of the Act as inconsistent with the Legislature's expressly stated intent. It is true [the buyer] alleged and proved to the jury's apparent satisfaction not merely a breach of contract, but a violation of the replace-or-refund obligation imposed by the Act. This does not, however, entitle him to damages beyond those provided for in the Act." (*Id.* at p. 191, fn. omitted.) *Gomez v. Volkswagen of America, Inc.* (1985) 169 Cal.App.3d 921, in holding there was no tort remedy for violation of covenant of good faith and fair dealing in an automobile warranty, concluded "There is nothing before the court to indicate that the remedy afforded by Civil Code section 1794 is inadequate either in the amount of damages that a meritorious plaintiff may recover or as a deterrent to the proscribed conduct. Such inadequacy is, of course, a cornerstone of the judicial policy supporting a tort remedy for violation of the covenant

of good faith and fair dealing found in every contract. [Citation.]" (*Gomez v. Volkswagen of America, Inc., supra,* 169 Cal.App.3d at pp. 928-929; see also *Bishop v. Hyundai Motor America* (1996) 44 Cal.App.4th 750, 755 [Legislature intended to limit damages available under Song-Beverly to those specified in Civil Code section 1794].)

For its part, Consumer Advocates says nothing about the adequacy of the remedy provided for in Song-Beverly to address the practices involved in this case—from which we may assume it concedes a consumer's Song-Beverly remedy is adequate to address injuries a consumer might suffer if a car manufacturer fails to comply with its obligations under Song-Beverly. Rather, Consumer Advocates argues the availability of an adequate legal remedy is completely irrelevant in a UCL action, i.e., if the conduct is unfair then it may obtain an injunction regardless of the consumer's own legal remedies.

Preliminarily, Consumer Advocates' reliance on *In re Marriage of Van Hook* (1983) 147 Cal.App.3d 970, and *Ghory v. Al-Lahham* (1989) 209 Cal.App.3d 1487, in support of its position is misplaced as neither case involved UCL actions. Consumer Advocates also relies on *People v. James* (1981) 122 Cal.App.3d 25, 40, in which the court held that in an action by the People "acting pursuant to a legislative mandate to seek injunctive relief against unlawful, unfair or fraudulent business practices" adequacy of the remedy at law, and other equitable defense, were irrelevant. But that case predates our Supreme Court's opinion in *Cortez, supra,* 23 Cal.4th 163, which requires consideration of equitable defenses.

Consumer Advocates implores us to disregard or repudiate this Court's own decision in *Prudential* arguing it is either wrong or has been "repealed by implication." We are unsure as to what Consumer Advocates means by the latter—repeal by implication is a principle invoked in the context of two irreconcilable *statutes*. (See *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 568.) Assuming what Consumer Advocates means is that *Prudential* has been impliedly overruled in subsequent cases, it has not given us any citations to support that claim. Nor can we

agree with Consumer Advocates that *Prudential* was wrongly decided and we abide by our prior decision here. Our Supreme Court confirmed the relevance of equitable defenses in *Cortez, supra,* 23 Cal.4th 163.

In conclusion, we find the remedies provided for in Song-Beverly are adequate to protect a consumer. If a manufacturer fails to comply with its obligations under Song-Beverly, a consumer may sue for damages. If successful, the consumer is entitled to the Song-Beverly remedy of replacement or restitution plus costs and attorney fees. If the manufacturer has engaged in the tactics DaimlerChrysler has been accused of here, the consumer may well be entitled to recover a civil penalty. Consumer Advocates points to no additional benefit to the consumer by virtue of the injunction, and as we discuss below, other equitable considerations militate against the broad equitable relief granted in this case.

2. Equitable Abstention

DaimlerChrysler argues injunctive relief is further inappropriate in this case because it will embroil the courts in ongoing supervision of its business practices, lead to a multiplicity of suits, and is incapable of meaningful enforcement. A series of appellate court cases have articulated the principle that on occasion a court of equity simply should not intervene under the guise of the UCL when injunctive relief implicates matters of complex economic policy, where the injunction would lead to a multiplicity of enforcement actions, and/or result in ongoing judicial supervision of an industry. We agree this is one of those cases.

In *Diaz v. Kay-Dix Ranch* (1970) 9 Cal.App.3d 588 (*Diaz*), migratory farm workers filed a class action suit against three ranches under the predecessor to the UCL, seeking to enjoin the practice of employment of illegal immigrants in the farming industry. (*Id.* at p. 590.) The appellate court held it was inappropriate for injunctive relief to be granted. The court reasoned that if these defendants were enjoined, soon similar injunctions would issue against other farm operators. “A network of these

injunctions may cover growers in rural counties. A single superior court may be called upon to issue dozens of these injunctions." (*Id.* at p. 598.) The potential for alleged violations of such an injunction would be enormous implicating virtually every new hire. "Injunction violations would subject employers to judgments of contempt, punishable by fine or jail. [Citation.] Eligible workers or other observers would report seeming violations, contempt citations would issue and judicial hearings held. At peak employment seasons the superior courts in rural counties would sit in judgment over charges of contempt and over the form and adequacy of investigations. Multiple injunctions covering a wide segment of California agriculture would have the cumulative effect of a statutory regulation, administered by the superior courts through the medium of contempt hearings. The injunctive relief sought by plaintiffs would subject farm operators to burdensome, if bearable, regulation, and the courts to burdensome, if bearable, enforcement responsibilities." (*Id.* at p. 599.) The court concluded it would be "more orderly, more effectual, [and] less burdensome to the affected interests," to leave the matter to the federal government. (*Ibid.*)

Larez v. Oberti (1972) 23 Cal.App.3d 217 (*Larez*), similarly involved an unfair business practice claim against employers who hired illegal immigrants. Following *Diaz*, the *Larez* court also refused to consider issuing injunctive relief. "We add further that, in our opinion, the impracticability of drafting, supervising and enforcing an injunctive order in this case and the plethora of cases it would undoubtedly spawn is a factor to consider in determining the appropriateness of injunctive relief [citation]. The courts are ill-equipped to deal with that task." (*Id.* at pp. 222-223.) Interestingly, the *Larez* court also noted injunctive relief was inappropriate because a newly enacted Labor Code provision "makes it a criminal offense for an employer to knowingly employ an alien if such employment would have an adverse effect on lawful resident workers. Apparently it also contemplates a cause of action for damages [citation]." Thus, the court noted the plaintiffs had an adequate remedy at law "which is

a consideration that the court may assess in denying equitable relief [citations]." (*Id.* at p. 222.)

Consumer Advocates protests that *Diaz* and *Larez* were really cases about federal preemption and because there is no federal agency that oversees enforcement of Song-Beverly, the cases are irrelevant. Not so.

Although, "The notion of abstention in the context of the UCL originally arose in cases involving the intersection of federal and state law[,]" it has been extended beyond that to UCL cases involving matters of "complex economic policy." (*Desert Healthcare Dist. v. PacifiCare FHP, Inc.* (2001) 94 Cal.App.4th 781, 794 (*Desert Healthcare*).) For example, in *California Grocers Assn. v. Bank of America* (1994) 22 Cal.App.4th 205 (*Grocers*), the plaintiff filed a UCL action based on the alleged unconscionability of check processing fees charged by the defendant. The trial court found the defendant bank's check processing fees to be unconscionable, and an unfair business practice under the UCL. It issued an injunction requiring the bank to reduce the allowable fees, but declined to award restitution. (*Id.* at p. 212.) The appellate court reversed, concluding that granting injunctive relief was an abuse of discretion under the circumstances. "Judicial review of one service fee charged by one bank is an entirely inappropriate method of overseeing bank service fees. . . . [¶] This case implicates a question of economic policy: whether service fees charged by banks are too high and should be regulated. "It is primarily a legislative and not a judicial function to determine economic policy."' [Citation.]" (*Id.* at p. 218.)

Wolfe v. State Farm Fire & Casualty Ins. Co. (1996) 46 Cal.App.4th 554 (*Wolfe*) rejected a UCL claim based on the refusal by insurers to issue earthquake insurance policies following the 1994 Northridge earthquake. The *Wolfe* court concluded that even if the insurers' refusal constituted an unfair business practice, "that by itself does not permit unwarranted judicial intervention in an area of complex economic policy." (*Id.* at p. 565, fn. omitted.)

Desert Healthcare, supra, 94 Cal.App.4th 781, is also instructive. In that case a hospital sued a health maintenance organization to recover payment for services it had rendered to the HMO's subscribers. The HMO had contracted with a physicians group, which in turn had contracted with the hospital for hospital services. The physicians group went bankrupt, leaving the hospital unpaid. Among the hospital's causes of action was one for unfair business practices based on the HMO's practice of requiring waivers from its providers and refusing to pay claims for which it had received premiums from its subscribers. The HMO's demurrer was sustained. (*Id.* at pp. 786-787.) As to the UCL claim, the *Desert Healthcare* court concluded that even if the hospital established the HMO was engaged in an unfair business practice under the UCL, "we do not believe that judicial intervention under the guise of the UCL would be proper in this case." (*Id.* at p. 794.)

The *Desert Healthcare* court reasoned that "because the remedies available under the UCL, namely injunctions and restitution, are equitable in nature, courts have the discretion to abstain from employing them. Where a UCL action would drag a court of equity into an area of complex economic policy, equitable abstention is appropriate. In such cases, it is primarily a legislative and not a judicial function to determine the best economic policy. [¶] The instant case is a perfect example of when a court of equity should abstain. [The hospital] essentially argues that [the HMO] abused the capitation system by transferring too much risk to its intermediary without adequate oversight. In order to fashion an appropriate remedy for such a claim, be it injunctive or restitutionary, the trial court would have to determine the appropriate levels of capitation and oversight. Such an inquiry would pull the court deep into the thicket of the health care finance industry, an economic arena that courts are ill-equipped to meddle in. As such, there is no proper role for the court of equity to play in the instant dispute." (*Desert Healthcare, supra,* 94 Cal.App.4th at pp. 795-796.)

We find the reasoning of *Desert Healthcare, Wolfe, Grocers, Diaz,* and *Larez* applicable and compelling. We preface our comments here with the admonition that we in no way are condoning any practice by DaimlerChrysler of disregarding (or shirking) its obligations to consumers under Song-Beverly. But if it is in fact doing so, Song-Beverly provides the consumer with an adequate remedy. Given the hundreds of thousands of new cars sold within the state each year, across the board court intervention in manufacturer's new car warranty claims practices certainly involves complex matters. Although there is no evidence in this record as to how other manufacturers handle new vehicle warranty claims involving the lemon law, we doubt they are much different than DaimlerChrysler's. By undertaking to oversee DaimlerChrysler's warranty practices, similar actions against other manufacturers will certainly not be far behind. As with the employment practices at issue in *Diaz* and *Larez*, a network of injunctions against manufacturers will soon follow, and the court will indeed be pulled deep into a thicket it is "ill-equipped to meddle in." (*Desert Healthcare, supra,* 94 Cal.App.4th at p. 796.)

This injunction will certainly lead to a multiplicity of actions. The injunction allows consumers who have been denied their replacement or restitution remedy all together to bypass Song-Beverly, and proceed directly to a contempt proceeding for violation of the injunction. In such a case, the underlying standards of Song-Beverly would have to be established (i.e., the vehicle had a substantial nonconformity that could not be repaired after a "reasonable number" of attempts) and every contempt proceeding would involve a Song-Beverly trial, with the important difference that the manufacturers would be denied a jury trial on the unique threshold issues. Additionally, the injunction would allow a consumer who was afforded the replacement or restitution to nonetheless proceed in contempt on the grounds the remedy was not "promptly" offered, or the consumer was first referred to the dealer, or the consumer was at first only offered replacement, or the consumer was referred to arbitration. In other words, any new car customer who was simply unhappy with their

treatment by DaimlerChrysler could become the basis of a contempt proceeding, regardless of whether the consumer received the replacement or restitution remedy.

We simply do not believe a court of equity has any "proper role . . . to play in the instant dispute." (*Desert Healthcare, supra,* 94 Cal.App.4th at pp. 795-796.) If DaimlerChrysler has violated Song-Beverly in handling a particular customer's new car warranty claims, the consumer has an adequate remedy via an action at law. If in fact DaimlerChrysler does so consistently, or has policies that "erect[] hidden obstacles to the ability of an unwary consumer to obtain redress" under Song-Beverly, then that certainly will impact a decision to award a civil penalty in any given case. (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1105.) A court of equity simply should not be otherwise supervising DaimlerChrysler's business practices. Accordingly, the injunction must be reversed.[2]

---

[2] No member of Consumer Advocates owns or has ever owned a DaimlerChrysler product and its members have no individual claims against DaimlerChrysler under Song-Beverly. Consumer Advocates filed this representative action "on behalf of the general public" under the authority of former Business and Professions Code section 17204, which provided an action for violation of the UCL could be brought by any person or association "acting for the interests of itself, its members or the general public." After this case was argued and taken under submission, the voters approved Proposition 64 placing limits on private UCL enforcement actions. As amended, Business and Professions Code section 17204, effective November 3, 2004 (Cal. Const., art. II, § 10, subd. (a)), now provides a private UCL enforcement action may only be filed by one "who has suffered injury in fact and has lost money or property as a result of such unfair competition." The amended Business and Professions Code section 17203 allows a private litigant to pursue a representative claim only if the standing requirements of Business and Professions Code section 17204 are met, and the private litigant complies with Code of Civil Procedure section 382's class action certification requirements. We vacated submission and invited supplemental briefing on the applicability of the amendments to the UCL to pending cases. However, in view of our conclusion the judgment must be reversed for other reasons, we need not decide the issue of Proposition 64's applicability to the facts in this case and leave that question for another day.

V

ATTORNEY FEES

Because we reverse the judgment to the extent Consumer Advocates prevailed, we also reverse the order awarding Consumer Advocates attorney fees and costs under Code of Civil Procedure section 1021.5 (private attorney general doctrine). "An order awarding such fees 'falls with a reversal of the judgment on which it is based.' [Citation.]" (*Grocers*, *supra,* 22 Cal.App.4th at p. 220.)

VI

CROSS-APPEAL

In its cross-appeal, Consumer Advocates contends the trial court abused its discretion by refusing to order "restitution" to "every consumer who was entitled to it." The contention is without merit.

As the trial court correctly notes, this UCL action was a *representative* action only; there were no individual plaintiffs who had suffered harm as a result of DaimlerChrysler's allegedly unfair business practices. The Supreme Court has held "[f]luid recovery is not authorized in a UCL action that is not certified as a class action. For that reason the trial court may not make an order for disgorgement of all benefits [a] defendant may have received from failing to pay overtime wages. It may only order restitution to persons from whom money or property has been unfairly or unlawfully obtained." (*Cortez*, *supra*, 23 Cal.4th at p. 172.) In other words, "disgorgement of money obtained through an unfair business practice is an available remedy in a representative action only to the extent that it constitutes restitution." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1145.) And restitution is limited to restoring money or property to *direct victims* of an unfair practice. (*Ibid.*) There are no such persons in this case, accordingly, the trial court properly refused to consider fashioning any kind of restitution order.

VII

DISPOSITION

The judgment is reversed. The order awarding attorney fees is reversed. DaimlerChrysler is awarded its costs on appeal.

O'LEARY, J.

WE CONCUR:

SILLS, P. J.

MOORE, J.