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## **Consumer Wins Landmark Safety Recall Case Against CarMax California Court of Appeals Rules in Favor of Consumer**

Tammy Gutierrez of Bakersfield, California has won an important victory against CarMax, arguing successfully that she had alleged valid claims that CarMax acted illegally when the auto giant sold her a car with an unrepaired safety recall. The modified ruling issued by the Fifth District Court of Appeal in Fresno on Thursday, February 22, is widely considered to be the first decision challenging the legality of car dealers selling unrepaired recalled used cars that led to a state appellate court ruling

“I appreciate the Court’s ruling in favor of my client,” said Robert Starr, who represented Ms. Gutierrez against CarMax. “I believe that used car buyers deserve the same protections from unsafe, defective recalled cars as new car buyers.” Ms. Gutierrez initially filed her case against CarMax without an attorney, then obtained legal representation after CarMax fought back in court.

The three-judge panel ruled 2-1 that Ms. Gutierrez’s complaint stated a valid legal claim that CarMax violated California’s Consumer Legal Remedies Act and the state’s Unfair Competition Law (which also prohibits unfair and deceptive acts and practices)<sup>1</sup> when it sold Ms. Gutierrez a 2008 Hyundai Elantra with an unrepaired safety recall. The Court’s ruling overturned a decision rendered by a lower court. The Court awarded Ms. Gutierrez costs for the appeal and sent the case back to the lower court to proceed with her suit.

In response to a request from Consumers for Auto Reliability and Safety and attorneys who represent victims of auto fraud in California, the Court of Appeal modified its ruling on February 22, regarding the implied warranty of merchantability. The new ruling shows a path for victims of such practices who allege that recalled vehicles fail to comply with the implied warranty of merchantability, and are therefore unfit for sale to the public as transportation, to provide additional relevant facts concerning the safety defects.

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<sup>1</sup> California Business and Professions Code 17200: “As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.” Such laws are common in 49 states, and are often referred to as “UDAP” statutes.

CarMax advertises widely that it subjects each vehicle to a rigorous inspection and “reconditions” vehicles before they qualify to be sold as “CarMax Quality Certified” vehicles. Ms. Gutierrez purchased the dangerously defective Hyundai on May 6, 2013, from CarMax in Bakersfield, CA, which advertised that the car had passed CarMax’s “rigorous 125-point inspection.” CarMax’s inspection checklist included brake lights.

However, prior to that sale, Hyundai had already recalled that Elantra due to a faulty brake light switch. According to Hyundai, the defective switch could “intermittently malfunction. A stop lamp switch malfunction may result in intermittent operation of the push-button start feature, intermittent ability to remove the vehicle’s shifter from the Park position, illumination of the “ESC” (Electronic Stability Control) indicator lamp in the instrument cluster, intermittent interference with operation of the cruise control feature, and may also cause the brake lights to not illuminate when the brake pedal is depressed. Intermittent operation of the stop lamps could increase the risk of a crash.”<sup>2</sup>

“CarMax should stop violating state consumer protection laws and stop playing ‘recalled used car roulette’ with its customers’ lives,” said Rosemary Shahan, President of Consumers for Auto Reliability and Safety.

“We hope that more consumers who have been placed in danger by CarMax or other auto dealers will seek legal advice, and challenge those reckless practices in court, under state consumer protection laws,” said Michael Landis, Litigation Director for the U.S. Public Interest Research Group.

“Fortunately, Ms. Gutierrez was not injured or killed, but there have been many serious injuries and deaths as a result of defects in recalled cars,” said Jason Levine, Executive Director of the Center for Auto Safety. “Cars are recalled either because they are defective or because they are in violation of federal regulations. These are not cosmetic problems, these recalled vehicles can be dangerous to drivers, passengers, and everyone on the road.”

“This Court of Appeals ruling may be taken into account by other courts, including courts in other states, although it may not set a formal legal precedent in other jurisdictions,” said Steven Taterka, former Deputy Attorney General of Indiana and former Assistant Attorney General of Tennessee who specializes in representing victims of auto fraud.

"There are many ways it is obviously wrong for dealers such as CarMax to sell cars with unperformed safety recalls, and I believe many ways it is against existing law; now we have an appellate decision confirming one of the ways it is against existing law," said consumer attorney Bernard Brown, who teaches auto fraud litigation to other attorneys who represent victims of auto fraud.

Among the findings by the Court of Appeals: CarMax had a “duty to disclose” the facts about the safety recall, but instead of full disclosure, “CarMax made *partial* representations about the vehicle’s braking and lighting systems and those representations were likely to mislead for want of communication of the facts about the recall.”<sup>3</sup> – page 38 (emphasis added).

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<sup>2</sup> [Hyundai Safety Recall Notice for owners of the recalled vehicles](#)

<sup>3</sup> [Fifth Circuit Court of Appeal Modified Ruling in Tammy Gutierrez v. CarMax Auto Superstores](#), page 38, issued February 22, 2018.

This ruling is further evidence that the anti-consumer, anti-safety Federal Trade Commission's Consent Orders with CarMax and other dealers are not only unnecessary, but are worse than existing law. Those Consent Orders would allow the dealers to advertise and sell vehicles with unrepaired safety recalls as "safe," "repaired for safety," and having passed an inspection and qualified to be sold as "certified" if the dealers merely state that the vehicles "may" be subject to an "open safety recall," without having to repair the safety recall defects. Consumers for Auto Reliability, the Center for Auto Safety, and USPIRG have sued the FTC, seeking to have the Consent Orders overturned. That case is pending before the U.S. District Court in Washington, D.C.

CarMax is the largest retailer of used cars in the U.S. An in-depth report issued by the Consumers for Auto Reliability and Safety Foundation, Massachusetts Public Interest Research Group and the Frontier Group last year found that more than 27% of vehicles CarMax offered for sale in Connecticut, Massachusetts, and California had at least one unrepaired safety recall. One pickup truck CarMax offered for sale in Massachusetts had 6 unfixed safety recall defects.

Related links:

Court of Appeal's Modified ruling in [Tammy Gutierrez vs. CarMax](#), with original ruling attached.

[Hyundai Safety Recall Notice for brake light switch defect](#)

[Used Car Roulette: CarMax Doubles Down on Selling Unsafe Recalled Vehicles](#), issued by the Consumers for Auto Reliability and Safety Foundation, MASSPIRG Education Fund, and the Frontier Group, September, 2017

[News release announcing lawsuit](#) brought by Consumers for Auto Reliability and Safety, Center for Auto Safety, and U.S. PIRG against the FTC, over its anti-consumer, anti-safety Consent Orders

More than 98,000 people have signed [a petition on Change.org](#) calling on CarMax to stop selling unrepaired recalled cars.