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MOTOR VEHICLE DEALERS AND MOTOR VEHICLE MANUFACTURERS: FLORIDA REACTS TO PRESSURES IN THE MARKETPLACE

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Florida has substantially regulated the relationship between motor vehicle manufacturers and motor vehicle dealers since 1970. Through the years, the legislature has made a number of substantive amendments to Florida's core motor vehicles statutes contained in chapter 320, *Florida Statutes*, including changes in 1980, 1984, and a major overhaul in 1988. The 2001 legislature has again passed major amendments to the regulatory scheme. This Article is intended as an analytical review of these amendments.

Chapter 320's regulatory scheme pertains to a very specific industry with narrowly defined interests. It is precisely these narrowly defined interests, however, that allow an analysis of the 2001 statutory changes to serve as an excellent example of the legislative response—formulated principally by private interests—to developments in case law and business practices. Moreover, although the workings of the regulatory scheme take place "off the radar," the business it regulates is of great importance to the public at large, with about seventeen million new cars and light trucks sold each year in the United States by over 20,000 dealers.

I. FLORIDA'S REGULATION OF MOTOR VEHICLES, DEALERS, AND MANUFACTURERS

A. Title and Registration

As anyone who owns a car knows, a motor vehicle is personal property, the ownership of which is evidenced by a title. The regulation of motor vehicle titling is found principally in chapter 319, *Florida Statutes*, which establishes the authority for titling vehicles. Ownership of new vehicles held in inventory for sale to first-time buyers is evidenced by a manufacturer's statement of origin, which is converted to a certificate of title when a consumer purchases the vehicle. Once issued, a title can be transferred from owner to owner on resale.[1] This titling system not only provides the means of tracing ownership, it also protects the consumer by requiring disclosures about the vehicle's history[2] and odometer statements.[3] Furthermore, it protects creditors by requiring certificates of title, which provide a notice of lien.[4]

B. Motor Vehicle Registration and Motor Vehicle Dealer Licensing

In addition to having a title, each motor vehicle used on the public roads must be registered. The basic statutory framework for registra-

1. FLA. STAT. §§ 319.21-.22 (2001).
2. *Id.* § 319.14 (e.g., previous use as a police car or taxicab).
3. *Id.* § 319.225; *cf.* 49 C.F.R. § 580.5 (2000).
4. FLA. STAT. § 319.27.

tion is found in various sections of chapter 320.[5] For example, chapter 320 allows for voluntary contributions to organizations at the time of registration,[6] authorizes the license tax[7] and specialty license plates,[8] and provides the various procedures for accomplishing registration.

Chapter 320 also mandates the licensing of motor vehicle dealers in several classes. Classification depends on whether the dealer has a contract to represent a manufacturer in the sale of new motor vehicles, sells only used vehicles, or deals only in wholesale, in vehicles at auction, or in salvaged vehicles.[9] This licensing system provides the additional protection of state oversight from the Department of Highway Safety and Motor Vehicles ("Department") of the sale and, to a limited extent, the servicing of motor vehicles. The Department is empowered to deny applications or to suspend and revoke dealer licenses for a number of violations related to business practices or criminal history.[10] The clear intent of the regulation is to create protection for consumers against unscrupulous dealers. In this same vein, the statutes require dealers to post a small surety bond of $25,000 against losses that may be caused by a dealer's regulatory violations.[11] The statute also directs the Department to enforce its authority by imposing civil fines[12] and by seeking injunctions in circuit court.[13]

C. Licensing of Manufacturers and Regulation of the Manufacturer-Dealer Relationship

This Article addresses sections 320.60-.70, *Florida Statutes*. In these sections, the legislature requires that each manufacturer, factory branch, distributor, or importer (collectively referred to in the statutory scheme as "licensee" and generally referred to in this Article as "manufacturer") be licensed.[14] An application for license may be denied, or a license may be revoked or suspended, on various

5. *Id.* § 320.02.
6. *Id.* § 320.023.
7. *Id.* § 320.08.
8. *Id.* §§ 320.08056, .08058, .0807.
9. *Id.* § 320.27. The delimiting definition of motor vehicle, *see id.* § 320.27(1)(b), and the related definition of motor vehicle dealer, *see id.* § 320.27(1)(c), does not include mobile homes, recreational vehicles, mopeds, or motorcycles with a displacement of 50 cc or less. Mobile home dealers are licensed pursuant to section 320.77, and recreational vehicle dealers are licensed pursuant to section 320.771. Mopeds and small displacement motorcycles may be sold without a dealer's license.
10. *Id.* § 320.27(9).
11. *Id.* § 320.27(10).
12. *Id.* § 320.27(12).
13. *Id.* § 320.27(11).
14. *Id.* § 320.61.

grounds.[15] Whereas denial, suspension, or revocation of dealer licenses are based on consumer protection, the grounds for acting against licensees arise principally out of their dealings with motor vehicle dealers with whom the licensees have a contractual relationship allowing the dealer to sell and service the licensee's new motor vehicles.[16] In addition, separate sections regulate specific aspects of the manufacturer-dealer relationship in the following areas: cancellations or modifications of franchise agreements;[17] establishment of additional dealers;[18] sale of interests in dealerships;[19] change in executive management of dealerships;[20] restrictions on licensees as dealers;[21] and payment of warranty reimbursements to dealers.[22]

In the past, sections 320.60-.70 have been amended occasionally to address issues arising out of frictions between dealers and manufacturers or in reaction to decisional law. Occasionally, the issues have reached sufficient volume to produce a major revision, as happened in 1988.[23] The legislative amendments in 2001 are the result of a build-up of commercial pressure and court decisions.

II. THE MANUFACTURER-DEALER RELATIONSHIP

A. The Beginnings of the Regulatory System

The manufacturer-dealer relationship has grown out of the history of twentieth century sales and marketing of motor vehicles. One must be very indifferent to the economic and social history of the United States to be unaware of the role played by the car in American life. Those who use "Frigidaire" instead of "refrigerator" to refer to the common household appliance might still use "agency" to refer to a car "dealership." "Agency" suggests the early method of selling motor cars, in which the vehicle was ordered from the manufacturer, delivered to the agency, and in turn delivered to the buyer by the agent, who perhaps gave the buyer his first and only driving lesson at delivery.

By the 1920s, manufacturers had firmly established the independent dealer system, in which the manufacturer and dealer entered into a contract establishing the rights and obligations of the re-

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15. *Id.* § 320.64.
16. *See id.* § 320.60(*l*) (defining "agreement" or "franchise agreement").
17. *Id.* § 320.641.
18. *Id.* § 320.642.
19. *Id.* § 320.643.
20. *Id.* § 320.644.
21. *Id.* § 320.645.
22. *Id.* § 320.696.
23. Mary E. Haskins & Walter E. Forehand, *Regulations for Motor Vehicle Manufacturers and New Protections for Their Franchisees*, 16 FLA. ST. U. L. REV. 763 (1988) (discussing the comprehensive revisions enacted by the 1988 legislature).

lationship.[24] The manufacturer's bargaining position in these contracts was clearly greater than that of the dealer. The economic ebb and flow and the natural competition created by the existence of competing manufacturers—to whom dealers could go if their manufacturer abused its power too greatly—kept the system somewhat in balance through the first half of the century. However, the inequities arising from the inequality of power became generally recognized as a threat to the efficient provision of vehicles to consumers.[25] Pushed along by public opinion and the National Automobile Dealers Association, regulation began to emerge. The most prominent early example of this regulation was the Automobile Dealers' Day in Court Act ("ADDICA").[26]

B. The Automobile Dealers' Day in Court Act

Congress passed ADDICA in 1956.[27] A congressional report presented the question this way:

> Automobile production is one of the most highly concentrated industries in the United States, a matter of grave concern to officers of the Government charged with enforcement of the antitrust laws. Today there exist only 5 passenger-car manufacturers, 3 of which produce in excess of 95 percent of all passenger cars sold in the United States. There are approximately 40,000 franchised automobile dealers distributing to the public cars produced by these manufacturers. Dealers have an average investment of about $100,000. This vast disparity in economic power and bargaining strength has enabled the factory to determine arbitrarily the rules by which the two parties conduct their business affairs. These rules are incorporated in the sales agreement or franchise which the manufacturer has prepared for the dealer's signature.
>
> Dealers are with few exceptions completely dependent on the manufacturer for their supply of cars. When the dealer has invested to the extent required to secure a franchise, he becomes in a real sense the economic captive of his manufacturer. The substantial investment of his own personal funds by the dealer in the business, the inability to convert easily the facilities to other uses, the dependence upon a single manufacturer for supply of automobiles, and the difficulty of obtaining a franchise from another manufacturer all contribute toward making the dealer an easy prey for domination by the factory. On the other hand, from the standpoint of the automobile manufacturer, any single dealer is

24. STEWART MACAULAY, LAW AND THE BALANCE OF POWER: THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS 13-15 (1966).

25. *See id.* at 10-12.

26. 15 U.S.C. §§ 1221-25 (2000).

27. Automobile Dealers' Day in Court Act, ch. 1038, 70 Stat. 1125 (1956) (codified as amended at 15 U.S.C. §§ 1221-25 (2000)).

> expendable. The faults of the factory-dealer system are directly attributable to the superior market position of the manufacturer.[28]

Congress's reaction was short and to the point:

> An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956, to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided*, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith.[29]

On the surface, the statute would appear to require that manufacturers play fairly with their dealers, specifically when carrying out the franchise agreement and when terminating, canceling, or not renewing the agreement. The definitions, however, make clear that "good faith" is not an ethical term.

Indeed, the definition of good faith has been the key question in judicial interpretations and applications of the statute:

> The term "good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided*, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.[30]

This definition is the key to the evil against which Congress sought to intercede. Because of their superior positions, the manufacturers could (and did) intimidate dealers and coerce them to tolerate business arrangements which they would prefer not to accept. As dealers rightly feared that their term contracts would be terminated or simply would not be renewed at the end of their terms, this was the ultimate threat to a dealership's survival.

The "coercive" component of the definition, and the proviso expressly allowing manufacturers to aggressively press their contractual positions, has led to a body of case law in the district and circuit courts[31] that requires an "illegal" threat by a manufacturer or its rep-

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28. S. REP. NO. 84-2073, at 2 (1956).
29. Automobile Dealers' Day in Court Act § 1222 (2000).
30. *Id.* § 1221(e).
31. The Supreme Court has never interpreted the statute.

resentative in order to support an action under the statute.[32] Consequently, as long as employees are trained to avoid outright threats, a manufacturer can shield itself from liability under the statute.

This Article is not intended to go deeply into the workings of ADDICA. For these purposes, it is sufficient to note that ADDICA is a forerunner of the state dealer franchise laws, of which chapter 320, *Florida Statutes*, is an example. ADDICA provides one example of legislative reaction to a perceived problem in the industry. Congress was careful to provide that states are free to legislate in this area as long as state statutes are not in direct conflict.[33]

C. State Regulatory Statutes

Both before and after the passage of ADDICA, states have been concerned with regulation of dealers and manufacturers of motor vehicles. The United States Supreme Court, for example, recited a brief history of California's efforts in *New Motor Vehicle Board of California v. Orrin W. Fox Co.*,[34] the only case in which the Court has discussed these state statutes. These regulations began first as licensing or certification statutes addressed at dealers and later manufacturers. Later, California and other states added sections dealing with specific topics. As the Court noted in *Orrin W. Fox Co.*, the Supreme Court of Wisconsin, in discussing the application of a prohibition in Wisconsin's law against manufacturers applying for dealer licenses, noted that the Wisconsin statutes "[were] enacted in recognition of the long history of the abuse of dealers by manufacturers."[35] The Wisconsin court also provided a thumbnail sketch of the Wisconsin statute's history:

> Sec. 218.01(3), Stats., is a part of the Wisconsin Auto Dealership Law, which was enacted in 1935. Implicit in this law is the recognition of the gross disparity of bargaining power between the manufacturer of automobiles and the local retailer. It was enacted in recognition of the long history of abuse of dealers by manufacturers. These laws deal with the relationship between auto manufacturers and auto dealers. The purpose of the law is to furnish the dealer with some protection against unfair treatment by the manufacturer. Sec. 218.01(3)(f) was enacted into law in 1955. Earlier enactments had guarded against specific evils occasioned by what the legislature considered the unfair or overreaching tactics of manufacturers, e.g., forced acceptance of unordered autos or parts;

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32. *See, e.g.,* Autohaus Brugger, Inc. v. Saab Motors, Inc., 567 F.2d 901, 911 (9th Cir. 1978) (requiring unfair and inequitable actual or threatened coercion or intimidation to violate the statutory duty of good faith).

33. Automobile Dealers' Day in Court Act § 1225.

34. 439 U.S. 96 (1978).

35. Forest Home Dodge, Inc. v. Karns, 138 N.W.2d 214, 217-18 (Wis. 1965).

> coercion or unfair treatment through threat of cancellation; unfair cancellation or refusal to renew franchises, or without due regard to the equities of the dealer.[36]

Not every state, however, began its regulation as early, especially regulation of the manufacturer-dealer relationship. The 1970s were a particularly rich time for this type of regulation, although some states did not begin to regulate in this area until the early 1980s. Today every state has some form of regulation, and the states regularly amend their statutes.

D. The Florida Automobile Dealers Act: Sections 320.60-.70, Florida Statutes[37]

Florida began to require motor vehicle dealers to be licensed in 1923.[38] Licensing of manufacturers began in 1941.[39] The first version of the regulatory scheme currently found in sections 320.60-.70 was enacted in 1970.[40] A major addition in 1980 first regulated the transfer of interests in dealerships,[41] and changes in management were regulated in 1984.[42] The first major overhaul of the statute occurred in 1988, in connection with the now repealed "sunset" reviews.[43] Each of these steps was a reaction to a perceived need for the regulation of the relationship. In 1988, the legislature at last stated the overall purpose of the regulation:

> It is the intent of the Legislature to protect the public health, safety and welfare of the citizens of the state by regulating the licensing of motor vehicle dealers and manufacturers, maintaining competition, providing consumer protection and fair trade and providing minorities with opportunities for full participation as motor vehicle dealers.[44]

Unlike regulations applying to motor vehicle dealers[45]—which are primarily aimed at protecting consumers from abuses by dealers—the regulations in the Act are designed primarily to protect dealers.

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36. *Id.* (citations omitted).

37. No section of the statute provides a short title; however, some courts have referred to the provisions as such. *See* Mike Smith Pontiac, GMC, Inc. v. Mercedes-Benz of N. Am., Inc., 32 F.3d 528, 529 (11th Cir. 1994). *But see* Meteor Motors, Inc. v. Hyundai Motor Am. Corp., No. 97-8820-Civ., 1999 WL 1800074, at *2 (S.D. Fla. Mar. 9, 1999) (using the "Florida Motor Vehicle Dealer *Protection* Act") (emphasis added). The legislation will be referred to hereinafter as the "Act."

38. Act effective June 7, 1923, ch. 9157, 1923 Fla. Laws 156.

39. Act effective Oct. 1, 1941, ch. 20236, 1941 Fla. Laws 103.

40. Act effective Jan. 1, 1971, ch. 70-424, 1970 Fla. Laws 1269.

41. FLA. STAT. § 320.643 (1981) (amended 1995, 2001).

42. *Id.* § 320.644 (1985) (amended 1988).

43. Act effective Oct. 1, 1988, ch. 88-395, 1988 Fla. Laws 2290.

44. *Id.* at 2297 (creating FLA. STAT. § 320.605).

45. FLA. STAT. § 320.27 (2001).

Without going into great detail, a survey of the provisions in sections 320.60-.70 will provide useful orientation to the regulatory scheme.

Definitions of "motor vehicle related" terms generally applicable to *Florida Statutes* are found in section 320.01. Definitions specially used in the Act are set forth in section 320.60. Because some of these terms are used in a more specialized manner in sections 320.60-.70, the definitions section takes on substantive significance.

One should note that "licensee," used often in these sections, is defined as "any person licensed or required to be licensed under section 320.61."[46] In this Article, the term manufacturer is frequently used interchangeably with "licensee," technically including manufacturer, factory branch, distributor, or importer[47]—terms used for the provider of vehicles to dealers, whether or not the providing entity is in fact the entity which manufactures the vehicles.

Sections 320.61, .615, .62, .63, and .64 cover the licensing process, establishing who must be licensed, the agent for service of process, licensing fees, the application process, and grounds for denial, suspension, or revocation of licenses. Section 320.64 provides a long list of prohibited actions, the commission of which may provide grounds for the Department to act against the licensee. The section also provides for causes of action by dealers.

Sections 320.6403 and .6405 provide that manufacturers or importers may not refuse successors to their distributors. Subsidiaries of licensees are deemed to be agents of the licensee—that is, manufacturers may not avoid legal obligations by attempting to function through other entities.

Sections 320.641, .642, .643, and .644 each regulates an aspect of manufacturer-dealer relations, superseding the contractual agreement between the parties.[48] Section 320.641 establishes procedures and requirements that a manufacturer must follow to terminate a dealer, cancel or decide not to renew a franchise, or modify a franchise. Section 320.642 requires a manufacturer to give notice and an opportunity to be heard to affected dealers when it wishes to add an additional dealer in an area or relocate an existing dealer. Also, upon protest by one of its dealers, the manufacturer must prove that existing dealer representation is inadequate. Section 320.643 establishes procedures for the transfer of ownership interests in dealerships. Finally, section 320.644 addresses the procedure under which dealers may change executive management.

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46. *Id.* § 320.60(8).

47. *See id.* § 320.61(1).

48. *See* Bayview Buick-GMC Truck, Inc. v. Gen. Motors Corp., 597 So. 2d 887, 889 (Fla. 1st DCA 1992).

Section 320.645 limits the right of a manufacturer to have an ownership interest in a dealership. Sections 320.664, .67, .68, and .69 deal with departmental procedural matters. Section 320.696 establishes requirements for manufacturers to reimburse dealers for doing service work covered under manufacturers' warranties, and sections 320.6992 and .701 delineate the applicability of the statute.

Section 320.698 provides for civil fines to be enforced by the Department for violations of the Act. Section 320.70 establishes a criminal violation (first degree misdemeanor) for violations. Section 320.695 creates an injunction remedy without bond to the Department, or to dealers in the name of the Department, to prevent or stop violations. Section 320.697 creates a private right of action for any person injured by a violation of the statute, including treble damages and prevailing plaintiff's attorney's fees and costs. Section 320.699 creates express rights to administrative proceedings for declaratory statements and for protests by dealers of proposed additional dealerships.

III. THE 2001 CHANGES TO THE ACT: ACTION AND REACTION TO MARKET CHANGES AND JUDICIAL INTERPRETATIONS

Those amendments to the Act passed by the 2001 legislature and signed by the Governor, contained in Committee Substitute for Senate Bill 1956, represent the compromises that made their way into law. For the purposes of this analysis, however, a comparison between the new laws and the proposals that were filed and considered by the 2001 legislature is instructive. Such a comparison provides an understanding of the interplay of concerns that motivated the efforts to amend this segment of the Act. Of principal interest is House Bill 1239—devoted exclusively to amending the Act—which contains a virtual wish list of dealer oriented amendments.

A. Who Is a Motor Vehicle Dealer Under the Act?

Changes in these definitions of who is a motor vehicle dealer have a substantive effect on the regulatory provisions of the Act. For example, prior to the 2001 amendments, a motor vehicle dealer for the purposes of the Act was one who repaired or sold vehicles pursuant to a franchise agreement.[49] A motor vehicle was and continues to be defined as any new automobile, motorcycle, or truck which has not had title transferred to an ultimate purchaser.[50] Many businesses sell small displacement motorcycles, often called motor scooters, of 50cc or less. These vehicles are motor vehicles as defined by section

49. FLA. STAT. § 320.60(11)(a) (2000) (amended 2001).
50. *Id.* § 320.60(10) (2001).

320.01(1)(a). The businesses often have a selling agreement with the vehicle manufacturer that satisfies the definition of franchise agreement under section 320.60(1). However, under the special definition of motor vehicle in section 320.27(1)(b), which indirectly defines motor vehicle dealer in section 320.27(1)(c), small displacement motorcycles are expressly not motor vehicles. Accordingly, those who sell them are not required to be licensed as motor vehicle dealers by section 320.27(3). Therefore, under the definitions of the Act, a seller might be protected under the Act but still not be a motor vehicle dealer otherwise regulated by chapter 320. On the other hand, if the vehicle in question does not fit the definition of automobile, motorcycle, or truck, then it is not protected by the Act. This is the case regardless of whether the business is required to be licensed as a motor vehicle dealer or not.[51]

Given the implications of these definitions, the 2001 amendment to section 320.60(11)(a) must be examined in detail. The 2000 statute read:

> "Motor vehicle dealer" means any person, firm, or corporation who, for commission, money or other things of value, repairs or services motor vehicles or used motor vehicles pursuant to an agreement as defined in subsection (1), or sells, exchanges, buys, or rents, or offers, or attempts to negotiate a sale or exchange of any interest in, motor vehicles or who is engaged wholly or in part in the business of selling motor vehicles, whether or not such motor vehicles are owned by such person, firm, or corporation.[52]

The 2001 statute now reads:

> "Motor vehicle dealer" means any person, firm, company, corporation, or other entity, who,
>
> 1. Is licensed pursuant to s. 320.27 as a "franchised motor vehicle dealer" and, for commission, money or other things of value, repairs or services motor vehicles or used motor vehicles pursuant to an agreement as defined in subsection (1), or
>
> 2. Who sells, exchanges, buys, leases or rents, or offers, or attempts to negotiate a sale or exchange of any interest in, motor vehicles, or

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51. *See* Aero Prod. Corp. v. Dep't Highway Safety & Motor Vehicles, 675 So. 2d 661, 663-64 (Fla. 5th DCA 1996). This case creates even greater confusion. The Department, supported by the Fifth District Court of Appeal, *see id.* at 664-65 (Griffin, J., concurring), used the definition of "truck" found in section 320.01(9), *Florida Statutes*, to decide whether the vehicle sold was a "motor vehicle," because section 320.60(10) defines "motor vehicle" as a "new automobile, motorcycle, or truck." One wonders how the Department will react in the future if it is presented with the proposition that heavy truck dealers, which have consistently been treated as dealers under the protection of the Act, are not dealers because "truck," *see* FLA. STAT. § 320.01(9), "heavy truck," *id.* § 320.01(10), and "truck tractor," *id.* § 320.01(11), are each defined as a distinct vehicle.

52. FLA. STAT. § 320.60(11)(a) (2000) (amended 2001).

> 3. Who is engaged wholly or in part in the business of selling motor vehicles, whether or not such motor vehicles are owned by such person, firm, company, or corporation.[53]

The position of dealers as a group is that new motor vehicles may only be sold by persons licensed as "franchised motor vehicle dealer[s]" pursuant to section 320.27(1)(c)1. While that is the general rule, modern business practices create gray areas. Some persons operating as independent dealers[54] are able to acquire new vehicles from franchised dealers for their inventories, thus avoiding the need to pay sales tax because there is no sales tax on property bought for inventory. Independent dealers subsequently sell the vehicles for a profit but still at a price typically lower than competing franchised dealers. The vehicles are titled as used but retain virtually all of the advantages of new vehicles to the consumer.[55]

Moreover, the increasing use of e-commerce has created new opportunities for consumers to purchase new vehicles from persons outside the state. These practices have raised the concern that volume sellers from outside the state—or within the state selling off-premises—may undersell franchised dealers unfairly, because they do not have the overhead ordinarily required to be a franchised dealer. Because the establishment of additional motor vehicle dealers is regulated by section 320.642, the definition of motor vehicle dealer can be important for establishing methods of private or public policing of illegal practices.

The new subsection 320.60(11)(a) addresses one aspect of that issue. In *Meteor Motors, Inc. v. Hyundai Motor America Corp.*,[56] the court was not impressed by the plaintiff's argument that Hyundai had granted a new dealer franchise when it entered into an agreement under which Dollar Rent-a-Car could receive reimbursement for doing warranty service on Hyundais in Dollar's rental fleet. The right to perform warranty service is ordinarily exclusive to licensed franchised motor vehicle dealers. The court had several grounds for granting Hyundai summary judgment, one of which was that Dollar was a rental car company and so excluded from the definition of dealer.[57] However, at least as far as the classification of Dollar as a dealer for the purposes of the Act is concerned, the question was clearly a tight one. Absent the rental car exception, the court would have had to rely on other grounds to grant summary judgment.

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53. *Id.* § 320.60(11)(a) (2001).

54. *Id.* § 320.27(1)(c)2.

55. Other regulations already in place have sought to limit this practice. *See* FLA. ADMIN. CODE ANN. r. 15C-7.005 (1998).

56. No. 97-8820-Civ., 1999 WL 1800074 (S.D. Fla. Mar. 9, 1999).

57. *Id.* at *2-3.

By requiring that a motor vehicle dealer be licensed as a "franchised motor vehicle dealer," under section 320.27, the amended statute now makes clear that if the person is not required to be licensed, then the person will not be a dealer for purposes of the Act. Or does it? A committee analysis of Committee Substitute for Senate Bill 1956 asserts:

> The bill amends s. 360.60, F.S., [sic] revising the definition of "motor vehicle dealer" so that the person or firm must also be licensed as a "franchised motor vehicle dealer" pursuant to s. 320.27, F.S., in order to be considered a "motor vehicle dealer," and includes persons or firms who lease motor vehicles in the definition.[58]

Ordinary principles of construction do not support this conclusion. The disjunctives in the 2000 statute might be construed as establishing one category of dealer: doing any of these (selling, servicing, or being in the business of selling) pursuant to an agreement makes one a motor vehicle dealer.

The 2001 statute has created, with very distinct subparts each numbered and separated by a disjunctive, *pace* the House committee analysis, three definitions of motor vehicle dealer. A person is a motor vehicle dealer if he services or repairs vehicles pursuant to a franchise agreement and is required to be licensed by section 320.27(3); if he sells, buys, etc. motor vehicles (there is no requirement that there be a franchise agreement or that the person be licensed); or if he is in the business of selling, buying, etc., motor vehicles (there is no requirement that there be a franchise agreement or that the person be licensed). The *Meteor Motors* question is clarified—in the service-only context, the person must be licensed under section 320.27. However, the presumably careful separation into subparts conclusively supports the interpretation that those who sell vehicles are dealers for the purposes of the Act, regardless of whether they are franchisees or are section 320.27 dealers.

A curious feature of the amendment to section 320.11(a) is the addition of the words "company" and "or other entity." One must ask whether anything is meant or gained by the addition. The definition of "person"[59] adequately covers all natural and juridical persons. Why then was "company" added to a sequence already containing superfluous terms? Perhaps the answer lies in the increasing use of limited liability companies (LLCs) as a business organization of choice for operating motor vehicle dealerships. Lay persons will not need to be nervous that their LLCs are not "corporations." Even so, it is curious that "company" should be so favored and "limited partnership," a

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58. Fla. H.R. Comm. on Transp., CS for SB 1956 (2001) Staff Analysis 5 (June 15, 2001) (on file with comm.).

59. FLA. STAT. § 320.60(12).

business organization not infrequently used to operate dealerships, is omitted. Often the truth is that an amendment is made with one objective in mind without seeing anomalies which it may create. In this case both "person" and "other entity" are so inclusive that perhaps the drafters should have used only "person." The lawyer needs only "person" and the definition thereof; however, because "company" and "corporation" are specifically named, the lay person is left wondering whether a limited partnership may be a motor vehicle dealer.

Another potential impact of the new definition of motor vehicle dealer is in section 320.642, which provides the procedure a manufacturer must follow if it wishes to establish an additional dealer in an area. One asks whether, under the literal language of the definition of motor vehicle dealer, one who sells a manufacturer's new vehicles by e-commerce into an area might be an additional motor vehicle dealer added by the manufacturer.

B. Limiting the Manufacturer's Role as a Dealer

1. The Problem

Most states have included in their regulations a prohibition against "company stores"—that is, dealerships owned by a manufacturer. The dealer must rely on the manufacturer for inventory of new vehicles and the parts and accessories used to repair and service them. Consequently, if certain dealer competitors are owned by the manufacturer, the appearance—and perhaps the reality—will be that "company stores" will be given unfair competitive advantages. For example, a "company store" might sell vehicles at a much lower profit than an independent competitor. Indeed, the *de facto* customer of the manufacturer is its dealer. The manufacturer sells its products not to the consumer but to the dealer. Of course, if the product is unattractive to customers or if the dealer does not sell the product effectively, then there is a powerful effect on the manufacturer. Without continued sale to customers, the system would eventually break down to the manufacturer's detriment. Nonetheless, because the manufacturer makes its profit from the sale of the product to the dealer, a dealer owned by the manufacturer would not need to make as much profit as a dealer owned by another. The "company store" would need only to sell many vehicles at break even for the manufacturer to make an overall corporate profit on the vehicles.

Such a system could have devastating effect on existing dealers who would be forced to compete in a profit-oriented economy with a direct competitor—the "company store"—that has a different agenda. But is this sort of competition in the public interest? For the overwhelming majority of the states, the answer has been no. The dealer system has been firmly established: to allow this form of competition

is both unfair and potentially adverse to the public. The "private" competition between dealers keeps prices in line, and the need to attract customers gives an incentive to provide good customer service—or so the states perceive. If dealers are forced out of business by competition from "company stores," consumers will ultimately suffer.

In fact, there is anecdotal evidence that "company stores" do not do well. Some states—for example, Indiana and Utah—have never prohibited manufacturer ownership. In the 1990s, for example, there were several unsuccessful experiments by Ford with manufacturer controlled dealer groups in Indianapolis and Salt Lake City. Nonetheless, dealers remain wary of efforts to establish *de facto* "company stores."

The arrival in recent years of the Internet as an avenue of commerce has also concerned dealers. On the one hand, dealers worry that the Internet offers manufacturers a way of selling directly to customers without bricks and mortar, both as a means of selling vehicles and of marketing "indirect" products that dealers rely on for significant profits. These include the sale of retail sales contracts made by the dealers with consumers to commercial lenders, who buy the contracts and give the dealer a percentage of the interest for placing the contract with them, and from commissions on the sale of credit life insurance and extended service insurance commonly called an extended warranty.

In addition, manufacturers' experiments with the Internet have led to concerns that the manufacturers may be able to create an uneven playing field by favoring some dealers over others by referring customer leads from Internet contacts to local favorites. In addition, some are concerned with the potential upset to the local competitive balance in the pricing of products and services that would occur if manufacturers supplied suggestions over the Internet to consumers concerning retail pricing in the consumers' area; for example, manufacturers could provide quotes for average selling prices of specific models.

2. Florida's New Prohibition Against Manufacturer Ownership

Since 1984, Florida has generally prohibited manufacturer ownership of dealerships.[60] The 2000 version of section 320.645 prohibited ownership directly or indirectly by a licensee, agent, or subsidiary except under limited circumstances. A manufacturer was permitted to own a dealership, for example, under the following circumstances: (a) operation lasted for no more than one year during a change in ownership; (b) while a dealership was for sale to an independent per-

60. *Id.* § 320.645 (2000) (amended 2001).

son at a fair price (unless after a chapter 120 hearing the manufacturer could show that no person was available to buy the dealership); or (c) in "a bona fide relationship with an independent person, other than a licensee or its agent or affiliate, who has made a significant investment that is subject to loss in the dealership and who can reasonably expect to acquire full ownership of the dealership on reasonable terms and conditions."[61]

The "one year" and "no available person" provisions of the statute have not been an issue. However, the "bona fide relationship" provision has recently caused controversy. The provision is meant to allow manufacturers to implement programs in which some division of the manufacturer acts as a co-owner of a dealership with an individual, often a minority person, who has a contractual right to gradually buy out the manufacturer co-owner.

In these arrangements, the manufacturer provides a substantial share of the initial capital necessary to establish the dealership. The individual makes sufficient investment to have a small initial equity ownership and operates the dealership under a contract that allows him to purchase shares from the manufacturer on a regular basis, requiring the dealership to be generally profitable at the risk of the individual forfeiting ownership entirely. While manufacturers are ordinarily content to have their retail networks provided by the capital of independent dealers, the recent experiments with various forms of retailing through dealerships owned in whole or in part by the manufacturer or its subsidiaries brought the issue to the fore. In Florida, the "Saturn" cases[62] put section 320.645 before the Department.

In one instance, Saturn entered into a relationship with an individual in 1998 to be co-owner of seven Saturn dealerships. There was widely reported concern that the economic arrangements in the sale did not satisfy section 320.645. Allegedly, the individual was required to invest only one percent of the stores' value and had to wait twenty years to acquire a fifty percent ownership. Was this a "significant" investment with reasonable expectation to acquire full ownership? The Department investigated and finally accepted the arrangement.[63]

In a related case, Saturn asked the Department whether it could enter into an arrangement whereby it would be part owner of a conglomerate of stores—a "retail network"—under some scenario that

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61. *Id.* § 320.645(1)(b).

62. *Cf.* Donna Harris, *Florida Probes Sale of Saturn Stores*, AUTO. NEWS, Apr. 19, 1999.

63. Donna Harris, *Florida Oks Daniels' Deal for GM Stores*, AUTO. NEWS, May 24, 1999.

would involve public ownership of dealerships in conjunction with a company partially owned by Saturn or in partnership with Saturn. In answering the request for a declaratory statement by Saturn Retail Enterprises, Inc., and Williamson Saturn, Inc., the Department concluded that any arrangement in which the manufacturer had even indirect permanent ownership would violate the statute.[64]

The 2001 amendments to section 320.645 are in direct response to the Saturn cases. The amendment flatly prohibits licensees from being licensed as motor vehicle dealers pursuant to section 320.27.[65] Subsection 320.645(1)(b) has been amended to provide that a manufacturer is not in violation:

> When operating a motor vehicle dealership temporarily for a reasonable period for the exclusive purpose of broadening the diversity of its dealer body and enhancing opportunities for qualified persons who are part of a group that has historically been underrepresented in its dealer body, or for other qualified persons who the licensee deems to lack the resources to purchase or capitalize the dealership outright, in a bona fide relationship with an independent person, other than a licensee or its agent or affiliate, who has made a significant investment that is subject to loss in the dealership within the dealership's first year of operation and who can reasonably expect to acquire full ownership of the dealership on reasonable terms and conditions.[66]

The references to underrepresented persons is in accord with the legislative purpose of section 320.605, providing that the purpose is to "provid[e] minorities with opportunities for full participation as motor vehicle dealers."[67] The new specificity is generally intended to present an obstacle to arrangements that may primarily be a convenience to the manufacturer, notwithstanding the problems of proof that such an allegation might have.

The more significant amendments are the definitions of terms intended to foreclose a repeat of the "Saturn" situation. The definitions of "independent person," "reasonable terms and conditions," and "significant investment" assure that the perceived abuse of the spirit of the statute would not be repeated. Practitioners know that not only the Saturn cases, but also contracts between independent persons and manufacturers involving the purchase of the dealerships, have influenced these definitions. Full ownership should ordinarily occur within ten years and must be reasonably expected to be purchased from dealership profits. The independent person must have

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64. *In re*: Saturn Retail Enters., Inc., Fla. Admin. Order (Feb. 22, 2000) (on file with Clerk, Fla. Dep't High. Saf. & Motor Veh.).

65. FLA. STAT. § 320.645(1).

66. *Id.* § 320.645(1)(b).

67. *Id.* § 320.605.

"sufficient control" to permit acquisition and cannot be terminated "solely to avoid full ownership." Expedited purchase must be allowed. All these provisions are directed at situations practitioners encounter from time to time in disputes which arise between "independent persons" and manufacturers. Manufacturers have not been forgotten, however. For example, provisions for prepayment charges and costs may be included in agreements, and the independent person may be required to pay for "unrecouped restored losses"—that is, additional capital the manufacturer as owner has contributed to the dealership to make up for losses.

In direct response to *Meteor Motors*, the case in which a rental car company serviced new vehicles under a contract with a manufacturer, the newly created subsection 3 expressly authorizes relationships between manufacturers and short-term rental companies. However, what is given with one hand is limited with the other. Rental companies may sell only vehicles used in the rental business, and financing provided by these companies to retail customers for the purchase of vehicles is limited to the purchase of used motor vehicles.[68]

A curious feature of the revised section 320.645 is the "carve out" for distributors. This section of the 2000 statute exempted dealerships owned by manufacturers prior to May 31, 1984.[69] The provision has since been deleted. The 2001 statute allows a "licensee-distributor" not owned by a manufacturer "that has owned and operated a motor vehicle dealership in this state on or before July 1, 1996," to own and operate a dealership that does not sell or service the line-make distributed by the distributor.[70] This provision is curious indeed and can only be *ad hominem*. There is nothing in the history of section 320.645 to suggest that July 1, 1996, is a significant date. Moreover, there is no obvious reason for favoring distributors over other licensees, and one is prompted to ask how the distributor was operating the dealership legally after 1984, unless it also met the pre-May 31, 1984, exception. The reasonable inference is that a powerful interest was at work in securing this exception.

A comparison with the provisions of House Bill 1239 illustrates the competing interests that shaped the final version of the section 320.645 amendments. Under that bill, a licensee would have had to certify in writing that "the dealer development arrangement is bona fide and is not an attempt by the licensee to own, operate, or control one or more dealerships in this state."[71] It would have created a di-

68. *Id.* § 320.645(3)(a).
69. *Id.* § 320.645(2) (2000) (amended 2001).
70. *Id.* § 320.645(4) (2001).
71. Fla. HB 1239, § 8 (2001) (proposed FLA. STAT. § 320.645(2)(b)).

rect cause of action to test compliance with the statute, running not only to the Department, which would be given subpoena power,[72] but to "any person."[73] In direct response to the multiple ownership arrangement in the Saturn cases, no person would be allowed to be in more than one ownership arrangement with a licensee.[74] The bill would have further provided that even in a legitimate relationship, the licensee would be expressly prohibited from discriminating, presumably by favoring its own dealership, over its other dealers.[75] The bill also provided a definition of "significant investment" that required the initial investment of the independent person to be "not less than 6 percent"[76] of the overall investment considering the fair market value of the dealership. On the other hand, the rental company exception and the distributor ownership section were not features of the bill.

In general, the history and final version of the amendments to section 320.645 illustrate the compromises in amending the Act. Response to a general concern by dealers, given focus by specific cases, prompted the effort to amend. The manufacturers' response was to generalize the language of the amendment and to lessen the prospect of existing dealers bringing actions to test the validity of every subsection (1)(b) dealership arrangement. The "licensee-distributor" exception is a clear example of lobbying power. Those who may have to defend the statute in the future will doubtless be grateful for the severability provision in case this provision is so specific that it cannot sustain a "rational basis" attack.[77] On the face of the statute, it is hard to see what state purpose could be served by discriminating in favor of one class of licensee.

C. Increasing the Act's Dealer Protection

Section 320.64 establishes the grounds for denying, suspending, or revoking a licensee's application or license. When one compares the subsections of section 320.64 to those of section 320.27(9), the analogous section for the denying, suspending, or revoking of dealer licenses, one is struck by the concentration on acts which directly affect consumers in the dealer licensing statute as compared to the concentration on acts which affect dealers in the manufacturer licensing section. The amendments to this list are especially instructive of the dealer concerns that have developed in the industry since the last significant amendments.

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72. *Id.* (proposed FLA. STAT. § 320.645(5)).
73. *Id.* (proposed FLA. STAT. § 320.645(3)).
74. *Id.* (proposed FLA. STAT. § 320.645(2)(b)).
75. *Id.* (proposed FLA. STAT. § 320.645(4)).
76. *Id.* (proposed FLA. STAT. § 320.645(6)(b)).
77. FLA. STAT. § 320.6991 (2001).

1. Alliance of Automobile Manufacturers v. Hull[78] *and Florida's 2001 Legislation*

Perhaps the most comprehensive recent state regulation focusing on potential incursions by manufacturers into dealers' traditional profit centers can be seen in the 2000 amendments to the Arizona dealer statute. The Arizona Legislature passed House Bill 2101, codified as section 28-4460, *Arizona Revised Statutes*, which created a new section entitled "Factories; competition or unfair discrimination prohibited; definitions."[79] As the title indicates, this section deals with various areas in which a manufacturer might be perceived as a competitor with its dealers or seen as having unfairly granted a competitive advantage to some dealers over others. Arizona created a prohibition against: manufacturer ownership in section 28-4460(B)1; direct sales to consumers by manufacturers in section 28-4460(B)2; "controlling any aspect of the final amount charged"[80] for a vehicle or vehicle financing in section 28-4460(B)3; refusing to provide all models manufactured to each dealer and at a price no greater than to any other dealer in the country in section 28-4460(B)4; and providing or directing all "leads"[81] to the dealer nearest the address of the lead.

Two manufacturer associations challenged provisions of the statute on a variety of constitutional grounds. The order of the court was on the plaintiffs' motion for temporary injunctive relief. The court concluded:

> While plaintiffs have presented arguments that may hold merit upon the development of a more comprehensive factual record, they have not met their burden at this stage of the proceedings, due, in large part, to their failure in proving the balance of hardships tips decidedly in their favor or that any irreparable harm would result from denial of an injunction.[82]

Nonetheless, the court provided considerable constitutional analysis. Because a number of the Arizona statute's concepts have been enacted or were proposed for the Florida Act, a brief review of the court's constitutional analysis is in order.

First, *Hull* does not question the right of the state to regulate this area.

> The present statute is not an entirely new proposition. Arizona has regulated the automobile industry and the relationship between

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78. 137 F. Supp. 2d 1165 (D. Ariz. 2001), *appeal docketed*, No. 01-15940 (9th Cir. 2001).

79. ARIZ. REV. STAT. § 28-4460 (2000).

80. *Id.* § 28-4460(B)3.

81. *See id.* § 28-4301(16) (2000) (stating that a lead is one's expressed interest in purchasing a product).

82. *Hull*, 137 F. Supp. 2d at 1177.

> manufacturers and dealers for several years. Title 28 regulates the automobile manufacturers' business transactions in this State, preventing the manufacturers from competing with their dealer franchisees. *See* A.R.S. § 28-4333(A) and § 28-4334(A). Such franchise laws keep the disparity of power between manufacturers and dealers in check. Similar regulations exist in nearly every State. *See generally, New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978) (recognizing State interest in regulating dealer-manufacturer relationship); *Tober Foreign Motors, Inc. v. Reiter Oldsmobile, Inc.*, 376 Mass. 313, 381 N.E.2d 908 (1978) (explaining rationale behind State regulation of dealer-manufacturer relationship).[83]

As the court observes in the parenthetical, the United States Supreme Court has indicated that a state has the power to regulate the manufacturer-dealer relationship without being in conflict with antitrust laws.[84] The plaintiffs in *Hull*, however, attacked the new legislation on a number of constitutional grounds, including the First Amendment, the Commerce Clause, the Equal Protection Clause, the Takings Clause, and vagueness.[85]

a. The Threat of Information v. The First Amendment.—"The essence of plaintiffs' First Amendment challenge is that the operative effect of subsections (B)(3) [prohibition against controlling any aspect of amount charged for vehicles or services] and C(1) [definition of 'controlling'] taken together prevents vehicle manufacturers from publishing pricing information about vehicles and other products on their Internet Web sites."[86] The key to the court's ruling on this issue rests on the fact that the court interpreted the claim as an "as applied" challenge.[87] The factual record was too fragmented to support a temporary injunction on this ground.[88] Framing the issue, however, is revealing.

The Internet is a strong and growing force in commerce. Dealers are concerned that consumer access to Internet information put forth by manufacturers will unfairly influence pricing. Thus, publication of "average" selling prices, or "available" financing rates, or "recommended" selling prices, other than the federally required new car manufacturer's suggested retail price,[89] in dealers' eyes represent threats to dealers' ability to make a reasonable profit.

House Bill 1239 sought to introduce the exact language of section 28-4460(B)(3), *Arizona Revised Statutes*, adding the phrase at the

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83. *Id.* at 1168.
84. New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978).
85. *Hull*, 137 F. Supp. 2d at 1169.
86. *Id.* at 1170.
87. *Id.* at 1171-72.
88. *Id.* at 1171.
89. 15 U.S.C. § 1232 (2000).

end of the first sentence "or has charged the dealer more than 90 percent of the manufacturer's suggested retail price for a motor vehicle" and substituting the word "influencing" for "controlling."[90] Clearly, the Florida dealer lobby wished to go one step further than Arizona. This language did not pass. However, another section was approved that may achieve a similar purpose.

Section 320.64(28), *Florida Statutes*, now makes the following a prohibited act:

> The applicant or licensee has published, disclosed, or otherwise made available in any form information provided by a motor vehicle dealer with respect to sales prices of motor vehicles or profit per motor vehicle sold. Other confidential financial information provided by motor vehicle dealers shall not be published, disclosed, or otherwise made publicly available except in composite form. However, this information may be disclosed with the written consent of the dealer or in response to a subpoena or order of the Department, a court or a lawful tribunal, or introduced into evidence in such a proceeding, after timely notice to an affected dealer.[91]

House Bill 1239 contained a provision on the same subject which read:

> The applicant or licensee has published, disclosed, or otherwise made available any information, including composite information, obtained from any motor vehicle dealer or dealers, including, without limitation, selling or leasing prices of motor vehicles or profit per motor vehicle sold or leased.[92]

Section 320.64(28) represents a compromise with the House Bill 1239 provision that partially addresses the problem that the Arizona statute addresses. The selling price of a new vehicle is provided to the manufacturer by its dealer. Section 320.64(28) prohibits disclosure of sales price or profit information provided by the dealer in any form. Read in conjunction with the provision that "other confidential information" may be disclosed in composite form, the first sentence will forbid the disclosure of sales information even in composite form. Thus, a manufacturer may not publish an "average" new vehicle price for the dealer's area because the only way to calculate such a price would be in part from pricing information supplied by the dealer. This provision does not address the "price" of financing and other services, but it should effectively address the question of new motor vehicle prices on manufacturers' Web sites. It may also be more resistent to a First Amendment challenge than the Arizona statute, whose constitutional fate is yet to be decided, or the analo-

90. Fla. HB 1239, § 4 (2001) (proposed FLA. STAT. § 320.64(36)).
91. FLA. STAT. § 320.6408 (2001).
92. Fla. HB 1239, § 4 (2001) (proposed FLA. STAT. § 320.64(32)).

gous provision of House Bill 1239, because it is drawn more narrowly and protects confidential information rather than making sweeping prohibitions against commercial speech.

Practitioners will especially understand the compromise nature of the provision. The disclosure portions are prompted by discovery disputes that arise especially in administrative litigation under section 320.642, *Florida Statutes*, in which an existing dealer protests the establishment of another same line-make dealer in its area. In this form of litigation, the opposing parties often seek discovery of details of each other's financial operations. Obviously, this information could be quite valuable to competitors and is correspondingly sensitive to those whose information it is. The statute as it stands favors nondisclosure but does not forbid it on a proper showing. The practical effect will be that such discovery, if allowed, will be allowed only in summary form. Thus the statute will go far to narrow the arguments in future motions to compel discovery.

b. The Internet, the Commerce Clause, and Vagueness.—The *Hull* plaintiffs claimed that the Arizona statute violated the Commerce Clause by prohibiting a manufacturer "from selling, leasing or providing, or offering to sell, lease or provide, vehicles or products, services or financing to any retail customer or lead."[93] The *Hull* court noted that the plaintiffs did not question the right of the state to prohibit manufacturers from competing with their dealers. The court suggested that any attempt to do so would be futile in view of the precedent of *Exxon Corp. v. Governor of Maryland*.[94] What the plaintiffs did claim was that the ban on peripheral products, rather than the sale of new vehicles, made the case distinguishable from *Exxon*.[95] The court, however, saw no such distinction.[96]

The 2001 legislature has created an analogous prohibition to the Arizona statute in two new subsections of section 320.64:

> (23) The applicant or licensee has competed or is competing with respect to any activity covered by the franchise agreement with the motor vehicle dealer of the same line-make located in this state with whom the applicant or licensee has entered into a franchise agreement, except as permitted in s. 320.645.
>
> (24) The applicant or licensee has sold a motor vehicle to any retail consumer in the state except through a motor vehicle dealer holding a franchise agreement for the line-make that includes the motor vehicle. This section does not apply to sales by the applicant or licensee of motor vehicles to its current employees, employees of

93. ARIZ. REV. STAT. § 28-4460(B)2 (2000); *see Hull*, 137 F. Supp. 2d at 1173-74.
94. 437 U.S. 117 (1978).
95. *Hull*, 137 F. Supp. 2d at 1174.
96. *Id.*

> companies affiliated by common ownership, charitable not-for-profit-organizations, and the federal government.[97]

These provisions cut off direct sales of new motor vehicles to Florida consumers by manufacturers over the Internet. In most cases, it would also preclude used vehicle sales, because most manufacturers in their franchise agreements require their dealers to sell used vehicles. The same is true of service and the sale of parts and accessories, which are also required dealer activities under the franchise agreements. Thus, experiments in the recent past with manufacturer-owned service facilities would not be allowed because they would compete with an existing dealer. The same would apply to direct sale of factory approved parts and accessories to independent suppliers. What is not directly prohibited by these sections is the direct sale of financing products. This latter factor may be the distinguishing feature between the Florida statutes and their Arizona analogue, if the "collateral" products portion of the Arizona statute is ultimately found to offend the Commerce Clause.[98]

A common aspect of regulation of manufacturers is the criminalizing of violations. Section 320.70, *Florida Statutes*, establishes such criminal penalties:

> Any person being a manufacturer, factory branch, or factory representative, who violates any provision of ss. 320.61-320.70, or who does any act enumerated in s. 320.64 as a ground for the denial, suspension or revocation of a license, shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.[99]

There is no reported case in which a manufacturer has been charged under section 320.70. The presence of the section, however, raises special constitutional issues.

Because there is a possible criminal penalty for violating a section of the Act, its provisions are open to enhanced scrutiny for vagueness. The Arizona court opined that the plaintiffs "raise a legitimate concern" about the interpretation of what activities would be included under "competition" as a defined term.[100] The court made no ruling on this claim but, based on the state's clarifications, concluded

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97. FLA. STAT. § 320.64(23), (24) (2001).

98. The state in *Hull* will take comfort from the ruling in *Ford Motor Co. v. Texas Dep't of Transp.*, 264 F.3d 293 (5th Cir. 2001). The Fifth Circuit found that article 4413(36), section 5.02(c) of the Texas Revised Civil Statutes forbid manufacturers from "acting in the capacity of a dealer" and rendered them ineligible for a dealer's license. Therefore, the statute prevented Ford from selling used vehicles over its Web site through an arrangement with local dealers. The statute was found to be constitutional against challenges very similar to those brought against the Arizona statute.

99. FLA. STAT. § 320.70.

100. *Hull*, 137 F. Supp. 2d at 1176.

that the plaintiffs could not bear their burden of showing imminent harm.[101] Based on the *Hull* court's analysis, it remains an open question whether "compete" is sufficiently vague so that a manufacturer would not be able to know whether its actions were criminal. If it is squarely decided at some point in the history of *Hull* that the statute is unconstitutionally vague, it is likely that manufacturers will attack section 320.64(23). The question will surely come up if there is a civil or administrative suit against a manufacturer based on a claim that the manufacturer has violated one of these provisions.

2. A Bigger, Brawnier Section 320.64

The 2001 amendments to section 320.64, *Florida Statutes*, as well as the proposed amendments which did not pass, could be commentary on the headlines from the industry trade journals on issues of conflict and tension between dealers and manufacturers. In addition to the changes already discussed, the legislature has addressed the allocation of new models to existing dealers, audits by manufacturers of warranty payments or sales incentive programs, and alternative dispute clauses in franchise agreements.

a. New Vehicle Models to All Dealers.—A major concern of some dealers in recent years has been the effort of certain manufacturers to condition allocation of a distinctive new model to be added to a line-make upon a dealer attaining performance goals or providing modifications to its facilities. For example, when Oldsmobile launched its Aurora model, there was much noise that dealers would not receive the model unless they achieved certain performance goals. Oldsmobile ultimately did not follow through. Volvo required dealers with facilities it considered inferior to upgrade in order to receive the S70 when it added the vehicle to its line in 1998. More recently, BMW has attempted to offer dealers a separate franchise agreement to sell its X5 sport utility vehicle, which will not be available to dealers with the standard BMW agreement. That decision has led to litigation in Texas.

Texas has a statute making it unlawful for a manufacturer to

> refuse to offer to its same line-make franchised dealers all models manufactured for that line-make, or require a dealer to pay any extra fee, purchase unreasonable advertising displays or other materials, or remodel, renovate, or recondition the dealer's existing facilities as a prerequisite to receiving a model or series of vehicles.[102]

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101. *Id.*
102. TEX. REV. CIV. STAT. art. 4413(36), § 5.02(b)(26) (2001).

The Texas Motor Vehicle Board overturned an administrative law judge's recommendation and ruled that the X5 was a car, not a truck, so that franchised dealers must receive the vehicle.[103] In 2001, Florida's legislature passed a similar provision.

Section 320.64(22) has replaced previous section 320.64(13). The provision previously focused on prohibiting manufacturers from refusing to provide dealers with reasonable quantities of vehicles and other products in a timely manner, a provision intended to prohibit selective allocation of hot selling models. Section 320.64(22) added the following:

> Such refusal includes failure to offer to its same line-make franchised motor vehicle dealers all models manufactured for that line-make, or requiring [*sic*] a dealer to pay any extra fee, require a dealer to execute a separate franchise agreement, purchase unreasonable advertising displays or other materials, or remodel, renovate, or recondition the dealer's existing facilities, or provide exclusive facilities as a prerequisite to receiving a model or series of vehicles.

Florida has gone Texas one better by adding the "no new franchise" provision expressly to the statute. Those in the industry will recognize the motivation for the "provide exclusive facilities" language. An ongoing struggle between manufacturers and dealers has developed out of the manufacturers' desire to have exclusive representation in a facility for their products and dealers' desire to represent several manufacturers in facilities designed to give the dealer maximum economy of scale. In fact, many dealerships represent more than one line-make from a facility. The introduction of a new product is an occasion for a manufacturer to exert pressure on its "dualled" dealers to provide exclusive facilities for the line-make in order to receive the product.

The new provision clearly protects dealers from such "power plays" by manufacturers. One wonders, however, if the new legislation may produce an unwanted consequence. Section 320.60(14) provides the following definition: "'Line-make vehicles' are those motor vehicles which are offered for sale, lease, or distribution under a common name, trademark, service mark, or brand name of the manufacturer of same." A visit to Ford's Web site reveals a picture of a Thunderbird, an Explorer, and an F-150 with the caption "FORD VEHICLES" beneath. Ford has routinely given its dealers two franchise agreements, one for light trucks and one for cars. Other manufacturers who sell both cars and trucks do the same. There is, however, a significant definitional question in the modern motor vehicle

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103. Autobahn Imp., Inc. v. BMW of N. Am., Inc., Tex. Admin. Order No. 99-0023 LIC (July 19, 2001) (on file with Clerk, Motor Vehicle Bd., Tex. Dep't. of Transp.).

environment as to what is a car and what is a truck. The industry has treated sport utility vehicles as trucks because they are built on a truck frame or "platform." Many of these vehicles are not what "trucks" have been traditionally thought to be, as the Texas BMW case illustrates. "Light" trucks, such as the Ford F-150, which have a heritage as "working" vehicles used to haul pay loads, especially on farms or construction sites, are now being designed primarily to carry passengers, with interiors outfitted for passenger comfort and suspensions designed for a smooth ride.

This raises an interesting question. To use the Ford example, while Ford car dealers are also given a Ford "light truck" franchise allowing them to sell the F-150 and F-250, and some have "medium" truck licenses allowing them to sell F-350s and F-450s, there are some truck dealers selling medium and heavy duty trucks of various line-makes who also have a franchise to sell Ford "light" trucks. On the basis of the new section 320.64(22), read as it is written and in light of the statutory definition of "line-make vehicles" and Ford's own advertising, these "truck only" dealers will have an argument for demanding Ford ship them passenger cars.

b. Manufacturer Audits.—Two important sources of income for dealers are warranty reimbursements and manufacturer rebate programs. Warranty reimbursements are moneys paid to dealers for repairing vehicles covered by the manufacturer's standard vehicle warranty. Dealers file claims with the manufacturer for reimbursement for parts and labor, which is paid to the dealer on a periodic basis.[104] Unless there is some obvious mistake in the claim, manufacturers generally pay as a matter of course, usually as an entry in the "open" account used to account for money owed the dealer by the manufacturer for such claims and money owed the manufacturer by the dealer for the purchase of parts and accessories. However, manufacturers have accounting teams which audit dealership warranty reimbursement claims from time to time and sometimes disallow some of the claims. The manufacturer then "charges back" these disallowed claims in the "open" account. Sometimes the sums can be quite large, causing havoc to the dealer's cash position. Some "charge backs" are occasioned by fraudulent practices unearthed by the auditors; much more often they are the result of failures to abide by the manufacturer's procedures in making the claim—disagreements over the amount that properly could be claimed for the service performed or disputes over whether the repair was covered by the warranty. Dealer complaints about this auditing process center principally on

104. Section 320.696, *Florida Statutes*, requires reimbursement within thirty days of the manufacturer's receipt of the dealer's billing—in practical terms, a rule honored more in the breach than in the observance.

audits that go back many months and that demand repayment of reimbursements made years before. Sometimes, the audits even occur long after the year's accounting has closed, occasioning a large loss that could not have been anticipated in the ordinary course of business. Sometimes the "charge backs" are based on hypertechnical violations of the claim procedures.

The 2001 legislature has addressed this concern in section 320.64(25). This subsection makes it an express violation to fail to comply with section 320.696 (requiring prompt payment of claims), giving greater focus to a statute already on the books. It limits audit "look back" periods to one year following the payment of the claim, and section 320.64(25) limits the bases on which a claim may be denied. The manufacturer

> shall not deny a claim or charge a motor vehicle dealer back subsequent to the payment of a claim unless the [manufacturer] can show that the claim was false or fraudulent or that the motor vehicle dealer failed to substantially comply with the reasonable written and uniformly applied procedures of the [manufacturer] for such repairs or incentives.[105]

In addition, section 320.64(30) now expressly prohibits a manufacturer from conducting any audit in order to coerce a dealer to forego its rights. On the other hand, section 320.64(25) specifically acknowledges the right of the manufacturer to "periodically audit" in order to determine "the validity of paid claims."[106]

This subsection exhibits the balance achieved by the process of party lobbying in the legislative process. A comparison with the proposed subsection presented in House Bill 1239 illustrates the point. That bill would have required reimbursement for any repair to correct a "defective condition" that was "desirable to prevent deterioration of any part of or the value of the motor vehicle, or to correct a potential safety hazard" unless the manufacturer proved, by clear and convincing evidence, that the repair was unnecessary or not performed, or that the dealer substantially failed to justify the claim in any reasonable fashion.[107] It forbade audits of actual time spent, the custom being often to receive payment for "book time"—that is, the time "allowed" for the repair by the manufacturer's service manual. Book time is measured irrespective of the actual time the repair took. Dealers who pay their mechanics on book time but receive payment for actual time commonly complain about this method of measurement.[108] Finally, it required a written, detailed explanation of the

105. FLA. STAT. § 320.64(25) (2001).
106. *Id.*
107. Fla. HB 1239, § 4 (2001) (proposed FLA. STAT. § 320.64(25)(a)).
108. *Id.* (proposed FLA. STAT. § 320.64(25)(b)).

reason for any "charge back," and a period for the dealer to file a challenge. During the challenge, the manufacturer may not take any action to collect the "charge back" from the dealer's accounts. Additionally, a successful challenging dealer is provided a remedy of double the amount "charged back" and attorney's fees.[109]

These proposals directly address the following dealer complaints: that manufacturers refuse to pay for reasonably necessary repairs not contemplated in the "fine print" of the warranty; that any reasonable substantiation of work done should suffice to support a claim and not the strict compliance with difficult claims documentation procedures; that manufacturers take sums of money from the dealers based solely on the results of the audit even when the results are in dispute; and that warranty "charge backs" are often in amounts making it commercially uneconomical to hire attorneys to pursue the claims.

The statute that passed addresses the main complaints but in substantially reduced form from the prospective of dealers. Nonetheless, the limitation on the claims subject to audit and the "substantial compliance" language should go far in leveling the playing field between manufacturer and dealer in this area of their business.

In addition to warranty reimbursements, special incentive programs related to new vehicle sales are a substantial source of income for dealers. These programs encourage dealers to sell certain vehicle models, or a certain number of new vehicles, during a specific time period. Dealers are given a rebate for each qualifying sale under these type of programs. Often the dealer receives nothing unless it meets the program objectives, but upon reaching the objective, the dealer receives a rebate for all vehicles sold. Other programs encourage "fleet sales"—that is, bulk sales of new vehicles to a single buyer such as a rental car company. These sales are usually negotiated at a very low profit margin for the dealer. They tend not to be ordinarily attractive, as they would use up vehicle inventory without a good return. Such sales are important to manufacturers, however, because they serve as a sort of advertisement, putting rental customers, for example, in a virtual test drive. This in return increases vehicle sales. To support such sales, manufacturers give incentives to the dealer, often by paying the dealer a set amount for each vehicle sold in a qualifying fleet transaction.

The incentive payments can be quite large, and manufacturers audit claims for incentive payments to ensure the rules of the programs have been followed. But as with warranty audits, these audits often occur long after the program has finished or after the fleet in-

109. *Id.* (proposed FLA. STAT. § 320.64(25)(e)).

centive has been paid. In these cases, disputes may arise between dealers and auditors over whether a vehicle sale qualifies for the program. A frequent bone of contention, especially in Florida, is prohibition against the sale of vehicles for export. Many manufacturers prohibit their dealers from selling for export and disallow such sales in their incentive programs. However, there is a significant market in exported vehicles, which in many countries can be sold at a profit even after they have been purchased at retail and shipped to the final purchasers. Florida dealers especially object to being cut off from such sales. Manufacturers, however, counter that to permit domestic dealers to export undermines their relations with foreign dealers. Even more galling than the prohibition, manufacturers follow the history of vehicles, either by periodic checks at ports or by noting that a vehicle has not been brought in for warranty work. Sales of vehicles that manufacturers believe have been exported are disallowed on a "strict liability" basis—that is, regardless of whether the dealer had any knowledge of an intent to export the vehicle. The obvious dealer complaint is that the dealer should not be responsible for what a consumer does with a vehicle after it has been sold.

Collectively, new sections 320.64(25) and 320.64(26) address this question. Incentive audits are limited to an eighteen-month "look back" period (section 320.64(25)). Manufacturers are additionally prohibited from penalizing dealers, in any way, from selling directly to a customer at the dealership without dealer knowledge of the customer's intent to export. Titling in one of the fifty states provides a rebuttable presumption that the dealer was without knowledge (section 320.64(26)).

Again, House Bill 1239 would have gone much further. One section provided an analogous program to that proposed for warranty audits.[110] Another flatly prohibited a "not for export" policy by manufacturers.[111] Comparison with the legislation that was passed immediately shows the compromise. Manufacturers must audit within eighteen months of payment or waive the right to charge back, but they retain the right to make reasonable rules. Dealers must substantially follow the rules but are relieved from the "strict liability" associated with sales of vehicles later exported without the dealer's knowledge.

110. *Id.* (proposed FLA. STAT. § 320.64(27)).
111. *Id.* (proposed FLA. STAT. § 320.64(29)).

c. Alternative Dispute Resolution.—This is not the place for a comprehensive discussion of the growing legal debate over arbitration clauses in form contracts. Suffice to say that arbitration is a favored form of dispute resolution for any dispute falling under the Federal Arbitration Act,[112] and such clauses have been broadly enforced in state and federal court.[113] Nonetheless, several states have prohibitions against mandatory arbitration provisions in manufacturers' franchise agreements.[114] However, the one appellate decision on point has declared that such statutes are unenforceable on preemption grounds by the Federal Arbitration Act.[115] Diving into this stream, the 2001 legislature attempted to provide significant relief to dealers while avoiding the problem of preemption.

Section 320.64(31), *Florida Statutes*, creates the following violation:

> From and after the effective date of enactment of this provision, the applicant or licensee has offered to any motor vehicle dealer a franchise agreement that:
>
> (a) Requires that a motor vehicle dealer bring an administrative or legal action in a venue outside of this state;
>
> (b) Requires that any arbitration, mediation, or other legal proceeding be conducted outside this state; or
>
> (c) Requires that a law of a state other than Florida be applied to any legal proceeding between a motor vehicle dealer and a licensee.[116]

Many franchise agreements have choice of law clauses specifying the state law in which the manufacturer's principal place of business is located, rather than the dealer's state. Others have choice of venue clauses setting venue outside the dealer's state, and some require arbitration or mediation in a place outside Florida.

This again is not the place to discuss the relative advantages or disadvantages of arbitration in the settlement of disputes between very large corporations and relatively small corporations. However, it is clearly a burden on dealers to be forced to seek redress in a distant place, whether judicially or in alternative dispute resolution. It is likewise an imposition on a Florida dealer to be forced to deal with the laws of another state. As there is nothing in section 320.64(31) prohibiting arbitration or mandatory mediation provisions, nothing

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112. Federal Arbitration Act, 9 U.S.C. § 1 (2000).

113. *See generally* Doctor's Ass'n, Inc. v. Casarotto, 517 U.S. 681 (1996).

114. *See, e.g.*, ALA. CODE § 8-20-4(3)(m) (2001) (disallowing a controversy to be referred to any person other than the courts, if referral is binding).

115. *See* Saturn Distrib. Corp. v. Williams, 905 F.2d 719, 722 (4th Cir. 1990) (holding that Virginia state law that singled out arbitration agreements and limited their enforceability was preempted by the FAA).

116. FLA. STAT. § 320.64(31) (2001).

is likely preempted by the Federal Arbitration Act. Nonetheless, in passing this provision, the legislature has heeded a significant dealer complaint and provided significant relief.

d. Other Dealer Proposals.—House Bill 1239 contains some other notable proposals that were not enacted into law but clearly were intended to address specific dealer concerns. One such concern involves manufacturer programs that "certify" dealerships as meeting specific standards of performance and/or facilities. These standards, however, may be very expensive to meet. Chrysler's "Five Star" and Ford's "Blue Oval" are examples. The fear is that some dealers will not qualify for these programs and will not be given special incentives such as favorable financing or leasing terms. These incentives are provided to qualifying competitors, which the competitors in turn offer their customers, thus placing nonqualifying dealers in a disadvantageous position. House Bill 1239 would have required the manufacturer to offer any variation in pricing, whether directly or by way of special rebates based on the unwillingness of a dealer to take certain actions necessary to become a certified program dealer, to all its dealers.[117]

Another concern of dealers is that financing subsidiaries of manufacturers, such as General Motors Acceptance Corporation, Chrysler Financial Corporation or Ford Motor Credit Company, have in the past attempted to encourage dealers to use more of their services by offering preferred rates to "volume" customers. These companies provide commercial financing to dealers and "buy" retail sales contracts from the dealers. Major issues are "floor plan" financing and "A paper." Floor plan financing programs, used by virtually all dealers, provide financing to the dealer for the purchase of its new, and often used, vehicle inventories. The manufacturer sells the vehicle to the dealer, or the dealer buys a used vehicle from one of many auctions, and payment is made by the financing source, which is repaid when the vehicle is sold. "A paper" refers to the retail sales contract made by dealers with vehicle buyers who have exceptional credit. Dealers receive a payment from the lenders when they assign the retail sales contract, usually based on a small percentage of the principal amount of the contract. Standard lenders prefer these contracts because they have fewer collection problems than contracts with buyers with lower credit ratings.

In return for using the floor plan and giving preferential treatment in the placement of "A paper," these financing companies have from time to time offered the preferred dealers better financing for long-term leases to consumers than they would give to another same-line dealer. Dealers who do not want to participate in these pro-

117. *Id.*

grams, usually dealers who have their floor plan with another lender or have other established "A paper" sources, feel threatened in the competitive market by the favorable terms available to competing dealers. House Bill 1239 would have prohibited such practices.[118] There are obvious arguments against such a statute. For manufacturers to offer incentives to customers—in this case the dealers—to gain their business is quite normal, and this sort of competition for business ultimately benefits consumers in the form of lower leasing rates. Indeed, this was not one of the proposals that made it through the legislative process.

D. When Things Fall Apart: Changes to the Franchise Termination Process

Perhaps the aspect of the manufacturer-dealer relationship of greatest ultimate concern to dealers is the power of the manufacturer to end the relationship. Franchise contracts uniformly contain provisions delineating the grounds upon which the manufacturer may terminate the agreement. Moreover, many are term agreements; that is, they are entered into for a term of years and, like any other contract, end when the term is completed. These contract provisions are the ultimate in superior bargaining power. Dealers invest large amounts of money in purchasing or leasing properties to provide facilities from which to sell the manufacturer's products. These are single purpose facilities and long-term commitments that dealers are left with if their agreements are terminated. Moreover, consumers are affected if the dealer from whom they have bought their new vehicle is no longer there to serve them. Notwithstanding, the market conditions in recent years have led some manufacturers to reduce their dealer bodies. The widely publicized phase out of Oldsmobile dealers is an example. Consequently, termination or nonrenewal is a major concern for dealers.

Florida has addressed this concern in section 320.641. As with other portions of the 2001 Act, the amendments of section 320.641 are direct reactions to dealer concerns and case law. Comparison between the final language in Committee Substitute for Senate Bill 1956 and proposed House Bill 1239 illustrates well the industry conflicts that were resolved in the 2001 legislature.

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118. Fla. HB 1239, § 4 (2001) (proposed FLA. STAT. § 320.64(35)).

1. When Can a Manufacturer Discontinue, Cancel, Fail to Renew, Modify, or Replace a Dealer's Franchise Agreement?

a. Termination.—"Termination" is not found in section 320.641. Rather, the phrase "discontinue, cancel, or fail to renew a franchise agreement"[119] is used to define the ways in which a manufacturer may "terminate" its franchise with a dealer. In short, section 320.641 applies to any attempt to end the franchise relationship. Manufacturers are not, of course, forbidden to terminate agreements with their dealers. Rather, if they wish to do so, they must follow the procedures provided by the statute. Essentially, a manufacturer must notify both the dealer and the Department of its intention to terminate a dealer at least ninety days before the termination is to be effective, or fifteen days if the reason for termination is abandonment of the dealership.[120] If the dealer files a protest with the Department within the ninety-day notice period, a determination is made as to whether the proposed termination is "unfair or prohibited" and the proposed termination is stayed.[121] The question is what grounds may a manufacturer cite for termination? Over this question the manufacturers and the dealers parted ways.

Prior to the 2001 legislation, section 320.641(3) read:

> [D]iscontinuation, cancellation, or nonrenewal of a franchise agreement is unfair if it is not clearly permitted by the franchise agreement; is not undertaken in good faith; is not undertaken for good cause; or is based on an alleged breach of the franchise agreement which is not in fact a material and substantial breach.[122]

The 2001 legislature added the following language after "substantial breach": "or, if the grounds relied upon for termination, cancellation, or nonrenewal have not been applied in a uniform and consistent manner by the licensee." The question of establishing the basis for termination has plagued the statute. Prior to 1984, the criterion was whether the dealer was "unfairly cancelled."[123] In 1984, the "unfair or prohibited" language entered.[124] In 1988, the legislature added the

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119. FLA. STAT. § 320.641(1)(a).

120. *Id.* § 320.641(1)(a), (5).

121. *Id.* § 320.641(3). A curious feature of the procedural law in this area, not addressed by the 2001 legislature, is that while the notice of termination in the case of abandonment is a fifteen-day notice, the case law has established that nonetheless, an affected dealer has ninety days in which to file an opposition. Gen. Motors Corp. v. Gus Machado Buick-GMC, Inc., 581 So. 2d 637, 638 (Fla. 1st DCA 1991). Section 320.641(3) also does not expressly say that the petition or complaint is to the Department; section 320.699(1), however, allows for the petition to the Department. *See also* FLA. STAT. § 320.695 (reference to determination under section 320.641(3) by the Department).

122. FLA. STAT. § 320.641(3) (2000).

123. *See id.* § 320.641(3) (1983).

124. *See id.* § 320.641(3) (1985).

pre-2001 language, elaborating somewhat on "unfair or prohibited." Nonetheless, the statute continues to be interpreted in the light of *International Harvester Co. v. Calvin*.[125] The following interpretation is typical:

> to determine whether the termination in this case was unfair or prohibited, an examination must be made of those grounds set forth in the Agreement which would allow termination/cancellation; the good faith in deciding to terminate; whether termination was for good cause and whether the breaches of the Agreement, if any, were material and substantial. In assessing such matters, the Petitioner has the burden of demonstrating that the intended cancellation is unfair or prohibited. See International Harvester Co. v. Calvin, 353 So.2d 144 (Fla. 1st DCA 1977).[126]

The 2001 Act squarely addresses the question of burden. Although the dealer must initiate the administrative action, the manufacturer now bears the burden.

The shift in burden may affect proof in termination cases. Formerly "not clearly permitted"; "not in good faith"; "not for good cause"; *or* "material and substantial breach" if breach had been claimed, had to be proved by the dealer. With the changed burden, the manufacturer may have more difficulty proving good faith than defending against a dealer trying to prove bad faith. Moreover, a common basis for termination based on breach is the failure of the dealer to meet performance objectives in vehicle sales and customer service.[127] A common defense by dealers has been "I may not be good, but others are worse and are not being terminated." The new language will give a great deal of strength to that defense.

Despite these additions, dealers may still be terminated for reasons not related to the performance of their franchise obligations. House Bill 1239 would have gone much farther in protecting dealers from termination. It clearly expressed the concern prevalent among dealers in the wake of news that suggests that several large manufacturers would prefer to reduce their dealer bodies, especially by removing smaller dealers and dealers which are not top performers. The proposed language is quite lengthy.[128] These are salient features: that the manufacturer be required to prove by clear and convincing evidence *all of the following*: (i) the termination is permitted by the

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125. 353 So. 2d 144 (Fla. 1st DCA 1977).

126. Broward Truck & Equip. Co. v. Navistar Int'l Transp. Corp., Fla. Admin. Rec. Order No. 93-5966 (Final Order Aug. 18, 1994); *see also* Import City, Inc. v. Daihatsu Am., Inc., No. 92-30199/LAC (N.D. Fla. June 23, 1993) (order granting summary judgment), *aff'd*, 21 F.3d 1125 (11th Cir. 1994) (without opinion) (decision to abandon United States market sufficient good cause for cancellation).

127. *See, e.g.*, Bill Gallman Pontiac, GMC Truck, Inc. v. Gen. Motors Corp., Fla. Admin. Order No. 89-0505 (Feb. 28, 1991) (on file with Clerk, Dep't of High. Saf. & Motor Veh.).

128. Fla. HB 1239, § 5 (2001) (proposed FLA. STAT. § 320.641).

franchise agreement, and the provision is not suspect under public policy considerations, including adhesion due to the relative bargaining positions of the parties; (ii) good faith; (iii) good cause; and (iv) material and substantial breach. Good cause may not be solely based on breach, including a desire for greater sales performance, but must be shown by clear and convincing evidence to have caused significant damage to the manufacturer.[129] Additionally, performance-based termination must offer an opportunity for cure,[130] and termination for fraud must prove that those in charge of the dealership knew of the fraud and failed to take steps to remedy it.[131]

Practitioners will recognize that each of these proposed provisions derives from experience with dealer termination cases. One may be tempted to observe that to have passed the package in House Bill 1239 would have given dealers virtual immunity from termination, save for serious malfeasance or complete nonfeasance. This would be an overly harsh reaction. Regulation of dealer termination recognizes that, having expended great sums of money to represent a manufacturer, the dealer must be protected from the manufacturer's desire to change its method of selling at the dealer's expense. It is understandable that dealers who hear of other dealers being terminated because rogue employees have defrauded the manufacturer or the public without management's knowledge, or for perceived performance deficiencies which are hardly the worst in the area, believe that strong protection is in order.

While the more specific proposals of House Bill 1239 were not adopted, the fact that manufacturers now must bear the burden of proof and must demonstrate that they are not engaging in selective enforcement is a genuine step for dealers in the regulation of dealer terminations. It remains to be seen whether these changes will provide significantly greater protection to dealers than the 2000 Act when cases are actually litigated.

b. Modification.—The procedures established with respect to a proposed termination are also applicable if a manufacturer proposes to modify or replace a franchise in such a way as to "adversely alter the rights or obligations of a motor vehicle dealer under an existing franchise agreement or will substantially impair the sales, service obligations, or investment" of the dealer.[132] Clearly, such a provision is as important as the termination provision to those dealers whose franchise agreements are not perpetual or have clauses that contemplate modification. Whereas termination may be an event affecting

129. *Id.* (proposed FLA. STAT. § 320.641(d)).
130. *Id.* (proposed FLA. STAT. § 320.641(e)).
131. *Id.* (proposed FLA. STAT. § 320.641(f)).
132. FLA. STAT. § 320.641(1)(a) (2001).

only the occasional dealer, periodic refranchising affects the vast majority of dealers.

The pre-2001 statute came under scrutiny in *Chrysler Corp. v. Florida Department of Highway Safety and Motor Vehicles*.[133] In that case, the manufacturer had given notice of its intention to modify its franchise agreement to make explicit that United States dealers were prohibited from exporting vehicles manufactured for domestic sale.[134] Several dealers filed a complaint with the Department. Chrysler defended by claiming that the statute was unconstitutional and filed in circuit court.[135] The case was decided based on where constitutional challenges in an administrative context are appropriately adjudicated. The case blazes no new territory. What is of interest here is Chrysler's facial challenge; namely, that the absence of standards for determining if a modification is unfair or prohibited rendered this portion of the statute unconstitutional as an improper delegation of legislative authority.[136] The case was not further resolved in litigation, but the prospect of the constitutional challenge has clearly led to the addition in 2001 of the language: "A modification or replacement is unfair if it is not clearly permitted by the franchise agreement; is not undertaken in good faith; or is not undertaken for good cause."[137] Certainly, this is not a particularly detailed direction, but the terms "good faith" and "good cause" are sufficiently established so that the modification section should be safe from an improper delegation argument.

What remains to be seen, however, is how this new language will be applied. The "trigger point" for the provision remains somewhat problematic. The statute does not say that franchise agreements may not be modified or replaced. Rather, a proposed modification or replacement must be noticed if the alteration will adversely affect dealers.[138] The manufacturer is in something of a box. Section 320.641 allows dealers to void any adverse change that is made in the agreement without following the procedures of the statute. Consequently, the manufacturer is obliged to notice any change for fear that it may later be determined to have been adverse. Conversely, however, is giving notice, even with a reservation of rights, itself tantamount to an admission that the proposed change is adverse? Presumably nonadverse changes would be exempt.

Prior to the 2001 amendment, it was unclear whether any adverse change could be made. That is, was a determination that a proposed

133. 720 So. 2d 563 (Fla. 1st DCA 1998).
134. *Id.* at 565.
135. *Id.* at 566.
136. *Id.* at 567.
137. FLA. STAT. § 320.641(3).
138. *Id.* § 320.641(1)(a).

change was adverse sufficient in itself to determine that it was unfair? The amendment clearly implies that an adverse modification or replacement otherwise permitted by the franchise agreement may nonetheless be allowed if it is in good faith and undertaken for good cause. The problem with this standard is that it may be interpreted only from the manufacturer's perspective and not with regard to the potential effect on the dealer—if a manufacturer articulates a commercially reasonable basis to make the proposed change, then it may pass the "good cause" standard. The "good faith" standard can be satisfied, presumably, by showing the absence of bad motive, and it is unlikely that the manufacturer would be "out to get" all its dealers by replacing the franchise agreement. If this is the result, then the 2001 amendments, while shoring up the modification section against constitutional attack, may have completely pulled its teeth.

House Bill 1239 would have addressed this problem, principally with the following:

> A modification or replacement provision of a franchise agreement is unfair if it is not clearly permitted by the franchise agreement, is not undertaken in good faith, is not undertaken for good cause, fails to take into account the investment of a motor vehicle dealer in the franchise and will unreasonably adversely affect the return of such investment, is inconsistent with or in violation of any provision of ss. 320.60-.70, fails to provide that, in any dispute between a licensee and a motor vehicle dealer in any forum, the law of this state applies, both substantively and procedurally, or is undertaken without regard to the equities of the motor vehicle dealer. For purposes of modification or replacement, good faith includes, but is not limited to, proof that the licensee is not taking unwarranted or disproportionate advantage of any of its motor vehicle dealers given the lack of relative bargaining power of the parties. For purposes of modification or replacement, good cause includes, but is not limited to, proof of a material and substantial change in circumstances since the execution of the franchise agreement which warrants the modification or replacement and does not cause significant detriment to any of the licensee's motor vehicle dealers.[139]

The specific language in House Bill 1239 can be summarized as providing that any proposed change must be evaluated with a balancing test between the needs of the manufacturer and the potential detriment to existing dealers. From the fact that modifications are regulated by the Act, it can be presumed that the intent is to provide dealers protection from the effects of an adverse change in their franchise agreements produced by the superior bargaining power of manufacturers. If it turns out that the amendment provides protec-

139. Fla. HB 1239, § 5 (2001) (proposed FLA. STAT. § 320.641(2)(e)).

tion only against actual malice in proposing the change or arbitrariness, the purpose of the statute will surely be thwarted.

2. Preserving Value: Changes in Termination Relief

It is a peculiarity of the motor vehicle franchise, and of state law, that the selling of a franchise is not freely allowed. Franchise agreements uniformly recite that the franchise is not transferable, though most provide for some form of ownership change upon application to the manufacturer. Most states, however, including Florida,[140] provide a procedure allowing a dealer to sell its franchise, with an opportunity for the manufacturer to veto the proposed sale if the buyer does not meet certain qualifications. The greatest value of the dealership is, of course, the right to sell new vehicles and to receive reimbursement for doing warranty service work. The franchise is the document which gives that right. In the past, when a dealer received a notice of intent to terminate, manufacturers sometimes argued that any transfer of the franchise agreement transfered the agreement subject to the termination. That general principal has not prevailed in Florida.[141] The question becomes more difficult if a determination adverse to the dealer has been entered by the Department and the termination stayed on appeal. The pre-2001 statute provided only that the manufacturer could not replace the terminated dealer pending appeal if a stay had been entered by the Department or an appellate court except by transfer of the franchise.[142]

The 2001 Act greatly amplifies protection for the terminated dealer's investment. The new subsection 8 provides that any time during the course of a termination case, including on appeal, there will be a stay without bond if a transfer is proposed pursuant to section 320.643.[143] During the period of manufacturer review as provided in that statute and during the period of any administrative proceeding prompted by a manufacturer's refusal to accept a proposed transfer, the franchise will remain in effect.[144] The dealer may propose two such transfers, and when any transfer is accomplished, the termination proceedings will be dismissed as moot.[145]

Whereas dealers did not get what they wished on the procedural side, these new provisions will go far to protect a dealer who believes that the manufacturer's grounds for termination will not be upheld from losing everything if it takes its case through hearing and loses.

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140. *See* FLA. STAT. § 320.643 (2001).

141. Mercedes-Benz of N. Am. v. Mike Smith Pontiac GMC, Inc., 561 So. 2d 620, 624 (Fla. 1st DCA 1990).

142. FLA. STAT. § 360.641(7) (2000) (amended 2001).

143. *Id.* § 320.641(3) (2001).

144. *Id.*

145. *Id.*

In practical terms, as long as the dealership is economically viable enough to attract a buyer, the procedures will afford the dealer the opportunity to stay in business or to sell the dealership for many months after an adverse determination.

E. Section 320.643 and the Transfer of Franchises

Section 320.643 regulates transfers of franchises and ownership interests in dealerships. The reasons for this regulation have been discussed already. Neither a transfer of the franchise—usually accomplished by an asset sale in which one of the transferred assets is the franchise agreement[146]—nor the sale of a personally owned equity interest can be made without notification to the manufacturer and an opportunity for the manufacturer to object. On the other hand, the reasonableness of a manufacturer's objection may be tested. The 2001 amendments and the proposed amendments are direct reactions to issues that have arisen in litigation over manufacturer "turn downs" of proposed transfers.

1. Hawkins v. Ford Motor Co.[147]

Section 320.643 contemplates two distinct types of transfer, transfer of the franchise agreement (subsection 1) and transfer of an equity interest (subsection 2(a)). The essence of the statute includes notice to the manufacturer of an intended transfer, the manufacturer's vetting of the proposed transferee within a specified amount of time, approval, silence equaling approval, or disapproval and an opportunity to test whether the disapproval is reasonable. The content of the required notice differs in the two types of transfer, however, as does the basis on which a manufacturer may "turn down" the proposed transfer.

Prior to the 2001 amendments, when a manufacturer wished to "turn down" a proposed transfer, the manufacturer was required to file an administrative complaint.[148] The practical effect of such a filing when the proposed transfer was of the franchise agreement was that the proposed sale was eventually voided by the parties. Because the administrative hearing could be expected to last several months and an appeal would go on even longer, the buyer and seller, relying on contingencies contained in all purchase contracts that require manufacturer approval and set an outer limit for the transaction to

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146. In reality, manufacturers, dealers, and the Department engage in something of a fiction. Section 320.643 forbids a manufacturer from unreasonably refusing the transfer of a franchise, but manufacturers typically take the position that the franchise is not transferable. In practice, the transferee receives a new franchise in its own name.

147. 748 So. 2d 993 (Fla. 1999).

148. FLA. STAT. § 320.643(1) (2000) (amended 2001).

close, voided the contract. If the transaction is at arm's length, no one wants to risk the adverse consequences to business operations of keeping the transaction in limbo. Additionally, because the only relief the Department can provide is a determination as to whether the transfer can take place,[149] the offended party, usually the disappointed buyer, will bring a suit for damages pursuant to section 320.697, *Florida Statutes*.[150]

Hawkins was just such a damage action. Its resolution led to the Florida Supreme Court's guidance on how section 320.643 is to be interpreted. The effort to account for the effects of that case brought manufacturers and dealers into disagreement in the 2001 legislature.

The buyers in *Hawkins* were purchasing all the shares of the dealership company.[151] Thus, they contended that the manufacturer was only allowed to look at the moral character of the proposed transferees.[152] The purchasers proposed, however, to buy all the stock of the dealer corporation and to change the executive management.[153] The manufacturer turned down the proposal based not on the moral character of the proposed transferees but on their business experience, which is a criterion applicable to section 320.643(1)—when the proposed transfer is of the franchise.[154] The trial court—the United States Court for the Middle District of Florida—held that in this instance, where there was a proposed change of control and of executive management, the manufacturer could look to the business experience of the proposed transferee, and granted summary judgment to the manufacturer.[155] The case came to the Florida Supreme Court on certified question from the United States Court of Appeals for the Eleventh Circuit.[156]

The supreme court engaged in extensive statutory analysis to reach an interesting conclusion. On the one hand, the court noted:

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149. *See, e.g.*, Ford Motor Co. v. Ernie Haire Ford, Inc., Fla. Admin. Order No. 98-5473 (Apr. 5, 1999) (order dismissing action without hearing) (on file with Clerk, Dep't High. Saf. & Motor Veh.), *aff'd*, 758 So. 2d 999 (Fla. 1st DCA 2000) (without opinion). *But see* Chrysler Corp. v. Plaza Dodge, Inc., Fla. Admin. Order No. 94-3869 (Sept. 3, 1996) (on file with Clerk, Dep't High. Saf. & Motor Veh.) (finding son wishing to purchase shares from father to be of good moral character).

150. *See* Mike Smith Pontiac, GMC, Inc. v. Mercedes-Benz of N. Am., Inc., 32 F.3d 528, 529 (11th Cir. 1994).

151. *Hawkins*, 748 So. 2d at 995.

152. *Id.* at 996. The court noted that while the statutory scheme controlled the present case, the scheme had not changed and the decision applied equally to the 1993 statute. *Id.* at 994 n.1. The 1993 statute was the same version in effect in 2000. FLA. STAT. § 320.643(2)(a) (2000) (amended 2001).

153. *Hawkins*, 748 So. 2d at 995 (holding change of executive management requires notice and approval); *see also* FLA. STAT. § 320.644 (1993).

154. *Hawkins*, 748 So. 2d at 995.

155. *Id.* at 996.

156. *Id.* at 994.

> Although we agree with Ford and the amici for Ford that as a matter of public policy, manufacturers have a substantial and legitimate interest in designating those with whom the public will transact business, this Court may not rewrite statutes contrary to their plain language. The policy concerns raised by Ford and the amici for Ford more appropriately must be addressed by the Legislature. While one may agree or disagree with the underlying policy concerns or wisdom of legislation with regard to the relationship of a franchise agreement to corporation and stock ownership, the inescapable legal conclusion is that section 320.643(2)(a) may, under some other circumstances not present here, provide the exclusive basis for objection when the totality of the transaction is solely and exclusively an equity interest transfer.[157]

On the other hand, the court found:

> Contrary to the position taken by . . . [Appellants], the proposed transaction here cannot be viewed in a vacuum. Instead, the totality of the transaction must be considered, not only the designation or name attributed to the documents. If the transaction here involved only a sterile transfer of an equity interest in a corporation, without more, only the criteria for objection set forth in section 320.643(2)(a) would be applicable. However, because the proposed transaction here involved not only the transfer of all the equity interest in [the dealership], but also a change in the executive management control of that corporate motor vehicle dealership, section 320.643(2)(a) does not provide the exclusive basis for objection. The terms and conditions of the proposed transaction here were not separate and distinct, but were instead part of a unified whole. Therefore, in the present case, [the manufacturer] could properly object to the proposed transaction based on the criteria set forth in both section 320.643(2)(a) and section 320.644.[158]

Thus, the manufacturer was not allowed to consider the criteria in section 320.643(1) but could consider the criteria with respect to prospective executive managers in section 320.644. Because business experience was an applicable criterion in section 320.644, the result was the same as if section 320.643(1) had been applicable.

The result, as well as the supreme court's analysis, provide a clear invitation to legislate. In this, the manufacturer's lobby seems to have prevailed. The only change affecting criteria (changes in procedure will be discussed below) is the addition of the transferee's financial qualifications as an item to be examined with moral character and business experience when a transfer is proposed.[159] Indeed, this is a small change given the notice requirement of section 320.643(1). The amendment only makes explicit what has probably been im-

157. *Id.* at 1000-01 (footnotes omitted).
158. *Id.* at 1001.
159. *Compare* FLA. STAT. § 320.643(1) (2000), *with* FLA. STAT. § 320.643(1) (2001).

plicit.[160] The dealers cannot be accused of not trying. House Bill 1239 sought several changes in the statute to overrule case law.

The bill would have overruled *Hawkins* with the following:

> When a change of executive management is proposed in conjunction with a proposed transfer under this section, a licensee may reject the proposed change in executive management consistent with s. 320.644. The licensee may not turn down a proposed transfer under either s. 320.643 (1) or s. 320.643 (2) because a proposed change of executive management under s. 320.644 is made in conjunction with the proposed transfer.[161]

This is, of course, the appellants' argument in *Hawkins*: franchise changes and management changes must be considered separately.[162] The practical result—from the dealer's point of view—is that a qualified transferee must be accepted even if the transferee as owner must find another manager acceptable to the manufacturer. Indeed, this is a significant point in the present fluid market for motor vehicle dealerships. An owner of an existing dealer may find a well-financed buyer with no experience in the business wishing to buy the stock of the dealership corporation and propose a person with experience as the manager. Because the manufacturer does not approve the manager, the dealers contend, the owner should not be prevented from selling the shares. The buyer simply must provide another, acceptable manager. For whatever reason, *Hawkins* was not overruled.

That dealers wish to broaden the opportunity to sell their dealerships is obvious from a second proposed amendment. In a proposed franchise transfer, the proposed transferee must "agree[] in writing to comply with all requirements of the franchise then in effect."[163] It has been squarely held that if the proposed transferee buys the franchise on condition that the dealership be relocated, the transferee cannot satisfy this requirement, and the proposed transfer is not governed by section 320.643.[164] This is a thorn in the side of sellers, because it is often the case that the buyer wishes to move the franchise from the seller's facility to an established facility owned by the buyer. In such a case, however, the protections of section 320.643 are simply unavailable to protect the transaction from unreasonable "turn down." Consequently, sellers and buyers are completely at the manufacturer's mercy in such proposed transfers.

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160. *See* Mercedez-Benz of N. Am. v. Mike Smith Pontiac GMC, Inc., 561 So. 2d 620, 624 n.8 (Fla. 1st DCA 1990).

161. Fla. HB 1239, § 7 (2001) (proposed FLA. STAT. § 320.643(3)(b)).

162. *See Hawkins*, 748 So. 2d at 996.

163. FLA. STAT. § 320.643(1) (2001).

164. Gus Machado Buick-GMC Truck, Inc. v. Gen. Motors Corp., 623 So. 2d 810, 813 (Fla. 1st DCA 1993).

This is not true in all states.[165] House Bill 1239 would have placed Florida among the states granting some protection to "relocation" transfers:

> When a transfer is proposed which is contingent upon a proposed relocation, the licensee may turn down the proposed transfer only if the proposed relocation would be subject to protest under s. 320.642 or if the proposed facilities do not satisfy the licensee's reasonable, written, and uniformly applied facilities guidelines.[166]

Again, the issue is how much control the manufacturer may exert. Clearly, the dealer lobby was unable to overrule *Gus Machado*, and this section was abandoned in the give and take of the legislative process.

It would, however, make good policy. The manufacturer could not prevent a dealer from realizing the fruits of his or her labors by selling to a willing and qualified buyer merely because the manufacturer wished to exercise complete control over the location of the dealership. Likewise, the manufacturer could not thwart the dealer realizing the goodwill value built up in the dealership because the manufacturer did not wish the buyer to associate the manufacturer's product with some other line-make, even if the facilities were otherwise equal to the manufacturer's standards.

2. Risley v. Nissan Motor Corp. USA[167]

The *Risley* decision—even before it was rendered—led to a procedural change in section 320.643. The case involved a damage action under section 320.697 brought by sellers who claimed that the manufacturer had improperly opposed their proposed transfer and had thereby damaged them.[168] The proposed transfer was a stock sale, without change of executive management, so that *Hawkins* mandated that the moral character of the proposed transfer was the only criterion upon which the manufacturer could rely in turning down the proposal.[169] At issue was whether the manufacturer's filing of its administrative complaint, in which it alleged that the proposed transferee was of bad moral character—a complaint later dismissed by the manufacturer—insulated the manufacturer from liability for violation of the statute.[170]

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165. In Ohio, for example, as long as the potential relocation facility meets the manufacturer's standards, the mere fact that a proposed transfer involves a relocation is not sufficient good cause to reject the transfer. OHIO REV. CODE ANN. § 4517(E)(5) (West 1999).

166. Fla. HB 1239, § 7 (2001) (proposed FLA. STAT. § 320.643(3)(a)).

167. 254 F.3d 1296, *reinstated on reh'g*, 260 F.3d 1310 (11th Cir. 2001).

168. *Id.* at 1298.

169. *Id.* at 1299-1300.

170. *Id.* at 1298.

Under section 320.643, as it existed in 1997, the manufacturer was required to file an administrative action to oppose a proposed transfer. The manufacturer argued that it could not be held liable for damages caused by the filing of its complaint under the Noerr-Pennington Doctrine; namely, that a person cannot be liable in damages for the result caused by petitioning the government.[171] This led to the 2001 change, in which the manufacturer must now communicate its disapproval to the dealer or equity owner proposing transfer before the dealer may file a complaint testing whether the refusal was "in violation of the law."[172] Committee Substitute for Senate Bill 1256 became law with the Governor's signature on June 8, 2001; *Risley* was decided on June 27, 2001. The dealers were in for a surprise.

It had been well established in case law that a manufacturer who fails to file a complaint alleging proper statutory criteria for a "turn down" violates section 320.643.[173] The owners in *Risley* had argued that the proposed transferee was not of bad moral character—even though the administrative law judge had ruled that the manufacturer's complaint was legally sufficient in its pleading—and so they were entitled to damages because the opposition was not in fact reasonable.[174] The court held, however:

> We disagree with Appellants' construction of *Mike Smith* and § 320.697. *Mike Smith* did not say that, for a licensee to be free from fear of reprisal under § 320.697, it had to file a *successful* or *meritorious* objection under § 320.643. In using the words "not permitted" and "[not] properly asserted," *Mike Smith* was referring to complaints that were legally insufficient under the Act—that is, complaints warranting dismissals because they lacked "a proper basis for a transfer challenge." *Mercedes-Benz*, 561 So. 2d at 624. Thus, a licensee does not violate the Act pursuant to § 320.697 when it files a legally sufficient verified complaint, irrespective of whether the licensee would ultimately prevail in the challenge to the proposed transfer.[175]

The result of this decision is devastating to section 320.643. A 320.643 administrative determination rarely goes to completion. Buyers and sellers simply will not wait for the outcome, and buyers

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171. The Doctrine is named from two cases, *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). *See Risley*, 254 F.3d at 1301 n.11 ("Since we conclude Appellee did not violate § 320.697, we need not address the argument, advanced by Appellee, that holding it liable under § 320.697 would violated its 'right . . . to petition the Government for a redress of grievances.' U.S. Const. amend. I.").

172. *Compare* FLA. STAT. § 320.643 (2000), *with* FLA. STAT. § 320.643 (2001).

173. *See* Mike Smith Pontiac, GMC, Inc. v. Mercedes-Benz of N. Am., Inc., 32 F.3d 528, 533 (11th Cir. 1994); Bayview Buick-GMC Truck v. Gen. Motors Corp., 597 So. 2d 887, 889 (Fla. 1st DCA 1992).

174. *Risley*, 254 F.3d at 1300.

175. *Id.* at 1301 (footnote omitted).

especially do not want a determination from an administrative forum that they are unqualified. If that determination is to be made, they want the "upside" possibility of substantial damages for being unreasonably thwarted in their attempts to purchase the dealership. In practical terms, a seller has less of a claim to damages than the buyer. The seller still has the dealership, and unless it wishes to claim that the selling price was so high that it lost a chance to sell at an above-market premium, it can show little damage. The sellers in *Risley* are an exception because they had agreed to accept as consideration for their shares in company stock which lost value from the time when the sale should have occurred to the delayed closing.[176]

Consequently, a manufacturer apparently may, under *Risley*, block most transfers it disapproves for reasons unrelated to the qualifications or character of the proposed transferee, simply by turning down the transfer in its notice to the dealer on grounds cognizable under the statute. A manufacturer will not need to worry about the merits of the case. Usually the case will become moot; at the worst, the Department may ultimately rule that the transfer must be allowed. Companies the size of General Motors will not make their decisions based on the cost necessary to pursue an administrative action. Thus, the protection intended by the Act for dealers against more powerful manufacturers is effectively thwarted, not in theory but in practical effect.

A crack of light, however, may shine through this fissure. The Eleventh Circuit granted rehearing *sua sponte* to address the affect of the 2001 amendments on its *Risley* decision:

> We *sua sponte* grant rehearing. Our prior opinion in this case construed Fla. Stat. § 320.643. *See Risley v. Nissan Motor Corp. USA,* 254 F.3d 1296 (11th Cir.2001). On June 8, 2001, the Governor of Florida signed Fla. Laws ch. 2001-196, which amends *inter alia*, Fla. Stat. § 320.643. These amendments pertain, in part, to the procedural steps for filing a complaint with the Department of Highway Safety and Motor Vehicles. *See* Fla. Laws ch. 2001-196, § 23. Regardless, the amendments do not alter our holding or reasoning in this case, because, as noted in our prior opinion, the events here are governed by the 1997 version of the Florida Statutes. *See Risley*, 254 F.3d at 1297 n. 1; *see also Barry Cook Ford, Inc. v. Ford Motor Co.*, 616 So.2d 512, 517 n. 5 (Fla. 1st DCA 1993). Therefore, our prior opinion is REINSTATED.[177]

This is a curious statement from the Eleventh Circuit. After examination of the procedural changes in section 320.643, the statute seems to contain no substantive change. Now a manufacturer must

176. *Id.* at 1298.
177. Risley v. Nissan Motor Corp. USA, 260 F.3d 1310, 1310 (11th Cir. 2001).

notify the dealer or owner giving "the material reasons" for its rejection.[178] The dealer or owner[179] must then file a complaint. Apparently, however, the Eleventh Circuit is not sure what the amendment may mean. The 1997 version of the statute required the manufacturer to file a verified complaint "for a determination that the proposed transferee is not a person qualified to be a transferee under this section."[180] The 2001 Act allows a dealer (or owner) to file a complaint with the Department "alleging that the rejection was in violation of the law or the franchise agreement."[181] Indeed, this difference in language may in fact be substantive. A new section 320.64 violation was also created in 2001:

> Notwithstanding the terms of any franchise agreement, the applicant or licensee has rejected or withheld approval of any proposed transfer in violation of s. 320.643 or a proposed change of executive management in violation of s. 320.644.[182]

Manufacturers who violate this section are made expressly liable for claims under section 320.697, a provision added in 2001.[183] While section 320.697 has already been available to persons injured by violation of any section of the Act, this reinforcement in section 320.64(32), specifically with respect to transfers and changes of management, and the modification of the language in section 320.643, may well be a basis to argue that the Eleventh Circuit was indeed perceptive and felt that application of the 2001 Act would require a different result in *Risley*. If so, the inquiry in a damage suit will be whether the "turn down" was unreasonable and *ipso facto* a violation of the statute. The Eleventh Circuit may very well have understood that its *Risley* ruling, while in accord with the literal language of the statute, produced a harsh result in the practical world and offered a chance to revisit the question in a case controlled by the 2001 Act.

F. The First Shall Be Last: Changes and Nonchanges to Section 320.642

No section of the Act is more litigated than section 320.642. This statute requires that a manufacturer who wishes to place an additional dealership in a "community or territory" or to relocate an existing dealer (with some exceptions), must notify the Department,

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178. FLA. STAT. § 320.643(1) (2001).

179. There is an unfortunate turn of phrase in section 320.643(2)(a). The "person whose proposed sale of stock is rejected" may file a complaint with the Department; the manufacturer must answer what is referred to as the "motor vehicle dealer's complaint." The correction is obvious. *Id.* § 320.643(2)(a).

180. *Id.* § 320.643(1), (2)(a) (1997) (amended 2001).

181. *Id.* § 320.643(1), (2)(a) (2001).

182. *Id.* § 320.64(32).

183. *Id.* § 320.64 (prefatory language).

which in turn publishes this intention and notifies affected dealers.[184] Dealers with standing, as defined in the statute, may file protests with the Department requiring the manufacturer to prove that it is not being adequately represented by existing dealers in the "community or territory."[185] Such statutes are found, in some form, in most states. Thus, one of the cornerstones of manufacturer-dealer regulation is the requirement that manufacturers may not franchise additional dealers or relocate dealers in the market at will.

Practitioners know that the evidence in cases under this section is often dominated by complicated analyses of data by experts. The process of preparing a case is not a short one as acknowledged in section 320.699(2). The path that led to the modification of this section is an example of the unexpected consequences of the budget bill.

In 1999 (and 2000), section 320.699(2) provided that in protests under section 320.642, "a hearing shall be held within 180 days of the date of filing of the first objection or notice of protest, unless the time is extended by the hearing officer for good cause shown." Litigation under statutes such as section 320.642 delays the operation of new dealerships; therefore, manufacturers are quite sensitive to delay. Nonetheless, both dealers and manufacturers need time to prepare their cases, and practitioners expect that reasonable requests for hearing dates and extensions, especially joint requests, be routinely granted by the administrative law judges who conduct the section 120.57 hearings required by Florida's Administrative Procedure Act. In 2000, however, the legislature's budget implementation bill set performance standards for administrative law judges that related directly to the speed with which they disposed of their cases. Suddenly, final hearings were being set on short notice and requests for extension—even joint requests—were being denied.

In an industry-specific joint effort by manufacturers, section 320.699(2) was amended as follows:

> If a written objection or notice of protest is filed with the department under paragraph (1)(b), a hearing shall be held not sooner than 180 days nor later than 240 days from the date of filing of the first objection or notice of protest, unless the time is extended by the administrative law judge for good cause shown. This subsection shall govern the schedule of hearings in lieu of any other provision of law with respect to administrative hearings conducted by the Department of Highway Safety and Motor Vehicles or the Division of Administrative Hearings, including performance stan-

184. *Id.* § 320.642(1).
185. *See id.* § 320.642(2)(a)(2).

> dards of state agencies, which may be included in current and future appropriations acts.[186]

It is hard for an amendment to address more specifically a peculiar complaint of a specific industry.

What did not happen, however, was a change to section 320.642 itself. With the statute in existence since 1970, there have been very few cases in which a manufacturer was not able to convince the Department that a "community or territory" was not being adequately represented. There has been only one such case in the past twenty years.[187] That is not to say that the statute has provided no help to existing dealers. Practitioners know that many cases between protesting dealers and manufacturers seeking to add a new dealer or to relocate an existing dealer have been settled precisely because of the existence of the statute. Previous modification of the statute in 1988 has made no difference. Practitioners pressed two changes on the 2001 legislature. One related the practical conduct of section 320.642 hearings, and the other addressed a specific case.

Practitioners are aware that the bulk of evidence in these cases is presented by opposing experts who compare the performance of the line-make in the area under consideration with possible performance in another area. Courts have repeatedly held that, in fact, a larger area may be generally well represented, but if there is inadequacy in a smaller area, an "identifiable plot," manufacturers may show inadequacy in that area alone.[188] Moreover, dealers have come to believe that evidence is routinely accepted comparing performance in an area to that in another gerrymander area used solely to support the manufacturer's proposition that existing dealers are not "doing the job" in their area. In response, House Bill 1239 would have included the following language in section 320.642(2)(b)3:

> Furthermore, with respect to evaluating the performance of the line-make within the community or territory, a geographic area used for making comparisons must be reasonably similar in demographic traits to the community or territory, including age, income, import penetration, education, size class preference, and product popularity, and such comparison areas may not be smaller than an entire county. Reasonably expected market penetration must be measured with respect to the community or territory as a whole and not with respect to any part thereof or identifiable plot therein.[189]

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186. *Id.* § 320.699(2).

187. *See* Mitsubishi Motor Sales of Am., Inc. v. King Motor Co. of Coconut Creek Ltd., Fla. Admin. Order No. 99-3978 (Dec. 12, 2000) (on file with Clerk, Dep't of High. Saf. & Motor Veh.).

188. *See* Bill Kelley Chevrolet, Inc. v. Calvin, 322 So. 2d 50, 52 (Fla. 1st DCA 1975).

189. Fla. HB 1239, § 6 (2001) (proposed FLA. STAT. § 320.642 (2)(b)(3)).

Obviously, only those who litigate these cases would have understood the import of this section.

Another proposed change would have addressed an unexpected result in a specific case. In *Meteor Motors, Inc. v. Hyundai Motor America Corp.*,[190] the industry discovered that in the court's opinion, the Act did not provide what many practitioners had assumed it did. In 1993, the legislature added "servicing" to "selling" in the definition of "motor vehicle dealer," making anyone who services vehicles under an agreement with a manufacturer a dealer for the purposes of the Act.[191] The plaintiff in *Meteor Motors* contended that when the manufacturer entered into an agreement with a rental company to receive warranty reimbursements for warranty work done on its rental vehicles, the manufacturer should have followed the procedures of section 320.642.[192]

While the court found that the rental car company was included in an exception to the definition, it also concluded that section 320.642 would not have applied even if there had been no exception, as existing dealers only had standing to protest in the case of proposed additional dealers for the sale of vehicles—there was no mention of service in the standing section.[193] In response, House Bill 1239 contained a two-word modification to section 320.642(3), from "to be sold by the proposed additional or relocated dealer" to "to be sold or serviced by the proposed additional or relocated dealer."[194] The legislature did not adopt this effort to overrule *Meteor Motors*.

IV. CONCLUSION

The 2001 legislature made a number of changes to the Act that address dealer concerns in the current economic environment. These involve most directly the changes to section 320.64 that regulate the direct relationship between manufacturer and dealer in the day-to-day conduct of business. The 2001 Act also addresses fears that dealers have about manufacturer competition in the marketplace. What the legislature insufficiently addressed were dealer attempts to push back manufacturer gains in case law interpreting the Act. The legislature provided the dealers new protections to preserve the value of their franchises in the face of termination proceedings but did not afford the broader protections against termination itself which the dealers had wanted.

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190. No. 97-8820-Civ., 1999 WL 1800074 (S.D. Fla. 1999).

191. *Compare* FLA. STAT. § 320.60(11) (Supp. 1992), *with* FLA. STAT. § 320.60(11) (1993).

192. *Meteor Motors*, 1999 WL 1800074, at *2.

193. *Id.* at *3-4.

194. Fla. HB 1239, § 6 (2001) (proposed FLA. STAT. § 320.642(3)).

The industry that the Act regulated is unusual. While it is of great importance to Florida consumers, the Act's regulations go largely unobserved except by the factions within the industry itself. For this reason the jockeying for position in the 2001 legislature is an especially good illustration of the legislative process. The issues involved were not affected by public opinion campaigns. They were, however, advocated by well-paid professional lobbyists on each side. The resulting legislation unusually reveals the unobtrusive tussling between well financed factions taking place "off the radar," and provides an interesting study of the legislative process at work.