HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1269 Motor Vehicle Dealers

SPONSOR(S): Lopez-Cantera

TIED BILLS: **IDEN./SIM. BILLS:** 2582

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Economic Expansion & Infrastructure Council		Brown	Tinker
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

HB 1269 creates several new prohibitions relating to motor vehicle manufacturers and dealers. Specifically, the bill:

- prohibits manufacturers from requiring dealers to improve or expand franchise facilities in certain situations, from offering financial incentives to some dealers but not others, in an attempt to coerce dealers to improve franchise facilities, or from taking any adverse action against dealers who refuse to improve facilities;
- prohibits manufacturers from taking an action against a dealer selling cars for foreign export unless the manufacturer can prove the dealer had actual knowledge, and providing a conclusive presumption that if a car is titled in any U.S. state, the dealer does not have actual knowledge of its eventual foreign export;
- prohibits manufacturers from auditing dealers in certain circumstances;
- prohibiting manufacturers from terminating franchise agreements for fraud, unless the manufacturer can show that the owner of the franchise had actual knowledge of the fraudulent activity;
- substantially rewrites the statutory provision regarding manufacturer reimbursement for warranty parts and labor installed or performed by dealers for warranty customers.

The bill has an effective date of July 1, 2008.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – The bill creates additional prohibitions for licensed motor vehicle manufacturers with regard to franchise agreements and compensation owed to motor vehicle dealers. These prohibitions increase the regulatory authority of the Department of Highway Safety and Motor Vehicles.

Safeguard individual liberty – The bill decreases the ability for motor vehicle manufacturers and dealers to contract privately, with regard to certain financial matters.

B. EFFECT OF PROPOSED CHANGES:

Sections 320.60 – 320.071, F.S., regulate several aspects of the business relationship between motor vehicle manufacturers and franchised motor vehicle dealers. The purpose of these statutes is 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."[1]

Manufacturer Licensing; Grounds for Suspension (Section 1)

Current Situation

Motor vehicle manufacturers must be licensed by the Department of Highway Safety and Motor Vehicles (the Department).[2] Section 320.64, F.S., outlines 37 specific causes for which the Department may deny, suspend, or revoke a manufacturer's license. Prohibitions relevant to this bill include the following:

- Section 320.64(10), F.S., which prohibits licensees from attempting to contract with motor vehicle dealers who do not, at the time of contract signing, have "proper facilities to provide… services… which are covered by the new motor vehicle warranty issued by the licensee."
- Section 320.64(18), F.S., which prohibits licensees from allocating motor vehicles to dealers using any system that is unfair, inequitable, unreasonably discriminating, or "not supportable by reason and good cause considering the equities of the affected motor vehicle dealer or dealers."
- Section 320.64(22), F.S., which prohibits licensees from refusing to deliver motor vehicles if such delivery is contractually contingent on the motor vehicle dealer paying additional fees, signing separate contracts, purchasing "unreasonable advertising displays," or remodeling, renovating, or reconditioning the dealer's facilities. However, manufacturers may impose "reasonable requirements," such as "the purchase of special tools required to properly service a motor vehicle…."
- Section 320.64(25), F.S., which provides detailed warranty-reimbursement processes and prohibits the licensee from auditing its warranty payments to dealers in violation of the given processes.
- Section 320.64(26), F.S., which prohibits a licensee from taking any adverse actions against a dealer, if the dealer sells a car to a buyer physically in the dealer's facility, and the dealer "did not know or should not have reasonably known" that the vehicle would be shipped to a foreign country. This section also states that titling the vehicle in any U.S. state creates a rebuttable

[1] Section 320.605, F.S.

[2] Section 320.62, F.S

presumption that the dealer did not or should not have reasonably known the motor vehicle would be shipped to a foreign country.
- Section 320.64(30), F.S., which prohibits a licensee from using an audit of a dealer as a method of coercion.

A violation of any of these provisions entitles a dealer to the rights and remedies of ss. 320.695 – 320.697, F.S. These remedies include injunctions against manufacturers as well as treble damages and reasonable attorney's fees to be paid by manufacturers.

Proposed Changes

HB 1269 makes numerous amendments to s. 320.64(10), F.S., regarding dealer facilities. Specifically, the bill provides that:

- After a licensee has approved a motor vehicle dealer facility, it cannot require the dealer to expand, relocate or re-construct any part of the facility.
- A licensee may provide a loan or grant to a motor vehicle dealer to induce relocation, expansion, or re-construction of the dealer's facility, but only if the licensee insures a sufficient supply of new motor vehicles to justify the relocation.
- A licensee shall not withhold a benefit available to other franchised dealers in Florida, or take or threaten to take any action that is unfair or adverse to, a dealer who does not enter into a relocation or expansion agreement with the licensee.
- A licensee cannot refuse to offer a bonus or incentive program to a dealer if the offer is available to other dealers nationally or regionally.
- Any portion of a national or regional bonus or incentive program offered by a licensee aimed at inducing relocation or re-construction is void, as it applies to Florida dealers. However, those dealers remain eligible for other provisions of the incentive program.
- A licensee is permitted to create and uniformly apply reasonable standards for a dealer's facility relating to upkeep, repair, and cleanliness.

The bill also amends 320.64(18), F.S., regarding motor vehicle allocation to dealers, clarifying that a licensee may not take any action that "reduces or alters allocations or supplies of new vehicles to dealers to achieve a purpose that is prohibited by ss. 320.60-320.70, F.S., or is otherwise unfair." The bill defines "unfair" for the purposes of this paragraph as a licensee's refusal or failure to offer any dealer a supply of new vehicles by model, mix, or color, equitably similar to the supply made available to other dealers in the state.

In s. 320.64(22), F.S., the licensee's prohibition against coercing a dealer to "remodel, renovate, or recondition" a facility is expanded to "relocate, expand, improve, remodel, renovate, recondition, or alter," the facility.

HB 1269 amends section 320.64(26), F.S., to detail the types of adverse actions a licensee may not take against a dealer distributing cars for foreign export, and to provide that in a legal challenge, the licensee must prove that the motor vehicle dealer had "actual knowledge that the customer's intent was to export or resell the motor vehicle." The bill also states that if the disputed vehicle is titled in any state of the United States, there is a "conclusive presumption"[3] that the dealer had no actual knowledge.

The bill amends s. 320.64(30), F.S., to prohibit a licensee from performing reasonable and periodic audits of dealer claims if the licensee is not in compliance with ss. 320.60 – 320.70, F.S., generally.

The bill creates a new 38th prohibition in s. 320.64, F.S., providing that a license may be suspended or revoked if the licensee discriminates between dealers by offering motor vehicles at varying prices to

[3] Black's Legal Dictionary, 6th ed., states that a conclusive presumption exists "when an ultimate fact is presumed to be true upon proof of another fact, and no evidence, no matter how persuasive, can rebut it."

different dealers, or using any "promotional program or device, or an incentive, bonus, payment, or other benefit," that ultimately results in dealers receiving differing prices for identical vehicles.

Franchise Agreements; Cancellation or Modification (Section 2)

Current Situation

Section 320.641, F.S., outlines the procedure a manufacturer must follow when discontinuing, canceling, modifying, or replacing franchise agreements with motor vehicle dealers. The manufacturer is required to provide written notice to the dealer at least 90 days before the effective date of the action, along with the specific grounds for such action. Any dealer who receives such a notice may file a petition or complaint for a determination of whether the action is unfair or prohibited.

According to s. 320.641(3), F.S., a cancellation of a franchise agreement is considered unfair if:

- It is not clearly permitted by the franchise agreement;
- It is not undertaken in good faith;
- It is not undertaken for good cause;
- It is based on an alleged breach of the franchise agreement which is not in fact a material or substantial breach; or
- The grounds relied upon for termination, cancellation, or non-renewal have not been applied in a uniform and consistent manner by the licensee.

A modification or replacement of a franchise agreement is considered unfair if:

- It is not clearly permitted by the franchise agreement;
- It is not undertaken in good faith; or
- It is not undertaken for good cause.

The burden of proof is on the manufacturer to prove that a cancellation or modification is fair and thus not prohibited.

Proposed Changes

HB 1269 creates s. 320.6412, F.S., preventing licensees from terminating, canceling, discontinuing, or refusing to renew a franchise agreement with a dealer on the basis of misrepresentation, fraud, or the filing of false or fraudulent statements or claims. A licensee may only terminate for fraud if the licensee can prove by clear and convincing evidence at a hearing that the dealership's majority owner, dealer-operator, or dealer-principal, had actual knowledge of the fraudulent acts at the time they were being committed against customers or the licensee, and did not take steps within a reasonable amount of time, after being advised they were occurring, to prevent them.

Warranty Reimbursements (Section 3)

Current Situation

Dealers purchase parts from manufacturers; some of these parts are used in warranty repairs on customers' vehicles while other parts are sold 'over the counter' to customers at dealer-determined retail prices. Manufacturers must reimburse dealers for the price of parts used in warranty work.

Section 320.696, F.S., which was substantially modified in 2007, provides a framework for the manufacturer's reimbursement to the dealer for both parts and labor. (Prior to 2007, the statute addressed only labor charges.) The statute provides that reasonable compensation by the manufacturer must be equal to the amount charged by the dealer for like work for non-warranty repairs or service. The manufacturer may challenge the rate charged, and the burden is on the manufacturer to prove, in a proceeding before the DHSMV, that the retail charges for labor and parts are improper, "in light of all economic circumstances." Compensation not received within 30 days is deemed untimely

by the statute, and a manufacturer is prohibited from recovering any costs by adding charges or fees to the initial wholesale cost of parts.

Proposed Changes

HB 1269 significantly rewrites Section 320.696, F.S. This section defines the timely compensation of dealers for motor vehicle repairs under warranty, including both parts and labor, and defines the terms "compensate" and "retail customer repair."

The bill provides that a licensee must compensate a dealer for parts used in warranty repairs based on an agreed percentage mark-up. However, if no agreement is reached between the manufacturer and the dealer, the bill provides that compensation will be based on:

- The mean percentage markup from 25 consecutive retail customer repairs within the last 3 months;
- The manufacturer's highest suggested retail or list price for the parts; or
- An amount equal to the price a dealer receives from customers for parts used in non-warranty repair work.

Similarly, compensation for labor in warranty repair work would either be per agreement, or, if no agreement is reached, then the greater of the hourly rate charged for retail customer repairs or an amount equal to the dealer's markup over dealer cost for retail customer-paid repairs.

In calculating the non-warranty rates for both parts and labor, the bill provides that the dealer need not include any sales that may have involved a discounted rate, a group, fleet, or insurance rate, special promotion, or other variation from a standard retail rate.

A licensee failing to compensate a dealer within 30 days is deemed untimely. The bill provides that a licensee cannot take or threaten to take action against a dealer who seeks to obtain compensation, and provides a non-exclusive list of prohibited actions such as threatening to conduct audits or delaying reimbursements against dealers who are owed warranty reimbursement.

Licensees may not audit dealers more than semi-annually. Dealers may request changes in compensation rates at any time, and such requests are deemed accepted unless the licensee submits a dispute "with specificity," challenging the rate. The bill gives dealers a cause of action for injunctive relief and treble damages, if the licensee disputes the request.

The bill also prohibits a manufacturer from recovering any of its costs for compensating a dealer for warranty work, including labor and parts, by imposing a charge or surcharge to the wholesale price paid by the dealer for any product. Licensees are also prohibited from attempting to recoup costs by eliminating Florida dealers from any national or regional incentive plans or by modifying wholesale prices offered to Florida dealers.

Lastly, the bill includes a "savings clause," in the event that any portion of the bill is deemed void or unenforceable.

C. SECTION DIRECTORY:

Section 1. Amends section 320.64, F.S., prohibiting certain actions by licensees with respect to dealer facilities; permitting licensees to set certain standards related to upkeep, repair, and cleanliness of dealer facilities; providing additional violations subjecting licensees to denial or suspension.

Section 2. Creates section 320.6412, F.S., establishing the burden of proof upon a licensee to justify cancellation of a franchise agreement for misrepresentation.

Section 3. Amends section 320.696, F.S., requiring licensees to compensate motor vehicle dealers under certain circumstances; defining terms; prohibiting certain legal actions by licensees; providing that compensation for parts may be percentage-based; providing statistical price-controls on parts; exempting certain parts from price-controls; prohibiting licensees from implementing certain accounting methods to avoid price-controls on parts; providing statistical price-controls on labor charges; exempting certain labor charges from price-controls; prohibiting licensees from amending price-controls; limiting number of times dealers may amend price-controls; prohibiting licensee modifications to dealer incentive plans under certain circumstances; prohibiting licensees from attempting to influence dealers with respect to sales of parts; provides a severability clause.

Section 4. Creates an effective date of July 1, 2008.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate. To the extent that the bill could require motor vehicle manufacturers to provide additional compensation to motor vehicle dealers for warranty work, there may be an increase in expenditures for manufacturers who currently compensate dealers for warranty labor and parts at levels below market prices. In the same respect, dealers in the state of Florida may see an increase in revenues due to the increase in the level of reimbursement received for warranty work from manufacturers.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because the bill does not appear to: require counties or cities to spend funds or take action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties..

2. Other:

The bill imposes additional governmental regulation over certain subjects that may currently be addressed by private contracts between motor vehicle manufacturers and franchised motor vehicle dealers. This regulation could potentially raise federal and state constitutional issues.

The Contract Clause of Article I, s. 10 of the United States Constitution prohibits states from passing laws which impair contract rights. This clause does not apply to the federal government (*Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1 (1976)), and prevents only "substantial impairments" of contracts (*Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1923).) Courts use a balancing test to determine whether a particular regulation violates the contract clause, measuring the severity of the contract impairment against the importance of the public interest advanced by the regulation. Courts also look at whether the regulation is a reasonable and narrowly tailored means of promoting the state's interest. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). Courts generally accord considerable deference to legislative determinations relating to the need for laws which impair private obligations. *East New York Savings Bank v. Hahn,* 326 U.S. 230 (1945).

Article I, s. 10 of the Florida Constitution also provides that no law "impairing the obligation of contracts shall be passed." Courts are empowered to strike laws which retroactively burden or alter contractual relations. *In re Advisory Opinion to the Governor*, 509 So.2d 292 (Fla. 1987); *Daytona Beach Racing & Recreational Facilities District v. Volusia County,* 372 So.2d 419 (Fla. 1979); *Dewberry v. Auto-Owners Ins. Co.*, 363 So.2d 1077 (Fla. 1978). However, not all contractual impairments warrant overturning an otherwise valid law. State statutes which impair contractual obligations are measured on a sliding scale of scrutiny. The degree of contractual impairment permitted is delineated by the importance of the governmental interest advanced. *Yellow Cab Co. of Dade County v. Dade County*, 412 So.2d 395 (Fla. 3d DCA 1982). In *Pomponio v. Cladridge of Pompano Condominium, Inc.* 378 So.2d 774 (Fla. 1980), the court enumerated several factors it might weigh when making such decisions:

- Whether the law was enacted to deal with a broad economic or social problem;
- Whether the law operates in an area that was already subject to state regulation at the time the contract was entered into; and
- Whether the effect on the contractual relationship is temporary; not severe, permanent, immediate, and retroactive.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES