HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 921 Motor Vehicle Manufacturers, Factory Branches, Distributors, Importers, & Dealers
SPONSOR(S): Judiciary Committee; Business & Professions Subcommittee; Trujillo
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 1048

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Professions Subcommittee	12 Y, 0 N, As CS	Anstead	Luczynski
2) Judiciary Committee	18 Y, 0 N, As CS	Aziz	Havlicak
3) Regulatory Affairs Committee			

SUMMARY ANALYSIS

The bill provides additional grounds to deny, suspend, or revoke a license held by a motor vehicle manufacturer, factory branch, distributor, or importer ("manufacturer"). The bill prohibits manufacturers from taking certain actions against motor vehicle dealers and requires certain procedures be followed by the manufacturer when dealing with motor vehicle dealers. Specifically, the manufacturer:

- Is limited to a 12-month period following the date a claim was paid to perform audits of warranty, maintenance, service-related payments and incentive payments and can deny such a claim if the manufacturer has reason to believe that the claim is intentionally false or fraudulent;
- May not deny or charge back any payment related to a warranty, maintenance, or other service-related claim or incentive claim until the manufacturer has "proven" the claim to be false or fraudulent or that the dealer failed to substantially comply with the reasonable, written, and uniformly applied procedures of the manufacturer;
- May not take adverse action against a motor vehicle dealer due to a delivered motor vehicle being resold or exported by the customer unless the manufacturer provides a written notice to the dealer within 12 months;
- Must pay a dealer for temporary replacement vehicles provided to customers during service or repair provided the dealer complies with the manufacturer's written vehicle eligibility requirements relating to loaner vehicles; and
- May not require a motor vehicle dealer to participate in a dealer advertising or marketing pool. However, a manufacturer may require a dealer or a dealer advertising or marketing group to execute a licensing agreement for use of the manufacturer's protected marks or brand images in any media or advertisement.

The bill does not have a fiscal impact on state or local governments.

The bill shall take effect upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Motor Vehicle Manufacturers and Franchise Dealerships – Generally:

Manufacturers, distributors, and importers ("manufacturers") enter into contractual agreements with motor vehicle dealers to sell particular vehicles that they manufacture, distribute, or import. Florida law, ch. 320, F.S., has regulated the relationship between motor vehicle manufacturers and motor vehicle dealers since 1970. Existing law requires the licensing of motor vehicle manufacturers, and regulates numerous aspects of the contracts between manufacturers and motor vehicle dealers.

Section 320.64, F.S., currently provides thirty-eight grounds for the denial, suspension, or revocation of the license of a manufacturer.

Section 320.61(1), F.S, states, in part, "[n]o manufacturer, factory branch, distributor, or importer shall engage in business in this state without a license therefor…." Section 320.61(2), F.S., allows the Department of Highway Safety and Motor Vehicles ("DHSMV") to prescribe renewal applications pursuant to s. 320.63, F.S., which requires a manufacturer to submit the following documents to determine fitness:

- Information relating to solvency and financial standing;
- A certified copy of any warranty connected with the motor vehicles sold or any component;
- A copy of the written agreement and all supplements thereto between the motor vehicle dealer and the manufacturer;
- A list of authorized dealers or distributors and their addresses;
- An affidavit acknowledging that the provisions of an agreement are not contrary to the provisions contained in ss. 320.60-320.70, F.S.;
- A certified copy of all applicable preparation and delivery charge obligations of the dealer;
- An affidavit stating the rates which the manufacturer pays or agrees to pay any authorized motor vehicle dealer licensed in this state for the parts and labor advanced or incurred by such authorized motor vehicle dealer for or on account of any delivery and preparation obligations imposed on its dealers or relating to warranty obligations;
- An annual license fee; and
- Any other information needed to safeguard the public interest which DHSMV may, by rule, prescribe.

The requirements regulating the contractual business relationship between a motor vehicle dealer and a manufacturer are primarily found in ss. 320.60-320.071, F.S., (the Florida Automobile Dealers Act).[1] These sections of law specify, in part:

- The conditions and situations under which the DHSMV may grant, deny, suspend, or revoke a license;
- The process, timing, and notice requirements for manufacturers to discontinue, cancel, modify, or otherwise replace a franchise agreement with a dealer, and the conditions under which the DHSMV may deny such a change;
- The procedures a manufacturer must follow if it wants to add a dealership in an area already served by a dealer, the protest process, and the DHSMV's role in these circumstances;
- Amounts of damages that can be assessed against a manufacturer in violation of Florida statutes; and
- The DHSMV's authority to adopt rules to implement these sections of law.

[1]Walter E. Forehand and John W. Forehand, *Motor Vehicle Dealer and Motor Vehicle Manufacturers: Florida Reacts to Pressures in the Marketplace*, 29 FLA. ST. UNIV. LAW REV. 1058 (2002) (No section of the statute provides a short title; however, many courts have referred to the provisions as such.), http://www.law.fsu.edu/journals/lawreview/downloads/293/Forehand.pdf.

Prohibitions for Manufacturers - Current Situation:

There are currently 38 different criteria that could lead the DHSMV to take action against a motor vehicle manufacturer.[2] A violation of any of these provisions entitles a motor vehicle dealer to rights and remedies contained within the Florida Automobile Dealers Act, including an administrative protest, obtaining an injunction[3] against the manufacturer, and receiving treble damages and attorney's fees[4], if the manufacturer is found to have violated the Act.

A manufacturer is prohibited from coercing or attempting to coerce a motor vehicle dealer into accepting delivery of motor vehicles, parts, or accessories, or any other commodities which have not been ordered by the dealer.[5]

A manufacturer is precluded from requiring a dealer to relocate, expand, improve, remodel, renovate, or alter previously approved facilities unless the requirements are reasonable and justifiable in light of the current and reasonably foreseeable projections of economic conditions, financial expectations, and market.[6]

A manufacturer cannot withhold a bonus or other incentive that is available to its other same line-make Florida dealers if the manufacturer offers to enter into an agreement or to selectively offer incentive programs to dealers in Florida, other regions, or other states. A manufacturer may not discriminate against a dealer with respect to a program, bonus, incentive, or other benefit within a zone or region that includes Florida.[7]

A manufacturer may periodically audit the transactions of a motor vehicle dealer relating to certain financial operations by the dealer. Audits of warranty payments may only be performed during the one-year period immediately following the date a warranty claim was paid. Audits of incentive payments may only be performed during an 18-month period immediately following the date the incentive was paid.[8]

Section 320.64(26), F.S., details the types of actions against a dealer by a manufacturer if the dealer distributes cars for foreign export. This section provides that, in a legal challenge, the manufacturer must prove that the motor vehicle dealer had "actual knowledge that the customer's intent was to export or resell the motor vehicle." This section also states that if the disputed vehicle is titled in any state of the United States, there is a "conclusive presumption"[9] that the dealer had no actual knowledge that the customer intended to export or resell the motor vehicle.

Prohibitions for Manufacturers - Effect of Proposed Changes:

The bill address several issues related to motor vehicle manufacturers, distributors, and importers, and the franchise contracts between these businesses and motor vehicle dealers. The bill provides for severability of the provisions if any provision is determined to be invalid.

The bill amends s. 320.64, F.S., to specify that a manufacturer is prohibited from committing certain actions against motor vehicle dealers and requires certain procedures be followed by the manufacturer when dealing with motor vehicle dealers. The bill amends two existing provisions and adds two additional provisions. Specifically, the manufacturer:

[2] s. 320.64, F.S.
[3] s. 320.695, F.S.
[4] s. 320.697, F.S.
[5] s. 320.64(5), F.S.
[6] s. 320.64(10)(b), F.S.
[7] s. 320.64(38), F.S.
[8] s. 320.64(25), F.S.
[9] BLACK'S LAW DICTIONARY, p. 263 (5th ed. 1979) (Defines conclusive presumption to mean "a presumption that cannot be overcome by any additional evidence or argument.").

- Is limited to a 12-month period following the date a claim was paid to perform audits of warranty, maintenance, other service-related payments and incentive payments. However, the 12-month limitation does not apply if the manufacturer suspects the claim submitted was intentionally false or fraudulently;

- May not deny or charge back any payment related to a warranty, maintenance, or other service-related claim or incentive claim until the manufacturer has "proven" the claim to be false or fraudulent or that the dealer failed to substantially comply with the reasonable, written, and uniformly applied procedures of the manufacturer;

- May not take adverse action against a motor vehicle dealer due to a delivered motor vehicle being resold or exported by the customer unless the manufacturer notifies the dealer of such within 12 months after the date the dealer sold or leased the vehicle to the customer;

- Must pay the dealer for temporary replacement vehicles provided to customers by the dealer as a loaner vehicle during service or repair even if the dealer owns the vehicle, provided that the dealer complies with written and uniformly enforced vehicle eligibility requirements; and

- May not require a motor vehicle dealer to participate in a dealer advertising or marketing pool. However, a manufacturer may require a dealer or a dealer advertising or marketing group to execute a licensing agreement for use of the manufacturer's protected marks or brand images in any media or advertisement.

B. SECTION DIRECTORY:

Section 1 amends s. 320.64, F.S., relating to denial, suspension, or revocation of license.

Section 2 provides for severability of provisions if any provision is determined to be invalid.

Section 3 provides that the bill shall take effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The DHSMV already regulates this industry, so the additional grounds proposed in the bill for regulatory actions should result in no additional state impact. However, it is possible the DHSMV may experience an increase in the number of administrative hearings as a result of the bill. The bill may have an indeterminate fiscal impact.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

To the extent the agreements between dealers and motor vehicle manufacturers, distributors, and importers change due to compliance with existing laws, the parties may be positively or negatively impacted. Dealers may experience increased revenue from new limitations and procedures governing the incentives, bonuses, and other benefit programs.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

The Federal Contracts Clause provides that no state shall pass any law impairing the obligation of contracts.[10] However, the Contracts Clause prohibition must be weighed against the State's inherent power to safeguard its people's interests. Three factors are considered when evaluating a claim that the Contracts Clause has been violated: (1) whether the law substantially impairs[11] a contractual relationship; (2) whether there is a significant and legitimate public purpose for the law; and (3) whether the adjustments of rights and responsibilities of the contracting parties are based upon reasonable conditions and are of an appropriate nature.[12]

Some state laws regulating contracts between automobile manufacturers and dealers have been found to have violated the constitution while other laws have been upheld as constitutional. *See Alliance of Auto. Mfrs., Inc. v. Currey*, 984 F. Supp. 2d 32 (D. Conn. 2013) (Upholding state law that revised statutory method for calculating reasonable compensation for vehicle warranty work and prohibited manufacturers from recovering any additional cost of the new method from the dealers.); *Arapahoe Motors, Inc. v. Gen. Motors Corp.*, No. CIV.A. 99 N 1985, 2001 WL 36400171, at *13 (D. Colo. Mar. 28, 2001) (the retroactive application of state law would be unconstitutional as it would create a new obligation or impose a new duty upon General Motors.).

B. RULE-MAKING AUTHORITY:

The DHSMV already regulates this industry, and has rule making authority. The additional grounds proposed in the bill for regulatory actions may result in some additional rule making.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 17, 2015, the Business & Professions Subcommittee considered a strike-all substitute amendment and reported the bill favorably as a committee substitute. The adopted strike-all amendment made the following changes to the filed version of the bill:

- Provides that a manufacturer may not refuse to pay a dealer who participated in a bonus program related to facility improvements or signs "any increase in benefits" between the program that the

[10] U.S. CONST. art I, s. 10.

[11] In determining the extent of the impairment, a court will consider whether the industry the complaining party has entered has been regulated in the past. *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983).

[12] *Vesta Fire Ins. Corp. v. State of Fla.,* 141 F.3d 1427, 1433 (11th Cir. 1998).

dealer participated in and a new program offered within 10 years that the dealer does not participate in;
- Provides that a manufacturer is limited to a 12-month period following the date a claim was paid to perform audits of warranty, maintenance, other service-related payments and incentive payments;
- Provides that a manufacturer may not deny or charge back any payment related to a warranty, maintenance, or other service-related claim or incentive claim until the manufacturer has "proven" it to be false or fraudulent;
- Deletes from the bill a provision related to paying 80 percent of a bonus;
- Changes a time limitation related to the resale of a vehicle from 90 days to 120 days;
- Deletes a provision that required the manufacturer to provide a written statement or notice disclosing whether the manufacturer has an ownership interest in a prescribed vendor;
- Provides that a manufacturer must prove by clear and convincing evidence before a trier of fact that the motor vehicle dealer knowingly engaged in a pattern of conduct of selling to known exporters;
- Deletes a provision related to the vicarious liability of a dealer when loaning out a replacement vehicle to a customer;
- Adds a provision providing that the act shall apply to all franchise agreements entered into, renewed, or amended subsequent to October 1, 1988; and
- Adds a provision providing for severability of provisions if any provision is determined to be invalid.

On April 8, 2015, the Judiciary Committee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment:
- Provides that the 12-month limitation on audits by manufacturers following warranty, maintenance, and other service related incentive payments does not apply if a manufacturer has reason to believe the dealer's claim is intentionally false or fraudulent;
- Requires that a dealer comply with written vehicle eligibility, use, and reporting requirements by the manufacturer relating to loaner vehicles before a dealer may make a claim that the manufacturer did not pay for replacement vehicles;
- Provides that manufacturers can require dealers who form an independent advertising or marketing group to execute a licensing agreement for use of the manufacturer's protected marks or brand images in any media or advertisement; and
- Removes from the bill provisions relating to manufacturers' bonus program; dealership protection from adverse actions for resale; purchase of goods and services from manufacturers' vendors; dealer protection from adverse actions for refusal to contribute to advertising; and application to agreements entered into, renewed, or amended after October 1, 1988.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.