HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 921 Motor Vehicle Manufacturers, Factory Branches, Distributors, Importers, & Dealers
SPONSOR(S): Trujillo
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Professions Subcommittee		Anstead	Luczynski
2) Civil Justice Subcommittee			
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:

- May not take adverse action against a motor vehicle dealer due to a delivered motor vehicle being resold or exported by the customer unless such resale or export occurred within 30 days after the date of the original sale;
- May not refuse to pay a bonus to a motor vehicle dealer who does not comply with the conditions of an offered bonus program related to improvements to facilities or additions of new signs if the dealer's facility was required or approved to make improvements within the last 10-years and the new program's improvements would replace or alter those previously approved improvements;
- Is required to give motor vehicle dealers at least 80 percent of the total bonus offered to other participants of a facility improvement bonus program that meets the 10-year prior improvement condition above;
- May not require or coerce a dealer to purchase goods from a vendor selected by the manufacturer without first making available to the dealer the option to obtain the goods or services from a vendor chosen by the dealer;
- Must provide a written statement or notice disclosing whether the manufacturer has an ownership interest in a prescribed vendor, provide the agreement between the vendor and the manufacturer for payment, and provide the basis for the amount of compensation;
- Must increase the dealer's benefits by the amount of a "prorated share" of any compensation by a vendor or fair market value of such ownership in a vendor, if the manufacturer provides a notice that discloses an ownership interest;
- Must provide the dealer with the right to purchase leased signs or other image elements of like kind and quality from a vendor selected by the dealer and be given the opportunity to purchase the signs at a price substantially similar to the capitalized lease costs; and
- May not require a motor vehicle dealer to participate in a dealer advertising or marketing pool or threaten to take adverse action for refusing to do so.

The bill removes any liability on the part of the motor vehicle dealer for loaning a car or a "temporary replacement vehicle" to a customer who gets into an accident. The bill also removes previously set limits on liability related to temporary replacement vehicles provided by motor vehicle dealers.

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

The bill has an effective date of July 1, 2015.

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, chapter 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.

Prohibitions for Manufacturers - Current Situation:

[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.

There are currently 38 different criteria that could lead the DHSMV to take action against a motor vehicle manufacturer. 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 against the manufacturer, and receiving treble damages and attorney's fees, 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.

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.

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.

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.

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"[2] 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 amends two existing provisions and adds two additional provisions.[3]

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. Specifically, the manufacturer:

[2] 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.").

[3] The DHSMV has held in an administrative decision that amendments to the Florida Automobile Dealers Act do not apply to dealers having franchise agreements which were signed prior to the effective date of the amendment. *See Motorsports of Delray, LLC v. Yamaha Motor Corp., U.S.A.*, Case No. 09-0935 (Fla. DOAH Dec. 9, 2009). In this holding, the DHSMV ruled that a 2006 amendment to the Florida Automobile Dealers Act, which requires that if a dealer's franchise agreement is terminated the manufacturer must buyback from the dealer its unsold vehicles, parts, signs, special tools, and other items, does not apply to a dealer terminated in 2008 because the dealer's franchise agreement was entered into prior to the effective date of the amendment. This Final Order was initially appealed but was later voluntarily dismissed. *See also, In re Am. Suzuki Motor Corp*., 494 B.R. 466, 480 (Bankr. C.D. Cal. 2013) (The DHSMV has indicated it will be applying this holding to every amendment to the Florida Automobile Dealers Act. That means dealers have different protections under the law depending on when they signed their franchise agreement.).

- May not take adverse action against a motor vehicle dealer due to a delivered motor vehicle being resold or exported by the customer unless such resale or export occurred within 30 days after the date of the original sale and may not require a dealer to inquire of a customer whether they are going to sell or export the vehicle.

- May not require a dealer to inquire of a customer whether the customer taking delivery will be the end user of the motor vehicle and may not use as a basis for termination of a motor vehicle dealer the fact that a customer resold or exported a vehicle.

- May not refuse to pay a bonus to a motor vehicle dealer who does not comply with the conditions of an offered bonus program related to improvements to facilities or additions of signs if the dealer's facility was required or approved to make improvements within the last 10 years and the new program's improvements would replace or alter those previously approved improvements.[4] A dealer whose existing facilities were approved within the last 10 years is deemed to be in full compliance with such program's eligibility requirements. The manufacturer is required to give such a motor vehicle dealer at least 80 percent of the total bonus offered to other participants. However, the manufacturer can have such a program if it offers to pay in a lump sum payment to assist dealers in making the improvements.

- May not require or coerce a dealer to purchase goods from a vendor selected by the manufacturer without first making available to the dealer the option to obtain the goods or services from a vendor chosen by the dealer. This does not include goods that include material subject to the intellectual property rights of the manufacturer.

- Must provide the dealer with written notice of the right to choose a vendor and if the manufacturer disputes whether the vendor's materials are substantially similar in quality to the materials by the manufacturer's vendor, the manufacturer must provide a written statement disclosing the identity of the vendor selected by the manufacturer, indicating whether the manufacturer has an ownership interest, providing the agreement between the vendor and the manufacturer for payment, and providing the basis for the amount of compensation and whether the compensation is paid directly to the vendor or by credit. It provides that "if the notice required under this paragraph discloses such an ownership interest or any such compensation, that program or incentive shall increase the dealer's benefits by the amount of a prorated share of such compensation or fair market value of such ownership."

- Must provide the dealer with the right to purchase signs or other image elements of like kind and quality from a vendor selected by the dealer, if goods and services offered by the manufacturer are supplied to the dealer by a manufacturer's vendor and are to be leased to the dealer. Dealer must also be given the opportunity to purchase the signs at a price substantially similar to the capitalized lease costs.

- May not require a motor vehicle dealer to participate in a dealer advertising or marketing pool or threaten to take adverse action for refusing to do so.

Vicarious Liability of Rental Companies - Current Situation:

Section 324.021, F.S., currently limits the liability of a rental car company as the owner of a vehicle rented to a customer. A motor vehicle dealer that loans a vehicle to a customer for up to 10 days is considered a rental car company under the statute. According to the statute, rental car company liability would be limited to up to the first $100,000 per person for bodily injury, $300,000 per incident for bodily injury, and $50,000 per incident for property damage. However, federal law overrides this provision of the Florida Statutes.

[4] *Id.* The bill adds the phrase "notwithstanding the terms of any franchise agreement" to s. 320.64 (38), F.S., which may or may not be interpreted to apply to contracts previously entered into between the manufacturers and dealers.

The federal law, called the Graves Amendment, applies to owners of motor vehicles that are in the business of renting or leasing motor vehicles. The law preempts all state law related to the vicarious liability of such owners for the negligence of the driver, except when there is negligence or criminal wrongdoing on the part of the owner.[5] Thus, Florida law may not statutorily require that rental car companies be vicariously liable for the acts of renters. However, the law does not forbid the states from imposing "financial responsibility" or insurance standards on the owner or rental car company for the privilege of registering the vehicle and operating the vehicle in Florida. This means that the state can still require that proof of insurance coverage be provided for the privilege of driving on Florida's roads.[6] However, s. 324.021, F.S., was not drafted to require proof of certain types or amounts of insurance. It only set limits on the amount of liability for rental car companies.

In *Vargas v. Enterprise Leasing Company*, 60 So. 3d 1037, 1043 (Fla. 2011), the Florida Supreme Court upheld the constitutionality of the Graves Amendment, held that the Graves Amendment preempted Florida law related to rental car companies and that Florida's vicarious liability standard for rental car companies did not fall within any exceptions.

Vicarious Liability of Rental Companies - Effect of Proposed Changes:

The bill amends s. 324.021, F.S., within the "Financial Responsibility" chapter, to provide that motor vehicle dealers who loan vehicles to customers as temporary replacement vehicles have the same immunity from vicarious liability as owners of motor vehicles that are in the business of renting or leasing motor vehicles or rental car companies.

Any liability on the part of the dealer for loaning a car to a customer who is negligent and has an accident is removed as to any damage or injury unless the motor vehicle dealer is negligent or criminally responsible. The bill provides that it is not negligent for a motor vehicle dealer to provide a temporary replacement vehicle to a customer, if the motor vehicle dealer obtains the driver license and insurance information from the customer, even if this information is later determined to be fraudulent. The bill does not establish limits for coverage or require proof of any set amount of coverage. The bill changes the definition of "rental company," removing the requirement currently in the definition that the length of the loan by a motor vehicle dealer only be "up to 10 days."

B. SECTION DIRECTORY:

Section 1 amends s. 320.64, F.S., prohibiting a manufacturer from taking certain actions against a motor vehicle dealer and requiring certain procedures be followed by manufacturers when dealing with motor vehicle dealers.

Section 2 amends s. 324.021, F.S., relating to the vicarious liability of a motor vehicle dealer for loaning a motor vehicle to a customer.

Section 3 provides an effective date of July 1, 2015.

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

[5] 49 U.S.C. § 30106 (2012).
[6] *Id*.

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. U.S. Const. art I s. 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 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.[7]

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.

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

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES