1983

Session Law 83-105

Florida Senate & House of Representatives

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HB 977

By Representative Drage

A bill to be entitled
An act relating to licensure of motor vehicle manufacturers, factory branches, distributors, and importers; adding a subsection (15) to s. 320.64, Florida Statutes, relating to grounds for denial, suspension, or revocation of license, to provide additional grounds; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (15) is added to section 320.64, Florida Statutes, to read:

320.64 Denial, suspension, or revocation of license; grounds.--A license may be denied, suspended, or revoked within the entire state or at any specific location or locations at which a licensee engages in business and at which a violation of ss. 320.60-320.70 has occurred, on the following grounds:

(15) Notwithstanding the terms of any franchise agreement, and unless it can be shown that a licensee's franchised dealer is actively negligent, the applicant or licensee has failed to indemnify and hold harmless its franchised dealers against any judgment or settlement for damages, including, but not limited to, court costs and reasonable attorney's fees of the new motor vehicle dealer, arising out of complaints, claims, or lawsuits based upon each ground as strict liability, negligence, misrepresentation, warranty, express or implied, or rescission of the sale as described in s. 672.608, to the extent that the judgment or settlement relates to the alleged defective or negligent...
manufacture, assembly, or design of new motor vehicles, parts, or accessories or other functions of the manufacturer.

Section 2. This act shall take effect October 1, 1983.

************************************************

HOUSE SUMMARY

With respect to the licensure of motor vehicle manufacturers, factory branches, distributors, and importers, provides that the failure of the applicant or licensee to indemnify and hold harmless its franchised dealers against certain judgments or settlements for damages relating to defective or negligent manufacture, assembly, or design shall be grounds for denial, suspension, or revocation of license.

CODING: Words in struck through type are deletions from existing law; words underlined are additions.
I. SUMMARY:

A. Present Situation:

Every manufacturer, distributor, factory branch or importer of new motor vehicles must be licensed in order to engage in business in this state.

Section 320.64 specifies several grounds for denial, suspension, or revocation of the license.

Presently, indemnification of the dealer by the manufacturer is not a matter addressed by statute. Whether or not the dealer will be indemnified by the manufacturer in a suit in which both are named as defendants is currently controlled by case law applying the equitable principle of indemnity.

B. Effect of Proposed Changes:

The bill establishes as an additional ground for denial or revocation of a manufacturer's license, failure of the manufacturer to indemnify its franchised dealers in any judgment or settlement for damages to the extent that the judgment or settlement relates to the alleged defective or negligent manufacture, assembly, or design of new motor vehicles, parts, accessories or other functions of the manufacturer.

Such failure would be justified only when it can be shown that the dealer was actively negligent.

Indemnification by the manufacturer would be required notwithstanding the terms of any franchise agreement, and would include but not be limited to court costs and reasonable attorney fees incurred by the dealer.

II. ECONOMIC IMPACT AND FISCAL NOTE:

A. Public:

None.

B. Government:

None.

III. COMMENTS:

The primary thrust of the bill is to preclude a manufacturer from insulating himself from indemnifying his dealers in the franchise agreement and to require manufacturer indemnification of attorney fees and litigation costs of a franchised dealer who has been completely exonerated from liability, whether or not the
manufacturer is ultimately adjudged guilty of the alleged wrongdoing.

IV. AMENDMENTS:
SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

I. SUMMARY:
   A. Present Situation:
      Every manufacturer, distributor, factory branch or importer of new motor vehicles must be licensed in order to engage in business in this state.
      Section 320.64 specifies several grounds for denial, suspension, or revocation of the license.
      Presently, indemnification of the dealer by the manufacturer is not a matter addressed by statute. Whether or not the dealer will be indemnified by the manufacturer in a suit in which both are named as defendants is currently controlled by case law applying the equitable principle of indemnity.
   B. Effect of Proposed Changes:
      The bill establishes as an additional ground for denial or revocation of a manufacturer's license, failure of the manufacturer to indemnify its franchised dealers in any judgment or settlement for damages to the extent that the judgment or settlement relates to the alleged defective or negligent manufacture, assembly, or design of new motor vehicles, parts, accessories or other functions of the manufacturer.
      Such failure would be justified only when it can be shown that the dealer was actively negligent.
      Indemnification by the manufacturer would be required notwithstanding the terms of any franchise agreement, and would include but not be limited to court costs and reasonable attorney fees incurred by the dealer.

II. ECONOMIC IMPACT AND FISCAL NOTE:
   A. Public:
      None.
   B. Government:
      None.

III. COMMENTS:
   The primary thrust of the bill is to preclude a manufacturer from insulating himself from indemnifying his dealers in the franchise agreement and to require manufacturer indemnification of attorney fees and litigation costs of a franchised dealer who has been completely exonerated from liability, whether or not the
manufacturer is ultimately adjudged guilty of the alleged wrongdoing.

IV. AMENDMENTS:

No. 1 by Transportation: Specifies that the settlement referred to in the bill must be one agreed to in writing by the manufacturer. Provides that the amount for which the manufacturer indemnifies a franchised dealer would be reduced by any offset for vehicle use recovered by the dealer.
A bill to be entitled

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following grounds:

(15) Notwithstanding the terms of any franchise
agreement, and unless it can be shown that a licensee's
franchised dealer is actively negligent, the applicant or
licensee has failed to indemnify and hold harmless its
franchised motor vehicle dealer against any judgment for
damages or settlement agreed to in writing by the applicant or
licensee, including, but not limited to, court costs and,
reasonable attorney's fees of the motor vehicle dealer,

arising out of complaints, claims, or lawsuits based upon such
grounds as strict liability, negligence, misrepresentation,

warranty, express or implied, or rescission of the sale as
described in s. 672.408, less any offset for use recovered by

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the licensee's franchised motor vehicle dealer, and only to the extent that the judgment or settlement relates to the alleged defective or negligent manufacture, assembly, or design of new motor vehicles, parts, or accessories or other functions of the manufacturer.

Section 2. This act shall take effect October 1, 1983.
HOUSE SUMMARY

With respect to the licensure of motor vehicle manufacturers, factory branches, distributors, and importers; provides that the failure of the applicant or licensee to indemnify and hold harmless its franchised dealers against certain judgments for damages or settlements relating to defective or negligent manufacture, assembly, or design shall be grounds for denial, suspension, or revocation of license.
I. SUMMARY:

A. Present Situation:

Currently, ss. 320.60-320.70, Florida Statutes, provide for the licensure by the Department of Highway Safety and Motor Vehicles of motor vehicle manufacturers, factory branches, distributors and importers. Specifically, s. 320.64, Florida Statutes, sets forth the grounds by which the Department may deny, suspend or revoke such license.

B. Probable Effect of Proposed Changes:

HB 977 would expand the specific grounds for denial, suspension or revocation under 320.64, Florida Statutes, and authorizes the Department to take such action against the applicant or licensee when the motor vehicle manufacturer, factory branch, distributor, or importer fails to indemnify and hold harmless its franchised dealers on judgments arising from defects under implied or express warranty. Such judgments must relate to defection or negligent manufacture, assembly or designs of the vehicle, or other functions related to the manufacturer. This provision would apply regardless of the terms of any franchise agreement.

II. FISCAL IMPACT:

There may be additional costs to a motor vehicle manufacturer, distributor, or importer depending on the franchise agreements in effect; however, such additional costs, if any, are indeterminable.

III. COMMENTS:

This bill appears to support the principles of HB 885, "The Motor Vehicle Warranty Enforcement Act" previously reported favorable by this Committee, and would authorize the Department to take licensure action based on motor vehicle warranty actions. The Senate Companion SB 793 was reported favorably by the Transportation Committee and is on the Senate Calendar.

IV. AMENDMENTS:

The bill was amended and made into a committee substitute to provide that any judgment recovered under the terms of the provision should be offset by whatever amount the dealer recovered for use of the vehicle by the owner. The amendments conform the bill to the Senate companion.
I. SUMMARY:
A. Present Situation:

Every manufacturer, distributor, factory branch or importer of new motor vehicles must be licensed in order to engage in business in this state.

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B. Effect of Proposed Changes:

The bill establishes as an additional ground for denial or revocation of a manufacturer's license, failure of the manufacturer to indemnify its franchised dealers in any judgment or settlement agreed to in writing for damages to the extent that the judgment or settlement relates to the alleged defective or negligent manufacture, assembly, or design of new motor vehicles, parts, accessories or other functions of the manufacturer.

Such failure would be justified only when it can be shown that the dealer was actively negligent.

Indemnification by the manufacturer would be required notwithstanding the terms of any franchise agreement, and would include but not be limited to court costs and reasonable attorney fees incurred by the dealer. The amount of indemnification by the manufacturer would be reduced by any offset for vehicle use recovered by the dealer.

II. ECONOMIC IMPACT AND FISCAL NOTE:
A. Public:

None.

B. Government:

None.
III. COMMENTS:

The primary thrust of the bill is to preclude a manufacturer from insulating himself from indemnifying his dealers in the franchise agreement and to require manufacturer indemnification of attorney fees and litigation costs of a franchised dealer who has been completely exonerated from liability, whether or not the manufacturer is ultimately adjudged guilty of the alleged wrongdoing.

IV. AMENDMENTS: None.
By Senator Langley-

A bill to be entitled

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SENATE COMMITTEE AMENDMENT

The Committee on Transportation... recommended the following amendment which was moved by Senator... and adopted:

and failed:

On page... lines... Strike all of lines... through...

and insert:

franchised motor vehicle dealer against any judgment for damages or settlement agreed to in writing by the applicant or licensee, including, but not limited to, court costs and reasonable attorney's fees of the motor vehicle dealer, arising out of complaints, claims, or lawsuits based upon such grounds as strict liability, negligence, misrepresentation, warranty, express or implied, or rescission of the sale as described in s. 672.608, less any offset for use recovered by the licensee's franchised motor vehicle dealer, and only to the extent that the judgment or settlement relates to the alleged defective or negligent...
MEMORANDUM

TO: Representative Tom Drage
FROM: Bill Owen
DATE: April 4, 1983
RE: Indemnity Legislation Proposed by Florida Automobile Dealers Association

This memorandum is submitted to you for informational purposes in connection with the indemnity legislation which you were kind enough to file on behalf of FADA.

I am enclosing herewith copies of two DCA decisions [Pender v. Skillcraft Industries, Inc., 358 So.2d 45 (Fla. 4th DCA 1978) and Maple Chair Company v. Badcock, 385 So.2d 1036 (Fla. 1st DCA 1980)] which illustrate the problems and potential difficulties which we are attempting to address with the proposed legislation.

First, the operation of indemnity as set forth in Pender is acceptable to FADA. However, since Pender holds that the obligation of the manufacturer to indemnify its retailer arises by express or implied contract, we feel the proposed legislation is needed in order to prevent automobile manufacturers from limiting their indemnity obligation by language incorporated into the franchise agreements with dealers.

Secondly, as I read the opinion in the Maple Chair Company case, a manufacturer's obligation to indemnify its retailer is dependent on a finding of fault on the part of the manufacturer. Under this interpretation of indemnity, a manufacturer would not be obligated to indemnify its retailer in any case which was settled or otherwise terminated without a finding of fault on the part of the manufacturer. The proposed legislation is intended
to provide for indemnification for the dealer in every case except those situations when the dealer is actively at fault.

I hope this gives you some insight into the Association's reasons for requesting the proposed legislation. I am available at your request and convenience to discuss any feature of the legislation in more detail.

WCO/nsh
Enclosures

cc: Mr. David D. Jeffries
    Executive Vice President - FADA
rendered by the Circuit Court, Brevard County, Virgil B. Conkling, J., upon adverse jury verdict in a strict liability case. The District Court of Appeal, Schwartz, Alan R., Associate Judge, held plaintiffs' counsel's improper reference to Ford Pinto and Firestone 500 cases, notwithstanding fact that trial judge had twice sustained objections to such references during the course of the trial, was not so inflammatory as to destroy defendant's right to fair trial and thus to constitute fundamental error; therefore, defendant, who made no contemporaneous objections to the argument and raised issue only in motion for mistrial after jury had been instructed and had retired to consider its verdict, failed to preserve the issue for review.

Affirmed.

Appeal and Error 6-207

In strict liability action against manufacturer of allegedly defective lawn tractor, plaintiffs' counsel's improper reference in final argument to Ford Pinto and Firestone 500 cases, notwithstanding fact that trial judge had twice sustained objections to such references during course of the trial, was not so inflammatory as to destroy defendant's right to fair trial and thus to constitute fundamental error; therefore, defendant which made no contemporaneous objections to the argument and raised issue only in motion for mistrial after jury had been instructed and had retired to consider its verdict, failed to preserve the issue for review.

Ernest J. Rice, Orlando, for appellants.

Hale Baugh of Stromire, Westman, Linta, Baugh, McKinley, Antoon, Clifton & Pearce, P.A., Cocoa, for appellees.

SCHWARTZ, ALAN R., Associate Judge.

The defendant below, the manufacturer of an allegedly defective lawn tractor, appeals from a judgment rendered against it upon an adverse jury verdict in a strict liability case. The only point which gives us pause concerns the rebuttal portion of the plaintiffs' final argument, in which counsel improperly referred to the Ford Pinto and Firestone 500 cases notwithstanding the fact that the trial judge had twice sustained objections to such references during the course of the trial. While we certainly do not approve of this conduct, the record shows that defense counsel made no contemporaneous objections to the argument at the time it was made and raised the issue below only in a motion for mistrial after the jury had been instructed and had retired to consider its verdict. Since the comment, taken in context, was not so inflammatory as to destroy the defendants' right to a fair trial and thus to constitute fundamental error, it is apparent that the mistrial motion came too late to preserve the issue for review. See State v. Cumber, 380 So.2d 1031 (Fla.1980); Boggett v. Davis, 194 Fla. 701, 129 So. 372 (1934); Bishop v. Watson, 367 So.2d 1073 (Fla.3d DCA 1979); Sears, Roebuck & Co. v. McAfee, 303 So.2d 1306 (Fla.3d DCA 1974); H.J. Holding Co. v. Dade County, 129 So.2d 608 (Fla.3d DCA 1961). We find no other error, and the judgment below is therefore

AFFIRMED.

COBB and FRANK D. UPCHURCH, Jr., JJ., concur.

No. 85-39.

Chair manufacturer appealed summary judgment granted by the Circuit Court.
MAPLE CHAIR CO. v. W. S. BADCOCK CORP.  
Alachua County, John A. H. Murphree, J., been recovered by the customer against Maple Chair. We agree with this contention, and reverse.

In the customer's action against the parties, Badcock cross-claimed against Maple Chair for indemnity, based upon its allegation that since Maple Chair was the manufacturer, Maple Chair's negligence, if any, was active, whereas Badcock could be guilty only of passive negligence in that it delivered the rocking chair to the customer without removing it from the package. Badcock applied for a partial summary judgment on its cross-claim against Maple Chair, and the trial court, agreeing with Badcock's contention that its negligence, if any, was passive in nature, found that Badcock was entitled to indemnity from Maple Chair, and awarded attorney's fees, the amount to be considered at a later date. Badcock subsequently moved for and was granted a summary judgment on the claim of the plaintiff in the main suit, and its replication for assessment of attorney's fees against Maple Chair was then granted by the trial court. Meanwhile, there has been no trial of the plaintiff's action against Maple Chair, and there has been no finding of a judgment of liability on the plaintiff's suit against Maple Chair.

We agree with Maple Chair's position that the two cases, Insurance Company of North America v. King, 340 So.2d 1175 (Fla. 4th DCA 1976), and Pender v. Skillcraft Industries, Inc., 358 So.2d 45 (Fla. 4th DCA 1978), do not support the award of attorney's fees in this case. The distinguishing feature is that in each of those cases a judgment had been rendered against one defendant before indemnification was allowed to the other defendant. Here, Badcock has received an award of attorney's fees even though no judgment has been entered against it or Maple Chair.

The position of Maple Chair is supported by Diaz v. Western Venturers, Inc., 467 F.2d 1361 (5th Cir. 1972), in which a ship repairman brought an action against a shipowner for personal injuries and lost income. The shipowner filed a third party action for indemnification against the repairman's
employer. Because Diaz was unable to prove that his injuries occurred on the ship in question, the court found that the issue of whether or not there had been a breach of warranty of workmanlike performance had never been reached. The court said that if the seaman's employer were obligated to indemnify by virtue of the breach of its legal duty, such obligation would extend to the litigation expenses of the shipowner for defending the suit. However, the court held, absent a finding of breach of warranty by the seaman's employer, the employer would not be liable for expenses of the shipowner's successful defense of the personal injury action.

[1, 2] We disagree with Badcock's contention that it is entitled to indemnification by recovery of attorney's fees expended in defense of the law suit, regardless of whether the injured customer ultimately recovers a judgment against Maple Chair Company. Since there is no contractual duty, either express or implied, imposing an obligation upon Maple Chair to pay Badcock's defense costs, those cases awarding attorney's fees based upon some contractual duty are inapplicable. See Pender v. Skillcraft Industries, Inc., supra. Badcock's sole basis for recovery of defense costs would be based upon the equitable principle of indemnity, which is defined as a right which vests in a person who has discharged a duty which is owed by him but which, as between himself and another, should have been discharged by the other. Stewart v. Hertz Corporation, 301 So.2d 100 (Fla.1977).

Badcock cites no authority in support of its contention that a manufacturer's duty to the retailer extends to the expenses of litigation where the retailer has been absolved of liability, and it has not yet been determined that the manufacturer was at fault. We know of no theory upon which it can be said that a manufacturer has a duty, absent an express contract, to indemnify its retailers from unproven claims of dissatisfied customers. Finally, liability for Badcock's attorney's fees cannot be imposed upon Maple Chair by means of the summary judgment finding Badcock only passively negligent, unless and until it has been determined that Maple Chair has been guilty of the wrongful acts alleged in the suit against R.

The summary final judgment awarding attorney's fees to appellee-Badcock is reversed, and the cause is remanded.

MILLS, C. J., and SHIVELY, J., concur.

Erik JOHNSON, as Personal Representative of the Estate of Nancy M. Johnson, Deceased, Appellant,

v.


No. MM-439.

District Court of Appeal of Florida, First District.

June 6, 1980.

Rehearing Denied Aug. 8, 1980.

Personal representative of deceased patient brought action against physician alleging medical malpractice. The Circuit Court, Alachua County, Theron A. Yawn, Jr., J., granted final summary judgment for defendant, ruling that plaintiff's action was barred by statute of limitations, and plaintiff appealed. The District Court of Appeal, McComb, J., held that the applicable statute of limitations was one which was in effect during period when decedent discovered her cause of action, which was when she learned that her cancer had metastasized beyond surgically removed portions of her body, and thus her action, which was filed within two years of such date, was not barred by the applicable statute.

Reversed and remanded.
In products liability litigation, plaintiff sued a defendant retailer appealed from the circuit Court for Palm Beach County, T. E. Holtz, J. The District Court of Appeal, Alderman, C. J., held that: (1) there was no abuse of discretion in denying plaintiff's oral motion at late stage of trial to amend proceeding to state cause of action for her own personal injuries, in addition to causes of action for electrocution of her son, and (2) where retailer clearly would have been entitled to indemnification from manufacturer if it had been found liable on theory of negligence or breach of implied warranty, and logically the same result would apply under a strict liability theory, and such indemnification would include attorney fees and costs; thus, where retailer was wholly exonerated of liability on all possible theories, it was nonetheless entitled to indemnification for attorney fees and court costs.

Judgment in main action affirmed; judgment as to indemnity reversed and cause remanded.

In case in which plaintiff sued for wrongful death of son and as administrator of minor son's estate and it was determined that complaint was insufficient to state cause of action for her own personal injuries, there was no abuse of discretion in denying her oral motion made at a late stage of the trial to amend her pleadings to state cause of action for her own personal injuries.

2. Indemnity =13.1(3), 13.3

Where defect in clamp-on light which caused electrocution was latent and there was no evidence that retailer knew or should have known of the defect, retailer would have been entitled to indemnification from manufacturer if it had been found liable on theory of negligence or breach of implied warranty, and logically the same result would apply under a strict liability theory, and such indemnification would include attorney fees and costs; thus, where retailer was wholly exonerated of liability on all possible theories, it was nonetheless entitled to indemnification for attorney fees and court costs.

3. Indemnity =13

Some nexus is required to support an implied contract theory of indemnification.

Richard W. Slawson of Thompson, Tucker & Slawson, West Palm Beach, for appellant-Pender.
Robert B. Bennett, Jr., Sarasota, for appellee-Skillcraft Industries, Inc.
Michael B. Davis of Walton, Lantaff, Schroeder & Carson, West Palm Beach, for appellees-Escom Enterprises, Inc., and United States Fidelity & Guaranty Co.
Marjorie D. Calarian of Jones, Paine & Foster, West Palm Beach, for appellees-Dade Wholesale Products, Inc., and Consolidated Mut. Ins. Co. as to Case No. 76-1527, and for appellant-Dade Wholesale as to Case No. 76-1803.

ALDERMAN, Chief Judge.

These consolidated appeals result from proximate products liability litigation. In
the primary action, Case No. 76-1527, the plaintiff, Martha Pender, claimed to have sued the defendants (two retail sellers, two manufacturers, and their respective insurance carriers) in three distinct capacities: (1) for her own personal injuries resulting from an electrical shock; (2) as a statutory beneficiary under the wrongful death statute for the electrocution death of her minor son; and (3) as administratrix of her minor son's estate under the survival statute. The sufficiency of the complaint to state a cause of action for her personal injuries became an issue during the trial and was disposed of adversely to plaintiff.

[1] Mrs. Pender questions the propriety of the trial court's order denying her oral motion made at a late stage of the trial to amend her pleadings in order to state a cause of action for her personal injuries and refusing to permit her claim to go to the jury. Under the totality of the circumstances, we find no abuse of discretion in this regard. She raised five other points in her brief; however, at oral argument these points were waived except as they might apply to the claim for her own personal injuries. Since we find that the trial court did not abuse its discretion in denying her motion to amend and in refusing to allow her claim for personal injuries to go to the jury, we shall not consider these other points on appeal.

In the consolidated appeal, Case No. 76-1803, the cross-appellant, Dade Wholesale Products, Inc. d/b/a Eagle Army-Navy Stores, Inc. (retail seller of a defective clamp-on light that contributed to the electrocution of Mrs. Pender's son), challenges the trial judge's denial of his claim against codefendant Aetna Manufacturing Co. (manufacturer of the defective clamp-on light) and its insurance carrier for indemnification for attorney fees and costs of defending itself in the primary action. Although Dade Wholesale as a retail seller was exonerated of liability in the primary action, Aetna as manufacturer was found liable and judgment was entered against it for $65,000 in the wrongful death action and for $15,000 in the estate's action; said judgment having already been satisfied. The trial judge held that since no judgment was rendered against the cross-claimant in the primary action, there was nothing for which to indemnify Dade Wholesale.

Dade Wholesale has alleged no express contractual relationship between it and Aetna wherein Aetna obligated itself to defend actions brought against Dade for injury caused by defective products manufactured by Aetna. Thus any right to indemnification would have to be by implied contract, or one otherwise created purely by law.

[2] In the present case there was no evidence that Dade Wholesale, the retailer, knew or should have known of the defect in the clamp-on light; all testimony was to the effect that the defect was latent. Thus if Dade Wholesale was found to have been liable for the death of plaintiff's minor child on a negligence theory, it would necessarily have been only passive negligence and Dade Wholesale would have then been entitled to indemnification from Aetna. See General Motors Corp. v. County of Dade, 272 So.2d 192 (Fla. 3d DCA 1973), cert. denied, 277 So.2d 535 (Fla. 1973). Likewise, if Dade had been found liable on a breach of implied warranty theory, Aetna would be obligated to indemnify Dade also on a breach of implied warranty theory. Mims Crane Service, Inc. v. Inlay Manufacturing Corp., 226 So.2d 836 (Fla. 2d DCA 1969), cert. denied, 234 So.2d 122 (Fla. 1969). Logically the same result would apply if Dade Wholesale would be liable on a strict liability theory. In this court has held that if a retailer, who is not an active wrongdoer according to the evidence at trial, is entitled to indemnity from a manufacturer for a judgment against the retailer due to its sale of a defective product, the retailer is also entitled to be indemnified for its attorney's fees and court costs incurred in defending itself in the primary action. Insurance Co. of North America v. King, 340 So.2d 1175 (Fla. 4th DCA 1976).

The difficulty in the present case, of course, is that Dade Wholesale was exonerated of liability on all possible theories (by
The judgment in Case No. 76-1521 is affirmed.

The judgment in Case No. 76-1803 is reversed and the cause remanded for further proceedings in accordance with this opinion.

CROSS, J., and DURANT, N. JOSIAH, Jr., Associate Judge, concur.

Eugene Ewan MORI, Appellant,
v.
BOMAC INDUSTRIES, INC., et al., Appellees.
No. 76-193.
District Court of Appeal of Florida, Fourth District.

In action involving breach of lease, the Circuit Court, Broward County, George Richardson, Jr., J., found that certain defendant was not individually liable to plaintiff and awarded plaintiff $500 as damages against defendant corporation, and plaintiff appealed. The District Court of Appeal, Fourth District, held that: (1) evidence supported finding that a defendant was not liable individually to plaintiff, but (2) provision for payment of $15,000 as liquidated damages was not nullified due to fact that such amount of money was not deposited because check for the amount was returned for insufficient funds.

Affirmed, in part; reversed, in part; and remanded with directions.

Cross, J., dissented and filed opinion.
22 April '83

Jane....As promised.....Repair or Replace info.....

I think this will give you a fair background on the issue. Good reading!!
The modern automobile is a highly complex machine made up of some 14,000 parts. The automobile is more complicated than virtually any other single item a person owns. It is the second largest expenditure that most consumers make in their lifetimes. Of the 110,000,000 vehicles in use everyday only a small number are not repaired properly and promptly. Provisions are currently in existence to resolve problems with vehicles not repaired satisfactorily.

Every new car buyer receives an owner's manual which spells out the procedure to register a complaint with the manufacturer, concerning the vehicle or the vehicle's service related problems. The procedure is simple. The first step is for the consumer to contact the dealer who sold or serviced the vehicle and register the complaint. If the consumer is not satisfied with the dealer's action the consumer may then contact the manufacturer, through the procedures outlined in the owner's manual and request further.
assistance. The vast majority of all complaints handled through the regular procedures are resolved to the consumer's satisfaction.

Consumers who still remain dissatisfied have the option to use independent dispute resolution systems which manufacturers and some dealer associations have established. There is no charge to the consumer for these services and they are easily accessible, timely and avoid expensive litigation. In the unlikely situation that dispute resolution cannot resolve the problem a consumer may commence an action at law either under common law, state Uniform Commercial Code provisions or under Federal Magnusson-Moss warranty provisions.

In view of presently available remedies which are less expensive to consumers than litigation, new legislation is unnecessary. It's reasonable to expect that expenses incurred by manufacturers from increased litigation may be passed on to consumers.

This type of legislation could lead to an over reaction both on the part of vehicle repair persons and consumers. If a consumer brings a vehicle into the repair shop with a carburetor problem, and the proposed legislation is in effect, then the tendency on the part of the mechanic may be to replace the entire carburetor rather than attempt to make a more minor (less
expensive) repair. This would be done to insure that the vehicle is repaired within the specified number of attempts. Also, this new legislation could increase the number of repair visits on the part of the general public. This cumulative increase of repair visits could lead to increased costs to consumers.

The proposed legislation could discourage manufacturers from increasing warranty time and mileage limitations at a time when most consumers have been responding favorably to the increased length of their warranties.

Equity and reason demand that manufacturers should not be burdened with the sole responsibility for errors beyond their control. This would happen if legislation were enacted which immunizes dealers from any liability even when their acts in performing or failing to perform repairs cause or contribute to a service problem. Imposing such vicarious liability upon the manufacturers is of questionable constitutional validity and certainly an unwise public policy. Problems may have been aggravated by communications difficulties between the consumer and dealer service personnel. Unless legislation specifically requires that the manufacturer be directly notified of a consumer's on-going problems, the manufacturer may not have an opportunity to repair the automobile before being required to replace the vehicle or refund the purchase price.
The Motor Vehicle Manufacturers Association member companies strongly believe that consumer satisfaction is their number one priority. Our member companies are extremely competitive. Solving warranty problems quickly and efficiently is in their best interest. Each manufacturer is fully aware that a disappointed consumer will look elsewhere.
<table>
<thead>
<tr>
<th>TYPE OF VEHICLES EFFECTED</th>
<th>CALIFORNIA Civil 1793.2</th>
<th>AIA</th>
<th>ALTERNATIVE PROPOSAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>A new motor vehicle which is used or bought for use primarily for personal, family or household purposes. (4)(B)</td>
<td>A new motor vehicle which is used or bought for use primarily for personal, family or household purposes. (4)(ii)</td>
<td>A passenger motor vehicle or a passenger and commercial motor vehicle, purchased other than for purposes of resale. (a)</td>
<td></td>
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</tbody>
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<tr>
<th>DEFINITION OF &quot;NONCONFORMITY&quot;</th>
<th>CALIFORNIA Civil 1793.2</th>
<th>AIA</th>
<th>ALTERNATIVE PROPOSAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Substantially impairs the use, value, or safety of the new motor vehicle. (4)(A)</td>
<td>Substantially impairs the use, value or safety of a new motor vehicle. (4)(i) A &quot;same nonconformity&quot; is any malfunction affecting the same part or component. (4)(iii)</td>
<td>Substantially impairs use and value of motor vehicle. (c)(1)</td>
<td></td>
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<tr>
<th>PERIOD OF MANUFACTURER'S LIABILITY</th>
<th>CALIFORNIA Civil 1793.2</th>
<th>AIA</th>
<th>ALTERNATIVE PROPOSAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>One year from delivery to buyer or 12,000 miles whichever occurs first. (c)(1)</td>
<td>One year from delivery to buyer or 12,000 miles whichever comes first. (c)(1)</td>
<td>The term of express warranties or the period of one year following the date of delivery, whichever is the earlier date. (b)</td>
<td></td>
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10/82
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<thead>
<tr>
<th>TYPE OF NOTIFICATION REQUIRED FROM BUYER TO MANUFACTURER AND/OR DEALER</th>
<th>CALIFORNIA</th>
<th>ALA</th>
<th>CONNECTICUT</th>
<th>ALTERNATIVE PROPOSAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Buyer must notify the manufacturer only if the manufacturer has disclosed to the buyer with the warranty or the owner's manual, the provisions of the statute. (e)(1)</td>
<td>Buyer must directly notify the manufacturer only if the manufacturer has disclosed to the buyer with the warranty or the owner's manual the provisions of the statute. (c)(1)</td>
<td>Manufacturer only liable under statute if the consumer reports the nonconformity to the manufacturer, its agent or its authorized dealer during the term of express warranty or within one year. (b)</td>
<td>Manufacturer only liable under statute if the manufacturer has received prior direct notification from the consumer and an opportunity to cure the alleged defect. (d)</td>
<td></td>
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<tr>
<td>NUMBER OF REPAIR ATTEMPTS/DAYS OUT OF SERVICE PERMITTED BEFORE REMEDY AVAILABLE</td>
<td>Four or more repair attempts and the buyer has at least once directly notified the manufacturer of the need for repair of the nonconformity or the vehicle is out of service for 30 calendar days. (e)(1)</td>
<td>Four or more repair attempts which shall include a minimum of two repair attempts after direct notification for repair by the buyer to the manufacturer or the vehicle is out of service 30 calendar days which shall include at least 10 calendar days after direct notification by the buyer to the manufacturer. (c)(1)(i)</td>
<td>Four or more repair attempts or the vehicle is out of service 30 or more calendar days. (d)</td>
<td>Four repair attempts or the vehicle is out of service 30 or more business days. (d)</td>
</tr>
<tr>
<td>AFFIRMATIVE DEFENSES</td>
<td>None.</td>
<td>None.</td>
<td>Nonconformity does not substantially impair such use and market value or that a nonconformity is the result of abuse, neglect or unauthorized modifications or alterations of a motor vehicle by a consumer. (c)(1)(2)</td>
<td>Nonconformity does not substantially impair such use and market value or that a nonconformity is the result of abuse, neglect or unauthorized modifications or alterations of a motor vehicle by a consumer. (c)</td>
</tr>
<tr>
<td>REMEDY</td>
<td>AIA</td>
<td>CONNECTICUT</td>
<td>ALTERNATIVE PROPOSAL</td>
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<tr>
<td>The manufacturer shall either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer, less that amount directly attributable to use by the buyer prior to the discovery of the non-conformity. (d)</td>
<td>The manufacturer shall either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer, less that amount directly attributable to use by the buyer prior to the discovery of the non-conformity. (d)</td>
<td>Manufacturer must replace the vehicle with a new vehicle or refund the purchase price. A reasonable allowance must be made for use of the vehicle by the consumer before his first report of the non-conformity to the manufacturer, agent or dealer and during any subsequent period when the vehicle is not out of service for repairs.</td>
<td>Manufacturer must replace the vehicle with a comparable vehicle or refund the purchase price. A reasonable allowance must be made for use of the vehicle by the consumer before his first report of the nonconformity to the manufacturer, agent or dealer and during any subsequent period when the vehicle is not out of service for repairs.</td>
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</tr>
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<td>A dispute system which complies with the FTC's minimum requirements for informal dispute settlement procedures of 16 CFR part 703 that renders decisions which are binding on the manufacturer if the buyer elects to accept the decision; which gives the manufacturer a maximum of 30 days to comply. This system must also provide an annual report and conduct annual audit and there must be timely notification of the dispute resolution system and its effect to the buyer. (e)(4)</td>
<td>A dispute system which complies with the FTC's minimum requirements for informal dispute settlement procedures of 16 CFR part 703 that renders decisions which are binding on the manufacturer if the buyer elects to accept the decision; which gives the manufacturer a maximum of 30 days to comply. This system must also provide an annual report and conduct annual audit. (c)(3)</td>
<td>An informal dispute settlement procedure which complies with 16 CFR part 703. (c)(1)(2)</td>
<td>An informal dispute settlement procedure which complies substantially with the provisions outlined in Title 16, CFR part 703. (c)</td>
<td></td>
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<tr>
<td>MODEL YEAR TO BE EFFECTIVE</td>
<td>CALIFORNIA</td>
<td>ALA</td>
<td>CONNECTICUT</td>
<td>ALTERNATIVE PROPOSAL</td>
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<td>The law would be effective for motor vehicles manufactured after a date in the future. (Left blank in the bill). (5)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DEALER RESPONSIBILITY</td>
<td>None.</td>
<td>None.</td>
<td>None.</td>
<td>None.</td>
</tr>
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</table>
A bill to be entitled

An act relating to licensure of motor vehicle manufacturers, factory branches, distributors, and importers; adding a subsection (15) to s. 320.64, Florida Statutes, relating to grounds for denial, suspension, or revocation of license, to provide additional grounds; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (15) is added to section 320.64, Florida Statutes, to read:

320.64 Denial, suspension, or revocation of license; grounds.—A license may be denied, suspended, or revoked within the entire state or at any specific location or locations at which a licensee engages in business and at which a violation of ss. 320.60-320.70 has occurred, on the following grounds:

(15) Notwithstanding the terms of any franchise agreement, and unless it can be shown that a licensee's franchised dealer is actively negligent, the applicant or licensee has failed to indemnify and hold harmless its franchised motor vehicle dealer against any judgment for damages or settlement agreed to in writing by the applicant or licensee, including, but not limited to, court costs and reasonable attorney's fees of the motor vehicle dealer, arising out of complaints, claims, or lawsuits based upon such grounds as strict liability, negligence, misrepresentation, warranty, express or implied, or rescission of the sale as described in s. 672.608, less any offset for use recovered by

CODING: Words in struck through type are deletions from existing law; words underlined are additions.
the licensee's franchised motor vehicle dealer, and only to
the extent that the judgment or settlement relates to the
alleged defective or negligent manufacture, assembly, or
design of new motor vehicles, parts, or accessories or other
functions of the manufacturer.

Section 2. This act shall take effect October 1, 1983.

*****************************************

HOUSE SUMMARY

With respect to the licensure of motor vehicle
manufacturers, factory branches, distributors, and
importers, provides that the failure of the applicant or
licensee to indemnify and hold harmless its franchised
dealers against certain judgments for damages or
settlements relating to defective or negligent
manufacture, assembly, or design shall be grounds for
denial, suspension, or revocation of license.