Florida State University Law Review

Volume 16 | Issue 3

Article 7

Fall 1988


Barbara Balzer

Follow this and additional works at: https://ir.law.fsu.edu/lr

Part of the Administrative Law Commons, Legislation Commons, and the State and Local Government Law Commons

Recommended Citation
https://ir.law.fsu.edu/lr/vol16/iss3/7

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact efarrell@law.fsu.edu.
THE FRAGILITY OF GOOD IDEAS: A CASE FOR ABOLISHING SUNSET REVIEW OF FLORIDA'S MOTOR VEHICLE MANUFACTURER LICENSING STATUTE

BARBARA BALZER*

"How did I get here? Somebody pushed me. Somebody must have set me off in this direction and clusters of other hands must have touched themselves to the controls at various times, for I would not have picked this way for the world."

STATE regulation of the practice of a profession or an occupation by the imposition of licensing requirements is designed to protect the health, safety, and welfare of the public from significant and discernible harm. Such regulation is not intended to regulate members of an industry so as to adversely and unreasonably affect the competitive market. The Regulatory Sunset Act, section 11.61, Florida Statutes, provides for the systematic repeal, or sunset, of those statutes which regulate the initial entry into and continued practice of certain professions, occupations, businesses, and industries. Each such statute is scheduled for automatic repeal unless, pursuant to an orderly review, it is found that the statute should be reenacted by the Legislature in the public interest.

Sections 320.60 through 320.71, Florida Statutes, regulating motor vehicle manufacturers, factory branches, distributors, and importers, have been subject to sunset review twice since the Regulatory Reform

---

* Legislative Analyst, Florida Senate, Committee on Economic, Community and Consumer Affairs, 1984-1988. B.A., 1974; J.D. 1979, University of Iowa. The views expressed in this Article are those of the author and are not intended to reflect the views of the Florida Senate.

1. J. HELLER.
3. Id. § 11.61(2)(b).
4. Id. § 11.61(2)(c).
5. Id.
6. Id. §§ 320.60-.71.

697
Act was enacted in 1976, once in 19807 and again in 1988.8 Twice the sunset review has resulted in the recommendation that the statute be allowed to repeal as not in the public interest. Twice the Legislature has not only disregarded the recommendation to repeal, but has enacted a bill which expands the state’s regulation of motor vehicle manufacturers.

This Article is prompted by the recent contrary use of the sunset review process by motor vehicle dealers to greatly increase the state’s regulation of motor vehicle manufacturers to the benefit of new motor vehicle dealers and to the detriment of purchasers. It is also prompted by the refusal of the 1988 Legislature to allow the motor vehicle statute to repeal as scheduled. If the Legislature’s refusal had been an isolated and lone response to such recommendation, the decision would not be so troubling. Combined with a similar refusal in 1980, however, and a 1988 sunset bill comprised mostly of a lengthy motor vehicle dealer-drafted amendment which greatly restricted the conduct of motor vehicle manufacturers, a disturbing pattern emerges.

It is the thesis of this Article that the sunset review process, as it relates to motor vehicle manufacturers specifically,9 is not being used for its intended purpose of examining regulatory programs enacted to protect the public from incompetent or fraudulent practitioners and unnecessary regulation. Instead, the process has resulted in a periodic state-sponsored forum wherein the motor vehicle dealers augment existing special interest legislation with similar legislation which, but for the sunset year, might neither be proposed by the motor vehicle dealers nor likely be entertained by the Legislature.


8. STAFF OF FLA. S. COMM. ON ECON., COMM’Y & CONS. AFFAIRS, A REVIEW OF SECTIONS 320.27-.31, FLORIDA STATUTES, RELATING TO MOTOR VEHICLE DEALERS AND SECTIONS 320.60-.71, FLORIDA STATUTES, RELATING TO MOTOR VEHICLE MANUFACTURERS, FACTORY BRANCHES, DISTRIBUTORS AND IMPORTERS (Apr. 1988) [hereinafter 1988 SUNSET REVIEW] (on file with committee).

9. In the 1987-1988 interim, Senate President Vogt, Dem., Merritt Island, 1974-1988, directed the Florida Senate Committee on Governmental Operations to review both the sunset and sundown laws, sections 11.61 and 11.611, Florida Statutes, and to evaluate the effectiveness of the reviews. Upon finding such reviews costly and the benefits intangible and unquantifiable, the staff recommended scheduling the sunset and sundown laws themselves for automatic repeal in 1992 subject to prior legislative review and creating statutory criteria to guide such review. Senate Bill 1057, containing those recommendations, passed 31 to 0 in the Senate but died in the House of Representatives Committee on Regulatory Reform. FLA. S. JOUR. 568 (Reg. Sess. May 31, 1988); STAFF OF FLA. S. COMM. ON GOVTL. OPS., A REVIEW OF THE SUNSET AND SUNDOWN LAWS IN FLORIDA 5-7, 89-90 (Mar. 1988) [hereinafter SENATE REVIEW OF SUNSET].
This Article includes an explanation of the sunset review process; a history of the motor vehicle manufacturer-dealer relationship; a history of the Florida statute regulating motor vehicle manufacturers; and a discussion of the relevant economic studies, Federal Trade Commission (FTC) comments, sunset reviews and performance audits published in Florida and other states in the 1980-1988 sunset interim. It also examines the 1980 and 1988 legislative sunset reviews, the recommendations to repeal resulting from those reviews, and the Legislature's response not only to reenact the statute, but, at the urging of the motor vehicle dealers, to increase the state's regulation of motor vehicle manufacturers. Finally, the Article concludes with a recommended resolution of the problem created by the Legislature's repeated response.

I. THE HISTORY OF SUNSET REVIEW IN FLORIDA

The Regulatory Sunset Act of 1976, section 11.61, Florida Statutes,\(^{10}\) established a formal process for the periodic, systematic, legislative review of statutes which regulate professions, occupations, businesses, and industries in Florida.\(^{11}\) The purpose of the review is to examine the need for, and benefits derived from, such regulatory acts to the public. If a review establishes that the public benefits from the regulation, the statute can be reenacted as is or as amended, whichever is appropriate. If, however, a review establishes that there is little or no public benefit or protection derived from a particular state regulatory statute, the statute can be allowed to repeal. The sunset process is unique in that it mandates that the regulation of the occupation end on a specified date unless the Legislature positively affirms the need for continued regulation by passing new legislation.\(^{12}\) The burden of


11. Florida became the second state to enact sunset legislation following Colorado. The concept of a systematic periodic repeal of designated statutes was first proposed by former United States Supreme Court Justice William O. Douglas, then Chairman of the Securities and Exchange Commission. Justice Douglas suggested to President Franklin Roosevelt that every federal agency be abolished after 10 years. Otherwise, Douglas warned, the regulatory agencies would be captured by the very industries they were established to regulate. In 1969, Cornell University Professor Theodore J. Lowi proposed a 5- to 10-year limit on the life of every legislative act which "may ultimately be the only effective way to get substantive evaluation of a program and an agency." STAFF OF FLA. S. COMM. ON GOVT. OPS., MANUAL OF INSTRUCTION FOR THE IMPLEMENTATION OF THE REGULATORY REFORM ACT OF 1976, at 203 (Mar. 1977); FLA. S. COMM. ON GOVT. OPS., 1986 SUNSET/SUNDOWN HANDBOOK AND OTHER LEGISLATIVE REPEALS 2 (Feb. 1987) [hereinafter SUNSET HANDBOOK] (on file with committee).

12. Unlike sunset review, which provides an after-the-fact review of a previously enacted regulatory law, sunrise review requires a before-the-fact review of the alleged benefits of the proposed regulation of an unregulated profession. This relatively new procedure typically re-
proof is on those seeking reenactment of the regulation and not on those seeking its repeal.

**A. The Sunset Process**

The Regulatory Reform Act, as amended, established a cycle not to exceed six years for the automatic repeal and the legislative review of regulatory statutes. The Act provided that programs scheduled for termination under the Act could not be reestablished for more than six years and any program created to regulate the entry into any profession, occupation, business, industry, or other endeavor would be subject to the same automatic six year repeal and review. Sunset reviews were conducted under this Act in 1978, 1979, 1980, and 1981. These included, in 1980, the review of sections 320.60 through 320.70, the statute relating to motor vehicle manufacturers, factory branches, factory representatives, distributors, and importers.

In 1981, the Regulatory Reform Act was repealed and a revision, the Regulatory Sunset Act, was enacted as section 11.61. The reviews required asking questions similar to those included in the sunset review process, including whether there is recognizable harm to the public from nonregulation, and what the potential benefit to the public from regulation would be. A significant feature of sunrise is that the burden is on the group seeking regulation to demonstrate the need for such regulation. In sunset the burden to demonstrate the need for such regulation is on those seeking reenactment of the existing regulation. Critics of the sunset process note that the focus of the process is generally on improving the effectiveness of the existing regulation and not its elimination. Three states, Mississippi, Nebraska, and North Carolina, have nonetheless repealed their sunset laws altogether. THE COUNCIL OF STATE GOVERNMENTS, LEXINGTON, KY., STATE SUNRISE PROGRAMS: DECIDING WHEN TO REGULATE HEALTH PROFESSIONS, NATIONAL CLEARINGHOUSE ON LICENSURE, ENFORCEMENT AND REGULATION 3 (1986).

Four similar bills seeking to implement sunrise review in Florida have been proposed between 1981 and 1986: SB 857 and HB 875 in 1981; CS for SB 199 in 1982; SB 1029 in 1985; and SB 50 in 1986. Although the bills have been acted on favorably by different substantive committees, none has successfully passed both houses and become law. Currently, bills proposing the regulation of previously unregulated professions are handled as any other bill.

In 1987, the Florida Senate Committee on Economic, Community & Consumer Affairs conducted a study to assess the need for sunrise review in Florida. The staff found the number of proposals for the regulation of previously unregulated occupations filed each year to be large and the approach to their evaluation inconsistent and recommended that Chapter 11, Florida Statutes, be amended to include a sunrise section requiring formal legislative review of such bills based on statutorily established criteria. FLA. S. COMM. ON ECON., COMM'Y & CONS. AFFAIRS, AN EVALUATION OF THE NEED FOR SUNRISE REVIEW OF PROPOSED REGULATION OF UNREGULATED PROFESSIONS IN FLORIDA 51-55 (Mar. 1987). Senate Bill 489, reflecting those recommendations, died in the Senate Committee on Rules & Calendar. FLA. S. JOUR. 120 (Reg. Sess. June 6, 1987). Efforts to establish sunrise review in Florida have apparently failed due to the included requirement that bills proposing new professional regulation be filed at least 90 days prior to the first day of legislative session to allow for the required sunrise review.

---

15. 1980 SUNSET REVIEW, supra note 7.
and repeals of the 36 professions, occupations, businesses, and industries originally scheduled for 1982 by the Regulatory Reform Act of 1976 were divided and staggered between the years 1982, 1983 and 1984 by the Sunset Act. A schedule of second reviews was also established for previously reviewed statutes.\textsuperscript{17}

The Regulatory Sunset Act replaced the original ambitious six-year cycle of repeals with a more practical ten-year cycle and required that any newly created regulatory statute also be scheduled for review and automatic repeal within at least ten years of enactment.\textsuperscript{18} Most importantly, the Sunset Act provided that the legislative intent of the Act was to require that the regulation subject to review be found necessary to protect the public health, safety, or welfare and that the police power of the state be exercised only to the extent necessary for that purpose.\textsuperscript{19} The Act again set forth the six criteria which the Legislature is required to consider in determining whether to continue a regulatory program. Those criteria are:

(a) Would the absence of regulation significantly harm or endanger the public health, safety, or welfare?

(b) Is there a reasonable relationship between the exercise of the police power of the state and the protection of the public health, safety, or welfare?

(c) Is there a less restrictive method of regulation available which would adequately protect the public?

(d) Does the regulation have the effect of directly or indirectly increasing the costs of any goods or services involved and, if so, to what degree?

(e) Is the increase in cost more harmful to the public than the harm which could result from the absence of regulation?

(f) Are any facets of the regulatory process designed for the purpose of benefitting, and do they have as their primary effect the benefit of, the regulated entity?\textsuperscript{20}

Stated differently, the primary question answered by sunset review of a regulatory statute is, "Does the law subject to review protect the public from serious potential harm to such an extent that if the statute was repealed, the public’s health, safety, or welfare would be threatened?"

If the answer is positive, then the statute must be evaluated to determine whether it is crafted to address the potential for serious public

\begin{itemize}
\item \textsuperscript{17} Id.
\item \textsuperscript{18} FLA. STAT. § 11.61(4) (1987).
\item \textsuperscript{19} Id. § 11.61(2)(1).
\item \textsuperscript{20} Id. § 11.61(6).
\end{itemize}
harm in the least restrictive manner and at the least possible cost. If the answer is negative, however, the chapter must be allowed to repealed.

B. Senate and House Sunset Reviews

The two Houses of the Legislature have conducted sunset review differently since 1979. In 1978 and 1979, the first two years in which sunset reviews were conducted, the Legislative Committee Staff of the Senate and House Governmental Operations Committees split the review of statutes scheduled for review. This resulted in a single sunset review of each statute. After 1979, both Houses began conducting simultaneous independent sunset reviews, resulting in two sunset reviews of a single statute. The same year, seeking to make the best use of the expertise of the existing Legislative Committee Staff, the Senate President assigned sunset reviews to the substantive senate committee charged with oversight of the particular law subject to repeal. The reviews are now assigned as interim projects the year before the scheduled repeal. The senate committee to which a review has been assigned has routinely prepared and published a formal sunset report prior to the commencement of the legislative session. In preparation of each report, the senate committee sends a questionnaire to the involved state regulatory agency and interested state associations, and conducts workshops to identify developing issues. The final sunset report generally includes findings of facts deduced from the responses to such questionnaires and information obtained in the workshops, conclusions based on those findings, less restrictive alternatives, if any, to the present method of regulation, and recommendations based on the offered alternatives. Such recommendations are typically elevated to a Proposed Committee Bill (PCB) which plays host, after its public presentation, to amendments proposed by interested parties and by the involved state regulatory agency familiar with any inadequacies or improprieties in the current statute. The contents of both the report and the accompanying PCB remain confidential until presented to the committee membership at a formal public committee meeting. The confidentiality, intended to circumvent lobbying by interested parties, allows staff recommendations to be perceived as “pure,” uninflu-

22. Id. at 47-48.
23. Id. at 56.
24. Id. at 46-47.
25. Id. at 51-54.
26. Id. at 49, 54, 65.
enced by parties with a stake in the outcome of the review process. In the House of Representatives, sunset reviews are typically assigned to the House Regulatory Reform Committee, created in 1979 by then Speaker Hyatt Brown. It was believed that a new committee could more objectively assess the effectiveness of the reviewed program. The House of Representatives, although conducting sunset reviews as mandated, has less frequently reduced committee findings to published pre-session sunset reports and did not issue a pre-session report related to either the 1980 or 1988 sunset review of motor vehicle manufacturers.

Although the House Regulatory Reform Committee also issues questionnaires and conducts workshops, in the past, when the staff had concluded that a law should be allowed to repeal, it typically issued neither a report nor a bill analysis. Because a statute scheduled for sunset review will repeal automatically, a bill is only necessary to reenact the statute, not to repeal it. The Regulatory Reform Committee, unlike the involved senate committees, encourages early participation by parties interested in the outcome in the sunset review process and regularly discloses its unfolding deliberations. Because the Regulatory Reform Committee considers and accommodates special interest proposals prior to converting staff recommendations to a PCB, House sunset bills are more frequently perceived as reflecting political influence than are Senate sunset bills. In that way, the sunset process is compromised, or subject to abuse, to the extent that the House recommendation or PCB is not constrained by the responses to the six criteria of section 11.61, Florida Statutes.

The sunset process is abused again when the sunset recommendation reflects the responses to the criteria, but the Legislature ignores

---

27. Id. at 64-65.
28. Id. at 56. Although all sunset reviews are assigned by the Speaker of the House, the majority are assigned to the House of Representatives Committee on Regulatory Reform. The Committee Chairman, at his discretion, assigns the reviews to one of three subcommittees. The House of Representatives Committee on Regulatory Reform has subcommittees concerning business regulation, professional regulation, and technical and consumer resources. All bills resulting from sunset review are ultimately heard by the full Committee, regardless of subcommittee action.
29. Id. at 46-47.
30. Id. at 47-48, 59-60. In 1988 the House of Representatives Regulatory Reform Committee issued a written post-session sunset review dated July 1, 1988, which could more properly be characterized as a summary than as a recommendation.
31. Id. at 48.
32. Id. at 58.
33. Id. at 58, 64-65. For that reason, while the staff of the involved senate committee and House of Representatives Regulatory Reform Committee may arrive at the same general conclusions pursuant to sunset review, the PCB's of the Senate and House committees may not resemble one another.
that recommendation. The Legislature has contravened sunset recommendations in this way several times. For instance, in the 1983-1984 interim, the staff of the Senate Economic, Community and Consumer Affairs Committee conducted a sunset review of chapter 310, Florida Statutes, relating to harbor pilots, piloting, and pilotage. The review focused on section 310.061, which restricted to ninety-three the number of pilots to be licensed in thirteen listed Florida ports and directed the Florida Board of Pilot Commissioners to determine the number of pilots necessary for each port based on the Board’s determination of supply and demand for piloting services and the public’s interest in maintaining safe and efficient services. The staff found that the established quota statutorily limiting the number of pilots that may be licensed in Florida operated to establish and maintain a monopoly. That monopoly, in turn, was found to stifle competition and result in artificially high pilotage rates with no accompanying public benefit. The staff concluded that the state’s regulation of pilots was more restrictive than necessary to protect the public from incompetent pilots. Rather than use quotas or a board-determined level of supply and demand, it was suggested that licensure requirements could be developed not only to insure that only competent individuals are licensed as pilots and deputy pilots, but that all qualified individuals would be eligible. As a result, the staff recommended that the language establishing the restrictive quota and board determination be deleted from the chapter and that two qualification standards be created providing a licensure exam for pilots and certification exam for deputy pilots. This, it was reasoned, would broaden the pool from which candidates for pilot licenses and deputy pilot certificates could be chosen, increase competition within the profession, and allow piloting rates to be set by the marketplace to the benefit of the public, rather than by the quota or the Board of Pilot Commissioners to the benefit of harbor pilots. The staff’s recommendation was guided by the criteria of section 11.61. The Legislature, however, not only left untouched the anti-competitive quota and board determination, but elected not to respond to the recommendation that exams be developed to both as-

34. STAFF OF FLA. S. COMM. ON ECON., COMM’Y & CONS. AFFAIRS, A REVIEW OF CHAPTER 310, FLORIDA STATUTES, RELATING TO PILOTS, PILOTING, AND PILOTAGE (Dec. 14, 1983) [hereinafter PILOT SUNSET REVIEW].
36. PILOT SUNSET REVIEW, supra note 34, at 48.
37. Id. at 67-68.
38. Id. at 65.
sess competency to insure the public against unqualified pilots and to increase the pool of harbor pilots to the benefit of the public.\textsuperscript{40}

In 1985, the Legislature contravened a sunset recommendation. In the 1984-1985 interim, the Senate Committee on Economic, Community and Consumer Affairs conducted sunset reviews of chapter 476, Florida Statutes, relating to barbering, and chapter 477, Florida Statutes, relating to cosmetology.\textsuperscript{41} Upon review, the staff found that individuals who offer hair cutting and styling services no longer posed a significant threat to those seeking such services in that original tools such as straight razors and marcel irons had been subsequently replaced by safer tools. Noting that complaints against such practitioners based on misuse of tools or mechanical applicators were almost nonexistent,\textsuperscript{42} the staff determined that the principal remaining threat to the public posed by either the practice of barbering or cosmetology was the application to the hair of chemicals used to color, wave, or relax the hair.\textsuperscript{43} Certain concentrated chemicals, it was found, may produce primary irritations or allergic reactions and result in complications. As a result, the staff concluded that the reviewed statutes provided for the exercise of police power "far beyond that which is necessary to protect the public's health, safety, and welfare,"\textsuperscript{44} as contemplated by section 11.61(2)(a). Accordingly, the staff recommended that chapters 476 and 477 be repealed and that a regulatory law limited to "[h]air [c]hemical [a]pplicators" be enacted to protect the public from the application of certain caustic chemicals to the hair for aesthetic reasons by persons for compensation.\textsuperscript{45} The Legislature, in response to heavy lobbying by barbers and cosmetologists, not only disregarded the recommendation to allow both chapters to repeal, but significantly expanded the state regulation of both barbers and cosmetologists. Further, the Legislature elected not to address what had been identified as the only significant threat of harm, chemical hair applications.\textsuperscript{46} In fact, as a result of the sunset process, several newly

\begin{itemize}
\item \textsuperscript{41} \textit{Staff of Fla. S. Comm. on Econ. Comm'y & Cons. Affairs, A Review of Chapter 476, Florida Statutes, Barbering and Chapter 477, Florida Statutes, Cosmetology} (Jan. 1985).
\item \textsuperscript{42} \textit{Id.} at 104.
\item \textsuperscript{43} \textit{Id.} at 101-02.
\item \textsuperscript{44} \textit{Id.} at 103.
\item \textsuperscript{45} \textit{Id.} at 110-11.
\end{itemize}
regulated specialists were included within the practice of cosmetology, including manicurists, pedicurists, and those who administer facials. In 1988, the Legislature contravened still another sunset recommendation and incorporated into the sunset bill a bill that had repeatedly died in previous sessions. In the 1986 and 1987 legislative sessions, similar bills creating the Interior Designers Licensing Act were filed in both Houses. The bills provided for the regulation of interior designers by the Department of Professional Regulation and established education, experience, and examination prerequisites to licensure, as well as continuing education requirements for renewal and reactivation. The bills also suggested fees and provided grounds for disciplinary action. In 1986, Senate Bill 1226 died in committee and House Bill 1127 died on the calendar. In 1987, both Senate Bill 1105 and House Bill 741 died on the calendar. A bill analysis of the Senate Bill commented "this is a title act and does not prevent anyone from practicing interior design, but only protects the use of the title 'interior designer.'" The focus of the bill on the protection of the use of the title would not appear to coincide with the public intended to be protected by the Sunset Act. In 1988, a bill identical to those filed in 1986 and 1987, House Bill 94, was filed in the House.

In the 1987-1988 interim, the staff of the Senate Committee on Economic, Community and Consumer Affairs conducted a sunset review of chapter 481, Part I, Florida Statutes, relating to the practice of architecture. As a result of that review, the staff found that while a potential for harm to the public would exist if the statute were allowed to repeal, certain provisions, such as the requirement that at least one principal officer of a corporation or partner of a partnership be an architect, to be overly restrictive with no corresponding benefit to the public. The staff, therefore, recommended that the statute be

47. The rationale for placing the burden on the professional group seeking regulation is based on the phenomenon that requests for regulation are typically initiated not by consumers seeking protection from abuse, but by the practitioners themselves seeking the benefits of regulation such as reduced competition due to restrictive entry standards and the resulting increase in the status of the profession. B. Shimberg & D. Roederer, Occupational Licensing: Questions a Legislator Should Ask the Council of State Governments 3 (Mar. 1978).
52. Id. at 88.
53. Id.
reenacted with minor amendments.\textsuperscript{54} No reference was made in the sunset review to the practice of interior design. Accordingly, neither the Senate nor the House bills resulting from the 1987-1988 sunset reviews of the practice of architecture originally referred to the practice of interior design.\textsuperscript{55} Both sunset bills, however, were amended as a result of an effective interior designer lobby to include the substance of the bills providing for the regulation of interior designers that had been unsuccessfully filed in both houses in 1986 and 1987, and in the House in 1988.\textsuperscript{56} Not only were education, experience, and examination requirements established and fees imposed, but because the bill creating an interior designer licensing act was amended into the sunset bill, the Board of Architecture was renamed the Board of Architecture and Interior Design and an interior design advisory board was created to advise the Department. The sunset bill, therefore, a "must-pass"\textsuperscript{57} bill, intended to reflect the scrutiny of existing regulatory statutes, was loaded down with a payload that subjected a previously unregulated occupation, interior designers, to regulation. The sunset bill, House Bill 1502, passed 116 to 0 in the House\textsuperscript{58} and 34 to 0 in the Senate.\textsuperscript{59} The 1988 sunset review of the motor vehicle manufacturer licensing statute, however, offers the most egregious example of this form of abuse.\textsuperscript{60}

While the focus of this Article is the Legislature's response to the 1980 and 1988 sunset recommendations to allow the motor vehicle manufacturers licensing statute to repeal, a history of the motor vehicle manufacturer-dealer relationship both eases understanding of the Legislature's otherwise perplexing response to such recommendations and points toward a resolution of the problem created by such response. The Article, therefore, is prefaced with a brief history of the motor vehicle manufacturer-dealer relationship in the United States and the dealers' journey for relief through various forums until their arrival in the state legislatures.

\textsuperscript{54} Id. at 91-95.
\textsuperscript{55} Fla. SB 127 (1988); Fla. HB 1502 (1988).
\textsuperscript{56} See Fla. HB 94 (1988).
\textsuperscript{57} The sunset process is perceived by some to encourage circumvention of the methodical, deliberative nature of the legislative process in that it creates a "crisis" situation; a regulation faces extinction absent legislative action. A provision that warrants further study, therefore, or is altogether an inappropriate subject of regulation, may elude the safeguards of the legislative process by its inclusion in a sunset bill. \textit{Senate Review of Sunset}, \textit{supra} note 9, at 2.
\textsuperscript{58} Fla. H.R. Jour. 1525 (Reg. Sess. June 6, 1988).
\textsuperscript{60} The Senate Review of Sunset focused on a cost-benefit analysis of the sunset process and not instances of abuse of the process.
C. A History of the Motor Vehicle Manufacturer-Dealer Relationship

The goals and interests of motor vehicle manufacturers and dealers have been counterposed since the inception of their relationship. While both want to sell motor vehicles, manufacturers want to retain residual control of their dealers and dealers want to wrest more independence from their manufacturers. Dealers, bowed by manufacturer dominance, have sought relief from the "onerous" terms of their franchise agreements over the years in various forums: the courts, the state legislatures, Congress, and finally again, and successfully, the state legislatures. Conversely, manufacturers have emerged victorious in all but the last forum; their dealer franchise agreements are presently subject to varying degrees of regulation in forty-six states.61

The manufacturer's dominance of the dealer is rooted in the early methods of motor vehicle distribution. Originally, manufacturers operated local dealerships from their central offices, but with increased production, this method of distribution was no longer cost-effective. Soon, the franchise system evolved offering a preferred method of

distribution which decreased the costs and irritations associated with an integrated system. Dealers, originally agents of the manufacturer, evolved into quasi-independent sellers. The franchise system, too, however, soon revealed inherent problems, most of which were manifestations of the disparity in the bargaining power of the manufacturers and the franchisees. Manufacturers, whose success or failure rested solely on the sales of their dealers, sought to retain supervisory control over their retail operations in many ways, including through the purposeful manipulation of the motor vehicle supply, the establishment of other dealers in the same area, and retention of the unconditional right to cancel a dealer's franchise agreement. Manufacturers also generally prohibited their dealers from transferring or selling ownership of the franchise without the permission of the manufacturer. Manufacturers forced their dealers to accept unordered vehicles but were exempt from liability for failure to deliver vehicles as promised. Despite these lopsided terms, applicants for franchises were not scarce. Dealers responded to manufacturers' attempts at control, especially as manifested in "wrongful" termination of the franchise agreement, in several ways.

First, individual dealers whose franchise agreements had been cancelled sought relief in the courts, arguing that the termination was a breach of the terms of a binding contract, which would enable the dealer to recover damages. The courts initially rejected the argument by finding that both "lack of mutuality" and "indefiniteness" rendered the franchise agreement void and unenforceable as a contract. In S.B. McMaster, Inc. v. Chevrolet Motor Co., however, the court began a pattern of judicial noninterference, concluding that the manufacturers "are entirely within their rights in so framing their contract as to carry out their intention. The intention of the parties in the absence of any ground of public policy must prevail, and their intention must be gathered from the terms of the contract itself." The court, though sympathizing with the plight of "the comparatively helpless dealer at the mercy of the manufacturer," nonetheless held, "we can-

---

65. 3 F.2d 469 (E.D.S.C. 1925).
66. Id. at 473.
not make contracts for parties or protect them from the provisions of contracts which they have made for themselves. Dealers doubtless accept these one sided contracts because they think that the right to deal in the product of the manufacturer, even on his terms, is valuable to them.’”

Commentators criticized this early application of contract law by the courts. Later, in *Buggs v. Ford Motor Co.*, the court found that the franchise agreement constituted a valid contract, but one subject to cancellation provisions that terminated all legal obligations arising under it. Either way, the dealers were losing. When they responded by asking the courts to at least impose a condition of good faith upon the manufacturer’s power to terminate, the court in *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.*, siding with the manufacturer, refused. The court reasoned that “the situation arises from the strong bargaining position which economic factors give the great automobile manufacturing companies: the dealers are not misled or imposed upon, but accept as nonetheless advantageous an agreement in form bilateral, in fact one-sided.”

While individual motor vehicle dealers were losing in the courts, motor vehicle dealers’ organizations were lobbying state legislatures to enact remedial legislation regulating manufacturer conduct. The first state regulation of motor vehicle manufacturers was drafted by the Wisconsin Automotive Traders Association (WATA), was enacted by the Wisconsin Legislature in 1935, and was amended in 1937 to require that all motor vehicle manufacturers be licensed to do business in the state; to label as wrongful certain conduct, including unfair cancellation of the dealer’s franchise; and to impose a primary sanction of license revocation. Other state dealer associations, with assistance in both drafting and strategy from the WATA, successfully pressed for similar legislation in their states, including Florida in 1941. However, only a small number of states enacted laws regulating motor vehicle manufacturers. Dealer associations in some states had not pushed for such state regulation of manufacturers because

67. *Id.*


69. 113 F.2d 618 (7th Cir.), cert. denied, 311 U.S. 688 (1940).

70. 116 F.2d 675 (2d Cir. 1940).

71. *Id.*


73. S. MCAULAY, *supra* note 63, at 31-43.

74. Ch. 20236, Laws of Fla. (1941) (current version at Fla. Stat. §§ 320.60-.70 (1987)).
they either did not believe that governmental regulation was appropriate or that manufacturer and dealer differences merited incurring manufacturer hostility.\textsuperscript{75}

Unsatisfied with their limited and varied success in the state legislatures, dealers, through the National Automobile Dealers Association (NADA), sought to blame existing unfair trade practices on manufacturer dominance. The dealers' association, advocating federal legislation to redress the power imbalance between dealers and manufacturers and correct the resulting inequities, petitioned the Wisconsin Legislature to introduce a NADA resolution directing the FTC to investigate manufacturers' policies.\textsuperscript{76} The resulting FTC investigation, however, surprisingly attacked the dealers for conduct which seriously restricted competition, such as price-fixing, which was unrelated to manufacturer dominance. The FTC heaped praise upon the manufacturer, finding:

Active competition among automobile manufacturers, although some of them have made very large profits, gave to the public improved products, often at substantially reduced prices . . . . Such competition has been the basis for the remarkable growth of the industry. Consumer benefits from competition in the automobile-manufacturing industry have probably been more substantial than in any other large industry studied by the Commission.\textsuperscript{77}

The FTC recommended only moderate limits on the vertical power it found to be necessarily concomitant with the manufacturer's size. The FTC's investigation and report, however, were not followed by legislation. In addition, a proposed Motor Vehicle Act of 1940, drafted in 1939 by the Executive Committee of NADA, was rejected by a majority of the dealers. Commentators have partially based the sudden dealer-nonsupport of both the FTC Report recommendations and NADA's proposed federal bill on the dealer criticisms contained in the FTC report and the fact that territorial security clauses had been removed from NADA's bill.\textsuperscript{78}

In the early 1950s, a post-war buyers' market increased dealer competition. Motor vehicle manufacturers maintained control over deal-

\textsuperscript{75} S. Macaulay, \textit{ supra} note 63, at 34.
\textsuperscript{76} Id. at 38.
\textsuperscript{78} C. Hewitt, \textit{Automobile Franchise Agreements} 110 (1956); J. Palamountain, \textit{supra} note 64, at 140 (dealers also feared federal regulation of manufacturers would lead to similar regulation of dealers).
ers' quotas with increased threats of termination. These threats renewed dealer interest in protective federal legislation and generated several Congressional hearings.\textsuperscript{79} The dealers prevailed and the hearings collectively resulted in the Federal Automobile Dealer's Day in Court Act of 1956 (DDCA).\textsuperscript{80}

The DDCA provides a civil cause of action for a dealer damaged by the manufacturer's failure "to act in good faith in . . . terminating, canceling, or not renewing the franchise with said dealer."\textsuperscript{81} The primary purpose of the Act was "to correct the abuses of arbitrary termination and nonrenewal"\textsuperscript{82} and to impose a condition of good faith where the courts, in decisions such as Bushwick,\textsuperscript{83} would not. The Act in its final form defined "good faith" as:

\begin{quote}
[the] duty of each party to any franchise . . . to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: Provided, that recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.\textsuperscript{84}
\end{quote}

This definition rendered the DDCA useless as a dealer remedy. Ten years after the federal law was enacted, one study concluded that "the dealers have been highly unsuccessful in recovering money from the manufacturers as a result of filing complaints under this act."\textsuperscript{85} Their lack of success was attributed to the courts' narrow application of the DDCA to instances in which the dealer could show not general unfairness or arbitrariness, but coercion or intimidation.\textsuperscript{86}

\begin{footnotes}
\item 82. Id. at 6.
\item 83. See supra note 70 and accompanying text.
\item 85. S. Macaulay, supra note 63, at 93.
\item 86. See, e.g., Ed Houser Enter. v. General Motors Corp., 595 F.2d 366 (7th Cir. 1979); Kotula v. Ford Motor Corp., 338 F.2d 732 (8th Cir. 1964), cert. denied, 380 U.S. 979 (1965); Kessler, supra note 63, at 1179.
\end{footnotes}
The narrow application of the DDCA continues today and was commented upon by the court in *Quarles v. General Motors Corp.* 87

As "Congress' initial effort at regulation of the relationships between automobile manufacturers and their dealers", the DDCA admittedly falls far short of providing a basis for relief in every case of unfair conduct, including many cases which "might well call for remedial action."

... To demonstrate an absence of "good faith" within the meaning of the DDCA, therefore, it will not suffice to show that a dealership's termination was arbitrary, or even unfair. It must be shown that defendant coerced or intimidated plaintiff, and that the coercion was designed to achieve some objective which was improper or wrongful ... Where there is no evidence of such wrongful coercion or intimidation by defendant, as those terms have been narrowly construed, there can be no recovery under the DDCA, "even if the manufacturer otherwise acted in 'bad faith' as that term is normally used." 88

To appreciate subsequent state legislation, it is useful to scrutinize the definition of good faith as originally drafted. The early language required the manufacturer to act in a "fair, equitable, and nonarbitrary manner so as to guarantee the dealer freedom from coercion ... or intimidation, and in order to preserve and protect all the equities of the automobile dealer which are inherent in the nature of the relationship between the automobile dealer and automobile manufacturer." 89 This definition provided more than freedom from coercion. It provided dealers protection from unfair, inequitable, and arbitrary manufacturer conduct. Manufacturers argued, however, that such language would sharply swing the balance of power toward the dealer, since even an unmotivated dealer with poor sales may be found to have "equities." The definition would also build for dealers "a sanctuary from the rigors of competition" at the cost of denying consumers the benefits of competition. 90 The equities language was removed to prevent a construction of "good faith" inconsistent with antitrust principles. Therefore, although the DDCA worked to more evenly balance the contractual scales between the manufacturer and the dealer with

88. Id. at 1040-41 (citations omitted).
90. S. MACAULAY, supra note 63, at 61-63.
more dealer protection, it left the dealers unsatisfied and refocused on the state legislatures.

Section 1225 of the DDCA reads, "[T]his chapter shall not invali-date any provision of the laws of any State except insofar as there is a direct conflict between an express provision of this chapter and an express provision of State law which can not be reconciled." This section has been construed as an invitation for supplemental state regulation of the manufacturer-dealer relationship and to date, forty-six states, including Florida, have responded by enacting legislation which regulates the relationship between motor vehicle manufacturers and dealers.

D. Florida's Motor Vehicle Manufacturer Licensing Statute

In Florida, regulation of motor vehicle manufacturers, factory branches and representatives, distributors, and importers began in 1941 with the passage of chapter 20236, Laws of Florida. The statute, unlike the Federal Dealer Day in Court Act of 1956, did not attempt to regulate the manufacturer-dealer franchise relationship. Instead, it simply required manufacturers and factory branches and representatives to obtain a license in order to engage in business in Florida. This requirement did not prove to be a significant entry barrier. The State Motor Vehicle Commissioner was authorized to grant, deny, suspend, or revoke licenses after a public hearing. Persons convicted of violating the provisions of the act were guilty of a misdemeanor and subject to fine, imprisonment, or both. The Commissioner was authorized to inspect the relevant files of a licensee if a written complaint was made against such licensee.

Early amendments to the statute were infrequent and of relatively minor consequence. In 1951, chapter 26869 provided that proceeds from license application and renewal fees were to be credited to the general revenue fund rather than to the counties. In 1959, the statute

93. See supra note 61 and accompanying text.
94. Ch. 20236, Laws of Fla. 103 (1941) (current version at FLA. STAT. §§ 320.60-.70 (1987)).
95. Id. at 104.
96. Eckard, The Effects of State Automobile Dealer Entry Regulation on New Car Prices, 24 ECON. INQUIRY 223, 224 n.4 (1985). The initial license fee was only $5. Ch. 20236, § 3, Laws of Fla. 103, 104 (1941).
97. Ch. 20236, § 3, Laws of Fla. 103, 104-05 (1941) (current version at FLA. STAT. § 320.62 (1987)).
98. Id. at 106.
was amended to authorize disciplinary action to an applicant or licensee who sold, exchanged, or rented a motorcycle with more than five brake horsepower and with the knowledge that it was intended for use by a holder of a restricted driver's license. In 1965, the Department of Motor Vehicles was created under the control of the Governor and the Cabinet and the Director of the Department was given all the powers and duties formerly vested in the Motor Vehicle Commissioner. Under the Governmental Reorganization Act of 1969, the Department of Motor Vehicles was transferred to the Department of Highway Safety and Motor Vehicles (DHSMV).

It was not until 1970 that the statute, in addition to perfunctory and conforming amendments, was amended to regulate a manufacturer's franchise relationship with its dealers. Section 320.641, Florida Statutes, was created to prohibit "unfair" cancellation by the manufacturer of a dealer franchise agreement. Section 320.641 required a manufacturer to give ninety days notice of its intent to cancel the dealer's franchise agreement, entitling a dealer who files a complaint with the DHSMV within that time to a hearing for a determination of unfair discontinuation. Franchise agreements continued in effect until the Department rendered a final determination and prevailing dealers were entitled to attorneys' fees and costs. The "equities" and "unfair" language included in this section resembles the language Congress rejected in the final draft of the DDCA to prevent any construction inconsistent with antitrust principles.

Section 320.642, was created to require the Department to deny an application for a dealer license in any community or territory where the manufacturer's presently licensed franchise dealer or dealers were complying with the terms of the franchise agreement and were providing adequate representation for the manufacturer. The burden of showing inadequate representation was expressly placed on the manu-

100. Ch. 59-351, § 4, 1959 Fla. Laws 1242, 1243-44 (amending Fla. Stat. § 320.64 (1987)).
103. Fla. Stat. §§ 320.60-.70 (1977). Such amendments resulted in an increase of the licensing fee from $5 to $10, a provision for hearing procedures and procedures for reinstatement, and a seven member advisory council consisting of representatives of the industry and the public, and the Director of the Division of Motor Vehicles to advise and assist the Department in administering the law. The Department was also authorized to seek injunctive relief in circuit court to restrain persons from engaging in the motor vehicle manufacturing business in the state without a license. Fla. Stat. § 320.695 (1977).
105. Id. § 320.641(5).
106. Id. § 320.642.
facturer. Remarkably, as a result of these two provisions, not only could the state restrict a manufacturer's ability to end its business relationship with an existing dealer, it could also restrict a manufacturer's establishment of new dealerships.

In 1976, Florida Administrative Code Rule 15C-1.008 was promulgated providing that the Director of the DHSMV must notify all presently franchised dealers of the same line-make in the "territory or community" of a manufacturer's proposed dealership and of their right to a protest hearing. "Territory or community" was construed by the DHSMV to mean (1) a county in which the proposed point was to be located; (2) an adjoining or adjacent county; and (3) surrounding counties when a new point was proposed in a county in which there were no existing dealers of like franchise.

Department policy provided that if no protests were received within thirty days of notice, the application process continued. If a dealer protested within thirty days or filed an advance protest pursuant to the rule, the Department was authorized to conduct a hearing wherein the manufacturer was required to prove either that the existing dealer was not complying with the terms of the franchise agreement or had inadequately represented the manufacturer. The restrictions contained in sections 320.641 and 320.642 were the seeds of the motor vehicle manufacturer licensing statute that were to become commonly referred to as the franchise provisions. Those provisions allow the state to address issues which are already included as negotiated terms in the private contract or franchise agreement and which form the legal basis of the manufacturer-dealer relationship. Another such provision, also enacted in 1970, required manufacturers to reasonably compensate dealers for repairs performed pursuant to its warranty, and for the cost of delivery and new motor vehicle preparation services. Further, the Director of the Division of Motor Vehicles was empowered to impose civil fines for violations, and dealers suffering pecuniary loss were entitled to treble damages.

107. Id. The restriction originally surfaced in the Florida Statutes as a ground for disciplinary action in 1970, ch. 70-424, § 9, 1970 Fla. Laws 1269, 1279, and was isolated and elevated to a single paragraph section that same year which directed the legislative statutory revision service to conform all language to that of the Reorganization Act of 1969. Ch. 70-439, § 1, 1970 Fla. Laws 1321, 1321.


109. Id.

110. 1988 Sunset Review, supra note 8, at 128.


112. Id. § 320.698.

113. Id. § 320.697.
In 1977, the Act was amended to authorize the Director of the DHSMV to conduct hearings in accordance with the provisions of chapter 120, \(^{114}\) and to provide that the Director's rulings would constitute final agency action. \(^{115}\) This allowed dealers to obtain an administrative hearing on the issues of unfair cancellation pursuant to section 320.641, or inadequate representation pursuant to section 320.642. Typically, the DHSMV would relinquish jurisdiction of the issue to the Department of Administrative Hearings, which would conduct a hearing and make a recommended final order usually adopted by the DHSMV. This was the state of the statute regulating motor vehicle manufacturers when the statute was subject to sunset review in 1980.

**E. The 1980 Sunset Review**

In 1980, sunset review of sections 320.60-.70, Florida Statutes, was conducted pursuant to chapter 76-168, Laws of Florida, and was assigned to the Senate Transportation Committee and to the House Regulatory Reform Committee. In 1988, sunset review of the statute was conducted pursuant to chapter 81-318, Laws of Florida, and was ultimately assigned in the Senate to the Economic, Community and Consumer Affairs Committee and again in the House to the Regulatory Reform Committee. The Senate Transportation Committee in 1980, and the Senate Economic, Community and Consumer Affairs Committee in 1988, prepared and published a formal sunset review analysis of the statute. \(^{116}\) The House Regulatory Reform Committee conducted less formal reviews in 1980 and 1988 and never made a pre-session recommendation. \(^{117}\) The findings, conclusions, and recommendations in the Senate Transportation Committee and the Senate Economic, Community and Consumer Affairs Committee reports, therefore, will be construed as representative of those made to the Legislature in 1980 and 1988, respectively. \(^{118}\)

In preparation of the 1980 Sunset Review, the Senate Transportation Committee Staff sent questionnaires regarding the manufacturer licensing statute to four motor vehicle manufacturers and to the Florida Automobile Dealers Association. \(^{119}\) Failing to receive any re-

---

114. *Id.* § 320.665.
115. *Id.*
117. The House Regulatory Reform Committee published a three volume report indicating the results of the sunset reviews conducted by the Committee during the 1988 legislative session on July 1, 1988, after the 1988 Legislature had adjourned. According to the staff, no pre-session recommendation relating to motor vehicle manufacturers was ever made.
119. *Id.* at 5.
sponse, the staff reviewed several manufacturers' Sales and Service Agreements (franchise agreements) and interviewed one former and three current dealers.\textsuperscript{120} From the review of the manufacturers' franchise agreements, the staff was provided insight into the manufacturers' perception of the role of their franchised dealers. Such franchise agreements expressly stated that the sale of motor vehicles is a very competitive and high risk venture and that a cooperative effort on the part of the manufacturer and the dealer is necessary for the venture to succeed.\textsuperscript{121} Such agreements typically provided that dealers are responsible for maintaining an aggressive sales program and providing acceptable service to the customer.\textsuperscript{122} For instance, one manufacturer's contract provided that "[b]ecause the Company relies heavily on its dealers for success, it reserves the right to cease doing business with any dealer who is not contributing to such programs."\textsuperscript{123}

From the interviews with dealers, the staff also gained insight into the rationale behind the enactment of the motor vehicle manufacturer licensing statute, or more specifically, the franchise provisions. The dealers indicated that the franchise provisions were necessary to afford dealers leverage against manufacturers which had historically treated dealers unfairly.\textsuperscript{124} The dealers especially argued the need for prohibitions against a manufacturer's "unfair" cancellation of a dealer's franchise agreement and against a manufacturer's establishment of an additional franchised dealer in an area currently represented.\textsuperscript{125} Those interviewed indicated that dealers had been reluctant to object to undue manufacturer pressure for fear of losing their franchise. A franchise, it was stressed, represented a large financial investment in terms of property, buildings, motor vehicles and parts inventory, and personnel training expenses.\textsuperscript{126} The dealers indicated that "the public also derives benefits from some of those provisions identified as directly benefitting dealers."\textsuperscript{127} For instance, if manufacturers were able to discontinue a franchise at will, establish an additional dealership where an existing franchise holder was providing adequate representation, or force dealers to accept inventory in excess of that which the dealer ordered, the public, as well as incumbent dealers, would be adversely affected in that an unrestrained manufac-

\begin{thebibliography}{9}
\bibitem{120} Id. at 33.
\bibitem{121} Id. at 33-34.
\bibitem{122} Id. at 34.
\bibitem{123} Id.
\bibitem{124} Id. at 33.
\bibitem{125} Id. at 36.
\bibitem{126} Id. at 33.
\bibitem{127} Id. at 36.
\end{thebibliography}
turer would overload the market area. As a result, dealers would fail to attract customers in sufficient quantity so as to enjoy a reasonably profitable venture and would be forced to reduce expenses. When a dealer is forced to reduce expenses, the service department is typically immediately scaled down due to its costly service personnel and parts inventory. Consequently, the customer would be adversely affected by the reduced quality of services.

The staff, however, rejected the dealers' argument that the public benefits, even secondarily, from the additional dealer restrictions for two reasons. First, it found the argument to be "contrary to the generally accepted view that the public benefits from a competitive market place." The staff reasoned that a customer would benefit from several dealers rather than a single dealer in a market area to the extent that resulting competition would reduce the price of a new motor vehicle. The staff concluded:

[j]ust as with other commercial ventures, the better managed dealerships should prosper, while less efficient operations could lose business and eventually fail. In such an event, the public would gravitate to the better operated dealerships where they would be able to receive quality sales and service at an economical cost.

The staff found that its conclusion that the entry restriction primarily benefited new motor vehicle dealers and not the public was buttressed by the findings in two cases wherein section 320.642 had been specifically litigated. Second, the staff was unconvinced by the dealer argument that, unrestricted by the additional dealer provision, manufacturers would be inclined to overload market areas to the detriment of both the dealers and the public. The staff indicated that a manufacturer, prior to supporting a dealer license application for an area already served by one of its franchised dealers, typically conducts a sophisticated market analysis upon which such decision is based. The staff found nothing that would induce a manufacturer to promote several struggling and inefficient dealers in a single market area. Instead, it found that the Department had approved twenty-two of the twenty-four additional dealer applications filed in the previous five years. In other words, the manufacturer had almost always demon-

128. Id.
129. Id.
130. Id. at 36-37.
131. Id. at 37.
132. Id.
133. Id.
134. Id.
strated that its existing franchised dealer was inadequately representing the manufacturer in the market area and that an additional franchise could be established as proposed without overloading that area.\textit{135}

A reading of the franchise provisions convinced the staff that a majority of the provisions are "primarily concerned with supporting the dealer in his relationship with the manufacturer."\textit{136} The staff specifically found that:

The sections relating to notice prior to the discontinuation or cancellation of a franchise; proof of need by manufacturers for additional franchises; compensation to dealers for warranty work; authorization for dealers to seek injunctions; authorization to recover treble damages in case of pecuniary loss; and the prohibition against forcing the acceptance of unordered inventory offer direct safeguards to the dealer that allow him protection against actions of a manufacturer that he feels are detrimental.\textit{137}

The staff concluded that two grounds for disciplinary action of a manufacturer’s license benefit the public: 1) the prohibition against manufacturer coercion of a dealer to provide installment financing through a specific lending institution, and 2) the prohibition against a manufacturer’s refusal to deliver to the dealer vehicles and parts within a reasonable time and in an adequate quantity where the manufacturer has publicly advertised the availability of such vehicles and parts.\textit{138} In the first instance, the public was found to have benefited to the extent a new motor vehicle purchaser is not forced to finance the new motor vehicle at an unreasonably high rate. In the second instance, the public was found to have benefited to the extent the provision results in a reasonable assurance that the vehicle or part sought is available as represented.\textit{139}

The staff concluded that if the motor vehicle manufacturer licensing statute were allowed to repeal, significant harm would not befall the public.\textit{140} It further concluded that if the provisions found to benefit the public were also allowed to repeal, complaints resulting from motor vehicle manufacturer misconduct or deceptive advertising could be adequately resolved in the courts.\textit{141} The staff, therefore, recom-

\textit{135. Id.}
\textit{136. Id. at 38.}
\textit{137. Id. at 34-35.}
\textit{138. Id. at 35-36.}
\textit{139. Id.}
\textit{140. Id. at 43.}
\textit{141. Id. at 7.}
mended that the Legislature take no action to reenact the motor vehicle manufacturer licensing statute. Notwithstanding the sunset review recommendation to allow the statute to repeal, the Legislature not only reenacted the provisions, but expanded the state's regulation of the motor vehicle manufacturer-dealer relationship. Chapter 80-217, Laws of Florida, amended section 320.641, Florida Statutes, which prohibited a manufacturer's unfair cancellation of a dealer's franchise agreement, to provide that a dealer who fails to engage in business for ten consecutive business days is deemed to have abandoned his franchise agreement.\(^4\) The chapter also created section 320.643, to require that a dealer notify the manufacturer before a transfer, assignment, or sale of a franchise agreement.\(^4\) The statute provided that if the manufacturer failed to respond to the notice of the dealer's intended transfer within sixty days of receipt of notice, approval was to be deemed granted, and that a manufacturer's acceptance of the proposed transferee could not be unreasonably withheld. A transfer was not valid, however, unless the proposed transferee agreed in writing to comply with the terms of the franchise agreement then in effect.

II. THE 1980-1988 INTERIM

In the interim between the 1980 and 1988 sunset reviews, the Florida franchise provisions were frequently and significantly amended until, by 1988, the Florida statute regulating the motor vehicle manufacturer-dealer franchise relationship was among the most restrictive of the state statutes regulating motor vehicle manufacturers. During the same interim, economists conducted two empirical studies which addressed the impact of both state franchise regulations generally and additional dealer restrictions specifically. Two other states similarly conducted sunset reviews and two states, including Florida, conducted performance audits of motor vehicle manufacturer licensing regulations. Furthermore, the anti-competitive impact of state additional dealer restrictions and other franchise provisions was studied and commented upon repeatedly by the FTC. As a result, while the statute recommended for repeal was being amended in the interim to further address and restrict the motor vehicle manufacturer's relationship with its franchised dealers, authors of empirical studies, sunset reviews, performance audits, and FTC reports were consistently finding such restrictions to be anti-competitive and their resulting effect on new motor vehicle purchasers to be significantly adverse.

\(^{142}\) Ch. 80-217, §§ 6, 16, 17, 1980 Fla. Laws 684, 691, 700-01 (current version at Fla. Stat. § 320.641 (1987)).
\(^{143}\) Id. § 7, 1980 Fla. Laws at 691 (current version at Fla. Stat. § 320.643 (1987)).
A. Interim Amendments

There were five primary amendments enacted during the 1980-1988 interim period. These provisions sought to accomplish the following: 1) to require a manufacturer to notify a dealer of its intent to replace a succeeding franchisee, 2) to require a dealer's agreement to continue in effect notwithstanding a change in a plan or system of distribution, 3) to create a presumption of unreasonableness where a manufacturer refuses to accept a proposed transferee of good moral character, 4) to prohibit a manufacturer from preventing a dealer from changing certain executive management control, and 5) to generally prohibit a manufacturer from owning and operating a dealership in Florida for the sale or service of motor vehicles already offered for sale under a franchise agreement with a dealer in Florida.¹⁴⁴

Most of these amendments were passed in 1984. The Legislature also required that the manufacturers, as well as their factory branch distributor, or importer, must be licensed before the manufacturers' motor vehicles could be sold or leased in the state. As a result of this mandatory licensing requirement, foreign manufacturers which had a contractual relationship with, for example, a distributor, but not with a Florida dealer of its product, or minimum contacts with the state, would now be subject to the general jurisdiction of Florida courts. With the addition of this provision and section 320.6405, Florida Statutes, which created an expeditious fiction of agency between a manufacturer and a dealer, dealers could more easily by-pass intermediaries, such as importers or distributors with which they had contractual privity, to reach a manufacturer with which they did not, to address franchise termination issues.

Other 1984 amendments required a licensee to notify the Department at least sixty days prior to offering a dealer a modification of a franchise agreement to allow the Department the opportunity to verify that such modification is not contrary to the provisions of the stat-

---

¹⁴⁴ 1988 SUNSET REVIEW, supra note 8, at 184. The staff found the following grounds for disciplinary action to directly benefit the public and, therefore, did not recommend their repeal: (1) section 320.64(5), prohibiting a licensee from forcing unordered commodities upon a dealer; (2) section 320.64(10), prohibiting a licensee from entering into a franchise agreement with a dealer who does not have sufficient facilities to provide service as warranted; (3) section 320.64(11), prohibiting a licensee from coercing a dealer to provide installment financing with a specified institution; (4) section 320.64(12), prohibiting a licensee from using false, deceptive, or misleading advertising regarding the sale of motor vehicles; and (5) section 320.64(13), prohibiting a licensee from refusing to deliver in reasonable quantities within a reasonable time to his dealers any vehicles or parts publicly advertised by the licensee to be immediately available. The staff further recommended reenactment of section 320.645, restricting manufacturer ownership of a franchise, and section 320.697, creating a civil action for up to treble damages; and section 320.698, providing for civil penalties.
The amendments also imposed agency status on any entity distributing a manufacturer's product pursuant to a franchise agreement and principal status on a manufacturer whose products are offered for sale in Florida under a franchise agreement executed by an agent of the manufacturer.\textsuperscript{146}

Grounds for manufacturer disciplinary action were added in both 1983 and 1984. In 1983, the failure of a licensee to indemnify its franchised dealer who was not actively negligent for any judgment of damages against a settlement agreed to by the licensee became a ground for disciplinary action against a manufacturer.\textsuperscript{147} In 1984, a threat by a manufacturer to change a dealer's franchise agreement to adversely affect the contractual rights of the dealer also became a ground.\textsuperscript{148} Other 1984 amendments required that dealer franchise agreements provide that a manufacturer give a dealer written notice of its intent to modify or replace a franchise with a succeeding franchise which would adversely alter the dealer's rights under an existing agreement or significantly impair his investment;\textsuperscript{149} that a dealer franchise agreement continue in effect notwithstanding a change in a plan or system of distribution and that the appointment of a new importer or distributor be deemed such a change;\textsuperscript{150} and that the Department, upon the occurrence of such change, refuse approval of an application for a license unless the applicant offers a dealer a new franchise agreement containing substantially the same provisions contained in the previous agreement or verifies with the Department its intent to fulfill the obligations of its predecessor under the previous agreement.\textsuperscript{151}

The balance of the 1984 amendments generally prohibited a manufacturer from interfering with a dealer's transfer or sale of the franchise unless the manufacturer could prove that the buyer was of bad moral character.\textsuperscript{152} Finally, minor changes were made in 1985 and 1987, increasing the license fee\textsuperscript{153} and removing a reference to "motor scooters."\textsuperscript{154}

\textbf{B. Interim Economic Studies}

In 1982, the results of the first of two empirical economic impact studies of growing state motor vehicle franchise regulations were pub-

\textsuperscript{145} Ch. 84-69, § 3, 1984 Fla. Laws 170, 171-72 (amending Fla. Stat. § 320.63 (1987)).
\textsuperscript{146} Id. §§ 3, 4, 1984 Fla. Laws at 171, 172 (current version at Fla. Stat. § 320.63 (1987)).
\textsuperscript{147} Ch. 83-105, § 1, 1983 Fla. Laws 351, 351 (amending Fla. Stat. § 320.64 (1987)).
\textsuperscript{148} Ch. 84-69, § 5, 1984 Fla. Laws 170, 172 (amending Fla. Stat. § 320.64 (1987)).
\textsuperscript{149} Id. § 6, 1984 Fla. Laws at 174 (amending Fla. Stat. § 320.641 (1987)).
\textsuperscript{150} Id. § 7, 1984 Fla. Laws at 175 (current version at Fla. Stat. § 320.6415 (1987)).
\textsuperscript{151} Id. § 8, 1984 Fla. Laws at 176 (current version at Fla. Stat. § 320.643 (1987)).
\textsuperscript{152} Id. (amending Fla. Stat. § 320.643 (1987)).
\textsuperscript{153} Ch. 85-176, § 5, 1985 Fla. Laws 1229, 1235 (amending Fla. Stat. § 320.62 (1987)).
\textsuperscript{154} Ch. 87-161, § 15, 1987 Fla. Laws 1152, 1159 (amending Fla. Stat. § 320.64 (1987)).
lished in *Franchise Regulation: An Economic Analysis of State Restrictions on Automobile Distribution.* This article was later relied upon by the FTC and others, including the Florida Auditor General's Office, in their inquiries into the public benefit of state regulation of the franchise relationship. The hypothesis tested in the studies were that motor vehicle franchise regulations have tended to create local market power for franchised dealers who have raised motor vehicle prices and reduced motor vehicle sales. The extent of such increases and reductions, it was hypothesized, depended upon the stringency of the regulations favoring dealers. The effect of the regulations was thought to entrench existing dealerships by hindering the creation of new dealerships and the termination of inefficient existing dealerships. The four general regulatory policies selected were the requirement that dealers be licensed, the prohibition against manufacturers establishing new dealerships in the same territory as an existing dealer without cause, the prohibition against a manufacturer forcing dealers to accept unordered motor vehicles, and the prohibition against manufacturers cancelling a dealers' franchise without cause. The author tested the economic impact of these regulations using preregulation data from 1954 and postregulation data from 1972 to demonstrate that such state regulation protects existing dealers from the entry of new dealerships, from manufacturer discipline, and from involuntary termination at the expense of the new motor vehicle buying public. The author found that the net effect of the restriction was fewer dealerships and increased market power resulting in higher new motor vehicle prices. More specifically, the author concluded that such regulation increased the average new motor vehicle price by $390. Because only six states, Colorado in 1963, Iowa and Florida in 1970, and Nebraska, Ohio and South Dakota in 1971, had enacted additional dealer restrictions prior to 1972, and at the time the study was conducted, only one had had such regulation in effect for more than two years, the amount of the new motor vehicle price increase specifically attributable to state entry restrictions appeared to be small. In 1983, the results of the second empirical study, *The Effects of State Automobile Dealer Entry Regulation on New Car Prices,* were pub-

---

156. *Id.* at 140.
157. *Id.* at 140-41.
158. *Id.* at 143.
159. Smith concluded that the impact of regulation in all states from 1954 to 1972 was a 15.3% reduction in the number of new motor vehicle dealerships. *Id.* at 146.
160. *Id.* at 154.
This article hypothesized that state additional dealer restrictions specifically result in increased new motor vehicle prices. The data used in the study consisted of the motor vehicle sales reports submitted to General Motors monthly by 5,717 Chevrolet dealers in business during in 1978. By 1978, twenty-two states had enacted entry restrictions. States were divided into those enacting additional dealer restrictions before 1975, those enacting entry restrictions in or after 1975, and those which had not enacted entry restrictions.

The study conjectured both that some time must pass after enactment of an entry restriction before the effect of such law would be measurable and that such effect would be greater in faster growing urban areas than in slower growing rural areas. Such conjecture was supported by the results of the study. While it was found that entry restrictions enacted in 1975 or after had an "insignificant" impact on the price of a new motor vehicle sold in 1978, it was also found that those entry restrictions enacted prior to 1975 worked to increase the price of a new motor vehicle by $56. Additionally, the results indicated that entry restrictions increase the price of new motor vehicles by an average of $56 in urban areas and by $28 in rural areas in 1978 dollars. From this it was extrapolated that the total cost of state entry restrictions to new motor vehicle purchasers of all makes in 1978 was approximately $109 million. The author noted that this amount will undoubtedly increase to the extent that states without entry restrictions elect to enact such laws and to the extent the effect of existing entry restrictions increases.

C. Federal Trade Commission

The Federal Trade Commission (FTC) Act prohibits unfair methods of competition and unfair or deceptive acts or practices. The FTC is responsible for enforcing the federal antitrust laws and for promoting competition and protecting consumers from restraints of trade. Accordingly, the Commission staff, upon request, provides comments to

\[161.\] Eckard, supra note 96.
\[162.\] Id. at 226.
\[163.\] Id. at 225-26.
\[164.\] Id.
\[165.\] Id. at 233.
\[166.\] Id. at 235-37.
\[167.\] Id.
\[168.\] Id. at 240.
\[169.\] Id.
\[171.\] Id.
federal, state, and local governmental bodies to assist their assessment of the competitive and consumer welfare implications of pending policy issues. For instance, in 1982 and 1983, the FTC staff commented on Delaware Senate Bill 513 and Senate Bill 26, respectively, similar bills filed in successive sessions which would have amended Delaware's "Motor Vehicle Franchising Act" to regulate the contractual relationship between motor vehicle manufacturers and dealers. The FTC stated that the provision in both bills which sought to regulate the establishment or relocation of dealers would likely insulate existing dealers from competition, reduce new motor vehicle sales and service in Delaware, and result in increased new motor vehicle prices and reduced sales. Similarly, in April 1987, the FTC staff commented on Ohio Senate Bill 103 which would impose additional restrictions on the establishment, relocation, and termination of motor vehicle dealers by manufacturers. The FTC staff not only argued against passage of the bill, which it stated would increase the already costly and unnecessary restraints on competition, but also suggested that repeal of Ohio's entire statute regulating motor vehicle franchises would benefit consumers to the extent it would reduce new motor vehicle prices. In June, 1987, the FTC staff endorsed the enactment of Wisconsin Senate Bill 47 which sought to delete the state's entry restriction which inhibited competition and thereby raised the cost of new motor vehicles for consumers. In addition, the staff gratuitously recommended the elimination of the existing requirement that provided dealers the right to sixty days notice of a manufacturer's intent to terminate a franchise and the right to an administrative hearing on the fairness of the termination.

The FTC's developing piecemeal position was fleshed out in a 1986 report prepared by the Bureau of Economic's staff of the FTC, The Effect of State Entry Regulation on Retail Automobile Markets. Al-

172. Letter from Carol M. Thomas, Sec. FTC, to Rep. Roger Roy, Delaware H.R. (Jan. 26, 1983) (setting forth reasons that the FTC opposed the anticompetitive aspects of the proposed SB 26 which amended Delaware's Motor Vehicle Franchising Act to restrict a manufacturer's ability to establish or relocate a new point) (on file with committee).


174. Letter from William P. Golden, Acting Dir., Chicago Regional Office, FTC, to the Hon. Lynn Adelman, Chairman, Wis. S. Comm. on Jud. & Cons. Affairs (June 19, 1987) (endorsing a bill that would have repealed portions of that state's statute which allows an existing dealer to challenge the establishment of an additional same line-make dealer) (on file with committee).

175. Id. at 5.

176. R. ROGERS, THE EFFECT OF STATE ENTRY REGULATION ON RETAIL AUTOMOBILE MARKETS
though the report relied upon the empirical studies of Smith and Eckard and sought to address the weaknesses it perceived therein, the Bureau, like Eckard, limited its observations to the effect of state additional dealer restrictions, and not of general franchise regulations, on the prices of new motor vehicles. The Bureau indicated that it improved upon the studies in two ways. First, the possibility that conditions in the motor vehicle retail market, including the ability of dealers to influence the political process, could affect the likelihood of the enactment of entry restrictions was taken into account. This would allow, the author believed, for more consistent estimates of the influence of the entry restrictions. Second, variables were added that would interact entry restrictions with absolute population growth. Like Eckard, the Bureau used data based on Chevrolet motor vehicles sold in 1978.

It was reasoned that use of the same data would facilitate comparison of the author's results with Eckard's. The Bureau found that in the thirteen states having entry restrictions for at least two years, the average price of 1978 Chevrolet motor vehicles was 6% higher than motor vehicle prices in states without entry restrictions. The Bureau also found that entry restrictions have the greatest impact in rapidly growing areas and estimated that new motor vehicle prices in such areas are increased 7.6% as a result of entry restriction. The Bureau concluded, therefore, that "the costs of these entry regulations are much higher than previously estimated by Smith and Eckard."
D. Performance Audits

In addition to economic studies, the Legislature also evaluated the results of performance audits. These audits were required by the statute and supported repeal.

1. Florida

In February 1986, the Florida State Auditor General’s Office, as part of an ongoing program of performance auditing required by statute, published the results of its audit of sections 320.60 through 320.70, Florida Statutes. The scope of the performance audit included an assessment of the need for the regulatory program in protecting the public. Although the office collected and analyzed data from motor vehicle manufacturers, dealers, and the Department of Highway Safety and Motor Vehicles, it also relied heavily on the findings of Smith and Eckard.

The office found that although the manufacturer licensing program is intended to protect the consumer’s access to the sale and servicing of motor vehicles by regulating the motor vehicle manufacturer-dealer relationship, the program is not only unnecessary for such purpose, but harms consumers to the extent that it shelters dealers from competition and allows them to increase the price of new motor vehicles. The office concluded that the program was unnecessary in that 89% of all of the manufacturers’ protested requests for additional dealerships in Florida between 1972 and 1985 were granted by the Department; the manufacturers had demonstrated inadequate representation by the protesting incumbent dealers. Additionally, the office found that during this same period, a significant percentage of the forty-three dealers who protested their franchise cancellation as unfair nonetheless had their franchises cancelled. Moreover, the office found that the department had never suspended or revoked a manufacturer’s license or fined a manufacturer for unfair treatment of its dealers. The office concluded that this data did not support the assumption

187. Fla. Stat. § 11.45(3)(a) (1987). The office of the Auditor General conducts annual financial audits of state agencies and performance audits of all state programs within a 10-year cycle. The office is removed from the legislative process and is not authorized to introduce legislation. The inquiries and recommendations made pursuant to the regulatory sunset process would require the office to unwisely depart from its current auditing function and become involved in the daily legislative function.


189. Id. at vii.

190. Id. at 20.
that manufacturers will overload markets or unfairly cancel franchises if unregulated, and that dealers who believe they have been unfairly treated by a manufacturer are already adequately protected both by section 817.416, the state’s franchise law of general application, and the Federal DDCA.\textsuperscript{191}

The office further found that the entry restriction specifically worked to inhibit competition by prohibiting the Department from approving an application for a franchised dealership if the manufacturer is currently adequately represented in the market area by a dealer who is complying with the terms of the franchise agreement. Thus, if an existing dealer protests the proposed additional dealer, the manufacturer must establish at an administrative hearing that the dealer is inadequately representing the manufacturer. The office found that even if the Department ultimately approves the additional dealership, the effect of the delay resulting from the hearing is similar to that resulting from a judicial temporary restraining order (TRO).\textsuperscript{192}

Unlike the plaintiff requesting a TRO, however, the dealer is not required to meet the judicial precondition for such relief of demonstrating the likelihood of success on the merits.\textsuperscript{193} Relying heavily on the conclusions of Smith and Eckard, the office found manufacturer regulations create territorial market power for incumbent dealers and protect inefficient dealers. This allows the establishment of local monopolies which result in higher product prices and lower quality service for the consumer. The office concluded, therefore, that continued regulation of motor vehicle manufacturers is not only unnecessary but shelters dealers from competition and inflates new motor vehicle prices to the detriment of new motor vehicle purchasers. The office recommended that the Legislature repeal the motor vehicle manufacturer licensing program. No move, however, was made to repeal the statute.

2. \textit{Tennessee}

In 1986, the Tennessee State Comptroller of the Treasury conducted a program audit of the Tennessee Motor Vehicle Commission.\textsuperscript{194} The

\textsuperscript{191} \textit{Id.} at 20-21.
\textsuperscript{192} \textit{Id.} at 21.
\textsuperscript{193} \textit{Id.} at 21-22.
\textsuperscript{194} \textit{TENNESSEE STATE COMPTROLLER OF THE TREASURY, PERFORMANCE AUDIT OF THE TENNESSEE MOTOR VEHICLE COMMISSION (Mar. 27, 1986) [hereinafter TENNESSEE AUDIT]. The Tennessee Governmental Entity Review Law requires the Comptroller of the Treasury to conduct a limited program review audit of the commission and to report to the Joint Government Operations Committee of the General Assembly. TENN. CODE ANN. § 4-29-111 (Supp. 1988). The audit
Tennessee Comptroller, relying on sources similar to those relied upon by the Florida Auditor General’s Office, made similar findings. Again, the findings of Smith and Eckard were relied upon for the proposition that state regulation of the motor vehicle franchise relationship have gone far beyond their original purpose of protecting dealers from manufacturer abuse to create local monopoly power for the benefit of existing dealers and to the detriment of the public. As a result of this audit, the Comptroller recommended repeal of the statute. The statute, however, was not repealed.

III. OTHER STATES’ SUNSET REVIEWS

Forty-six states regulate the motor vehicle manufacturer-dealer relationship. Curiously, however, according to A Schedule of State Sunset Reviews, of the thirty-six states which have enacted sunset laws, only four, Pennsylvania, Hawaii, Florida, and Nebraska, subject the motor vehicle manufacturer licensing provisions to sunset review. As noted, Florida has twice conducted such sunset review, once in 1980 and again in 1988, and both times recommended that the Legislature allow the provisions to repeal as not in the public interest. In addition, Pennsylvania conducted sunset review of its statute in 1983 as did Hawaii in 1986. Both similarly recommended repeal.

A. Pennsylvania

In 1983, the Pennsylvania Legislative Budget and Finance Committee evaluated the state’s motor vehicle manufacturer licensing program to determine the value of its continued existence, and whether the program was operating in the public interest. As a result, the Committee issued A Sunset Performance Audit of the Pennsylvania

was intended to assist the Joint Government Operations Committee in determining whether the Commission should be abolished, continued, or restructured. One of the objectives of the audit was to evaluate the need for the licensing and regulation of the motor vehicle industry, including manufacturers.

195. TENNESSEE AUDIT, supra note 194, at 2.
196. Id.
197. See supra note 61.
199. Nebraska's report, REPORT OF THE PERFORMANCE REVIEW AND AUDIT COMMITTEE ON THE NEBRASKA MOTOR VEHICLE INDUSTRY LICENSING BOARD (1979), issued prior to the 1980 FLORIDA SUNSET REVIEW, indicated that of the 8 additional franchise hearings conducted from 1972 to 1978, 4 were granted and 4 were denied, and of the 10 termination hearings conducted during that same period, 8 were terminated and 2 were not. Id. at 29. From this, the Committee concluded that the Board has impacted upon commerce but not “significantly,” and that the denials issued did not “significantly” affect the price of new motor vehicles. Id. at 36.
State Board of Motor Vehicle Manufacturers, Dealers and Salesmen. The Committee, apparently relying on the sunset report published by the Florida Senate Transportation Committee in 1980, recommended that Pennsylvania’s motor vehicle manufacturer licensing program be discontinued. However, the legislative committee’s recommendation was disregarded, and, as a result, motor vehicle manufacturers doing business in Pennsylvania remain subject to state regulation of their franchise relationship.

B. Hawaii

In the 1986 Hawaii Sunset Evaluation Report, the Office of the Legislative Auditor staff found, as did the court in S.B. McMaster, Inc. v. Chevrolet Motor Co., that, “we do not believe that special statutory protection is warranted for dealers who enter freely into these franchise agreements. Dealers are not coerced into becoming franchisees.”

The staff noted that in the preceding three years, only nine of the 600 motor vehicle related complaints filed by Hawaii consumers were against manufacturers, and that no dealer complaints had been filed against manufacturers; manufacturers were found to conduct business with other members of the industry who have the expertise and resources to protect their interests. Further, several federal laws were cited that were argued to already provide adequate dealer remedies.


201. Id. at 38. A letter included in the audit from R. Dario, Executive Director of the Pennsylvania Committee on Legislative Budget and Finance, indicates that a draft of the audit was provided to members of the Pennsylvania State Board of Motor Vehicle Manufacturers, Dealers and Salesmen. Id. In response to undisclosed criticisms of the board, “certain statements set forth in the draft (and commented on in the following letter) have been deleted and do not appear in this final version of the report.” Id. at 36. The reference to the 1980 Florida Sunset Review is contained in those comments, but the conclusions of the Pennsylvania Committee staff did not survive.


203. 3 F.2d 469 (E.D.S.C. 1925).

204. HAWAII SUNSET REVIEW, supra note 202, at 43.

205. Id. at 44.

206. Id. at 43-44. The Dealers Day in Court Act, later amended as the Automobile Dealers Franchise Act, it was argued, adequately provided safeguards for dealers from unfair, capricious, or arbitrary manufacturer conduct by allowing a dealer to enjoin a manufacturer in federal district court from unfairly terminating a franchise agreement until a hearing is held to determine that the manufacturer is acting in “good faith.”
Additionally, unconvinced that unregulated manufacturers would implement abusive business practices that would jeopardize the availability of motor vehicles, parts, and services, the staff recommended that the Legislature repeal the state’s manufacturer licensing requirement. That legislative recommendation, however, was disregarded by the Hawaii Legislature and motor vehicle manufacturers remain subject to state regulation of their franchise relationship with their dealers.

IV. Florida’s 1988 Sunset Review

In 1988, pursuant to chapter 81-318, Laws of Florida, Florida’s motor vehicle manufacturer licensing program was again scheduled for sunset review and automatic repeal. Again, the Senate President assigned the review to the Senate Transportation Committee and, again, the Speaker of the House assigned sunset review by that House to the Regulatory Reform Committee. On June 24, 1987, however, Senator Gwen Margolis, Chairperson of the Senate Committee on Economic, Community and Consumer Affairs, requested Senate President Vogt to make that Committee the Committee of second reference as to the upcoming sunset review project. Senator Vogt responded, instead, by withdrawing sunset review from the Senate Transportation entirely and making the Senate Economic, Commu-

207. *Id.* at 45.
209. Ch. 81-318, 1981 Fla. Laws 1492 (amending *FLA. STAT.* § 11.61 (1987)).
211. Letter from Fla. Sen. Gwen Margolis, Dem., North Miami, Chairman, S. Comm. on Econ., Comm’y & Cons. Affairs, to Fla. Sen. John Vogt, S. President, Dem., Merritt Island, 1974-1988 (June 24, 1987) (on file with committee). The letter indicated that the staff of the Committee had issued an interim report in March 1987 reviewing chapter 681, the “Motor Vehicle Warranty Enforcement Act,” commonly referred to as the “Lemon Law.” That report described the existing lemon law as unable to provide Florida consumers with a viable settlement procedure by which they could resolve motor vehicle repair disputes. Since a compromise could not be reached by the motor vehicle manufacturer, dealer, and consumer representatives during the 1987 legislative session, Senator Margolis expressed the hope that the upcoming sunset review of motor vehicle manufacturer and dealer licensing programs would provide another opportunity to amend the lemon law. The dealers, indifferent to amending the lemon law during the 1987 legislative session but eager for further motor vehicle manufacturer regulation, might express support for the improved lemon law in the 1988 session if their proposals for further state regulation of the franchise relationship were favorably received. The manufacturers, as a result, might find themselves in the unenviable position of opposing both further state regulation of their franchise relationship and an improved lemon law, without an ally. They, not dealers, would be ultimately liable for the replacement or repurchase of defective motor vehicles purchased by consumers who prevail in lemon law arbitration.
nity and Consumer Affairs Committee the Committee of first reference.\footnote{212}

In April 1988, the Senate Economic, Community and Consumer Affairs Committee issued its sunset report of the state's motor vehicle dealer and manufacturer licensing program. As in 1980, the House Regulatory Reform Committee conducted an abbreviated sunset review of the provisions, but made no pre-session recommendation to the Legislature. The sunset findings, conclusions, and recommendations made in the committee report, therefore, are the only such recommendations made to the Legislature. The Committee sunset report, as did the 1980 Senate Transportation Committee sunset report, recommended that the Legislature allow the motor vehicle manufacturer licensing program to repeal as not in the public interest.\footnote{213}

While the conclusions and recommendations of both Senate Committees were similar, the findings of the Senate Economic, Community and Consumer Affairs Committee were more comprehensive than those of 1980 for two reasons. First, the motor vehicle manufacturer licensing program in Florida had been amended since 1980 to greatly extend the state's regulation of the franchise relationship between the manufacturer and it dealers. In 1980, the Senate Transportation Committee staff focused on what remains the core of that regulation: the state's regulation of the manufacturer's ability to terminate a dealer's franchise and the additional dealer entry restriction. In 1988, the staff considered the impact of both of these statutory restrictions on manufacturers as well as those subsequently enacted in 1980 and 1984.

Second, in the 1980-1988 interim, much attention had been given to franchise provisions included in many states' motor vehicle manufacturer licensing statutes in the 1970s and early 1980s. Economists published the results of empirical studies of the economic impact of motor vehicle franchise regulations on new motor vehicle prices and recommended repeal.\footnote{214} The FTC had prepared comments at the request of several state legislators and issued a report consolidating those comments and recommending repeal of motor vehicle manufacturer restrictions. Two states, including Florida, had conducted performance audits of motor vehicle manufacturer licensing programs and concluded they were not only unnecessary to protect the dealers but

\footnote{212. Senator Margolis insisted that the manufacturers and dealers agree to an improved version of the existing lemon law in the 1988 legislative session before issues relating to sunset review of the motor vehicle franchise provisions, scheduled for automatic repeal on October 1, 1988, would be addressed. \textit{Tougher 'Lemon Law' May Grow Out of Dispute, Car Dealers, Makers Headed for Showdown}, Tallahassee Democrat, Jan. 3, 1988, at Al, col. 1.}

\footnote{213. 1988 \textit{SUNSET REVIEW}, supra note 8, at 184.}

\footnote{214. See Smith, supra note 155; Eckard, supra note 96.}
adversely affected consumers. And two other states, Pennsylvania and Hawaii, conducted sunset reviews of their franchise provisions and recommended that the provisions be allowed to repeal. In preparing the 1988 Sunset Review, the Economics, Community and Consumer Affairs Committee staff relied on much of this information.

The proliferation of legislation regulating the franchise relationship enacted after the 1980 sunset recommendation to repeal did not distract the focus of the 1988 Sunset Review from the two core provisions: the state’s regulation of a manufacturer’s right to terminate a dealer’s franchise, or “unfair cancellation,” and the state’s restriction on the establishment of additional dealers, or “entry restriction.” In fact, the report expressly stated that these two provisions:

arguably comprise the core upon which the balance of the state’s regulation of the franchise relationship is based, if not dependent. Therefore, if it is found that these first two provisions withstand sunset review, the balance of the provisions must be more closely scrutinized to determine the existence of individual public purpose. If it is found, however, that the first provisions do not survive the sunset review criteria, the balance of the provisions should fall, in varying degrees, like dominoes.

A. Restrictions on a Manufacturer’s Right to Terminate

First, section 320.641, was examined for public purpose. Since it was noted that the statute itself was not prefaced with an express statement of purpose, the staff turned to case law where it found that public purpose of section 320.641, Florida Statutes, had been deduced by the Third District Court of Appeals in J.R. Furlong, Inc. v. Chrysler Corp. The lower court, finding no legitimate basis upon which to create a unilateral award of attorneys fees and costs to a prevailing dealer in a termination hearing “between two private parties, with no public interest at issue,” struck the provision on equal protection grounds. The court, reversing, concluded:

If no public interest were at stake here, there would be no need for the extensive regulation undertaken by the legislature of motor vehicle manufacturers, factory branches, distributors or importers . . . and the entire statutory scheme would be unconstitutional. . . .

215. See supra notes 200, 202 and accompanying text.
216. 1988 SUNSET REVIEW, supra note 8, at 102.
217. 419 So. 2d 385 (Fla. 3d DCA 1982).
218. Id. at 387-88.
In particular, there would be no need for the legislature to give a motor vehicle dealer some protection against unfair discontinuation or cancellation of his franchise agreements with a motor vehicle manufacturer, factory branch, distributor or importer. The legislature, however, has taken the view that this regulation is necessary in order to equalize the conceded difference in bargaining power between the two parties here and to accord some protection to the motor vehicle dealer as the weaker of the two parties.219

The staff indicated that the public purpose presumed by the court in Furlong was more narrowly construed than the public purpose contemplated by sunset review. The purpose of this provision was to directly protect dealers by giving them the right to protest and enjoin a manufacturer's termination of the franchise and not to protect the motor vehicle buying public from direct manufacturer misconduct.220 Further, the staff found that in the five years preceding sunset review, only 15 of the 1,200 annually franchised dealers had sought a hearing on the fairness of a manufacturer's proposed termination of a franchise, and of those, only one dealer had prevailed.221 From this, the staff concluded that those seeking reenactment of the provision had failed to carry their burden of proving that the public contemplated by sunset review would be subject to identifiable significant harm if the provision were not reenacted.

B. Restrictions on a Manufacturer's Establishment of a Franchise

Second, section 320.642, was examined for public purpose. While it was again noted that no express statement of purpose prefaced the statute, the public purpose of the entry restriction was found, as it had been found by the Senate Transportation Committee in 1980, to have been held by the courts in Plantation Datsun v. Calvin,222 and Bill Kelley Chevrolet v. Calvin,223 to be "to prevent powerful manufacturers from taking unfair advantage of their dealers by overloading a market area" and not to foster combinations to prevent the introduction of dealer competition.224 In addition, the staff cited Dave Zinn Toyota, Inc. v. Department of Highway Safety & Motor Vehicles,225 wherein the Third District Court of Appeals agreed that the

219. Id. at 388.
220. 1988 SUNSET REVIEW, supra note 8, at 107-08.
221. Id. at 108.
222. 275 So. 2d 26 (Fla. 1st DCA 1973).
223. 322 So. 2d 50 (Fla. 1st DCA 1975).
224. 1988 SUNSET REVIEW, supra note 8, at 109.
225. 432 So. 2d 1320 (Fla. 3d DCA 1983).
purpose of section 320.642 was to protect incumbent franchised dealers.\textsuperscript{226} The staff stated that a finding that motor vehicle dealers are the primary intended beneficiaries of the entry restriction did not preclude a finding that the public may benefit, if only secondarily or incidentally, from the provision. Relying on the conclusions of Smith, Eckard, the FTC, and the Florida Auditor General, however, the staff concluded that the entry restriction adversely affects Florida consumers in that it has resulted in an "undeterminable but significant" increase in new motor vehicle prices.\textsuperscript{227} The staff reasoned that a regulation which increases the cost of goods to the consumer might still be justified if it protects the public from significant harm. Noting that of the 625 franchise dealer applications filed with the department in the preceding five years, only 27 were subject to an additional dealer protest and of those, only one of a manufacturer's proposed dealers was denied a license based on adequate representation by the existing dealer,\textsuperscript{228} the staff concluded that those seeking reenactment of these two provisions had failed to meet their burden.

C. Other Statutory Protest Rights Distinguished and Policy Considerations

The staff also distinguished the similar statutory rights to protest afforded interested parties in the license application process of three other regulated business entities: banks, cemeteries, and health care facilities.\textsuperscript{229} While such rights to protest were afforded by the state to

\textsuperscript{226} Id.

\textsuperscript{227} 1988 \textsc{sunset review}, \textit{supra} note 8, at 116.

\textsuperscript{228} Id.

\textsuperscript{229} Id. at 118-20. After the Department of Banking and Finance (DBF) has determined, pursuant to section 658.20, Florida Statutes, that a need for a bank exists in the service area where the proposed bank is to be located, notice of the intent to approve the application for charter is published. Any person may request a public hearing within 21 days of such notice but Rule 3C-9.006 of the Florida Administrative Code limits those who may participate in the hearing to: (1) the applicant, (2) the department, and (3) persons with a substantial interest in the decision. The public purpose of the code as stated in section 658.14, is the safe conduct of banks and trust companies. Similarly, after the DBF has determined, pursuant to the Florida Cemetery Act, section 497.006, that a need for a cemetery does not exist in the community where the proposed cemetery is to be located, the applicant must request a hearing on the Department's denial within 21 days after the receipt of notice of denial. \textsc{fla. admin. code} R. 3D-30.015 (1987). The public purpose of the code as expressed in section 497.002, Florida Statutes, is "that purchasers of preneed burial rights or cemetery merchandise may suffer serious economic harm if purchase money is not set aside for future use as intended by the purchaser and that the failure to maintain cemetery grounds properly may cause significant emotional stress." Finally, after the Department of Health and Rehabilitative Services has determined to issue or deny a certificate of need for a new health care facility in the proposed service district pursuant to section
protect a clearly identifiable public interest, the staff maintained, the right to protest an additional dealer afforded incumbent dealers was created by the state not to protect the public but to protect incumbent franchised dealers from market overloading by a manufacturer. Moreover, the staff, citing *American Motors Sales Corp. v. Division of Motor Vehicles*,\(^2\) indicated that policy considerations weaken the argument that the motor vehicle manufacturer-dealer relationship is sufficiently unique to compel such statutory protection. The staff noted that the court, in finding a similar Virginia entry restriction unconstitutional as violative of the commerce clause,\(^3\) had concluded:

The shape of American commerce has been transformed by the proliferation of all types of chain and franchise business operations. Motels, drug stores, fast food restaurants, ice cream shops, variety and department stores, tire dealers and numerous other businesses frequently operate under the franchise system. If Virginia were permitted to utilize section 46.1-547(d) to keep additional motor vehicle franchises out of areas of high unemployment and slow population growth, it could enact similar statutes to bar all types of additional franchises from what it views to be economically weak markets. Under such circumstances, the State, rather than the marketplace, would become the arbiter of the appropriate level of competition in each franchised industry.\(^2\)

---

381.709, the applicant or aggrieved existing health care facilities must request a hearing on the issue within 21 days of notice of intent to issue or deny. FLA. STAT. § 381.709(5)(a) (1987). The public purpose of regulating health-related projects, as expressed in section 381.025, is to improve the health and well-being of the state’s citizens by striving to improve health care services. 230. 445 F. Supp. 902 (E.D. Va. 1978), rev’d, 592 F.2d 219 (4th Cir.), cert. denied, 444 U.S. 836 (1979).

231. 1988 *SUNSET REVIEW*, supra note 8, at 121. This decision predated the landmark United States Supreme Court decision *New Motor Vehicle Board v. Orrin W. Fox*, Corp., 439 U.S. 96 (1978), wherein the Court upheld the constitutionality of the California additional dealer entry restriction. The Court found that the entry restriction did not deny a manufacturer due process of law because such interests are always subject to reasonable restrictions imposed by a “general scheme of business regulation.” Id. at 106. The Court also concluded that such restrictions did not conflict with the Sherman Act in that the entry restriction fell within the “state action” exception. Id. at 109. The Virginia state case was one of four which had, just prior to *Orrin W. Fox*, resulted in conflicting opinions on the issue of whether state entry restrictions unconstitutionally burden interstate commerce. Compare Chrysler Corp. v. New Motor Vehicle Board, 89 Cal. App. 3d 1034, 153 Cal. Rptr. 135 (1979) and Tober Foreign Motors v. Reiter Oldsmobile, 381 N.E.2d 908 (Mass. 1978) with American Motor Sales Corp. v. Division of Motor Vehicles, 592 F.2d 219 (4th Cir. 1979) and General GMC Trucks v. General Motors Corp., 239 Ga. 373, 237 S.E.2d 194, cert. denied, 434 U.S. 996 (1977). The Supreme Court, curiously, failed to address these cases, apparently leaving the commerce clause as a viable challenge to entry restriction provisions. *See Note, State Motor Vehicle Franchise Legislation: A Survey and Due Process Challenge to Board Composition*, 33 VAND. L. REV. 385, 409-10 (1980). Sunset review, however, focuses on public purpose, and not constitutional issues.

232. 1988 *SUNSET REVIEW*, supra note 8, at 121 (citing *American Motor Service Corp. v. Division of Motor Vehicles*, 592 F.2d at 219).
D. The Balance

After demonstrating that the cancellation and additional dealer entry restrictions do not survive sunset review, the staff turned its attention to the balance of the provisions enacted to regulate the franchise relationship. 233 Most of the provisions were found to be innocuous but unnecessary in that, while they might not result in increased product prices, they addressed terms already present in the negotiated franchise agreement or covered by tort law.

These relatively harmless provisions included disciplinary grounds for a manufacturer's failure to indemnify a dealer who has paid on a claim related to the defective manufacture of a vehicle, part, or accessory, and regulation of manufacturer activity related to dealership succession. 234 The provisions regulating a manufacturer's change in plans or systems of distribution, 235 the transfer, assignment, or sale of franchise agreements, 236 changes of executive management control of a dealership, 237 a manufacturer's reimbursement of a dealer's warranty related work, 238 and the provision providing treble damages for dealers who prevail in an action based on a manufacturer's violation of the statute were also included. 239 The provisions requiring the licensure of foreign motor vehicle manufacturers, however, benefited franchised dealers of foreign motor vehicles to the extent they subjected such licensees to Florida jurisdiction. 240 The mandatory agency provision benefited such dealers to the extent it created the fiction that the distributor of a motor vehicle is the producer of that motor vehicle. 241

E. Florida's 1988 Sunset Recommendations

As a result of such findings, the staff concluded, as did the Senate Transportation Committee staff in 1980, that those seeking reenactment of the motor vehicle manufacturer licensing program had failed to meet their burden of establishing a public purpose and proving that significant harm would befall the public if the reviewed regulation were allowed to repeal. 242 The staff recommended that all but a few

233. Id.
234. FLA. STAT. § 320.64(16), (18) (1987).
235. Id. § 320.6415.
236. Id. § 320.643.
237. Id. § 320.644.
238. Id. § 320.696.
239. Id. § 320.697.
240. Id. § 320.61(1)(c).
241. Id. § 320.6405.
242. Id.
minor isolated provisions be allowed to repeal as not in the public interest.

F. A Foreboding of Dealer Influence

Two novel moves were made relating to the 1988 sunset report. First, the analysis of the additional dealer entry restriction included a lengthy discussion of several less anti-competitive alternatives that, if adopted, would temper the impact of the existing additional dealer entry restriction. Acknowledging that all entry restrictions impede competition, by either delaying or preventing the establishment of new dealer points, the staff juggled the entry restrictions of many other states which also regulated the establishment of new points to flesh out the least anti-competitive alternatives to Florida's existing provi-

243. Id.

for its proposal. The staff offered an alternative if the Legislature did not adopt the "rational basis" standard and, instead, followed the majority "good cause" standard. It suggested that the Legislature could weaken the anti-competitive impact of such standard by adopting a list of factors to be considered in determining whether a manufacturer has demonstrated good cause for an additional dealer point. The factors focused primarily on the impact of the new point on the public rather than the complaining dealer. The staff suggested that the burden of proof be shifted from the manufacturers to the complainant, the protesting dealer, to prove a positive, adequate representation. It noted that contrary to the rules of civil procedure, the respondent-manufacturer is required to prove a negative. The staff also suggested reducing the dealer's burden from adequate representation to the unreasonableness of the manufacturer's proposed point. In addition, finding that the statute did not limit the amount of time that may elapse between the time the protest is filed and the time a final decision must be rendered before the proposed point is deemed approved, the staff recommended that the entry restriction be amended to require that the final decision be rendered within sixty days of filing. In finding that the mere filing of an unsupported protest by a probable competitor can delay the establishment of a proposed and ultimately approved new point for up to two years, the staff proposed that the Legislature provide, as a disincentive, that costs and attorneys' fees be awardable to the prevailing party in an administrative hearing. Typically, a sunset report does not contain such a developed range of alternatives inconsistent with the recommendation of the report.

Second, the staff's report is generally accompanied by a PCB reflecting recommendations contained in the report, in this instance, a bill repealing the existing statute. Instead, anticipating the improbability of repeal and the strength of the dealer lobby, the staff prepared a PCB reenacting the existing statute.\textsuperscript{245} The 1988 Legislature heeded neither the sunset recommendation to repeal, nor the PCB simply reenacting the existing statute. Instead it passed House Bill 1683\textsuperscript{246} which was based on a lengthy dealer-drafted amendment to the Senate companion reenactment bill, Committee Substitute for Senate Bill 982. The two moves had been unsuccessful.

\textsuperscript{245} Florida Senate Bill 982 (1988) would have reenacted sections 320.60-71, Florida Statutes, relating to the licensing of motor vehicle manufacturers, factory branches, distributors, and importers, and scheduled the provisions for automatic repeal on Oct. 1, 1998, and for sunset review prior to that date.

\textsuperscript{246} Fla. HB 1683 (1988).
While the bill focused on increasing the state's regulation of a manufacturer's establishment of additional dealer points, it substantially amended other provisions addressing the franchise relationship to expand generally the state's regulation. For instance, section 320.61, Florida Statutes, was amended to impose licensure of any manufacturer, importer, or distributor which issues an agreement to a motor vehicle dealer in the state as a precondition to the sale or lease of motor vehicles in the state. The section was also amended to subject any licensed manufacturer, importer, or distributor, as well as any unlicensed foreign motor vehicle manufacturers whose product is sold or leased in Florida, to the jurisdiction of Florida courts in any action for relief provided in the statute. Such provisions apparently work to deprive manufacturers, importers, or distributors of a jurisdictional due process challenge. In addition, although there was no finding that manufacturers were offering dealers franchise agreements containing terms inconsistent with Florida law, section 320.63 was amended to require that all franchise agreements offered to Florida dealers provide that all terms therein inconsistent with the law are void. The section was also amended to require manufacturers to annually report to the Department its efforts to add new minority dealer points.

Section 320.64 was amended to clarify the Department's authority to discipline a licensee upon proof of a pattern of misconduct, to clar-
ify that a manufacturer may not refuse to accept a successor dealer who is a legal heir or devisee unless it can prove the proposed successor does not meet certain standards, and to expressly place the burden of proof on the manufacturer.252 The amendment added four new grounds for disciplinary action against a manufacturer, including: (1) the establishment by a manufacturer of an inequitable and unreasonably discriminatory system of motor vehicle allocation or distribution; (2) the intentional delay, refusal, or failure of a manufacturer to deliver vehicles, parts, or accessories; (3) the requirement by a manufacturer that a dealer assent to a release, or other action, which would relieve any person from liability under sections 320.60 through 320.70; and (4) the coercion of a dealer by a manufacturer to waive his right to protest the establishment or relocation of an additional dealer in the coerced dealer's area.253

Section 320.6403 was created to provide dealer successor language relative to distributor agreements.254 The new section prohibits the refusal by a manufacturer or importer to accept the lawfully designated successor to a distributor agreement as provided by will or as designated by the distributor during his lifetime, and allows the rejection of a successor only if demonstrated to be significantly detrimental to the interest of the public, manufacturer or importer. Section 320.6405 was amended to extend the state's jurisdiction over manufacturers not licensed pursuant to the statute, as well as licensees.255 An exemption from the agency relationship was carved out to exclude domestic manufacturers distributing vehicles in Florida under their own brand name, but which are substantially manufactured by another entity, if such entity is substantially engaged in the manufacture of other line-make motor vehicles and is licensed as a manufacturer in Florida.256 As a result, the foreign manufacturer, and not the distributor, would be subject to possible penalties for violation of the statute.

Section 320.641, relating to the termination of franchise agreements, was amended to require a manufacturer to provide a dealer with fifteen day's notice of its intent to discontinue the franchise agreement when the manufacturer determines that a dealer has abandoned the franchise, and for a dealer to file for a hearing on whether

252. Id. § 8, 1988 Fla. Laws at 2299, 2301 (amending Fla. Stat. § 320.64, 320.64(18) (1987)).
253. Id. § 8, 1988 Fla. Laws at 2301-02 (codified at Fla. Stat. § 320.64(20)-(23) (Supp. 1988)).
254. Id. § 9, 1988 Fla. Laws at 2302 (codified at Fla. Stat. § 320.6403 (Supp. 1988)).
255. Id. § 10, 1988 Fla. Laws at 2303 (amending Fla. Stat. § 320.6405 (1987)).
256. Id.
an abandonment has occurred.\textsuperscript{257} The period during which a manufacturer is prohibited from appointing a replacement dealer was extended to include the exhaustion of all appellate remedies by the discontinued dealer if a stay is issued by the Department or appellate court.\textsuperscript{258}

Section 320.643, relating to the transfer of franchise agreements, was amended to allow a manufacturer, after notice of a dealer’s intent to transfer his franchise, to file a complaint with the Department to determine whether the proposed transferee is qualified to assume the franchise.\textsuperscript{259} Section 320.644, relating to a dealer’s change of executive management control, was amended to expressly provide that the termination of employment of executive management, including the dealer-operator of such management, is not to be deemed a change of executive management control or a transfer of a franchise.\textsuperscript{260} Section 320.696, relating to a manufacturer’s warranty reimbursement responsibility, was amended to prohibit a manufacturer’s reasonable compensation to a dealer for warranty work of less than the amount the dealer charges for similar non-warranty retail repairs unless the licensee can demonstrate that the dealer’s labor charges are improper.\textsuperscript{261} The section also provides that compensation not paid by a manufacturer to a dealer within thirty days of dealer’s notice of billings is to be presumed untimely.\textsuperscript{262}

Section 320.699, relating to administrative hearing and adjudication procedures, was created to outline a dealer’s options already available under administrative law in seeking redress for manufacturer conduct which adversely affects the dealer.\textsuperscript{263} The options include an administrative hearing pursuant to chapter 120 and a dealer protest hearing pursuant to section 320.642. The 1988 Senate sunset report had indicated that typically six to eighteen months elapsed from the time a proposed dealer filed the preliminary application to the entry of a final order. During the delay, the protesting dealer’s competition is held at bay, capital invested in the proposed point is tied up and rendered unproductive, and the proposed location may be lost to another use. Apparently to remedy this inequity, the section was created to require that a protest hearing must be conducted within 180 days from the date of the first filing of protest unless the hearing officer extends the

\textsuperscript{257} Id. § 11, 1988 Fla. Laws at 2304 (codified at Fla. Stat. § 320.641(5) (Supp. 1988)).
\textsuperscript{258} Id. (codified at Fla. Stat. § 320.6405(7) (Supp. 1988)).
\textsuperscript{259} Id. § 13, 1988 Fla. Laws at 2308 (amending Fla. Stat. § 320.643(1) (1987)).
\textsuperscript{260} Id. § 14, 1988 Fla. Laws at 2309-10 (amending Fla. Stat. § 320.644(1) (1987)).
\textsuperscript{261} Id. § 16, 1988 Fla. Laws at 2310-11 (amending Fla. Stat. § 320.696 (1987)).
\textsuperscript{262} Id.
\textsuperscript{263} Id. § 17, 1988 Fla. Laws at 2311 (codified at Fla. Stat. § 320.699 (Supp. 1988)).
time for good cause.\textsuperscript{264} The section was further designed not to deny the Department jurisdiction of the issue if the hearing is not scheduled within that time, but simply to authorize the parties to request such hearing "which shall be held forthwith."\textsuperscript{265} The newly created statutory deadline, therefore, is not a forceful remedy which ensures timely resolution of the dispute, but an illusory one couched in terms rendering it of dubious use. Section 320.6991 was created to prohibit a manufacturer's reapplication for an additional or relocated dealer license for two years where a manufacturer has dismissed the original application on or after March 1, 1988, until June, 1988, the effective date of the revised law.\textsuperscript{266} This amendment was apparently intended to foil any attempt by a manufacturer to benefit, if possible, from the newly defined dealer protected areas from the time the proposed dealer-drafted amendment containing the proposed areas was made public until the time it was made law.

The majority of these amendments result in further state regulation of the franchise relationship between a manufacturer and its dealers. While most of these new provisions redundantly address terms already addressed in the franchise agreement, they are relatively innocuous in that they do not further restrict manufacturer conduct to the detriment of the public any more than does the franchise agreement itself or contract or tort law. One of the most salient features of the franchise provisions has been the state's ability to restrict a manufacturer's ability to establish a new point. Section 320.642, a single statute paragraph and an administrative rule in 1988, became, after the enactment of House Bill 1683, seven pages of statute. The dealers had flexed.

Section 320.642 had only required that the Department deny a manufacturer's application for additional dealer license in any community or territory where the manufacturer's presently franchised dealers were both complying with the terms of their franchise agreements and providing adequate representation in the community or territory for such license. The burden of proof was placed on the manufacturer. An administrative rule promulgated in 1976, Rule 15c-1.008, Florida Administrative Code, required a manufacturer intending to establish an additional point to notify the director of the Division of Motor Vehicles of a dealer application prior to acquiring facilities necessary for such point. The notification was required to disclose the location

\textsuperscript{264} Id. (codified at Fla. Stat. \textsection 320.699(2) (Supp. 1988)).

\textsuperscript{265} Id.

\textsuperscript{266} Id. \textsection 18 (codified at Fla. Stat. \textsection 320.6991 (Supp. 1988)).
of the proposed point and the names of any other same line-make dealers in the "surrounding trade areas, community or territory." Upon receipt of the notification, the director was required to send notice to the named dealers advising them of the provisions of section 320.642, and of their right to protest such establishment and obtain a hearing on the issue. The determination by the director was effective for twelve months from the date of the order or the date of the final judicial determination in the event of an appeal, unless, for good cause, the director had set a different period in the order. Since the statute did not define "community or territory," Department policy had been to construe the term to mean the county in which the proposed point was located, and the counties adjacent to or surrounding the one in which the new point was located.

Section 320.642 was amended in 1988 to elaborately codify an arguably more restrictive variation of the administrative rule and Department policy. The section was amended to require a manufacturer to give written notice to the Department of its intent to establish an additional dealership. The notice must state not only the location of the proposed dealership, the date on which the manufacturer intended to begin business with the additional dealer, and the identity of all same line-make franchised dealers in the county or any contiguous counties, but also, the names and addresses of the dealer-operator and principal investors in the proposed dealership. The Department, upon receipt of such notice, was required to not only send a copy of the published notice to all affected dealers, but to publish notice of the proposed additional or relocating dealership in the Florida Administrative Weekly. Dealers are now required to file their protest regarding the proposed additional dealer within thirty days of receipt of such notice by statute instead of by Department policy. The section was also amended to reduce the former alternative ground for denying a manufacturer's application for an additional point, that is, that the protesting dealer is complying with the terms of the franchise agreement, to a factor that may be considered in determining whether the standard of inadequate representation has been met.

Previously, case law had offered some guidance in determining the issue of inadequate representation. One court, in Stewart Pontiac Co. v. Department of Motor Vehicles & Highway Safety, held that evidence of the financial impact of the proposed additional dealer point

267. Id. § 12, 1988 Fla. Laws at 2304-08 (amending Fla. Stat. § 320.642 (1987)).
268. Id. (codified at Fla. Stat. § 320.642(1) (Supp. 1987)).
269. Id. (codified at Fla. Stat. § 320.642(2)(b)(8) (Supp. 1988)).
270. 511 So. 2d 660 (Fla. 4th DCA 1987).
on the protesting dealer was not admissible. Section 320.642 was amended to offer eleven express factors which may be considered by the hearing officer in resolving the issue of adequacy of representation. The first factor listed, curiously, is “[t]he impact of the establishment of the proposed or relocated dealer on the consumers, public interest, existing dealers, and the licensee; provided, however, that financial impact may only be considered with respect to the protesting dealer or dealers.”

In *Dave Zinn Toyota, Inc. v. Department of Motor Vehicles & Highway Safety,* the court rejected appellant’s contention that a manufacturer’s restrictions on the number of motor vehicles provided to each dealer precluded it from showing existing dealers who had sold their allotted number inadequately represented the territory. The court reasoned that the purpose of the entry regulation is to prevent powerful manufacturers from taking unfair advantage of their dealers, existing and prospective. The purpose was “not to foster combinations to prevent the introduction of dealer competition which is reasonably justified in terms of market potential.”

The fourth of the factors to be considered is a manufacturer’s action which affects a dealer’s opportunity for growth, including its allocation of motor vehicles.

Where Department policy had been to send notice of the proposed new point to same line-make dealers in the county of the proposed point, or in the adjacent or adjoining counties, the section was amended to statutorily define the RMA. The section was amended to create an unprecedented RMA, bifurcated based on population, as suggested in the 1988 Sunset Report, but amorphic and potentially one of the largest in the nation based on less than a majority of the sales and service of the protesting dealer. The larger the RMA, the larger the dealer’s protected area, and the greater both its anti-competitive impact and resulting adverse impact on new motor vehicle buyers.

The new additional dealer entry restriction provides that in counties of less than 300,000 persons, a dealer is eligible to protest if the proposed new or relocating dealership is within the area of responsibility described in the franchise agreement of the existing dealer, and is within a 20-mile radius. Also, the dealer can protest if he can estab-

272. 432 So. 2d 1320 (Fla. 3d DCA 1983).
273. *Id.* at 1322 (quoting Bill Kelley Chevrolet v. Calvin, 322 So. 2d 50, 52 (Fla. 1st DCA 1975)).
lish that during any 12-month period of the 36-month period preceding the filing of the proposed dealer's application, 25% of his new motor vehicle retail sales were to persons whose registered household addresses were within 20 miles of the proposed location. In counties of greater than 300,000 persons, a dealer is eligible to protest if the proposed additional or relocating dealer is within 12.5 miles of the existing dealer, and the dealer can establish that during any 12-month period of the 36-month period preceding the filing of the proposed dealer's application, 25% of his new motor vehicle retail sales were to persons whose households were located within 12.5 miles of the proposed location.

As noted in the 1988 Sunset Report, only Massachusetts and Virginia rely on an RMA defined by a dealer's actual sales or service. In Massachusetts, while all dealers within a 20-mile radius of the proposed site receive notice of the proposed establishment, only those dealers within the radius and who obtain two-thirds of their retail sales or service, whichever is smaller, over the past three years or the life of the dealership, whichever is less, are eligible to protest the proposed new point. The Virginia statute refers to a "trade area" which has been construed by the commissioner of motor vehicles to be the area in which a dealership is expected to or does maintain the majority of sales or service of its franchised vehicles. The expansion of the dealer's protected area with the reference to sales and service is similar to those of Massachusetts and Virginia, but a Florida dealer must only make 25% of its retail sales and service in the proposed area to be eligible to protest. In Massachusetts, a dealer must make two-thirds of its sales in the proposed area, and in Virginia, at least "a majority" of sales must be made within the area. A Florida dealer with less proven stake in the proposed area can protest the proposed establishment, thereby at least delaying local competition.

The additional dealer restriction, which previously addressed only the establishment of a new point, was also amended to expressly address the relocation of an existing point. Previously, the relocation of a point had been governed by administrative law. Stone Buick, Inc. v. Keelan Buick, Inc. provided that if the existing location of a relocating applicant was already in the "community or territory" of the protesting dealer, and if the proposed relocation was within the same "community or territory," then the proposed change of location does

277. 1988 SUNSET REVIEW, supra note 8, at 124-25.
278. Div. of Admin. Hearings No. 84-4475 (Final Order May 20, 1985).
not implicate the substantial interests of the protesting dealer protected within the zone of interest of section 320.642.279 If, however, an applicant seeks to relocate from outside a protesting dealer's "community or territory" to inside it or seeks to relocate closer to the protesting dealer's borders in such a way that the territories of the protesting dealer and applicant overlap, it was found that such an intrusion upon the interests of the protesting dealer or an "injury in fact" results to create standing in the protesting dealer.

Section 320.642 was amended to carefully construe when the reopening of a point is not an establishment of a new point subject to protest.280 The Act provides that the opening or reopening of a dealer within twelve months is not an additional dealer if: (1) it is within the same or an adjacent county; or (2) the proposed location is further from each existing same line-make dealer than the prior location is from each such dealer within 25 miles of the new location; or (3) the opening or reopening is within 6 miles of the prior location and, if any existing such dealer is located within 15 miles of the former location, the proposed location is no closer to any existing such dealer; or (4) the opening or reopening is within 6 miles of the prior location, and if all existing such dealers are beyond 15 miles of the former location, the proposed location is further than 15 miles from any existing such dealer. The relocation exception was circumscribed by the edict, "[a]ny other such opening or reopening shall constitute an additional motor vehicle dealer within the meaning of this section."281 As a result of the enactment of House Bill 1683, where it was once silent, the motor vehicle manufacturer licensing statute has been refined to elaborately address and restrict the relocation, as well as the establishment, of a dealer point.

In 1980 and 1988, the Senate staff, finding no express legislative intent, deduced from case law that the intent of the statute was to protect incumbent dealers from manufacturer overloading of an area. A new section was created in 1988 to apparently address the noted silence and to provide express legislative intent in regulating motor vehicle manufacturers. Notwithstanding overwhelming evidence that such regulation benefits incumbent franchised dealers to the detriment of new motor vehicle purchasers, and with no evidence of a pattern of discrimination in the awarding of new dealer points, the section provides:


281. Id.
It is the intent of the Legislature to protect the public health, safety and welfare of the citizens of the state by regulating the licensing of motor vehicle dealers and manufacturers, maintaining competition, providing consumer protection and fair trade and providing minorities with opportunities for full participation as motor vehicle dealers.\textsuperscript{282}

Finally, House Bill 1683 provided for automatic repeal of both the reenacted and newly created provisions on October 1, 1998, and again, for sunset review of the statute by the Legislature.\textsuperscript{283}

\subsection*{H. Repealing Sunset}

Within a decade of Colorado's 1976 act, the highly touted concept of sunset review had caught the fancy of over thirty state legislatures.\textsuperscript{284} The premise was appealingly simple. Certain state agencies and regulatory programs, subjected to ambitious review schedules, would automatically terminate unless specifically reauthorized pursuant to a circumspect legislative review. Sunset review would return government to its essential and less costly frame. With such high expectations, however, disenchantment soon set in. Some critics assailed the high cost of reviews and relatively low resulting savings. Others argued that the process had been neutralized by "a wave of lobbyists who descended forcefully in state legislature."\textsuperscript{285} By 1981, North Carolina had repealed its sunset statute. Mississippi followed in 1984 and Nebraska in 1985. Five states have informally discontinued further sunset reviews.

In the 1987-1988 interim, the Florida Senate President directed the Senate Committee on Governmental Operations to review Florida's Regulatory Sunset and Sundown Acts to assess the laws and their implementation, to evaluate their accomplishments, and to recommend revisions if the review identified a need for change. Noting that no statutory criteria exists for reviewing the sunset law itself, the staff reviewed the 138 sunset reviews conducted in Florida between 1977 and 1987 to determine the cost and benefits of the law.\textsuperscript{286} The staff found that the total cost of the reviews had been $1,467,784 and the

\begin{thebibliography}{99}
\bibitem{282} Fla. Stat. § 320.605 (Supp. 1988).
\bibitem{283} Ch. 88-395, § 21, 1988 Fla. Laws 2290, 2312.
\bibitem{284} Ten Years of Sunset, A Survey of States' Experience, Compiled by the South Carolina State Reorganization Commission 4 (1986).
\bibitem{285} Id.
\end{thebibliography}
current average cost of a Senate sunset review to be $10,909. Of the nineteen regulatory laws repealed in that period, eleven regulated occupations and professions. The major benefit of the sunset process was found to be an intangible heightened legislative awareness of executive branch staff and functions, and the elimination of outdated statutory provisions.

The staff noted that the main factor motivating several states to repeal their sunset statutes altogether had been the imbalance between costs and benefits and that a similar imbalance had resulted in Florida. While the report focused on a cost-benefit analysis of the sunset review process, the staff found that one weakness of the sunset process is its failure to consider the political impact of the lobbying groups associated with most regulated professions. Noting that such groups are influential because they represent large numbers of regulated professionals, the staff concluded that sunset laws provide such groups with "an additional point of entry into the legislative system" and "a forum for imposing stricter regulations rather than for relieving practitioners of some of the regulations imposed."

The sunset review process is subject to such abuse when it results in more restrictive legislation with no corresponding public benefit. That has been the case with harbor pilots, barbers, and cosmetologists, or when an unregulated profession becomes regulated as a result of the sunset review of another profession, such as architects and interior designers. The staff concluded that consumers, the group sunset laws were designed to protect, comprise the group least likely to participate in the sunset review process.

As a result, the staff recommended that both the sunset and sun-down acts be scheduled to repeal in 1992 and be subject to prior legislative review, and that statutory criteria be added to guide such review. While Senate Bill 1057, which contained provisions reflecting the recommendations of the committee, passed enthusiastically in the Senate by a vote of 31 to 0, it died in the House Committee on Regulatory Reform, the substantive committee created in the House specifically to conduct sunset reviews. It is not within the scope of this Article, however, to explore the success or failure of the sunset concept altogether, but to register disenchantment with the concept

287. Id. at 68-69.
288. Id. at 67.
289. Id. at 78.
290. Id. at 78-79.
mainly as it relates to the motor vehicle manufacturer regulatory program.

V. CONCLUSION

The Legislature can do many things upon receiving a sunset recommendation to allow the reviewed statute to repeal. It can allow the statute to repeal. The Legislature has twice elected not to do this. Alternatively, it can reenact the existing statute. The Legislature has similarly twice elected not to do this. The Legislature can also reenact the statute as amended. This is how the Legislature has twice responded. The Legislature, however, has not amended the statute to render it less restrictive and more competitive as contemplated by sunset, but has expanded state regulation of the motor vehicle manufacturer-dealer relationship and rendered the already restrictive statute even more restrictive. Notwithstanding the collage of evidence indicating that franchise provisions in general, and the entry restriction in particular, benefit incumbent franchised dealers to the detriment of the new motor vehicle buying public, the Legislature has understandably heeded the concerted effort of the impressive in-state motor vehicle dealers’ lobby to not only reenact the statute but also, in 1980 and in 1988 in particular, to amend the statute to greatly benefit one element of the motor vehicle industry, the dealers, at the expense of the public the process was intended to protect. As a consequence, a process carefully crafted to purge the law books of special interest legislation that may creep into the statutes has been reduced to a periodic state-sponsored forum which triggers such legislation.

The ironic result is compounded by the cost incurred by the Legislature in conducting sunset review. A single Senate sunset report costs almost $11,000, a report apparently not host to serious consideration. Although the House sunset reviews are typically more abbreviated and less costly, this amount could easily be doubled to acknowledge the time spent by the staff and legislators in workshops, follow-up contacts, and in considering and preparing amendments.

The problem created by the Legislature’s repeated response can be remedied by simply refusing to subject to sunset review a statute clearly entrenched in the books. Thirty-five states, including Florida, provide for sunset review of selected regulatory statutes. Of the forty-six states regulating motor vehicle manufacturers, only four, including Florida, have provided for sunset review of such statutes. The rest, for whatever reasons, have declined to go through similar well in-

292. An obvious reason may be the perceived inappropriateness of the sunset concept as it
tended, but at best, unproductive, motions. The Florida Legislature, to spare itself the unintended irony and waste resulting from sunset review of the motor vehicle manufacturer licensing statute, could simply rejoin the majority by repealing the provision scheduling the statute for automatic repeal and a third sunset review in 1998. In the Legislature they say, in the elevators, the hallways, and the stairwells, as if it has to, "What goes around, comes around." But it does not have to.

applies to motor vehicle manufacturer regulatory programs. As noted, 46 state legislatures have allied themselves with the dealers to enact the franchise provisions and the courts have repeatedly endorsed this special interest legislation as necessary to protect the dealers in their business relationship with the manufacturers. It could be suggested that it is neither meaningful nor satisfying to insist that a legislature then inquire into the public purpose of such provisions; a statute clearly enacted to protect an element of an industry will not survive a sunset review focused on the public benefit of such legislation if the statute does not even coincidentally benefit the public.