Fall 1988

New Regulations for Motor Vehicle Manufacturers and New Protections for Their Franchisees

Mary E. Haskins
Walter E. Forehand

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/iss3/9

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.
NEW REGULATIONS FOR MOTOR VEHICLE MANUFACTURERS AND NEW PROTECTIONS FOR THEIR FRANCHISEES

MARY E. HASKINS AND WALTER E. FOREHAND

Sections 320.60 to 320.70, Florida Statutes, regulate the business relationships between motor vehicle manufacturers and their dealers. In this Article, the authors discuss the 1988 Florida Legislature's reenactment and comprehensive revision of the franchise protection scheme. While some scholars have advocated discontinuing the statutory regulation of motor vehicle manufacturers and their franchisees, Ms. Haskins and Dr. Forehand take a contrary position: that extension of the regulatory scheme will provide franchisees with more protections from unfair business practices than otherwise would be available, and may have the salutary effect of injecting a degree of certainty into an area which has heretofore remained unsettled.

TABLE OF CONTENTS

I. MANUFACTURER LICENSING ........................................ 766
   A. Commerce Clause .................................................. 769
   B. Equal Protection Clause .......................................... 770
   C. Supremacy Clause .................................................. 770
   D. Effect of the 1988 Amendments ................................. 771
II. THE AGENCY PROVISION ............................................ 771
   A. Contracts Clause .................................................. 772
   B. Freedom of Association ......................................... 772
   C. Effect of the 1988 Amendments ................................. 773
III. UNFAIR TERMINATION OR MODIFICATION OF FRANCHISE AGREEMENTS ........................................ 773
   A. Pre-Amendment Judicial Interpretations ....................... 774
   B. Effect of the 1988 Amendments ................................ 776
IV. DEALER PROTECTIONS AGAINST UNFAIR COMPETITION.... 777
   A. "Community or Territory" and "Adequate Representation" Under the Pre-Amendment Statute .... 778
V. MISCELLANEOUS PROVISIONS ..................................... 787
VI. CONCLUSION .......................................................... 788

763
NEW REGULATIONS FOR MOTOR VEHICLE MANUFACTURERS AND NEW PROTECTIONS FOR THEIR FRANCHISEES

MARY E. HASKINS* AND WALTER E. FOREHAND**

THE LAW of franchising and franchise agreements is a legal subspecialty which involves elements of both contract and agency. Because franchises have played an increasingly important role in the business life of this country,1 some statutory regulation of franchising has developed. For example, chapter 559, Florida Statutes, regulates the sale or lease of "business opportunities."2 Beer distributorships have received special attention,3 as have cable television franchises.4 By far the most extensive regulation of private business franchises, however, is that found in chapter 320, which governs motor vehicle manufacturers and their dealers.5 The extensive revision of sections 320.60 to 320.71 by the 1988 Legislature is the subject of this Article.

The sale of new motor vehicles has been a troublesome problem through the years. The early method of distribution was for the manufacturer to sell directly to the public. However, this proved to be unsatisfactory, and manufacturers began to change their distribution techniques to rely upon independent outlets controlled by contract.6 Two factors led to state and federal involvement in what could have remained a problem of private contract: the importance of the automobile in society and the imbalance in bargaining power between huge manufacturers and their independent dealers.

In 1941, Florida enacted chapter 20236, thereby taking its first step in regulating motor vehicle manufacturers doing business in this

---


** B.A., 1963, M.A., 1964, University of Florida; Ph.D., 1968, University of Texas; J.D., 1988, Florida State University. The authors would like to acknowledge the helpful suggestions of William C. Owen, Esq., and Daniel E. Myers, Esq.


3. Id. § 563.22.

4. Id. § 166.046.

5. See id. §§ 320.60-.71.

MOTOR VEHICLE MANUFACTURERS

state. This initial regulation essentially provided only for the licensing of manufacturers. It was not until 1970 that the regulatory scheme was greatly expanded and the general framework of sections 320.60 to 320.70 emerged.

In 1976, the various franchise provisions came up for immediate sunset review pursuant to the Regulatory Reform Act passed that year. Sunset, the mechanism which provides for the periodic and systematic review of the state’s various regulatory programs, permits the legislature to determine whether to terminate, modify, or reestablish the program. The franchise protection scheme was reenacted in that year as it then existed. It was reenacted with amendments in 1980.

In 1988, the law was once again presented to the Legislature for sunset review. The original proposal, Senate Bill 982, was merely a reenactment of the existing franchise provisions. The bill was referred to the Economic, Community and Consumer Affairs Committee, which ultimately produced a comprehensive Committee Substitute for Senate Bill 982. This bill died in the House Committee on Regulatory Reform.

Franchise legislation in the House was sponsored by Representatives Lippman, Gordon and Grindle. Like the Committee Substitute for Senate Bill 982, House Bill 1683 proposed substantial changes and additions to the existing franchise provisions. Having been reported favorably by the House Appropriations Committee, the bill was unanimously passed by the House. It was then sent to the Senate, where it was placed on the Special Order Calendar and passed as amended 37 to 0 on May 31, 1988. On June 1, the House took up the amended

---

7. Ch. 20236, Laws of Fla. (1941).
8. Ch. 70-424, 1970 Fla. Laws 1269 (codified as amended at FLA. STAT. §§ 320.27, 320.273, 320.60-.698 (1987)). Chapter 70-424 also created section 320.274, which dealt with procedures to be followed when the Director of the Division of Motor Vehicles conducted hearings pursuant to chapter 120, but the section was repealed. Ch. 80-217, § 18, 1980 Fla. Laws 684, 701.
bill which was again passed unanimously. The bill was signed into law by the Governor on July 6, 1988.

This Article examines prior statutory and case law as a basis for understanding the breadth and significance of the changes to the motor vehicle regulatory scheme enacted in 1988. Specifically, it explores the principal provisions of the regulatory scheme in light of various constitutional challenges which have been brought against it. The Article also analyzes the 1988 amendments to each section discussed. Finally, it suggests an interpretive framework upon which future franchise issues may be determined with greater certainty.

I. MANUFACTURER LICENSING

As it existed prior to 1984, section 320.61 mandated that certain entities obtain a license before selling, leasing, or offering motor vehicles for sale or lease in Florida. This section also subjected those entities to the jurisdiction of the Florida courts. With the exception of an unsuccessful attack on section 320.642, which permits a dealer to protest the establishment of a new dealership in its community or territory, the validity of section 320.61—and indeed the entire regulatory framework—had remained largely unquestioned for over a decade.

The tranquility ended abruptly in 1984 when the Legislature enacted chapter 84-69. Chapter 84-69 altered section 320.61 to require that both the manufacturer of a vehicle and its factory branch, distributor or importer, if any existed, had to be licensed before its cars could be sold or leased in the state. When read together with section

23. References in the text will be to the sections as they are to be codified.
24. The manufacturer or factory branch, on direct dealerships of domestic vehicles; the importer of foreign manufactured vehicles, on direct dealerships; or the distributor, on indirect dealerships of either domestic or foreign vehicles were entities required to obtain licenses. Fla. Stat. § 320.61(1) (1983).
25. Id.
26. See Plantation Datsun, Inc. v. Calvin, 275 So. 2d 261 (Fla. 1st DCA 1973). The section withstood claims that it violated the state constitution (improper delegation of legislative power), the due process clause of the federal Constitution (deprivation of property without due process of law), and the fifth and fourteenth amendments (unconstitutional imposition of burden of proof on applicant).
27. But see Yamaha Parts Distrib., Inc. v. Ehrman, 316 So. 2d 557 (Fla. 1st DCA 1975). In Ehrman, the Supreme Court of Florida held that the provision of section 320.61 which required a manufacturer to give 90 days' notice to a franchisee before terminating a franchise agreement could not be applied retroactively to impair existing contracts.
the result was that every manufacturer of cars sold in the state would be subject to the jurisdiction of the Florida courts. While this change did not alter the law with respect to domestic manufacturers, it reached beyond the direct franchise situation to include foreign manufacturers of automobiles which do not contract directly with Florida dealers. This apparently minor change to the wording of section 320.61(1) precipitated a sweeping constitutional challenge.

Chapter 84-69 represented the Legislature’s response to the existence of a gaping loophole in Florida’s extensive franchise protection scheme. The need for legislation had become apparent in February of 1984 when Porsche AG, the foreign manufacturer of Porsche vehicles, announced without warning to its American dealers that its distributorship agreement with Volkswagen of America (the Porsche United States distributor) would not be renewed upon its expiration in 1984. Porsche further announced that it intended to implement a new distribution network which effectively would eliminate the traditional concept and role of automobile dealerships.

The method of distribution typically used by Porsche and other overseas manufacturers was to conduct its sales to United States consumers through layers of importers or distributors interposed between the manufacturer and the Florida dealers. By virtue of these insulating layers, when a foreign manufacturer chose to terminate its contract with a United States distributor, it could successfully claim that it had no obligation to continue selling automobiles to the retail dealers franchised by the terminated distributor or importer. These franchised retail dealers had dealership contracts with either the importer or the distributor, but had no contracts directly with the foreign manufacturers. Clearly, the Florida regulatory scheme was unable to protect dealers from unfair cancellation of their franchises since ultimate control over the product source rested with the manufacturer, an entity which had no contractual privity with the Florida dealer. The foreign manufacturer, therefore, enjoyed immunity from statutory regulation, at least as long as it did not become licensed under section 320.61. The mandatory licensing requirement (and the agency provision contained

30. Section 320.61(5) provides, “[t]he obtaining of a license under §§ 320.60-320.70 conclusively establishes that the licensee is doing business in the state and subjects the licensee to all provisions of Florida law.” Id. § 320.61(5) (Supp. 1984).

31. Domestic manufacturers to this point generally have franchised directly with their Florida dealers, with no intervening middlemen such as distributors or importers. Thus, they already were required to be licensed and were doing business in the state so as to make them subject to its jurisdiction.
in section 320.6405) was added to ensure that franchise protection could not be avoided by manufacturers injecting one or more intermediate corporate layers into the chain of distribution of the automobiles. After the 1984 amendments, Florida dealers were protected from having their franchise agreements terminated arbitrarily or unfairly.

In response to this legislation, the Automobile Importers of America, Inc., and many of its members filed a complaint in the District Court for the Southern District of Florida for declaratory and injunctive relief against the Director of the Department of Highway Safety and Motor Vehicles in August 1985. The Florida Automobile Dealers Association was permitted to intervene as a party. Early in the proceedings the state agreed not to enforce the licensing and agency provisions.

The plaintiffs attacked the facial validity of sections 320.61(1) and 320.6405, arguing that the statutes violated the commerce, equal protection, due process, and supremacy clauses of the United States Constitution. Plaintiffs moved for summary judgment on these

32. Section 320.6405 as amended in 1984 imposed a limited agency relationship between manufacturers and their importers so that the manufacturer was effectively obligated upon franchise agreements entered into between importers and distributors of motor vehicles and Florida dealers. See infra notes 57-64 and accompanying text.

33. Although the Porsche events focused attention on the ability of foreign manufacturers to avoid the protective features of the franchise act, the Florida Automobile Dealers Association was also concerned that new domestic ventures and enterprises, such as the Saturn project announced by General Motors, might also be structured to escape the regulatory features of the act by interposing intermediate corporate layers between the manufacturer and the dealer.


35. Originally filed in the Southern District of Florida, the case was transferred to the Northern District. Letter from Charles J. Brantley, Div. of Motor Veh., to Eric J. Taylor, Ass't Att'y Gen. (Dec. 11, 1985) (agreeing to a six-month delay of the implementation of § 320.61(1) "in hopes that the issues involved in the instant law suit may be resolved by that time") (on file, Florida State University Law Review). Cf. Staff 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 155-157 (Apr. 1988) [hereinafter Staff of Fla. S. Comm. on Econ., Comm'y & Cons. Affairs Review] (on file with committee). In this study, the staff relied upon the fact that no complaints had been filed under either the licensing or agency provision to support its assertion that the public would not be harmed if those provisions were not reenacted.

36. Although technically the complaint was directed to sections 320.61(1) and 320.6405, the jurisdictional provision of section 320.61(5) was integral to the plaintiffs' challenge.


38. U.S. Const. amend. XIV, § 1.


40. U.S. Const. art. VI, cl. 2.
The respective arguments and the court's disposition of them are helpful in understanding the range of the constitutional challenges available to plaintiffs in the area of franchise regulation.

A. Commerce Clause

Plaintiffs argued that the licensing and agency requirements constituted a direct burden on commerce because in-state dealers were favored over out-of-state manufacturers, and they claimed that foreign manufacturers would refuse to become licensed. As a result, their cars would be excluded from the Florida market. The court held that, under Exxon Corp. v. Governor of Maryland, enterprises must be similarly situated before a finding of unconstitutional discrimination may be reached; that is, a law must favor in-state dealers or local manufacturers over out-of-state manufacturers before it will be held to discriminate. Since there were no local manufacturers that could benefit from the operation of the statute to the prejudice of the foreign manufacturers, the law imposed no direct burden on commerce. The court rejected the second argument by holding that "manufacturers cannot refuse to comply with an otherwise valid statute and then point to the effects of their noncompliance as constituting a direct burden on interstate commerce."

The plaintiffs next argued that the licensing provision failed the Pike v. Bruce Church, Inc. dormant commerce clause balancing test. The Pike test requires that a challenged statute must effectuate a legitimate state interest and may not impose a burden on commerce that is clearly excessive in relation to the local benefits to be derived from the statute. The legitimacy of the state's interest in regulating automobile franchises was previously recognized in New Motor Vehicle Board v. Orrin W. Fox Co., and was not contested by plaintiffs. Instead, they argued that the burden was unreasonable in relation to the benefits. Specifically, they contended that manufacturers would refuse to become licensed, thus frustrating the state's legitimate interest in pro-
tecting franchises for the benefit of dealers and consumers since the refusal to obtain a license would have the effect of terminating existing dealerships. The court rejected this argument, again because it weighed the burdens and benefits based upon the effects of noncompliance with the statutes.\textsuperscript{48}

\textbf{B. Equal Protection Clause}

The plaintiffs argued that the licensing and agency provisions violated the equal protection clause by requiring licensure of automobile manufacturers and importers without requiring licensure of manufacturers and importers of other goods and products. They contended that the state's regulatory interest was adequately served by licensing importers and distributors.

The court, again relying on the \textit{Fox} decision, held that the state's interest in regulating automobile franchises was legitimate. Furthermore, the court found that "Florida's decision to involve manufacturers so as to further extend franchise protection is not irrational . . . because the state could reasonably believe that effective franchise protection requires inclusion of the manufacturer who is in complete control of the supply of automobiles.\textsuperscript{49}" The court applied the rational relationship test appropriate to such economic regulation,\textsuperscript{50} despite the argument that strict scrutiny should be applied because the statute impaired the plaintiffs' fundamental first amendment right of association.\textsuperscript{51} The court denied summary judgment on the equal protection claims.

\textbf{C. Supremacy Clause}

The plaintiffs argued that the licensing and agency provisions offended the supremacy clause by discriminating against United States trading partners in violation of treaties of friendship, commerce and navigation executed between the United States and France, Germany, Italy and Japan. These treaties prohibit the signatories from taking any unreasonable or discriminatory measures that would impair the rights of the signing parties. The plaintiffs contended that singling out automobile manufacturers for regulation, and not the manufacturers of other imported goods, had the effect of discriminating against

\textsuperscript{48} Automobile Importers of Am., Inc. v. Mellon, No. TCA 85-7269, unpub. order at 15-16 (N.D. Fla. Sept. 21, 1987).

\textsuperscript{49} \textit{Id.} at 23.

\textsuperscript{50} See New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (appropriate inquiry is whether the classification complained of is rationally related to a legitimate state interest).

\textsuperscript{51} See infra notes 62-63 and accompanying text.
countries whose economies depend upon the export of automobiles. The court denied summary judgment, holding that the contested provisions applied equally to United States and foreign manufacturers, so the statutes had no discriminatory effect upon the citizens of the treaty partners.52

D. Effect of the 1988 Amendments

The licensing provision was amended to delete the requirement that manufacturers be licensed before their cars may be sold in the state.53 Pursuant to the amendment, only a manufacturer, importer or distributor that issues a franchise agreement in the state must be licensed. In conjunction with this change, the jurisdictional section of the statute54 was amended to provide that any manufacturer that does get licensed will be subject to the general long-arm jurisdiction of the Florida courts. Moreover, any unlicensed manufacturer whose automobiles are sold or leased in the state "pursuant to a plan, system or channel of distribution established, approved, authorized or known to the manufacturer" is still subject to the specific jurisdiction of Florida tribunals for violations of sections 320.60 to 320.70.55 These changes were specifically designed to cure any "minimum contacts" due process infirmities present in the previous version of the statute, as indicated by the challenge in Automobile Importers of America. Apparently these alterations, together with the amendment to section 320.6405 (agency relationship), have been effective, since the plaintiffs in that suit have dismissed the pending cause as moot.56

II. THE AGENCY PROVISION

In addition to the licensing feature, the 1984 law imposed a limited agency relationship between manufacturers and their distributors or importers so that a manufacturer became obligated upon franchise agreements entered into between importers and distributors and Florida dealers.57 The practical effect of this was to ensure that the con-

---

52. Automobile Importers of Am., No. TCA 85-7269, unpub. order at 18-19.
54. Id.
55. Id.
57. Section 320.6405 provides:

Any parent, subsidiary or common entity of a manufacturer; factory branch; distributor; importer; or other entity which by contractual arrangement or otherwise en-
tractual obligations of the automobile importer or distributor with its Florida dealers must be honored by the foreign manufacturer in the event the manufacturer decided to eliminate the intermediate importer or distributor, as in the Porsche situation.58

In addition to the commerce, equal protection, supremacy and due process challenges leveled against the statute, the plaintiffs in Automobile Importers of America attacked the agency provision as being violative of the contracts clause 59 and the right of freedom of association protected by the first amendment.60

A. Contracts Clause

The plaintiffs contended that the agency provision offended the contracts clause by interfering with existing contracts between the foreign manufacturers and their importers or distributors. The court quickly rejected this contention because the plaintiffs failed to explain how the existing contracts were in any way impaired, much less how they suffered the substantial impairment required before claiming the protection of the contracts clause.61

B. Freedom of Association

The plaintiffs asserted that the agency provision forced importers and distributors to associate with manufacturers by becoming their agents, in violation of their penumbral first amendment “right not to associate.”62 The court held that the plaintiffs failed to show that the

gages in the distribution of a manufacturer’s products shall be deemed to be the agent of the manufacturer for the purposes of any franchise agreement entered into between such agent and a motor vehicle dealer and shall be bound by the terms and provisions of such franchise agreement as if it were the principal. A manufacturer the products of which are offered for sale in this state under any franchise agreement which is executed by an agent of such manufacturer is bound by the terms and provisions of such franchise agreement as if it and not the agent had executed the franchise agreement.


58. See supra notes 28-33 and accompanying text.


60. U.S. CONST. amend. I.


statute had any harmful effect on their associational rights, particularly since "[m]anufacturers and importers were already in some form of contractual privity and the challenged provision merely codifies an agency relationship for the limited purpose of enforcing franchise agreements." 63

C. Effect of the 1988 Amendments

The 1988 amendments do not significantly alter the responsibilities of the manufacturer that conducts its business through importers or distributors toward the Florida dealers. The new provisions do make explicit that the agency fiction is not dependent upon whether the manufacturer is licensed under section 320.61. Now, the manufacturer will be "subject to all of the restrictions, limitations, remedies, and penalties" of sections 320.60 to 320.70 relating to franchise agreements regardless of whether it is required to be licensed. 64

One interesting change effected by the 1988 amendments is the provision that no agency relationship will be presumed where an entity distributes in the state under its brand name vehicles which are actually manufactured by a foreign company, so long as the distributing entity is independently licensed in the state as a manufacturer of other line-make vehicles. In that situation, only the distributing entity is subject to the franchise law, and the foreign manufacturer is free from possible penalties for any unfair franchise termination that might occur.

III. UNFAIR TERMINATION OR MODIFICATION OF FRANCHISE AGREEMENTS

Florida protects dealers against unfair discontinuation or modification of their franchise agreements both in section 320.64, which enumerates factors that can lead to denial or revocation of a manufacturer's license, 65 and in section 320.641, which is devoted to unfair termination or modification of such agreements. In addition, section 320.6415 requires that an agreement with an importer or distributor cannot be substantively altered by a change of importer or distributor or by a change in distribution plan.

The 1988 amendments provide an express cause of action for dealers under sections 320.695 (injunction) and 320.697 (civil damages) to

63. Automobile Importers of Am., No. TCA 85-7269, unpub. order at 22.
64. Ch. 88-395, § 10, 1988 Fla. Laws 2290, 2303 (codified at FLA. STAT. § 320.6405 (Supp. 1988)).
65. FLA. STAT. § 320.64(7), (8) (1987).
redress injurious violations of section 320.64. However, subsections 320.64(7) and (8) have been amended to link them with the requirements of section 320.641. Determinations under that section are made by the Department of Highway Safety and Motor Vehicles after an administrative hearing. Amendments to section 320.641 merit more detailed evaluation.

A. Pre-Amendment Judicial Interpretations

The leading case interpreting section 320.641 is International Harvester Co. v. Calvin. That court noted that the “obvious . . . legislative intent” was “to redress the economic imbalance” between national manufacturers and local dealers. It also determined that section 320.641 protected dealers “from arbitrary and discriminatory action” or coercion to expend monies out of fear of termination.

The dealer in International Harvester alleged that its protest of the installation of a new dealer in a neighboring city induced its manufacturer to attempt to terminate its franchise. Motive, the court observed, was a key element in determining the propriety of the manufacturer’s actions, for the manufacturer could properly attempt to enforce “valid contractual obligations.” It then adopted the reasoning of the United States Supreme Court in Mt. Healthy City Board of Education v. Doyle to determine whether antagonism toward the complaining party can lead to a conclusion of bad faith “discharge.” Under the Mt. Healthy test, the petitioner must establish by a preponderance of the evidence a prima facie showing of bad faith; the respondent must then counter with a preponderance of evidence to show that “it would have reached the same decision even in the absence of the alleged bad faith.” Furthermore, the International Harvester court implied that petitioners in commercial cases must bear a heavier burden than those complaining of wrongful discharge in public labor relations cases where first amendment rights are implicated and the

67. Id. (codified at Fla. Stat. § 320.64(7), (8) (Supp. 1988)).
69. International Harvester, 353 So. 2d at 147.
70. Id. at 147-48.
71. Id. at 146.
72. Id. at 148.
parties are in an adversarial relationship. In commercial cases both manufacturer and dealer want to make a profit, and it is therefore unlikely that the manufacturer would choose to terminate simply out of personal malice.\textsuperscript{75}

\textit{International Harvester}, therefore, shields manufacturers in cases where a troublesome dealer with whom there has been bad blood in the past, or whom the manufacturer is glad to make an example of, is in sufficient breach of the franchise agreement to warrant termination independent of any preexisting ill will. Despite the stringency of the \textit{International Harvester} standard, the Director of the Division of Motor Vehicles found in 1979 that a franchise was unfairly terminated because of a failure to meet a contractual "minimum sales responsibility."\textsuperscript{76} Chrysler had sought to terminate a dealership because it had fallen below the "minimum sales responsibility" specified in its franchise agreement for several consecutive years. The Director found, however, that the franchise agreement provided for an adjustment to the figure under certain conditions, which were present in the case, and that consequently the cancellation was unfair.\textsuperscript{77}

In the aftermath of that case, the dealer brought an action in circuit court under the statutory cause of action created by subsection (5)\textsuperscript{78} seeking attorney's fees and costs. The Third District Court of Appeal upheld this section of the statute against a constitutional challenge.\textsuperscript{79}

In general, \textit{International Harvester} presents a formidable burden for dealers protesting unfair termination, as a recent recommended order in \textit{Mike Smith Pontiac GMC v. Mercedes-Benz of North America}\textsuperscript{80} illustrates. After a careful analysis of "unfairness,"\textsuperscript{81} and despite finding four of the five grounds for termination stated in the manufacturer's termination letter to be unfair, the presence of one valid ground was sufficient to sustain termination.\textsuperscript{82}

\begin{itemize}
\item \textsuperscript{75} \textit{Id.} at 148 n.3.
\item \textsuperscript{76} \textit{In re} J.R. Furlong, Inc., Dep't of High. Safety & Motor Veh. Order (Aug. 22, 1979) (on file, \textit{Florida State University Law Review}).
\item \textsuperscript{77} \textit{Id.} at 10-12.
\item \textsuperscript{78} Renumbered in the amendments as subsection (6).
\item \textsuperscript{79} J.R. Furlong, Inc. \textit{v.} Chrysler Corp., 419 So. 2d 385 (Fla. 3d DCA 1982).
\item \textsuperscript{80} Div. of Admin. Hearings No. 86-0271 (dismissed as moot Nov. 9, 1987). This recommended order dealt with sections 320.641, 320.643, and 320.644. There were two Department of Highway Safety and Motor Vehicles cases (87-21/22) involved. When the Director ruled that the manufacturer had failed to file a technically correct verified complaint as required by sections 320.643 and 320.644, and so forfeited its opportunity to object to the transfer of the franchise, the section 320.641 action became moot. Although the recommended order is not controlling authority, it is nonetheless instructive in its interpretation of section 320.641. The consolidated cases are on appeal. Mike Smith Pontiac GMC \textit{v.} Mercedes-Benz of N. Am., No. 87-2041/2042 (Fla. 1st DCA filed Dec. 7, 1987).
\item \textsuperscript{81} \textit{Mike Smith Pontiac}, Div. of Admin. Hearings No. 86-0271, rec. order at 36-38.
\item \textsuperscript{82} \textit{Id.} at 54.
\end{itemize}
B. Effect of the 1988 Amendments

Two 1988 amendments to these sections are worthy of comment. One clarifies "abandonment" of a dealership and establishes a special procedure for terminating an abandoned dealership. The other amplifies the concept of "unfair":

A discontinuation, cancellation, or nonrenewal of a franchise agreement is unfair if it is not clearly permitted by the franchise agreement; is not undertaken in good faith; is not undertaken for good cause; or is based on an alleged breach of the franchise agreement which is not in fact a material and substantial breach.

This language attempts to define "unfair" more precisely and more liberally than federal courts have interpreted good and bad faith in the Dealer's Day in Court Act. This new language comports with "arbitrary and discriminatory action" or coercion as enumerated in International Harvester. "Good faith," "good cause," and "material and substantial breach" must be given their technical meanings as developed in the jurisprudence of Florida contract law, to which courts may turn with confidence for guidance.

What remains to be answered is whether by making this change at this time, rather than during the 1980 review, the Legislature intended to modify the judicial interpretation established in International Harvester. Does the new language imply that the manufacturer's actions must be based on overall good faith, good cause, or upon a material and substantial breach unless clearly permitted by the franchise agreement? Or does it aspire only to clarify "unfair," leaving intact the International Harvester standard with respect to motive?

On the principle that the Legislature could have given the direction necessary to modify International Harvester in express language had it so intended, the more probable reading is that it intended to clear up the vagueness of the standard without regard to the question of mixed motives. Given the fact that the language appears to be intended to protect the dealer against a manufacturer's clever efforts to take ad-

84. Id. (codified at Fla. Stat. 320.641(3) (Supp. 1988)). Of some note is the change in procedure allowing for a "petition or complaint" instead of a "verified complaint" to test the propriety of a manufacturer's proposed action. Id.
86. 353 So. 2d 144, 147-48 (Fla. 1st DCA 1977).
vantage of vagueness,87 a colorable argument also can be advanced that the Legislature intended a general "loosening" in favor of the dealer and that a technically permissible cause of termination pursued selectively against a given dealer because of bad blood is prohibited within the contemplation of the statute as amended.

IV. DEALER PROTECTIONS AGAINST UNFAIR COMPETITION

Of the franchise protection provisions in sections 320.60 to 320.70, litigation has occurred most frequently under section 320.642, which allows a dealer to protest the establishment of a new dealership in its "community or territory." The 1988 amendments make sweeping changes to this section. Consequently, the present study must examine the impact of these changes on "open point" or "new point" protests.

The section was first enacted in 1970 and has remained unchanged until now. It was quite simple in language, containing only fifty-nine words. The section mandated that the Department of Highway Safety and Motor Vehicles (DHSMV) deny an application for a new motor vehicle license in a "community or territory" where "the licensee's presently franchised" dealers were in compliance with franchise agreements and "providing adequate representation in the community or territory for such licensee." The burden of showing inadequate representation has rested upon the manufacturer. Since the enactment of this provision, judicial decisions have clarified the contours of this rather imprecise wording.

The 1988 amendments eliminate the present version of the statute and replace it with five subsections divided into over two dozen parts.88 Although the basic principle remains intact, the amendments clarify that additional dealers in the same line-make89 cannot be placed in areas already adequately representing the manufacturer's products. Moreover, the procedures for making determinations under the section have been made far more specific than under the version which has been in force for the past seventeen years.

---

87. Cf. Fla. Stat. § 320.641(1)(b) (1987) ("Designation of a franchise agreement at a specific location as a 'nondesignated point' shall be deemed an evasion of this section and constitutes an unfair cancellation.").


89. Id. § 3, 1988 Fla. Laws at 2296-97 (codified at Fla. Stat. § 320.60(14) (Supp. 1988)) ("'Line-make vehicles' are those motor vehicles which are offered for sale, lease, or distribution under a common name, trademark, service mark, or brand name of the manufacturer of same.").
A. "Community or Territory" and "Adequate Representation" Under the Pre-Amendment Statute

The Department has promulgated Florida Administrative Code Rule 15C-1.008 to implement section 320.642. The rule requires an applicant for a new motor vehicle license to notify the Director of the Division of Motor Vehicles and enclose either a copy of the franchise agreement or a letter of intent to grant the franchise from the manufacturer. The notification must include a statement of the location of the proposed dealership and the names of other dealers "in the surrounding trade areas, community or territory" who are licensed by the same manufacturer. In substance, the rule requires the Director to notify all dealers of the same line-make in the community or territory, omitting any that have filed a blanket letter of "no protest." Upon timely receipt of a letter indicating protest of the new point by an existing dealer, the Director determines whether section 320.642 is applicable. Since the 1980 amendments to chapter 320, that has meant submitting the case to the Division of Administrative Hearings (DOAH) for a section 320.642 hearing before deciding whether to grant or deny the license application.

Since the burden is on the manufacturer to prove adequate representation, the manufacturer is a petitioner and an indispensable party to the hearing. The proposed dealer, usually a corporation, is also a party petitioner. The protesting dealer or dealers and the Department are the respondents.

Although the statute does not define "community or territory," the Department has developed an unofficial rule for the purpose of notification. These "notification areas" provide the initial "invitation" to protest and, pursuant to Florida Administrative Code Rule 15C-1.008, the Department will order a hearing if any notified dealer protests. Dealers may also seek a hearing or intervenor status, under section 120.57(1). The "notification areas," however, have not constituted a definition of "community or territory" for purposes of the hearing.

The leading case for the definition of "community or territory" is Bill Kelley Chevrolet v. Calvin (Bill Kelley II), where the First District Court of Appeal held:

---

92. The consideration of "community or territory" (emphasis in DHSMV information) implicates three areas: (1) like franchise dealers in the county where the "new point" is to be located; (2) "new points" being placed near a county boundary and so affecting a "marketing area" in the adjacent county; and (3) dealers in surrounding counties if there is no dealer in the county where the "new point" is to be located.
93. 322 So. 2d 50 (Fla. 1st DCA 1975). Cf. Bill Kelley Chevrolet v. Calvin, 308 So. 2d 199
If within the territory described in the nonexclusive franchise agreements there remains an identifiable plot not yet cultivated, which could be expected to flourish if given the attention which the others in their turns received, we think the Director is justified in concluding that the cultivation of the territory is not adequate.

The purpose of § 320.642, F.S. 1973, is to prevent powerful manufacturers from taking unfair advantage of their dealers by overloading a market area. Its purpose is not to foster combinations to prevent the introduction of dealer competition.

*Bill Kelley II* thus stands for the proposition that a manufacturer-established market area may be considered "community or territory," but that if a large geographical area has been identified as a stated nonexclusive franchise territory, the "community or territory" may also be a smaller identifiable portion of that area.

In practice, organizational procedures vary considerably. Some dealer franchise agreements describe a geographical area of responsibility unique to the franchisee, although the dealership may sell to buyers from any area. Others assign the same, usually much larger, geographical area of responsibility to a number of dealers, again without any limitation on where vehicles may actually be sold. The nonexclusive area in *Bill Kelley II* encompassed a two-county metropolitan area already containing twelve dealers.

Under the reasoning of *Bill Kelley II*, it is possible for a manufacturer to choose a small area within a multi-county marketing area where its product does not enjoy a high share of the market in which to place a proposed dealership. It then would have quite good prospects of showing inadequacy in a section 320.642 hearing, as has been the experience in actual litigation.

---

(Fla. 1st DCA 1974) (either failure to comply with franchise agreements or inadequate representation sufficient to sustain grant of license to new dealer).

94. *Bill Kelley II*, 322 So. 2d at 52.

95. *Id.* at 51.

96. The staff report of the Senate Economic, Community and Consumer Affairs Committee has identified 27 cases filed under section 320.642 in the period 1983-1987; the protesting dealer prevailed in only one. See STAFF OF FLA. S. COMM. ON ECON., COMM’Y & CONS. AFFAIRS REVIEW, supra note 35, at 70. For examples of "community or territory," see In re Fischer Olds-Cadillac, Dep’t of High. Safety & Motor Veh. Order at 11 (May 23, 1980) ("trading area" consisting of "Martin County and the south half of St. Lucie County"); Steve Sorenson Chevrolet v. Tom Edwards, Inc., Div. of Admin. Hearings No. 83-2596, rec. order at 4, 8 (Final Order July 13, 1984) (Lake Wales sales locality consisting of Lake Wales, Babson Park, Frostproof, and Waverly); Legsdon & Nicolini, Inc. v. A.D.E. Sales, Div. of Admin. Hearings No. 83-4008, rec. order at 11 (Final Order July 10, 1984) (Hillsborough County as community or territory). For difficulties in establishing the "community or territory" see Chevrolet World, Inc. v. Century Chevrolet, Inc., Div. of Admin. Hearings No. 86-3617, order declining remand at 3-4 (May 12, 1988) (Final Order Nov. 10, 1988). The Final Order has been appealed. No. 88-2200 (Fla. 5th DCA filed Nov. 14, 1988).
protection against overloading a market area, but it has not been a significant restraint on licensing new dealers.

Few appellate cases have dealt with the adequacy of representation concept, a term which remains undefined in the present statute. One thing is clear: there must be a finding of inadequate representation, not merely that representation could be improved. As in other types of licensing proceedings, evidence of adequacy is largely supplied by expert witnesses, marketing specialists, economists, and statisticians. The most common measure of adequacy has been penetration of the market—comparison of the percent of total vehicles registered in the area represented by the line-make with like percentages in other markets. Adequacy is a matter to be judged by the administrative hearing officer as finder of fact in the recommended order to the Director.

Litigants are free to argue the reasonableness of the comparison and the proper expectation for the market. That a dealer has not been allotted sufficient cars by the manufacturer to increase market penetration has been offered as a factor in assessing adequacy, although the relevance of allocation may depend on the facts of the specific case. Demographic arguments have also been advanced to establish the proper level of expectancy. The mere fact that an additional dealership will have an adverse financial impact on existing dealers, however, is not a relevant factor.

Judicial effort has been expended defining what kinds of dealer license applications are new dealer applications for the purposes of section 320.642. For example, the establishment of a dealership by a presently licensed dealer through a wholly-owned subsidiary corporation is subject to the statute. Relocation of existing dealerships represents a special problem. Bill Kelley II established that the intent of the section was to protect existing dealers from overloading of a mar-

97. Hess Marine v. Calvin, 296 So. 2d 114 (Fla. 1st DCA 1974).
98. See, e.g., Chevrolet World, Div. of Admin. Hearings No. 86-3617, rec. order at 5.
99. See Steve Sorenson, Div. of Admin. Hearings No. 83-2596, at 5-8; Chevrolet World, Div. of Admin. Hearings No. 86-3617, rec. order at 25-26 (Final Order Nov. 10, 1988). In both cases the hearing officer rejected the manufacturers' statistical analyses and denied the applications.
100. Compare Dave Zinn Toyota v. Department of High. Safety & Motor Veh., 432 So. 2d 1320, 1323 (Fla. 3d DCA 1983) (restriction on number of vehicles allocated not relevant in view of comprehensive plan to have dealers of modest size) with Colonial Pontiac v. Dave Zinn Toyota, Div. of Admin. Hearings No. 81-3054, rec. order at 8-9 (Final Order Feb. 8, 1983) (sales controlled by availability of vehicles, license denied).
ket area by more powerful manufacturers. Since the relocation of an existing dealership within the same "community or territory" would not add to the representation in that area, it should not implicate section 320.642. However, where the relocation is coextensive with a change of ownership and represents a move of substantial distance, section 320.642 is applicable. The law appears unsettled with respect to a dealer who relocates into what is arguably a different community or territory.

B. The Effect of the 1988 Amendments: Does Florida Now Have a Relevant Market Area?

The 1988 amendments completely remodel section 320.642, deleting the existing text and enacting a replacement with much more specific provisions. Subsection (1) establishes notice provisions similar to those in Florida Administrative Code Rule 15C-1.008 and in the unofficial departmental policy. These place upon the manufacturer the requirement of notifying the DHSMV and upon the Department the duty to publish a notice concerning the new dealership or relocation in the Florida Administrative Weekly. Publication begins a twenty-day period within which those with standing may protest the addition or relocation. This amendment seems calculated to do little more than codify established practices. On the other hand, it does make explicit that the relocation of a dealership "to a location within a community or territory where the same line-make vehicle is presently represented" may be scrutinized to see if it falls within the purview of this section. Potentially implicated dealers are those in the county or in any contiguous county of the proposed new dealership, as outlined in subsection (1)(c). Indeed, this section makes specific reference to section 320.642(3), the standing section.

Section 320.642(2) represents a major overhaul of the essential features of section 320.642. Subsection (2)(a)(1) provides that one step in
the denial of a proposed license is "[a] timely protest . . . filed by a presently existing . . . dealer with standing to protest as defined in subsection (3)." Subsection (2)(a)(2) is essentially a restatement of the "adequate representation" portion of the pre-amendment section.

Section 320.642(2)(b) proceeds to delineate types of evidence which may be considered in determining adequate representation. It enumerates eleven factors: impact on consumers and established dealers including financial impact with respect to protesting dealers; investments and obligations of existing dealers in living up to their franchise agreements; market penetration, considered with respect to factors such as demographics and product popularity; manufacturer action affecting opportunity for growth, including allocation of vehicles; attempted coercion of existing dealers; convenience factors such as drive times; benefits to the consuming public; substantial compliance with dealer agreements; adequacy of competition; market conditions and anticipated future changes; and volume of registration. Comparison of this catalog with the overview of the factors weighed in actual hearings and judicial decisions reveals that the amended law makes quite explicit the permissibility of taking evidence on almost all the points that litigants have raised in the past. Allocation, for example, is now specifically at issue, superseding such decisions as Dave Zinn Toyota v. Department of Highway Safety & Motor Vehicles108 Financial impact on protesting dealers is now a permissible factor, effectively overruling Stewart Pontiac v. Department of Highway Safety & Motor Vehicles.109 Finally, compliance with the franchise agreement has been reduced from an element sufficient to decide the issue to only one of a number permissible factors to be considered.

In view of the low percentage of dealer protests that have been successful in recent years,110 it is likely that these revisions will result in greater trade protection for existing dealers. The single most important factor in the past for determining adequacy has been level of market penetration. Now finders of fact are expressly invited to consider penetration in the context of demographics and marketing factors which may affect it. Thus, protesting dealers will be supported directly by the statute in their efforts to distinguish their own markets from comparative markets in which the same line-make is faring better. More speculative factors like future economic prospects may also

108. 432 So. 2d 1320 (Fla. 3d DCA 1983).
109. 511 So. 2d 660 (Fla. 4th DCA 1987).
110. See STAFF OF FLA. S. COMM. ON ECON., COMM’Y & CONS. AFFAIRS REVIEW, supra note 35, at 70 (indicating that only one protest was successful in 27 cases filed under § 320.642 in the period 1983-1987).
be introduced. Finally, all of these issues open the door to extensive discovery which might in the past have been successfully opposed as irrelevant.

While section 320.642(2) directs a great deal of attention to "adequate representation," there is no analogous specific definition of "community or territory" in the statute. However, a careful reading of section 320.642(3) with other provisions and with section 120.57(1) leads to the conclusion that the Legislature has indeed delineated "community or territory." This change, in concert with the "adequacy" provisions, should bring much greater clarity to post-amendment hearings and should effectively supersede Bill Kelley II.111

The first use of the technical expression "community or territory" in the franchise provisions occurs at section 320.64(23), a 1988 amendment.112 This subsection makes it a violation for the manufacturer to threaten or coerce a dealer in an effort to gain waiver of "its right to protest [a new point] in the community or territory serviced by the . . . dealer." "Community or territory," then, is associated with a "service area."

Furthermore, section 320.642(3), the standing section, plays an important part in subsections (1) and (2). In section 320.642(1), manufacturers are required to provide the Department with notice when a proposed new dealer or relocation is "within a community or territory" already with representation in the same line-make. The publication of this notice in the Florida Administrative Weekly must state that dealers with "standing to protest" under subsection (3) may file such protests. A central element of the denial of a license application as established by section 320.642(2) is "[a] timely protest" by a dealer "with standing to protest" under subsection (3). In view of this concentration of attention on the standing section, which is essentially geographical in nature, "community or territory" now must be examined in light of its specific provisions.

Although the section 320.642 hearing is conducted under the provisions of section 120.57(1), the Legislature can limit the right of access to that hearing.113 This limitation, however, must be procedurally equitable. The following analysis demonstrates that, in the context of prevailing policy and when read together with other sections of the

111. 322 So. 2d 50 (Fla. 1st DCA 1975).
statute, the standing requirements of subsection (3) also define the relevant "community or territory."

Section 320.642(3) establishes six tests for standing to protest. The location of the proposed new dealer fixes the mode of analysis. Subsection (3)(a) treats situations in which the new dealer is to be in a county of less than 300,000 population, while subsection (3)(b) deals with locations in counties of more than 300,000. Next, one examines how the potentially affected dealer is "physically located." These two sections reveal that the affected area for dealers to be located in less populous counties is a circle around the proposed location whose radius is twenty miles,114 while that for more populous counties is a circle whose radius is 12.5 miles.115 There are three situations during which an existing same-line dealer has standing to protest: (1) if the dealership is physically located in the circle; (2) if the dealership is located in the same or a contiguous county and 25% of retail sales during any twelve-month period during the previous thirty-six months have been registered to addresses within the circle; or (3) if the proposed dealership is to be located in the existing dealer's contractually designated area of responsibility.116

The use of a statutorily designated area within which to consider representation is found in statutes from other states similar to section 320.642. The North Carolina statute,117 for example, defines the "relevant market area" (RMA), in the case of an existing dealer, as the area within a twenty-mile radius of the dealership or the area of responsibility defined in the franchise, whichever is greater. Where a manufacturer is seeking to establish a new dealership, the RMA is the area within a ten-mile radius of the proposed site if the population within that radius is 250,000 or greater, or the area within a fifteen-mile radius if the population within that radius is 150,000 or more, but the population within a ten-mile radius is less than 250,000. In all other cases the RMA is the area within a twenty-mile radius of an existing dealership.118 The advantage of an RMA is that it provides a reasonable focus for all parties, both when the manufacturer plans for

116. Id. (codified at § 320.642(3)(a)(1) (Supp. 1988)).
the placement of a new dealer and when potential protesting dealers evaluate the market area for adequacy of representation in deciding whether to protest. The "circles" in subsection (3) look remarkably like RMA's.

The conclusion that these areas are equivalent to the "community or territory" is further reinforced by section 320.699. This newly created section addresses the types of administrative hearings contemplated with respect to sections 320.60 to 320.70. Those aggrieved may petition for a hearing under section 120.57(1)(a) or may file a "written objection or notice of protest" pursuant to section 320.642. Section 320.699(2) further provides that 320.642 hearings should normally be held within 180 days of protest.

The care with which section 320.642 hearings are distinguished from section 120.57 hearings and the specificity with respect to those section 320.642 hearings make it clear that the two types are different. This distinction comports well with the limited standing provisions of section 320.642, but only if there is a clearly delineated area of interest. Without such an area of interest there would certainly be a fundamental conflict with the policy on standing normally afforded in licensing cases, where all substantially affected parties have a right to be heard. Protest by a dealer with standing is an element necessary for denial of a license. If the "community or territory" which is implicated by the statute were larger than the "standing area," as it might well be under existing case law, it is possible that dealers in that "community or territory" who had a substantial interest in the proceedings under the usual application of section 120.57 would be left with no effective means of pursuing their rights. If, however, the affected area is statutorily defined, all interested parties would be afforded a means of testing their rights. The substantial interest is either presumed by the proximity of the new dealership or established by reaching the statutorily mandated level of economic involvement with the area. There is a strong presumption that the statute is to be read without conflict with other statutes, in this case section 120.57. One must presume that there was no intent to thwart the established policy of affording the opportunity to affected persons to be heard in licensing proceedings.

Such an interpretation is also in keeping with the language of section 320.64(23): the area is “serviced by” dealers who are in proximity to the new point or sell a respectable number of vehicles in the area. Moreover, either of these circumstances would amount to “representation” in the area as contemplated in section 320.642(1).

Only section 320.642(2)(b)(1) requires further discussion. In this section, where the proposed dealership is to be located in a less populous county, a contractual area of responsibility can define the “community or territory.” Such an area might well be several counties in size. There is a certain lack of reciprocity in this concept. For example, if such a contractual area comprises two counties, one of more than 300,000 population, the other of less than 300,000, all dealers in the contractual area apparently would have standing to protest a proposed dealer to be located in the less populous county. On the other hand, dealers presumably would have to meet the “12.5-mile” test in order to protest a proposed dealer to be located in the more populous county. This provision probably will cause little problem, however, since there is simply no incentive to protest against a dealership which does not affect interests of the sort protected by the “circle” concept. Further, the protesting dealer could deliver its protest letter so worded as to implicate one of the “circles” rather than the entire contractual area. The subsection could also be interpreted as applying only to a contractual area comprising a single county of less than 300,000 population.

A final question on the issue of standing is whether intervenor status is contemplated for section 320.642 hearings. In fact, if the foregoing interpretation of the statute is correct, the question becomes moot. The kind of substantial interest necessary to enter the hearing is defined by the statute itself. Hence, section 120.57 style intervenor status would not be successful.

Although section 320.642 deals primarily with new vehicle dealers and dealers relocated into a community or territory, a separate section (5) has been created to address the problem of when a relocation should receive scrutiny. Called an “opening or reopening of the same or a successor motor vehicle dealer,” relocations within a one-year period are to be subject to the section if they do not fall within one of the stated exceptions: (1) relocation within the same or adjacent county within two miles of the former location; (2) the new location is further away than the prior location from every existing dealership located within twenty-five miles of the new location; or (3) in cases where the relocation is within six miles of the prior location, the new location is no closer to existing dealers located within fifteen miles of the former location. Since relocations are relatively common and have
caused problems of interpretation in the past, this section will be quite useful in providing exact instructions as to when “moving” a dealership is subject to section 320.642.

V. MISCELLANEOUS PROVISIONS

A number of sections deserve brief mention, although they have little or no history of formal litigation. First, section 320.605 sets forth the legislative intent behind the regulatory scheme. It states that the Legislature intends “to protect the public health, safety and welfare of the citizens of this state by . . . providing minorities with opportunities for full participation as motor vehicle dealers.”

Several sections deal with the property right represented by the franchise. Manufacturers are understandably concerned that they retain control over the management of their retail outlets, which they are prohibited by law from owning themselves. On the other hand, the dealership is a valuable asset of the franchisee. The balancing of these interests is an important concern of the statute. Section 320.64(18) makes it a violation for the manufacturer to refuse to permit succession by a qualified legal heir or devisee of the dealer. New language requires that such heir or devisee possess only minimal qualification standards.

Furthermore, the franchisee may assign its rights in the franchise. New language requires that the manufacturer bear the burden of establishing that an assignee is unqualified. Section 320.643 deals much more closely with transfers of interests, and new language places the burden on the manufacturer to establish that a transferee is unacceptable.

Section 320.696 mandates that the manufacturer reimburse a dealer fairly for warranty work. New language not only provides more detail on how fair compensation should be calculated, but establishes a “timeliness” requirement of thirty days for receipt of the reimbursement. This section does grant a cause of action to the individual consumer in conjunction with section 320.697; however, the action only runs against written warranties, not those which are oral or implied.

123. See supra notes 104-06.
127. Id.
130. See Jagodnik v. Renault, Inc., 328 So. 2d 211 (Fla. 1st DCA 1976).
The statute also provides for several forms of enforcement and for damages. Section 320.695 provides for statutory injunctive relief to prevent violations of the provisions of sections 320.60 to 320.70. The remedy runs to the DHSMV or a dealer acting in the name of the Department. Section 320.697 establishes a statutory cause of action for treble damages to any person suffering pecuniary loss or bad effect from violations of sections 320.60 to 320.70. The section requires only a prima facie showing of violation to shift the burden to the manufacturer. Sections 320.698 and 320.70 prescribe a civil penalty in the form of a fine and a criminal penalty as a first-degree misdemeanor for violations. Responsibility for enforcing the civil remedy rests with the Department.

VI. CONCLUSION

Pursuant to the requirement of statutory sunset review, the entire motor vehicle franchise regulatory scheme came under examination during the 1988 legislative session. Although the prior law had withstood several constitutional challenges through the years, the addition of a statement of intent evidencing a clear public purpose and amendments to the manufacturer licensing and agency provisions should ensure that any future attacks will be unavailing. However, other changes create as many questions as they answer. Of special interest is the addition of precise definitional language to section 320.641, which may suggest that the Legislature intended to relax the previous standard employed to determine the fairness of a franchise termination, to the potential benefit of existing dealers. Of equal moment is the likelihood that, by including a geographically-defined standing requirement in section 320.642, the legislature in fact created a "relevant market area" definition of "community or territory," an amorphous concept that was previously subject to manipulation by the manufacturer to the prejudice of the protesting dealer. If, as the authors suggest, the standing requirements are coextensive with the concept of "community or territory," the 1988 amendments to section 320.642 should be hailed as lending much-needed definition to an area where before uncertainty reigned.