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William Owen

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ANOTHER CASE FOR THE REMOVAL OF FLORIDA'S MOTOR VEHICLE MANUFACTURER-DEALER FRANCHISE TRADE REGULATION FROM PERIODIC SUNSET REVIEW—A COMMENT ON BALZER

WILLIAM OWEN*

THE PURPOSE of this Article is to present reasons for the removal of Florida's motor vehicle manufacturer-dealer franchise trade regulation¹ from periodic review pursuant to the Regulatory Sunset Act.² Several considerations favoring removal of this trade regulation from the operation of the sunset process are examined. It should be noted at the outset that this commentator agrees with the ultimate conclusion reached by author Barbara Balzer.³ However, Balzer premises her conclusion that automobile franchise regulation should be exempt from sunset review upon a basic misconception regarding the purpose and the ultimate effect of the franchise legislation, with the result that she disparages the ability of the Legislature to react realistically and critically within the sunset review process itself.

Balzer suggests that the Legislature's failure to accept and enforce the findings, conclusions, and recommendations of the Committee staff⁴ regarding the merits of the trade regulation under sunset review

* Shareholder, Carlton, Fields, Ward, Emmanuel, Smith, Cutler & Kent, P.A. B.A., 1964, University of Florida; J.D., 1967, University of Nebraska. Carlton, Fields represents the Florida Automobile Dealers Association, a trade association composed of over 800 Florida franchised motor vehicle dealers.

1. FLA. STAT. §§ 320.60-.70 (1987).

2. *Id.* § 11.61.

3. Balzer, *The Fragility of Good Ideas: A Case for Abolishing Sunset Review of Florida's Motor Vehicle Manufacturer Licensing Statute*, 16 FLA. ST. U.L. REV. 697 (1988) [hereinafter Balzer].

4. Balzer served as an analyst on the Senate Economic, Community and Consumer Affairs Committee's (ECCA) Staff which compiled a sunset report on the law for the Senate. Nothing published or adopted by the House Regulatory Reform staff suggests that it had developed the same "mind set" voiced by the ECCA staff. *Compare* STAFF OF FLA. H.R. COMM. ON REG. REFORM, 1988 SUNSET AND SUNDOWN REPORT, VOL. I (July 1988) [hereinafter 1988 SUNSET AND SUNDOWN REPORT] (on file with committee) *with* STAFF OF FLA. S. ECON., COMM'Y & CONS. AFFAIRS, A REVIEW OF SECTIONS 320.27-.31, FLORIDA STATUTES, RELATING TO MOTOR VEHICLE MANUFACTURERS, FACTORY BRANCHES, DISTRIBUTORS AND IMPORTERS (Apr. 1988) (on file with committee). In fact, the House staff report states:

It is concluded that the regulation of motor vehicle dealers, manufacturers, importers and distributors is necessary for the protection of the economic welfare of the citizens

was contrary to the function of the legislative sunset process in general. Based upon her view that the franchise regulation is not "necessary to protect the public health, safety, or welfare from significant and discernible harm or damage"⁵ she concluded that the law would not have been reenacted if the regulation had actually been subjected to meaningful sunset review by the Legislature. So long as the Legislature refuses to perform its sunset function properly, argues Balzer, removal of the regulatory scheme from periodic review under the sunset process would actually serve the public interest because it would deprive the dealer lobby of the opportunity to revise the applicable laws to the advantage of its members, and against the interests of automobile manufacturers and the consuming public generally.⁶

A beginning point for a meaningful critique of the significance of the franchise regulatory scheme is to examine why Florida, like the overwhelming majority of other states, has chosen to enact and update its existing laws governing the relationship between automobile manufacturers and dealers.⁷

In the early days of the franchise system, while dealers aspired, and perhaps even imagined themselves to be independent businessmen,⁸ they were in fact completely dominated by the vastly superior economic power of their respective manufacturers.⁹ The early contracts between manufacturers and dealers were "contracts of adhesion."¹⁰ Nonetheless, courts were curiously reluctant to impose conditions of "good faith" or "fair dealing" as public policy benchmarks in order to bridle manufacturers' unilateral power.¹¹ The courts' passive, non-

of the state, particularly regulation of the state's approximately 1200 franchise (new) and 8,000 independent (used) motor vehicle dealers. It is concluded, further, that the absence of regulation would have a potential for substantial harm to the public.

1988 SUNSET AND SUNDOWN REPORT 23.

5. Balzer, *supra* note 3, at 697 (quoting FLA. STAT. § 11.61(2)(b) (1987)).

6. Balzer, *supra* note 3, at 697.

7. Orme, *RMA Relevant Market Areas, A Look at State Franchise Law*, AUTOMOTIVE EXECUTIVE, Dec. 1987, at 27, 28 (reports that 49 state legislatures since the 1950s have enacted laws governing manufacturer/dealer relations).

8. Dealers may have thought of themselves as independent businessmen because dealers under the franchise system were historically responsible and accountable for significant start-up and maintenance costs and investments wholly independent of manufacturer assistance.

9. Even today, manufacturers dictate the amount of physical space required for showroom displays, inventory and repair facilities. The accompanying costs have generated pressure for many dealers to maintain "dual" franchises in a single location. Accordingly, dealers of domestic models typically also have a franchise for foreign models at the same facility. In Florida, the investment necessary to form a new dealership for a well-known model, even with savings from a "dual" arrangement, can easily exceed \$5 million.

10. Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135, 1155-56 (1957).

11. See *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.*, 116 F.2d 675 (2d Cir. 1940).

interference policy eventually proved to be a catalyst for dealers, through their national association, the National Automobile Dealers Association (NADA), to spearhead the enactment of federal legislation, culminating in the Dealers' Day in Court Act (DDCA).¹²

The DDCA incorporated the requirement of "good faith" into the relationship between manufacturers and their franchisees, a check perceived by dealers as necessary to ensure fair dealing by manufacturers. However, this concept was narrowly interpreted by the courts as only prohibiting the coercion or intimidation of dealers by manufacturers.¹³ Thus, the dealers' goal of achieving a balancing restraint on the unbridled vertical power of manufacturers was not attained through the enactment of the DDCA.

Dealers, through their local associations, such as the Florida Automobile Dealers Association (FADA),¹⁴ undertook the task of demonstrating to their respective state legislatures the need to enact trade regulations governing the franchise relationship between manufacturers and dealers.¹⁵ Now many states have enacted some form of regulation in this field. Of these, a majority of states have enacted provisions that set forth the circumstances under which manufacturers may install new dealers of the same line-make vehicles in relevant market areas or territories already designated as the principal trade area for existing dealers.¹⁶

The Florida regulatory scheme governing the franchise relationship between motor vehicle manufacturers and dealers was motivated by,

12. 15 U.S.C. § 1221 (1982).

13. See, e.g., *Quarles v. General Motors Corp.*, 597 F. Supp. 1037 (W.D.N.Y. 1984), *aff'd*, 758 F.2d 839 (2d Cir. 1985). See also Macaulay, *Changing a Continuing Relationship Between a Large Corporation and Those Who Deal With It; Automobile Manufacturers, Their Dealers, and the Legal System*, 1965 WIS. L. REV. 483 (1965).

14. FADA is a trade association composed of over 800 franchised motor vehicle dealers operating in the State of Florida, with headquarters in Orlando. Over the last 18 years, it has been managed and overseen by David D. Jeffries, its Executive Vice-President.

15. Although Florida has required licensing for manufacturers since 1941, it was not until 1970 that a regulatory scheme focusing on the franchise relationship of manufactures and dealers was enacted. See ch. 20236, Laws of Fla. 103 (1941) (current version at FLA. STAT. § 320.61 (1987)); ch. 70-424, 1970 Fla. Laws 826 (current version at FLA. STAT. §§ 320.60-.70 (1987)).

16. Regulations of this nature are commonly referred to as "entry restrictions" or "RMA" laws. In Florida, prior to the 1988 amendments, a manufacturer could add a new dealer to an area served by an existing dealer of the same line-make vehicle by simply demonstrating that the existing and protesting dealer or dealers had not complied with their franchise agreements or were not providing adequate representation for the manufacturer in the "community or territory." FLA. STAT. § 320.642 (1987). For an analysis of this statutory provision in its original form versus its new configuration, including a "cutting edge" forecast of the "judicial gloss" likely to be generated by the 1988 amendments, see Haskins & Forehand, *New Regulations for Motor Vehicle Manufacturers and New Protections for their Franchisees*, 16 FLA. ST. U.L. REV. 763 (1988) [hereinafter Haskins & Forehand].

and enacted in response to, the Legislature's judgment that there existed a need to provide a fair and equitable framework to harness the historically dominant and unchecked vertical power of manufacturers within the franchise relationship. Florida courts have uniformly recognized that the public policy considerations supporting the enactment of this trade regulation amply justify the invocation of the state's police power.¹⁷ Indeed, the United States Supreme Court has clearly recognized and enunciated the validity of the public policy supporting this type of trade regulation in the landmark decision of *New Motor Vehicle Board v. Orrin W. Fox Co.*¹⁸ The Supreme Court observed, "[t]he disparity in bargaining power between automobile manufacturers and their dealers prompted Congress and some 25 States to enact legislation to protect retail car dealers from perceived abusive and oppressive acts by the manufacturers."¹⁹

Against this backdrop the initial relevant inquiry from the standpoint of Florida's sunset review process should be whether, absent the subject trade regulatory scheme, manufacturers would return to their former pattern of asserting their vertical power to dominate Florida dealers unfairly. Because the economic disparity that formed the basis of the previous inequitable practices is inherent in the nature of the franchise relationship, common sense dictates that the answer will resound in the affirmative for the foreseeable future. Should there be any lingering doubt regarding the accuracy of this prediction, its correctness is corroborated by a recent attempt by a manufacturer to circumvent the franchise protections afforded its dealers in an effort to return to the "good old days" of unchecked dominance.

In 1987, Chrysler acquired American Motors Corporation. In structuring franchise agreements with the former AMC/Jeep dealers, in-

17. Judicial formulations of the public policy behind particular sections have been expressed in a series of early cases. See *International Harvester Co. v. Calvin*, 353 So. 2d 144, 147 (Fla. 1st DCA 1977); *Home Volkswagen, Inc. v. Calvin*, 338 So. 2d 1287, 1290 (Fla. 1st DCA 1976); *Bill Kelley Chevrolet v. Calvin*, 322 So. 2d 50, 52 (Fla. 1st DCA 1975); *Plantation Dat-sun, Inc. v. Calvin*, 275 So. 2d 26, 28 (Fla. 1st DCA 1973).

18. 439 U.S. 96 (1978).

19. *Id.* at 100-01 (citations omitted). The Court went on to observe:

In particular, the California Legislature was empowered to subordinate the franchise rights of automobile manufacturers to the conflicting rights of their franchisees where necessary to prevent unfair or oppressive trade practices. "[S]tates have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. . . . [T]he due process clause is [not] to be so broadly construed that the Congress and state legislatures are put in a straitjacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.'

Id. at 107.

cluding those established in Florida, Chrysler seriously considered the inclusion of a mandatory binding arbitration provision designed to eliminate the dealers' ability to gain access to state law remedies and forums. Chrysler reasoned that application of the doctrine of "pre-emption" ascribed to the Federal Arbitration Act would serve to deprive dealers of their state law remedies.²⁰

Chrysler's plans were deferred when states, including Florida, reminded the manufacturer that the proposed mandatory arbitration provisions appeared to be inconsistent with Florida law; such franchise provisions could not be offered to dealers in this state until Chrysler stated in affidavit form that the proposed franchises would not be inconsistent with Florida law.²¹ Apparently, Chrysler, to its credit, could not locate a corporate officer to verify under oath the absence of inconsistency between such arbitration provisions and Florida law. This example²² serves as convincing evidence that the underlying public policy supporting Florida's trade regulation continues to be justified in today's market setting. Accordingly, it is difficult to justify the periodic exposure of this trade regulation to the risk of sunset repeal simply to afford the Legislature the opportunity to reaffirm the public purpose supporting it. This is particularly true since the same public policy that originally warranted the trade regulation when it was enacted is equally viable today.

Balzer apparently believes that trade regulation in the area of automobile franchising is no longer desirable. In reaching this conclusion, however, she does not dispute that there is public policy supporting the law. Rather, she maintains that the legislative mechanisms devised to ensure fair play and dealing between manufacturers and dealers have created burdens for consumers; burdens that she feels far outweigh any benefits that may be derived from the regulatory scheme. Balzer concludes that since this balancing test weighs against the interests of consumers generally, whatever public policy supported the trade regulation originally must yield to perceived consumer benefits. Accordingly, in her view, this trade regulation should have been repealed as a result of the sunset review.

Yet, the express historical purpose and function of trade regulation is to regulate a particular trade or industry, not to provide consumer

20. 9 U.S.C. § 2 (1978). See also *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

21. See FLA. STAT. § 320.63(3) (1987). See also *id.* § 320.64(19).

22. Another recent example of a manufacturer flexing its muscles occurred in 1984 when Porsche A.G. notified its American Distributor, Volkswagen of America, that its distributorship agreement would not be renewed upon its expiration. Fourteen Porsche dealers in Florida were likewise notified that they would not be franchised dealers for Porsche vehicles under Porsche A.G.'s direct agency marketing plans.

protection that may be addressed through *consumer* legislation if that protection is deemed necessary or desirable by the Legislature. If paramount consideration of consumer benefits is inappropriate when enacting trade regulation, it is also inappropriate to apply the public benefit standard of the sunset law as the acid test of legislative determination of whether the regulatory scheme remains viable. In sum, it is senseless to condition the survival of such trade regulation on satisfaction of the nebulous test of whether consumers receive a greater measure of benefits from the regulation than the entities and interests actually regulated by the statute.²³ Nonetheless, it is just this comparison that forms the basis of Balzer's critique of the manufacturer-dealer franchise trade regulation.

The basis for Balzer's critique of the manufacturer-dealer franchise trade regulation rests principally on two published economic studies²⁴ and a 1986 Federal Trade Commission (FTC) report²⁵ that criticize the use of "entry restrictions" or "relevant market area (RMA)" laws to limit the manufacturer's decision to authorize additional dealerships. A cursory examination of these sources reveals the fatal flaws they contain. For example, Smith concludes that franchise regulation imposes an economic burden on consumers by applying a 1954 price database to regulations in effect in 27 states as of 1979. Smith apparently ignores the fact that at the time the 1972 Census of Retail Trade was compiled, which he relied upon, only 6 states had laws resembling the type of regulations in effect in the 27 states with such regulations in 1979. Accordingly, the validity of any conclusion based thereon is fundamentally questionable.

The 1983 Eckard study is also highly suspect. The apparent data source for this study is the retail price of 1978 Chevrolet vehicles. However, the data base arbitrarily excludes data for a car line if the calculated unit price or cost was greater or less than the national average by more than 50%. In other words, the data base is somewhat arbitrarily selective.

23. Indeed, a meaningful scale to weigh and measure the occurrence and accumulation of such putative consumer benefits or burdens has yet to be patented, much less perfected. For example, if Porsche A.G. had succeeded in 1984 with its plan to replace the American Porsche dealerships with local agents and geographical service centers, how would one quantitatively measure the consumer burdens which would accrue to Florida Porsche owners when their vehicles had to be taken to Atlanta for service instead of to the former conveniently located dealerships.

24. Eckard, *The Effects of State Automobile Dealer Entry Regulation on New Car Prices*, 24 *ECON. INQUIRY* 223 (1985); Smith, *Franchise Regulation: An Economic Analysis of State Restrictions on Automobile Distribution*, 25 *J.L. & ECON.* 125 (1982).

25. ROGERS, *THE EFFECT OF STATE ENTRY REGULATION ON RETAIL AUTOMOBILE MARKETS* (1986) (Bureau of Econ. Staff Report to the FTC).

The FTC report criticizing state "entry restrictions" or RMA laws as responsible for increased retail prices is based on the same database utilized by Eckard. Not only is the FTC methodology flawed from a theoretical and technical viewpoint,²⁶ but General Motors refused to release the data base or data source used by the FTC when requested by Wharton incident to its evaluation of the report. General Motors' refusal to allow other experts to use or even inspect its data pursuant to a review of the FTC findings and conclusions hardly provides a ringing endorsement of the opinions contained in the report.²⁷

Even assuming, as does Balzer, that the FTC report is wholly accurate and impeccable in its conclusion, the real weakness of the FTC report and, to some extent the Smith and Eckard findings, is underscored by the teachings of practical experience. For example, with reference to the states of Florida and Georgia (Georgia does not have an RMA law) the FTC report dictates that the retail price of a 1985 line-make vehicle would be at least 6.14% higher in Florida than the price of the same vehicle sold at retail in Georgia. Therefore, "high line"²⁸ cars retailing at an average price of \$30,000 in Georgia would, according to the FTC report, cost an additional \$1842 in Florida. If such disparity in prices actually existed in the marketplace, it is doubtful that any high line vehicles would ever be sold in north Florida since a short drive across the Georgia line would be financially rewarding. Of course, the absence of a flood of Florida car shoppers in Georgia to take advantage of this theoretical pricing differential is a meaningful fact tending to refute the conclusions of the FTC report.

Finally, Balzer argues that Florida's manufacturer-dealer trade regulation does not actually provide measurable benefits to Florida franchisees and should have been allowed to sunset. She reasons that since 22 of 24 manufacturers' applications for additional dealers ("new points") have been approved in the last five years, the entry restrictions are essentially ineffective in protecting existing dealers.²⁹ This analysis completely ignores the deterrent effect this law has had on "over dealing" by manufacturers. In fact, the most logical conclusion to be drawn from these statistics is that because of the entry re-

26. See Wharton Econometric Forecasting Associates, Inc., *An Evaluation of the FTC's Analysis of the Effects of RMA Laws on Auto Markets (1987)* (critique of the FTC study commissioned by the National Automobile Dealers' Association).

27. It is no small wonder that ECCA's staff report, which bottomed its conclusions in favor of sunset repeal largely on this FTC report, was not viewed as gospel by the rank and file legislative members.

28. Cadillac, Lincoln, Mercedes, BMW, and Porsche, to name a few.

29. This fact, however, tends to negate Balzer's contention that entry restrictions are inherently anticompetitive. Balzer, *supra* note 3, at 697.

strictions, manufacturers have largely confined themselves to applying for new points in areas where additional dealers are actually needed.

On balance, it is indeed a healthy sign that the Legislature, within the sunset process, continues to affirm the policy underlying the motor vehicle manufacturer-dealer franchise trade regulation, thus ensuring a course of fair dealing between manufacturers and their Florida franchisees. It is unfortunate, however, that the current sunset process demands a periodic review of all trade regulation even if it is obvious that the basic public policy justifying the enactment of such regulation remains viable and entrenched. Perhaps Florida should follow the lead taken by Mississippi, Nebraska and North Carolina and repeal its sunset law as it relates to trade regulation.³⁰

On the other hand, the demands of predictability and consistency play a significant role in measuring the responsiveness of any trade regulation. From this standpoint alone, the manufacturer-dealer law, as refined by the 1988 amendatory scheme, is better equipped to address the concerns and problems springing from the constantly evolving relationship of dealers and manufacturers.³¹ Of course, both the elements of predictability and consistency should be enhanced as the amended law is given judicial gloss and interpretation. Therefore, no one can question that the sunset process was indeed instrumental in leading to the creation of wide ranging amendments to the regulatory scheme; amendments which were fashioned as a compromise of the concerns raised by the regulated industries and which should operate to enhance the benefits derived from heightened elements of predictability and consistency. Accordingly, to assay the amended regulatory scheme, as does Balzer,³² as more restrictive as a result of sunset review and consideration is not meaningful.

The proper analysis should be whether the amended scheme is more responsive to industry-related problems and issues. Certainly a comprehensive review of the responsiveness of the amended trade regulation will be available in 1998. Then, the regulation is again scheduled to sunset, can be better addressed if in 1998 when the regulation is again scheduled to sunset, the Legislature remains of the view that all

30. The need for periodic review of the various dimensions and functions of regulatory agencies is appreciably different from the need to redefine the public policy supporting trade regulation generally. Sunset review seems ideally suited to provide periodic assessment of agency function and expansion. In the case of trade regulation, however, the regulated interests can always be expected to remind the Legislature if the regulation becomes one-sided or is no longer needed based on policy considerations and fundamental changes thereto.

31. See Haskins & Forehand, *supra* note 16, for analysis of the many issues addressed by the 1988 amendments.

32. Balzer, *supra* note 3, at 697.

trade regulation should be exposed to sunset review, a comprehensive review of the responsiveness of the amended trade regulation may be made and all problems and issues addressed.

