

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Commerce and Tourism

BILL: CS/CS/SB 466

INTRODUCER: Commerce and Tourism Committee; Transportation Committee; and Senator Hutson and others

SUBJECT: Motor Vehicle Warranty Repairs and Recall Repairs

DATE: March 27, 2017

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|----------------|----------------|-----------|---------------|
| 1. | <u>Jones</u> | <u>Miller</u> | <u>TR</u> | <u>Fav/CS</u> |
| 2. | <u>Harmsen</u> | <u>McKay</u> | <u>CM</u> | <u>Fav/CS</u> |
| 3. | _____ | _____ | <u>RC</u> | _____ |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 466 prohibits a licensed motor vehicle manufacturer, distributor, or importer (licensee), except as otherwise authorized by law, from denying a motor vehicle dealer's claim, reducing the dealer's compensation, or processing a chargeback to a dealer who performs covered warranty or recall repairs on a used motor vehicle under specific circumstances. Motorcycle manufacturers, distributors, or importers are not covered by this bill.

The bill also requires a licensee who has a franchise agreement with a motor vehicle dealer to compensate the dealer for a used motor vehicle that:

- Was originally manufactured, imported, or distributed by the licensee;
- Is subject to a recall notice, including those issued prior to July 1, 2017;
- Is held in the dealer's inventory at the time the recall notice was issued, or taken into the dealer's inventory after the recall notice;
- Cannot be repaired due to unavailability of a remedy within 30 days of the recall; and
- Is not subject to written statement from the licensee indicating that the vehicle may be sold or delivered to a retail customer before completion of the recall repair.

The bill requires such compensation to be the greater of:

- At least 1.75 percent of the motor vehicle's value for each month, or portion of a month, that the dealer does not receive a remedy for the vehicle; or

- Payment under a national program applicable to motor vehicle dealers holding a franchise agreement with the licensee for the dealer's costs associated with holding the used vehicle.

II. Present Situation:

Florida has substantially regulated motor vehicle manufacturers and motor vehicle dealers since before 1950.¹ Initially, the Florida Legislature implemented only consumer protections aimed at preventing consumer abuse by dealers.² In 1970, the Legislature passed more comprehensive legislation, embodied in ch. 320, F.S.,³ which regulates the contractual relationship between manufacturers and dealers,⁴ requires the licensing of manufacturers, and regulates numerous aspects of the contracts between manufacturers and dealers. This legislation applies only to those dealers and manufacturers who engage in the business of buying, selling, or dealing in motor vehicles, which includes any motor vehicle, but excludes recreational vehicles, mopeds, motorcycles powered by a motor with a displacement of 50 cubic centimeters or less, or mobile homes.⁵

Florida Automobile Dealers Act

The "Florida Automobile Dealers Act"⁶ (act), primarily regulates the contractual business relationship between dealers and licensees. A manufacturer, factory branch, distributor, or importer (licensee) must be licensed under s. 320.61(1), F.S., to engage in business in Florida.

The act specifies, in part:

- The conditions and situations under which the Department of Highway Safety and Motor Vehicles (DHSMV) may deny, suspend, or revoke a regulated license;
- The process, timing, and notice requirements for licensees who wish to discontinue, cancel, modify, or otherwise replace a franchise agreement with a dealer, and the conditions under which the DHSMV may deny such a request;
- The procedures a licensee must follow to add a dealership in an area already served by a franchised dealer, the protest process, and the DHSMV's role in these circumstances;
- The damages that can be assessed against a licensee who is in violation of Florida Statutes; and
- The DHSMV's authority to adopt rules to implement these sections of law.

Section 320.64, F.S., currently lists 40 criteria that may cause the DHSMV to deny, suspend, or revoke a licensee's license. A motor vehicle dealer who can demonstrate that he or she will be adversely affected by an applicant's or licensee's violation of, or failure to comply with, any of these provisions, is entitled to pursue an injunction against the licensee, and to be awarded treble

¹ Chapter 9157, Laws of Fla. (1923); Chapter 20236, Laws of Fla. (1941).

² Walter E. Forehand and John W. Forehand, *Motor Vehicle Dealer and Motor Vehicle Manufacturers: Florida Reacts to Pressures in the Marketplace*, 29 Fla. St. Univ. Law Rev. 1058, 1064 (2002), <http://ir.law.fsu.edu/cgi/viewcontent.cgi?article=1632&context=lr> (last visited Mar. 23, 2017).

³ See ch. 70-424, Laws of Fla.

⁴ See s. 320.60(11), F.S.

⁵ Section 320.27(b)-(c), F.S.

⁶ Sections 320.60-320.70, F.S.; See also, Walter E. Forehand, *supra* note 2 at 1065.

damages and attorney's fees.⁷ If the party bringing the action can show a violation under the law, the burden shifts to the licensee to prove otherwise.⁸

Applicability

Section 320.6992, F.S., provides that the act shall apply to all presently existing or future systems of distribution of motor vehicles in Florida, except to the extent that such application would impair valid contractual agreements in violation of the State Constitution or Federal Constitution. Generally, all agreements that are renewed, amended, or entered into subsequent to October 1, 1988, are governed by the act, including amendments to the act, unless specifically provided otherwise.

In 2009, the DHSMV held in an administrative proceeding that amendments to the act do not apply to dealers whose franchise agreements were signed prior to the effective date of various amendments to the act.⁹ The DHSMV has indicated that it will apply the *Motorsports* holding to every amendment to the act. This may result in different protections accruing to dealers, depending on when they signed their franchise agreements.

Motor Vehicle Warranties

A motor vehicle warranty is any written warranty, or affirmation of fact or promise issued or made by the motor vehicle manufacturer in connection with the sale of a motor vehicle to a consumer. This promise must relate to the nature of the material or workmanship and affirm or promise that such material or workmanship is free of defects or will meet a specified level of performance.¹⁰

Chapter 681, F.S., the "Motor Vehicle Warranty Enforcement Act," provides a regulatory framework for motor vehicle sales warranties.

Motor Vehicle Warranty Repairs

A licensee is required to timely compensate a motor vehicle dealer who performs work to maintain or repair a licensee's product under a warranty.¹¹ For this purpose, "timely" means within 30 days of receipt of the claim, and "compensate" includes payment for all labor (employee time spent for diagnosis and repair) and parts (replacement parts and accessories) included in the work.¹²

⁷ See ss. 320.64, 320.694, and 320.697, F.S.

⁸ Section 320.697, F.S.

⁹ See *Motorsports of Delray, LLC v. Yamaha Motor Corp., U.S.A.*, Case No. 09-002129 (Fla. DOAH Dec. 9, 2009). The DHSMV found that a 2006 amendment to the Florida Automobile Dealers Act does not apply to a dealer terminated in 2008 because the dealer's franchise agreement was entered into prior to the effective date of the amendment. This Final Order was initially appealed but was later voluntarily dismissed. See also, *In re Am. Suzuki Motor Corp.*, 494 B.R. 466, 480 (Bankr. C.D. Cal. 2013).

¹⁰ Section 681.102(22), F.S.

¹¹ Section 320.696(1), F.S.

¹² *Id.*

Motor Vehicle Recalls

If a licensee finds that a motor vehicle or its equipment contains a defect related to motor vehicle safety, or does not comply with applicable federal motor vehicle safety standards, the manufacturer may either decide to issue a recall notice, or may be required by the National Highway Traffic Safety Administration (NHTSA) to issue a recall notice.¹³ If a manufacturer determines that there is a safety-related defect in its vehicle or its equipment, or that the vehicle or its equipment is noncompliant with motor vehicle safety standards, it must submit a report to the NHTSA within 5 working days. However, a manufacturer may petition for exemption from recall notification and remedy requirements if the defect or noncompliance is inconsequential to motor vehicle safety.¹⁴ If it is determined the defect or noncompliance does pose a risk to safety, the manufacturer must:

- Notify owners, purchasers, and dealers of the vehicle or equipment; and
- Remedy the defect or noncompliance (either by repairing or replacing it, offering a refund, or repurchasing the vehicle.)¹⁵

The recall notice must be issued no later than 60 days from the date the manufacturer filed its report with the NHTSA.¹⁶ Recall notifications sent to motor vehicle dealers and distributors must contain a clear statement identifying the notification as a safety recall notice, and include:

- An identification of the motor vehicles or equipment included in the recall;
- A description of the defect or noncompliance;
- A brief evaluation of the risk to motor vehicle safety related to the defect or noncompliance;
- A complete description on the recall remedy;
- The estimated date on which the remedy will be available; and
- An advisory stating that it is a Federal violation for a dealer to sell or lease a new motor vehicle or any new or used item of motor vehicle equipment covered by the notification until the defect or noncompliance is remedied.¹⁷

A 2015 NHTSA annual report of recalls by year shows a steady increase in the number of recalls issued from 1995 to 2005.¹⁸ In 2015, the NHTSA issued 973 recalls, affecting over 87.5 million vehicles or equipment.¹⁹ Of note is the Takata airbag recall, which has resulted in a NHTSA recall of 46 million airbag inflators in 29 million cars in the United States since 2014.²⁰ The NHTSA expects to recall an additional 35-40 million airbags between May 2016 and December 2019.²¹

¹³ 49 C.F.R. ss. 577.5 and 577.6

¹⁴ 49 C.F.R. s. 573.6

¹⁵ NHTSA's Safercar.gov website, *Vehicle Recalls: Frequently Asked Questions*, <https://vinrcl.safercar.gov/vin/faq.jsp> (last visited Mar. 23, 2017).

¹⁶ 49 C.F.R. s. 577.7

¹⁷ 49 C.F.R. s. 577.13

¹⁸ NHTSA's Safercar.gov website, *2015 Annual Recalls Report*, <https://www.safercar.gov/staticfiles/safercar/pdf/2015-annual-recalls-report.pdf> (last visited Mar. 23, 2017).

¹⁹ *Id.*

²⁰ Kelsey Mays, Cars.com, *Is Your Car Part of the Takata Airbag Recall?* (Feb. 3, 2017), <https://www.cars.com/articles/is-your-car-part-of-the-takata-airbag-recall-1420680509675/> (last visited Mar. 23, 2017).

²¹ NHTSA, *Takata Air Bags: Timeline of NHTSA Actions* (Jan. 19, 2017), <https://www.nhtsa.gov/recall-spotlight/takata-air-bags> (last visited Mar. 23, 2017)

Recalls on New Vehicles

Federal law prohibits the sale of new motor vehicles determined to have a safety defect or noncompliance with motor vehicle safety standards,²² and requires a manufacturer, after selling the motor vehicle or equipment to the dealer and before it is sold by the dealer, to immediately:

- Repurchase the vehicle or equipment from the motor vehicle dealer at the same price paid, plus transportation charges and at least one percent a month of the price paid prorated from the date of notice to the date of repurchase; or
- Give the dealer, at the manufacturer's expense, the part or equipment needed to remedy the defect or noncompliance, plus cost of installation and one percent a month of the price paid prorated from the date of notice to the date the defect or noncompliance is remedied.²³

Recalls on Used Vehicles

Federal law, generally, does not prohibit the resale of used vehicles subject to a safety recall. However, manufacturers may choose to direct their dealers to stop selling such vehicles. Additionally, manufacturers may require such vehicles to be held in the dealer's inventory without a remedy to the dealer.

In 2016, Virginia and Maryland passed laws to require licensees to compensate their franchise dealers if the dealer is instructed or coerced by the licensee not to sell used vehicles within its inventory that have a recall with no remedy available. Specifically, Maryland law requires a licensee that issues a stop sale directive without an available remedy for the recall on a used vehicle held in its franchise dealer's inventory, to compensate the dealer by:

- Providing payment to the dealer at a rate of at least one percent per month or portion of a month of the value of the vehicle; or
- Compensating the dealer under a national program that is applicable to all dealers holding a franchise from the licensee for the dealer's costs associated with the stop sale directive.²⁴

Virginia law prohibits a licensee from coercing any dealer, whether by agreement program, incentive provision, or threat of loss of incentive payments or benefits. It further prohibits a licensee from requiring a dealer to refrain from selling any used motor vehicle subject to a recall, stop sale directive, technical service bulletin,²⁵ or other licensee notification unless the licensee has an available remedy. If no remedy for the recall is available, and the licensee prohibits the dealer from selling the vehicle, the licensee must then compensate the dealer at at least one percent of the cost of the used vehicle per month, or for any part of a month that the vehicle cannot be sold. The required compensation includes repairs and re-conditioning expenses incurred by the dealer.²⁶

²² Commonly referred to as "stop sale" notices.

²³ 49 U.S.C. s. 30116

²⁴ Maryland General Assembly, *House Bill 525 – Enrolled*, (Enacted May 28, 2016), available at: <http://mgaleg.maryland.gov/2016RS/bills/hb/hb0525E.pdf> (last visited Mar. 23, 2017).

²⁵ Technical service bulletins, not to be confused with recalls, are notices issued to dealers from manufacturers for nonsafety-related defects. These bulletins usually include recommended procedures for repairing vehicles if certain issues arise.

²⁶ Virginia Acts of Assembly – 2016 Session, *Chapter 534* (Mar. 29, 2016), available at: <https://lis.virginia.gov/cgi-bin/legp604.exe?161+ful+CHAP0534+pdf> (last visited Mar. 23, 2017).

III. Effect of Proposed Changes:

Section 1 amends s. 320.64, F.S., to prohibit a licensee, notwithstanding the terms of any franchise agreement, and except as authorized by law upon detection of fraudulent payments, from denying a dealer's claim, reducing the dealer's compensation, or processing a chargeback to a dealer for performing covered warranty or recall repairs on a used motor vehicle²⁷ due to:

- A dealer's discovery of a need for such repairs during the course of a separate repair requested by the consumer; or
- Notification by the dealer to the consumer of the need for such repairs after issuance of an outstanding recall for a safety-related defect.

Section 2 creates s. 320.6407, F.S., relating to recall notices under franchise agreements. The bill requires that a licensee that has a franchise agreement with a motor vehicle dealer must compensate the dealer for a used vehicle that:

- Was originally manufactured, imported, or distributed by the licensee;
- Is subject to a recall notice, including one issued prior to July 1, 2017;
- Is held in the dealer's inventory at the time the recall notice was issued, or taken into the dealer's inventory after the recall notice due to a trade-in, lease return, or other transaction;
- Cannot be repaired due to unavailability of a remedy for the vehicle within 30 days after issuance of the recall notice; and
- For which the licensee has not issued a written statement to the dealer indicating the vehicle may be sold or delivered to a retail customer before completion of the recall repair.

The bill requires such compensation to be the greater of:

- Payment of at least 1.75 percent of the motor vehicle value (as determined by the average Black Book value for that vehicle's model year and condition) for each month or portion of a month that the dealer does not receive a remedy for the vehicle, calculated from the later of either the date the recall was issued or when the vehicle was acquired by the dealer; or
- Payment under a national program applicable to motor vehicle dealers holding a franchise agreement with the licensee for the dealer's costs associated with holding the used vehicle.

This section also clarifies that motorcycle manufacturers, distributors, or importers are exempt from the provisions of section 320.6407, F.S.

Section 3 reenacts s. 320.6992, F.S., providing that amendments made to the act shall apply to all presently existing or future systems of distribution of motor vehicles in Florida, except to the extent that such application would impair valid contractual agreements in violation of the State Constitution or Federal Constitution.

Section 4 provides an effective date of July 1, 2017.

²⁷ A "used motor vehicle" is any motor vehicle for which the title has been transferred at least once, by a manufacturer, distributor, importer, or dealer to an ultimate purchaser. *See* s. 320.60(13), F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The fiscal impact to the private sector is indeterminate. To the extent that agreements between dealers and licensees change, the parties could be impacted positively or negatively. Dealers with vehicles in their inventory impacted by a recall that cannot be repaired or sold will likely experience a positive fiscal impact.

C. Government Sector Impact:

The fiscal impact to state government sector is indeterminate, but appears insignificant. The DHSMV may experience an increase in the number of administrative hearings as a result of the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The United States Constitution and the Florida Constitution prohibit the state from passing any law impairing the obligation of contracts.²⁸ “[T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear.”²⁹ If a law does impair contracts, the courts will assess whether the law is deemed reasonable and necessary to

²⁸ U.S. Const. Article I, s. 10; Art. I, s. 10, Fla. Const.

²⁹ *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774, 779 (Fla. 1979) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-45 (1978)). See also, *General Motors Corp. v. Romein*, 503 U.S. 181 (1992).

serve an important public purpose.³⁰ The factors that a court will consider when balancing the impairment of contracts with the public purpose include whether the law:

- Was enacted to deal with a broad, generalized economic or social problem;
- Operates in an area that was already subject to state regulation at the time the parties undertook their contractual obligations, or whether it invades an area never before subject to regulation; and
- Results in a temporary alteration of the contractual relationships of those within its scope, or whether it permanently and immediately changes those contractual relationships, irrevocably and retroactively.³¹

Some state laws regulating contracts between automobile manufacturers and dealers have been found to violate the constitution, while other laws have been upheld as constitutional.³²

VIII. Statutes Affected:

This bill substantially amends section 320.64 of the Florida Statutes.

This bill creates section 320.6407 of the Florida Statutes.

This bill reenacts section 320.6992 of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Commerce and Tourism on March 27, 2017:

- Clarifies that the requirements on motor vehicle manufacturers, and remedies to motor vehicle dealers, apply to motor vehicle recalls that were issued prior to July 1, 2017;
- Reduces the amount required to be paid to the motor vehicle dealer from 2 to 1.75 percent;
- Exempts motorcycle manufacturers, distributors, and importers from the bill; and
- Changes the effective date from “on becoming law” to July 1, 2017.

CS by Transportation on March 14, 2017:

The CS extends the length of time that the licensee must make a recall remedy available to a dealer to avoid compensating that dealer for the used vehicle, from 15 to 30 days, and reduces the amount required to be paid to the dealer, from 2.43 percent to 2 percent.

³⁰ *Park Benziger & Co. v. Southern Wine & Spirits, Inc.*, 391 So. 2d 681, 683 (Fla. 1980); *Yellow Cab Co. of Dade County v. Dade County*, 412 So. 2d 395, 397 (Fla. 3d DCA 1982) (citing *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977)).

³¹ *See supra*, note 28; *see also*, *Vesta Fire Ins. Corp. v. State of Fla.*, 141 F. 3d 1427, 1433 (11th Cir. 1998).

³² *See Alliance of Auto. Mfrs., Inc. v. Currey*, 984 F. Supp. 2d 32 (D. Conn. 2013) (upholding state law that revised statutory method for calculating reasonable compensation for vehicle warranty work and prohibited manufacturers from recovering any additional cost of the new method from the dealers); *Arapahoe Motors, Inc. v. Gen. Motors Corp.*, No. CIV. A. 99 N 1985, 2001 WL 36400171, at 13 (D. Colo. Mar. 28, 2001) (the retroactive application of state law would be unconstitutional as it would create a new obligation or impose a new duty upon General Motors).

The CS also adds that such compensation is not required for used vehicles for which the licensee has issued a written statement to the dealer indicating the used vehicle may be sold or delivered to a retail customer prior to completion of the recall repair.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
