BEGINNING AND ENDING FRANCHISE RELATIONSHIPS: The Florida Franchise Act and Franchise Relationship Laws

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I. INTRODUCTION

The Florida Franchise Act ("FFA"), Fla. Stat. § 817.416,[2] sets the broad guidelines for the establishment of franchises and distributorships in Florida. However, to say that the FFA is all-encompassing regarding these kinds of business relationships is incorrect. Rather, the FFA sets out the requirements for a "garden variety" franchise or distributorship, and imposes penalties on those making misrepresentations regarding the franchise or distributorship sales transaction. Importantly, other laws may apply in place of or in addition to the FFA, depending on the nature of the transaction or if the arrangement involves certain specialty industries. This section will provide an overview of the principal areas of Florida law that can affect the franchise and distributorship arrangement.

II. THE FLORIDA FRANCHISE ACT

A. Defining the Franchise or Distributorship

The FFA, § 817.416(1)(b), sets out four elements that determine the existence of a franchise or distributorship in Florida:

> The term "franchise or distributorship" means a contract or agreement, either expressed or implied, whether oral or written, between two or more persons:
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> 1. Wherein a commercial relationship of definite duration or continuing indefinite duration is involved;
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> 2. Wherein one party, hereinafter called the "franchisee," is granted the right to offer, sell, and distribute goods or services manufactured, processed, distributed or, in the case of services, organized and directed by another party;

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[2] Interestingly, the Florida Legislature never designated Fla. Stat. § 817.416 the "Florida Franchise Act." See Chapter 71-61, Laws of Florida. However, courts and commentators alike have widely used this title. See Hotels of Key Largo, Inc. v. RHI Hotels, Inc., 694 So.2d 74 (Fla. 3d DCA 1997); Burger King Corp. v. Austin, 805 F.Supp. 1007 (S.D. Fla. 1992); Glenn J. Waldman, The Florida Franchise Act – Protection for the In-State Franchisor or Out-of-State Franchisee?, 73 FLA. B.J. 1999. For convenience sake, § 817.416 will be referred to here as the "Florida Franchise Act" or "FFA."

3. Wherein the franchisee as an independent business constitutes a component of franchisor's distribution system; and

4. Wherein the operation of the franchisee's business franchise is substantially reliant on franchisors for the basic supply of goods.

Accordingly, in order for a franchise or distributorship to exist in Florida under the FFA definition, each of the above factors must be satisfied. Significantly, the FFA uses the terms "franchise" and "distributorship" interchangeably, blurring the distinction between the two forms of business arrangements.

The Florida courts have not yet spoken on these elements as they determine the existence or non-existence of a franchise in Florida. However, one federal court decision sheds some light on the "basic supply of goods" element. In Boca Mar Properties, Inc. v. International Dairy Queen, Inc., 732 F.2d 1550 (11th Cir. 1985), the 11th Circuit Court of Appeals addressed the argument that, because the franchisor did not itself supply the goods used by the franchisee, the business operation could not be termed a "franchise" under Florida law. The court rejected this argument. Where the franchisor established a network of approved suppliers who packaged approved products under the franchisor's label, the franchisees were required to purchase from the approved suppliers, and the franchisor collected a royalty fee by means of surcharges on the sales of the suppliers, the court found that the franchisee was substantially reliant on the franchisor for the basic supply of goods. Accordingly, the business arrangement satisfied the requirements under the FFA and was held to be a franchise. Although not expressed by the court, this rationale suggests that substantial, as opposed to strict compliance, is sufficient under the statute to render a business enterprise a franchise under Florida law.

The FFA imposes few requirements for a franchise relationship to arise. As compared to other franchise definitions, the Florida law does not require the existence of elements commonly associated with a franchise arrangement.[3] Indeed, the FFA's requirements are far less restrictive than those promulgated by the Federal Trade Commission ("FTC"). See 16 C.F.R. § 436.2 (1999). First, there is no apparent requirement of a franchise fee payment under the FFA. All that is required is that the franchisee be "granted the right to offer, sell, and distribute goods or services" in conjunction with the franchisor.[4] Although payment of a fee is a common element in franchise arrangements[5] and is required under FTC regulations, it seems possible that a franchise grant could be supported by considerations other than the payment of a fee under the Florida statute. There is no authority in Florida to clarify this issue. Secondly, there is no requirement that a franchisee have any substantial association with the franchisor's trademarks, another fairly universal factor in the franchisor-franchisee relationship and also an element under the FTC's regulations.[6] The FFA is silent on this issue, and it therefore cannot be considered as indicative of the existence of a franchise under Florida law. Finally, the franchise agreement

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[3] See 62B Am.Jur.2d Private Franchise Contracts § 24 (1990).
[4] Fla. Stat. § 817.416 (1)(b)2.
[5] See Deborah S. Coldwell, et al., Franchise Law, 53 SMU L. REV. 1055, 1056 (2000).
[6] Id.; 16 C.F.R. § 436.2 (1999).

may be written or oral, express or implied, and of a fixed or indefinite duration.[7] It is therefore possible that a franchise under Florida law will not qualify as such under Federal law. It is equally possible that parties to a business arrangement in Florida may create a franchise without even knowing or intending it. In sum, it is extremely easy for a business arrangement to be deemed a franchise in Florida.

B. The Inadvertent Franchise

Situations can exist where a franchisor-franchisee relationship was never sought or intended by the parties, but was nevertheless found to exist as a matter of law. Indeed, it is possible that parties may consciously seek to avoid their relationship being termed a "franchise," yet are ultimately adjudged to hold that status. This phenomenon is often referred to as the "inadvertent franchise."[8]

The Florida cases have yet to address this phenomenon, but the likelihood of an "inadvertent franchise" arising under the FFA is exceedingly strong. As mentioned, a franchise agreement may be express or implied, written or oral, and many of the common indicia of a franchise, required both by Federal law and the law of other jurisdictions before a franchise can be held to exist, are unnecessary under the FFA. Under these circumstances, a franchise may exist although the parties never coined their relationship as such or even if they sought to avoid the franchise designation. To repeat: any relationship, express or implied, written or oral, definite or indefinite in duration, where one party is granted the right to sell and distribute goods or services under the direction of the other, where the party is reliant on the other for the goods, and the party is a component of the other's distribution system, constitutes a franchise in Florida. Of course, that same definition applies to distributorships as well, adding an uncertainty regarding whether there is any appreciable difference between a franchise and a distributorship in Florida. Few other jurisdictions are so relaxed in their requirements. Accordingly, an "inadvertent franchise" can arise in Florida quite easily.

The reasons why a party might seek to actively avoid the franchise moniker are complex.[9] However, in Florida at least, a brief look at the second part of the FFA exposes some possible motivations. Fla. Stat. § 817.416(2)-(4) imposes civil and criminal liability for committing prohibited practices in the sale of a franchise. A party seeking to avoid this potential civil and criminal liability might be motivated to have their business arrangements deemed something other than a franchise. Because of the broad sweep of the FFA, this can be a daunting challenge.

C. Civil and Criminal Liability

The FFA imposes civil and criminal liability for: (1) intentionally misrepresenting the prospects or chances for success of a proposed franchise or distributorship; (2) intentionally

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[7] Fla. Stat. § 817.416(1)(b)-(1)(b)1.

[8] See James R. Sims, III, and Mary Beth Trice, The Inadvertent Franchise and How to Safeguard Against It, 18 FRANCHISE L. J. 54 (1998).

[9] Id.

misrepresenting or failing to disclose the total required franchise or distributorship investment; and (3) intentionally misrepresenting or failing to disclose efforts to establish more franchises or distributorships than is reasonable to expect the market or market area for a particular franchisee to sustain.[10] In addition, the FFA allows for recovery of all moneys invested in the franchise or distributorship and costs and attorneys fees incurred in bringing the action.[11] Finally, the Florida Department of Legal Affairs is empowered to bring legal action, separately or jointly with the Department of Agriculture and Consumer Services, to enjoin violations of the FFA.[12]

D. Misrepresentation Under the FFA Distinguished from Fraud

The FFA prohibits intentional misrepresentations regarding the prospects for success, total required investment, or efforts to establish more franchises or distributorships than the market can reasonably be expected to bear. With respect to misrepresenting the prospects of a franchise, the intent element under the FFA does not rise to the level of knowing misrepresentation or fraud by deliberate false statement. Travelodge International, Inc. v. Eastern Inns, Inc., 382 So.2d 789, 791 (Fla. 1st DCA 1980). That court explained:

> The [FFA], on the other hand, by focusing upon misrepresentations as to the "prospects or chances for success," concerns itself with what is said today about what probably or most likely will happen tomorrow. If the total effect of the [franchisor's] conduct was to intentionally misrepresent what would be the probable or most likely prospects for success of the [franchise] enterprise, based on the facts and circumstances which were known by [the franchisor], it may be liable for damages under the [FFA]. We hold that recovery under the [FFA] may be had upon proof of intentional words or conduct by the franchisor, concerning the prospects or chances of success of the enterprise, which were relied upon by the franchisee to his detriment, and which are not in accordance with the facts.

Id. Therefore, proof of a deliberate and intentional false statement of a material existing fact is unnecessary as to a claim for misrepresentation of the future prospects of a franchise enterprise. The Court in Travelodge made clear that the FFA makes conduct actionable. Whether this same standard applies to intentional misrepresentation of the required total franchise investment or attempts to establish more franchises than the market can reasonably absorb has yet to be decided.

E. No Fiduciary Obligations

The existence of a franchise agreement does not give rise to fiduciary obligations. Amoco Oil Co. v. Gomez, 125 F.Supp.2d 492, 509-510 (S.D. Fla. 2000). This is because such an agreement is at arms' length. Id. Neither does the FFA impose any fiduciary obligations – it is devoid of any such imposition of fiduciary responsibility. However, that is not to say a fiduciary responsibility cannot arise by operation of law by facts outside of the parties'

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[10] Fla. Stat. § 817.416(2).
[11] Fla. Stat. § 817.416(3).
[12] Fla. Stat. § 817.416(4).

agreement. Id. If a franchisee reposes trust and confidence in a franchisor, and the franchisor undertakes to advise, counsel, or protect the franchisee, a fiduciary duty may emerge. Id. However, in the absence of such facts, a fiduciary relationship does not exist merely because the parties are engaged in a franchisor-franchisee relationship.

F. Test for Standing: Doing Business In Florida

The FFA defines a "person" for the purposes of the FFA as "an individual, partnership, corporation, association, or other entity doing business in Florida." Fla. Stat. § 817.416(1)(a) (emphasis added). The application of this provision has not been addressed by Florida's appellate courts. However, federal district courts interpreting it have reached opposing views on whether it allows a cause of action by an out-of-state franchisee.[13] In Burger King Corp. v. Austin, 805 F.Supp. 1007, 1022-1023 (S.D. Fla. 1992), Judge Hoeveler observed that the FFA is only applicable to franchisees and franchisors doing business in Florida, but nevertheless determined that the parties agreement, which contained a Florida choice of law clause, demonstrated that the parties intended that they be regarded as doing business in Florida. Therefore, he allowed the FFA cause of action by an out-of-state franchisee to proceed. By contrast, in Barnes v. Burger King Corp., 932 F.Supp. 1441, 1443 (S.D. Fla. 1996), Judge Ungaro-Benages disagreed, contending that the plain language of the FFA applies only to persons doing business in Florida. Because the plaintiff in that case never contended it did business in Florida, Judge Ungaro-Benages concluded the plaintiff lacked standing under the FFA. In sum, although the plain language of the FFA suggests it applies only to those plaintiffs doing business in Florida, whether an out-of-state franchisee or distributor can invoke its remedies remains unsettled.

G. FFA Inapplicable to Franchisor When Franchise Sold by Franchisee

The FFA imposes liability for the intentional misrepresentations outlined above when "selling or establishing a franchise or distributorship." Fla. Stat. § 817.416(2)(a). It does not, however, impose liability on a franchisor when a franchise is sold by one franchisee to another franchisee. See Schubot v. McDonalds Corp., 757 F.Supp. 1351, 1358 (S.D. Fla. 1990); Hall v. Burger King Corp., 912 F.Supp. 1509, 1529 (S.D. Fla. 1995).

H. Punitive Damages Unavailable

Punitive damages cannot be recovered for violations of the FFA. Burger King Corp. v. Austin, 805 F.Supp. 1007, 1025-1026 (S.D. Fla. 1992). Recovery for violations of the FFA is limited to all moneys invested in such franchise or distributorship and reasonable costs and attorney's fees. Id. Fla. Stat. § 817.416(3).

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[13] See Glenn J. Waldman, The Florida Franchise Act – Protection for the In-State Franchisor or Out-of-State Franchisee?, 73 FLA. B.J. 1999.

I. Arbitrability of Claims

Claims under the FFA are subject to arbitration. Doctor's Associates, Inc. v. McCrory, 501 So.2d 126, 127 (Fla. 2d DCA 1987). In the absence of a contention that the arbitration clause itself was fraudulently induced, a provision requiring arbitration of all disputes arising out of or relating to a franchise agreement will require arbitration of FFA claims as well. Beaver Coaches, Inc. v. Revels Nationwide R.V. Sales, Inc., 543 So.2d 359, 362-363 (Fla. 1st DCA 1989).

II. SALE OF BUSINESS OPPORTUNITIES ACT

A. Brief Outline of Florida Business Opportunities Act

1. Business opportunities defined. The Florida Sale of Business Opportunities Act ("FBOA"), Fla. Stat. § 559.80 *et seq.*, regulates business opportunities, which are defined as "the sale or lease of any products, equipment, supplies, or services which are sold or leased to a purchaser to enable the purchaser to start a business for which the purchaser is required to pay an initial fee or sum of money which exceeds $500 to the seller." Accordingly, the FBOA only applies to the sales of new businesses, not existing businesses, provided the existing businesses to be sold are not greater than five in number. Fla. Stat. § 559.801(1)(a); § 559.801(1)(b)1; Batlemento v. Dove Fountain, Inc., 593 So.2d 234, 239 (Fla. 5th DCA 1991); Eclipse Medical, Inc. v. American Hydro-Surgical Instruments, Inc., 1999 WL 181412*18 (S.D. Fla. Jan 20, 1999). In addition, for the FBOA to apply, the seller must represent to:

a. Undertake to provide locations or assistance in finding locations for vending machines, display cases, and the like;

b. Purchase any and all products made by the buyer using, in whole or in part, the supplies, services or chattels sold to the purchaser;

c. Guarantee in writing the income of the purchaser or provide a refund or repurchase unused supplies; or

d. Provide a sales or marketing program that will enable purchaser to derive income from the business opportunity (except when made in conjunction with the licensing of a registered trademark or service mark).

The above provisions are written in the statute using the disjunctive "or," therefore, to qualify as a business opportunity only one of the representations need be made, not all four. See State v. Herman, 466 So.2d 435, 436 (Fla. 5th DCA 1985).

2. Disclosures required. The FBOA requires a number of disclosures by the seller be made to the buyer.[14] Fla. Stat. § 559.803. In abbreviated terms, these include:

a. A statement that the business opportunity has not been verified by the state;

b. The name of the seller, names under which it has done business, names and addresses of corporate officers;

c. Length of time the seller has been selling business opportunities;

d. Detailed listing of services seller undertakes to perform for buyer;

e. A copy of a current financial statement;

f. If training is to be provided, a complete description thereof;

g. Services to be performed in connection with the installation of equipment;

h. A bond or trust account disclosure;

i. Notification of right to cancel contract within 45 days if seller does not perform;

j. A history of the business opportunities earnings if a statement concerning earnings is made; and

k. History of past criminal or financial misconduct, including whether civil claims for fraud, misappropriation, and like claims were either adjudicated against the seller or settled out of court.

3. Prohibited acts. The FBOA also specifies prohibited acts which can subject the seller of a business opportunity to civil and administrative liability. Fla. Stat. § 559.809. The prohibited acts are:

a. Misrepresent, by failure to disclose or otherwise, the known required total investment;

b. Misrepresent or fail to disclose efforts to establish more franchises or distributorships that is reasonable for the market of the business opportunity to bear;

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[14] The disclosure requirements of the FBOA can be waived by written agreement, and such agreement will be enforced. S.J. Business Enterprises, Inc. v. Colorall Technologies, Inc., 755 So.2d 769, 771 (Fla. 4th DCA 2000).

c. Misrepresent the quality or quantity of products to be sold;

d. Misrepresent training and management assistance;

e. Misrepresent the amount of expected profits;

f. Misrepresent, by failure to disclose or otherwise, the termination, transfer, or renewal provision of a business opportunity agreement;

g. Falsely claim or imply that a primary marketer or trademark or products or services sponsors or participates in the business opportunity;

h. Assign an exclusive territory to more than one buyer;

i. Provide locations for vending machines for which no authorizations have been obtained;

j. Provide machines or displays substantially different from and inferior to those promoted by the seller;

k. Fail to provide a written contract;

l. Misrepresent the ability of the seller to provide locations or assistance; or

m. Misrepresent a material fact or create a false or misleading impression in the sale of the business opportunity.

4. Constitutional considerations. This listing of the FBOA's prohibited practices formerly included the following prohibition: "Misrepresent the prospects or chances for success of a proposed or existing business opportunity." Fla. Stat. § 559.809(1) (1991). However, this provision was found unconstitutionally vague in State v. McCarthy, 615 So.2d 784, 785 (Fla. 2d DCA 1993). The court reasoned that the statute was impermissibly vague because it gave inadequate notice of what conduct was prohibited and failed to define what constituted a misrepresentation of the prospects for success of a speculative activity. Id. Subsequently, the Florida Legislature removed the provision from the FBOA. See Chapter 93-244, Laws of Florida. The implications of this ruling for the Florida Franchise Act may be considerable.

In the FFA, it is presently unlawful "[i]ntentionally to misrepresent the prospects or chances for success of a proposed or existing franchise relationship." Fla. Stat. § 817.416(2)(1). Apart from the use of the word "intentionally," the two statutory commands are quite similar. Whether the use of the word "intentionally" takes the FFA section out of the McCarthy holding is unclear. McCarthy suggests the provision may be constitutionally infirm and subject to attack on that basis.

B. Exemption for Franchises

The FBOA provides an exception for franchise arrangements. Fla. Stat. § 559.802. Under this section, the sale of a franchise is exempt from the FBOA's requirements. Very significantly, however, **this franchise exception is not based on the definition of "franchise" found in the FFA, but applies only when the arrangement meets the definition of "franchise" under the FTC rule, 16 C.F.R. §§ 436.1 et seq. and its more particularized requirements**. It also imposes a filing requirement assuring compliance with the FTC rule, to be renewed each year, with the Department of Agriculture and Consumer Services. Fla. Stat. § 559.802(1)b. Therefore, it is possible for a franchise arrangement under the FFA not to meet the franchise exception set out in the FBOA. A "garden variety" franchise arrangement will not be exempt from the FBOA if it otherwise is applicable. Therefore, franchisors seeking to avoid the onus of the FBOA must meet the federal law definition of a franchise and comply with the filing procedures.

Given the requirements defining the franchise and for disclosure imposed by the FTC rule, the exemption for franchises permitted by the FBOA is understandable. Under the FTC rule, a franchise contains three basic elements: (1) a continuing commercial relationship whereby a franchisee offers, sells, or distributes goods, commodities, or services which are identified by a trademark, service mark, trade name, advertising or other commercial symbol of the franchisor; (2) payment of a franchise fee; and (3) the franchisor has significant authority over and/or provides significant assistance to the franchisee in the operation of the franchise business. See 16 C.F.R. § 436.2; Deborah S. Coldwell, et al., Franchise Law, 53 SMU L. REV. 1055, 1056-1057 (2000). The disclosure requirements under the FTC rule are equally as detailed as those under the FBOA and both require disclosure of similar information, such as the amount of the total required franchise investment; the franchisor's business, financial, and criminal history; and data concerning the operation of the franchisor's system as a whole. 16 C.F.R. § 436.1. In light of the level of regulation extended under the FTC rule, the FBOA exemption for franchises satisfying the FTC rule's requirements is sensible.

C. Inapplicability to Programs Including Licensing of Trademarks

Another important provision for franchise and distributor relationships is Fla. Stat. § 559.801(1)(a)4. This provision states that a business opportunity exists when the seller represents to provide a sales program or marketing program that will enable the purchaser to derive income from the business opportunity. Because sales programs and marketing programs are often part and parcel of franchise arrangements, this provision could, under the right facts, bring a franchise arrangement under the FBOA. However, because franchise and distribution arrangements frequently include trademark and service mark licensing agreements, a franchise that has such an agreement is effectively taken back out of the FBOA (assuming none of the other provisions is applicable). For example, where the sale of a franchise otherwise fell under the definition of business opportunity in § 559.801(1)(a)4, it was nevertheless excepted from the operation of the FBOA because the sale included a licensing agreement for the use of trademarks and service marks. The FBOA was held not to apply in those circumstances. Barnes v. Burger King Corp., 932 F.Supp. 1420, 1434 (S.D. Fla. 1996).

III. FRANCHISE RELATIONSHIP LAWS

A franchise relationship law is any regulation touching on or governing the franchise relationship. Although the Florida laws described above regulate the sale of franchises or business opportunities, Florida law has yet to enact regulations for the relationships between franchisors and franchisees in general, with exceptions for certain specialized industries.

A franchise relationship law is generally designed to: (1) define prohibited or unfair acts by the franchisor or franchisee during the term of the franchise; and (2) govern termination, cancellation, or non-renewal of the franchise. Other states and U.S. territories have adopted such laws.[15] These laws describe the kinds of acts that the franchise parties may not engage in relative to one another and specify the grounds upon which a franchise agreement may be terminated. Although Florida lacks such comprehensive regulation for all franchise arrangements, it does have franchise relationship laws for certain specialty industries. An examination of these special industry franchise relationship laws is instructive, reflecting some of the same kinds of prohibitions and regulations found in other jurisdictions, as well as suggesting what a general franchise relationship statute in Florida might look like if one was ever enacted.

IV. SPECIAL INDUSTRY FRANCHISE RELATIONSHIP LAWS

In marked contrast to the broad and generic sweep of the FFA, some special industries in Florida receive significant legislative attention and scrutiny governing the operation of their franchise and distributorship agreements. Florida has enacted significant legislation regulating the franchise and distributor relations for motor vehicle manufacturers and dealers, motor fuel producers and sellers, beer and malted liquor producers and distributors, and farm equipment sales franchises. Specific federal legislation also exists governing the franchise relationships in motor vehicle and motor fuel sales and is complementary to the Florida regulations in this area.

A. Motor Vehicle Dealers

Of all franchise business arrangements in Florida, motor vehicle dealers may be the most highly regulated. Fla. Stat. § 320.60-320.70, often called the Automobile Dealer Act ("ADA"), provides a comprehensive scheme governing the motor vehicle manufacturer/franchisor and motor vehicle dealer/franchisee relationship. The ADA establishes procedures for licensing of

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[15] Arkansas, Ark. Stat. Ann. §4-72-204; California, Cal. Bus. & Prof. Code §§20000 *et seq.*, Connecticut, Con. Gen. Stat. §42-133f; Delaware, Del. Code. Ann. tit. 6, §2552; Hawaii, Haw. Rev. Stat. §482E-6; Illinois, Ill. Ann. Stat. ch 121 1/2, ¶704.3; Indiana, Ind. Code Ann. §§23-2-2.7-1 *et seq.*; Michigan, Mich. Comp. Laws Ann. §445.1527; Minnesota, Minn. Stat. Ann. §80c.14; Mississippi, Miss. Code. Ann. §§75-77-3, 75-24-53; Missouri, Mo. Ann. Stat. §§407.405, 407.413; Nebraska, Neb. Rev. Stat. §87-404; New Jersey, N.J. Stat. Ann. §56:10-3; Virginia, Va. Code Ann. §13.1-564; Washington, Wash. Rev. Code Ann. §19.100.180; Wisconsin, Wis. Rev. Stat. §§135.03-135.04; District of Columbia, D.C. Code Ann. §29-1201; Puerto Rico, P.R. Laws Ann. tit. 10, §278; Virgin Islands, V.I. Code Ann. tit. 12A, §§132 *et seq.*

manufacturers and the grounds for denial, suspension, or revocation of a manufacturer's license; promulgates requirements for motor vehicle distributor agreements; prohibits unfair cancellation of motor vehicle dealer franchise agreements; controls changes in plans or systems of distribution; sets forth the procedures whereby a new dealership is established or existing dealership relocated; governs the transfer, assignment, and sale of dealer franchise agreements; and regulates the change in executive management or ownership of a franchised dealer. Civil and administrative procedures and remedies are also established, and the statute grants rulemaking authority to the Department of Highway Safety and Motor Vehicles ("DHSMV") to implement the provisions of the law.

1. Motor vehicle franchise agreement defined. The ADA defines a franchise agreement as a "contract, franchise, new motor vehicle franchise, sales and service agreement, or dealer agreement or any other terminology used to describe the contractual relationship between a manufacturer, factory branch, distributor, or importer ("manufacturer"), and a motor vehicle dealer, pursuant to which the motor vehicle dealer is authorized to transact business pertaining to motor vehicles of a particular line-make." Fla. Stat. § 320.60(1).

2. Licensing of manufacturers. In order to sell motor vehicles[16] in Florida, the manufacturer must be licensed in accordance with the ADA. The ADA sets out a number of requirements for licensing, the following of which are significant for the franchise relationship with the manufacturer's dealers:

a. For each manufacturer who uses an identical blanket basic agreement for its dealers or distributors, a copy of the agreement, together with any supplements thereto, and a list of its dealers in the state and their addresses, must be filed with the application for license. Fla. Stat. § 320.63(3).

b. Not later than 60 days prior to the date of revision or modification to a franchise agreement that is offered uniformly to a licensee's dealers in the state, the licensee must inform the DHSMV and file an affidavit that the new terms do not violate the statute – any inconsistencies with the statute in the agreement are of no force and effect. Id.

3. Denial, revocation, or suspension of manufacturer's license. A manufacturer can put its license in jeopardy by engaging in certain prohibited acts "with sufficient frequency as to establish a pattern of wrongdoing" in the franchise relationship with the franchised dealer. Prohibitions include:

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[16] For the purposes of the statute, a motor vehicle is "any new automobile, motorcycle, or truck the equitable or legal title to which has never been transferred by a manufacturer, distributor, importer, or dealer to an ultimate purchaser." Fla. Stat. § 320.60(10). Ambulances and other special purpose vehicles, such as school buses and fire engines, are not "motor vehicles" for the purpose of this section. Aero Products Corp. v. Dept. of Highway Safety and Motor Vehicles, 675 So.2d 661, 664 (Fla. 5th DCA 1996).

a. Coercing or attempting to coerce the dealer into accepting motor vehicles or other things it has not ordered, or to enter into any agreement with the licensee. Fla. Stat. § 320.64(5), (6).

b. Threatening to cancel, or actually canceling, a motor vehicle dealer franchise in violation of the unfair cancellation provisions of the statute. Fla. Stat. § 320.64(7), (8).

c. Threatening to modify or replace, or actually modifying or replacing, a franchise agreement with a succeeding franchise agreement which would adversely affect the rights or obligations of a motor vehicle dealer under an existing franchise agreement, or which substantially impairs the sales, service, or investment of the motor vehicle dealer. Fla. Stat. § 320.64(9).

d. Attempting to enter into, or actually entering into, a franchise agreement with a dealer who lacks the facilities to provide proper repair work under warranty. Fla. Stat. § 320.64(10).

e. Coercing a dealer to provide vehicle financing through a specified financial institution. Fla. Stat. § 320.64(11).

f. Failure to provide new vehicles and parts pursuant to the franchise agreement when it is within the control of the licensee to do so. Fla. Stat. § 320.64(12). Compare Cabriolet Porsche Audi, Inc. v. American Honda Motor Co., 773 F.2d 1193, 1204-1206 (11th Cir. 1985) (manufacturer did not breach franchise obligations under unwritten "sell more, get more" automobile allocation system by not allocating additional vehicles upon request to dealer during "hot" sales time, where dealer was allocated number of cars based on prior poor sales performance during "slow" sales period, dealer was aware of allocation scheme, and received as many cars under that scheme as he was entitled to).

g. Failure to indemnify and hold harmless dealer against any judgment for damages or settlement for claims arising out of claims based on such grounds as strict liability, negligence, misrepresentation, warranty, or rescission. Fla. Stat. § 320.64(16).

h. Causing a termination, cancellation or nonrenewal of a franchise agreement by a present or previous distributor or importer, unless the licensee offers the terminated franchisee an agreement with substantially the same provisions or files an affidavit with DHSMV acknowledging its undertaking to assume the rights, duties, and obligations of the predecessor distributor or importer

under the terminated agreement and the same is reinstated Fla. Stat. § 320.64(17).

i. Preventing or refusing to accept the succession to any legal interest in a franchise agreement by any legal heir or devisee under the will of a motor vehicle dealer or under the laws of descent and distribution; provided, the licensee is not required to accept succession where the heir or devisee does not meet the standard qualifications for dealer applicants. In any proceeding to challenge such a succession filed by the licensee, the licensee bears the burden of proof. Fla. Stat. § 320.64(18).

j. Including terms in a franchise agreement that do not comply with the requirements of the ADA, or failing to include terms to make the agreement comply. Fla. Stat. § 320.64(19).

k. Establishing an unfair and inequitable system of distribution among franchisees. Fla. Stat. § 320.64(20).

l. Failing to provide a reasonable supply of motor vehicles and parts in a reasonable time, unless beyond the control of the licensee. Fla. Stat. § 320.64(21). See also Cabriolet Porsche Audi, Inc., 773 F.2d at 1204-1206.

m. Requiring or threatening to require a dealer to prospectively assent to a release, assignment, novation, waiver, or estoppel intended to relieve the licensee of liability under the ADA. Fla. Stat. § 320.64(22).

n. Threatening or coercing a dealer to relinquish its right to protest the establishment or relocation of a motor vehicle dealer in the community or territory serviced by the dealer.

o. Finally, Fla. Stat. § 320.64 provides for a private cause of action for injunctive relief under Fla. Stat. § 320.695 and for treble damages, including costs and attorney's fees, under Fla. Stat. § 320.697, to persons injured by violations of the ADA.

4. Successors under distributor agreements. No manufacturer shall prevent or refuse to accept the succession to any interest in any distributor's agreement with the manufacturer or importer to any beneficiary, distributee or devisee who has established his or her right to the interest, provided a manufacturer or importer is not required to accept a succession significantly detrimental to the public interest or the interest of the manufacturer or importer. Further, a manufacturer cannot refuse to honor a successor designated by the distributor and accepted in writing by the manufacturer. The burden is on the manufacturer to demonstrate the rejection of the successor was reasonable. Fla. Stat. § 320.6403

5. Agency relationship. Any parent, subsidiary, or common entity of a manufacturer or other entity which engages in the distribution of motor vehicles in this state substantially manufactured by the manufacturer, shall be deemed to be the agent of the manufacturer for the purpose of any franchise agreement entered into between such agent and a motor vehicle dealer and shall be bound by the terms and provisions of the agreement as if it were the principal. Fla. Stat. § 320.6405.

6. Unfair cancellation of franchise agreement. A major aspect of the motor vehicle manufacturer licensing statute are the provisions relating to unfair cancellation of franchise agreements. Fla. Stat. § 320.641(3) provides that "[a] discontinuation, cancellation, or nonrenewal of a franchise agreement is unfair if it is not clearly permitted by the franchise agreement; it is not undertaken in good faith; it is not undertaken for good cause; or based on an alleged breach of the franchise agreement which is not in fact a material and substantial breach." However, where the cancellation is in accordance with the terms of the agreement, no action will lie. Dick Winning Chrysler-Plymouth of Ft. Meyers, Inc. v. Chrysler Motors Co., 750 F.2d 895, 899 (11th Cir. 1985) (holding that automobile manufacturer's decision to terminate dealership franchise agreement was in accordance with parties' franchise agreement and did not violate ADA where dealer failed to abide by the terms of the agreement regarding condition and renovation of dealership facilities); Barry Cook Ford, Inc. v. Ford Motor Co., 616 So.2d 512, 517-518 (Fla. 1st DCA 1993) (holding termination on grounds that dealer had engaged in conduct unbecoming a reputable businessman was permissible under the terms of the franchise agreement and therefore did not violate ADA). The procedure involved to determine if a cancellation was unfair involves both administrative and judicial avenues of redress. Recovery can include treble damages in court and costs and attorney's fees in both court and administrative proceedings.

a. At least 90 days prior to a decision to discontinue, cancel, renew on significantly less-advantageous terms, or not renew a franchise agreement, the manufacturer-licensee must give notice to the franchisee dealer and the DHSMV, together with the specific grounds for such action. Fla. Stat. § 320.641(1)(a).

b. The failure of the manufacturer-licensee to comply with the 90 day notice requirement shall render voidable, at the option of the dealer, any discontinuation, cancellation, nonrenewal, replacement or modification of the franchise agreement. Fla. Stat. § 320.641(1)(b).

c. Franchise agreements are deemed to be continuing unless the manufacturer-licensee notifies the DHSMV to the contrary. Fla. Stat. § 320.641(2).

d. During the 90 day notice period, a dealer whose franchise is terminated or replaced may file a petition or complaint with the DHSMV that the action is unfair. Fla. Stat. § 320.641(3). An unsworn letter to the DHSMV claiming the action to be unfair is

insufficient. Fiat Motors of North America, Inc. v. Calvin, 356 So.2d 908, 909 (Fla. 1978) (holding that under prior, similar version of statute, Director of DHSMV was not empowered to accept unsworn letter in lieu of the verified complaint required by statute).

e. If the franchisee-dealer prevails in the administrative forum, it has a cause of action against the manufacturer for the reasonable costs and attorney's fees incurred by him or her in such proceeding. Fla. Stat. § 320.641(6). He or she also has a cause of action under Fla. Stat. § 320.697 for treble pecuniary damages occasioned by the violation, as well as costs and attorney's fees. Id.

f. If the dealer ceases operations for more than 10 consecutive business days, except for causes out of the dealer's control, he or she is deemed to have abandoned the franchise. Fla. Stat. § 320.641(4), (5).

g. The burden of proof is initially on the dealer to show a prima facie case of unfairness, at which point the burden shifts to the manufacturer to show by a preponderance of the evidence that it would have reached the same decision to terminate or not renew even in the absence of the alleged bad faith or unfairness. International Harvester Co. v. Calvin, 353 So.2d 144, 148 (Fla. 1st DCA 1977); Dick Winning Chrysler-Plymouth of Ft. Meyers, Inc., 750 F.2d at 898.

h. Standing of officers and directors. As a general rule, officers, directors, and stockholders of the franchisee dealer do not have individual standing to assert violations of the statute against the dealer. Pearson v. Ford Motor Co., 694 So.2d 61, 64-66 (Fla. 1st DCA 1997) (holding that president, operator, and shareholder of dealership was not motor vehicle "dealer" as term was defined by ADA and was therefore not entitled to notice when manufacturer discontinued dealer development agreement; statute distinguishes between motor vehicle dealers and persons with entitlements in motor vehicle dealer).

7. Changes in plan or system of distribution. A motor vehicle dealer franchise will continue in full force and effect notwithstanding a change in the plan or system of distribution of the motor vehicles sold under the franchise agreement. Fla. Stat. § 320.6415(1). Upon the happening of such change, the DHSMV will deny any license application unless the applicant offers to each motor vehicle dealer that is part of the franchise a new franchise agreement that contains substantially the same terms as the prior agreement, or files an affidavit undertaking to assume the rights, duties, and obligations under the prior agreement. Fla. Stat. § 320.6415(2)(a).

8. Establishment of new dealer or relocation of existing dealer. In order for a motor vehicle manufacturer to establish a new dealership or permit the relocation of an existing dealership within a territory or community where the same line-make of motor vehicles are being sold by a franchised dealer or dealers, written notice must be given to the DHSMV. Fla. Stat. § 320.642(1).

a. The notice to the DHSMV must include the location of the proposed new or relocated dealership, the expected opening date of the dealership, the identity of all franchised dealers selling the same line-make of motor vehicles in the county or contiguous county of the proposed new or relocated dealership, and the names and addresses of the dealer-operator and principal investors of the new or relocated dealership. Id. When received by the DHSMV, the notice must be immediately published in the Florida Administrative Weekly.

b. Any affected franchised dealers have 30 days from the date the notice is published in the Florida Administrative Weekly in which to file a timely protest with the DHSMV. Id.

c. An application for a motor vehicle dealer license for a new or relocated dealership will be denied when a timely protest is filed and the motor vehicle manufacturer is unable to show that the existing franchised dealer(s) in the territory or community are not providing adequate representation of the manufacturer's line-make of motor vehicles. Fla. Stat. § 320.642(2)(a). See Bill Kelley Chevrolet, Inc. v. Calvin, 322 So.2d 50, 52 (Fla. 1st DCA 1975) (holding that although 12 existing franchised dealers adequately represented territory as a whole, where underserved "community" within territory was identified, new dealership was warranted); Dave Zinn Toyota, Inc. v. Dept. of Highway Safety and Motor Vehicles, 432 So.2d 1320, 1322 (Fla. 3d DCA 1983) (holding that fact that manufacturer had not penetrated metropolitan market more pervasively than it had the state in general supported inference that existing dealers in metropolitan area were providing inadequate representation); Larry Dimmitt Cadillac, Inc. v. Seacrest Cadillac, Inc., 558 So.2d 136, 138 (Fla. 1st DCA 1990) (holding that where exceptional circumstances exist, manufacturer may show that a distinct market area exists within a broader marketing area so that, even though existing dealers are adequately representing overall market area, additional dealership may be warranted in distinct community). The burden of proof is on the manufacturer to show inadequate representation by the existing dealer(s). Id.

d. Under Fla. Stat. § 320.642(2)(b)1-11, the adequacy of the existing motor vehicle dealers' representation is determined by considering the following non-exclusive factors:[17]

(1) The impact on the new or relocated dealership on the consumers, public interest, existing dealers, and the manufacturer, distributor, or importer. Financial impact may be considered with respect to the existing dealer(s).[18]

(2) The size and permanency of the investment by existing dealers.

(3) The reasonably expected market penetration of the line-make of motor vehicles being sold, considering factors such as age, income, education, product popularity, or other factors in the territory or community.

(4) Any actions by the manufacturer to deny the growth, market expansion, or relocation of existing dealerships in the territory or community.

(5) Any attempts by the manufacturers to threaten or coerce existing dealers into consenting to additional or relocated dealer franchises in the territory or community.

(6) Distance, travel time, traffic patterns, and accessibility between existing and the proposed new or relocated dealership.

(7) Whether consumers will benefit.

(8) Whether the protesting dealers are in substantial compliance with their franchise agreements.

(9) Whether there is adequate interbrand and intrabrand competition in the community or territory and whether service facilities are adequate.

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[17] This determination requires specific findings of fact by the DHSMV to support the granting of an application for a new dealership. See Hess Marine, Inc. v. Calvin, 296 So.2d 114, 115 (Fla. 1st DCA 1974).

[18] Allowing consideration of the financial impact on existing dealers is a change from the prior version of the statute, where such evidence was excluded as not relevant. See Stewart Pontiac Co., Inc. v. Dept. of Highway Safety and Motor Vehicles, 511 So.2d 660, 663 (Fla. 4th DCA 1987).

(10) Whether the new or relocated dealership is justified by economic and marketing conditions pertinent to dealers competing in the territory or community.

(11) The volume of motor vehicle registrations and service by the existing dealers in the territory or community.

e. To have standing to protest a new or relocated dealership, the existing dealer or dealers must be located in a geographic area pertinent to the new or relocated dealership. Fla. Stat. § 320.642(3). The statute provides a comprehensive set of factors which determine whether an existing franchised dealership is located in area affected by the proposed new or relocated dealership. See Braman Cadillac, Inc. v. Dept. of Highway Safety and Motor Vehicles, 584 So.2d 1047 (Fla. 1st DCA 1991) (holding that existing dealer lacked standing to challenge new dealership when existing dealer was not located in area prescribed by Fla. Stat. § 320.642(3) as would grant standing).

9. Transfer, assignment, or sale of franchise agreements. A motor vehicle dealer is required to inform, in writing, the manufacturer under which in holds a dealer franchise agreement, of its intent to transfer, assign, or sell the existing franchise. Fla. Stat. § 320.643(1). The notice must include the prospective transferee's name, address, financial qualification, and business experience during the previous five years. Id.

a. The manufacturer must accept or reject the proposed transferee within 60 days of receipt of the notice, and/or file a complaint with the DHSMV seeking to have the proposed transferee deemed unqualified. By failing to object, approval of the transfer is deemed granted. Id. See Bayview Buick-GMC Truck, Inc. v. General Motors Corp., 597 So.2d 887, 889-890 (Fla. 1st DCA 1992) (holding that manufacturer, who instead of rejecting proposed transferee and/or filing a complaint with the DHSMV within the 60 day notice period, but attempted to exercise right of first refusal in franchise agreement, was foreclosed from blocking transfer of dealership franchise, where right of first refusal in franchise agreement was found to be void as against policy of ADA, and the transfer of the franchise was found to have occurred by operation of law because the manufacturer failed to timely object).

b. Notwithstanding any terms in the franchise agreement to the contrary, acceptance of the proposed transferee shall not be unreasonably withheld. Fla. Stat. § 320.643(1). Refusal to accept a proposed transferee of good moral character who otherwise meets the written, reasonable, and uniformly applied standards of

the manufacturer relating to the executive experience required of motor vehicle dealers is presumed to be unreasonable. See Mike Smith Pontiac, GMC, Inc. v. Mercedes-Benz of North America, Inc., 32 F.3d 528, 533 (11th Cir. 1994), cert. denied, 516 U.S. 1044 (1996) (holding that where manufacturer opposed transfer of franchise on grounds not permitted under the statute, the potential transferee-franchisee had standing to file suit for three times its pecuniary losses because objecting to a proposed transferee on grounds not stated in the statute is itself a violation of the statute.)

c. The proposed transferee must agree in writing to comply with all requirements of the franchise then in effect. Fla. Stat. § 320.643(1). See Ernie Haire Ford, Inc. v. Ford Motor Co., 260 F.3d 1285, 1293 (11th Cir. 2001) (holding that manufacturer properly withheld acceptance of proposed transfer where proposed transfer also sought to relocate dealership to another street, where existing franchise agreement was specific that dealership was to be operated on specific street); Gus Machado Buick-GMC Truck, Inc. v. General Motors Corp., 623 So.2d 810, 813 (Fla. 1st DCA 1993) (same).

d. If the manufacturer, distributor, or importer fails to file a verified complaint with the DHSMV, or if after a hearing on the complaint the DHSMV rejects the challenge to the proposed transferee, the existing franchise agreement is deemed amended to include the transfer. Fla. Stat. § 320.643(1).

10. Transfer, sale or assignment of equity interest in dealership. Notwithstanding any terms in the franchise agreement to the contrary, a manufacturer, distributor, or importer may not refuse to give effect to an alienation of the equity interest in a motor vehicle dealership, in whole or in part, to any other person(s) or corporation, unless the manufacturer shows at a hearing that the "sale, transfer, alienation, or other disposition is to a person who is not, or whose controlling executive management is not, of good moral character." Fla. Stat. § 320.643(2)(a).

a. A franchised dealer is required to give notice of such a proposed transfer of equity interest in the dealership to the manufacturer identifying the name and address of the proposed transferee. Fla. Stat. § 320.643(2)(a).

b. A manufacturer may file a verified complaint with the DHSMV for a determination that the proposed transferee is not of good moral character. Fla. Stat. § 320.643(2)(a). See Risley v. Nissan Motor Corp. USA, 254 F.3d 1296, 1301 (11th Cir. 2001), rehearing granted, --- F.3d --- (11th Cir. Aug. 22, 2001) (holding that manufacturer who filed verified complaint objecting to transfer on

the basis that transferee was not of good moral character, and later withdrew that challenge, did not commit a violation of the act subjecting it to liability, irrespective of whether it could prevail on the merits – grounds asserted for objection were permitted under the ADA).

c. The DHSMV will determine whether the proposed transferee is of good moral character, or specify in its order conditions under which the proposed transferee would be qualified. Fla. Stat. § 320.643(2)(a).

d. If the manufacturer fails to file a verified complaint with the DHSMV, or if after a hearing on the complaint the DHSMV rejects the challenge to the proposed transferee, the existing franchise agreement is deemed amended to include the transfer. Id.

e. A proposed transfer of 100 percent of the stock of a motor vehicle dealership is not a transfer of the franchise or a change in executive management. Id. See Morse v. Ford Motor Co., 1996 WL 420837*3 (M.D. Fla. 1996) (rejecting argument that 100 percent transfer of stock of dealership also constituted a transfer of the franchise and change in management).

11. Changes in executive management of dealer. A motor vehicle manufacturer has only limited control over changes in the executive management of a franchised motor vehicle dealer. Fla. Stat. § 320.644(1). A motor vehicle manufacturer shall not prohibit or prevent, or attempt to prohibit or prevent, a motor vehicle dealer from changing executive management control, unless the proposed new management is "to a person or persons not of good moral character or who do not meet the written, reasonable, and uniformly applied standards of the licensee relating to the business experience of executive management required by the licensee of its motor vehicle dealers." Id.

a. The manufacturer may file a verified complaint with DHSMV challenging the change in management, and bears the burden on all issues raised in the complaint. Id.

b. A mere termination of an executive agreement is not considered a change under this section, but the designation of replacement executive management is subject to this section. Id.

c. Where a proposed transfer of stock in a franchised dealer also involves a change in management, a complaining manufacturer may object on both grounds of the statute. See Hawkins v. Ford Motor Co., 748 So.2d 993, 1001 (Fla. 1999) (holding that motor vehicle manufacturer could object to stock transfer in franchised dealership under both Fla. Stat. § 320.643(2)(a) and Fla. Stat. §

320.644 where transaction also involved a change in the executive management and control of the dealership – the totality of the transaction must be considered).

12. Injunctive relief and civil damages. The statute authorizes any franchised motor vehicle dealer to obtain injunctive relief for even one violation of the act without the need for an injunction bond. Fla. Stat. § 320.695. Trebled civil damages, along with reasonable costs and attorney's fees, are allowed to any person who has suffered pecuniary loss "or who has been otherwise adversely affected" by any violation of the Fla. Stat. §§ 320.60-320.70. Fla. Stat. § 320.697. The initial burden is on the person bringing the action to show that a violation has occurred; the burden of proof then shifts to the manufacturer to show that such a violation did not occur. Id. The DHSMV is also authorized to levy fines for violations. Fla. Stat. § 320.698. Violations are also criminal misdemeanors of the first degree. Fla. Stat. § 320.70.

B. Federal Automobile Dealer's Day in Court Act

In addition to the Florida statutory scheme regulating the franchise relationship between manufacturers and dealers, federal law also provides another element to this franchise relationship. This is known as the Automobile Dealer's Day in Court Act ("ADDCA"), 15 U.S.C. §§ 1221-1225. The purpose of the ADDCA is to "redress the economic imbalance and unequal bargaining power between large automobile manufacturers and local dealerships, protecting dealers from unfair termination and other retaliatory and coercive practices." Maschio v. Prestige Motors, 37 F.3d 908, 910 (3d Cir. 1994).

1. ADDCA applies to automobile manufacturers and dealers operating under a franchise agreement. 15 U.S.C. § 1221(a), (b), (c). An individual officer, shareholder, or member of a board of directors of a dealer is not a dealer under the ADDCA if he or she is not a party to the franchise agreement. See Pearson v. Ford Motor Co., 68 F.3d 1301, 1301 (11th Cir. 1995) (holding that individual stockholder lacked standing under the ADDCA where he was never a party to the franchise agreement between the dealer and the manufacturer). The ADDCA provides a cause of action for breach of motor vehicle dealer franchise agreements and other prohibited practices.

2. The franchise agreement must be written. 15 U.S.C. § 1221(b). See O'Neal v. General Motors Corp., 841 F.Supp. 391, 396 (M.D. Fla. 1993) (holding that there can be no claim under the ADDCA in the absence of a written franchise agreement).

3. Requires parties to act in good faith, defining good faith to mean "the duty of each party to any franchise . . . to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party." 15 U.S.C. § 1221(e). However, "recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith." Id. See Bob Maxfield, Inc. v. American Motors Corp., 637 F.2d 1033, 1037-1038 (5th Cir. 1981) (holding that actual coercion, intimidation, or threats are an essential element for a cause of action under the ADDCA).

4. Allows for recovery of damages sustained and the cost of suit by a dealer against a manufacturer "by reason of the failure of said automobile manufacturer from and after August 8, 1956, to act in good faith in performing or complying with any of the terms of the franchise, or terminating, canceling, or not renewing the franchise with said dealer." 15 U.S.C. § 1222.

5. Provides a three-year statute of limitations. 15 U.S.C. § 1223.

6. Does not repeal, modify, or supersede, directly or indirectly, and antitrust laws of the United States, and does not invalidate any provision of state law unless an express provision of the ADDCA and an express provision of the state law are in irreconcilable conflict. 15 U.S.C. § 1224-1225.

C. Florida Motor Fuel Marketing Practices Act

The Florida Motor Fuel Marketing Act ("MFMPA"), Fla. Stat. § 526.301-526.3135, contains a number of provisions that can impact the franchise relationship of motor fuel manufacturers and retailers. However, the MFMPA does not address franchise terminations or non-renewals, as this area is exclusively regulated by federal law. Nevertheless, violations of the MFMPA can result in civil penalties and civil liability for trebled damages.

1. Discriminatory practices unlawful. Under the MFMPA, discriminatory pricing schemes are prohibited. Fla. Stat. § 526.305. It is unlawful to sell for resale, or to knowingly receive for resale, motor fuel at a price lower than the price at which the seller contemporaneously sells motor fuel of like grade and quality to another person on the same level of distribution, in the same class of trade, and within the same geographical market as the purchaser, where the effect is to injure competition. Fla. Stat. § 526.305(1)(a), (b). The foregoing does not apply where the price differential is due to differing methods or quantities in which the grade of motor fuel is sold, or in a good-faith effort to meet an equally low price of a competitor. Fla. Stat. § 526.305(3), (4).

2. Unfair practices unlawful. The MFMPA contains two specific provision which can directly affect the franchise relationship.

a. A refiner or other supplier of motor fuel may not fix or maintain the price of motor fuel at a retail outlet supplied by that refiner or supplier. Fla. Stat. § 526.307(1).

b. It is unlawful for a supplier supplying motor fuel to a person for resale, and leasing a retail outlet to the person, to impose any material modification in the contractual arrangements during the term of the contract, including a material modification of the leased retail outlet, unless such modification is made in good faith and based upon reasonable business practices. Fla. Stat. § 526.307(2).

3. Certain rebates unlawful. Rebates, rent subsidies, or concessions by sellers to one party are prohibited where the effect is to injure competition, unless the seller provides the rebate, rent subsidy, or concession, on proportionally equal terms to all persons purchasing for resale in the relevant geographic market. Fla. Stat. § 526.308.

4. Private enforcement actions. Any person injured as a result of any violation of the MFMPA can bring a civil action for declaratory and injunctive relief and damages. Fla. Stat. § 526.312. Any actual damages may be trebled by the court, and prevailing party attorney's fees may be awarded. Fla. Stat. § 526.312(3), (4). Private actions are subject to a one year statute of limitation, except claims for discriminatory fuel pricing may be brought within two years. Fla. Stat. § 526.313.

5. Administrative actions. The Department of Agriculture and Consumer Services ("DACS") is authorized to impose civil penalties for violations of the act and to seek injunctive relief. Fla. Stat. § 526.311. DACS actions are subject to a two year statute of limitations. Fla. Stat. § 526.313.

D. Federal Petroleum Marketing Practices Act

The impact on the franchise relationships between motor fuel manufacturers and retailers in Florida must also be evaluated by reference to the Federal Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§ 2801-2806. The Florida law only complements the PMPA. The federal law exclusively regulates the termination and non-renewal of petroleum franchise arrangements and pre-empts contrary state regulations. See 15 U.S.C. § 2806. The PMPA was "promulgated for the purpose of protecting petroleum franchisees from franchisors' arbitrary or discriminatory decisions to terminate or non-renew franchise leases [and] provides standards and procedures which a franchisor must follow when terminating or non-renewing a franchise." Seckler v. Star Enterprise, 124 F.3d 1399, 1402 (11th Cir. 1997).

1. Defining the franchise. The PMPA defines a franchise in terms of three elements: "a contract to use the refiner's trademark, a contract for the supply of motor fuel to be sold under the trademark, and a lease of the premises at which motor fuel is sold." Shukla v. BP Exploration & Oil, Inc., 115 F.3d 849, 852-853 (11th Cir. 1997). See 15 U.S.C. § 2801(1).

2. Limited grounds for termination or non-renewal of franchise. Franchises may be terminated or non-renewed only for specified reasons found in 15 U.S.C. § 2802(b). Shukla, 115 F.3d at 852. Those grounds are:

a. Failure by the franchisee to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship, provided appropriate notice is given. 15 U.S.C. § 2802(b)(2)(A). See also Doebereiner v. Sohio Oil Co., 893 F.2d 1275, 1276 (11th Cir. 1990) ("Congress intended to permit termination or nonrenewal only when the franchisee's failure to comply involves a franchise provision that is

both reasonable--that is, fair, proper, just or moderate--and of real importance or great consequence to the franchise relationship.")

b. Failure by the franchisee to carry out good faith efforts to carry out the provisions of the franchise when the franchisee was given appropriate notice and afforded a reasonable opportunity to exert good faith efforts to carry out such provisions. 15 U.S.C. § 2802(b)(2)(B).

c. The occurrence of an event which is relevant to the franchise relationship and as a result of which termination or nonrenewal of the franchise relationship is reasonable, such as criminal or fraudulent conduct of the franchisee, declaration of bankruptcy or insolvency of the franchisee, or severe mental or physical disability of the franchisee of at least three months' duration which renders the franchisee unable to properly operate the franchise. 15 U.S.C. § 2802(b)(2)(C).

d. An agreement in writing between the franchisor and franchisee to terminate or not renew the franchise. 15 U.S.C. § 2802(b)(2)(D).

e. A good faith decision by the franchisor to withdraw from the marketing of motor fuel in the relevant geographic market where the franchise was entered into prior to June 19, 1978 or, for franchisees entered into on or after that date, was for a term in excess of three years.

f. The failure of the franchisor and franchisee to agree to changes or additions to the franchise agreement where such changes are the result of determinations made by the franchisor in good faith and in the normal course of business and are not made to convert the premises to the franchisor's benefit or otherwise thwart renewal of the franchise. 15 U.S.C. § 2802(b)(3)(A).

g. The receipt of numerous bona fide customer complaints by the franchisor concerning the franchisee's operation of the franchise where the franchisee was promptly notified of such complaints and failed to take corrective action. 15 U.S.C. § 2802(b)(3)(B).

h. Failure by the franchisee to operate the franchised premises in a clean, safe, and healthful manner if the franchisee failed on two or more occasions to do so and the franchisor notified the franchisee of such failures. 15 U.S.C. § 2802(b)(3)(C).

i. A good faith decision by the franchisor made in the normal course of business to convert the leased premises to a use other than the

sale or distribution of motor fuel, materially alter or replace such premises, sell such premises, or determine that renewal of the franchise is likely to be uneconomical. 15 U.S.C. § 2802(b)3(D). In the latter two events, the franchisor must make a bona fide offer to sell the premises to the franchisee or, where applicable, offer the franchisee the right of first refusal to purchase the franchisor's interest in the premises. Id.

j. Loss of the franchisor's right to grant possession of the leased premises to the franchisee through expiration of an underlying lease, provided appropriate notice was given the franchisee. 15 U.S.C. § 2802(b)(4).

k. A condemnation or taking, in whole or in part, of the leased premises under the power of eminent domain. 15 U.S.C. § 2802(b)(5).

l. Loss of the franchisor's right to the use of the trademarks which are subject to the franchise, unless such loss was due to the fault of the franchisor. 15 U.S.C. § 2802(b)(6).

m. Destruction, other than by the franchisor, of the leased premises. 15 U.S.C. § 2802(b)(7).

n. Failure of the franchisee to pay the franchisor all sums to which the franchisor is legally entitled. 15 U.S.C. § 2802(b)(8).

o. Failure of the franchisee to operate the premises for seven consecutive days, or such lesser time as the facts and circumstances show to be unreasonable. 15 U.S.C. § 2802(b)(9).

p. Willful adulteration, mislabeling, or misbranding of motor fuels or other trademark violations by the franchisee. 15 U.S.C. § 2802(b)(10).

q. Knowing failure of the franchisee to comply with federal, state, or local laws governing the operation of the franchised premises. 15 U.S.C. § 2802(b)(11).

r. Conviction of the franchisee of any felony involving a crime of moral turpitude. 15 U.S.C. § 2802(b)(12).

3. Exception for trial and interim franchises. Trial or interim franchises, for terms of not more than one year, are subject to an exception to the general rule. 15 U.S.C. § 2803. Under this section, no cause for nonrenewal need exist. Id. The franchisor need only provide appropriate notice to the franchisee under a trial or interim franchise of the franchisor's

desire not to renew. Id. See Freeman v. BP Oil, Inc., Gulf Products Div., 855 F.2d 801, 803 (11th Cir. 1988) (holding that franchisor to trial franchise agreement need only comply with notice requirements of statute when deciding not to renew; protections for regular franchisee do not apply.)

4. Notice requirements. The PMPA provides a comprehensive notice scheme that must be followed at termination. 15 U.S.C. § 2804. Such notice must be in writing, sent by certified mail or personally delivered, and specify the date of termination. Id. Furthermore, the franchisor must provide the franchisee with a summary of its rights and remedies as prepared by the Secretary of Energy and published in the Federal Register. Id.

5. Civil remedies. The PMPA creates a civil cause of action for unlawful termination or nonrenewal of a franchise. 28 U.S.C. § 2805(a). Such an action is subject to a one year limitations period. Id. The court is empowered to grant injunctive and declaratory relief, as well as damages, including punitive damages, and reasonable attorney's fees to the prevailing franchisee. 15 U.S.C. § 2805(b), (d). The burden of proof is initially on the franchisee to show the termination or nonrenewal, then the burden shifts to the franchisor to show that such termination or nonrenewal was permissible. 15 U.S.C. § 2805(c).

E. Beer and Malted Beverages Franchises

The franchise relationship between the brewers and distributors of beers and malted beverages ("beer") is also highly regulated. Fla. Stat. § 563. This section defines a franchise in a similar fashion as the FFA: "a contract or agreement, whether oral or written, for definite or indefinite period of time in which a manufacturer grants a beer distributor the right to purchase, resell, and distribute any brand or brands offered by the manufacturer." Fla. Stat. § 563.022(2)(c).

1. Legislative Purpose. The declared purpose of the statute governing the relationships between brewers and distributors of beers and malted beverages is set out in Fla. Stat. § 536.022(1)(a)1-3.

a. Assure that the beer distributor is free to manage its business enterprise, including the distributor's right to independently establish selling prices.

b. Assure the manufacturer and the public that the distributor will devote reasonable efforts and resources to the sales and distribution of the brewer's products.

c. Maintain an orderly system of distribution of beer to the public.

2. Unfair and prohibited acts. Fla. Stat. § 563.022(5)(a)(b)1-16 proscribes a number of prohibited acts in the beer distribution franchise relationship.

a. Coercing or compelling, or attempting to coerce or compel, any beer distributor to accept delivery of any beer or other commodity it has not voluntarily ordered.

b. Refusing to deliver beer in reasonable time and in reasonable quantity upon receipt of a distributor's order when it is within the brewer's power to do so. But see Jim Taylor Corp. v. Guinness Import Co., 897 F.Supp. 556, 558-560 (M.D. Fla. 1995) (holding that distributor had no cause of action under statute where brewer introduced new brand of beer, not covered by existing distribution agreement, distributor sought to become distributor for new brand, and brewer instead sought other distributors to distribute the new brand – brewer who carries several brands of beers is not obligated to extend distribution rights for each and every brand to single distributor).

c. Coercing or compelling, or attempting to coerce or compel, any beer distributor to enter into any agreement, written or oral, supplemental to any existing franchise, or to do any other act prejudicial to such distributor, by threatening to cancel such franchise. However, a good faith notification that a distributor is in violation of its franchise agreement is not a violation of this section.

d. Terminating, canceling, failing to renew, or refusing to continue the franchise of any distributor without good cause. Good cause exists under Fla. Stat. § 563.022(7) and (10) when:

(1) Failure of the distributor to comply with a reasonable and material provision of the franchise agreement, of which the brewer has not known about for more than 18 months.

(2) The distributor was given written notice of the non-compliance.

(3) The distributor was afforded a reasonable opportunity to cure the non-compliance, including 30 days within which to submit a plan and 90 days to implement it.

(4) The distributor is financially insolvent.

(5) The distributor's license to distribute has been revoked by the Federal Bureau of Alcohol, Tobacco and Firearms for more than 60 days.

(6) The distributor, or a partner or individual who owns ten percent or more of the distributor's stock, has been convicted of a felony which may reasonably negatively affect the goodwill of the distributor or brewer; provided, that in a partnership or corporate setting, if the remaining stockholders purchase the stock of the convicted person within 15 days of their conviction, this provision will not apply.

(7) There was fraudulent conduct on the part of the distributor in its dealings with the brewer.

(8) Where the brewer has assigned exclusive distribution territories, the distributor intentionally and willfully sells outside his or her territory.

(9) Failure to pay for the brewer's products.

(10) The distributor sells, transfers, or assigns the franchise without the written consent of the manufacturer.

e. Willfully discriminate, directly or indirectly, in the price offered to franchisees, where the effect is likely to substantially lessen competition.

f. Prevent or attempt to prevent any distributor from changing the capital structure by which it finances its enterprise; provided that the distributor meets at all times the generally accepted capitalization standards within the brewer's distribution system.

g. Prevent or attempt to prevent a beer distributor from selling or transferring his or her interest in the distribution enterprise; provided that a distributor may not transfer or sell the franchise or power of management control without the written consent of the brewer, which consent may not be unreasonably withheld.

h. Obtain anything of value from another person in exchange for coercing a distributor to do business with that person.

i. Require a distributor to assent to a release, assignment, novation, waiver, or estoppel which would relieve any person of its liabilities under this section.

j. Restrict or inhibit, directly or indirectly, the right of free association among manufacturers or distributors for any lawful purpose.

k. Fix or maintain the price at which a distributor resells beer.

l. Coerce or attempt to coerce a distributor to accept beer or other commodities ordered by the distributor when such order was properly cancelled.

m. Change a distributor's quota of a brand or brands if the change is not made in good faith.

n. Require a distributor to participate or contribute to any local or national advertising fund controlled directly or indirectly by the brewer.

o. Retaliate against a distributor who files a complaint alleging a violation by the brewer of state or federal law.

p. Require or prohibit, without good cause in writing, any change in the manager or successor manager of a distributor approved by the brewer as of June 4, 1987. Should a distributor change an approved manager or successor manager, the brewer shall not require or prohibit the change unless the person fails to meet the brewer's reasonable written standards for Florida distributors provided to the distributor.

3. Resignation, cancellation, termination, failure to renew or refusal to continue. A brewer shall not cause a distributor to resign, or terminate, fail to renew, or refuse to continue under a franchise agreement unless the brewer provides notice, has acted in good faith, and has good cause for the cancellation or non-renewal. Fla. Stat. § 563.022(6).

a. Notice must be sent 90 days prior to the effective date of the cancellation, termination or non-renewal, by certified mail, and must contain a statement of intent to terminate, a statement of reasons, and the effective date of the end of the agreement. Fla. Stat. § 563.022(9).

b. The burden of proof is on the brewer to show that it has acted in good faith, complied with the notice requirements, and had good cause for the termination, cancellation, or non-renewal. Fla. Stat. § 563.022(8).

4. Discontinuance of production or distribution. Notwithstanding anything to the contrary, a brewer may terminate, cancel, or not renew a distribution agreement if the brewer discontinues production or distribution of all the brands sold by the brewer to the distributor. Fla. Stat. § 563.022(11). Thirty-days notice to the distributor is required not to violate the provisions of this section. Id.

5. Reasonable efforts by the distributor. Under this section, a distributor is required to devote reasonable efforts and resources under the franchise agreement to the sale of the brewer's products which the distributor has the right and has agreed to distribute. Fla. Stat. § 563.022(12).

6. Agreements biding on successor. A successor to a brewer who continues in business as a brewer is bound by all terms and conditions of each agreement with distributors entered into by the predecessor on the date of succession. Fla. Stat. § 563.022(16). See Gulfside Distributors, Inc. v. Becco, Ltd., 985 F.2d 513, 515 (11th Cir. 1993) (holding that successor brewer who terminated distribution agreement in violation of statute was not liable, where successor brewer assumed predecessor's pre-existing contractual obligations and was bound to the same extent as the predecessor; since the agreements succeeded to by the successor were entered into prior to the statute, the statute could not be applied to the successor because to do so would violate Florida's prohibition on the impairment of contracts.)

7. Reasonable compensation upon termination. When a brewer, without good cause, terminates, cancels, or fails to renew a distributorship, or unreasonably withholds consent to any assignment, transfer, or sale of a distributor's business assets, the brewer shall pay to the distributor with whom it has a written agreement reasonable compensation for the value of the distributor's business which has been negatively affected by the manufacturer, inclusive of goodwill. Fla. Stat. § 563.022(17).

8. Remedies. A party aggrieved by a violation of the statute may seek injunctive relief without the need for an injunction bond and damages, including reasonable attorney's fees. Fla. Stat. § 563.022(18). Declaratory relief is also available. Id. In an action for damages, if the trier of fact finds the defendant acted maliciously, punitive damages may be awarded in accordance with Florida law. Id.

9. Repurchase of inventory upon termination. Whenever a distributor enters into a franchise agreement with a brewer and agrees to maintain an inventory of beer, when the franchise is subsequently terminated the brewer shall repurchase the inventory of beer the brewer supplied the distributor at 100 percent of the distributor's cost, unless the distributor has the right and desire to retain the inventory or ordered it on or after the date of termination, the value of which shall be offset against any debts of the distributor owed the brewer. Fla. Stat. § 562.022(20). If a brewer fails or refuses to repurchase the inventory within 60 days after the termination of the franchise, the brewer will be civilly liable to the distributor for 100 percent of the current wholesale price of the inventory, plus any applicable freight charges, and may recover court costs, reasonable attorney's fees, and interest computed from the 61st day after the termination. Id.

10. Indemnification. A brewer is required to indemnify and hold harmless its distributor for any losses in tort or warranty law for claims relating to the manufacture or packaging of beer or other functions beyond the distributor's control. Fla. Stat. § 563.022(21). However, the distributor must provide timely written notice of any such claims to the brewer for the brewer to be liable under this section. Id.

F. Florida Farm Equipment Manufacturers and Dealers Act

The franchise relationship between the manufacturers and dealers of farm equipment is controlled by the Farm Equipment Manufacturers and Dealers Act ("FEMDA"), Fla. Stat. § 686.40-686-418. Although there are no reported cases addressing the substantive provisions of the FEMDA, its comprehensive treatment of this franchise relationship is significant for the farm equipment industry.

1. Franchise defined. Unlike the other franchise relationship laws in Florida, the FEMDA is the only Florida law to specifically define a franchise for the purpose of the act as including the use of trade names, trade marks and service marks. Fla. Stat. § 686.402(7). The FEMDA defines a franchise as follows:

> "Franchise" means a contract or agreement, either expressed or implied, whether written or oral, for a definite or indefinite period of time in which a manufacturer, distributor or wholesaler grants to a tractor or farm equipment dealer permission to use a trade name, service mark, trademark, or related characteristic and in which there is a common interest or community of interest in the marketing of tractors or farm equipment or services related thereto at wholesale or retail, whether by leasing, sale, or otherwise.

Id. The association with trade names, service marks, and trademarks makes the FEMDA unique among the Florida franchising statutes.

2. Repurchase of inventory upon termination of franchise. Similar to the statute regulating the sales of beer and malted liquor, when a farm dealership franchise terminates, the manufacturer is obligated to repurchase a dealer's inventory where the franchise calls for the dealer to maintain an inventory of tractors, farm equipment, and/or parts. Fla. Stat. § 686.407(1).

a. The dealer may keep the inventory if he or she desires. Id.

b. Outstanding debts owed the manufacturer by the dealer are to be set-off against the repurchase amount. Id.

c. If the dealer chooses not to retain the inventory, the manufacturer must pay:

(1) 100 percent of the actual dealer cost, including freight, for all new, unsold, undamaged tractors and farm equipment, less reasonable depreciation. Fla. Stat. § 686.407(2)(a).

(2) 85 percent of the current wholesale price for all new, unused, and undamaged parts and accessories listed in the manufacturers current returnable parts list, plus a six percent allowance for packing, unless the manufacturer

chooses to pack the parts and accessories for return. Fla. Stat. § 686.407(2)(b).

(3) A manufacturer is not required to repurchase parts with a limited storage life or which are otherwise subject to deterioration; a single part from a set; a part not resalable as a new part without repackaging or reconditioning; inventory to which the dealer is unable to show good title; items that are not new, unused, and undamaged; tractors or equipment that have deteriorated due to use or weather conditions at the dealer's location unless an allowance for such use or deterioration is made; inventory ordered after the date the dealer received notice of termination; and inventory acquired by any source other than the manufacturer. Fla. Stat. § 686.407(4).

(4) If a manufacturer fails or refuses to repurchase the inventory within 60 days after the termination of the franchise, the manufacturer will be civilly liable to the dealer for 100 percent of the current wholesale price of the inventory, plus any applicable freight charges, and may recover court costs, reasonable attorney's fees, and interest computed from the 61st day after the termination. Fla. Stat. § 686.407(5).

3. Repurchase of inventory upon death or incapacity of dealer. In the event of the death of a franchised dealer, the heirs, devisees or transferees of the dealer have the option to require the manufacturer to repurchase the dealer's inventory in accordance with the provisions of Fla. Stat. § 686.407. Fla. Stat. § 686.408(1). This option must be exercised within one year after the dealer's death, and nothing prevents the heirs, devisees, or transferees and the manufacturer from entering into a new franchise agreement to operate the dealership. Id. A succession provision in the deceased dealer's franchise agreement remains applicable to the extent not inconsistent with this section. Fla. Stat. § 686.408.

4. Compensation for inventory upon wrongful cancellation, refusal to renew or restriction on the transfer of the franchise. In addition to the requirement that a manufacturer must repurchase inventory on the termination of a franchise when the franchise agreement calls for the dealer to maintain an inventory, it is also unlawful for a manufacturer, without due cause, to fail to renew a franchise agreement on terms then equally available to all his or her farm equipment dealers, terminate a franchise, or restrict the transfer of a franchise, unless the franchisee receives fair and reasonable compensation for the inventory of the business. Fla. Stat. § 686.409.

5. Indemnification of franchisees. A manufacturer is required to indemnify and hold harmless its franchisee for any losses in tort or warranty law or for claims for rescission

relating to the manufacture, design, or assembly of tractors and/or farm equipment or other functions beyond the distributor's control. Fla. Stat. § 686.41.

6. Unlawful acts and practices. The FEMDA outlines a number of prohibited acts applicable to the franchising of farm equipment. It is unlawful for a manufacturer to:

a. Coerce or compel, or attempt to coerce or compel, a tractor or farm equipment dealer to order or accept delivery of any tractor, item of farm equipment, parts, accessories, or any other commodity the dealer did not voluntarily order. Fla. Stat. § 686.413(2)(a).

b. Coerce or compel, or attempt to coerce or compel, a tractor or farm equipment dealer to order or accept delivery of any tractor or item of farm equipment with special features, accessories, or equipment not included in the base list price of such tractor or item of farm equipment as publicly advertised by the manufacturer. Fla. Stat. § 686.413(2)(b).

c. Refuse to deliver any tractor or item of farm equipment in reasonable quantities and within reasonable time after the dealer's order; however, such refusal is justified where it is based on a prudent and reasonable restriction on the extension of credit to the dealer or is due to acts beyond the control of the manufacturer. Fla. Stat. § 686.413(3)(a).

d. Coerce or compel, or attempt to coerce or compel, a franchised dealer to enter into any agreement supplemental to the franchise agreement, or to do any other act prejudicial to the dealer by threatening to cancel the franchise; however, notice in good faith of a dealer's violations of its franchise agreement is not a violation of this section when sent in writing by registered or certified mail and containing specific facts as to the dealer's violations of the franchise agreement. Fla. Stat. § 686.413(3)(b).

e. Terminate or cancel the franchise agreement of a dealer without due cause, due cause existing when the dealer:

(1) Has transferred an ownership interest in the dealership without the manufacturer's consent. Fla. Stat. § 686.413(3)(c)2.

(2) Has made a material misrepresentation in applying for or acting under the franchise agreement. Id.

(3) Has filed for bankruptcy, is in default under the terms of a security agreement in effect with the manufacturer, or is in receivership. Id.

(4) Has engaged in unfair business or trade practices. Id.

(5) Has inadequately represented the manufacturer's products with respect to sales, service, or warranty work. Id.

(6) Has inadequate and insufficient sales and service facilities and personnel. Id.

(7) Has failed to comply with applicable federal, state, or local licensing laws. Id.

(8) Has been convicted of a crime, the effect of which is detrimental to the manufacturer or dealer. Id.

(9) Has failed to operate in the normal course of business for 10 consecutive days or has terminated his or her business. Id.

(10) Has relocated his or her place of business without the manufacturer's consent. Id.

(11) Has failed to comply with the terms of the franchise agreement. Id.

f. Offer to sell or to sell any new tractor, item of farm equipment, parts or accessories to any other dealer at a lower actual price than the price offered to any other tractor or farm equipment dealer for the same model tractor or identical farm equipment which results in a lesser actual price or a fixed price predetermined solely by the manufacturer, unless the offer is made to any unit of government or to all franchised dealers at an equal price. Fla. Stat. § 686.413(3)(e).

g. Willfully discriminate, directly or indirectly, in price, programs, or terms of sale offered to franchisees when the effect is to lessen competition or give one franchisee a business advantage over other franchisees. Fla. Stat. § 686.413(3)(f).

h. Prevent or attempt to prevent a franchised dealer from changing his or her capital structure or means through which his or her dealership is financed, provided the dealer at all times meets the reasonable capitalization standards of the manufacturer and such

change does not amount to a change in the executive management of the dealership. Fla. Stat. § 686.413(3)(g).

i. Prevent or attempt to prevent a dealer from selling or transferring any part of their interest to another party; however, a dealer may not change the executive management of the dealership without the consent of the manufacturer, but such consent may not be unreasonably withheld. Fla. Stat. § 686.413(3)(h).

j. Obtain anything of value from any other person with whom the dealer does business or employs on account of the transactions between the manufacturer, dealer, and such other person. Fla. Stat. § 686.413(3)(i).

k. Require a dealer to assent to a release, assignment, novation, waiver, or estoppel which would relieve any person of liability under this section. Fla. Stat. § 686.413(3)(j).

7. Remedies. Any person aggrieved by violations of the FEMDA may obtain injunctive and declaratory relief as well as damages including reasonable attorney's fees. Fla. Stat. § 686.417(1), (2). In an action for damages, if the trier of fact determines that the defendant acted maliciously, punitive damages may be awarded in accordance with Florida law. Fla. Stat. § 686.417(4).

V. IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

Florida lacks a general franchise relationship law to govern situations like termination or unfair practices – the kinds of issues explicitly dealt with in the statutes for the specialized industries discussed above. In the absence of statutory regulation of the franchise relationship, regular contract law principles govern. One contract law doctrine, the implied covenant of good faith and fair dealing, has become a central factor in franchise relationship disputes.

A. Defining the Implied Covenant

Florida law recognizes that a covenant of good faith and fair dealing is implied in every contract. Insurance Concepts and Design, Inc. v. Healthplan Services, Inc., 785 So.2d 1232, 1234 (Fla. 4th DCA 2001). This covenant is intended to protect the reasonable expectation of the contracting parties in light of their express agreement. Id. In the context of franchise litigation, claims by franchisees that the franchisor breached the implied covenant of good faith and fair dealing have proven to be fertile ground for disagreement. See Kathryn Lea Harman, The Good Faith Gamble in Franchise Agreements: Does Your Implied Covenant Trump My Express Term?, 28 CUMB. L. REV. 473, 474 (1998). Some commentators have observed that franchisees allege breach of the covenant "in every lawsuit brought." Id. Although earlier decisions interpreted the covenant in such a way as to allow for broad protections of a franchisee's "reasonable expectations," the recent trend in Florida law is to limit the application

of the covenant so that it does not override an express term of the contract or impose liability absent the breach of an express term of the contract.

B. The Broad Scope of the Covenant in Early Decisions

Broad application of the covenant is found in earlier decisions involving both claims of encroachment and unfair termination.

1. Scheck v. Burger King Corp., 756 F.Supp. 543 (S.D. Fla. 1991) ("Scheck I"). In Scheck I, the plaintiff franchisee alleged that the franchisor, Burger King, breached the implied covenant of good faith and fair dealing when it authorized the construction of an additional Burger King franchise only two miles away from the existing franchisee's location. Id. at 545. However, Burger King argued that the franchise agreement did not contain any express term granting the franchisee exclusive territorial rights, and that in the absence of such a provision, no claim for breach of the implied covenant could exist. Id. at 549. The court disagreed, reasoning:

> The express denial of a territorial interest to Scheck does not necessarily imply a wholly different right to Burger King--the right to open other proximate franchises at will regardless of their effect on the Plaintiff's operations. It is clear that, while Scheck is not entitled to an exclusive territory, he is entitled to expect that Burger King will not act to destroy the right of the franchisee to enjoy the fruits of the contract.

Id. The court was equally persuaded by the fact that Burger King had developed internal policies and procedures designed to protect against the "cannibalization" and "potential ruin" of other Burger King franchises. Id. Despite the absence of a claim for breach of an express term of the franchise agreement, the court permitted the claim for breach of implied covenant to proceed, finding it to be a question of fact that could not be resolved on summary judgment. Id.

2. Scheck v. Burger King Corp., 798 F.Supp. 543 (S.D. Fla. 1992) ("Scheck II"). Not content with the outcome in Scheck I, Burger King moved for reconsideration of the court's decision. However, the court was unmoved by Burger King's arguments and further elucidated its position. First, the court reiterated that it remained "confident that Florida law recognizes an independent cause of action for breach of this implied covenant of good faith." Id. at 695. Secondly, the court denied Burger King's contention that it was allowing the implied covenant to override an express term of the contract because the franchisee agreement did not expressly reserve "the unlimited right to establish Burger King franchises at any location desired." Id. at 696. The court focused not on what rights were granted to the franchisee under the agreement, but the rights that were not expressly retained by the franchisor, Burger King. The court said:

> That the Franchise Agreement does not address this subject is quite notable, for it thus becomes apparent that there exists no explicit contractual language that this Court is overriding by virtue of implying a covenant of good faith and fair dealing into the Agreement. Because there is no express language in the Franchise

> Agreement providing that Burger King can establish Burger King restaurants wherever it so pleases, and because Florida law recognizes this implied covenant of good faith and fair dealing, this Court properly denied summary judgment. For these exact same reasons, furthermore, the pending reconsideration motion cannot succeed.

Id. Therefore, under the rationale of Scheck I and Scheck II, a claim for breach of implied covenant of good faith and fair dealing can lie in the absence of an alleged breach of an express term of the agreement.

3. Dunkin' Donuts of America, Inc. v. Minerva, Inc., 956 F.2d 1566 (11th Cir. 1992). In this case the franchisor terminated the agreement with the franchisee to operate two donut shops on the basis that two audits revealed the franchisee was underreporting sales to the franchisor. The franchisor filed a complaint alleging a breach of the franchise agreement and to stop the franchisee from operating. The franchisees counterclaimed that the franchisor breached the implied covenant of good faith and fair dealing by the kind of audit it performed and the motivations for it. At trial the jury found in favor of the franchisee on the implied covenant counterclaim. The franchisor appealed.

Applying Massachusetts laws, the Eleventh Circuit concluded that there was sufficient evidence for the jury to find breach of the implied covenant. Id. at 1570. The court found that there was sufficient evidence to show that (1) the first of the audits, conducted in 1982, was motivated by franchisee's refusal to subscribe to a renewal option agreement offered by the franchisor; (2) the kind of audit employed by the franchisor had not been disclosed to the franchisee and was not a reliable accounting method; and (3) that the termination of the agreement was not based on good cause because there had not been any intentional underreporting of sales. Id. The court therefore agreed that a reasonable jury could have found that the franchisor breached its obligation of good faith and fair dealing. Not discussed by the court, however, was how the alleged breaches related to any term in the franchise agreement.

C. Limiting the Scope of the Covenant

Although the earlier decisions gave the implied covenant of good faith and fair dealing broad application in franchise relationships, later cases have curtailed its scope.

1. Barnes v. Burger King Corp., 932 F.Supp. 1420 (S.D. Fla. 1996). Like the Scheck decisions, Barnes involved a claim of breach of good faith and fair dealing when Burger King allowed another franchisee to open near the plaintiffs location. Id. at 1424. However, the franchise agreement was interpreted in reverse of the agreement at issue in Scheck. Rather than focus on what was not retained by Burger King, the court in Barnes focused on what was not given away:

> [T]his Court finds that under the Franchise Agreement . . . Burger King was entitled to open additional Burger King franchises in the vicinity of the Barnes' franchise. This finding is based on the express language of the Franchise Agreement which explicitly states that Barnes is not entitled to any territorial or

> area rights and which in no way provides that Burger King is not entitled to open additional franchises in the vicinity of the Barnes' franchise.

Id. at 1439 (emphasis supplied). Thus, under this reading of the agreement, Burger King was perfectly entitled to open the additional restaurant which was the subject of the franchisee's complaint. Because of this reading, as opposed to the Scheck reading, of the franchise agreement, no breach of an express term could be found. The court further held that there can be no claim for breach of the implied covenant where application of the covenant would contravene the express terms of the agreement or where there is no accompanying action for breach of an express term of the agreement. Id. at 1438.

2. In Burger King Corp. v. Weaver, 169 F.3d 1310, 1317-1318 (11th Cir. 1999), the Eleventh Circuit expressly rejected the rationale of Scheck I and Scheck II. First, the Eleventh Circuit concluded that the Scheck court misapprehended Florida law when it allowed an independent claim for breach of the implied covenant of good faith and fair dealing to proceed absent a claim for breach of the express contract. Id. Secondly, it disagreed with the Scheck court's interpretation of the rights and duties under a franchise agreement:

> The Scheck court held that the franchisee had a cause of action, even though the franchise agreement provided no right to exclusive territory, because BKC had not expressly reserved the right to license additional Burger King (R) restaurants nearby. The flaw in this reasoning is that right and duty are different sides of the same coin; if one party to a contract has no *right* to exclusive territory, the other party has no *duty* to limit licensing of new restaurants.

Id. (emphasis original). The Eleventh Circuit held that there is no independent cause of action for breach of the implied covenant of good faith and fair dealing: "Where a party to a contract has in good faith performed the express terms of the contract, an action for breach of the implied covenant of good faith and fair dealing will not lie." Id.

D. Solidifying the Trend

The rationale espoused in the Scheck cases has been eroded by other decisions, solidifying the trend in Barnes and later cases.

1. City of Riviera Beach v. John's Towing, 691 So.2d 519, 521 (Fla. 4th DCA 1997) (the implied obligation of good faith cannot be used to vary the terms of an express contract).

2. Hospital Corp. of America v. Florida Medical Center, Inc., 710 So.2d 573, 575 (Fla. 4th DCA 1998) (duty of good faith must relate to the performance of an express term of the contract and is not an abstract and independent term of a contract which may be asserted as a source of breach when all other terms have been performed pursuant to the contract requirements).

3. Cox v. CSX Intermodal, Inc., 732 So.2d 1092, 1098 (Fla. 1st DCA 1999) (implied covenant cannot be used to vary the express terms of a contract).

4. Insurance Concepts and Design, Inc. v. Healthplan Services, Inc., 785 So.2d 1232, 1234-1235 (Fla. 4th DCA 2001) (two restrictions on claim for breach of implied covenant of good faith and fair dealing are that covenant cannot be invoked to override express terms of the parties agreement and cannot be maintained absent an allegation that an express term was breached).

5. Ernie Haire Ford, Inc. v. Ford Motor Co., 260 F.3d 1285, 1291 (11th Cir. 2001) (rather than serving as independent term of contract, the implied covenant of good faith and fair dealing attaches to the performance of a specific contractual obligation.)

E. Justifications for the New Trend

At least two justifications exist for moving away from the rule enunciated in Scheck. First, allowing a claim for breach of the implied covenant of good faith and fair dealing in the absence of the breach of an express term would "add an obligation to the contract which was not negotiated by the parties and not in the contract." See Hospital Corp. of America, 710 So.2d at 575. Secondly, the approach espoused in Scheck "adds uncertainty to franchise law, and could have the effect of slowing the growth of franchises." See Kathryn Lea Harman, The Good Faith Gamble in Franchise Agreements: Does Your Implied Covenant Trump My Express Term?, 28 CUMB. L. REV. 473, 477 (1998). However, because of the absence of any specific Florida law governing how franchise relationships are to be carried out and terminated, litigation over the implied covenant of good faith a fair dealing probably remains inevitable.