MINUTES OF THE SENATE BILL (SB 529) ADVISORY COMMITTEE MEETING OF THE BOARD OF THE TEXAS DEPARTMENT OF MOTOR VEHICLES HELD ON THURSDAY, SEPTEMBER 6, 2012

1. CALL TO ORDER

Pursuant to published notice, a meeting of the Senate Bill (SB) 529 Advisory Committee of the Board of the Texas Department of Motor Vehicles was held on Thursday, September 6, 201 in the Board Room located at 200 East Riverside, Building 150, Room 1b.1, Austin, Texas. The meeting was called to order by Committee Co-Chairman Laura Ryan. Co-Chairman Ryan noted that the meeting notice had been filed with the Office of the Secretary of State on August 23, 2012.

1.A.ROLL CALL

SB 529 Advisory Committee Members Rob Braziel, David Bright, Bill Crocker, Pam Crail, Buddy Ferguson, Raymond Palacios, Karen Phillips, Jeffrey Perry, Ken Roche, and Laura Ryan were present.

SB 529 Advisory Committee Members *Mike Marks, Clark McEwen, and Tony Reinhart* were not present.

Executive Director Whitney Brewster attended, along with staff participants Jeremiah Kuntz, Director of Government & Stakeholders Relations; Lea Burnett, Associate General Counsel; and Michelle Lingo, Motor Vehicle Division Staff Attorney.

2. REVIEW, DISCUSSION, CONSIDERATION, AND POSSIBLE ACTION

RECOMMENDATION OF STATUTORY CHANGES TO CLARIFY THE LANGUAGE OF OCCUPATIONS CODE, CHAPTER 2301

A. Good Will

Occupations Code §2301.4651(b)(3) provides that a manufacturer, distributor, or representative may be liable to a franchised dealer under certain conditions.

Laura Ryan and Raymond Palacios explained to the Committee members the difficulty in drafting language to clarify the term "goodwill" without modifying the meaning of the statute.

Committee members discussed that the statute is not intended to assign a goodwill value at zero. Using the day before the termination or discontinuance or the announcement of the intention to terminate was intended to balance the risk assumed by a manufacturer, distributor, or representative and the franchised dealer.

Committee members discussed that earlier drafts of SB 529 had contemplated alternative language for establishing the date and the method of evaluation. These earlier renditions had ultimately been rejected. For example, the point in time when there is "general knowledge" of the termination had been considered and rejected as statutory language. Committee members referenced other states that had also selected "the day before" as the point in time for valuation of goodwill.

Committee members discussed that the statute does not clearly define to whom the announcement is made and may, therefore, include early announcements to executives or employees.

Because goodwill is an intangible, statutory clarification may be impossible, especially because there is no single formula appropriate in every situation. Instead, goodwill must be considered on a case-by-case basis.

Committee members agreed that the value of goodwill that is to be determined in the case of termination is not the same as the valuation of goodwill when a dealership purchase is being contemplated.

Committee members discussed that goodwill in the motor vehicle industry differs from goodwill in other industries due to the cyclical nature of the motor industry and the somewhat steady demand for goods in other industries. Nevertheless, the calculation or determination of goodwill goes through the same process and consideration across various industries.

Committee members agreed to contemplate the following concepts relating to goodwill for possible rule language:

§215.XXX Goodwill

The business valuation of a franchised dealer's goodwill under Occupations Code §2301.4651(b) shall:

- be calculated in a manner such that the effect of the announcement of termination is not to be considered;
- be valued with the assumption that the franchise will continue;
- not be valued at zero, based solely upon the events described under Occupations Code §2301.4651(b)(3)(A) and (b)(3)(B).

B. Information Disclosure

SB 529 added new §2301.480, prohibiting a manufacturer, distributor, or representative from requiring a franchised dealer to provide information regarding a customer, except for a specific item of information necessary for the sale or delivery of a new motor vehicle to a customer; for *reasonable marketing purposes*; to validate a claim and make payment under an incentive program; to support a dealer's claim for reimbursement for repairs performed under a manufacturer's warranty; or to satisfy a product recall or safety obligation.

Previously, the Advisory Committee had determined that rulemaking is needed to clarify that "reasonable marketing purposes" does not include a marketing practice that impairs a dealer or causes harm to a dealer.

The Committee members discussed the difficulty of defining what is reasonable, the benefit of allowing a trier of fact to determine what is reasonable, and examples of what might be considered to be unreasonable use of such information. For each example discussed, the Committee members decided that it is likely the trier of fact (i.e., administrative law judge) would make a determination that the marketing purpose is "unreasonable." The committee members determined that no clarifying rule is needed.

The Committee members agreed that no rule language is needed to clarify the provisions of Occupations Code §2301.480.

C. Prospective application of amendments (or what constitutes a "new agreement") passed during the 82nd Legislature, Regular Session, 2011

SB 529 Non-Amendatory Section 16 provides that "The change in law made by this Act applies only to an agreement entered into or renewed under Chapter 2301, Occupations Code, on or after the effective date [September 1, 2011] of this Act. An agreement entered into or renewed before the effective date of this Act is governed by the law in effect on the date the agreement was entered into or renewed, and the former law is continued in effect for that purpose."

The Committee members discussed the provision and how it impacts implementation of the statute, which dealers enjoy protection under the SB 529 provisions, the disparity of treating dealers differently, and whether there is a way that the provisions of SB 529 could apply to all dealers.

Two diverse interpretations were discussed.

One perspective presented indicated:

- Since 1971, the provisions of Occupations Code §2301.263 have allowed the Board to apply all Occupations Code Chapter 2301 provisions to each license.
- Occupations Code §2301.263 provides "A license issued under this chapter
 is subject to each provision of this chapter and board rule in effect on the date
 the license is issued and each provision of this chapter and board rule that
 takes effect during the term of the license."
- U.S. Supreme Court and Texas case law speak to the vested rights under common law, statute, and the police powers of the state. Mention was made of three cases involving the Texas Edwards Aquifer, parental rights, Tort Reform (HB 4) regarding a mesothelioma case.
- Every time the Texas Legislature enacts or amends a provision of Chapter 2301, it is an exercise of its State Police Powers, protecting Texas's economy and the State's citizens.

Another perspective indicated:

- This is a federal and state constitutional legal issue that should be decided by a trier of fact;
- Case law indicates that the law should be applied prospectively;
- Laws are typically prospective in application and that the Texas Legislature did not specifically make this Act retrospective in application;
- A manufacturer may already have different contracts with each of its different franchised dealers;
- There are very few "evergreen" agreements, but that even those are periodically modified or renewed to some extent;
- Because Occupations Code §2301.263 includes the term "subject to," the Chapter 2301 provisions apply after the license is issued; the SB 529 Non-Amendatory Section 16 means that the SB 529 will only be applied going forward; and SB 529 is not a correction that is to "correct" for all instances.
- The term found under means that only applies after the license is issued;
- The Texas Legislature specifically limited the applicability of the SB 529 provisions; and
- SB 529 should not be applied to contracts that were entered into or renewed before September 1, 2011.

The Committee Members did not reach consensus on this issue, but agreed to leave it for a trier of fact to decide.

D. Other Suggested Modifications

D.1. The Advisory Committee's March 2012 Executive Summary included the following remark: "Rulemaking is needed to clarify the harmonious reading of §2301.4651 with §2301.453, such that the new §2301.4651 does not bypass the requirements of termination under §2301.453. Section 2301.453 is still good law."

Committee members contemplated these sections and how they worked together.

The Committee members agreed that:

- notice is still required in accordance with Occupations Code §2301.453 and rule §215.111;
- §2301.4651 is not to be used to circumvent notice requirements;
- §2301.4651 is not to be interpreted to allow an individual dealership that has been terminated to collect amounts under §2301.4651 and to also remain a franchised dealer.
- Statutory amendment is required, as opposed to clarification by rule.
- The statutory amendment was agreed upon and it was agreed that the changes indicated below may be included in the TxDMV's proposed legislative changes for cleanup. However, industry wanted to retain the ability to amend the section, as necessary.

Committee members agreed upon the following revision to the Occupations Code Chapter 2301:

Sec. 2301.4651. ADDITIONAL PAYMENT TO FRANCHISED DEALER IN CERTAIN SITUATIONS.

- (a) This section applies to a manufacturer, distributor, or representative that:
- (1) terminates or discontinues a franchise by any means without complying with Section 2301.453; or
- (2) regardless of whether the manufacturer, distributor, or representative complies with Section 2301.453, terminates or discontinues a franchise by:
- (1) (A) discontinuing a line-make;
- (2) (B) ceasing to do business in this state; or
- (3) (C) changing the distributor or method of distribution of its products in this state.
- (b) In addition to the duties placed on a manufacturer, distributor, or representative by Section 2301.465, a manufacturer, distributor, or representative to whom this section applies shall pay to the franchised dealer the following amounts as applicable:
- (1) either:
- (A) the dealer's construction costs for a new dealership completed in the two years preceding the date of the termination or discontinuance described by Subsection (a); or
- (B) if the dealer does not have any costs described by Paragraph (A), the fair monthly rental value of the dealership payable in cash each month beginning on the first day of the first month following the date of the termination or discontinuance described by Subsection (a) and ending on the earlier of:
- (i) the first anniversary of the termination or discontinuance date; or
- (ii) the date on which the dealer no longer owns the dealership;
- (2) the dealer's costs for upgrading or substantially altering a dealership if the upgrades or alterations were completed or added in the two years preceding the date of the termination or discontinuance described by Subsection (a); and
- (3) an amount equal to the value of the goodwill associated with the franchise as it existed on the day before the earlier of:
- (A) the date of the termination or discontinuance described by Subsection (a); or
- (B) the date on which the manufacturer, distributor, or representative announced its intention to terminate or discontinue the franchise in a manner described by Subsection (a).

- (c) A franchised dealer receiving money under Subsection (b)(1)(B) shall:
- (1) make a reasonable effort to earn income from a dealership after a termination or discontinuance described by Subsection (a); and
- (2) inform the manufacturer, distributor, or representative of the dealer's efforts under Subdivision (1) and of any income earned from the dealership.
- (d) The amounts to be paid under Subsection (b)(1) or (2) to the dealer by a manufacturer, distributor, or representative shall be based on the percentage of the total square footage of the dealership attributable to sales, service, and parts suggested by a manufacturer or distributor and allocated to the franchise being terminated or discontinued at the time of the termination or discontinuance.
- (e) A franchised dealer receiving money under Subsection (b)(1) or (2) shall mitigate damages by listing the dealership for lease or sublease with a real estate broker licensed under Chapter 1101 not later than the 30th day after the effective date of the termination or discontinuance described by Subsection (a) and shall reasonably cooperate with the broker in the performance of the broker's duties.
- (f) A manufacturer, distributor, or representative may reduce the amount of a payment made to a franchised dealer under Subsection (b)(1)(B) by the amount of any income earned by the dealer from the dealership during the month preceding the payment.
- (g) The manufacturer, distributor, or representative, as appropriate, shall pay any amount described by Subsection (b)(1)(A), (b)(2), or (b)(3) not later than the 90th day after the date of the termination or discontinuance described by Subsection (a).
- (h) An amount payable under Subsection (b)(1)(A) or (b)(2) does not include any tax depreciation benefit received by the franchised dealer or any amount previously paid to the franchised dealer by the manufacturer, distributor, or representative to subsidize the costs incurred by the dealer in performing the activities described by Subsection (b)(1)(A) or (b)(2).
- D.2. The Committee Members discussed the concept of dealership relocation more than two-miles from the original dealership location. The Committee Members agreed that the statute should be amended so that in cases triggering the affected county statutory provisions, the proposed relocation site must be situated closer to the protesting dealer. Otherwise, the protesting dealer would not have standing to protest the relocation. The Committee Members agreed that this concept of orientation to the protesting dealer was inadvertently omitted from the affected county provisions in SB 529. The statutory amendment that will be recommended to the legislature will provide for consistency with other standing provisions.

The motor vehicle industry will make this recommendation to the Texas Legislature to remedy the inadvertent omission.

3. PUBLIC COMMENT

No public comment was offered.

4. EXECUTIVE SESSION

No executive session was held.

5. ADJOURNMENT

The meeting adjourned at 2:30 PM. Date: September 6, 2012

Respectfully submitted,

Michelle Lingo Staff Attorney

Motor Vehicle Division

Read and approved this 13th day of December, 2012.

Raymond Palacios, Co-Chairman

SB 529 Advisory Committee

Board of the Texas Department of Motor Vehicles

Laura Ryan, Co-Chairman

SB 529 Advisory Committee

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