AUTO & TRUCK DEALERS WANT SWEEPING CHANGES TO FRANCHISE LAW TO APPLY RETROACTIVELY TO EXISTING CONTRACTS

By legislative fiat, all 44 sections of AB 132/SB 96 would apply to existing franchise agreements, making substantial, material and retroactive changes to existing contracts. These bills violate the letter and spirit of Contract Clause of the Constitution and send the wrong message to businesses that need assurances their lawful contracts will not be invalidated by elected officials.

Background – Agreement Reached on Every Substantive Issue

In early October 2010, attorneys representing the Wisconsin Auto & Truck Dealers Association (WATDA) presented the Alliance of Automobile Manufacturers (Alliance) proposed changes to the Wisconsin Fair Dealership Law.

- The initial list of changes was extensive, most were opposed by the Alliance and none were at their request. In their totality, the proposals leaned heavily toward WATDA's benefit.
- In good faith and consistent with past practices, the two groups spent considerable time and resources seeking a compromise on each proposal. In January, a consensus was reached on 21 changes to the existing Dealership Law.
- Because the Alliance would not agree to the retroactive language (see below), WATDA not only had that language included in AB 132/SB 96, they deemed it "fair game" to unwind key areas of agreement, including:
    - Definition of Coercion – WATDA previously agreed to delete this egregious language, and now it's back in the bill to cover all actions or refusals to act that are said to "deprive the coerced dealer of a benefit generally available to other dealers of the same line make of motor vehicles or will otherwise materially harm the coerced dealers." This wildly broad language departs from every known definition of coercion. (This provision was deleted by Assembly Amendment 1.)
    - Warranty Reimbursement –Significant changes to the agreed-to language were included in the bill. Most importantly, the dealers had previously agreed to remove the "cost recovery" bar (currently the subject of litigation by auto manufacturers in another state) and it is now back in the bill.
    - Use of Customer Information – Several conditions that were previously agreed to with regard to this language have been deleted.
    - Waiver Language (Section 39) –This is an entirely new issue and was never previously proposed.

The Dealers Insist the Legislature Retroactively Apply all Changes to Existing Contracts

- WATDA is demanding that all 44 section changes to the Dealership Law apply retroactively to existing franchise agreements. Section 45 of AB 132/SB 96 provides:

    > This act first applies to an agreement that exists or is entered into on the effective date of this subsection. (Emphasis ours)

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- The Alliance opposes retroactivity of these numerous and material changes not contemplated at the time these contracts were negotiated. Prospective application is another matter and not objectionable to automakers. The prospective applicability provision is:

  > This act applies to an agreement that is entered into or amended on or after the effective date of this Section.

- WATDA continues to misrepresent the applicability provision as *not* retroactive.
  - Webster's dictionary defines "retroactive" as "having an effect on things that are already past." This law would reach back and control/modify/rescind provisions in existing franchise agreements – agreements negotiated and agreed to IN THE PAST; that is, it would have a retroactive effect.
  - Throughout the entire four-month negotiations, WATDA consistently described this provision as the "Retroactive Application" provision. When they understood the legal perils of retroactive laws, they simply deny the obvious and changed the tag line to "initial applicability". The practical application of the language is unchanged.

The Retroactive Application of this Legislation is Unconstitutional under the Contract Clause

- Under standard statutory construction, changes to the law are prospective unless their retroactive application is expressly provided for, and such application overcomes key constitutional hurdles.
- In 1981 the Supreme Court of Wisconsin declared the Wisconsin Fair Dealership Law, Wis. Stats. 135.03 (1977) (WFDL) unconstitutional under the Contract Clause based on its retroactive nature. *Wipperfurth v. U-Haul Co.*, 101 Wis. 2d 586; 304 N.W.2d 767 (1981).
  - The Court found that the statute substantially affected contractual rights, did not remedy an important public problem, and was not carefully drafted to show the use of the police power was reasonably necessary and exigent.
  - Using this rationale, a court would necessarily find the retroactive application of the 21 amendments to the Franchise Law, as proposed by WATDA, unconstitutional under the Contract Clause.
  - WATDA reliance on *Chrysler Corp. v. Kolosso Auto Sales,* 148 F.3d 892, 893 (7th Crt., 1998) is misplaced because the Court found the amendment to the Franchise Law at issue was contemplated and considered when prior agreements were negotiated. In the present instance, no manufacturer could have possibly contemplated the extensive, wide-reaching changes embodied in the 21 amendments to the Franchise Law sought by WATDA.

Beyond arguments of constitutional rights and simple justice, businesses looking to locate or expand in Wisconsin will only do so if they believe the government will treat them fairly; most notably, perhaps, is the notion that contracts negotiated at arm's length that do not interfere with any significant public interest will not be rewritten by elected officials.

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