STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

LaFONTAINE SALINE, INC. d/b/a
LaFONTAINE CHRYSLER JEEP DODGE RAM,

Docket No. 146722

Plaintiff-Appellee,

vs.

CHRYSLER GROUP, LLC and IHS AUTOMOTIVE GROUP, LLC d/b/a CHRYSLER JEEP OF ANN ARBOR,

Defendants-Appellants

BRIEF ON APPEAL --- APPELLEE LAFONTAINE SALINE, INC. D/B/A LAFONTAINE CHRYSLER JEEP DODGE RAM

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The Appellee concurs with Appellant's statement of jurisdiction.

COUNTER-STATEMENT OF QUESTION PRESENTED

Did the Court of Appeals err in finding that IHS's letter of intent was not a dealer agreement and, thus, that the application of the 2010 PA 139 definition of relevant market area applies prospectively to any future dealer agreement entered into between IHS and Chrysler, notwithstanding Chrysler's 2007 Dealer Agreement with LaFontaine?

Plaintiff-Appellee LaFontaine answers:	No.
Defendant-Appellant IHS answers:	Yes.
Defendant-Appellant Chrysler answers:	Yes.
The Court of Appeals would answer:	No.
The Trial Court would answer:	Yes.

STATEMENT OF FACTS

Chrysler Group, LLC ("Chrysler") and LaFontaine Saline, Inc. ("LaFontaine") entered into a Sales and Service Agreement for the sale and service of Dodge vehicles on September 24, 2007 (the "Dealer Agreement" or "SSA"). (AA 48a-51a) The Dealer Agreement sets forth the terms and conditions of the parties' contractual relationship. The relationship between LaFontaine and Chrysler is governed by the "Dealer Act", MCL 445.1561 et seq., which regulates the relationship between motor vehicle manufacturers, distributors and dealers in Michigan and which was enacted in 1981, prior to the subject parties entering into the SSA. The Dealer Act prohibits unfair practices of manufacturers and distributors and provides for certain remedies and penalties for violations of its provisions. The Dealer Act was amended by the Michigan Legislature on November 1, 1983, December 30, 1998, June 28, 2000 and again on August 4, 2010 (the "2010 Amendments") in order to address a number of changes in the industry impacting dealers and manufacturers.

The Dealer Act provides extra-contractual and purely statutory rights and obligations between existing dealers and manufacturers and creates an independent cause of action to enforce those rights. One such provision of the Dealer Act defines the circumstances under which a manufacturer must give notice to existing dealers when proposing to add a new dealer location. See MCL 445.1576(2). From August 4, 2010 forward, those statutory notice obligations of the manufacturer are triggered in the event that a new like-line dealer is to be established as follows:

> "In a county that has a population of more than 150,000, the area within a radius of 9 miles of the site of the intended place of business of a proposed new vehicle dealer or the intended place of business of a new vehicle dealer that plans to relocate its place of business. . . "MCL 445.1566(1)(a). (the "2010Amendments")

Prior to the enactment of the 2010 Amendments, *relevant market area* was defined as follows:

> "For a proposed new motor vehicle dealer or a new motor vehicle dealer who plans to relocate his or her place of business in a county having a population which is greater than 25,000 the area within a radius of 6 miles of the intended site of the proposed or relocated dealers. . ."
> (emphasis added) MCL 445.1566(1)(a)

The Dealer Agreement between LaFontaine and Chrysler does not use the term "relevant market area" nor does it restrict LaFontaine's area of operation to any specific measurable area. The only reference to any area of operation is that of "Sales Locality", which the Dealer Agreement defines as follows:

> DEALER shall have the non-exclusive right, subject to the provisions of this Agreement, to purchase from CC those new specified CC vehicles, vehicle parts, accessories and other CC products for resale at the DEALER's Facilities and Location Addendum, attached hereto and incorporated herein by reference. DEALER will actively and effectively sell and promote the retail sale of CC vehicles, vehicle parts and accessories in DEALER's Sales Locality. As used herein, Sales Locality shall mean the area designated in writing to DEALER by CC from time to time as the territory of DEALER's responsibility for the sale of CC vehicles, vehicle parts and accessories, although DEALER is free to sell said products to customers, wherever they may be located. Said Sales Locality may be shared with other CC dealers of the same line-make as CC determines to be appropriate.

(AA 49)

Lacking in the Dealer Agreement is any contractual provision, express or implied, limiting LaFontaine's "relevant market area" to a specific distance.

Since the Dealer Act's enactment in 1981, Chrysler has been required under MCL 445.1576(2) of the Dealer Act to provide written notice of its intention to establish an additional Dodge dealer in LaFontaine's relevant market area. Receipt of the written notice triggers LaFontaine's statutory right, under MCL 445.1576(3), to file a declaratory judgment action to determine whether good cause exists for establishing a new dealership within its relevant market area. It is important to recognize that the intent of this provision (MCL 445.1576(3)) is to allow dealers like LaFontaine to protest a manufacturer's proposed action where it would infringe on

LaFontaine's "relevant market area". This protection was initially provided 31 years ago because dealers like LaFontaine invest millions of dollars in their facilities, and the legislature decided it was fair and equitable that they should receive protection from encroachments on their RMA by an overzealous manufacturer.

On February 2, 2010, prior to the enactment of the 2010 Amendments, Chrysler and IHS entered into an "LOI [Letter of Intent] to Add Vehicle Line" (the "LOI). (AA 61a-64a) By its plain language, the LOI only *contemplates* the establishment of a new facility in anticipation of Chrysler awarding it a new Dodge franchise, which is conditioned on many factors in the discretion of Chrysler. The LOI *does not* give IHS the legal right to purchase and sell the Dodge vehicle line. On the contrary, the LOI expressly anticipates the possibility of existing or subsequent legal issues prohibiting Chrysler from entering into a dealer agreement with IHS and relieves all parties to the LOI of any legal obligations in that event:

> Should anyone file a protest or lawsuit, demand arbitration or otherwise challenge the proposed establishment, and the challenge is not dismissed, withdrawn or resolved to allow the establishment, within 90 days of the challenge being filed, Chrysler will have the right, in its sole discretion, to terminate this LOI upon written notice to You . . . If the resolution of the challenge would affect, in any way, the terms of this Letter of Intent or the ability of any party hereto to comply with these terms, then this Letter of Intent will either terminate or, by mutual agreement of the parties hereto, be amended so it is consistent with such final resolution." (AA 61a)

On October 8, 2010, Chrysler provided notice to LaFontaine pursuant to MCL 445.1576(3) that it intended to approve the establishment of a Dodge franchise at IHS's location.[1] (AA 25a) Thereafter, on December 9, 2010, LaFontaine filed a Complaint for Declaratory Relief requesting that the Trial Court prohibit the installation of a Dodge franchise at IHS'S location, which was subsequently amended on March 24, 2011. (AA 18a-28a) Chrysler

[1] By complying with the notice provision MCL 445.1576(3), Chrysler essentially has conceded that it is subject to the 2010 Amendments despite its pre-existing Dealer Agreement with LaFontaine.

and IHS filed motions for summary disposition (AA 29a-64a; AA 65a-100a), which were ultimately granted by the Trial Court. (AA 151a-157a)

STATEMENT OF MATERIAL PROCEEDINGS

LaFontaine filed its Complaint for Declaratory Judgment on December 9, 2010, and its amended Complaint on March 24, 2011, requesting that the Trial Court prohibit Chrysler from assigning a Dodge franchise to IHS because it would be in direct violation of the nine mile prohibited radius set forth in the Dealer Act and because there is no good cause for Chrysler's assignment of said franchise. (AA 18a-28a) Chrysler and IHS filed motions for summary disposition alleging that the 2010 Amendments did not apply to Chrysler and IHS's proposed actions and that LaFontaine had no statutory right to challenge the transaction under Michigan law. (AA 29a-64a; AA 65a-100a) Additionally, Chrysler and IHS argued that any application of the 2010 Amendments would be an impermissible retroactive application under Michigan law.

LaFontaine filed a response to the motions for summary disposition arguing that the Dealer Agreement between LaFontaine and Chrysler did not even address, let alone limit LaFontaine's relevant market area; and thus, the Dealer Agreement did not contain any vested rights with which the application of the 2010 Amendments to the prospective proposed establishment of the Dodge franchise would interfere. (AA 101a - 120a) LaFontaine also argued that the LOI entered into between Chrysler and IHS did not constitute a "dealer agreement" as defined by the Dealer Act and, by its plain terms, only constituted an agreement between the parties for the improvement and construction of IHS's facilities in anticipation of receiving a new Dodge franchise from Chrysler. Most notably, the LOI permitted Chrysler to terminate the LOI and to refuse to assign IHS a Dodge franchise if anyone were to protest the establishment of the franchise. (AA 61a-64a) Accordingly, LaFontaine argued that the application of the 2010 Amendments to the establishment of IHS's proposed Dodge franchise was not prohibited under Michigan law and would not violate the parties' due process rights. The Trial Court disagreed

with LaFontaine's arguments and instead granted Chrysler and IHS's motions for summary disposition. (AA 151a-157a) The Trial Court held that the LOI was a "dealer agreement" under the Michigan Dealer Act and, thus, that the presumption of prospective application of statutes under Michigan law prohibited the enforcement of the 2010 Amendments against Chrysler and IHS's proposed transaction.

LaFontaine filed a motion for reconsideration. (AA 158a-179a) The Trial Court denied LaFontaine's motion for reconsideration and additionally concluded that LaFontaine's claims were properly dismissed because they were precluded under the doctrine of ripeness because its action rested on "contingent future events that may not occur." (AA 180a-182a) LaFontaine then appealed the Trial Court's decisions to the Court of Appeals, which reversed the Trial Court, finding, as urged by LaFontaine, that there was no reason to address the issue of retroactivity where the IHS LOI is not a "dealer agreement" as defined by the Michigan Dealer Act, and where any dealer agreement between Chrysler and IHS would be entered into after the 2010 Amendments. (AA 183a-190a) Accordingly, the Court of Appeals ultimately held that LaFontaine can maintain an action under MCL 445.1576(3) to determine if good cause exists for Chrysler to establish a new Dodge franchise at IHS. (AA 183a-190a) Chrysler and IHS filed motions for reconsideration with the Court of Appeals, which were ultimately denied. (AA 191a)

STANDARD OF REVIEW

Where a trial court's decision on a motion for summary disposition is reviewed de novo, that is the standard of review to be used by this Court. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW 2d 73 (2006). A motion for summary disposition under subrule MCR 2.116(C)(8) tests the legal sufficiency of the pleadings, *Johnson-McIntosh v City of Detroit*, 266 Mich App 318, 322; 701 NW2d 179 (2005), and the pleadings are considered alone, without consideration of evidence, MCR 2.116(G)(5). A motion made under subrule MCR 2.116(C)(10) tests the factual support for a claim and should be granted when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. In support of a MCR 2.116(C)(10) motion, the parties rely on documentary evidence. A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds could differ. *The Healing Place at N Oakland Med Ctr v Allstate Ins Co,* 277 Mich App 51, 55; 744 NW2d 174 (2007).

Whether a statute applies retroactively is a question of statutory construction that this Court reviews de novo. Questions of statutory interpretation are questions of law that are reviewed de novo. *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001) This Court also reviews de novo issues of law. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

INTRODUCTION AND SUMMARY OF ARGUMENT

Chrysler's analysis of this case does not take into consideration the specific provisions of the Dealer Act, and instead characterizes the issues far too broadly and only considering general issue of retroactive application of legislation in the context of pre-existing agreements without focusing on the express provisions, or lack thereof, contained in the pre-existing agreements. As this Court knows well, there is no blanket prohibition on legislative enactments that may affect or even alter the terms and conditions of a contractual relationship, particularly in industries that are heavily regulated. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983). Referring to the Court of Appeals' analysis contained in its November 27, 2012 Opinion, this Court can appreciate that the issues being raised by Chrysler and IHS, that of retroactivity and contractual interference, must be looked at in light of the specific statute applicable to dealers and manufacturers in the State of Michigan, that being the Dealer Act. Chrysler, however, fails to address the narrower issues applicable to the case at bar and instead continues with its broad and mostly inapplicable analysis of retroactivity and continues to compare this case to others entirely distinguishable from this and which are not binding on this Court.

In the context of the Dealer Act, as held by the Court of Appeals "the central issue in this case is whether the LOI is a "dealer agreement" under the MDA…[and] if the LOI is not a dealer agreement, then the nine-mile radius applies and plaintiff has standing under MCL 445.1576(3) because any dealer agreement between Chrysler and IHS will necessarily be executed after the effective date of the amendment." Not only is there no retroactive application issue at bar where the act at issue has not yet occurred (and thus did not occur prior to the 2010 Amendments), but also no impermissible retroactive *effect* occurs by enforcing the 2010 Amendments against

Chrysler in this case because the 2007 SSA between Chrysler and LaFontaine lacks any provision limiting LaFontaine's relevant market area to any specific measurable area, let alone to that set forth in the pre-2010 Dealer Act.

Indeed, the rights of existing dealers to challenge the establishment of additional like-line dealers within their relevant market area under Michigan law is particularly important to manufacturers and dealers in this state. With this in mind, the legislature could not have intended the 2010 Amendments to be as short reaching and limited in effect as Chrysler suggests. The disparity in bargaining power between manufacturers/distributors and their dealers prompted the Michigan Legislature to enact legislation to protect dealers from actions by manufacturers and distributors whose present and future conduct may impair the economic interests of an existing dealership. A judicial determination that the legislature intended dealership agreements to be affected and governed only by the laws in effect when the agreements were executed would create grave problems of enforcement and would essentially establish two classes of dealership-manufacturer relationships. Specifically, if this Court were to adopt Chrysler's argument, then only those dealers that execute agreements after August 4, 2010, would benefit from the expanded relevant market area provision, while those that executed agreements prior to the enactment of the 2010 Amendments would be governed by the "old" relevant market area provision of the Dealer Act. Taking Chrysler's argument to its illogical extreme, since there has been an original act and four sets of amendments passed to the Dealer Act, Chrysler would have the Courts create five classes of dealer-manufacturer relationships, each with different rights and responsibilities dependent solely upon the date that the franchise agreement was signed. This demonstrates that the position asserted by Chrysler is untenable and inconsistent with the express intention of the Legislature, which enacted the Dealer Act and a series of subsequent

amendments to protect dealers in a consistent and logical fashion. As held by the Michigan Court of appeals in *Anderson's Vehicle Sales, Inc. v OMC-Lincoln*, 93 Mich App 404, 414; 287 NW2d 247 (1979), the "broad legislative power includes the power to make the enactment effective immediately so as to prevent the evils which the statute aims to correct." The 2010 Amendments, which were given immediate effect, further the intent of the legislature to prevent unfair and oppressive trade practices by large manufacturers, such as Chrysler, against dealers like LaFontaine. In *Eastern Sport Car Sales, Inc. v Fiat Motors of North America*, 1988 WL 73449 (ED Mich), the court reviewed the Dealer Act's legislative history when it concluded that the Act "was not merely for the protection of new dealers, but also, and perhaps primarily, for existing dealers facing the potential threat of termination or unfair competition from new dealers in their geographical sales zone..." *Id.* at 1. (Ex. A) In enacting the Dealer Act, the legislature discussed the concern of the practice of manufacturers establishing new dealerships in areas which are already being served by existing dealers, thus threatening the economic well-being of the existing dealers. *Id.* at 1.

Chrysler contends that the protection of the sanctity of contracts has been a concern of this Court and that this Court has established a fundamental rule that contracts are to be enforced by their unambiguous terms and not modified by courts. The Court of Appeals did just that in its ruling in this case. The Court of Appeals looked at the terms of the Dealer Agreement and found that the Dealer Agreement does not provide that Chrysler had the right to be free from future expansions of the definition of relevant market area under Michigan law. Where the Dealer Agreement does not contain an express provision limiting the measurable distance between like-line dealerships and where the parties were aware of the existing legislation at the time of entering into the Dealer Agreement and of the possibility of future changes to the Dealer Act, the

Court of Appeals properly ruled in favor of LaFontaine. The prospective application of the 2010 Amendments does not affect the terms of the parties' agreements. There is no issue of retroactivity where "the statute regulates conduct occurring after the effective date of the legislation." *Anderson's* supra at 411. A ruling in favor of Chrysler would instead insulate any and all contracts from future remedial legislation intended to protect those with less bargaining power. The reasons behind the expansion of the relevant market from six to nine miles was to prevent "overdealering" from ever happening again, so that manufacturers would not have any reason to terminate the franchise agreements of viable dealers by using the bankruptcy code to avoid complying with Michigan law, as General Motors and Chrysler did in 2009.

Chrysler also contends that it had the "indisputable right" to establish a new Dodge dealership at the IHS location "well before the enactment of the 2010 Amendment." LaFontaine does not dispute this fact - if Chrysler had in fact entered into a dealer agreement with IHS to establish the Dodge franchise at IHS's location prior to August 4, 2010, LaFontaine would not have had any right to object. The fact of the matter is, however, that Chrysler and IHS *did not* enter into a sales and service agreement, but rather only a letter of intent to establish the Dodge franchise conditioned on a variety of factors. And, as correctly concluded by the Court of Appeals, where the LOI is not a "dealer agreement" as defined by the Dealer Act, LaFontaine had the right to object to the new Dodge franchise and this right, although triggered by the 2010 Amendments, is not an impermissible retroactive application of the legislation. Merely because Chrysler and LaFontaine had entered into a sales and service agreement in 2007 does not, in and of itself, deprive LaFontaine of the right to object to the establishment of the IHS Dodge franchise. Chrysler fails to directly address this issue, instead only referencing that its Dealer Agreement with LaFontaine permits it to establish additional Dodge dealers wherever it deems

appropriate. However, that right was always subject to the Dealer Act, which has regulated the relationships between manufacturers and dealers in the State of Michigan for over 30 years. Simply signing the 2007 Dealer Agreement did not set in stone those Dealer Act provisions in effect at that time, especially where, as here, the Dealer Agreement does not contain any express provision limiting LaFontaine's relevant market area.

Additionally, Chrysler makes the conclusory argument that the Court of Appeals' decision effectively "contravened the vested legal rights of Chrysler Group." Where Chrysler's right to establish new franchisees in 2007 outside of the 6-mile radius of LaFontaine only arose from the Dealer Act and was not a protected or negotiated right set forth in the Dealer Agreement, Chrysler's rights were not vested and, thus, were subject to change by the legislature. "A statutory defense, or a statutory right, though a valuable right, is not a vested right, and the holder thereof may be deprived of it." *Lahti,* 357 Mich. at 589. Chrysler's right to place a competing dealership outside of the 6-mile relevant market area of LaFontaine's dealership " 'sprang from the kindness and grace of the legislature. And it is the general rule that that which the legislature gives, it may take away.' " *Rookledge v. Garwood*, 340 Mich 444, 457; 65 NW2d 785 (1954) (citing *Wylie v. City Commission,* 293 Mich. 571, 292 N.W. 668) Where an amendment to a statute does not affect a vested right, it is not invalid despite its retrospective effect. *Lahti,* 357 Mich. at 594. Chrysler's position is directly contrary to the this Court's precedent, including its holding in *Harsha v. City of Detroit*, 261 Mich 586, 594; 246 NW 849 (1933): "There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal." Where Michigan law has clearly established that a statutory right cannot be a "vested right", the Court of Appeals' decision does not have an impermissible retroactive effect as contended by Chrysler.

In sum, the holding of the Court of Appeals reinforced what is particularly important to this state and most definitely intended by the legislature, which is to not create different classes of dealers which operate under different versions of the Dealer Act dependent on the date of their franchise agreements. Thus, this Court should affirm the Court of Appeals' decision so that the intent of the legislature and of the Dealer Act as a whole is carried out and protects those it intends on protecting - existing dealers like LaFontaine.

ARGUMENT

I. THIS COURT IS NOT BOUND TO FOLLOW THE OPINIONS ISSUED BY THE SIXTH CIRCUIT COURT OF APPEALS AND, WHERE THE SIXTH CIRCUIT'S DECISION IN *KIA V GLASSMAN* WAS MISGUIDED AND IMPROPERLY FOCUSED ON THE PARTIES' CONTRACTUAL RELATIONSHIP, THAT OPNION SHOULD BE DISREGARDED AND THE COURT OF APPEALS DECISION SHOULD BE AFFIRMED.

In its order granting Appellant's Application for Leave to Appeal, this Court specifically directed the parties to compare the case of *Kia Motors America, Inc v Glassman Oldsmobile Saab Hyundai, Inc*, 706 F3d 733, 735 (CA 6, 2013). As a threshold issue, of course, federal court interpretations of state law are not binding or controlling on state courts. *Van Buren Twp v Garter Belt, Inc.*, 258 Mich App 594, 604; 673 NW2d 111 (2003). "This Court is not bound by federal decisions interpreting Michigan law." *Ryder Truck Rental, Inc. v Auto-Owners Ins. Co., Inc.,* 235 Mich App 411, 416; 597 NW2d 560 (1999). When assessing the intent of a State legislature, a federal court is bound by a state court's construction of that state's own statutes. *Banner v* Davis, 886 F2d 777 (CA 6, 1989). See also, *Missouri v* Hunter, 459 US 359 (1983). Thus, federal courts defer to state courts on interpretations of state statutes. Where there are no conflicts between the Court of Appeals decision in this matter and any prior decision of this Court, this Court should affirm the decision of the Court of Appeals.

There is a direct conflict in the present case between the published decision by the Court of Appeals below and the Sixth Circuit's holding in *Kia*. Therefore, either the Sixth Circuit ***or*** the Michigan Court of Appeals erred in reaching their conclusion. LaFontaine respectfully submits that the Court of Appeals in this case correctly recognized that, with the LOI issue resolved, the issue of retroactivity does not apply to the instant facts. In *Kia*, the Sixth Circuit's reasoning was mistakenly premised on the date of the original sales and service agreement (SSA) between the manufacturer and the dealer as opposed to the date that the cause of action arose. The *Kia* Court failed to realize that this is a purely statutory cause of action and not a contractual cause of action. The Michigan Dealer Act was specifically enacted to protect a class of people: "new motor vehicle dealers". "[W]hile the dealership is wholly dependent on the franchise from the manufacturer, the manufacturer can easily exist without any individual dealership. Because of this economic domination, ***the MDA is designed to protect dealerships***." (emphasis added) *Pung v GMC*, 226 Mich App 384, 387; 573 NW2d 80 (1997). Put simply, if an entity fits into the definition of "new motor vehicle dealer" and the manufacturer fits into the definition of "manufacturer" under the Dealer Act (as LaFontaine and Chrysler admittedly do), then those parties are governed by the provision of the Dealer Act from the date of its enactment forward, prospectively. The date of the contract between the parties is irrelevant. In the case at bar, the incident giving rise to the dealer's rights under the Dealer Act was Chrysler's October 8, 2010 letter advising LaFontaine of its intent to award a Dodge franchise to IHS. Where the issue giving rise to the cause of action occurred after the August 4th enactment of the 2010 Amendments, both this case and the *Kia* case involve only prospective application of a statute.

The *Kia* decision expressly defined the "nub" of the issue being the application of the Dealer Act to the parties' contract. On the contrary, as properly held by the Court of Appeals,

the "nub" of the issue is the statutory relationship between dealers and manufacturers and the requirement under the Dealer Act mandating that manufacturers provide notice to existing dealers of their intention to appoint a new dealer within the Dealer Act's defined relevant market area. See MCL 445.1576. When examining a statutory provision, this Court is required to "give the words of a statute their plain, ordinary meaning unless the Legislature employs a term of art." *Bukowski v. City of Detroit*, 478 Mich. 268, 274; 732 NW2d 75 (2007). The statutory notice provision contained in MCL 445.1576(2) provides:

> Before a manufacturer or distributor enters into a dealer agreement establishing or relocating a new motor vehicle dealer within a relevant market area where the same line make is represented, the manufacturer or distributor shall give written notice to each new motor vehicle dealer of the same line make in the relevant market area of its intention to establish an additional dealer or to relocate an existing dealer within that relevant market area.

Giving MCL 445.1576 its plain meaning, a manufacturer is required to give notice to a "new motor vehicle dealer of the same line make in the relevant market area". Where the Legislature did not specifically amend this section when the 2010 Amendments were enacted to provide that those dealers with contracts in existence prior to the 2010 Amendments are not entitled to notice, then by its plain meaning, the notice provision in MCL 445.1576 applies to all "new motor vehicle dealers" in existence at the time of the 2010 Amendments. MCL 445.1576 does not state that only those "new motor vehicle dealers" who become dealers from this day forward are entitled to notice, but that is the way Chrysler is suggesting MCL 445.1576 should be interpreted - that this section does not apply to any dealers in existence in this state prior to August 4, 2010. Instead by its plain meaning, the statute reads that all dealers receive notice, including all those in existence prior to the 2010 Amendments, without any exception.

Furthermore, the term "new motor vehicle dealer" by its definition is a vehicle dealer with a "dealer agreement":

> "New motor vehicle dealer" means a person, including a distributor, that holds a dealer agreement granted by a manufacturer, distributor, or importer for the sale or distribution of its motor vehicles; is engaged in the business of purchasing, selling, exchanging, or dealing in new motor vehicles; and has an established place of business in this state.

MCL 445.1565. Thus, where the definition itself refers to those persons with dealer agreements, the 2010 Amendments apply to all dealers with dealer agreements entered into either before *or* after the 2010 Amendments, where the notice provision requires Chrysler to give notice to all "new motor vehicle dealers" within the relevant market area of the proposed new dealer. At the time that Chrysler's obligation to provide notice arose in this case, the relevant market area as defined by the Dealer Act was 9 miles.

Instead of revisiting the issues with a fresh perspective, Chrysler would like this Court to simply "rubber stamp" the *Kia* decision, hoping that his Court merely looks at the retroactivity issue as a doctrine instead of truly applying the facts and the plain language of the statute to its analysis. If this Court were to follow the *Kia* decision, once can imagine the commercial, legal, and logistical chaos that would ensue. Essentially, the *Kia* decision has the effect of declaring that any party with a contract in place prior to an amendment to a statute will continue to have those rights that existed under prior laws that are now abolished, even where the contract did not specifically provide for the rights and those rights were only defined by statute. Taking this a step further, assuming *arguendo*, if Chrysler's obligation to provide notice to existing dealers had been abolished with the 2010 Amendments, would Chrysler be arguing that it would still be bound to provide notice to dealers that had agreements in place prior to the abolishment of that provision? Clearly, the answer is no. To rule to the contrary, as Chrysler would request in this case, would create commercial, legal and logistical chaos for thousands of Michigan businesses.

II. WHERE THERE WAS NO RETROACTIVITY ISSUE TO ADDRESS, THE COURT OF APPEALS DID NOT ERR IN APPLYING MICHIGAN LAW.

The Court of Appeals properly overturned the Trial Court's decision, finding that the LOI is not a "dealer agreement" as defined by the Dealer Act; and, thus, there is no retroactivity issue to be addressed. Furthermore, contrary to Chrysler's position, the Court of Appeals did not fail to follow well-settled Michigan law by refusing to create an issue of retroactivity where one does not exist. Contrary to Chrysler's overly expansive analysis of retroactive applications of statutes, "[a] statute does not operate retroactively merely because it is applied in a case arising from conduct antedating the statute's enactment." *Patel v Gonzales*, 432 F 3d 685, 690 (CA 6, 2005) (citing *Langraf v USI Film Prods.*, 511 US 244, 269, 114 S Ct 1483 (1994)) Applying this principle to the case at bar, merely because the relationship between IHS and Chrysler and between Chrysler and LaFontaine arise out of contracts entered into prior to the 2010 Amendment's enactment, does not mean that an issue of retroactivity exists. In *Hughes v Judges Retirement Board*, 407 Mich 75, 86; 282 NW 2d 160 (1979), this Court also held: "A statute is not regarded as operating retrospectively because it relates to an antecedent event. Merely because some of the requisites for its application are drawn from a time antedating its passage does not constitute a law retrospective." Contrary to the arguments being made by IHS and Chrysler, "[a] retrospective law is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past". *Hughes*, supra, p 85; *Ballog v Knight Newspapers, Inc*, 381 Mich 527, 533-534; 164 NW2d 19 (1969).

As correctly held by the Court of Appeals, retroactive application of the 2010 Amendment is not the issue because the 2010 Amendment is being applied prospectively to the final future act: the date on which IHS and Chrysler enter into a Dealer Agreement for the sale

of Dodge vehicles. Chrysler argues that because it entered into the LOI before the 2010 Amendment was enacted, and because Chrysler and LaFontaine had a Dealer Agreement in place during the time when the Michigan Dealer Act defined "relevant market area" as six miles, the parties are indefinitely bound by this now nonexistent provision. This position flies in the face of well-established Michigan law and general logic:

> Where a section of a statute is amended, the original ceases to exist, and the section as amended supersedes it and becomes a part of the statute for all intents and purposes as if the amendment had always been there.
>
> Nevertheless, the old section is deemed stricken from the law, and the provisions carried over have their force from the new act, not from the former.
>
> It is plain from the authorities in this state and elsewhere that the effect of an act amending a specific section of a former act, in the absence of a saving clause, is to strike the former section from the law, obliterate it entirely, and substitute the new section in its place. This effect is not an arbitrary rule adopted by the courts. It is the natural and logical effect of an amendment 'to read as follows.' It accomplishes precisely what the words import. Any other construction would do violence to the plain language of the Legislature.

Lahti v Fosterling, 357 Mich 578, 588; 99 NW2d 490 (1959).

In the case of *Cosby v Pool*, 36 Mich App 571; 194 NW2d 142 (1971) (which this court followed in *Denham v Bedford*, 407 Mich 517 (1980)), the Defendant made the same argument that Chrysler and IHS are making now: "that laws written subsequent to the contractual agreement cannot be incorporated into the contract without violating the constitutions of Michigan and the United States." The Cosby Court disagreed and, relying on its holding in *Lahti*, found that "the amendment [at issue] has the effect of becoming a part of the contract and replaces the clause as written." *Cosby* at 577. The *Cosby* Court cited the following from *Lahti* in support of its finding:

> 'Liability under the workmen's compensation law is contractual, the amendment is not thereby violative of the provisions of the Constitution of the United States. The police power of the State may be exercised to affect the due process of

> law clause as well as the impairment of contract clause of the Federal Constitution.
>
> The subject matter of workmen's compensation reposes within the control of the legislature.
>
> A law enacted pursuant to rightful authority is proper, and private contracts are entered into subject to that governmental authority.' *Lahti* at 593.

Therefore, pursuant to Michigan law, where the regulation of automobile dealers and manufacturers rests within the control of the Michigan legislature, LaFontaine and Chrysler's Dealer Agreement was entered into subject to the Michigan Dealer Act, and application of the 2010 Amendments to LaFontaine and Chrysler is appropriate. Where Chrysler did not enter into a dealer agreement with IHS for the sale of the Dodge vehicles prior to the 2010 Amendments, Chrysler was required to comply with the laws existing at the time of establishing IHS as a new Dodge dealer despite their pre-existing contract. Therefore, Chrysler was required to and did send written notice to LaFontaine *before entering into a dealer agreement with IHS.* Upon receipt of Chrysler's notice, the Dealer Act then provided LaFontaine with the right to object to the placement under the Dealer Act.

Chrysler cannot rely on the 2007 LaFontaine Dealer Agreement as a defense to having to comply with current law which governs Chrysler's obligations when adding a new dealer in the relevant market area of LaFontaine's existing dealership. If this Court were to follow Chrysler's argument, it would essentially be holding that merely because two parties have a contractual relationship that predates an amendment to a statute which governs the industry in which those parties operate, the parties can escape compliance with current law, even where there is no issue of retroactive application or constitutional violations relating to the contracts clauses. Chrysler unsuccessfully argued this before the Court of Appeals in an attempt to create an issue of retroactivity, which the Court of Appeals wholly rejected. As held by the Court of Appeals, there

is no issue of retroactivity to be addressed. Chrysler was required to comply with the six mile relevant market area limitation throughout its contractual relationship with LaFontaine until the enactment of the 2010 Amendments. The six mile relevant market area limitation had nothing to do with terms of the 2007 Dealer Agreement with LaFontaine, but rather was a statutory limitation on what Chrysler as a manufacturer was permitted to do when appointing new franchisees in relation to existing franchisees. As of August 4, 2010, whenever Chrysler decides to expand its network of dealers by adding additional locations, Chrysler must comply with the 2010 Amendments which expanded the relevant market area limitation to nine miles. Neither Chrysler, nor any proposed new dealer, can rely on the fact that it entered into contracts that have no conflicting terms and conditions with the new definition of relevant market area in order to avoid complying with existing laws.

In *Anderson's Vehicle Sales, Inc. v OMC-Lincoln*, 93 Mich App 404; 287 NW2d 247 (1979), the Court found the date of the underlying SSA between the parties to be irrelevant where the statute regulated conduct occurring after the effective date of the statute. *Anderson's* involved an amendment to the Michigan Dealer Act in 1978, which changed the notice that was required to be given by a manufacturer when terminating a dealer's SSA from 30 days in advance to 60 days in advance of termination and the amendment imposed a new requirement to show cause to terminate. The trial court held that this amendment was retroactive in application and did not apply to Dealer Agreements that had already been signed before the amendment took effect. The Michigan Court of Appeals reversed, stating that there were no retroactivity problems with the statute because the termination at issue took place **after** the effective date of the amendment. As a result, the Court of Appeals held that the date of the underlying SSA between the manufacturer and the dealer was irrelevant **since the conduct regulated by the**

amendments occurred after the effective date of the legislation. The Court of Appeals specifically held:

> To hold with defendants' position is untenable. For the Legislature to say that contracts in existence before the effective date could be terminated in violation of the terms of the statute, but ones entered into a day later were subject to all the provisions of the statute, would fly in the face of the remedial purposes of the act. We do not believe the Legislature so intended.

Id at 410.

Likewise, in the case at bar, merely because IHS and Chrysler entered into an LOI and LaFontaine and Chrysler a dealer agreement before the 2010 Amendment does not mean that Chrysler will only be restricted to appointing dealers within a 6-mile radius of LaFontaine's store into perpetuity[2]. On the contrary, where the 2010 Amendment was made effective immediately, as was the 1978 amendment in *Anderson's*, this Court should follow the *Anderson* Court's reasoning that "the statute regulates conduct occurring after the effective date of the legislation." *Id* at 411. Accordingly, where the conduct at issue will occur in the future and where Chrysler has no vested contractual right at issue in this matter that was affected by the 2010 Amendment, there was no issue of retroactivity for the Trial Court to decide and the Court of Appeals properly applied the 2010 Amendment prospectively. The 2010 Amendment was given immediate effect, which simply means that after August 4, 2010, the new nine mile "relevant market area" definition applies and dictates if and when notice must be given to an existing dealer such as LaFontaine when a new dealer is awarded a Dodge franchise, notwithstanding the contractual relationship between the parties. The LOI between IHS and Chrysler and the 2007 Dealer

[2] If, hypothetically, the 2010 amendment *had abolished* the notice provision at issue, does Chrysler contend that it would still be obligated to indefinitely send notices to all dealerships within 6 miles that signed contracts during the years that the statute was effective? Obviously not. But, if Chrysler is willing to answer "yes" to this question for the purpose of maintaining their position in this lawsuit, imagine the Pandora's box such a ruling would open to eventually thousands of claims of dealerships who had statutory rights over the years that have since been abolished through amendments to the Dealer Act.

Agreement between LaFontaine and Chrysler are irrelevant for this analysis, and the Court of Appeals correctly overturned the Trial Court, which erred by concluding that the LOI was a Dealer Agreement instead of looking at the prospective application of the 2010 Amendment to the future conduct of Chrysler. Chrysler repeatedly cites to the Trial Court's decision where the Trial Court found that the application of the 2010 Amendments to Chrysler's establishment of a Dodge franchise at IHS's location would be an impermissible retroactive application under Michigan law. The Trial Court's decision, however, was based wholly on its erroneous conclusion that the LOI constituted a "dealer agreement" under the Dealer Act and, thus, the application of the 2010 Amendments would affect IHS and Chrysler's vested rights under their "dealer agreement." However, where the Court of Appeals properly ruled that the LOI is not a "dealer agreement" and where the law changed prior to Chrysler and IHS obtaining contractually vested rights to the establishment of the Dodge franchise at IHS' location, the 2010 Amendments are not being applied in an erroneous retrospective manner by the Court of Appeals.

Chrysler relies on this Court's opinion of *In re Certified Questions from the United States Court of Appeals for the Sixth Circuit*, 416 Mich 558; 331 NW2d 456 (1982), which addressed the issue of retroactivity of a comparative negligence provision of the Michigan Products Liability Act. This Court considered four factors when deciding this issue: (1) does the new act include specific language providing for retrospective application; (2) merely because the statute relates to an antecedent event does not mean it operates retrospectively; (3) the law is retrospective if it takes away or impairs a vested right, creates a new obligation, imposes a new duty or newly disables a party regarding transactions or considerations in the past; and (4) if the act is "remedial or procedural" and does not destroy a vested right, then the act will be applied even where the claim or injury occurred prior to the enactment of the statute. These factors,

however, were used to decide whether the amended act would be applied to an action which accrued and was sued upon prior to the enactment of the amendment and which was brought to trial after the effective date. Where this is a very different situation than the case at bar, the holding and rules set forth in *In re Certified Questions* cannot be applied strictly, but can only provide guidance.

Chrysler contends that the first factor is clearly not satisfied where the 2010 Amendments do not contain any explicit language regarding retrospective application. Chrysler also contends that the second factor does not apply to this case, which LaFontaine disputes. Further, Chrysler asserts that the third and fourth factors of this Court's retrospective analysis are violated by the Court of Appeals ruling below. However, by reviewing the quoted sections of this case in context of the facts, it is clear that there is no impermissible retroactive application occurring by holding that the 2010 Amendments applies to Chrysler and IHS's proposed transaction. In *In re Certified Questions*, this Court refused to apply a new statute to a cause of action that had accrued under the old act between contracting parties. In the case at bar, the cause of action --- LaFontaine's objection to the establishment of a new Dodge franchise---did not accrue until after the 2010 Amendments became effective. As the Court of Appeals properly concluded, the LOI does not constitute a dealer agreement as that term is defined by Dealer Act. Therefore, where IHS and Chrysler did not enter into a dealer agreement before the 2010 Amendments became effective, Chrysler was required to comply with the Dealer Act notice requirements once it decided to enter into the new dealer agreement with IHS, which then triggered LaFontaine's statutory right to object to the establishment of the new franchise. Thus, clearly the actions at issue, including any accrued rights, did not occur until after the 2010 Amendments were enacted. This Court in *In re Certified Questions* analyzed several different scenarios which could fall

under the "third factor". Specifically, this Court held that in those situations where contractual rights were impaired or where accrued causes of actions were abolished, the enforcement of an amendment or a new statute would be considered a retrospective application. However, the facts in the case at bar do not fit into either of those scenarios.

In rejecting plaintiff's argument in *In re Certified Questions*, this Court cited to its prior opinion of *Rookledge v Garwood*, 340 Mich 444, 65 NW2d 785 (1954), for its holding that "the defendant did not have a 'vested right' in the statutory defense dependent upon the plaintiff's election accorded him prior to the new act." *In re Certified Questions, supra* at 575. In *Rookledge*, this Court held that because the act at issue did not create a new cause of action against the defendant, thereby affecting a vested or substantive right, nor did it impose a new liability upon the defendant where none existed before, the statute could be applied retrospectively as a remedial statute. *Rookledge* at 456. In addition, this Court noted that since defendant's previous right to force an election of remedies was given by the legislature, defendant could be deprived of it by subsequent legislation. *Id.* at 458. In the case at bar, the 2010 Amendments did not create a new cause of action, nor did it impose a new liability where none existed before. On the contrary, the rights provided to an existing dealer when faced with the situation where a manufacturer chose to establish a new like-line dealership within the distance defined as the existing dealer's relevant market area did not change. The Dealer Act has always provided existing dealers with the right to file a declaratory judgment action against the manufacturer and proposed new dealer prohibiting the establishment of the new franchise unless the manufacturer could show that there was good cause for the establishment of the new dealership. Thus, even applying the standards set forth in *In re Certified Questions, supra*, the Court of Appeals' decision was proper and should be affirmed by this Court.

A. Where there is no retroactive application issue to be addressed, lack of express retroactive language in the statute is of no relevance to this case.

As maintained above, the application of the 2010 Amendments to the future establishment of a Dodge franchise at IHS's location has no retroactive effect on the parties to this appeal. Notwithstanding this logical argument adopted by the Court of Appeals, Chrysler continues to insist that the 2010 Amendments are being applied retroactively and should not be where the legislation did not include express retroactive language. Chrysler refers to this Court's ruling in *Brewer v AD Transp Esp Inc,* 486 Mich 50; 782 NW2d 475 (2010), where this Court found that the statute at issue in that case "contain[ed] no language suggesting that this new standard applies to antecedent events or injuries." LaFontaine is not disputing the fact that the 2010 Amendments do not contain express language directing that the amendments be applied retroactively. However, as clearly pronounced by the Court of Appeals, "the nine-mile radius applies and [LaFontaine] has standing under MCL 445.1576(3) because *any dealer agreement between Chrysler and IHS will necessarily be executed after the effective date of the amendment*." (emphasis added) Where no antecedent event is being affected by the 2010 Amendments, there is no need to address the lack of express retroactive language in the statute. The Court of Appeals found that no retroactive application is occurring, where the 2010 Amendments will be applied prospectively to any future dealer agreement to be executed between LaFontaine and IHS.

Chrysler also argues that because the Legislature included express retroactivity language in other prior amendments to the Dealer Act, this is indicative of the Legislature's intent to not apply this amending section retroactively. Notwithstanding the arguments set forth above, LaFontaine disagrees with this position. In *Chrysler Corporation v Kolosso Auto Sales, Inc.*, 148 F3d 892 (CA 7, 1998), which itself involved the retroactive application of an amendment to the

Wisconsin Motor Vehicle Dealers Law, the United States Court of Appeals for the Seventh Circuit noted: "It is true that previous changes in the dealership law had been made prospective only, with the exception of one that Wisconsin's highest court struck down under the contracts clause." The Court then concluded the following: "But the Wisconsin legislature had not committed itself to make all future changes prospective-and a rule which said that by making some changes in law prospective a legislature was disabling itself under the contracts clause from making future changes retrospective would encourage retroactive legislation, contrary to the original purpose of the contracts clause." (internal citations omitted) *Chrysler Corporation,* 148 F.3d at 896. Therefore, contrary to Chrysler's argument, the Legislature's silence is far from meaningful, especially where the 2010 Amendment was given "immediate effect" and, in the case at bar, is being applied to future conduct. Clearly, as in the past (1983 and 2000) the legislature did not feel it necessary to include language regarding its effect on *existing dealers*, especially where the defined category of "new motor vehicle dealers" only applies to those dealers with dealer agreements in place with a manufacturer. Furthermore, the text of the 2010 Amendment by its nature expresses the intent that it apply to existing dealers, where it defines "relevant market area" as "the area within a radius of nine miles of the site of the intended place of business of the proposed new vehicle dealer." The statute defines "relevant market area" in relation to the location of the proposed new dealership. Thus, it is only logical that the Legislature intended to include all existing dealers within that radius when determining the procedures that a manufacturer must follow prior to deciding on the location of a new dealership. Any other reading of this amendment would be contrary to common sense, because it would result in legislation that would only apply to a small class of dealers and would cause financial hardship to existing dealers. This would be devoid of logic, in light of the purpose of the statute

as a whole: to protect existing dealers who lack bargaining power from the oppressive trade practices of large manufacturers like Chrysler.

B. The application of the 2010 Amendments to Chrysler and IHS's proposed transaction is not a retrospective application nor does it affect any vested rights obtained by Chrysler through contract or under the law existing at the time.

Chrysler continues making its perfunctory argument that the application of the 2010 Amendments to IHS and Chrysler's yet-to-be executed agreement to establish a Dodge franchise at IHS's location impairs Chrysler's vested rights and imposes new duties and obligations on Chrysler. Chrysler reaches these conclusions, dismissing the fact that the explicit terms of its contracts with LaFontaine and IHS do not provide Chrysler with any vested right to be free from the legislature's authority to amend statutes regulating dealers and manufacturers with respect to future actions of those parties. Chrysler fails to address the fact that nowhere in the LaFontaine Dealer Agreement is LaFontaine's "Sales Locality" defined, nor are there any other restrictions regarding locations of like-line dealerships contained anywhere in the parties' contract. On the contrary, the last sentence in Section 4 of the LaFontaine Dealer Agreement actually reinforces LaFontaine's argument, that Chrysler was and will always be bound by the current "relevant market area" definition under the Dealer Act: "Said Sales Locality may be shared with other CC dealers of the same line-make as CC determines to be appropriate." Consequently, from 2007-August 3, 2010, if Chrysler had established a Dodge franchise anywhere near LaFontaine's dealership, it would have been restricted by the six-mile relevant market area under the Dealer Act, despite the fact that this sentence implies that Chrysler had the sole unrestricted authority to place another Dodge dealer anywhere near LaFontaine as Chrysler determined to be appropriate.

Chrysler continues to frame the primary issue at hand erroneously, looking at the establishment of IHS's Dodge franchise in relation to Chrysler's Dealer Agreement with

LaFontaine. Chrysler contends that it had "the right under its contract with LaFontaine to add the Dodge vehicle line at the IHS location *without providing notice to LaFontaine and without the fear of a lawsuit by LaFontaine seeking to block that addition*." However, as maintained by LaFontaine and the Court of Appeals, these rights and duties regarding establishing additional Dodge franchises were not expressly provided for in the Dealer Agreement, but rather were dictated by statute. Therefore, no contract rights are being limited by applying the 2010 Amendments to the establishment of the IHS Dodge franchise.

Chrysler contends that it acquired a right to establish additional Dodge dealers anywhere beyond a 6-mile radius of LaFontaine's dealership by entering into a Dodge Sales and Service Agreement with LaFontaine on September 27, 2007. This conclusion is erroneous where this right was not acquired as a result of entering into the Dealer Agreement, but rather the right was created by the Dealer Act. Merely because Chrysler and LaFontaine entered into the Dealer Agreement at the time when the Dealer Act defined "relevant market area" as a 6-mile radius, without something more in the Dealer Agreement adopting this limitation, does not lock in the statutory definition of relevant market area for the remainder of the parties' relationship. Chrysler is essentially arguing that contracting parties are immune from future legislative regulation. Taking that erroneous reasoning a step further, any changes in safety and emission control laws or in consumer protection laws without express retroactive intent, for example, that occurred after a Dealer Agreement was signed could not be enforced against the parties. Clearly, this is not what the legislature intended and not what Michigan law provides. Chrysler cannot selectively decide which provisions of the Dealer Agreement are subject to future legislation and which are not.

Michigan law has established that a statutory right is not a vested right and cannot serve as a basis for a contracts clause challenge. "A statutory defense, or a statutory right, though a valuable right, is not a vested right, and the holder thereof may be deprived of it." *Lahti v Fosterling*, 357 Mich 578, 589; 99 NW2d 490 (1959) "It is the general rule that that which the legislature gives, it may take away." *Lahti v Fosterling*, 357 Mich 578, 589; 99 NW2d 490 (1959). A right that arises by statute is valuable, but not vested." (emphasis added) *AG v. City of Flint*, 269 Mich App 209, 216; 713 NW2d 782 (2005). Chrysler's right to place a competing dealership outside the relevant market area of LaFontaine's dealership "'sprang from the kindness and grace of the legislature. And it is the general rule that that which the legislature gives, it may take away.'" *Rookledge, supra* at 457 (1954). Where an amendment to a statute does not affect a vested right, it is not invalid despite its retrospective effect. *Lahti*, 357 Mich at 594. Chrysler's argument that the mere fact that by it and LaFontaine entering into a contract predating the 2010 Amendments, Chrysler somehow has a vested right in the 6-mile radius limitation, precluding any change in that limitation is directly contrary to the this Court's pronouncements, including its holding in *Harsha v. City of Detroit*, 261 Mich 586, 594; 246 NW 849 (1933): "There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal." In *Minty v Bd of State Auditors*, 336 Mich 370, 390; 58 NW2d 106 (1953), this Court held:

> It would seem that a right cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws; it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another.

Where this Court has clearly established that a statutory right cannot be a "vested right" Chrysler's line of reasoning is unfounded.

More importantly, the contractual language of the Dealer Agreement does not include language defining the specific territory that LaFontaine had a limited right to operate within. In other words, the Dealer Agreement does not state that LaFontaine had the exclusive right to operate, for example, within 6, 7, 8, or 9 miles from its location. Instead, the Dealer Agreement allowed the Legislature under MCL 445.1565 to define the "exclusive territory". Chrysler's contention that merely because a contract is signed by two parties that those parties will be forever bound by the statutes in effect at that time is absurd. Nothing in the Dealer Agreement specifically adopts the 6-mile relevant market area limitation. If this were the case, every time an issue similar to this came up between two contracting parties, the parties would need to look back at the historical amendments to the statutes regulating their businesses to determine which laws applied to the parties, depending on the date of their agreement. Clearly, this cannot be what the legislature intended. Chrysler also argues that the application of the 2010 Amendments to its establishment of IHS's Dodge franchise impairs its contractual relationship with LaFontaine by diminishing rights contained in their contract. Chrysler fails to acknowledge that this right was always restricted by the original Dealer Act, which limited the location of a competing dealer to a radius of 6 miles from LaFontaine's dealership prior to the 2010 Amendment - illustrating that the issue is not really a contractual issue at all, but rather statutory. Chrysler does not have a vested right to remain governed by a repealed statute.

Chrysler's attempt to convince this Court that the application of the 2010 Amendments to Chrysler's placement of a new Dodge franchise at IHS's location will create a new obligation and impose a new duty on Chrysler falls short. Contrary to Chrysler's conclusory assertions, the 2010 Amendments did not change the rights and remedies surrounding the appointment of a new dealer within the defined "relevant market area". Rather, the 2010 Amendments only changed

the definition of "relevant market area" by adding three miles to the previous definition. The 2010 Amendments did not impose any new legal duties on Chrysler that had not already existed in the prior version, nor did it create new substantive rights for an existing dealer, such as LaFontaine.

Chrysler relies on *Kia Motors America, Inc. v Glassman Oldsmobile Saab Hyundai, Inc.* decided by the Sixth Circuit in support of its position stating that the Sixth Circuit found in favor of Kia by rejecting similar arguments made by LaFontaine in this case. Thus, the present case offers this Court the ideal opportunity to perform its intended role as the final interpreter of state law. Either the Sixth Circuit or the Michigan Court of Appeals erred in reaching their conclusions and LaFontaine submits that the erring Court was clearly the Sixth Circuit, which essentially ignored Glassman's arguments and made the central issue in that case one of retroactivity, where it need not have been. State court authority, however, takes precedence in interpreting state statutes. As stated above, federal court interpretations of state law are not binding or controlling on state courts. *Van Buren Twp v Garter Belt, Inc.*, 258 Mich App 594, 604; 673 NW2d 111 (2003). "This Court is not bound by federal decisions interpreting Michigan law." *Ryder Truck Rental, Inc. v Auto-Owners Ins. Co., Inc.,* 235 Mich App 411, 416; 597 NW2d 560 (1999).

Chrysler and the Sixth Circuit in *Kia* relied on the holding in *Dale Baker Oldsmobile v. Fiat Motors of North America, Inc.*, 794 F.2d 213 (CA 6, 1986). However, *Dale Baker* is readily distinguishable from the case at bar. In *Dale Baker,* the Dealer Act had just been enacted, replacing the act that previously regulated auto dealers. The Dealer Act significantly affected the explicit terms contained in a franchise agreement that had been entered into between Dale Baker Oldsmobile and Fiat prior to the enactment of the Dealer Act. Dale Baker and Fiat's franchise

agreement expressly defined each parties' rights and obligations in the event of a termination of the dealership by Fiat, which were entirely different than those set forth in the newly enacted Dealer Act. Therefore, the *Dale Baker* court held that an application of the newly enacted Michigan Dealer Act to the parties' agreement would constitute an improper retroactive application affecting the parties' express contractual agreement.

On the contrary, the cause of action in the case at bar is purely statutory. It arose in October, 2010, when Chrysler notified LaFontaine of its intent to place a new franchise with IHS, which was subsequent to the effective date of the 2010 Amendments. Therefore, logically, the law in effect at the time that the cause of action arose is the law that applies. As properly held by the Court of Appeals, there is no issue of retroactivity to address, and thus, the *Kia* opinion has no bearing on this case. Additionally, the *Kia* Court's reasoning is mistakenly premised on the notion that the application of the statute as urged by Glassman would preclude Kia from opening new dealerships. On the contrary, the application of the statute would not deny any manufacturer the right to open new dealerships, but instead merely requires the manufacturer to demonstrate good cause for opening a like-line dealer with the relevant market area of an existing dealer. The *Kia* Court erroneously concluded that the application of the 2010 Amendments would take away Kia's previously unrestricted contractual right to appoint new dealers – which is a complete misconstruction of Kia's rights, which were always restricted by the Dealer Act. More importantly, the Sixth Circuit interpretation favored the manufacturer instead of the dealer as intended by the legislature: "Because the Dealer Act was intended to protect dealers, an interpretation that provides such protection is more likely to be correct." *Bright Power Sports v. BRP US Inc.*, 2009 U.S. Dist. LEXIS 110134 (ED Mich, 2009). (Ex. B)

Chrysler also relies on the cases of *Ace Cycle World, Inc. v Am Honda Motor Co, Inc.*, 788 F2d 1225 (CA 7, 1986), *Fireside Chrysler-Plymouth Mazda, Inc v Chrysler Corp*, 129 Ill App 3d 575; 472 NE2d 861 (1984), and *Baker Chrysler-Jeep Dodge, Inc. v Chrysler Group, LLC* (an unpublished administrative decision out of New Jersey), which are all readily distinguishable and involve express contractual rights that are not present in the case at bar. The facts in *Ace Cycle World, Inc. v American Honda Motor Co.*, are distinctly different from those present in the case at bar, such that the holding is entirely inapplicable and should be disregarded by this Court. In *Ace*, the Court held that an amendment to the Illinois Motor Vehicle Franchise Act, which changed the definition of relevant market area from "the geographic scope defined by the franchise agreement" to "as the greater of 'the area within a 10 mile radius from the principal location of the franchise' or the area defined in the franchise agreement," could not be applied retroactively. *Ace* 788 F2d at 1226. However, in *Ace*, the franchise agreement at issue had no defined relevant market area. Thus, at the time of entering into the franchise agreement, Honda was free to place a new dealership as close or as far from the Plaintiff's dealership as it desired because the parties failed to define the term "relevant market area". When the amendment was enacted, suddenly Honda was limited by statute where previously it was not.

On the contrary, at the time that LaFontaine and Chrysler entered into the Dealer Agreement, the Legislature had already enacted a provision which restricted Chrysler from establishing a new dealer within a 6-mile radius of an existing like-line dealer without good cause. Unlike the Illinois Act, the Michigan Dealer Act did not leave it up to the parties to define relevant market area. And nowhere in the Dealer Agreement did Chrysler and LaFontaine limit LaFontaine's relevant market area to a 6-mile radius. Therefore, where Chrysler was fully aware of the statute restricting the placement of a like line dealership within the geographic area

of LaFontaine and where Chrysler failed to specifically address this issue in its Dealer Agreement, subsequent expansions or contractions of the statutorily defined relevant market area are binding, especially as to establishments of dealers after the expansion of the relevant market area as with IHS.

Additionally, missing from Chrysler's analysis of the *Ace* opinion was the following qualification included in the Seventh Circuit Court's opinion: "**to the extent** Honda had a vested right under the 1983 contract to establish the new dealership, see part III, *infra*, Illinois law would preclude the later amendments to the Act from defeating the right." 1228. The *Ace* Court relied on the case of *McAleer Buick-Pontiac Co. v. General Motors Corp.,* 95 Ill.App.3d 111, 50 Ill.Dec. 500, 419 N.E.2d 608 (1981) to support its opinion. Both the *Ace* and *McAleer* courts analyzed the retroactivity issue in the context of the explicit terms of the parties' contractual agreement in order to decide whether a retroactive application of the statute would cause a "substantial impairment of [a party's] contractual rights." The *Ace* Court found: "Prior to the 1983 amendments, it had been held that the scope of the relevant market area was limited to that area described in the franchise agreement, and if none was specified, none existed." Clearly, the *Ace* court based its conclusion on not only the lack of the legislature's explicit direction on retroactive application of the amendment, but also on the additional fact that the retroactive application would cause a contracts clause issue - intertwining these two issues.

And in *Fireside Chrysler-Plymouth Mazda, Inc. v. Chrysler Corp.,* 129 Ill App 3d 575, 582-583 (1984), the court did indeed find that the application of the newly defined relevant market area in relation to the parties' pre-existing dealer agreement would be impermissibly retroactive in contradiction of established law. However, the court came to this conclusion based upon the fact that the franchisor had obtained a vested right through its contract, which contained

a specifically defined sales locality broken down by county and city, and not merely because it had a pre-existing contract that predated the amendment. In reaching its holding, the court also discussed the fact this finding would not always be applicable in every situation and that there are times where the application of a subsequent statutory amendment to a pre-existing contractual relationship would not be impermissibly retroactive:

> *By our finding that application of the Motor Vehicle Franchise Act in this particular instance is retroactive and therefore impermissible, we do not, however, suggest that application of the Act to conduct arising from pre-existing franchise agreements will always be improper or retroactive.* It is well established that a statute is not retroactive merely because it relates to antecedent events or draws upon antecedent facts for its operation. (United States Steel Credit Union v. Knight (1965), 32 Ill. 2d 138, 204 N.E.2d 4.) A retroactive law is one that impairs vested rights. *A vested right is more than a mere expectation based upon an anticipated continuance of existing law; it must have become a fixed right, complete and consummated.* (Griffin v. City of North Chicago (1983), 112 Ill. App. 3d 901, 445 N.E.2d 827.) If an existing law changes by amendment or repeal prior to the vesting of a right, no cause to object arises, and the application of that law to the complained-of conduct is not unconstitutionally retroactive. 112 Ill. App. 3d 901, 445 N.E.2d 827.
>
> Chrysler, in stating that Buffalo Grove is not within Fireside's "area of primary responsibility," looks to the Act's definition of "market area," applies that definition, and concludes that pursuant to that definition, the Act was not violated by the granting of an additional franchise to B.G.C.P. in Buffalo Grove. By doing so, defendant implicitly acknowledges that the Act does apply to the 1971 franchise agreement, but because "market area" is defined in terms of the franchise agreement itself, it neither imposes a new duty nor attaches a new disability to defendant, and application of the term "market area" to the 1971 pre-existing agreement is not retroactive. Similarly, were either of the parties to engage in conduct that constituted an unfair practice under the Act, and said conduct was not governed by the terms of the pre-existing contractual agreement, application of the Act might not impair a vested contractual right and would not then be retroactive. In such instances the prohibited conduct governed by the Act is not "in respect of transactions or considerations already past" (Marquette National Bank v. Loftus (1983), 117 Ill. App. 3d 771, 454 N.E.2d 11), but merely relates to antecedent events or draws upon antecedent facts, namely, the pre-existing franchise agreement. (Sipple v. University of Illinois (1955), 4 Ill. 2d 593, 123 N.E.2d 722.) *Under such circumstances, unlike under the circumstances of McAleer, Marquette National Bank, and the instant case, application of the Motor Vehicle Franchise Act may be prospective and therefore proper.* (emphasis added)

As so aptly stated by the *Fireside* court, merely because the conduct relates to or draws upon antecedent facts or events, such as the Dealer Agreement between Chrysler and LaFontaine, the application of subsequently enacted legislation is prospective and proper where no rights vested arose from such antecedent event or fact.

Finally, Chrysler contends that the decision in *Baker-Chrysler Jeep v Chrysler Group* is instructive to this Court and that it demonstrates that other courts have followed the reasoning set forth by the *Kia* decision, in that amendments to dealer acts cannot be applied retroactively to pre-existing dealer agreements. However, like the aforementioned cases relied upon by Chrysler, this case is significantly distinguishable from the case at bar. The *Baker* decision concentrated on the fact that Chrysler had for over 3 years shown its intent to establish the new franchisee, and where the notice required by the New Jersey statute is triggered by a manufacturer manifesting its "intent" to establish a new dealer, the administrative tribunal decided that Baker could not aver itself of the benefit of the 2011 Amendment expanding the distance defined by "relevant market area" because Chrysler had manifested its intent to establish this new dealership years before the 2011 Amendment. Baker has absolutely no bearing on the Court of Appeals Opinion in this case because the Baker decision hinged on the word "intent" in the New Jersey statute and New Jersey cases interpreting "intent". In *Baker*, Chrysler had shown its intent to establish the new dealership and provided notice to Baker prior to the 2011 Amendment. On the contrary, in the case at bar, Chrysler did not provide LaFontaine with notice as required under MCL 445.1576(3) until *after* the 2010 Amendment at issue, which provided LaFontaine with the right to object to the establishment of a new Dodge franchise at IHS's location.

C. If This Court Determines That The Application Of The 2010 Amendments Is An Improper Retroactive Application, Then Lafontaine Contends That The 2010 Amendment At Issue Is Remedial In Nature And, Thus, An Exception To The Presumption Of Prospective Application.

Where the Court of Appeals correctly found that no improper retroactive application of the 2010 Amendments occurs where the 2010 Amendments are being applied to a future prospective act by Chrysler, it is not necessary for Chrysler to raise the issue of whether the 2010 Amendment is remedial or procedural in nature and, thus, can overcome the presumption of prospective application of statutes. However, due to the fact that Chrysler addressed the issue in its Brief, LaFontaine will accordingly respond to the argument.

Retrospective laws are not necessarily by their nature unconstitutional or invalid: "As the constitution does not prohibit the passing of retrospective laws, except when they are of the class technically known as *ex post facto*, congress may unquestionably pass them, even though private rights are affected thereby, unless they are invalid for some other reason than their retrospective character." *Lahti v. Fosterling*, 357 Mich 578, 594; 99 NW2d 490 (1959) An exception to the presumption of prospective application of statutes exists where "statutes which operate in furtherance of a remedy or mode of procedure and which neither create new rights nor destroy, enlarge, or diminish existing rights are generally held to operate retrospectively unless a contrary legislative intent is manifested." *Frank W. Lynch & Co. v. Flex Technologies, Inc.*, 463 Mich 578, 583-584; 624 NW2d 180 (2001).

In *Hansen-Snyder Company v. General Motors Corporation*, 371 Mich 480, 124 NW2d 286 (1963), the Michigan Supreme Court found that an amendment to the Mechanic's Lien Act operated retrospectively where it extended the time for filing a lien by fifty percent (50%) from sixty to ninety days because said extension did not affect the parties vested or substantive rights, despite the parties having been operating under a contract predating the amendment. Hansen-

Snyder was a subcontractor on a project owned by General Motors. At the time that Hansen-Snyder began its work on the project, the Mechanic's Lien Act required subcontractors to file their liens within 60 days of the date of first furnishing labor and/or materials to the property. While Hansen-Snyder was working on the project under an existing contract, the Michigan legislature amended the Mechanic's Lien Act extending the time for filing a lien from 60 to 90 days after first furnishing labor and/or materials. Finding that the amendment to the Mechanic's Lien Act had retrospective effect, the Michigan Supreme Court, held:

> '...remedial statutes, or statutes related to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of a remedy or confirmation of rights already existing, do not come within the legal conception of retrospective law, or the general rule against retrospective operation of statutes. To the contrary, the statutes or amendments pertaining to procedure are generally held to operate retrospectively, where the statute or amendment does not contain language clearly showing a contrary intention. Indeed, in the absence of any savings clause, a new law changing a rule of practice is generally regarded as applicable to all cases then pending. * * * Sometimes the rule is stated in the form that, when a new statute deals with procedure only, prima facie, it applies to all actions-**those which have accrued or are pending and future actions**.'

(emphasis added) *Hansen-Snyder*, 371 Mich at 484-485. In *Hansen*, the subcontractor previously had the right to file a lien against the property prior to the subject amendment extending the time from 60 to 90 days. The Court specifically held: "**No right vested in [defendants] or anyone else to have the time for serving notice of intent or filing the lien limited to 60 rather than 90 days**. The amendment in that regard did not affect vested or substantive rights but pertained **solely to procedure** for effectuating the statutory right already existing." (emphasis added) *Hansen-Snyder*, 371 Mich at 485.

In *Hansen-Snyder*, despite the fact that the parties had entered into a contractual agreement, that agreement was not the source of the limitation of the time frame for filing a construction lien. Rather, the Construction Lien Act was the source of the limitation. Likewise,

in the case at bar, the six mile limitation was not a part of the Dealer Agreement, but rather was a provision contained in the Dealer Act at the time that the parties entered into their contract. Additionally, in *Hansen-Snyder*, this Court found that the extension of time to file a lien from 60 to 90 days did not affect the vested or substantive rights of the parties and instead was a change in the procedure by which the protected class could accomplish its pre-existing statutory right. Chrysler and IHS contend that *Hansen-Snyder* is distinguishable from the case at bar for this reason. However, Chrysler and IHS fail to recognize that even in *Hansen-Snyder* where General Motors was subject to additional construction liens which it would not have been subject to prior to the amendment, this Court still found that the amendment was procedural in nature and did not affect vested or substantive rights.

Likewise, in the case at bar, LaFontaine already had the right to be protected from competition from other Chrysler dealers within a 6-mile radius under the prior version of the statute. As in *Hansen-Snyder*, the 2010 Amendment merely increased that protection by fifty percent (50%) to nine miles, keeping consistent the procedures that a manufacturer must follow to notify an existing dealer when desiring to appoint a new dealer within that restricted area. Chrysler's duties to notify existing dealers prior to entering into a dealer agreement with a like-line dealer did not change. The only change resulting from the 2010 Amendments is to whom the notice must be sent. Furthermore, as in *Hansen-Snyder* and *Lahti, supra*, no right had vested in Chrysler to have the definition of relevant market area remain fixed at six miles. Thus, the increase to nine miles is merely a procedural and remedial change that does not affect a vested right and, hence, does not come within the general rule against retrospective operation of statutes.

Additionally, the 2010 Amendment does not create a new legal burden for Chrysler nor does it serve a punitive or deterrent purpose. The 2010 Amendment was a minor change to a definition of the term "relevant market area", expanding it from six miles to nine miles. The remaining provisions regarding Chrysler's notice obligations and LaFontaine's rights to object subsequent to the receipt of notice did not change and existed prior to the date of the SSA. Therefore, where the 2010 Amendments are procedural in nature and where the legislature did not express a contrary intention, the 2010 Amendments must be given retrospective application, if necessary, and should govern any appointment of IHS as a Dodge dealer: "statutes or amendments pertaining to procedure are generally held to operate retrospectively, where the statute or amendment does not contain language clearly showing a contrary intention." *Hansen-Snyder*, 371 Mich at 484-485.

III. THE APPLICATION OF THE 2010 AMENDMENT DOES NOT VIOLATE THE CONTRACTS CLAUSES OF THE MICHIGAN AND UNITED STATES CONSTITUTION.

The application of the 2010 Amendment to the relationship between Chrysler and IHS does not violate the Contracts Clauses of the Michigan Constitution or the U.S. Constitution. The United States Constitution provides: "No State shall...pass any Bill of Attainder, ex post facto Law, or Law Impairing the Obligation of Contracts..." U.S. Const. art. I §10. See also Mich. Const. 1963, art. I, § 10. In order to demonstrate a violation of the Contract Clause under either the Michigan or the U.S. Constitution, a party must show that (1) its contractual relationship has been substantially impaired, (2) there is no significant and legitimate public purpose justifying the impairment, and (3) "the impairment is not based upon reasonable conditions or that the impairment is not of a character appropriate to the public purpose justifying adoption of the legislation." *Paw Paw Wine Distributors, Inc. v. Joseph E. Seagram &*

Sons, Inc., 34 F Supp 2d 550 (WD Mich 1987) (citing *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 US 400, 412-413; 103 SCt 697 (1983) and *Blue Cross and Blue Shield of Michigan v. Milliken*, 422 Mich 1; 367 NW2d 1 (1985). In determining whether a substantial impairment of a contractual relationship exists, the Court must look at three (3) factors: "(1) whether there is a contractual relationship, (2) whether a change in law impairs that contractual relationship, and (3) whether the impairment is substantial." *General Motors Corp. v. Romein*, 503 US 181, 186; 112 SCt 1105 (1992).

The Contracts Clause has never been applied literally. As the U.S. Supreme Court recognized: "The States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result. Otherwise, one would be able to obtain immunity from state regulation by making private contractual arrangements." *United States Trust Co. v. New Jersey*, 431 US 1, 22 (1977). Chrysler's argument that the application of the 2010 Amendment violates the Contracts Clause is unconvincing and flawed. Chrysler alleges that the retroactive application would divest it of contractual rights in violation of the United States and Michigan Constitutions. However, Chrysler fails to acknowledge that its rights were always restricted by the original Dealer Act, which limited the location of a competing dealer to a radius of 6 miles from LaFontaine's dealership prior to the 2010 Amendment - illustrating that the issue is not really a contractual issue at all, but rather Chrysler's belief that it has a vested right to remain governed by a repealed statute.

Chrysler fails to acknowledge the long-standing judicial view that parties to a contract in a heavily regulated industry should anticipate that their contractual rights may be disturbed by future legislation. The fact that the 2010 Amendments only expanded the relevant market area

by three miles and that it was not a completely new addition to the Dealer Act put Chrysler on notice of the possibility that the definition of "relevant market area" could be expanded. See *Veix v Sixth Ward Building & Loan Ass'n*, 310 US 32, 38; 60 SCt 792 (1940) ("When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic.")

In *Paw Paw Wine Distributors, Inc. v Joseph E. Seagram & Sons, Inc.*, 34 F Supp 2d 550 (WD Mich 1987), the United States District Court for the Western District of Michigan held that the Michigan Wine Franchise Act applied to contracts executed prior to the enactment of the Act and the retroactive application of the Act did not violate the Contracts Clause. The Michigan Wine Franchise Act was enacted on June 26, 1984 and ordered to take immediate effect. Contrary to the case at bar, the Wine Franchise Act expressly provided for its application to contracts in existence as of the effective date of the Act. Notwithstanding this distinction, the Contracts Clause analysis in *Paw Paw* is instructive in determining that the 2010 Amendment in this case does not violate the Contracts Clause. The Court in *Paw Paw* emphasized the primary factor in deciding Contracts Clause violation cases: "The threshold determination is whether the Wine Franchise Act has substantially impaired Seagram's contractual rights. Significant to this issue is the fact that the parties are operating in a heavily regulated industry." *Id.* at 559. Of note in the *Paw Paw* case is the fact that the statute at issue was an entirely new statute enacted to regulate wine franchisor and franchisee relationships, which is a significant statutory alteration compared to the minor amendment at issue in the case at bar. Notwithstanding this fact, the Court still found that the retroactive application of the Wine Franchise Act did not violate the Contracts Clause. The Court held that because other franchise regulations were in effect in the state of Michigan, including the Automobile Dealers Franchise Act, it was foreseeable that the

Wine Franchise Act would be enacted. "When one chooses to engage in an enterprise which is heavily regulated, one may not reasonably complain when further regulation in the field occurs if such regulation is reasonable and rationally related to a legitimate legislative purpose." *Id.* The *Paw Paw* Court further held "the Act's restrictions are appropriate in light of the legislation's remedial goals. The Act does not totally deny Seagram the power to terminate distributorships; it merely places restrictions on the timing, manner and rationale for such terminations. Based on these facts, the Court concludes that no substantial impairment has occurred." *Id.* In the case at bar, the 2010 Amendment has made an even less significant statutory alteration than that in *Paw Paw*. It does not deny Chrysler the power to add dealerships; it merely expands the relevant market area of an existing dealer to a 9-mile radius. Accordingly, Chrysler's argument that the 2010 Amendment substantially impairs its contractual relationship with LaFontaine should be rejected out-of-hand by this Court.

This issue of foreseeability with respect to future regulation of auto dealers and manufacturers was specifically addressed in *Eastern Sport Car Sales, Inc. v. Fiat Motors of North America, Inc.* by the United States District Court for the Eastern District of Michigan, which held: "Moreover, the automobile manufacturer-dealer industry is one that can reasonably expect to be regulated. It has historically been regulated, by virtue of the 1978 Act and its predecessors." 1988 WL 73449 (ED Mich 1988)

In *Chrysler Corporation v. Kolosso Auto Sales, Inc.*, 1998 U.S. App. LEXIS 26136 (CA 7, 1988), the United States Court of Appeals for the Seventh Circuit held that application of an amendment to the Wisconsin Motor Vehicle Dealers Law which entitled a dealership to challenge a manufacturer's refusal to allow the dealership to move locations did not violate the Contracts Clause, even where the contract expressly forbade the dealer to change its location

without Chrysler's written permission. The Court held that because the Contracts Clause is no longer applied literally, that even when a retroactively applied statute makes a contract more financially burdensome for one party, does not mean it is in violation of the Contracts Clause. *Id.* at 894. The Court relied heavily on the foreseeability of future legislation in reaching its decision:

> a contractual obligation is not impaired within the meaning that the modern cases impress upon the Constitution if at the time the contract was made the parties should have foreseen the new regulation challenged under the clause. Should have foreseen it not in detail of course, but sufficiently to have demanded and received compensation. Chrysler should have known in 1988 that it did not have a solid right to prevent a dealer from changing the location of the dealership, that it was operating in a grey area of the dealership law, that the law might some day be amended to regulate disputes over relocation specifically, and that if this happened it might not be able to get the amendment struck down under the contracts clause.

(emphasis added) *Id.* at 897. Likewise, Chrysler should have known in 2007 when it entered into the Dealer Agreement with LaFontaine that it did not have an irrevocable right to add new dealerships, and that the Michigan legislature might someday expand the relevant market area beyond a 6-mile radius and that it might not be able to succeed in a Contracts Clause challenge to its retroactive application. Thus, it should have economically bargained for this possibility at the time of entering into its contract with LaFontaine. See also *Alliance of Automobile Manufacturers v. Gwadosky*, 430 F3d 30 (CA 1, 2005) (holding that retroactive application of a statutory amendment barring recoupment by manufacturers of their costs of reimbursement to dealers for warranty repairs did not violate the Contracts Clause); and *Acadia Motors, Inc. v. Ford Motor Company*, 844 F Supp 819 (D Maine, 1994)

Additionally, Chrysler's Contracts Clause claim fails because the 2010 Amendments serve a legitimate public purpose. As held by the United States District Court for the Eastern District of Michigan in *Eastern Sport Car Sales, Inc., supra*: "Even assuming that Fiat could

demonstrate that the act substantially impairs its contract rights with Eastern, the state has a significant and legitimate public purpose in enacting the 1981 Act, i.e., to remedy broad economic problems existing between automobile manufacturers and their dealers. ***The ultimate beneficiary is the automobile consumer.***" (emphasis added) *Id.*

Based on the foregoing, Chrysler cannot demonstrate that a retroactive application of the 2010 Amendments, if the application can at all be characterized as retroactive, violates the Contracts Clause. Accordingly, the Court of Appeals properly ruled in favor of LaFontaine.

CONCLUSION

Based on the foregoing, Lafontaine respectfully requests that this Court affirm the Court of Appeals' November 27, 2012 decision.

Dated: December 27, 2013

Respectfully submitted,

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A

1 of 1 DOCUMENT

EASTERN SPORT CAR SALES, INC., a Michigan corporation, Plaintiff, v. FIAT MOTORS OF NORTH AMERICA, INC., a New York corporation, Defendant.

Civil No. 84CV4738DT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

1985 U.S. Dist. LEXIS 24081

June 5, 1985, Decided
June 5, 1985, Filed

COUNSEL: [*1] For EASTERN SPORT CAR SALES, PLAINTIFF: EDWARD M. KRONK, BUTZEL, LONG, GUST, KLEIN & VAN ZILE, DETROIT MI.

For FIAT MOTORS OF NORTH AMERICA, DEFENDANT: Lawrence G. Campbell, DICKINSON, WRIGHT, MOON, VAN DUSEN & FREEMAN, Detroit, MI.

JUDGES: Robert E. DeMascio, United States District Judge.

OPINION BY: Robert E. DeMascio

OPINION

MEMORANDUM OPINION

Plaintiff, Eastern Sport Car Sales, Inc. (Eastern) filed this action in Wayne County Circuit Court against defendant, Fiat Motors of North America, Inc., (Fiat), alleging violations of the Michigan Automobile Dealership Act, *Mich. Comp. Laws §§ 445.1561 et seq.* (1981) and seeking declaratory relief that said statute is applicable. Defendant timely removed this action from state court on the basis of diversity of citizenship, *42 U.S.C. § 1441.* Presently before the court are cross motions for summary judgment.

Beginning in April 1967, Eastern entered into a dealer sales and service agreement with defendant's successor to sell Fiat automobiles. In March 1976, this agreement was re-drafted and Fiat, as successor manufacturer, became a party to the agreement. Paragraph Tenth of the agreement provides:

> This Agreement is to be governed by, and construed according to, the laws of the [*2] State of New York. It is understood, however, that it is a general form of agreement designated for use in any state; and it is therefore agreed that any provision herein contained which in any way contravenes the laws of any state or constituted authority which may apply to this Agreement, shall be deemed to be deleted herefrom.

On January 23, 1983, Fiat notified Eastern that its agreement would be terminated. No one disputes the fact that Fiat had the right to terminate the agreement and that the conditions precedent for termination had been satisfied. The dispute between the parties arises over the applicability of the Michigan act, which became effective July 19, 1981 and sets forth procedures to be followed by automobile manufacturers after terminating a dealership agreement. Fiat contends that the act is applicable only to those agreements entered into after July 19, 1981, while Eastern contends that the act is applicable to any dealership agreement that is terminated after that date.

Section 445.1561 was enacted to replace *Mich. Comp. Laws §§ 445.521 et. seq.* (1978). The stated purpose of *§ 445.1561* is:

> to regulate motor vehicle manufacturers, distributors, wholesalers, dealers, [*3] and their representatives; to regulate dealings between manufacturers and distributors or wholesalers and their dealers; to regulate dealings between manufacturers, distributors, wholesalers, dealers, and consumers; to prohibit unfair practices; to provide remedies and penalties; and to repeal certain acts and parts of acts.

The legislative history behind *§ 445.1561*, as set forth in the Senate Analysis Report, indicates that it was enacted not merely for the protection of new dealers, but also, and perhaps primarily, for existing dealers facing the potential threat of termination or unfair competition from new dealers in their geographic sales zone:

> Despite the enactment of Public Act 331 of 1978, which was an attempt to regulate auto manufacturer-dealer relationships, some people feel that problems still remain and that dealers need further protection. One concern is the practice by manufacturers of establishing new dealerships in areas which are already being served by existing dealers, thus threatening the economic well-being of the existing dealers. A second concern is the termination of dealer agreements by the manufacturers for what some feel are arbitrary reasons. Agreements are [*4] supposed to be terminated only for 'good cause' but some have argued that 'good cause' is not adequately defined in the law.

While the Michigan courts have never addressed this issue with respect to this particular statute, the Michigan Court of Appeals, in *Anderson's Vehicle Sales, Inc. v. OMC-Lincoln 93 Mich. App. 404, 287 N.W.2d 247 (1979)*, addressed the issue with respect to the 1978 act. The court rejected the argument that the statute was meant to apply only to those dealership agreements that were entered into after July 11, 1978, the effective date of the act. Rather, the court held that the statute applies to all dealership agreements that are terminated after the effective date of the act. This analysis has equal application to the 1981 Act. Not only did the 1981 Act replace the 1978 Act, but both acts have the same express purpose and similar remedy provisions.

Fiat also contends that the 1981 Act is constitutionally infirm on due process and contract clause grounds. In determining whether the Michigan Automobile Dealership Act violates the contract clause, the relevant inquiry is whether the act substantially impairs the parties' contractual relationship. See *Energy Reserves Group v. Kansas Power & Light, 459 U.S. 400, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1982).* [*5] We find that the statute impacts on the amount of notice required for termination and certain economic rights and obligations upon termination. We note, however, that the contract itself makes reference to state law and deletes any portion of the contract that is in contravention of that law. Moreover, the automobile manufacturer-dealer industry is one that can reasonably expect to be regulated. It has historically been regulated, by virtue of the 1978 Act and its predecessors. We conclude that the 1981 Act does not substantially impair the parties' contractual relationship.

Even assuming that Fiat could demonstrate that the act substantially impairs its contract rights with Eastern, the state has a significant and legitimate public purpose in enacting the 1981 Act, i.e., to remedy broad economic problems existing between automobile manufacturers and their dealers. The ultimate beneficiary is the automobile consumer.

Thus, for the above reasons, in addition to those set forth on the record, we conclude that *Mich. Comp. Laws §§ 445.1561 et. seq.* is applicable to the termination of the dealership agreement between Eastern and Fiat.

Accordingly, Eastern's motion for summary judgment will [*6] be granted and defendant's motion for stay will be denied as moot.

IT IS SO ORDERED.

/s/ Robert E. DeMascio

Robert E. DeMascio

United States District Judge

Dated: JUN 5, 1985

3

BRIGHT POWER SPORTS, LLC, a Michigan limited liability company, Plaintiff, -vs- BRP US INC., a Deleware corporation, Defendants.

Case No. 09-11545

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2009 U.S. Dist. LEXIS 110134

November 25, 2009, Decided
November 25, 2009, Filed

COUNSEL: [*1] For Bright Power Sports, LLC, Plaintiff: Daniel J. Schouman, LEAD ATTORNEY, Ryan and Schouman, Walled Lake, MI.

For BRP US Inc., Defendant: Steven D. Brock, Bowen, Radabaugh, Troy, MI.

JUDGES: Hon: AVERN COHN, UNITED STATES DISTRICT JUDGE.

OPINION BY: AVERN COHN

OPINION

MEMORANDUM AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This is a Michigan Motor Vehicle Dealer Act (Dealer Act) case under *MICH. COMP. Laws § 445.1561 et seq.* Defendant BRP, US Inc. (BRP) removed the case to this court based upon diversity of citizenship under *28 U.S.C. § 1332*. Plaintiff Bright Power Sports LLC (Bright) is a Michigan limited liability corporation involved in the retail sale of all terrain vehicles (ATVs). BRP is a Delaware corporation with a principle place of business in Florida; it manufactures ATVs. Bright and BRP entered into a dealer agreement under which Bright sold ATVs manufactured by BRP. Bright claims that BRP violated the Dealer Act as well the terms of their contract by refusing to repurchase Bright's remaining inventory of BRP products when the dealer agreement was terminated. The complaint is in three counts:

> (I) [*2] *MICH. COMP. Laws §§ 445.1571* and *.1572* for failure to repurchase inventory at dealer acquisition costs,
>
> (II) Declaratory Judgment pursuant to *MICH. COMP. Laws § 445.1580(3)*, and
>
> (III) Breach of Contract [1]

1 BRP has moved for summary judgment on Bright's breach of contract claim. The Court finds that this claim is based on an allegation that BRP violated the Dealer Act and is wholly derivative of Bright's other claims. Because of its derivative nature, the Court will not address it as an independent claim.

Now before the Court are Bright's motion for summary judgment as to counts I and II and BRP's motion for summary judgment as to all counts. Bright asserts that the Dealer Act requires the repurchase of all current model year vehicles and all financed noncurrent model year vehicles at the dealers' net acquisition costs. BRP asserts that none of the vehicles in question are current model year vehicles, that the Dealer Act does not require the repurchase of noncurrent model year vehicles purchased more than 120 days before termination of a dealer agreement, and that it has not breached any contractual obligation. For the reasons that follow the motions will be gratned in part and denied in [*3] part.

II. ISSUES

A. The Dealer Act

Michigan's Dealer Act governs the relationship between the manufacturers and dealers of new motor vehicles. The act defines new motor vehicle dealers, [2] manufacturers, [3] and motor vehicles. [4] The parties do not dispute that, for purposes of the Dealer Act, Bright was a new motor vehicle dealer, BRP a manufacturer, and the ATVs motor vehicles.

> 2 "'New motor vehicle dealer' means a person, including a distributor, who holds a dealer agreement granted by a manufacturer, distributor, or importer for the sale or distribution of its motor vehicles, who is engaged in the business of purchasing, selling, exchanging, or dealing in new motor vehicles and who has an established place of business in this state." *MICH. COMP. Laws § 445.1565(2).*
>
> 3 "'Manufacturer' means any person who manufactures or assembles new motor vehicles; or any distributor, factory branch, or factory representative." *MICH. COMP. Laws § 445.1564(2).*
>
> 4 "'Motor vehicle' means that term as defined in *Section 33* of the Michigan vehicle code, 1949 PA 300, *MCL 257.33*, but does not include a bus, tractor, or farm equipment." *MICH. COMP. LAWS § 445.1564(3).* "'Motor vehicle' means every vehicle that is self-propelled, [*4] but . . . does not include industrial equipment such as a forklift, front-end loader, or other construction equipment that is not subject to registration under this act. Motor vehicle does not include an electric patrol vehicle being operated in compliance with the electric patrol vehicle act. Motor vehicle does not include an electric personal assistive mobility device." *MICH. COMP. LAWS § 257.33.*

The Dealer Act requires manufacturers and distributors of new motor vehicles to repurchase certain types of inventory from dealers when dealer agreements are terminated. The Dealer Act states:

> (1) Upon termination, cancellation, nonrenewal, or discontinuance of any dealer agreement, the new motor vehicle dealer shall be allowed fair and reasonable compensation by the manufacturer or distributor for the following:
>
> (a) All new current model year motor vehicle inventory purchased from the manufacturer or distributor, which has not been materially altered, substantially damaged, or driven for more than 300 miles and all new motor vehicle inventory not of the current model year which has not been materially altered, substantially damaged, or driven for more than 300 miles, provided the noncurrent [*5] model vehicles were purchased from the manufacturer or distributor and drafted on the dealer's financing source or paid for within 120 days of the effective date of the termination, cancellation, or nonrewal.
>
> (b) Supplies and parts inventory purchased from the manufacturer or distributor and listed in the manufacturer's or distributor's current parts catalog.

MICH. COMP. LAWS § 445.1571. The act does not distinguish between terminations initiated by a manufacturer or by a dealer.

Once a dealer agreement is terminated, the manufacturer is required to repurchase the new motor vehicles described above at the dealer's "net acquisition cost" and parts inventory at the amount stated in the manufacturer's "current parts price list." *MICH. COMP. LAWS § 445.1572.* A manufacturer is also required to pay interest at a rate of 12% for all payments not made within 90 days. *Id.* In addition, a manufacturer found liable under the act shall also be liable for "all court costs and reasonable attorney's fees incurred by the dealer." *MICH. COMP. LAWS § 445.1580(4).*

B. Questions Presented

The motions for summary judgment present two questions which must be answered by the Court:

1. Were the ATVs remaining in [*6] Bright's inventory current or noncurrent model year vehicles?

2. If the ATVs were noncurrent model year vehicles, does the Dealer Act require BRP to repurchase them when they were purchased through Bright's financing source more than 120 days before the Dealer Agreement was terminated?

III. FACTS

On December 6, 2007 Bright and BRP entered into a Recreational Products Dealer Agreement (Dealer Agreement) under which Bright became a dealer in ATVs manufactured by BRP. Bright's termination rights were set forth in the following contract clause:

> (19.3) This agreement may be terminated by DEALER for any or all of the Lines of Products for a material breach of this Agreement by BRP upon thirty (30) days prior written notice to BRP during which time BRP shall have the right to cure such material default or at any time without notice by mutual written consent of DEALER and BRP.

Pursuant to the Dealer Agreement, Bright purchased ATVs from BRP. The ATVs were purchased on credit through Bright's financing source.

On July 1, 2008, BRP launched its 2009 model year ATVs and began marketing them.

On November 10, 2008 Bright sent a letter to BRP purporting to terminate the dealer agreement. The letter stated [*7] in part "Bright hereby terminates its BRP dealer agreement for ATVs pursuant to the terms of said agreement and Michigan law." The letter also informed BRP of its obligation to repurchase the ATVs it had on hand under the Dealer Act. The letter did not assert a material breach by BRP.

On December 3, 2008 Bright's legal counsel sent a second letter to BRP regarding its termination of the dealer agreement. The letter stated in part: "On November 13, 2008 BRP US, Inc. received via certified mail [Bright's] request to terminate its BRP agreement with respect to ATVs. Accordingly, my client's termination date pursuant to contract is December 12, 2008." The letter also requested that BRP repurchase Bright's ATV inventory pursuant to the Dealer Act. Again, the letter did not assert a material breach by BRP.

On December 12, 2008 BRP's legal counsel replied to Bright, acknowledging receipt of Bright's letters and promised to review and respond to Bright's requests.

On January 9, 2009 Bright sent BRP a list of its inventory, which included 88 ATVs. All of the ATVs were of the 2008 model year and had invoice dates between October 26, 2007 and April 28, 2008.

On February 4, 2009 BRP responded to Bright's [*8] repurchase demand by offering to repurchase Bright's ATV inventory at a reduced price. BRP offered to pay 80% of the purchase price for crated inventory and 75% of the purchase price for uncrated inventory.

Bright rejected BRP's repurchase offer and filed this case on March 19, 2009.

III. STANDARD OF REVIEW

Summary judgment is appropriate when the evidence submitted shows that "there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c).* "A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim." *Fed. R. Civ. P. 56(a).* Accordingly, the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying what it believes demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).* When a motion for summary judgment is properly made and supported, an opposing party must set out specific facts showing a genuine issue for trial. *Fed. R. Civ. P. 56(e).* All facts and inferences should be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970).*

IV. [*9] ANALYSIS

A. Date of Termination of the Dealer Agreement

Under the Dealer Act, a dealer's obligation to repurchase motor vehicles upon the termination of a dealer agreement varies depending on whether or not the motor vehicles were of the current model year. Thus the date of termination must be established as a prerequisite to determining the status of the vehicles as current or noncurrent models.

Bright asserts that the letter it sent to BRP on November 12, 2008 terminated the dealer agreement between them. BRP counters by asserting that the dealership agreement was not terminated until February 4, 2009 when it consented to Bright's termination offer.

The dealership agreement between Bright and BRP specifically addressed Bright's termination rights. Bright was permitted to terminate the dealer agreement after 30 days notice if BRP committed a material breach. In the absence of a material breach, Bright could terminate the agreement at any time, but only with BRP's consent.

Furthermore, the Dealer Act does not give a dealer the unilateral right to terminate a dealer agreement when such a right is not provided in the agreement itself.

The letters that Bright sent to BRP on November 12, 2009 [*10] and December 3, 2009 stated that Bright was terminating the dealer agreement pursuant to its contractual terms. However, these letters do not reference a material breach on the part of BRP which would have given Bright the right to unilaterally terminate the agreement. Bright has provided no evidence to suggest that a material breach occurred. Without some evidence of a material breach, Bright could not terminate the dealer agreement without BRP's consent.

BRP, relying on letters it sent to Bright, asserts that it did not consent to the termination until February 4, 2009. The first letter, dated December 12, 2009, confirmed BRP's acknowledgment of Bright's termination request, but stated that BRP would review Bright's requests and respond at a later date. BRP asserts that consent to terminate did not occur until February 4, 2009 when it offered to repurchase Bright's inventory at a reduced price. This letter is the first document attributable to BRP that signals a willingness to terminate the dealer/manufacturer relationship.

Based on the evidence before the Court, no reasonable jury could find that the dealer agreement was terminated in 2008. [5] Bright has provided no evidence of a material [*11] breach by BRP or of mutual consent prior to January 1, 2009. As a result, there is no genuine issue of material fact as to the date of the termination of the agreement.

> 5 Even if a reasonable jury could find that the dealer agreement was terminated in 2008, it would not change the analysis with respect to Bright's motion. At summary judgment, all disputed facts must be construed in the favor of the non-moving party. Thus a termination date in 2009 would still apply with respect to Bright's motion because the date of termination would then be in dispute.

B. Current Model Year Motor Vehicles

The term "current model year motor vehicle" is not defined in the Dealer Act. However, a manufacturer's obligations to repurchase vehicles at the termination of a dealer agreement vary depending on whether the vehicle is of the current model year or a noncurrent model year. Bright asserts that current model year motor vehicles are those whose model year corresponds to the current calendar year. Under this interpretation, 2008 model vehicles would be considered current model year vehicles for all of 2008, even if 2009 models had already been introduced. BRP asserts that current model year motor vehicles [*12] are those of the most recent model year which is available for sale from the manufacturer. Under this interpretation, 2008 model year vehicles cease to be of the current model year as soon as the 2009 models are introduced. There is no published authority construing this phrase.

Because the agreement was terminated in 2009, there is also no material dispute as to the interpretation of the term current model year. The parties agree that all of the ATVs in Bright's inventory were of the 2008 model year. Even under Bright's more lenient interpretation, those vehicles were not of the current model year when the agreement was terminated in 2009. Therefore, the statutory rules for non-current model year motor vehicles apply to all of the vehicles at issue in this case.

C. Noncurrent Model Year Motor Vehicles

1.

In order for a dealer to receive full reimbursement for noncurrent model year motor vehicles (noncurrent models) upon the termination of a dealer agreement, several elements must be met. First the noncurrent model must still be "new" and cannot be "materially altered, substantially damaged, or driven more than 300 miles." *MICH. COMP. LAWS § 445.1571(1)(a).* Second, the noncurrent model [*13] must have been purchased from the manufacturer or distributor from whom repurchase is demanded. *Id.* These two requirements speak for themselves and are not in dispute.

The parties dispute the meaning of the final element: "and drafted on the dealer's financing source or paid for within 120 days." *Id.* Bright asserts that the manufacturer is obligated to repurchase *all* noncurrent models which are financed by the dealer as well as any noncurrent models purchased outright by the dealer within 120 days. In contrast, BRP asserts that the 120 day limitation applies to all noncurrent models obtained by a dealer, whether financed or purchased outright. The term has not been defined by any state or federal court.

On its face, the statute is unclear. The 120 day limitation could reasonably be interpreted to apply only to the immediately preceding element, noncurrent models paid for by the dealer. Alternatively, it could reasonably be interpreted to apply to the entire preceding clause, including both noncurrent model year vehicles that are either paid for outright or financed. While both interpretations may be reasonable, Bright's is more persuasive. Michigan recognizes the rule against surplusage [*14] as a canon of statutory interpretation. The Michigan Supreme Court has stated that "every word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible."

Pittsfield Charter Township v. Washtenaw County, 468 Mich. 702, 714, 664 N.W.2d 193 (2003). When a dealer purchases a vehicle from a manufacturer or distributor it has two options. It can purchase the vehicle on credit or it can buy it outright. In other words, these two alternatives represent the entire field of options open to a dealer. If, as BRP suggests, the 120 day limitation were applied to both credit and non-credit purchases, the statute's specification of these two types of purchases becomes surplus. [6] In order to give meaning to the phrase "and drafted on the dealer's financing source or paid for," the 120 day limitation must only be applied to noncurrent models owned outright by the dealer and not to those that are financed at the termination of a dealer agreement.

> 6 Under BRP's interpretation, there is no difference between the following two statements:
>
> (1) . . . provided the noncurrent model vehicles were purchased from the manufacturer or distributor within 120 days, and
>
> (2) [*15] . . . provided the noncurrent model vehicles were purchased from the manufacturer or distributor and drafted on the dealer's financing source or paid for within 120 days.

BRP asserts that, for a manufacturer, it makes no difference whether a dealer purchases a noncurrent model outright or financed the purchase. In either case, it must repurchase a noncurrent model at the dealer's net acquisition cost even though it is outdated and worth less than its original price. BRP's argument is compelling in cases such as this where the dealer decides to terminate the agreement. It becomes even more compelling in situations where a dealer's inventory includes models that are several years old and have been subject to more substantial depreciation in value.

However, the Dealer Act was designed to address situations where the manufacturer -- not the dealer -- terminated the dealer agreement. The fact that it applies to all terminations and not just to those initiated by the manufacturer does not diminish the protectionist nature of the statute. The Michigan Court of Appeals has stated that the original Dealer Act, passed in 1979, "recognizes the economic disparity that usually exists between manufacturers [*16] and dealers of motor vehicles." *Anderson's Vehicle Sales v. OMC-Lincoln, 93 Mich. App. 404, 409, 287 N.W.2d 247 (1979)*. The Court of Appeals further stated:

> Dealers are with few exceptions completely dependant upon the manufacturer for their supply of cars. When the dealer has invested to the extent required to secure a franchise, he becomes in a real sense the economic captive of his manufacturer. . . . On the other hand, from the standpoint of the automobile manufacturer, any single dealer is expendable. The faults of the factory-dealer system are directly attributable to the superior market position of the manufacturer."

Id. (quoting *New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96, 101 n.4, 99 S. Ct. 403, 58 L. Ed. 2d 361 (1978)*). Further, the 1983 amendment to the Dealer Act which added the repurchase requirement for noncurrent models was intended to provide additional protection for dealers in their interactions with manufacturers. *See Senate Analysis Section, S.B. 206 (Third Analysis)*, Oct. 27, 1983. Because the Dealer Act was intended to protect dealers, an interpretation that provides such protection is more likely to be correct.

Bright notes in its brief that dealers who rely on credit to purchase vehicles [*17] face challenges that are not shared by dealers who are in a position to purchase vehicles outright. These dealers face increased default risks when a dealer agreement is terminated and may need additional protection in the face of a terminated dealer agreement. Bright states:

> Most dealers have millions of dollars worth of financial inventory. If the dealer defaults on such a large note with their finance company, the dealership and the guarantors are financially ruined and the finance company takes a huge hit as well. However, if the dealership actually owns the inventory free and clear, these concerns are non-existent. A manufacturer sits in a better position to repurchase and redistribute noncurrent inventory to its other dealers for sale to the public. A single terminated dealer can't redistribute the inventory anywhere.

Reply Brief of Plaintiff at 3, *Bright Power Sports v. BRP US, Inc.*, No 09-11545. Bright's assertion underscores both the financial risks to dealers and their creditors as well as the difference between dealers who rely on credit and those who rely on cash to purchase their inventory. In light of these considerations, it is reasonable to find that the Michigan legislature [*18] was aware of the heightened risks faced by dealers who rely on financing and sought to provide them with additional protection through the amendments to the Dealer Act.

Thus, the Dealer Act's repurchase provisions for noncurrent models applies to all vehicles financed and to all vehicles purchased free and clear within 120 days of the termination. This interpretation is supported by the plain language of the statute and is the only interpretation that gives meaning to each part of the statute. BRP is correct to assert that this interpretation shifts a significant amount of risk related to noncurrent inventory from the dealer to the manufacturer. However, the purpose of the Dealer Act was to shift some of the risk in a dealer agreement from the dealer to the manufacturer.

2.

In order to recover the net acquisition cost of the noncurrent model ATVs remaining in its inventory, Bright must meet all of the terms specified in the Dealer Act.

First, Bright must prove that the vehicles were not "materially altered, substantially damaged, or driven for more than 300 miles." Although the parties do not appear to dispute this issue, Bright has not produced any evidence in support of this element. [*19] Until Bright provides credible evidence of the condition of the ATVs or the parties stipulate to their condition, Bright cannot prevail on its motion.

Second, Bright must prove that the vehicles were purchased from BRP. The parties do not dispute that BRP was the source of the ATV's. Further, BRP's offer to repurchase the ATVs in question establishes that they were originally purchased by Bright from BRP.

Third, Bright must establish the date of the original purchases and whether they occurred within 120 days of the termination of the dealer agreement. The inventory lists provided by both Bright and BRP establish that all of the ATVs in question were purchased between October 26, 2007 and April 28, 2008. Thus all of the ATVs were purchased more than 120 days before the date of termination.

Finally, BRP must prove that the ATVs were purchased on credit because they were not purchased within 120 days of termination. There is no dispute in this case that the vehicles were drafted on Bright's financing source when they were purchased from BRP. BRP states in its brief that "[i]t is undisputed that all of the units that are at issue in this case were drafted on Plaintiff Bright Powersports [*20] financing source prior to June 1, 2008.

Based on the record before the Court, Bright has met all of the elements required by the Dealer Act for the repurchase of noncurrent models except for the condition of the ATVs. If Bright produces evidence demonstrating the "new" condition of the ATVs as required by the Dealer Act, BRP must repurchase them at Bright's net acquisition cost.

V. CONCLUSION

For the reasons stated above, Bright's motion is DENIED without prejudice with respect to the condition of ATVs in its inventory at the time termination and GRANTED on all other issues. BRP's motion is DENIED. Either party may file a subsequent motion for summary judgment addressing the condition of the ATVs in Bright's inventory.

SO ORDERED.

/s/ Avern Cohn

AVERN COHN

UNITED STATES DISTRICT JUDGE

Dated: November 25, 2009