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The Motor Vehicle Franchise Agreement Arbitration Fairness Act

By Christopher C. Genovese and Erik T. Norton

At first blush, the Motor Vehicle Franchise Contract Arbitration Fairness Act (“Fairness Act”) appeared to be a big win for automobile dealers who were, according to Congress, “virtual economic captives of automobile manufacturers.” S. Rep. No. 107-266, at 2 (2002). The Fairness Act sought to balance the bargaining power between dealers and manufacturers by declaring that arbitration clauses contained in motor vehicle franchise contracts (“Franchise Contracts”) are only enforceable if both parties to the contract agree to arbitrate in writing after the dispute arises. 15 U.S.C. § 1226(a)(2) (2002). The concept is simple enough: in the event of a dispute, dealers have the opportunity to refuse arbitration and to have their dispute heard in the forums provided by state law. Manufacturers can no longer shield themselves from state laws, which were “specifically designed to level the playing field between manufacturers and dealers,” by compelling arbitration in the terms of the Franchise Contract prior to any dispute arising. S. Rep. No. 107-266, at 3 (2002). Because manufacturers cannot compel arbitration, dealers are not be deprived of legal safeguards like the right to appeal. *Id.* Since the passage of the Fairness Act, however, courts have narrowly construed the scope of what constitutes a Franchise Contract. As a result, manufacturers may still arbitrate disputes arising out of contracts if those contracts are deemed separate from the motor vehicle franchise contracts.

This article reviews the history and purpose of the Fairness Act and examines how courts have construed the Fairness Act in the years following its enactment. This article also discusses several reasons why the Fairness Act has not shifted the bargaining power between dealers and manufacturers as greatly as was first anticipated. First, the breadth of the Fairness Act has been limited by a narrow construction of the term Franchise Contract. In determining what constitutes a Franchise Contract, courts look at the Fairness Act’s clear and unambiguous statutory definition with no resort to policy or legislative intent. Second, the Act itself is limited to those Franchise Contracts that have been “entered into, amended, altered, modified, renewed or extended after November 2, 2002.” 15 U.S.C. § 1226(b) (2002). Finally, in situations where a dispute is governed by both the Franchise Contract and a separate agreement containing an arbitration clause, the courts generally rely on the Federal Arbitration Act and the federal policy favoring arbitration to resolve the conflict in favor of arbitration. Manufacturers may be able to show that the dispute is addressed in a separate agreement that contains an arbitration clause. Thus, a dealer only benefits from the Fairness Act

in the rare instance where his agreement falls within the narrowly defined Franchise Contract; the agreement was created or amended after a certain date; and there is no other contract with an arbitration provision that governs the dispute.

History & Purpose of the Fairness Act

In 1956, Congress passed the Federal Automobile Dealers Franchise Act, better known as the “Automobile Dealers’ Day in Court Act,” codified at 15 U.S.C. §§ 1221–1225. See 62B Am. Jur. 2d Private Franchise Contracts § 356 (citing *Kotula v. Ford Motor Co.*, 338 F.2d 732 (8th Cir. 1964)). The purpose of the Automobile Dealers’ Day in Court Act was “to establish a balance of power between manufacturers and dealers in the automobile industry by curtailing the heavy economic advantages of the manufacturers.” 62B Am. Jur. 2d Private Franchise Contracts § 358 (citing *Randy’s Studebaker Sales, Inc. v. Nissan Motor Corp. in U.S.A.*, 533 F.2d 510 (10th Cir. 1976)). Thus, the Dealers’ Day in Court Act was enacted “to assure dealers their day in court by granting them broad judicial protection from the manufacturer’s arbitrary treatment through a newly created cause of action, with an opportunity to secure a judicial determination . . . irrespective of the contract terms.” *Id.* (citing *Dreiling v. Peugeot Motors of America, Inc.*, 850 F.2d 1373 (10th Cir. 1988); *Southern Rambler Sales, Inc. v. American Motors Corp.*, 375 F.2d 932 (5th Cir. 1967); *Barney Motor Sales v. Cal Sales, Inc.*, 178 F. Supp. 172 (S.D. Cal. 1959); *Hoffman Motors Corp. v. Alfa Romeo S.P.A.*, 244 F. Supp. 70 (S.D.N.Y. 1965)).

In addition to the Automobile Dealers’ Day in Court Act, most states “enacted laws specifically designed to level the playing field between manufacturers and dealers and prevent unfair contract terms and practices.” *Id.* Because of the economic impact that disputes between motor vehicle manufacturers and dealers have on individual states and their consumers, states passed laws that governed “nearly every aspect of the franchise contract.” *Id.* The Supreme Court upheld the constitutionality of these statutes regulating the contractual relationship between automobile dealers and manufacturers “as a valid exercise of [states’] police powers. *Id.* (citing *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978)).

However, the judicial protections afforded dealers by the Automobile Dealers’ Day in Court Act and the state franchise laws were easily circumvented after the passage of the Federal Arbitration Act (“FAA”). With the FAA, Congress “declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims that the contracting parties agreed to resolve by arbitration.” *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). The FAA preempted state laws affording a judicial forum to dealers, and the FAA made arbitration agreements “valid, irrevocable, and enforceable.” 9 U.S.C. § 2.

Manufacturers took advantage of the new federal policy favoring arbitration and routinely included mandatory arbitration clauses in their dealership agreements as well as their many “non-negotiated side contracts with dealers, such as those governing dealer finance and incentive disputes.” S. Rep. No. 107-266, at 3–4 (2002). Because manufacturers are limited in number and control the shipment of stock and flow of warranty payments, dealers were subjected to these contracts on a “take it or leave it’ basis.” Id. at 3. Thus, the FAA enabled manufacturers and dealers to contract away the protections that the Automobile Dealers’ Day in Court Act and state laws sought to provide.

When Congress passed the Fairness Act, codified at 15 U.S.C. § 1226, it noted that the Automobile Dealers’ Day in Court Act had not done enough to “level the playing field between manufacturers and dealers” because it did not “address the ‘one-sidedness’ of the [Franchise Contract] itself.” S. Rep. No. 107-266, at 7 (2002). The Fairness Act sought to alleviate this imbalance by declaring that arbitration clauses in Franchise Contracts would not be enforced unless both parties agreed to arbitration in writing after the dispute arises. 15 U.S.C. § 1226(a)(2).

Narrow Construction of Franchise Contract

The Fairness Act applies to all parties of the Franchise Agreement. Some dealers have argued that Congress intended the Fairness Act to protect dealers against manufacturers and that the statute should be interpreted “more leniently” when the dealership is the party seeking arbitration of a dispute. See *Volkswagen of America, Inc. v. Sud’s of Peoria, Inc.*, 474 F.3d 966, 975 (7th Cir. 2007). Because Congress created the Fairness Act to protect dealers, the dealers argued that Congress did not intend for the Fairness Act to prevent dealers from compelling arbitration. Id. (citing S. Rep. No. 107-266, at 7 (2002)). The Seventh Circuit Court of Appeals disagreed, finding that the Senate Committee Report, consistent with the Fairness Act’s language, repeatedly states that “both parties” must consent “after” the dispute arises. Id. (citing S. Rep. No. 107-266 at 2, 8, 9). Thus, the Fairness Act applies to both dealers and manufacturers to limit the enforceability of any arbitration provisions in a Franchise Contract.

The Fairness Act defines a “motor vehicle franchise contract” as “a contract under which a motor vehicle manufacturer, importer, or distributor sells motor vehicles to any other person for resale to an ultimate purchaser and authorizes such other person to repair and service the manufacturer’s motor vehicles.” 15 U.S.C. §1226(a)(1)(B) (2002). The statute further provides that the Fairness Act will apply to “a controversy arising out of or relating to such contract.” Id. § 1226(a) (2) (emphasis added). A manufacturer–dealer franchise agreement clearly falls within this statutory definition. However, dealerships and

manufacturers usually enter into multiple agreements, in addition to the main Franchise Agreement, when engaging in a new business venture. As a result, the controversy is often whether these separate agreements also fall within the statutory definition of a Franchise Contract.

At least one court has adopted a broad, liberal interpretation of the Fairness Act to include within the ambit of Franchise Contracts those manufacturer–dealer agreements that are separate from the Franchise Contract. See 418 F. Supp. 2d 374 (S.D.N.Y. Nov. 21, 2005), rev'd 460 F.3d 231 (2d Cir. 2006); see also Louis S. Chronowski, Jr., *Arciniaga v. Gen. Motors Corp.* Suggests Possible Expansion of Rights Regarding Arbitration Clauses Under ADDCA, 25 FRANCHISE L.J. 124, 126 (2006) (“If dealers and manufacturers want arbitration clauses to be given effect, they should place such arbitration clauses in agreements that are clearly separate from the motor vehicle franchise contract. Even then, as the holding in *Arciniaga* illustrates, there are no guarantees that arbitration will be allowed.”). The lower court in *Arciniaga v. General Motors Corp.* suggested that courts should freely apply the Fairness Act to separate agreements to provide dealers greater protection against mandatory arbitration clauses. *Arciniaga*, 418 F. Supp. 2d. at 378. However, the lower court’s decision was reversed on appeal, and an analysis of the final holding in *Arciniaga* and other subsequent holdings indicates that the current trend is to narrowly construe the Fairness Act so that it does not apply to side contracts. *Arciniaga*, 460 F.3d at 237; see also *Brown Pontiac-Olds, Inc. v. Gen. Motors Corp.*, No 05-204-P-H, 2006 WL 318827, at *1 (D.Me. Feb. 9, 2006) (rejecting the conclusion of *Arciniaga* that other courts “have interpreted the [Fairness Act] too narrowly”).

The dispute in *Arciniaga* involved a stockholder’s agreement between a dealer and manufacturer which enabled the dealer to buy more stock in the dealership as it became profitable. *Arciniaga*, 418 F. Supp. 2d at 376. The two parties then entered into a franchise agreement. *Id.* A dispute later arose regarding the stockholder’s agreement, and the manufacturer sought to compel arbitration pursuant to the terms of that agreement. *Id.* at 377. The dealer argued that the Fairness Act applied to the stockholder’s agreement and moved to stay arbitration. *Id.* at 376. The district court agreed and justified its holding by focusing on the policy underlying the Fairness Act. *Id.* at 378. According to the court, Congress’s interest in balancing the bargaining power between dealers and manufacturers necessitated a broad interpretation of the statutory definition so as not to “exclude instances like this where the corporate structure is not strictly a franchise agreement in form but closely resembles one in substance.” *Id.* at 377. With this, the district court adopted the following method of construing Franchise Contracts: “[i]f other written agreements are so interwoven with the document ostensibly designated as the franchise as to affect materially the legal significance of the latter,

they must be regarded as part of the franchise agreement.” Id. at 378 (quoting *Kavanaugh v. Ford Motor Co.*, 353 F.2d 710, 715 (7th Cir. 1965)). The district court concluded that the stockholder agreement was part of the understanding between the dealer and manufacturer; as such, the Fairness Act applied and the manufacturer could not compel arbitration. Id. at 380.

When determining whether these separate agreements constitute Franchise Contracts, *Arciniaga* stands as the exception rather than the rule: most courts have strictly adhered to the Fairness Act’s statutory definition. For example, before *Arciniaga* was reversed by the Second Circuit, a federal court in Maine distinguished the holding in *Arciniaga* and instead found that the Fairness Act did not apply to various separate agreements. In *Brown Pontiac-Olds, Inc. v. General Motors Corp.*, the dealer and manufacturer entered into a franchise agreement and an “Agreement and Business Plan” through which the dealer acquired another dealership that sold the manufacturer’s cars. *Brown Pontiac-Olds, Inc. v. Gen. Motors Corp.*, No 05-204-P-H, 2006 WL 318827, at *1 (D. Me. Feb. 9, 2006). The dealer argued that although the Agreement and Business Plan was not a Franchise Contract as defined by the Fairness Act, Congress intended the Fairness Act to encompass such an agreement. Id. at *4. The court distinguished *Arciniaga* because the stockholders agreement in that case provided that the manufacturer would supply most of the capital to purchase the dealership. Id. However, in *Brown*, the Agreement and Business Plan was separately negotiated and did not provide for any method of financing. Id. The court concluded that the Agreement and Business Plan could not “be forced into [the] mold” of a Franchise Contract because it was not strictly in the form of a Franchise Contract nor was it similar in substance. Id.

Prior to *Arciniaga*, a Washington district court held that the Fairness Act did not apply to a “Relocation Agreement and Business Plan” or an “Exclusive Use Agreement” because they were separate from the main franchise agreement. See *Today Chevrolet Co. v. GMC*, No. Co2-5642FDB, 2003 U.S. Dist. LEXIS 27003, at *7–8 (W.D. Wash. May 12, 2003). The district court found that these Agreements did not authorize the dealer to sell or service the manufacturer’s cars and were, therefore, not Franchise Contracts within the meaning of the Fairness Act. Id. at *4–5. Similarly, a Mississippi district court held that an agreement that included provisions for the dealer to be employed by and invest in a dealership corporation did not meet the statutory definition of a Franchise Contract and was, therefore, not governed by the Fairness Act. *Pride v. Ford Motor Co.* 341 F. Supp. 2d 617, 621 (N.D. Miss. 2004).

The holdings in *Brown Pontiac-Olds*, *Today Chevrolet*, and *Pride* all restrict the Fairness Act to its statutory language and apply it only to contracts that involve agreements for the selling and service of vehicles. This was the approach the Second Circuit adopted

when it overruled the lower court's holding in *Arciniaga*. 460 F.3d 231 (2d Cir. 2006). The Second Circuit held that the Fairness Act applies only to Franchise Contracts as defined by the Fairness Act and not agreements that merely “touch on the relationship between an automobile manufacturer and a car dealership.” *Id.* at 235. In support of this narrow construction of the Fairness Act, the court noted that Congress separately provided a more narrow definition of the term “motor vehicle franchise contract” in the Fairness Act than it had in the Automobile Dealers’ Day in Court Act. *Id.* at 235–36 (citing § 1221(b)). The stockholders agreement was not subject to the Fairness Act because it did not involve “an agreement by which GM ‘sells motor vehicles to any other person for resale to an ultimate purchaser,’” and it did not authorize the dealer to service or repair GM automobiles. *Id.* at 235.

The dealer in *Arciniaga* made two arguments for why the court should apply a broader interpretation of the statutory definition to circumvent the Fairness Act’s plain language: legislative policy and incorporation under state law. *Id.* at 236. The Second Circuit disregarded the dealer’s policy arguments; because the Fairness Act was unambiguous, it need not “consider the statute’s legislative history.” *Id.* Further, the court refused to accept the dealer’s incorporation argument that the multiple agreements created a “non-severable package” from which emerged a “motor vehicle franchise contract,” stating that such a use of state contract law was “not unlike trying to fit the step-sisters foot into Cinderella’s shoe.” *Id.* An analysis of that sort would “abandon ‘motor vehicle franchise contracts’ to the vagaries of different states’ contract laws.” *Id.* The court refused to decide whether the incorporation argument was plausible because the laws of the two states governing the two agreements required evidence of the parties’ intent for the agreements to be interpreted as one contract, and there was no such evidence. *Id.* at 236–37. Based on contract law of the two states, the Second Circuit considered the following four factors in finding that the parties had not intended for the agreements to be read as one: (1) the parties involved in the two contracts were different; (2) the contracts were not mutually dependent upon one another for effect; (3) the agreements were made on separate forms and did not refer to one another; and (4) the agreements serve separate purposes. *Id.* at 237. Notably, the court did not identify any of these factors as particularly crucial nor did it address how these factors should be weighed against one another. A different set of facts could very easily produce a different outcome.

The current trend of the courts is a narrow application of the Fairness Act only to those contracts that meet the statutory definition of a Franchise Contract with no resort to policy or legislative intent. However, where a dealer can show that incorporation would be appropriate under state contract law, the question remains whether courts will incorporate the separate agreement so as to bring it within the definition of a Franchise Contract or refuse incorporation to ensure uniform application of the federal statute across the states.

Modifications

The Fairness Act only applies to Franchise Contracts “entered into, amended, altered, modified, renewed, or extended after November 2, 2002.” 15 U.S.C. §1226(b) (2002). Dealers may not have much difficulty showing that their Franchise Contract was modified or renewed. Some courts have applied lenient standards as to what constitutes a modification or renewal for purposes of the Fairness Act. For example, a manufacturer and a dealer entered into a franchise agreement that required them to establish “Target Agreements” each year to determine the number of vans the dealer needed to buy and sell. *DaimlerChrysler Vans LLC v. Freightliner of NH, Inc.*, No. 03-304-B, 2004 WL 51314, at *2 (D.N.H. Jan. 8, 2004). The court held that these Target Agreements were modifications to the franchise agreement because they were required by the franchise agreement and they changed sales numbers each year which were not otherwise provided by the franchise agreement. *Id.* at *5–6. Therefore, although the actual Franchise Contract remains unchanged, the Fairness Act may apply if subsequent agreements alter or redefine the general provisions provided in the Franchise Contract.

While it may be easier for dealers to show that a modification to the Franchise Contract was made, the modifications or renewals must be valid to trigger application of the Fairness Act. In *Indian Motorcycle Corp. v. Yamin Motorcycle of Houston*, a dealer argued that the Fairness Act should apply because his franchise agreement had been orally modified after November 2, 2002. No. C 03-01891 WHA, 2003 WL 23416114, at *4 (N.D. Cal. July 14, 2003). However, the franchise agreement included a “no oral modification” clause, and there was no other evidence that the contract had been modified or renewed. *Id.* at *4-5. Because the franchise agreement had not been properly modified, the court held that the Fairness Act did not apply. *Id.* at *5.

Dealers may also encounter difficulty showing that the modification was appropriately timed. While it is clear from the language of the statute that a modification must take place after November 2, 2002, for the Fairness Act to be applicable, courts have split on whether the modification may take place after the controversy has arisen. Some courts have held that the modification must take place before the controversy arises. For example, the District Court of Maine cited with approval the Northern District of Indiana’s holding that the “[Fairness Act] could only reasonably have been intended to apply to controversies arising [after the modification] rather than before the modification.” *Brown Pontiac-Olds, Inc. v. GMC*, No 05-204-P-H, 2006 WL 318827, at *5 (D. Me. Feb. 9, 2006) (citing *Tom Naquin Chevrolet, Inc. v. Gen. Motors Corp.*, No 3:02-Cv-0714 RM, 2003 U.S. Dist. LEXIS 27093, at *10 (N.D. Ind. June 23, 2003)). Otherwise, “the statute would have a retroactive application that Congress clearly hadn’t intended.” *Id.* However, some courts have found that

there is no such limit on when the modification must take place. In *DaimlerChrysler Vans, LLC v. Freightliner of New Hampshire, Inc.*, the court rejected the argument that modifications were irrelevant because they did not become effective until after the respondent moved to compel arbitration. No. 03-304-B, 2004 WL 51314, at *2 (D.N.H. Jan. 8, 2004). Instead, the court found that the Fairness Act “does not exempt amendments that occur after a demand for arbitration has been made.” *Id.* While there is disagreement over the implications of the statute’s language, courts are likely to base their decisions on whether they favor the arbitration goals of the FAA or the dealer protection goals of the Fairness Act. Because the trend is to narrowly construe the Fairness Act, courts are likely to find that the Fairness Act is not implicated by modifications after a dispute has arisen.

Conflict with the Federal Arbitration Act

By enacting the Fairness Act, Congress intended to resolve the conflicting policy issues of the Automobile Dealers’ Day in Court Act and the FAA. Under the Fairness Act, dealers may not be coerced into mandatory arbitration agreements which would deny them access to judicial review. If the manufacturer desires arbitration, both parties must agree in writing after the dispute arises. To Congress, this may have seemed like a perfect solution to resolving the imbalance in bargaining power between dealers and manufacturers. However, when a dispute relates to both a Franchise Contract and a separate agreement that contains an arbitration clause, a court is likely to follow the federal policy favoring arbitration under the FAA and enforce the arbitration clause in the separate contract. See *Brown Pontiac-Olds v. General Motors*, No 05-204-P-H, 2006 WL 318827, at *6 (D. Me. Feb. 9, 2006); see also *Trapp Chevrolet-Oldsmobile-Cadillac, Inc. v. GMC*, No. 02-0158 § T(1), 2002 U.S. Dist. LEXIS 10412, at *7 (E.D. La. May 31, 2002). This judicial policy may result in an extreme narrowing of the Fairness Act. In many cases, the manufacturer may validly argue that a dispute is addressed by a provision in a separate contract and compel the dealer to arbitrate the dispute.

Prior to the passage of the Fairness Act, the court made clear in *Trapp Chevrolet v. General Motors Corp.* that if a dispute can be said to arise out of a contract with a binding arbitration clause and a contract with a voluntary arbitration clause, “all doubts concerning the scope of coverage of an arbitration clause should be resolved in favor of arbitration.” No. 02-0158 § T(1), 2002 U.S. Dist. LEXIS 10412, at *7 (E.D.La. May 31, 2002) (citing *Pennzoil Exploration and Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1065 (5th Cir. 1998)). The court deferred to the Congressional “declaration of a liberal federal policy favoring arbitration agreements.” *Id.* at *6 (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983)). While the Trapp opinion was decided before the Fairness Act was enacted, it remains important because even after its

passage, courts have relied on this logic to evaluate the breadth of a binding arbitration clause, notwithstanding the fact that the dispute in question is governed by the Fairness Act. See, e.g., *Brown Pontiac-Olds v. General Motors*, No. 05-204-P-H, 2006 WL 318827, at *3 (D. Me. Feb. 9, 2006) (“The existence of a broad agreement to arbitrate creates a presumption of arbitrability which is only overcome if it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” (quoting *MSAD No. 68 v. Johnson Controls, Inc.*, 222 F. Supp. 2d 50, 55 (D. Me. 2002))); *Tom Naquin Chevrolet, Inc. v. GMC*, No. 3:02-CV-0714 RM, 2003 U.S. Dist. LEXIS 27093 (N.D. Ind. June 23, 2003) (holding that the parties must pursue arbitration, despite the argument that the Fairness Act is applicable, because “it cannot be said with positive assurance that the arbitration clauses aren’t susceptible of an interpretation that covers the parties’ disputes” (citing *Welborn Clinic v. Medquist*, 301 F.3d 634, 639 (2002))).

The conflict between the FAA and the Fairness Act is clearly illustrated in *Brown Pontiac-Olds v. General Motors*. The manufacturer claimed that the actions that led to the dispute between the manufacturer and dealer were addressed in the Agreement and Business Plan which contained a binding arbitration clause; therefore, the dispute should be governed by the FAA. No. 05-204-P-H, 2006 WL 318827, at *3 (D. Me. 2006). The dealership, on the other hand, claimed that the dispute arose from the franchise agreement and should be governed by the Fairness Act. *Id.* The court relied in part on the court’s analysis in *Trapp* to find that the arbitration clause contained in the Agreement and Business Plan was broad enough to cover the dispute in question. *Id.* at *6. Specifically, the court stated: “[a]t least portions of the present dispute fall within the scope of that agreement Because some of the plaintiff’s claims are subject to mandatory arbitration, all of its claims should be submitted in the first instance to an arbitrator.” *Id.* (citing *Tom Naquin Chevrolet, Inc. v. General Motors Corp.*, No. 3:02-CV-0714 RM (N.D. Ind. June 23, 2003)).

In addition, when a dispute between a manufacturer and dealer involves multiple claims arising out of multiple contracts, a court in its discretion may hear some of the issues but stay the remaining issues for arbitration. See *Volkswagen of America, Inc. v. Sud’s of Peoria, Inc.*, 474 F.3d 966, 971 (7th Cir. 2007). In *Sud’s*, the district court chose to hear claims that were governed by the Franchise Agreement but stayed the claims that arose out of non-franchise agreement contracts. *Id.* at 969. In affirming this decision, the Seventh Circuit cautioned that, although permissible, “staying arbitrable issues, while allowing nonarbitrable issues to proceed in the district court, risks ‘inconsistent rulings’ because the pending arbitration is ‘likely to resolve issues material to [the] lawsuit.’” *Id.* at 972 (quoting *AgGrow Oils, LLC v. Nat’l Union Fire Ins. Co. of Pittsburgh*, 242 F.3d 777, 783 (8th Cir. 2001)). The Seventh Circuit offered examples where a court abused its discretion by choosing to stay some claims while allowing

others to proceed when the non-arbitrable issue was completely dependent on the arbitrable issue for assessment of the defendant's liability. *Id.* (citing *Morrie Mages & Shirly Mages Foundation v. Thrifty Corp.*, 916 F.2d 402 (7th Cir. 1990)). Thus, in a suit between a dealer and manufacturer involving multiple claims governed by multiple contracts, a claim arising out of the Franchise Agreement may be subject to arbitration if the court finds that the claims are interdependent.

The Brown and Sud's holdings should encourage manufacturers to include arbitration clauses in separate agreements which are broad enough to cover disputes arising out of both the separate agreement and the Franchise Contract. If courts follow Trapp, Brown, and Sud's, manufacturers may freely bypass the strictures of the Fairness Act and force dealers to arbitrate disputes even when they arise out of the Franchise Contract.

Conclusion

Although the Fairness Act was intended to protect dealers from being forced to arbitrate disputes by manufacturers, that purpose has not been fulfilled for several reasons. Courts have narrowly construed the term "Franchise Contract" by looking only to the statutory definition without resort to policy or legislative intent. The result of this narrow construction is that manufacturers may enforce arbitration provisions found in separate agreements which are not considered Franchise Contracts within the meaning of the Fairness Act. Dealers are left with the slight chance that courts will refuse to compel arbitration because the separate agreement was incorporated into the Franchise Contract under state contract law. The Fairness Act's effect is also limited because it only applies to Franchise Contracts that were entered into, modified, or renewed after November 2, 2002. While courts have been lenient regarding what may constitute a modification, courts have required that they be valid to trigger application of the Fairness Act. Furthermore, courts are split on whether such a modification must occur prior to the dispute. Finally, in cases where there are separate agreements that contain arbitration provisions in addition to the Franchise Contract, and doubt exists as to which governs the dispute, courts tend to defer to the FAA and compel arbitration. All of these trends undermine the purpose of the Fairness Act to protect dealers from forced arbitration. Despite the Congressional attempt to tip the balance of power between dealers and manufacturers in favor of dealers, courts have allowed manufacturers to retain their ability to compel arbitration in many of the disputes that arise between dealers and manufacturers.