Controlling Person Liability for Motor Vehicle Dealer Violations of the South Carolina Motor Vehicle

December 21, 1996

By Daniel F. Blanchard, III

Winter, 1996

47 SC L. Rev. 349

Susan C. Rosen & Daniel F. Blanchard, III

I. Introduction

A recent trend by private litigants to name corporate executives as defendants in lawsuits brought against motor vehicle dealerships under the South Carolina Motor Vehicle Unfair Trade Practices Act (MVUTPA) n1 has aroused considerable interest in the scope of personal liability under that Act. Threatened with personal liability for the acts and omissions of corporate subordinates, executives are asking an important question: Can a plaintiff hold an individual liable for a motor vehicle dealership's violation of the MVUTPA based solely on the individual's status as an officer, director, or controlling shareholder of the offending dealership? A negative response to this question would seem certain considering such entrenched doctrines as the corporate veil and limited shareholder liability. However, in Rowe v. Hyatt n2 the South Carolina Court of Appeals recently interpreted language somewhat obscured in the MVUTPA to extend individual liability to the officers, directors, and controlling persons of corporate dealerships for the misconduct of dealership employees. n3 [*351]

Seizing this statutory language, private litigants are suing the officers, directors, and persons in control of motor vehicle dealerships in their individual capacities without even alleging that the individuals participated in or knew of the actionable misconduct. Although empirical data is unavailable on the number of private damage actions filed under the MVUTPA against the officers, directors, and controlling persons simply because of their office or shareholding status, the authors' observations and experience suggest that litigants are increasingly bringing these claims. n4 Moreover, it is only reason- able to believe that these claims will proliferate in the wake of Rowe and as attorneys become more familiar with the provisions of the MVUTPA. n5

This article argues that individual officers, directors, and controlling persons should not be held personally liable under the MVUTPA based solely on their relationship to an offending dealership and urges the legislature to amend the existing statute. Part II provides an overview

of the general principles in corporation law and tort law governing the personal liability of officers, directors, and shareholders to third persons. Part III summarizes the statutory provisions of the MVUTPA and the South Carolina Unfair Trade Practices Act (UTPA). n6 Part III also discusses the specific provisions of the MVUTPA that the South Carolina Court of Appeals construed to impose individual liability on the officers, directors, and controlling persons of motor vehicle dealerships for the acts of dealership employees. Part IV examines the judicial extension of personal liability to the controlling persons of offending entities in actions brought under the UTPA and the Federal Trade Commission Act (FTCA). n7 Part V sets forth the arguments against extending personal liability to the officers, directors, and controlling persons of motor vehicle dealerships when liability is based solely on the dealership's violation of the MVUTPA. Finally, Part VI offers a legislative solution to the MVUTPA's current inadequacies. [*352]

II. General Principles Governing the Personal Liability of Officers, Directors, and Shareholders to Third Persons

A. Shareholder Liability

Limited shareholder liability is the defining characteristic of the modern corporation. Shareholders are not personally liable for the corporation's acts or debts. n8 Unless the corporation's articles of incorporation provide otherwise, shareholders risk only their investment regardless of the extent of the corporation's liabilities. n9 The corporate veil protects shareholders from personal liability because the corporation and its shareholders are separate and distinct entities. n10 The corporate veil doctrine provides that when "corporate formalities are substantially observed, initial financing is reasonably adequate, and the corporation is not formed to evade an existing obligation or a statute or to cheat or to defraud," the shareholders are shielded from liability for the tortious acts or debts of the corporation. n11 Majority or total ownership of a corporation's shares by one person does not by itself impose any additional or different liability on that shareholder. n12 Limited shareholder liability supports the vital economic policy of encouraging capital investment in the massive business enterprises which are essential to industry and commerce. n13 Limited shareholder liability makes investments less risky and increases their expected value to potential investors. n14 [*353]

This rule of limited liability, however, does not immunize shareholders from personal liability for torts in which they participate. n15 Furthermore, third persons may hold shareholders personally liable when they are parties to or personal guarantors of contracts made on behalf of the corporation. n16 The courts will also "pierce the corporate veil" and impose personal liability on the shareholders when the corporate form has been abused to defraud creditors or treat them in an outrageously unfair manner. n17 These cases typically involve shareholders in a closely held corporation who manipulate the corporate entity for personal gain. The

manipulation is often manifested by gross corporate undercapitalization and the disregard of corporate formalities. n18 The corporate veil is pierced when the corporation is no longer a bona fide independent entity and when treating the corporation as a separate entity would justify a wrong or protect a fraud. A judgment against an insolvent corporation that is a mere shell is worthless if the shareholders, in whose hands the assets are concentrated, are insulated from personal liability.

B. Director and Officer Liability

Like shareholders, directors and officers are generally not liable to a corporation's creditors or to third persons for corporate acts or debts. n19 Directors and officers are merely agents of the corporation and are protected from personal liability on corporate contracts if they do not purport to bind themselves individually. n20 In addition, a director or officer does not incur personal liability for the corporation's torts merely because of his official relationship to the corporation. n21

A director or officer can be liable, however, on a written instrument executed in a manner that makes him personally liable. n22 For example, a [*354] corporate president who executes a contract on behalf of the corporation by signing only his name with the affix "president" is personally liable on the contract unless the whole instrument or parol evidence shows that it was intended to be a contract by the corporation. n23

Furthermore, directors and officers are personally liable for their own torts, whether committed in the course of the corporation's business or not. n24 A director or officer cannot escape liability on the ground that in committing the tort he acted as a director or officer of the corpora- tion. Directors and officers are also personally liable for the acts of subordi- nates that they have ratified. In Hunt v. Rabon n25 the South Carolina Supreme Court summarized the standard governing the personal liability of a corporate officer or director for the misconduct of corporate employees. "A director, officer, or agent is not liable for torts of the corporation or of other officers or agents merely because of his office. He is liable for torts in which he has participated or which he has authorized or directed." n26

III. South Carolina Unfair Trade Practices Legislation Regulating Motor Vehicle Dealers

A. The UTPA

The South Carolina General Assembly, against the backdrop of the burgeoning consumer protection movement of the 1960s and 1970s, enacted the UTPA to protect innocent consumers from deceptive trade practices and to eliminate unfair methods of competition between competing businesses. n27 Commentators often refer to the UTPA as the "Little FTC Act" [*355] because of its similarity to the FTCA. n28 In fact, the UTPA instructs South Carolina courts, when construing section 39-5-20(a), to "be guided by" the interpretations

given by the federal courts and the Federal Trade Commission (FTC) to section 5 of the FTCA. n29 This express adoption of the extensive body of precedent existing under the FTCA was intended not only to benefit the courts but also to guide businesses in determining what is an unfair or deceptive trade practice. n30

Section 39-5-20(a) of the UTPA declares that "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are . . . unlawful." n31 The South Carolina Court of Appeals has defined an unfair trade practice as one that is "offensive to public policy or . . . immoral, unethical, or oppressive." n32 In addition, a practice is deceptive if it merely has a tendency or capacity to deceive. n33 Neither actual deception nor intent to deceive is needed to prove that a practice is deceptive under the UTPA. n34 Proof of common-law fraud is not required to support a finding of deceptive conduct under the Act. n35

The UTPA provides for enforcement by the attorney general n36 and, with the attorney general's prior approval, by solicitors and county and city attorneys. n37 The Act permits the government to seek injunctions, n38 civil [*356] penalties, n39 restitution for injured persons, n40 and the dissolution, suspension, or forfeiture of a corporate charter or franchise. n41 During these proceedings, government attorneys can issue investigative demands and subpoenas to compel the testimony of witnesses and the production of documentary and physical evidence. n42

The UTPA also grants a private right of action to "any person who suffers any ascertainable loss of money or property, real or personal," as the result of a violation of section 39-5-20. n43 Private plaintiffs may recover actual damages and, in the case of willful violations, treble damages. n44 "A willful violation occurs when the party committing the violation knew or should have known that his conduct was a violation of [the Act]." n45 In addition, prevailing plaintiffs are entitled to reasonable attorney's fees and such other relief as the court may deem "necessary and proper." n46 Although a showing of willful conduct in violation of section 39-5-20 is necessary to recover treble damages, willfulness is not necessary to receive attorney's fees–merely finding a viola- tion itself is sufficient. n47

Public enforcement actions and private damages actions may be brought against any person who uses or employs any method, act, or practice declared unlawful under section 39-5-20. n48 The term "person" is broadly defined and includes "natural persons, corporations, trusts, partnerships, incorporated or [*357] unincorporated associations and any other legal entity." n49 Thus any person who violates the UTPA and causes another person an "ascertainable loss of money or property" is subject to personal liability under the Act. n50

Although the statutory definition of person does not specifically refer to officers, directors, or shareholders, in government enforcement actions South Carolina courts have extended the definition to include controlling persons of offending entities. n51 As discussed below, it is

 |

unclear whether these cases authorize the government to hold controlling persons liable even if they did not participate in or ratify the UTPA violation. n52 However, the South Carolina Supreme Court recently held that in private damages actions brought under the UTPA, officeholding or shareholding alone is insufficient to confer controlling person liability for corporate violations. n53 In private damages actions, control- ling persons must personally participate in or authorize the unlawful conduct to be liable for a corporation's unfair trade practices. n54

B. The MVUTPA

The language of the MVUTPA closely parallels that of the UTPA. n55 Sec- tion 56-15-30(a) of the MVUTPA declares that "unfair methods of competi- tion and unfair or deceptive acts or practices as defined in section 56-15-40 [*358] are . . . unlawful." n56 The Act makes it a violation of section 56-15-30(a) for any "motor vehicle dealer to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public." n57 The MVUTPA protects consumers from unfair and deceptive trade practices in connection with the sale, rental, or lease of a new or used motor vehicle. n58 Like the UTPA, the MVUTPA expressly instructs South Carolina courts to apply section 56-15-30(a) of the statute by reference to the provisions of the FTCA. n59

The MVUTPA, like the UTPA and FTCA, provides for cease and desist orders and injunctive relief as remedial measures in actions brought by the attorney general. n60 The MVUTPA further grants a private cause of action to "any person who shall be injured in his business or property by reason of anything forbidden" by the Act. n61 Violations of section 56-15-30(a) carry with them mandatory double damages and attorney's fees. n62 A private plaintiff is not required to prove that the defendant knowingly or wilfully violated the MVUTPA. The plaintiff need only show that the defendant engaged in conduct that violated the Act and that caused injury to the plaintiff's business or property. n63 The court can also award treble damages [*359] in the form of statutory punitive damages if the jury finds that the defendant acted maliciously. n64 Most importantly, damages may be "pyramided"–a plaintiff can recover double damages and punitive damages up to three times actual damages when malice is shown. n65

A motor vehicle dealer is defined as "any person who sells or attempts to effect the sale of any motor vehicle." n66 In an unexplained departure from the UTPA, the MVUTPA expands the definition of a person to include:

A natural person, corporation, partnership, trust or other entity, and, in case of an entity, it shall include any other entity in which it has a majority interest or effectively controls as well as the individual officers, directors and other persons in active control of the activities of each such entity. n67

The MVUTPA definition is patently more inclusive than the UTPA defini- tion n68 and is therefore troublesome for the officers, directors, and controlling shareholders of corporate dealerships.

Within its definition of a motor vehicle dealer, the MVUTPA arguably encompasses four different categories of individuals and entities: [*360]

(1) Any natural person, corporation, partnership, trust, or other entity which sells or attempts to effect the sale of any motor vehicle.
Example. A sole proprietor in the automobile sales business or an incorporated automobile dealership.
(2) In the case of an "entity" which sells or attempts to effect the sale of any motor vehicle, any other entity in which the first entity has a majority interest or effective control.
Example. The wholly-owned subsidiary of an incorporated automobile dealership.
(3) In the case of an "entity" which sells or attempts to effect the sale of any motor vehicle, the officers, directors, and other persons in active control of the activities of that entity.
Example. The president of an incorporated automobile dealership.
(4) In the case of an "entity" which sells or attempts to effect the sale of any motor vehicle, the officers, directors, and other persons in active control of the activities of any other entity in which the first entity has a majority interest or effective control.

Example. The president of a wholly-owned subsidiary of an incorpo- rated automobile dealership.

The MVUTPA's definition of a motor vehicle dealer clearly includes the individuals and entities identified in subdivisions (1) and (2). Whether the definition also includes the individuals identified in subdivisions (3) and (4) depends on one's interpretation of the phrase "each such entity." Section 56- 15-10(n) states that the term person means a legal entity itself plus any other entity that it effectively controls as well as the officers, directors, and other persons in control of "each such entity." n69 The statute's use of the word "such" creates the difficulty in ascertaining whether the drafters intended a motor vehicle dealer to include the individuals identified in subdivisions (3), (4), or both. n70 The word such refers to some entity previously mentioned in the sentence. The critical question then becomes: To which before- mentioned entity (or entities) does the phrase "each such entity" refer? Three interpretations can be employed to answer this question.

Under the first interpretation, the phrase "each such entity" refers only to the entity that is effectively controlled by the entity selling motor vehicles [*361] or in which the entity selling motor vehicles has a majority interest. This interpretation, therefore, omits the individuals identified in subdivision (3) from the definition of a motor vehicle dealer because these individuals fail to qualify as officers, directors, or persons who control an entity that is

effectively controlled by an entity selling motor vehicles. This interpretation would include, however, the individuals identified in subdivision (4).

Under the second interpretation, the phrase "each such entity" refers only to the entity that is selling the motor vehicles. This interpretation includes the individuals identified in subdivision (3) because they qualify as officers, directors, or persons in control of an entity that sells motor vehi- cles. However, individuals identified in subdivision (4) are excluded from the definition of a motor vehicle dealer.

Under the third interpretation, the phrase "each such entity" refers not only to the entity that is effectively controlled by the entity selling motor vehicles or in which the entity selling motor vehicles has a majority interest, but also to the entity that is selling the motor vehicles. Accordingly, the third interpretation would include the individuals identified in subdivision (3) because they are officers, directors, or persons in control of an entity that sells motor vehicles. This interpretation also encompasses the individuals identified in subdivision (4) because they are officers, directors, or persons in control of an entity that is effectively controlled by an entity selling motor vehicles or in which the entity selling motor vehicles has a majority interest.

The second interpretation appears to be the most logical and reasonable of the three alternatives. Adopting the first interpretation would create the anomalous result in which the officers, directors, and persons in control of a dealership would not be included in the definition of a motor vehicle dealer, but the officers, directors, and persons in control of a subsidiary of the dealership would be included. It would contradict logical reasoning to define a motor vehicle dealer to include the persons in control of a subsidiary of a dealership but to exclude the persons in control of the dealership itself. n71

The third interpretation should not be followed because it disregards the plain and ordinary meaning of the words used in the definition. A principle of construction requires that statutory language must be given its plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. n72 Applying this principle to the MVUTPA, the [*362] ordinary meaning of the phrase "each such entity" is grammatically singu- lar. The phrase refers to only one entity: either the entity selling motor vehicles or the entity that is effectively controlled by the entity selling motor vehicles. Only a forced construction can expand the meaning of the phrase to encompass both the entity selling motor vehicles and the entity which is effectively controlled by the entity selling motor vehicles. Such a construction would effectively rewrite the phrase "each such entity" to mean both such entities.

Consequently, the second interpretation is the most reasonable of the three alternatives because (1) it leads to the most sensible result and (2) it gives the phrase its plain and ordinary

meaning. Under this interpretation, the MVUTPA definition of the term "person" would effectively read as follows:

"Person," a natural person, corporation, partnership, trust or other entity, and, in the case of [a corporation, partnership, trust or other entity], it shall include i any other entity in which [the corporation, partnership, trust or entity] has a majority interest or effectively controls as well as ii the individual officers, directors and other persons in active control of the activities of [the corporation, partnership, trust or entity].

The South Carolina Supreme Court's recent decision in Toyota of Flor- ence, Inc. v. Lynch, n73 which is the first reported appellate court opinion to discuss the MVUTPA's definition of the term person, fails to provide any insight regarding which of the three interpretations the courts will adopt. The Lynch decision, however, does indicate that a corporate holding company fails to qualify as an "officer, director, or person in active control" of a motor vehicle distributor within the meaning of the MVUTPA.

In Lynch, the plaintiff obtained substantial jury verdicts under the MVU- TPA against Southeast Toyota Distributors (SET), a motor vehicle distributor, and JM Family Enterprises (JM), a holding company that was the sole share- holder of SET. n74 The MVUTPA defines a distributor as "any person who sells or distributes new motor vehicles to motor vehicle dealers." n75 Like the definition of the term dealer, the definition of a distributor incorporates the MVUTPA's definition of the term person. Therefore, under the same reasoning applied to the definition of a dealer, the MVUTPA arguably includes four different subdivisions of individuals and entities within its definition of [*363] a distributor. n76 Under a subdivision (3) situation, the officers, directors, and other persons in active control of SET (an incorporated "distributor") could be held liable for SET's violations of the MVUTPA. Because JM owned all of SET's stock, an argument could be made that JM qualified as a person in active control of SET's activities within the meaning of the MVUTPA.

The supreme court, however, reversed the jury verdict against JM and ruled as a matter of law that the plaintiff could not hold JM liable under the MVUTPA. n77 The court disposed of the issue in a rather summary fashion. n78 The entire text of the court's opinion relating to JM's liability under the MVUTPA provides as follows:

The jury returned a verdict for [the plaintiff] under the MVUTPA against both SET and JM. JM contends this verdict against it should be set aside because it is not one of the entities which can incur liability under the Act. We agree.

[The plaintiff] alleged damages as the result of violations of SC Code Ann. section 56-15-40 (1991). This statute makes it unlawful for a manu- facturer, factory branch or division, factory representative, distributor, wholesaler, distributor branch or division, distributor representative, motor vehicle dealer, or wholesale branch or division, to engage in certain

conduct. Id. These terms are defined in SC Code Ann. section 56-15-10 (1991). While SET is both a distributor and a franchisor under the Act, section 56-15-10(g) and (j) (1991), there is no provision making the owner of such an entity liable. Cf., section 56-15-10(n) (liability extended to an entity in which SET has a majority interest or effectively con- trols). The judgment against JM under the Act shall be set aside. n79

[*364]

The court clearly based its holding on that portion of the MVUTPA's definition of the term person which expressly includes a "natural person, corporation, partnership, trust or other entity, and, in case of an entity, it shall include any other entity in which it has a majority interest or effectively con- trols." n80 In other words, the court focused on a subdivision (2) situation as discussed above. Because SET did not have a majority interest in or effectively control JM the court correctly held that JM could not be held liable under that portion of the definition.

Unfortunately, the supreme court did not further expound upon the scope of the MVUTPA's definition of a person in rendering its decision. Noticeably absent from the court's opinion is any discussion of the remaining portion of the definition–the language referring to the "officers, directors and other persons in active control" of a legal entity. Even though SET did not have a majority interest in or effectively control JM, JM was SET's sole shareholder and conceivably could be held liable to the plaintiff under a subdivision (3) situation. Under this scenario, the plaintiff could sue SET, an entity which sells or distributes new motor vehicles to motor vehicle dealers, as well as JM, the officer, director, or "person" in active control of SET.

Despite the existence of the "officers, directors, and other persons in active control" language in the MVUTPA, the supreme court specifically stated that "there is no provision [in the Act] making the owner of" a distributor liable. n81 If applied literally, this statement could mandate a wholesale rejection of the imposition of liability based on either a subdivision (3) or (4) situation discussed above. It is unlikely, however, that the court intended its holding to be so sweeping. The importance of the Lynch holding most likely is that sole shareholder status alone is insufficient to impose controlling person liability under the MVUTPA. In other words, if the sole shareholder of a corporation is not also a corporate officer or director and does not otherwise actively control or manage the daily activities of the corporation, then it is inappropriate to impose controlling person liability upon the shareholder under the MVUTPA. The apparent conclusion of the supreme court is that JM confined its activities merely to owning SET's stock and did not control or manage SET's business activities. n82 The court's decision in [*365] Lynch, therefore, effectively immunizes certain passive investors from controlling person liability under the MVUTPA.

In Rowe v. Hyatt, n83 the second and most recent appellate court opinion to discuss the

MVUTPA's definition of a person, the South Carolina Court of Appeals conclusively determined that a person includes the individuals identi- fied in a subdivision (3) situation. In Rowe the president, director, and sole shareholder of a motor vehicle dealership was held personally liable for a salesman's violation of the MVUTPA even though he did not know of or participate in the salesman's misconduct. n84 The result in Rowe necessarily rejects the first interpretation of the phrase "each such entity" as previously discussed. However, the opinion still leaves unresolved which of the remaining two interpretations the courts will follow. n85

The facts in Rowe are straightforward. Ken Hyatt was the sole sharehold- er, president, and director of Imperial Chrysler-Plymouth, Inc. (Imperial), an incorporated automobile dealership. n86 The plaintiffs, Roger and Mitchalene Rowe, relied on a dealership salesman's representations when they purchased an automobile from Imperial. n87 The salesman violated the MVUTPA by misrepresenting the automobile to be a 1987 demonstrator vehicle when in fact it was a 1986 model purchased from a rental fleet. n88 Although Hyatt exercised significant control over Imperial's operations, he never had any contact with the Rowes and was not involved in the sale of the automobile at issue. n89 The evidence disclosed that Hyatt did not personally participate in, know of, or approve of the salesman's unlawful conduct.

Despite Hyatt's lack of participation in or knowledge of the salesman's misconduct, the court of appeals held that the Rowes could maintain a cause of action under the MVUTPA against Hyatt in his individual capacity based on the salesman's violation of the Act. n90 The court distinguished the South Carolina Supreme Court's opinion in Plowman v. Bagnal, n91 which had been decided only six months earlier. The Plowman court had held that "in private actions under the UTPA, directors and officers are not liable for the corporation's unfair trade practices unless they personally commit, participate [*366] in, direct, or authorize the commission of a violation of the UTPA." n92 The court of appeals distinguished the Plowman holding based on the significant difference in definitions of the term "person" found in the UTPA and MVUTPA. n93 The court held that by including officers, directors, and other controlling persons of a corporate defendant in the MVUTPA definition, the legislature expressly provided for controlling person liability under the MVUTPA. n94

The Rowe court also stated that the MVUTPA goes further than the UTPA and allows a private plaintiff to hold the officers, directors, and control persons of a motor vehicle dealership personally liable based on the dealersh- ip's violation of the Act–even when the individual was unaware of and did not participate in the unlawful conduct. Consequently, for every potential MVUT- PA violation by an employee or subordinate, the dealership not only risks liability as principal, but the officers, directors, and other control persons risk personal liability as well.

IV. Controlling Person Liability Under the UTPA and the FTCA

A. Judicial Recognition and Development of the Controlling Person Doctrine Under the

UTPA

1. Government Enforcement Actions

Although the UTPA definition of the term "person" is less inclusive than the definition contained in the MVUTPA, South Carolina courts, in the context of government enforcement actions, have extended the UTPA definition to include the controlling persons of corporate defendants. In State ex rel. McLeod v. C & L Corp., n95 South Carolina's landmark controlling person doctrine case, the court of appeals invoked the doctrine to hold that the attorney general could bring suit for injunctive relief or civil penalties against controlling persons for corporate violations of the UTPA. A controlling person under the UTPA is judicially defined as "one who formulates and directs corporate policy or who is deeply involved in the important business affairs of the corporation." n96 [*367]

In C & L Corp., L.G. Funderburk (Funderburk) and W.L. Cooper, Jr. (W.L. Cooper), officers and sole shareholders of C & L Corp., Inc. (C & L), formed C & L to develop and sell a real estate subdivision. C & L contracted with Wayne Cooper, W.L. Cooper's brother, to plan the subdivision, sell the lots by installment-purchase contracts, and make all collections on the install- ment contracts for a commission. Sales agents hired by Wayne Cooper engaged in deceptive and unfair trade practices to induce purchases of the subdivision lots.

The attorney general initiated an action under the UTPA against C & L as the corporation, Funderburk and W.L. Cooper as its officers, and Wayne Cooper as C & L's alleged agent. The special referee granted summary judg- ment to Funderburk and W.L. Cooper. The court of appeals overturned the summary judgment order and remanded for trial the issue of whether Funder- burk and W.L. Cooper were controlling persons of C & L.

In reversing the special referee, the court of appeals held that the UTPA authorizes the attorney general to hold both a corporation and its controlling persons liable for a corporate violation of the Act. n97 The court cited a string of federal cases interpreting the FTCA as authority for the court's rule of law. n98 Applying this rule to the facts before it, the court found that the status of Funderburk and W.L. Cooper as officers and sole shareholders of C & L "alone was sufficient to create a reasonable inference that they were control- ling persons." n99 If the attorney general proved that Funderburk and W.L. Cooper were controlling persons of C & L, then they would be personally liable for C & L's violation of the UTPA. The court of appeals upheld the special referee's finding that Wayne Cooper and his salesmen were "agents" of C & L and that their actions bound the corporation as principal. n100 Thus, the sole question to be decided on remand was whether Funderburk and W.L. Cooper were controlling persons of C & L. If so, they would be personally liable for the actions of Wayne Cooper and the salesmen.

C & L Corp. makes clear that the legal consequence of being a controlling person of an

 |

offending corporation is similar to that of a shareholder or officer when the court pierces the corporate veil. The legal fiction that treats a corporation as separate and distinct from its officers and shareholders is effectively disregarded. A controlling person becomes the alter ego of the [*368] corporation. As a result, agency law subjects a controlling person to personal liability as a principal for the misconduct of a corporate agent acting within the scope of his agency, regardless of whether the controlling person authorized, participated in, or knew of the misconduct. n101

C & L Corp., however, fails to clarify whether a showing of culpable conduct is completely unnecessary to establish controlling person liability. A complete understanding of the specific circumstances under which an officer, director, or controlling shareholder will be deemed a controlling person is crucial. Unfortunately, the court in C & L Corp. did not delineate under what circumstances an officer, director, or shareholder would be considered a controlling person. But the court did implicitly decline to hold that the individual defendants' status as sole shareholders and officers of C & L per se made them liable as controlling persons. n102 Instead, the court held that this status created an "inference," which presumably could be rebutted on re- mand. n103 Because there is no reported decision following remand, it is uncer- tain exactly what types of evidentiary facts are sufficient or necessary to rebut the inference created by majority stock ownership and corporate officeholding.

In State ex rel. Medlock v. Nest Egg Society Today, Inc., n104 the officers, directors, and shareholders of the corporate defendant appealed the lower court's assessment of civil penalties against them in their individual capaci- ties. The court of appeals responded to the individuals' claims that they were not liable as controlling persons as follows:

[The individual defendants] contend the State produced no evidence that they, individually, conducted any activities on behalf of the corporation in South Carolina.

The argument is without merit. They admittedly are officers, directors, and principal shareholders of the corporation. They admittedly make policy and management decisions for the corporation. They were admittedly personally involved in formulating the membership program [*369] which violates [the UTPA]. Since they are both persons who formulate and direct corporate policy and are deeply involved in the important business affairs of [the corporation], they are controlling persons of the corpora- tion. n105

The precise meaning of this holding is unclear. Although the appellate court apparently concluded that the individuals were liable as controlling persons because they "formulated and directed corporate policy and were deeply involved in the important business affairs of [the corporation,]" there was also evidence in the record indicating that they were "personally involved" in the very conduct violating the Act. n106 Consequently, Nest Egg Society could be interpreted as tacitly recognizing a culpability require- ment. On the other hand, it could be

argued that any person who formulates and directs corporate policy or who is deeply involved in the corporation's important business affairs will be liable as a controlling person, regardless of whether the person participated in or knew of the particular trade practice in question.

Thus, in government enforcement actions under the UTPA, South Caroli- na decisions seem to require something more than mere status as an officer, director, or majority shareholder to impose personal liability for a corporate violation of the Act. However, it is still open to debate whether liability is restricted to situations in which the individual knew of and participated in the illegal conduct. n107

2. Private Damages Actions

In Plowman v. Bagnal, n108 the South Carolina Supreme Court, by a narrow 3-2 majority, recently settled the question of controlling person liability in the context of a private damages action under the UTPA. The court ruled that a private litigant cannot hold the controlling persons of a corporate defen- dant personally liable for a corporate violation of the UTPA merely because [*370] of their relationship to the corporate defendant. n109 An individual's status as an officer, director, or person in control of the affairs of a corporation is insufficient by itself to warrant controlling person liability in a private damages action under the UTPA. n110 The Plowman majority further enunciated the legal standard for holding controlling persons individually liable in a private damages action under the UTPA. The court held that "in private actions under the UTPA, directors and officers are not liable for the corporation's unfair trade practices unless they personally commit, participate in, direct, or authorize the commission of a violation of the UTPA." n111

The Plowman majority gave three reasons in support of its recognition of a culpability requirement. First, the court focused on the language of the UTPA's enforcement provision. Specifically, the court reasoned that because section 39-5-140 of the UTPA speaks of the "use or employment by a per- son" n112 of an unfair trade practice to impose liability, holding a person liable solely because of their relationship to a corporate defendant would contravene this requirement and impose liability "without regard to whether that person 'used or employed' an unfair trade practice." n113 Second, the majority analogized to the standard applicable to tort actions. The court pointed out that in tort actions, a director or officer of a corporation is not liable for the torts of the corporation or of other officers or agents merely by holding office, but is liable for the torts in which the director or officer participated or autho- rized. n114 Finally, the court pointed out that when the legislature "has seen fit to take the unusual step of providing for control person liability, it has done [*371] so explicitly." n115 The court concluded that the UTPA did not explicitly provide for controlling person liability under the circumstances. n116

The Plowman majority also rejected the plaintiffs' argument that its holding was inconsistent

with previous controlling person decisions which arose in the context of government enforcement actions under the UTPA. n117 The dissent found the plaintiffs' argument persuasive. n118 Indeed, if in interpreting and applying previous government enforcement precedents under the UTPA, the courts do not require more than mere officer, director, or shareholder status to impose personal liability for a corporate violation of the Act, then the Plowman decision is inconsistent with those hold- ings. n119 Nevertheless, the Plowman majority pointed out that a different standard is appropriate in private damages actions versus government enforce- ment actions. n120

As support for applying a different standard in private damages actions, the majority cited Federal District Court Judge Falcon B. Hawkins' opinion in Smith v. Burdette Chrysler Dodge Corp. n121 Judge Hawkins' decision in Smith is the first reported opinion by a South Carolina court addressing the issue of controlling person liability in a private damages action under the UTPA. Judge Hawkins ultimately declined to rule on the issue based on jurisdictional grounds. Although the opinion did not rule on the merits of the controlling person issue, it nevertheless outlined several of the arguments [*372] against the imposition of controlling person liability in a private damages action under the UTPA when such liability is based solely on an individual's status as an officer, director, or person in control of a legal entity.

The facts in Smith closely parallel those present in Rowe v. Hyatt. n122 In Smith, Jo Smith purchased a motor vehicle from an automobile dealership and brought suit against the dealership and Wayne Burdette, the dealership's owner, under the UTPA based on allegations that the dealership misrepresent- ed the vehicle's mileage. n123 Smith admitted during his deposition that he never had any direct contact with Burdette and it was undisputed that Burdette had no personal involvement in the alleged wrongdoing. n124 Burdette moved for summary judgment as to the claims against him on the basis that there was no evidence of any wrongdoing on his part individually.

In opposing the summary judgment motion, Smith argued that the controlling person doctrine, as espoused in State ex rel. McLeod v. C & L Corp., n125 supported imposition of personal liability on Burdette. n126 Smith asserted that Burdette was individually liable by virtue of his status as an officer, director, and majority shareholder of the dealership. Although jurisdic- tional constraints prohibited Judge Hawkins from deciding the controlling person issue, his opinion suggests that he would not have imposed personal liability on Burdette based on the facts before him.

Judge Hawkins acknowledged that "South Carolina courts had not touched upon the precise question raised which is whether Burdette, as a controlling person, is liable [under the UTPA] to Smith for damages simply as a result of the Dealership's violation of the statute." n127 He also noted that the South Carolina Court of Appeals's decision in C & L Corp., n128 as well as

the controlling person cases decided under the FTCA, all arose in the context of government suits for civil penalties or injunctive relief. n129 Thus, there was no precedent in South Carolina law for applying the controlling person doctrine to a private action for monetary damages. In addition, Judge Hawkins observed that holding officers, directors, and shareholders individual- ly liable for corporate violations of the UTPA, without more, contravenes the protections of the corporate veil and limited shareholder liability. n130 Indeed, [*373] it seems unlikely that in passing legislation regulating unfair trade practices, the South Carolina General Assembly intended to abrogate entrenched doctrines in corporation and tort law.

Judge Hawkins also pointed out that the court of appeals in C & L Corp. relied heavily on a string of federal cases decided under the FTCA as its authority for allowing the attorney general to hold controlling persons individ- ually liable for corporate violations of the UTPA. n131 As will be discussed in more detail below, n132 to impose controlling person liability under the FTCA, the Federal Trade Commission must demonstrate that the individual defendant knew of and participated in the unfair or deceptive conduct to warrant control- ling person liability. n133 Thus, even if the controlling person doctrine of the federal cases was applied to a private damages action, officeholder or share- holder status by itself would not warrant individual liability.

Finally, in discussing the FTCA decisions, Judge Hawkins touched upon the rationale for imposing controlling person liability. n134 In the context of government enforcement of the unfair trade practices legislation, the primary purpose behind naming the officers, directors, and shareholders of a corporation in a cease and desist or injunctive order is not to punish them for a past violation of the law, but to prevent them from evading the order outside of the corporate structure. n135 Officers, directors, and shareholders possess the power to dissolve a corporation against which a cease and desist or injunctive order has been directed and, therefore, are capable of continuing the unlawful practices in the future by reorganizing the corporation under a different name. Accordingly, courts include officers, directors, and sharehold- ers in a cease and desist or injunctive order to curtail recurring or future violations of the law, not to remedy past misconduct. In comparison, the primary objective of a private damages action is to compensate a particular victim of past misconduct, not necessarily to prevent or enjoin future violations of the law. [*374]

B. The Controlling Person Doctrine Under the FTCA

1. The Doctrine's Purpose

The South Carolina Court of Appeals in State ex rel. McLeod v. C & L Corp. n136 looked to federal court decisions interpreting the FTCA for author- ity in extending liability under the UTPA to controlling persons of corporate defendants. The controlling person doctrine initially developed in cases arising under federal law. Numerous courts have applied the doctrine in

government enforcement actions brought under the FTCA, which gives the FTC power to prevent persons, partnerships, or corporations from using unfair methods of competition or unfair or deceptive practices in or affecting commerce. n137

The FTCA decisions applying the controlling person doctrine demonstrate that the doctrine's primary purpose is to prevent the evasion of cease and desist orders issued by the FTC and to punish those who knowingly violate those orders. n138 As pointed out above, if the controlling persons of a corporation could not be enjoined as individuals, they could simply dissolve the corporation against which the order was directed, reorganize under another name, and thereby continue the very practices sought to be enjoined. Likewise, if civil penalties could not be imposed upon controlling persons for a knowing violation of a cease and desist order, n139 no incentive would exist to refrain [*375] from these evasive tactics, thereby making the order's enforcement virtually impossible.

The FTC's decision in In re Gold Bullion International, Ltd. n140 illus- trates the rationale underlying the controlling person doctrine. In that case, Gold Bullion International, Ltd. (Gold Bullion) imported into the United States gold coin reproductions of various German, Mexican, and Austrian govern- ment currencies. Gold Bullion sold and distributed the reproductions to coin dealers for resale to consumers. Although the coins were not issued by any government or used in exchange, none of the coins were marked "copy." Utilizing the FTCA's enforcement provisions, government officials issued a complaint seeking a cease and desist order against Gold Bullion and its corporate officers on the basis that their importation and sale of copies of government coins without marking them as such constituted a deceptive sales practice in violation of section 5 of the FTCA. n141

The complaint named Gold Bullion's corporate officers in their individual capacities, including H. Kenneth Costello, Walter N. Thompson, and William H. Bogart. n142 All three participated in Gold Bullion's formation, contributed to its initial capitalization, and were major shareholders. n143 Since the corporation's inception, Costello had served as its president, Thompson as its vice-president and treasurer, and Bogart as its secretary and legal coun- sel. n144 These three individuals, along with a fourth person whom the Com- mission previously dismissed pursuant to a consent order, were solely responsible for Gold Bullion's ownership and control. n145 Costello and Thompson were responsible for Gold Bullion's daily operations and manage- ment. n146 Although Bogart did not actively participate in the corporation's daily business operations, he advised the company regarding the legality of marketing and selling the gold coin reproductions in the United States. n147

In reviewing the initial decision of the Administrative Law Judge (ALJ) on appeal, the Commissioner adopted the following statements from the ALJ's opinion as correctly setting forth the law regarding individual liability under the FTCA:

It is well settled that to promote the full effectiveness of its orders and to prevent those orders from being evaded, the Commission has the [*376] authority to name the officers, directors, and stockholders of a corporation as respondents in their individual capacities when they have played a significant role in the acts or practices giving rise to the complaint. . . . The basic purpose of an order directed to individual respondents is to "prevent recurrence of the particular violations for which named individu- als have been responsible." If the individuals were not responsible for the viola

tions, then there is little likelihood of recurrence of those viola- tions. n148

Based on the factual finding that "there were no objective circumstances that would preclude, or minimize the likelihood of [the individual defen- dants] re-entering the coin business in the future," the Commission ruled that "protection of the public interest and prevention of recurrence of violations" required the extension of the cease and desist order entered against Gold Bullion to include "the individuals who founded, operated, and controlled [Gold Bullion], and were responsible for its practices." n149 Thus, the Commission's cease and desist order included Costello, Thompson, and Bogart in their individual capacities.

2. The Standard for Imposing Individual Liability

The purpose of the controlling person doctrine is to prevent recurring or future violations of the FTCA. A controlling person is named individually in a cease and desist order directed to the company in order to prevent the individual from evading the order in an individual capacity or outside the corporate structure. n150 To fulfill this purpose, the FTC must establish a connection between the individual defendant and the unlawful practice; that is, the evidence must suggest that the individual will likely engage in the unlawful practice in the future as an individual. Accordingly, the federal decisions recognize a culpability requirement and restrict the imposition of controlling person liability for a corporation's use of unfair or deceptive acts to those officers, directors, or shareholders who knew of and participated in, or failed to exercise their authority to stop, the unlawful acts. n151 Mere [*377] ownership and control of an offending corporation whose employees have committed the unlawful practices is not enough to justify naming the officers, directors, and shareholders in their individual capacities in a cease and desist order. n152 A similar rule exists under the federal securities laws: in order to impose controlling person liability, a plaintiff must show not only that the defendant had actual power or influence over the controlled person, but that the defendant was also a culpable participant in the illegal activity. n153

Coro, Inc. v. FTC n154 demonstrates this limitation on controlling person liability under the FTCA. Coro, Inc. (Coro), a large, publicly held corporation, sold and distributed a special line of jewelry and watches to so- called "catalogue houses." n155 As part of its distribution process, Coro furnished printed sheets to the catalogue houses for insertion in their catalogues. n156

The sheets contained two prices: one at which a purchaser could buy the product from the catalogue house and another fictitious "list" [*378] or "retail" price. The practice falsely implied that the catalogue price was one-half the ordinary retail price charged for the product. n157

The FTC sought a cease and desist order against Coro and against Coro's president, largest stockholder, and chairman of the board of directors, as an individual. n158 Despite the individual defendant's own testimony that "he had 'overall corporate responsibility' and 'responsibility for the acts and practices of the corporation' and that he made the decision to put Coro into the catalogue house business," n159 the court of appeals held that the FTC erred in including him personally in the cease and desist order when there was no evidence that he was aware of the corporation's participation in unlawful pricing practices or that he was personally involved in Coro's unlawful conduct. n160

In Consumer Sales Corp. v. FTC, n161 a decision cited by the South Carolina Court of Appeals in C & L Corp., n162 the defendants were sole shareholders and officers of a corporation that sold cookware and dinner- ware through door-to-door salesmen. The salesmen falsely represented to potential customers that they could get a special low price by sending in a certain number of box tops from specified soap manufacturers' prod- ucts. n163 In holding the shareholders and officers individually liable under the FTCA for the salesmen's misrepresentations, the Second Circuit emphasized the need for some degree of actual culpability by controlling persons to impose liability:

The [shareholders and officers] argue that they had no knowledge of the salesmen's false statements and neither authorized nor participated in their making. The FTC, however, found that "by furnishing the salesmen with order forms falsely representing that they were making a special offer, by permitting the salesmen to request purchasers to collect box tops and by furnishing self-addressed envelopes for the handling of the box tops, respondents actively encouraged and participat- ed in making the said false representations." . . . The FTC found that "the evidence shows that the above-described sales approach was the usual and typical sales method, of salesmen selling [the corporation's] products." It is also obvious that the [shareholders and officers] knew that the "Special Offer" order blanks supplied to the salesmen would de- [*379] ceive customers since the prices stated thereon were the customary and regular prices for the merchandise offered. . . . The finding that the [shareholders and officers] "actively encouraged and participated in making" the false representations is amply supported by the evi- dence n164

Consistent with the objectives of preventing the evasion of cease and desist orders and punishing those who knowingly violate such orders, the controlling person decisions under the FTCA recognize a culpability require- ment. The imposition of personal liability on the officers, directors, and shareholders of corporate defendants is limited to situations in which the individuals knew of and participated in, or failed to exercise their authority to stop, the

unlawful conduct.

V. Legal and Policy Considerations Supporting a Culpability Requirement for Imposing Controlling Person Liability in Private Damages Actions Under the MVUTPA

The South Carolina legislature should ensure that individuals are not held personally liable in private damages actions under the MVUTPA based solely on their status as officers, directors, or persons in control of an offending motor vehicle dealership. Instead, to warrant individual liability, a plaintiff in a private damages action should be required to prove that the officer, director, or control person knew of and participated in, or failed to exercise his authority to stop, the unlawful conduct. Compelling legal and policy arguments support the imposition of a culpability requirement.

A. Harmonizing the MVUTPA

with State Corporation and Tort Laws and the UTPA

Subjecting officers, directors, and shareholders to liability for a private damages award based solely on their relationship to a dealership that violated the MVUTPA is repugnant to the policies embodied in the doctrines of limited shareholder liability and the corporate veil. As previously discussed, these policies are deeply imbedded in South Carolina's laws, such as the South Carolina Business Corporation Act (Business Corporation [*380] Act), n165 and are fundamental to its business and economic institutions. In effect, the corporation and its shareholders are no longer separate and distinct entities if victims of unfair trade practices are allowed to reach the shareholders' assets in satisfaction of the corporation's liabilities. Such a rule stifles the investment of new capital that is so crucial to the continued growth and stability of the motor vehicle industry by imposing excessive risks on investors of motor vehicle dealerships. Shareholders of motor vehicle dealerships would risk not only the price paid for their stock, but their home, property, and personal assets as well.

Conversely, limiting the imposition of personal liability to situations in which the officers, directors, or shareholders knew of and participated in the unlawful conduct is consistent with the Business Corporation Act and the doctrines of limited shareholder liability and the corporate veil. Corporation law and tort law have traditionally provided exceptions to limited sharehold- er liability and the corporate veil. Most notably, officers, directors, and shareholders are not immunized from personal liability for the torts in which they participated or which they authorized or directed. n166 Shareholders are also held personally liable when they abuse the corporate form for personal gain, the corporation is inadequately capitalized, or corporate formalities have not been properly complied with. n167 The courts have disregarded the general rule of immunity when the corporation and its principals, although separate in form, are really the same.

State ex rel. McLeod v. Whiteside n168 illustrates how the doctrines of limited shareholder liability and the corporate veil can be harmonized with controlling person liability under the unfair trade practices legislation. That case utilized the doctrine of "piercing the corporate veil" to hold sharehold- ers personally liable for a corporation's violation of the UTPA based on the finding that the corporate structure was a mere umbrella for deceptive conduct and because the principals behaved as if the corporation did not exist. n169 The case involved the attorney general's suit against Southeastern Energy Systems, Inc. (Southeastern) and its two owners, Richard Whiteside and Louis Moseley, Jr., for a permanent injunction prohibiting the defendants from representing to consumers that certain electrical devices known as the "Energymizer" and the "Tightwad" would save electrical energy. n170 The defendants represented to customers and potential custom- ers that the devices would save energy and reduce a person's electricity bill [*381] by ten to forty percent by suppressing the "transient voltage surges" or power surges which enter a home's electrical system. n171

The court found that the defendants had engaged in unfair and deceptive practices because the devices did not in fact save energy or reduce a person's electricity bill by any measurable degree and, therefore, entered a permanent injunction against Southeastern and the individual owners. n172 In holding Whiteside and Moseley individually liable, the court found that the evidence clearly established that "the corporate Defendant was a corporation in name only." n173 Corporate records had not been maintained, share- holders and directors meetings were never held, corporate minutes were unavailable, corporate bank accounts were used to pay Moseley's personal bills, and it was uncertain exactly who held the various offices in the corporation and who were the corporation's directors. n174 Based on these facts, the court held:

Defendants Whiteside and Moseley owned, dominated and managed Southeastern. The only apparent evidence that a corporation ever existed is the corporate charter and checkbook in evidence before the Court. It would indeed be unfair and unjust to immunize the individual Defen- dants behind a corporation for (sic) responsibility for their actions solely because they obtained a corporate charter and opened a bank account prior to engaging in unfair and deceptive trade practices. When individu- als behind a corporation act as though no corporation exists, they may properly be held accountable for activities conducted under the corporate name. n175

The court further held that when a corporation is a mere shell its controlling persons "cannot bury their heads in the sand and close their eyes to actions being taken under the corporate name and thus evade liability for actions ostensibly taken by the corporation." n176 [*382]

In addition to harmonizing the MVUTPA with the policies reflected in the Business Corporation Act and the doctrines of limited shareholder liability and the corporate veil, ensuring that individuals are not held liable under the MVUTPA based solely on their status as

officers, directors, and shareholders of a motor vehicle dealership will avoid the unusual result in which liability exists under the MVUTPA but not under the UTPA. n177 As discussed above, in Plowman v. Bagnal n178 the South Carolina Supreme Court ruled that a private litigant cannot hold the controlling persons of a corporate defendant personally liable for a corporate violation of the UTPA merely because of their relationship to the corporation. An individual's status as an officer, director, or person in control of the affairs of an entity is insufficient by itself to warrant controlling person liability in a private damages action under the UTPA. Because the particular conduct regulated by the UTPA and MVUTPA is virtually indistinguishable n179 and the statutes' purposes are identical, there is no practical or theoretical basis for differentiating between the two with regard to officer, director, or control- ling person liability. A consistent standard of liability should be imposed under both acts.

B. Harmonizing the MVUTPA with the FTCA

All of the controlling person cases under the FTCA have arisen in the context of government suits for injunctive relief or civil penalties. n180 The federal courts have never applied the controlling person doctrine to a private action for monetary damages. Moreover, it is extremely unlikely that the federal courts will ever address this issue because of the unavailability of a private cause of action under the FTCA. n181 Despite the lack of federal precedent in the area of private damages actions, the MVUTPA, like the UTPA, specifically instructs South Carolina courts to apply the statute by [*383] reference to the FTCA. n182 Thus, the decisions under the FTCA should be persuasive in interpreting liability under the MVUTPA.

The government enforcement decisions under the FTCA recognize a culpability requirement and limit personal liability for officers, directors, and controlling persons to those situations in which the individuals knew of and participated in, or failed to exercise their authority to stop, the unlawful conduct. n183 As in private damages actions under the UTPA, an individual's status as an officer, director, or person in control of the affairs of an entity is insufficient by itself to warrant controlling person liability under the FTCA. Likewise, in the context of private damages actions under the MVUTPA, the legislature should require plaintiffs to prove that the officer, director, or shareholder knew of and participated in the unlawful conduct to warrant individual liability.

C. Recognizing the Dissimilarities Between Government Enforcement Actions and Private Damages Actions Under Unfair Trade Practices Legislation

Even if in the context of government enforcement of the MVUTPA liability is imposed on an individual solely because of his status as an officer, director, or shareholder of an offending

motor vehicle dealership, such an imposition does not necessarily support a similar result in a private damages action. Different rules are justified because the primary objective sought to be achieved by extending liability to officers, directors, and shareholders in the context of government enforcement of the MVUTPA is not furthered by the imposition of similar liability in a private damages action under the Act. The purpose of naming the officers, directors, and shareholders of a corporation in a cease and desist or injunctive order is not to punish them for a past violation of the law, but to prevent them from evading the order outside of the corporate structure. n184 Officers, directors, and shareholders possess the power to dissolve a corporation against which a cease and desist or injunctive order has been directed and, therefore, are capable of continuing the unlawful practices in the future by reorganizing the corporation under a different name.

In contrast, the major thrust of a private action for monetary damages is not to prevent recurring violations of the law, but to compensate the plaintiff for damages incurred as a result of a past violation. n185 In pursuit [*384] of this objective, it does not matter that the individual officers, directors, and shareholders may later dissolve the corporation and continue the unlawful practices under a different name because the dissolved corporation remains liable to the plaintiff for any claims against it. n186 In addition, in those instances where the corporate defendant is insolvent and the company is little more than an empty shell with assets concentrated in the hands of its officers, directors, and shareholders, the doctrine of "piercing the corporate veil" is available to hold the corporate principals personally liable for the corporation's violation of the MVUTPA. Consequently, it is unnecessary to impose individual liability on officers, directors, or shareholders to protect a plaintiff injured as the result of a corporate violation of the unfair trade practices statutes.

Furthermore, important substantive and procedural protections that are present in government enforcement actions under the unfair trade practices legislation are lacking in private damages actions under the MVUTPA. n187

For example, under the government enforcement scheme of the FTCA, the FTC issues a complaint to an offending corporation or person setting forth the unlawful business practices sought to be curtailed. The corporation or person then has the opportunity to show cause why a cease and desist order should not be issued against the particular practice involved. n188 If a cease and desist order is issued, a district court can levy civil penalties against a corporation or person for violating the order only when the corporation or person possessed actual knowledge that their activity was unfair or deceptive and was unlawful under the Act. n189

However, a plaintiff in a private damages action under the MVUTPA can recover double actual damages, plus costs and attorney's fees, without the necessity of showing that the defendant violated a previously issued cease and desist or injunctive order or that the defendant possessed actual knowledge that his conduct was unlawful under the Act. n190 A private

plaintiff need only show that a violation occurred which caused him injury compensable under the statute. This distinction is especially important considering that unfair trade practices statutes such as the MVUTPA contain "words of proscription that are broad, potentially encompassing a wide [*385] range of conduct, including conduct not yet examined by any court." n191 The absence in private damages actions of the important substantive and procedural safeguards that are present in government enforcement actions makes the imposition of a culpability requirement in the private litigation setting even more compelling.

D. Avoiding Overly Strict Unfair Trade Practices Legislation

Imposing liability based solely on an individual's shareholder or officeholder status is counterproductive to the purposes underlying unfair trade practice legislation. Fault or culpability becomes irrelevant if liability is imposed merely on the basis of stock ownership or office. The implica- tions of such a rule of law are troublesome. For example, assuming that the officers or directors of a motor vehicle dealership took every conceivable precaution to prevent the dealership's employees from committing unfair trade practices, they would still be automatically responsible for the illegal acts of their subordinates, whether or not those acts were known to them and even if the acts were done contrary to express instructions. Moreover, the chance that an officer, director, or control person will be completely unaware of a particular instance of employee misconduct is more than abstract. Today's typical complex business features decentralized functions and broadly delegated responsibilities. It is plainly unrealistic to expect the officers, directors, and control persons of large organizations to be able to police the actions of every employee or subordinate.

Not only would the imposition of liability based simply on one's status ensnare innocent individuals, but it would penalize those officers and directors who, after learning of suspected illegal activity, took action to repudiate the conduct and prevent its recurrence. By ferreting out the unfair trade practices of corporate employees, an officer or director renders his personal assets vulnerable to the claims of injured plaintiffs. Thus, the imposition of liability without fault discourages officers and directors who did not participate in or know of the unlawful conduct at the time of its commission from punishing misconduct by subordinates or taking remedial measures to prevent future violations of the law.

Finally, the imposition of liability based solely on an individual's status leads to overdeterrence. Prudent and cautious businesspersons might shun altogether the motor vehicle business because of the unavoidable risks of [*386] liability. Consequently, such a rule of law would not only sweep up the malevolent and dishonest motor vehicle dealers in its broad net, but would also dissuade honest entrepreneurs and investors from investing in the indus- try. Instead of imposing the "strictest honesty in commercial dealings," n192 it would impose the strictest form of liability.

E. Passing Constitutional Scrutiny

Important constitutional restrictions may prohibit any construction of the MVUTPA that imposes liability on an individual solely because of his status as an officer, director, or person in control of a motor vehicle dealership that has violated the Act. Such a construction divides officers, directors, and control persons into separate classes–those of entities selling motor vehicles and those of all other entities. Moreover, the members of the motor vehicle class receive disparate treatment under the law in that they are denied the protections of limited shareholder liability and the corporate veil while similarly situated officers, directors, and shareholders of other entities still receive these protections. Although a thorough discussion of the constitution- al issues is beyond the scope of this article, imposing liability without fault only on the officers, directors, and controlling persons of motor vehicle dealerships arguably violates the Due Process and Equal Protection Clauses of the South Carolina n193 and United States n194 Constitutions.

The Due Process Clause mandates that any legislation "which deprives a person of life, liberty, or property, must have a rational basis–the reason for the deprivation may not be so inadequate that the judiciary will characterize it as arbitrary." n195 Similarly, the Equal Protection Clause for- bids "irrational and unjustified classifications." n196 Courts generally review [*387] economic and public welfare legislation under this "rational basis" standard. n197 A legislative classification will satisfy the standard "if: (1) the classification created by the statute is rationally related to its legislative purpose; (2) the members of the class are treated like those similarly situated; and (3) the classification rests on some rational basis." n198

To determine whether any state action employing a classification violates the due process or equal protection guarantees, courts focus on the nexus between the statute's objective and the classification provided to accomplish that objective. n199 Assuming that the statute's objective is a proper one, whether a legislative classification passes constitutional scrutiny depends on the degree of congruence or the "fit" between the group of individuals included in the legislative classification and the group of individuals tainted with the mischief at which the law is aimed at prevent- ing. n200 As an oft-cited commentary states: "A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law." n201

The legislative purpose behind the MVUTPA is to protect persons from the fraudulent and deceptive trade practices of motor vehicle dealerships doing business in South Carolina. n202 South Carolina courts would have little difficulty finding this to be a legitimate goal. To uphold a construction of the MVUTPA's statutory language that imposes liability based solely on an individual's status as an officer, director, or person in control of a motor vehicle dealership that violated the Act, the courts must find a reasonable [*388] distinction between the officers, directors, and persons in control of motor vehicle dealerships and those of other entities.

Furthermore, the distinction must be rationally related to the statutory purpose of protecting individuals from fraudulent and deceptive trade practices. n203

It is difficult to imagine how the imposition of liability on persons who may have no personal involvement with the disputed transaction at all other than their status as officers, directors, or persons in control of an entity selling motor vehicles can be considered rationally related to the purpose of protecting persons from fraudulent and deceptive trade practices. The classification involved is egregiously overinclusive. It imposes a burden (liability for damages) upon a larger group of individuals than are tainted with the mischief sought to be eliminated (deception and fraud upon innocent persons). n204 It would appear to be unreasonable and irrational to suppose that because a motor vehicle dealership has committed fraudulent and deceptive trade practices, all the officers, directors, and other persons in control of the dealership are guilty of these practices as well. A [*389] classification based on one's officeholding or shareholding status bears no reasonable relation to the purpose of preventing fraud or deception. Individuals who own stock or hold office in a motor vehicle dealership are no more or less likely than officeholders and shareholders in other businesses to engage in fraudulent or deceptive conduct. Therefore, the classification is arguably not rationally related to the statutory purpose and any construction of the MVUTPA which imposes liability based solely on an individual's status as an officer, director, or person in control of a motor vehicle dealership is likely unconstitutional.

VI. Conclusion: A Proposed Solution

In light of the South Carolina Court of Appeals's recent decision in Rowe v. Hyatt n205 it is certain that private litigants will continue to name the controlling persons of motor vehicle dealerships as defendants in actions brought under the MVUTPA against the dealership. This will occur even when the controlling persons did not know about or participate in the deceptive or fraudulent conduct forming the basis of the suit. Compelling reasons support the modification of existing law to ensure that individuals are not held personally liable in a private damages action under the MVUTPA based solely on their status as officers, directors, or persons in control of an offending dealership.

The General Assembly can accomplish this modification through a simple amendment to the current statute. Specifically, the legislature could amend section 56-15-110 of the MVUTPA, which sets forth the provisions granting private plaintiffs a right of action, by adding the following subsection:

(5) An officer, director, shareholder, or other person in active control of the activities of a corporation, partnership, trust, or other entity shall not be held personally liable for the acts or practices of the entity, except that he may become personally liable by reason of his knowledge of and participation in, authorization of, or acquiescence in acts or practices

forbidden by this chapter. n206

Without harming or reducing the protections afforded to deceived and defrauded consumers, this amendment would go far toward ensuring that blameless individuals are not held personally liable for the misconduct of [*390] others. The South Carolina legislature should not force the officers, direc- tors, and persons in control of this state's motor vehicle dealerships to be the insurers of the losses sustained by deceived and defrauded individuals.

FOOTNOTES:

n1 SC Code Ann. sections 56-15-10 to -360 (Law. Co-op. 1991 & Supp. 1994) (codified under the title "Regulation of Manufacturers, Distributors and Dealers"). Although the MVUTPA covers both manufacturers and distributors of motor vehicles, this article will discuss the issues from the dealership perspective only. Consequently, while much of the material in this article applies with equal force to the officers, directors, and other persons in control of manufacturers and distributors, the text will primarily refer to dealerships throughout.

n2 SC , 452 S.E.2d 356 (Ct. App. 1994).

n3 Id. at , 452 S.E.2d at 359. The court achieved this extension of individual liability by linking broadly defined terms found in the Act's definition section and then applying those terms to the Act's enforcement provisions. See infra notes 83-94 and accompanying text.

n4 Most of these lawsuits name the dealership's majority stockholder or chief executive officer (CEO) as a defendant. Apparently, the primary strategy for adding the CEO or controlling shareholder as a defendant is to coax a pretrial settlement. Indeed, the consequences can be seri- ous for the individual named as a defendant. Sued in an individual capacity, the officer, director, or shareholder not only may be forced to disclose personal and confidential financial information and produce private records such as income tax returns and financial statements during discovery, but may also lose personal assets to a prevailing plaintiff.

n5 Although the General Assembly enacted the MVUTPA in 1972, there are presently less than 15 reported decisions interpreting or applying its provisions. Approximately two-thirds of these decisions were rendered within the last decade.

n6 SC Code Ann. sections 39-5-10 to -160 (Law. Co-op. 1985 & Supp. 1994).

n7 15 U SC section 45 (1994). The MVUTPA's proscriptive language is patterned after the FTCA.

n8 This principle is codified in the South Carolina Business Corporation Act, which states: "Unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct." SC Code Ann. section 33-6-220(b) (Law. Co-op. 1990).

n9 See Sherwood M. Cleveland et al., South Carolina Corporate Practice Manual section 37.06[3] (1989). But see Henry Hansmann & Reinier Kraakman, Toward Unlimited Shareholder Liability for Corporate Torts, 100 Yale L.J. 1879 (1991) (calling for

reconsideration of the doctrine of limited shareholder liability and arguing that shareholders should be personally liable for tort claims against the corporation when corporate assets are insufficient to satisfy those claims.); David W. Leebron, Limited Liability, Tort Victims, and Creditors, 91 Colum. L. Rev. 1565 (1991) (calling for similar reconsideration).

n10 Costas v. First Fed. Sav. & Loan Assoc., 283 SC 94, 102, 321 S.E.2d 51, 56 (1984).

n11 Harry G. Henn & John R. Alexander, Laws of Corporations and Other Business Enterprises 347 (3d ed. 1983).

n12 See Carroll v. Smith-Henry, Inc., 281 SC 104, 106, 313 S.E.2d 649, 651 (Ct. App. 1984) (holding that a corporation is not liable for its subsidiary's acts whether the subsidiary is wholly or partially owned).

n13 See Anderson v. Abbott, 321 U.S. 349, 362 (1944).

n14 See Leebron, supra note 9, at 1573.

n15 Cleveland et al., supra note 9, section 37.06[1]; cf. Griffin v. Heinitsh, 309 F. Supp. 1028, 1033 (D SC 1970) (holding that a shareholder is not liable in a fraud and deceit action when he did not participate in alleged misconduct).

n16 Cleveland et al., supra note 9, section 37.06[1].

n17 Id. section 37.06[3].

n18 See DeWitt Truck Brokers v. W. Ray Flemming Fruit Co., 540 F.2d 681 (4th Cir. 1976); Sturkie v. Sifly, 280 SC 453, 313 S.E.2d 316 (1984); Cumberland Wood Prods., Inc. v. Bennett, 308 SC 268, 417 S.E.2d 617 (Ct. App. 1992); C.T. Lowndes & Co. v. Suburban Gas & Appliance Co., 307 SC 394, 415 S.E.2d 404 (Ct. App. 1991).

n19 Olin Mathieson Chem. Corp. v. Planters Corp., 236 SC 318, 330, 114 S.E.2d 321, 327 (1960); 18B Am. Jur. 2d Corporations section 1829 (1985).

n20 Green v. Industrial Life & Health Ins. Co., 199 SC 262, 270, 18 S.E.2d 873, 876-77 (1942); 18B Am. Jur. 2d Corporations sections 1829-1841 (1985).

n21 Olin Mathieson, 236 SC at 330, 114 S.E.2d at 326; 18B Am. Jur. 2d Corporations sections 1877-1891 (1985).

n22 See Costas v. First Fed. Sav. & Loan Ass'n, 283 SC 94, 102, 321 S.E.2d 51, 56 (1984) ("It is well settled that directors and officers are personally liable on written instruments signed by them which are not so worded as to bind the corporation.") (citing 19 C.J.S. Corporations section 840 (1990)); Gregory B. Adams, Suing Corporations and Those Behind Them, SC Trial Law. Bull. Summer 1992, at 17, 17 ("There are many cases where carelessly signing a corporate contract or note without indicating that the signature is solely on behalf of the corporation in the signer's official capacity has resulted in personal liability.").

n23 See, e.g., Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 SC 80, 232 S.E.2d 20 (1977); J.L. Mott Iron Works v. Clark, 87 SC 199, 69 S.E. 227 (1910).

n24 Rice v. Baltz, No. 94-UP-020 (SC Ct. App. Jan. 31, 1994). For example, if the president of a corporation negligently causes an automobile accident, his personal liability remains the same whether he is driving a company car while on corporate business or driving his family car while

on vacation. Cleveland et al., supra note 9, section 37.04[2].
n25 275 SC 475, 272 S.E.2d 643 (1980).
n26 Id. at 478, 272 S.E.2d at 644 (citation omitted); see also Tillman v. Wheaton-Haven Recreation Ass'n, 517 F.2d 1141, 1144 (4th Cir. 1975) (finding a corporate executive not vicariously liable for the torts of his corporation merely by virtue of his office; personal liability must be based on specific acts by the individual director or officer).
n27 See Richard E. Day, The South Carolina Unfair Trade Practices Act: Sleeping Giant or Illusive Panacea?, 33 SC L. Rev. 479, 479-83 (1982); N. Heyward Clarkson, III, Note, Consumer Protection and the Proposed "South Carolina Unfair Trade Practices Act", 22 SC L. Rev. 767, 767-70 (1970). For a commentary examining the judicial development of the UTPA, see Michael R. Smith, Note, Recent Developments Under the South Carolina Unfair Trade Practices Act, 44 SC L. Rev. 543 (1993).
n28 Albert L. Norton, Jr., The South Carolina Unfair Trade Practices Act and the Void-for-Vagueness Doctrine, 40 SC L. Rev. 641, 641 (1989); see Day, supra note 27, at 479-80; Clarkson, supra note 27, at 780.
n29 SC Code Ann. section 39-5-20(b) (Law. Co-op. 1985). Section 5 of the FTCA prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." 15 U SC section 45(a)(1) (1994).
n30 Clarkson, supra note 27, at 782-83 n.86. But see Norton, supra note 28, at 663-66 (challenging the notion that the UTPA's reference to federal precedents provides adequate notice to potential defendants regarding what conduct is unlawful).
n31 SC Code Ann. section 39-5-20(a) (Law. Co-op. 1985).
n32 Young v. Century Lincoln-Mercury, Inc., 302 SC 320, 326, 396 S.E.2d 105, 108 (Ct. App. 1989), aff'd in part and rev'd in part on other grounds, 309 SC 263, 422 S.E.2d 103 (1992) (per curiam).
n33 State ex rel. McLeod v. Brown, 278 SC 281, 285, 294 S.E.2d 781, 783 (1982) (citing United States Retail Credit Ass'n v. FTC, 300 F.2d 212, 221 (4th Cir. 1962)).
n34 Id.
n35 Inman v. Key Hyatt Chrysler Plymouth, Inc., 294 SC 240, 242, 363 S.E.2d 691, 692 (1988) (citing State ex rel. McLeod v. C & L Corp., 280 SC 519, 313 S.E.2d 334 (Ct. App. 1984)).
n36 SC Code Ann. section 39-5-50(a) (Law. Co-op. 1985).
n37 SC Code Ann. section 39-5-130 (Law. Co-op. 1985).
n38 SC Code Ann. section 39-5-50(a) (Law. Co-op. 1985).
n39 SC Code Ann. section 39-5-110 (Law. Co-op. 1985). In actions brought by the attorney general, the state may recover civil penalties up to $ 5,000 for each willful violation of the Act and up to $ 15,000 for violations of injunctions issued under the Act. Id.
n40 SC Code Ann. section 39-5-50(b) (Law. Co-op. 1985).
n41 SC Code Ann. section 39-5-120 (Law. Co-op. 1985).
n42 SC Code Ann. sections 39-5-70(a), -80 (Law. Co-op. 1985).

 |

n43 SC Code Ann. section 39-5-140(a) (Law. Co-op. 1985).
n44 Id.
n45 SC Code Ann. section 39-5-140(d) (Law. Co-op. 1985). One commentator asserts that use of the language "should have known" in the statutory definition of willful conduct suggests a negligence standard. Smith, supra note 27, at 555; see State ex rel. Medlock v. Nest Egg Soc'y Today, Inc., 290 SC 124, 128, 348 S.E.2d 381, 384 (Ct. App. 1986) ("The standard is not one of actual knowledge, but of constructive knowledge. If, in the exercise of due diligence, a person of ordinary prudence engaged in trade or commerce could have ascertained that his conduct violates the Act, then such conduct is 'willful' within the meaning of the statute."); see also Haley Nursery Co. v. Forrest, 298 SC 520, 525, 381 S.E.2d 906, 909 (1989) (quoting Nest Egg). But cf. State ex rel. McLeod v. Whiteside, No. 79-CP-40-0671, slip op. at 18 (SC Ct. C.P. Richland July 16, 1981) ("Willfulness [under the UTPA] implies the conscious or knowing doing of an act and an absence of good faith.").
n46 SC Code Ann. section 39-5-140(a) (Law. Co-op. 1985). See Freeman v. A. & M. Mobile Home Sales, Inc., 293 SC 255, 265, 359 S.E.2d 532, 538-39 (Ct. App. 1987).
n47 See Note, Recovery of Attorneys' Fees as Costs or Damages in South Carolina, 38 SC L. Rev. 823, 855 (1987).
n48 SC Code Ann. sections 39-5-50(a), -140(a) (Law. Co-op. 1985).
n49 SC Code Ann. section 39-5-10(a) (Law. Co-op. 1985).
n50 SC Code Ann. section 39-5-140(a) (Law. Co-op. 1985).
n51 See, e.g., State ex rel. Medlock v. Nest Egg Soc'y Today, Inc., 290 SC 124, 132, 348 S.E.2d 381, 385-86 (Ct. App. 1986); State ex rel. McLeod v. C & L Corp., 280 SC 519, 531- 32, 313 S.E.2d 334, 341 (Ct. App. 1984); see also State ex rel. McLeod v. Brown, 278 SC 281, 283-84, 294 S.E.2d 781, 782 (1982) (reversing summary judgment finding that the defendant was not liable as a controlling person of the corporate defendant when evidence was in dispute regarding whether the defendant owned stock and was actively involved in corporate operations); cf. State ex rel. McLeod v. VIP Enter., Inc., 286 SC 501, 506, 335 S.E.2d 243, 246 (Ct. App. 1985) (holding that the defendants were not liable as controlling persons when the "record was devoid of evidence these individuals either helped to formulate company policy regarding the marketing scheme [that violated the UTPA] or were involved in important corporate affairs." (citation omitted)). See generally Smith, supra note 27, at 549-50 (discussing the liability of principals and corporate personnel).
n52 See infra notes 95-107 and accompanying text.
n53 Plowman v. Bagnal, SC , 450 S.E.2d 36 (1994); see infra notes 108-20 and accompanying text.
n54 Id.
n55 For commentary noting these parallels, see Nathan M. Crystal, Consumer Product Warranty Litigation in South Carolina, 31 SC L. Rev. 293, 352 (1980); Note, supra note 47, at 859 & n.213. Although it clearly mirrors the UTPA and FTCA in several areas, the MVUTPA's

exact origin is unclear. One commentator suggests that the MVUTPA is based on the Federal Automobile Dealers Day in Court Act, 15 U SC sections 1221-25 (1994). Mark L. Rich- ardson, Case Comment, Court Addresses the Regulation of Manufacturers, Distributors, and Dealers Act, 45 SC L. Rev. 21, 23 (1993).

n56 SC Code Ann. section 56-15-30(a) (Law. Co-op. 1991). Unlike the UTPA, the MVUTPA specifically enumerates unfair methods of competition and deceptive acts or practices. The inclusion of a comprehensive "catch-all" provision, however, makes it unlikely that an act which would be an unfair trade practice under the UTPA would not also be actionable under the MVUTPA. See SC Code Ann. section 56-15-40(1)-(4) (Law. Co-op. 1991).

n57 SC Code Ann. section 56-15-40(1) (Law. Co-op. 1991). The legislative findings state that the MVUTPA's purpose is "to regulate motor vehicle . . . dealers and their representatives doing business in South Carolina in order to prevent frauds, impositions and other abuses upon its citi- zens." Act of May 22, 1972, No. 1237, section 1, 1972 SC Acts 2419, 2419.

n58 See Southern Nat'l Leasing Corp. v. Hall, 306 SC 92, 94, 410 S.E.2d 577, 578 (Ct. App. 1991). The MVUTPA excludes motorcycles from its coverage. SC Code Ann. section 56-15-10(a) (Law. Co-op. 1991).

n59 SC Code Ann. section 56-15-30(b) (Law. Co-op. 1991). At least one commentator argues that this parallel suggests that court decisions under section 39-5-20 of the UTPA should be highly persuasive in interpreting liability under section 56-15-30 of the MVUTPA. Note, supra note 47, at 859 n.213.

n60 SC Code Ann. section 56-15-40(5) (Law. Co-op. 1991). Unlike the UTPA, the MVUTPA does not allow the government to seek civil penalties or restitution for persons injured by violations of the Act. See SC Code Ann. sections 39-5-50(b), -110 (Law. Co-op. 1985).

n61 SC Code Ann. section 56-15-110(1) (Law. Co-op. 1991). But see Richardson, supra note 55, at 23-24 (challenging the assumption that the MVUTPA grants a private cause of action to consumers).

n62 SC Code Ann. section 56-15-110(1) (Law. Co-op. 1991) (an injured plaintiff "shall recover double the actual damages by him sustained." (emphasis added)); see also Riddle v. Pitts, 283 SC 387, 388, 324 S.E.2d 59, 59 (1984) ("Section 56-15-110 . . . mandates double recovery of actual damages and permits punitive damages up to three times actual damages . . . ." (em- phasis added)).

n63 Note, supra note 47, at 860. Although the appellate courts have not ruled on the issue, the MVUTPA apparently does not grant a private right of action for unfair trade practices that cause only personal injuries. See SC Code Ann. section 56-15-40(5) (Law. Co-op. 1991) (granting private cause of action to any person "injured in his business or property" (emphasis added)); cf. Berg v. First State Ins. Co., 915 F.2d 460, 464 (9th Cir. 1990) (holding that personal injuries are not compensable under the Racketeer Influenced and Corrupt Organizations Act (RICO) provision that grants a private cause of action to any person "injured in his business or property" by conduct violating the Act); Rylewicz v. Beaton Servs., 888 F.2d 1175, 1180 (7th

Cir. 1989) (allowing no recovery for personal injuries under RICO).
n64 SC Code Ann. section 56-15-110(3) (Law. Co-op. 1991). Although the MVUTPA does not define the malice requirement, a commentator has observed that this standard is higher than that required by the UTPA. Note, supra note 47, at 860. In comparison, the UTPA allows punitive damages for willful violations. A willful violation occurs "when the party committing the violation knew or should have known that his conduct was a violation of [the UTPA]." SC Code Ann. section 39-5-140(a), (d) (Law. Co-op. 1985). For a discussion of the willfulness require- ment under the UTPA, see supra note 45 and accompanying text.
n65 See Tousley v. North Am. Van Lines, 752 F.2d 96, 104-05 (4th Cir. 1985); Columbia Teachers Fed. Credit Union v. Newsome Chevrolet-Buick, Inc., 303 SC 162, 167, 399 S.E.2d 444, 447 (Ct. App. 1990).
n66 SC Code Ann. section 56-15-10(h) (Law. Co-op. 1991). The MVUTPA expressly exempts from the definition of a motor vehicle dealer public officers selling vehicles as part of their official duties, persons disposing of vehicles acquired for their personal use, and finance companies selling repossessed vehicles. Id.
n67 SC Code Ann. section 56-15-10(n) (Law. Co-op. 1991) (emphasis added).
n68 In contrast, the UTPA defines person to include "natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations and any other legal entity." SC Code Ann. section 39-5-10(a) (Law. Co-op. 1985). The UTPA definition does not expressly include the officers, directors, and other persons who are in active control of legal entities.
n69 SC Code Ann. section 56-15-10(n) (Law. Co-op. 1991).
n70 As an adjective, such can be used to mean of this or that kind, character, or degree. . . . Avoid using such as an adjective meaning before-mentioned to avoid repeating a word or phrase. When such is used in this way, replace it with that, this, these, those, its, or the.

. . . .

Avoid using such as a pronoun. When such appears as a pronoun, replace it with a noun or another pronoun.

Texas Law Review, Manual on Style section 2:17:59 (7th ed. 1992) (emphasis omitted).
n71 See United States v. Rippetoe, 178 F.2d 735, 737 (4th Cir. 1949) (requiring that whenever a reasonable application can be given consistent with the legislative purpose, courts should give all laws a "sensible construction" and avoid "literal applications of language which leads to absurd consequences"); Stephens v. Hendricks, 226 SC 79, 93, 83 S.E.2d 634, 641 (1954) (holding that courts will not give a construction to a statute which would make its application unreasonable and absurd).
n72 See Adkins v. Varn, 312 SC 188, 191, 439 S.E.2d 822, 824 (1993); Bryant v. City of Charleston, 295 SC 408, 411, 368 S.E.2d 899, 900-01 (1984); see also Poole v. Saxon Mills, 192 SC 339, 347, 6 S.E.2d 761, 764 (1940) (holding that statutory "phrases and sentences are to be construed according to the rules of grammar").

n73 SC , 442 S.E.2d 611 (1994).
n74 Id. at , 442 S.E.2d at 614. The jury awarded compensatory damages of $ 5 million and punitive damages of $ 3.5 million. The trial judge remitted the compensatory damages to $ 4,525,232 and then doubled them to $ 9,050,464 as required under Act.
n75 SC Code Ann. section 56-15-10(g) (Law. Co-op. 1991) (emphasis added).
n76 In the case of distributors, these subdivisions would include the following:

(1) Any natural person, corporation, partnership, trust, or other entity which sells or distributes new motor vehicles to dealers;
(2) In the case of an "entity" which sells or distributes new motor vehicles to dealers, any other entity in which that entity has a majority interest or effective control;
(3) In the case of an "entity" which sells or distributes new motor vehicles to dealers, the officers, directors, and other persons in active control of the activities of that entity; and
(4) In the case of an "entity" which sells or distributes new motor vehicles to dealers, the officers, directors, and other persons in active control of the activities of any other entity in which that entity has a majority interest or effective control.
n77 Lynch, SC at , 442 S.E.2d at 615-16.
n78 The court's brevity may be explained by the fact that neither litigant briefed the issue of JM's liability in any significant detail. Although the appellants and respondents submitted briefs at least 90 pages in length, neither side devoted more than two pages to the issue of controlling persons. See Initial Brief of Appellants at 65-66; Brief of Respondents at 86.
n79 Lynch, SC at , 442 S.E.2d at 615-16 (emphasis added).
n80 SC Code Ann. section 56-15-10(n) (Law. Co-op. 1991) (emphasis added).
n81 Lynch, SC at , 442 S.E.2d at 616.
n82 It is unclear from the record in Lynch whether JM was in fact more than a mere holding company for SET. Compare Initial Brief of Appellants at 65 ("JM, the record shows without dispute, is simply a Florida holding company that owns the stock of SET and several other operating corporations. . . . JM does not conduct any operations itself. . . . There was no evidence that JM did anything except own the stock of SET.") with Brief of Respondents at 86 ("JM was not simply a stockholder of SET; JM was the managing agent of SET. JM bills SET for management services provided to SET by employees of JM.").
n83 SC , 452 S.E.2d 356 (Ct. App. 1994).
n84 Id. at , 452 S.E.2d at 359.
n85 For example, Rowe did not address whether a sole shareholder, president, and director of a subsidiary of an automobile dealership–a subdivision (4) situation–can be held personally liable for the dealership's violation of the MVUTPA.
n86 Rowe, SC at , 452 S.E.2d at 356.
n87 Id.
n88 Id. at , 452 S.E.2d at 357.

 |

n89 Id.
n90 Id. at , 452 S.E.2d at 359.
n91 SC , 450 S.E.2d 36 (1994).
n92 Id. at , 450 S.E.2d at 38 (citations omitted).
n93 Rowe, SC at , 452 S.E.2d at 358.
n94 Id. at , 452 S.E.2d at 358-59.
n95 280 SC 519, 313 S.E.2d 334 (Ct. App. 1984). For commentary on this case, see Lisa D. Hyman, Case Comment, Fraud and Liability Under the South Carolina Unfair Trade Practices Act, 37 SC L. Rev. 40 (1985).
n96 C & L Corp., 280 SC at 531, 313 S.E.2d at 341 (citations omitted); see also State ex rel. McLeod v. VIP Enter., Inc., 286 SC 501, 506, 335 S.E.2d 243, 245 (Ct. App. 1985) (quoting C & L Corp.).
n97 C & L Corp., 280 SC at 530, 313 S.E.2d at 341.
n98 Id. (citing FTC v. Standard Educ. Soc'y, 302 U.S. 112 (1937); Sunshine Art Studios, Inc. v. FTC, 481 F.2d 1171 (1st Cir. 1973); Benrus Watch Co. v. FTC, 352 F.2d 313 (8th Cir. 1965); Consumer Sales Corp. v. FTC, 198 F.2d 404 (2d Cir. 1952), cert. denied, 344 U.S. 912 (1953)). See infra notes 136-64 and accompanying text for a discussion of the controlling person doctrine under the FTCA.
n99 C & L Corp., 280 SC at 531, 313 S.E.2d at 341.
n100 Id. at 528, 313 S.E.2d at 339-40.
n101 Id. at 528, 313 S.E.2d at 340 (citing Williams v. Commercial Casualty Ins. Co., 159 SC 301, 156 S.E. 871 (1931); Reynolds v. Witte, 13 SC 5 (1879)). In West v. Service Life & Health Ins. Co., 220 SC 198, 66 S.E.2d 816 (1951), the South Carolina Supreme Court stated:

> [A principal] is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, negligences, and other malfeasances and omissions of duty of his agent in the course of [the agent's] employment, although the principal did not authorize or justify or participate in, or indeed, know of such misconduct, or even if he forbade the acts or disapproved of them.

Id. at 202, 66 S.E.2d at 817 (quoting Huestess v. South Atl. Life Ins. Co., 88 SC 31, 41, 70 S.E. 403, 407 (1911)).
n102 C & L Corp., 280 SC at 531, 313 S.E.2d at 341.
n103 Id.
n104 290 SC 124, 348 S.E.2d 381 (Ct. App. 1986).
n105 Id. at 132, 348 S.E.2d at 385-86 (emphasis added).
n106 Id.
n107 Compare Adams, supra note 22, at 17 ("Personal liability [of shareholders, directors, and officers] may result from participation in violations of statutory requirements found in many state and federal laws, ranging from the Internal Revenue Code to federal and state securities

laws to unfair trade practices acts to environmental laws." (emphasis added)) with Cleveland et al., supra note 9, section 37.04[1] ("Under the securities laws and unfair trade practices acts, liability may be imposed upon shareholders, directors, or officers who are 'controlling persons' even though they do not personally participate in the conduct giving rise to the liability." (emphasis added)).

n108 SC , 450 S.E.2d 36 (1994). For commentary on this case, see Cynthia A. Smith, Case Comment, "Controlling Person" Doctrine Not Applicable to Private Actions Under South Carolina Unfair Trade Practice Act, 47 SC L Rev. 23 (1995).

n109 Plowman, SC at , 450 S.E.2d at 37-38.

n110 See also Rowe v. Hyatt, SC , , 452 S.E.2d 356, 357-58 (Ct. App. 1994) (affirming a directed verdict in favor of the defendant in a private action brought against the sole shareholder, president, and director of a dealership).

n111 Plowman, SC at , 450 S.E.2d at 38 (emphasis added). As support for this standard of liability, the court cited several decisions from other jurisdictions holding corporate officers and directors personally liable under state unfair trade practice statutes when they actually participated in the unlawful conduct. Id. (citing Donsco, Inc. v. Casper Corp., 587 F.2d 602 (3rd Cir. 1978); Eastern Star, Inc. v. Union Bldg. Materials Corp., 712 P.2d 1148 (Haw. Ct. App. 1985); Moy v. Schreiber Deed Sec. Co., 535 A.2d 1168 (Pa. Super. Ct. 1988); Great Am. Homebuilders, Inc. v. Gerhart, 708 S.W.2d 8 (Tex. Ct. App. 1986); Grayson v. Nordic Constr. Co., 599 P.2d 1271 (Wash. Ct. App. 1979) (en banc)).

n112 SC Code Ann. section 39-5-140(a) (Law. Co-op. 1985).

n113 Plowman, SC at , 450 S.E.2d at 37.

n114 Id. at , 450 S.E.2d at 37-38 (citing Hunt v. Rabon, 275 SC 475, 272 S.E.2d 643 (1980)).

n115 Id. at , 450 S.E.2d at 38 n.1 (citing the South Carolina Uniform Securities Act, SC Code Ann. section 35-1-1500 (Law. Co-op. 1987), which provides that "every person who directly or indirectly controls a seller liable under section 35-1-1490, every partner, officer or director of such a seller, every person occupying a similar status or performing similar functions, . . . are also liable jointly and severally with and to the same extent as the seller."); see also Rowe v. Hyatt, SC , , 452 S.E.2d 356, 358-59 (Ct. App. 1994) (holding that the legislature expressly provided for controlling person liability under the MVUTPA by enacting a more expansive definition of the term "person," which includes the officers, directors, and other persons in active control of the activities of a corporate defendant).

n116 Plowman, SC at , 450 S.E.2d at 38.

n117 Id.

n118 See id. at , 450 S.E.2d at 40 (Toal, J., dissenting) (stating that the majority's ruling causes controlling person liability to mean one thing for private damages actions and another for government enforcement actions).

n119 Neither the majority nor the dissent in Plowman addressed whether the previous government enforcement cases under the UTPA do in fact require something more than mere

 |

officer, director, or shareholder status to impose controlling person liability for a corporate violation of the Act. An argument can be made that, even in the context of government enforcement, liability is restricted to situations in which the individual knew of and participated in the illegal conduct. See supra notes 95-107 and accompanying text. If culpability is required to impose controlling person liability in government enforcement actions under the UTPA, the previous precedents are reconcilable with the majority opinion in Plowman.

n120 Plowman, SC at , 450 S.E.2d at 38.

n121 774 F. Supp. 380 (DSC 1991).

n122 SC , 452 S.E.2d 356 (Ct. App. 1994). For a discussion of Rowe, see supra notes 83-94 and accompanying text.

n123 Smith, 774 F. Supp. at 381.

n124 See Defendants' Memorandum in Support of Motion for Summary Judgment at 3.

n125 280 SC 519, 313 S.E.2d 334 (Ct. App. 1984). See supra notes 95-103 and accompany- ing text.

n126 Smith, 774 F. Supp. at 383.

n127 Id. at 382.

n128 280 SC 519, 313 S.E.2d 334 (Ct. App. 1984).

n129 Smith, 774 F. Supp. at 383.

n130 Id.

n131 Id.

n132 See infra notes 150-52 and accompanying text.

n133 Smith, 774 F. Supp. at 383.

n134 Id.

n135 See FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952) ("Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future."); Coro, Inc. v. FTC, 338 F.2d 149, 153 (1st Cir. 1964) ("The FTC . . . is not empowered to issue a cease and desist order as punishment for past offenses. It has power only to put a stop to present unlawful practices and to prevent their recurrence in the future.") (citing New Standard Publishing Co. v. FTC, 194 F.2d 181, 183 (4th Cir. 1952)); Regina Corp. v. FTC, 322 F.2d 765, 768 (3d Cir. 1963) ("The purpose of the FTCA is to protect the public, not to punish a wrongdoer.") (citing Gimbel Bros. v. FTC, 116 F.2d 578, 579 (2d Cir. 1941)).

n136 280 SC 519, 530-31, 313 S.E.2d 334, 341 (Ct. App. 1984) (citing FTC v. Standard Educ. Soc'y, 302 U.S. 112 (1937); Sunshine Art Studios, Inc. v. FTC, 481 F.2d 1171 (1st Cir. 1973); Benrus Watch Co. v. FTC, 352 F.2d 313 (8th Cir. 1965), cert. denied, 384 U.S. 939 (1966); Consumer Sales Corp. v. FTC, 198 F.2d 404 (2d Cir. 1952), cert. denied, 344 U.S. 912 (1953)).

n137 15 U SC section 45(b) (1994). A private cause of action is unavailable under the FTCA. See Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973); Carlson v. Coca-Cola Co.,

483 F.2d 279 (9th Cir. 1973); Summey v. Ford Motor Credit Co., 449 F. Supp. 132 (DSC 1976), aff'd mem., 573 F.2d 1306 (4th Cir. 1978).

n138 See FTC v. Standard Educ. Soc'y, 302 U.S. 112, 119 (1937) ("Since circumstanc- es . . . are such that further efforts of these individual respondents to evade orders of the FTC might be anticipated, it was proper for the FTC to include them in its cease and desist order."); Benrus Watch Co. v. FTC, 352 F.2d 313, 324 (8th Cir. 1965) ("Once violations of the law have been shown to exist, the FTC has broad discretion in devising a remedy adequate to prevent the same or similar violations in the future."), cert. denied, 384 U.S. 939 (1966); Consumer Sales Corp. v. FTC, 198 F.2d 404, 408 (2d Cir. 1952) ("The fact that [the individual] resigned as an officer and director and disposed of his stock before the order was entered does not make errone- ous his inclusion in it. . . . [The corporate defendant] is not the only vehicle through which such acts may be accomplished in the future. . . . The Commission was warranted in not dismissing the complaint against him."), cert. denied, 344 U.S. 912 (1953).

n139 The FTCA provides that a district court can levy civil penalties against a person who violates a cease and desist order only when the person has actual knowledge that the activity is unfair or deceptive. See 15 U SC section 45(m)(1)(B)(2) (1994).

n140 92 F.T.C. 196 (1978).

n141 Id. at 196.

n142 Id.

n143 Id. at 199.

n144 Id.

n145 Gold Bullion, 92 F.T.C. at 199.

n146 Id. at 200. The corporation had only two employees besides its officers–a secretarial employee and a temporary employee. Id.

n147 Id.

n148 Id. at 210-11 (emphasis added) (citations omitted) (quoting In re Peacock Buick, Inc., 86 F.T.C. 1532, 1565 (1975), appeal denied, 553 F.2d 97 (4th Cir. 1977)).

n149 Gold Bullion, 92 F.T.C. at 224-25 (footnote omitted) (citing In re Virginia Mortgage Exch., Inc., 87 F.T.C. 182, 202-03 (1976); In re Peacock Buick, Inc., 86 F.T.C. 1532, 1565 (1975), appeal denied, 553 F.2d 97 (4th Cir. 1977)).

n150 See United States v. Bestline Prods. Corp., 412 F. Supp. 754, 764 (N.D. Cal. 1976).

n151 See, e.g., FTC v. Amy Travel Serv., Inc., 875 F.2d 564, 573 (7th Cir.) ("Once corporate liability is established, the FTC must show that the individual defendants participated directly in the practices or acts or had authority to control them. . . . The FTC must then demonstrate that the individual had some knowledge of the practices." (citations omitted)), cert. denied, 493 U.S. 954 (1989); FTC v. Patriot Alcohol Testers, Inc., 798 F. Supp. 851, 859 (D. Mass. 1992) ("To hold an individual liable for the deceptive acts or practices of a corporate entity, the FTC must establish the following three required elements: first, the FTC must prove that the individual had knowledge that the corporation engaged in dishonest or fraudulent conduct; second, the

FTC must prove that the individual participated in the acts or had authority to control the conduct; and third, the FTC must show customer reliance." (citations omitted)); FTC v. National Bus. Consultants, 781 F. Supp. 1136, 1152 (E.D. La. 1991) ("In order to attach individual liability for corporate unfair or deceptive practices, the FTC must show that the indi- vidual knew the corporation was engaged in dishonest or fraudulent conduct. . . . The FTC must also show that the defendants directly participated in acts or had authority to control the conduct of the corporation." (citations omitted)); FTC v. Kitco of Nevada, Inc., 612 F. Supp. 1282, 1292 (D. Minn. 1985) ("The FTC must prove that the individual had knowledge that Kitco or one or more of its agents engaged in dishonest or fraudulent conduct. . . . In addition, the FTC must show that the defendants directly participated in the acts or had the authority to control the conduct." (citations omitted)); see Southwest Sunsites, Inc. v. FTC, 785 F.2d 1431, 1439 (9th Cir.), cert. denied, 479 U.S. 828 (1986). See generally Richard A. Whiting, Antitrust and the Corporate Executive, 47 Va. L. Rev. 929, 965-72 (1961) (discussing early cases under the FTCA).

n152 See Standard Educators, Inc. v. FTC, 475 F.2d 401, 403 (D.C. Cir. 1973) (Wilkey, J., dissenting); Flotill Prods., Inc. v. FTC, 358 F.2d 224, 233 (9th Cir. 1966). Cf. Barrett Carpet Mills, Inc. v. Consumer Prod. Safety Comm'n, 635 F.2d 299, 304 (4th Cir. 1980) (holding that the Consumer Product Safety Commission improperly included the company president in a cease and desist order issued under the Flammable Fabrics Act when sole basis for inclusion was that the individual was an officer of the corporation involved in the violation).

n153 Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1440 (9th Cir. 1987); Sharp v. Coopers & Lybrand, 649 F.2d 175, 185 (3d Cir. 1981), cert. denied, 455 U.S. 938 (1982); Herm v. Stafford, 663 F.2d 669, 684 (6th Cir. 1981); Carpenter v. Harris, Upham & Co., 594 F.2d 388, 393-94 (4th Cir.), cert. denied, 444 U.S. 868 (1979); Walker v. Cardinal Sav. & Loan Ass'n, 690 F. Supp. 494, 500 (E.D. Va. 1988).

n154 338 F.2d 149 (1st Cir. 1964), cert. denied, 380 U.S. 954 (1965).

n155 Id. at 150.

n156 Id.

n157 Id.

n158 Id. at 151.

n159 Coro, Inc., 338 F.2d at 154.

n160 Id. (distinguishing Forster Mfg. Co. v. FTC, 335 F.2d 47 (1st Cir. 1964)).

n161 198 F.2d 404 (2d Cir. 1952), cert. denied, 344 U.S. 912 (1953).

n162 State ex. rel. McLeod v. C & L Corp., 280 SC 519, 313 S.E.2d 334 (Ct. App. 1984). See supra notes 95-103 and accompanying text.

n163 Consumer Sales Corp., 198 F.2d at 406.

n164 Id. at 406-07 (emphasis added); see also Rayex Corp. v. FTC, 317 F.2d 290, 295 (2d Cir. 1963) ("The FTC's order is . . . modified in conformity with its concession on oral argument that [a corporate officer], who neither personally engaged in [the corporate defendant]'s sales and

advertising practices nor was in a position to exercise any control over such matters, was improperly included."); Pati-Port Inc. v. FTC, 313 F.2d 103, 105 (4th Cir. 1963) ("It is . . . clear that the respondent . . . was President of the corporation at the time the practices complained of were carried on and that he knew of and approved of them.").

n165 SC Code Ann. sections 33-1-101 to 33-20-105 (Law. Co-op. 1990 & Supp. 1994).

n166 See supra notes 8-26 and accompanying text.

n167 See supra notes 17-18 and accompanying text.

n168 Case No. 79-CP-40-0671 (SC Ct. C.P. Richland July 17, 1981).

n169 Id. slip op. at 16.

n170 Id. slip op. at 1-2.

n171 Id. slip op. at 5-6.

n172 Id. slip op. at 15-16.

n173 Whiteside, Case No. 79-CP-40-0671, slip op. at 12.

n174 Id. slip op. at 12-13.

n175 Id. slip op. at 16 (citations omitted).

n176 Id. (citations omitted). In a subsequent securities fraud suit seeking recovery of money invested in the corporation, the South Carolina Court of Appeals held Whiteside personally liable under the South Carolina Uniform Securities Act, SC Code Ann. sections 35-1-10 to -1590 (Law. Co-op. 1987 & Supp. 1995), as a controlling person of Southeastern. McGaha v. Mosley, 283 SC 268, 275, 322 S.E.2d 461, 465 (Ct. App. 1984) ("As an officer and controlling person of the seller, Whiteside was liable to [the investor] to the same extent as the corporation."). Under the Uniform Securities Act, every person who directly or indirectly controls a seller of securities and every partner, officer, or director of such a seller is liable to the same extent as the seller "unless the nonseller who is so liable sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist." SC Code Ann. section 35-1-1500 (Law. Co-op. 1987).

n177 See Anderson v. FDIC, 918 F.2d 1139, 1143 (4th Cir. 1990) (noting that courts should, if possible, construe statutes harmoniously, especially if they deal with the same subject matter, even if apparent conflict exists); Higgins v. State, 307 SC 446, 449, 415 S.E.2d 799, 801 (1992) (same).

n178 SC , 450 S.E.2d 36 (1994). See supra notes 108-20 and accompanying text.

n179 See supra notes 55-59 and accompanying text.

n180 See supra notes 136-37 and accompanying text.

n181 See Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973); Carlson v. Coca- Cola Co., 483 F.2d 279 (9th Cir. 1973); Summey v. Ford Motor Credit Co., 449 F. Supp. 132 (DSC 1976), aff'd mem., 573 F.2d 1306 (4th Cir. 1978).

n182 See SC Code Ann. section 39-5-20(b) (Law. Co-op. 1985) and section 56-15-30(b) (Law. Co-op. 1991).

 |

n183 See supra note 151 and accompanying text.
n184 See supra notes 134-35, 138-39 and accompanying text.
n185 These concepts are reflected in the statutory requirements under the MVUTPA and UTPA, respectively, that a person must have been "injured in their business or property" or have "suffered an[] ascertainable loss of money or property" as the result of a statutory violation before a private cause of action can be stated. See SC Code Ann. section 39-5-140(a) (Law. Co-op. 1985) and section 56-15-110(1) (Law. Co-op. 1991).
n186 See SC Code Ann. sections 33-14-101 to -107 (Law. Co-op. 1990); Cleveland, et al., supra note 9, sections 36.01, .06.
n187 See Norton, supra note 28, at 642-45; Richardson, supra note 55, at 23.
n188 15 U SC section 45(b) (1994).
n189 See 15 U SC section 45(m)(1)(B)(2) (1994).
n190 See SC Code Ann. section 56-15-110(1) (Law. Co-op. 1991).
n191 Norton, supra note 28, at 642. For example, one commentator has remarked that "section 39-5-20 [of the UTPA] is a masterpiece of vagueness and ambiguity which will insure that any person or entity sued for anything that has any relationship with trade or commerce will also be sued for committing an unfair trade practice." Note, supra note 47, at 854 n.179.
n192 Day, supra note 27, at 486.
n193 SC Const. art. I, section 3 ("nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws").
n194 U.S. Const. amend. XIV, section 1 ("nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").
n195 Hamilton v. Board of Trustees, 282 SC 519, 524, 319 S.E.2d 717, 721 (Ct. App. 1984).
n196 South Carolina Pub. Serv. Auth. v. Citizens & Southern Nat'l Bank, 300 SC 142, 161, 386 S.E.2d 775, 786 (1989). The South Carolina Supreme Court has explained the concept of equal protection of the laws as follows:

> The constitutional guaranty of equal protection of the laws requires that all persons shall be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. . . . The equal protection guaranty is intended to secure equality of protection not only for all, but against all similarly situated.

Thompson v. South Carolina Comm'n on Alcohol & Drug Abuse, 267 SC 463, 472, 229 S.E.2d 718, 722 (1976) (citation omitted).
n197 See Prudential Property & Casualty Co. v. Insurance Comm'n, 534 F. Supp. 571, 576 (DSC 1982), aff'd, 699 F.2d 690 (4th Cir. 1983); Ex parte Estate of Evans, 299 SC 366, 384 S.E.2d 748 (1989), cert. denied sub nom. Lynch v. Fleming, 439 U.S. 1081 (1990).
n198 Jenkins v. Meares, 302 SC 142, 147, 394 S.E.2d 317, 319 (1990).
n199 See Ramey v. Ramey, 273 SC 680, 258 S.E.2d 883 (1979), cert. denied, 444 U.S. 1078

(1980); Bauer v. South Carolina State Hous. Auth., 271 SC 219, 246 S.E.2d 869 (1978); Broome v. Truluck, 270 SC 227, 241 S.E.2d 739 (1978); 19 SC Jur. Constitutional Law section 85 (1993).
n200 See Joseph Tussman & Jacobus tenBroek, The Equal Protection of the Laws, 37 Cal. L. Rev. 341 (1949).
n201 Id. at 346.
n202 The legislative findings of the MVUTPA, which are found only in the session laws, state in their entirety:

SECTION 1. Findings. The General Assembly finds that the distribution of motor vehicles in the State of South Carolina vitally affects the general economy of the State and the public interest and public welfare, and in the exercise of its police power, it is necessary to regulate motor vehicle manufacturers, distributors, dealers and their representatives doing business in South Carolina in order to prevent frauds, impositions and other abuses upon its citizens.

Act of May 22, 1972, No. 1237, section 1, 1972 SC Acts 2419.
n203 See Bauer, 271 SC at 231, 246 S.E.2d at 875 (requiring a "reasonable relationship between the public purpose to be achieved and the means chosen to effectuate that purpose"); Marley v. Kirby, 271 SC 122, 124, 245 S.E.2d 604, 606 (1978) (stating that "the requirement of equal protection is not fulfilled unless the classification rests upon some difference which bears a reasonable and just relation to the legislative purpose sought to be effected").
n204 See Ramey v. Ramey, 273 SC 680, 258 S.E.2d 883 (1979), cert. denied, 444 U.S. 1078 (1980). In Ramey the South Carolina Supreme Court considered the constitutionality of an automobile guest statute that required injured automobile guests or passengers to prove intentional or reckless misconduct on the part of their host drivers to recover therefrom. One of the rationales proffered to support the constitutionality of the statute was that it discouraged collusive lawsuits between guests and their hosts. In striking down the statute as unconstitutional, the court rejected this rationale as follows:

The "collusion prevention" rationale is similarly untenable. Although the guest statute may prevent some collusive suits between hosts and their passengers, the statute's overinclusiveness is devastating as it operates to bar the great majority of valid claims. "The wholesale elimination of all guests' causes of action for negligence does not treat similarly situated persons equally, but instead improperly discriminates against guests on the basis of a factor which bears no significant relation to actual collusion."
We believe the proper way to ferret out fraudulent actions is to impose existing civil law sanctions rather than to exclude an entire class of claims. Therefore, we cannot accept the premise that the supposed prevention of collusive lawsuits may justify a statute which bars meritorious litigation.

Id. at 685, 258 S.E.2d at 885 (quoting Brown v. Merlo, 506 P.2d 212, 215 (Cal. 1973)). Si-

 |

milarly, the wholesale deprivation of the protections of limited shareholder liability and the corpo- rate veil from the officers, directors, and control persons of motor vehicle dealerships does not treat similarly situated persons equally. Instead this deprivation improperly discriminates against the officers, directors, and persons in control of motor vehicle dealerships on the basis of a factor that bears no reasonable relation to fraud or deception.
n205 SC , 452 S.E.2d 356 (Ct. App. 1994).
n206 The corresponding provision of the South Carolina Motorcycle Unfair Trade Practice Act, SC Code Ann. sections 56-16-10 to -210 (Law. Co-op. 1991 & Supp. 1994), which was carved out of the MVUTPA, could be similarly amended. See SC Code Ann. section 56-16-200 (Law. Co-op. 1991).

