

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2001

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SENATE BILL 470
Commerce Committee Substitute Adopted 4/25/01

Short Title: Clarify MV Dealer Franchise Laws.

(Public)

Sponsors:

Referred to:

March 15, 2001

A BILL TO BE ENTITLED

AN ACT TO CLARIFY THE MOTOR VEHICLE DEALER FRANCHISE LAW.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 20 of the General Statutes is amended by adding a new section to read:

"§ 20-301.1. Notice of additional charges against dealer's account; informal appeals procedure.

(a) Notwithstanding the terms of any contract, franchise, novation, or agreement, it shall be unlawful for any manufacturer, factory branch, distributor, or distributor branch, to charge or assess one of its franchised dealers located in this State, or to charge or debit the account of such a dealer for goods, materials, or services, other than the published cost of new motor vehicles, and merchandise, tools, and equipment specifically ordered by the dealer, unless the dealer receives a detailed itemized description of the nature and amount of each such charge in writing at least 10 days prior to the date such charge or account debit is to become effective or due. For purposes of this subsection, the charges or debits for which prior written notice is required include, but are not limited to: advertising or advertising materials; advertising or showroom displays; customer informational materials; computer or communications hardware or software; warranty reimbursement; sales incentives; parts; tools; signage; equipment; dealership operation guides and other materials; manufacturer catalog or program materials; internet programs or materials, and any additional charges or surcharges made or proposed for goods, materials, or services previously charged to the dealer.

(b) Upon receipt of a notice given pursuant to or in satisfaction of subsection (a) of this section, in the event of a payment, reimbursement, or credit that is insufficient or inadequate under this Article or under the franchise, or in the event a new motor vehicle dealer discovers an actual or proposed charge or debit for which a manufacturer should have provided prior written notice under subsection (a) of this section, the dealer, if he believes the charge, payment, reimbursement, or credit to be unreasonable, or contrary

1 to the provisions of this Article or the franchise, may challenge the charge, credit, or
2 payment either by filing a petition before the Commissioner as provided in G.S. 20-
3 301(b) or a civil action in any court of competent jurisdiction under G.S. 20-308.1. If
4 the amount in controversy is less than or equal to ten thousand dollars (\$10,000), the
5 dealer may, in his discretion, prior to filing a petition before the Commissioner or civil
6 action, use the informal dispute resolution procedure provided in subsection (c) of this
7 section.

8 (c) Any franchised new motor vehicle dealer who seeks to challenge an actual or
9 proposed debit or charge to the dealer or to the dealer's account in an amount less than
10 or equal to ten thousand dollars (\$10,000) and that is in violation of this Article,
11 contrary to the terms of the franchise, or unreasonable, or a payment, reimbursement, or
12 credit which is insufficient or inadequate under this Article or under the franchise, the
13 inadequacy or insufficiency of which is in an amount less than or equal to ten thousand
14 dollars (\$10,000), may, prior to filing a formal petition before the Commissioner as
15 provided in G.S. 20-301(b) or a civil action in any court of competent jurisdiction under
16 G.S. 20-308.1, request and obtain a mediated settlement conference as provided in this
17 subsection.

18 (1) It is the policy and purpose of this subsection to implement a system of
19 settlement events that are designed to reduce the cost of litigation
20 under this Article to the general public and the parties, to focus the
21 parties' attention on settlement rather than on trial preparation, and to
22 provide a structured opportunity for settlement negotiations to take
23 place.

24 (2) The dealer shall send a letter to the Commissioner by certified or
25 registered mail, return receipt requested, identifying the actual or
26 proposed charges the dealer seeks to challenge and the reason or basis
27 for such challenge. The charges, payments, reimbursements, or credits
28 challenged by the dealer need not be related, it being the intention of
29 this subsection that multiple issues may be resolved in a single
30 proceeding. The motor vehicle dealer shall send a copy of the letter to
31 the affected manufacturer, factory branch, distributor, or distributor
32 branch, addressed to the current district, zone, or regional manager in
33 charge of overseeing the dealer's operations, or the registered agent for
34 acceptance of legal process in this State. Unless the dealer specifically
35 states in the letter that the dealer will be represented in the mediation
36 by legal counsel, the matter shall be mediated by the mediator without
37 the appearance of legal counsel by either the dealer or manufacturer.
38 Upon the mailing of a letter to the Commissioner and the manufacturer
39 under this subsection, any chargeback to or any payment required of a
40 dealer by a manufacturer shall be stayed during the pendency of the
41 mediation. Upon the mailing of a letter to the Commissioner and
42 manufacturer under this subsection, any statute of limitation or other

1 time limitation for filing a petition before the Commissioner or civil
2 action shall be tolled during the pendency of the mediation.

3 (3) Upon receipt of the written request of the motor vehicle dealer, the
4 Commissioner shall appoint a mediator and send notice of that
5 appointment to the parties. A person is qualified to serve as mediator
6 as provided by this subdivision if the person is certified to serve as a
7 mediator under Rule 8 of the North Carolina Rules Implementing
8 Statewide Mediated Settlement Conferences in Superior Court Civil
9 Actions and does not represent motor vehicle dealers or manufacturers,
10 factory branches, distributors, or distributor branches. A mediator
11 acting pursuant to this subdivision shall have judicial immunity in the
12 same manner and to the same extent as a Judge of the General Court of
13 Justice.

14 (4) The parties shall by written agreement select a venue and schedule for
15 the mediated settlement conference conducted under this subsection. If
16 the parties are unable to agree on a venue and schedule, the mediator
17 shall select a venue and schedule. Except by written agreement of all
18 parties, a mediation proceeding and mediated settlement conference
19 under this section shall be held in North Carolina.

20 (5) In this subsection, "mediation" means a nonbinding forum in which an
21 impartial person, the mediator, facilitates communication between
22 parties to promote reconciliation, settlement, or understanding among
23 them. A mediator may not impose his or her own judgment on the
24 issues for that of the parties.

25 (6) At least 10 days prior to the mediated settlement conference, the
26 affected manufacturer, factory branch, distributor, or distributor
27 branch, shall, by certified or registered mail, return receipt requested,
28 send the mediator and the motor vehicle dealer a detailed response to
29 the allegations raised in the dealer's written request.

30 (7) A mediation proceeding under this section shall be complete not later
31 than the sixtieth day after the date of the Commissioner's notice of the
32 appointment of the mediator; this deadline may be extended by written
33 agreement of the parties. The parties shall be solely responsible for the
34 compensation and expenses of the mediator on a fifty-fifty basis. The
35 Commissioner is not liable for the compensation paid or to be paid a
36 mediator employed pursuant to this subdivision.

37 (8) A party may attend a mediated settlement conference telephonically in
38 lieu of personal appearance. If a party or other person required to
39 attend a mediated settlement conference fails to attend without good
40 cause, the Commissioner may impose upon the party or person any
41 appropriate monetary sanction including, but not limited to, the

1 payment of fines, attorneys' fees, mediator fees, expenses, and loss of
2 earnings incurred by persons attending the conference.

- 3 (9) If the mediation fails to result in a resolution of the dispute, the motor
4 vehicle dealer may proceed as provided in G.S. 20-301(b) and G.S. 20-
5 308.1. Upon the filing of such a petition or civil action, the affected
6 manufacturer, manufacturer branch, distributor, or distributor branch
7 shall not require payment from the dealer or debit or charge the
8 dealer's account unless and until a final judgment supporting such
9 payment or charge has been rendered by the Commissioner or court.
10 All conducted communications made during a mediation proceeding,
11 including but not limited to those communications made during a
12 mediated settlement conference, are presumed to be made in
13 compromise negotiation and shall be governed by Rule 408 of the
14 North Carolina Rules of Evidence."

15 **SECTION 2.** G.S. 20-305(30) reads as rewritten:

- 16 "(30) To vary the price charged to any of its franchised new motor vehicle
17 dealers located in this State for new motor vehicles based on the
18 dealer's purchase of new facilities, supplies, tools, equipment, or other
19 merchandise from the manufacturer, the dealer's relocation,
20 remodeling, repair, or renovation of existing dealerships or
21 construction of a new facility, ~~or upon~~ the dealer's participation in
22 training programs sponsored, endorsed, or recommended by the
23 ~~manufacturer.~~ manufacturer, whether or not a dealer is dualled with one
24 or more other line makes of vehicles, a dealer's sales penetration or,
25 except as provided in this subdivision, a dealer's sales volume, a
26 dealer's level of sales or service customer satisfaction, a dealer's
27 purchase of advertising materials, signage, nondiagnostic computer
28 hardware or software, communications devices, or furnishings, or a
29 dealer's participation in used vehicle inspection or certification,
30 programs sponsored or endorsed by the manufacturer.

31 The price of the vehicle, for purposes of this subdivision shall
32 include the manufacturer's use of rebates, credits, or other
33 consideration which has the effect of causing a variance in the price of
34 new motor vehicles offered to its franchised dealers located in the
35 State.

36 Notwithstanding the foregoing, nothing in this subdivision shall be
37 deemed to preclude a manufacturer from establishing sales contests or
38 promotions which provide or award dealers or consumers rebates or
39 ~~incentives.~~ incentives; provided however, that the manufacturer
40 complies with all of the following conditions:

- 1 a. With respect to manufacturer to consumer rebates and
2 incentives, the manufacturer's criteria for determining
3 eligibility shall:
- 4 1. Permit all of the manufacturer's franchised dealers in
5 this State to offer the rebate or incentive; and
- 6 2. Be uniformly applied and administered to all eligible
7 consumers.
- 8 b. With respect to manufacturer to dealer rebates and incentives,
9 the rebate or incentive program shall:
- 10 1. Be based solely on the dealer's actual or reasonably
11 anticipated sales volume or on a uniform per vehicle sold
12 or leased basis; and
- 13 2. Be uniformly available, applied and administered to all
14 of the manufacturer's franchised dealers in this State;
15 and
- 16 3. Provide that any of the manufacturer's franchised dealers
17 in this State may, upon written request, obtain the
18 method or formula used by the manufacturer in
19 establishing the sales volume(s) for receiving the
20 rebate(s) or incentive(s) and the specific calculation(s)
21 for determining the required sales volume(s) of the
22 inquiring dealer and any of the manufacturer's other
23 franchised dealers located within 75 miles of the
24 inquiring dealer.

25 Nothing contained in this subdivision shall prohibit a
26 manufacturer from providing assistance or encouragement to a
27 franchised dealer to remodel, renovate, recondition, or relocate
28 the dealer's existing facilities, provided that this assistance,
29 encouragement, or rewards are not determined on a per vehicle
30 basis.

31 It is unlawful for any manufacturer to charge or include the
32 cost of any program or policy prohibited under this subdivision
33 in the price of vehicles that the manufacturer sells to its
34 franchised dealers or purchasers located in this State.

35 In the event that ~~at the time of the ratification of this act as~~
36 of October 1, 1999, a manufacturer ~~is currently~~ was operating a
37 program or ~~has had~~ in effect a policy that varied the price
38 charged to its franchised dealers located in this state in a
39 manner which would violate this ~~subdivision after October 1,~~
40 ~~1999, subdivision,~~ it shall be lawful for that program or policy,
41 or a program or policy similar thereto implemented after the
42 effective date of this act, to continue in effect as to the

1 manufacturer's franchised dealers located in this State until
2 December 31, ~~2002~~-2004. Any manufacturer shall be required
3 to pay or otherwise compensate any franchise dealer who has
4 earned the right to receive payment or other compensation
5 under a program in accordance with the manufacturer's program
6 or policy.

7 The provisions of this subdivision shall not be applicable to
8 multiple or repeated sales of new motor vehicles made by a new
9 motor vehicle dealer to a single purchaser under a bona fide
10 fleet sales policy of a manufacturer, manufacturer branch,
11 distributor, or distributor branch."

12 **SECTION 3.** G.S. 20-305.2(b) reads as rewritten:

13 "(b) This section shall not apply to manufacturers or distributors of ~~trailers, motor~~
14 ~~homes, trailers~~ or semitrailers."

15 **SECTION 4.** Chapter 20 of the General Statutes is amended by adding a
16 new section to read:

17 **"§ 20-305.6. Unlawful for manufacturer or captive finance company to unfairly**
18 **discriminate among dealers.**

19 (a) Notwithstanding the terms of any contract, franchise, novation, or agreement,
20 it shall be unlawful for any manufacturer, factory branch, distributor, or distributor
21 branch to do any of the following:

22 (1) Offer or distribute goods or services to one or more of its franchised
23 dealers located in this State at a lower price or on a more favorable
24 basis than is available to any of its other franchised dealers located in
25 this State.

26 (2) Treat its franchised dealers located in this State who have dual
27 facilities at which the vehicles distributed by the manufacturer are sold
28 or serviced with one or more other line-makes of vehicles on a less
29 favorable basis than it treats its dealers who exclusively sell vehicles
30 distributed by that manufacturer.

31 (3) Otherwise treat one or more of its franchised dealers located in this
32 State on a more favorable basis than it treats any of its other franchised
33 dealers located in this State.

34 (b) Notwithstanding the terms of any contract, franchise, novation, or agreement,
35 it shall be unlawful for any leasing company, finance company, or other lender that is
36 owned, operated, or controlled by a manufacturer, factory branch, distributor, or
37 distributor branch, to do any of the following:

38 (1) Fail or refuse to permit any of the dealers franchised by that
39 manufacturer, factory branch, distributor, or distributor branch in this
40 State with whom that leasing company, finance company or other
41 lender engages in business the opportunity to participate in any
42 program or policy that offers the customers of participating dealers

- 1 more favorable rates or terms than those available to the customers of
2 that manufacturer's other franchised dealers located in this State.
3 (2) Unfairly discriminate among its franchised motor vehicle dealers
4 located in this State with respect to the availability of credit, the terms
5 of credit, availability of a lease, or terms of a lease available to a
6 dealer's customers. For purposes of this subdivision, evidence that a
7 customer was denied credit or the extension of a lease from a lender
8 covered by this section when the application was made through one
9 dealer, but, within a 30-day period, the same customer was granted
10 credit or the extension of a lease when the application was made
11 through another dealer, shall constitute a prima facie case of unlawful
12 discrimination in violation of this subdivision."

13 SECTION 5. G.S. 20-308.1 reads as rewritten:

14 "**§ 20-308.1. Civil actions for ~~violations~~ violations.**

15 (a) Notwithstanding the terms, provisions or conditions of any agreement or
16 franchise or other terms or provisions of any novation, waiver or other written
17 instrument, any person who is or may be injured by a violation of a provision of this
18 Article, or any party to a franchise who is so injured in his business or property by a
19 violation of a provision of this Article relating to that franchise, or an arrangement
20 which, if consummated, would be in violation of this Article may, notwithstanding the
21 initiation or pendency of, or failure to initiate an administrative proceeding before the
22 Commissioner concerning the same parties or subject matter, bring an action for
23 damages and equitable relief, including injunctive relief, in any court of competent
24 jurisdiction with regard to any matter not within the jurisdiction of the Commissioner or
25 that seeks relief wholly outside the authority or jurisdiction of the Commissioner to
26 award.

27 (b) Where the violation of a provision of this Article can be shown to be willful,
28 intentional, malicious ~~malicious~~, or wanton, or if continued multiple violations of a
29 provision or provisions of this Article occur, the court may award punitive damages,
30 attorneys' fees and costs in addition to any other damages under this Article.

31 (c) A new motor vehicle dealer, if he has not suffered any loss of money or
32 property, may obtain final equitable relief if it can be shown that the violation of a
33 provision of this Article by a manufacturer or distributor may have the effect of causing
34 ~~such a~~ loss of money or property.

35 (d) ~~Where there are continued violations of a provision or provisions of this~~
36 ~~Article and it can be shown that the violations are willful or wanton, the court, in~~
37 ~~addition to any other remedy or awards of damages under this Article may assess~~
38 ~~monetary penalties.~~ Any association that is comprised of a minimum of 400 motor
39 vehicle dealerships, or a minimum of 10 motorcycle dealerships, substantially all of
40 whom are new motor vehicle dealerships located within North Carolina, and which
41 represents the collective interests of such members, shall have standing to file a petition
42 before the Commissioner or a cause of action in the General Court of Justice of North

1 Carolina for itself, or on behalf of any or all of its members. Such action may seek a
2 determination whether one or more manufacturers, factory branches, distributors, or
3 distributor branches doing business in this State has violated any of the provisions of
4 this Article, or for the determination of any rights created or defined by this Article, so
5 long as the association alleges an injury to the collective interest of its members
6 cognizable under this section. A cognizable injury to the collective interest of the
7 members of such an association shall be deemed to occur if a manufacturer, factory
8 branch, distributor, or distributor branch doing business in this State has engaged in any
9 conduct or taken any action which actually harms or affects all of the franchised new
10 motor vehicle dealers holding franchises with that manufacturer, factory branch,
11 distributor, or distributor branch in this State. With respect to any administrative or civil
12 action filed by an association pursuant to this subsection, in no event shall the
13 Commissioner or court enter an award of monetary damages in favor of the
14 association."

15 **SECTION 6.** G.S. 20-305 reads as rewritten:

16 **"§ 20-305. Coercing dealer to accept commodities not ordered; threatening to**
17 **cancel franchise; preventing transfer of ownership; granting additional**
18 **franchises; terminating franchises without good cause; preventing family**
19 **succession.**

20 It shall be unlawful for any manufacturer, factory branch, distributor, or distributor
21 branch, or any field representative, officer, agent, or any representative whatsoever of
22 any of them:

23 ...

24 (38) Notwithstanding the terms, provisions or conditions of any agreement
25 or franchise or other terms or provisions of any novation, waiver or
26 other written instrument, to assign or change a new motor vehicle
27 dealer's area of responsibility under the franchise arbitrarily or without
28 due regard to the present or projected future pattern of motor vehicle
29 sales and registrations within the dealer's market. A new motor vehicle
30 dealer who believes that a manufacturer, factory branch, distributor, or
31 distributor branch with whom the dealer has entered into a franchise
32 has violated this subdivision may file a petition before the
33 Commissioner as provided in G.S. 20-301(b) contesting the dealer's
34 assigned area of responsibility. At the hearing before the
35 Commissioner, the affected manufacturer, factory branch, distributor,
36 or distributor branch shall have the burden of proving that all portions
37 of its current or proposed area of responsibility for the petitioning
38 dealer are reasonable in light of the present or projected future pattern
39 of motor vehicle sales and registrations within the dealer's market. If a
40 protest is or has been filed under G.S. 20-305(5) and the dealer's area
41 of responsibility is included in the relevant market area under the

- 1 protest, any protest filed under this subdivision shall be consolidated
2 with that protest for hearing and joint disposition of all of the protests.
3 (39) Notwithstanding the terms, provisions, or conditions of any agreement
4 or franchise or other terms or provisions of any novation, waiver or
5 other written instrument, to require, coerce, or attempt to coerce any of
6 its franchised dealers in this State to purchase or lease one or more
7 signs displaying the name of the manufacturer or dealer:
8 a. Upon unduly onerous or unreasonable terms or conditions;
9 b. When the cost of the signage or its installation or maintenance
10 would be unreasonable in light of the dealer's reasonably
11 anticipated sales volume of new motor vehicles manufactured
12 or distributed by that manufacturer or current market or
13 economic conditions;
14 c. If the manufacturer's signage requirements are inconsistent with
15 the signage requirements of one or more other manufacturers
16 whose line-makes of new motor vehicles are sold at the same
17 facility;
18 d. If installation of the additional signage would require removal
19 or relocation of any of the dealer's existing signs displaying the
20 dealership's name or the name of other line makes of new
21 motor vehicles sold at the same facility; or
22 e. If installation of the additional signage would violate local
23 signage or zoning laws to which the dealer is subject.
24 Any provision of any agreement, franchise, waiver, novation, or any
25 other written instrument which is in violation of this subdivision shall
26 be deemed null and void and without force and effect."

27 **SECTION 7.** If any clause or provision contained in this act shall be
28 determined to be unconstitutional or unenforceable, that unconstitutionality or
29 unenforceability shall not affect the validity of all remaining clauses or provisions not
30 specifically determined to be unconstitutional or unenforceable.

31 **SECTION 8.** Section 2 of this act becomes effective December 31, 2001.
32 All other sections of this act are effective when they become law.