

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2007

H

1

HOUSE BILL 1156*

Short Title: Fair Compensation for MV Dealer Termination. (Public)

Sponsors: Representatives Cole, Brubaker (Primary Sponsors); Allred, Howard, McComas, Pate, Walend, and Williams.

Referred to: Commerce, Small Business and Entrepreneurship, if favorable, Judiciary III.

March 29, 2007

A BILL TO BE ENTITLED

1 AN ACT TO REQUIRE THAT FAIR COMPETITION BE PAID TO FRANCHISED
2 MOTOR VEHICLE DEALERS TERMINATED AS A RESULT OF INDUSTRY
3 REORGANIZATION.
4

5 The General Assembly of North Carolina enacts:

6 **SECTION 1.** G.S. 20-305(6) reads as rewritten:

7 "(6) Notwithstanding the terms, provisions or conditions of any franchise
8 or notwithstanding the terms or provisions of any waiver, to terminate,
9 cancel or fail to renew any franchise with a licensed new motor vehicle
10 dealer unless the manufacturer has satisfied the notice requirements of
11 subparagraph c. and the Commissioner has determined, if requested in
12 writing by the dealer within (i) the time period specified in
13 G.S. 20-305(6)c.II, III or IV, G.S. 20-305(6)c.1. II., III., or IV., as
14 applicable, or (ii) the effective date of the franchise termination
15 specified or proposed by the manufacturer in the notice of termination,
16 whichever period of time is longer, and after a hearing on the matter,
17 that there is good cause for the termination, cancellation, or
18 nonrenewal of the franchise and that the manufacturer has acted in
19 good faith as defined in this act regarding the termination, cancellation
20 or nonrenewal. When such a petition is made to the Commissioner by
21 a dealer for determination as to the existence of good cause and good
22 faith for the termination, cancellation or nonrenewal of a franchise, the
23 Commissioner shall promptly inform the manufacturer that a timely
24 petition has been filed, and the franchise in question shall continue in
25 effect pending the Commissioner's decision. The Commissioner shall
26 try to conduct the hearing and render a final determination within 180
27 days after a petition has been filed. If the termination, cancellation or

1 nonrenewal is pursuant to ~~G.S. 20-305(6)~~^{III} G.S. 20-305(6)c.1. III.
2 then the Commissioner shall give the proceeding priority consideration
3 and shall try to render his final determination no later than 90 days
4 after the petition has been filed. Any parties to a hearing by the
5 Commissioner under this section shall have a right of review of the
6 decision in a court of competent jurisdiction pursuant to Chapter 150B
7 of the General Statutes. Any determination of the Commissioner under
8 this section finding that good cause exists for the nonrenewal,
9 cancellation, or termination of any franchise shall automatically be
10 stayed during any period that the affected dealer shall have the right to
11 judicial review or appeal of the determination before the superior court
12 or any other appellate court and during the pendency of any appeal;
13 provided, however, that within 30 days of entry of the Commissioner's
14 order, the affected dealer provide such security as the reviewing court,
15 in its discretion, may deem appropriate for payment of such costs and
16 damages as may be incurred or sustained by the manufacturer by
17 reason of and during the pendency of the stay. Although the right of
18 the affected dealer to such stay is automatic, the procedure for
19 providing such security and for the award of damages, if any, to the
20 manufacturer upon dissolution of the stay shall be in accordance with
21 G.S. 1A-1, Rule 65(d) and (e). No such security provided by or on
22 behalf of any affected dealer shall be forfeited or damages awarded
23 against a dealer who obtains a stay under this subdivision in the event
24 the ownership of the affected dealership is subsequently transferred,
25 sold, or assigned to a third party in accordance with this subdivision or
26 subdivision (4) of this section and the closing on such transfer, sale, or
27 assignment occurs no later than 180 days after the date of entry of the
28 Commissioner's order. Furthermore, unless and until the termination,
29 cancellation, or nonrenewal of a dealer's franchise shall finally become
30 effective, in light of any stay or any order of the Commissioner
31 determining that good cause exists for the termination, cancellation, or
32 nonrenewal of a dealer's franchise as provided in this paragraph, a
33 dealer who receives a notice of termination, cancellation, or
34 nonrenewal from a manufacturer as provided in this subdivision shall
35 continue to have the same rights to assign, sell, or transfer the
36 franchise to a third party under the franchise and as permitted under
37 G.S. 20-305(4) as if notice of the termination had not been given by
38 the manufacturer. Any franchise under notice or threat of termination,
39 cancellation, or nonrenewal by the manufacturer which is duly
40 transferred in accordance with G.S. 20-305(4) shall not be subject to
41 termination by reason of failure of performance or breaches of the
42 franchise on the part of the transferor.

- 43 a. Notwithstanding the terms, provisions or conditions of any
44 franchise or the terms or provisions of any waiver, good cause

1 shall exist for the purposes of a termination, cancellation or
2 nonrenewal when:

3 1. There is a failure by the new motor vehicle dealer to
4 comply with a provision of the franchise which provision
5 is both reasonable and of material significance to the
6 franchise relationship provided that the dealer has been
7 notified in writing of the failure within 180 days after the
8 manufacturer first acquired knowledge of such failure;

9 2. If the failure by the new motor vehicle dealer relates to
10 the performance of the new motor vehicle dealer in sales
11 or service, then good cause shall be defined as the failure
12 of the new motor vehicle dealer to comply with
13 reasonable performance criteria established by the
14 manufacturer if the new motor vehicle dealer was
15 apprised by the manufacturer in writing of the failure;
16 and

17 I. The notification stated that notice was provided of
18 failure of performance pursuant to this section;

19 II. The new motor vehicle dealer was afforded a
20 reasonable opportunity, for a period of not less
21 than 180 days, to comply with the criteria; and

22 III. The new motor vehicle dealer failed to
23 demonstrate substantial progress towards
24 compliance with the manufacturer's performance
25 criteria during such period and the new motor
26 vehicle dealer's failure was not primarily due to
27 economic or market factors within the dealer's
28 relevant market area which were beyond the
29 dealer's control.

30 b. The manufacturer shall have the burden of proof under this
31 section.

32 c. Notification of Termination, Cancellation and Nonrenewal. –

33 1. Notwithstanding the terms, provisions or conditions of
34 any franchise prior to the termination, cancellation or
35 nonrenewal of any franchise, the manufacturer shall
36 furnish notification of termination, cancellation or
37 nonrenewal to the new motor vehicle dealer as follows:

38 I. In the manner described in G.S. 20-305(6)c2
39 below; and

40 II. Not less than 90 days prior to the effective date of
41 such termination, cancellation or nonrenewal; or

42 III. Not less than 15 days prior to the effective date of
43 such termination, cancellation or nonrenewal with
44 respect to any of the following:

- 1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
- A. Insolvency of the new motor vehicle dealer, or filing of any petition by or against the new motor vehicle dealer under any bankruptcy or receivership law;
 - B. Failure of the new motor vehicle dealer to conduct its customary sales and service operations during its customary business hours for seven consecutive business days, except for acts of God or circumstances beyond the direct control of the new motor vehicle dealer;
 - C. Revocation of any license which the new motor vehicle dealer is required to have to operate a dealership;
 - D. Conviction of a felony involving moral turpitude, under the laws of this State or any other state, or territory, or the District of Columbia.
- IV. Not less than 180 days prior to the effective date of such ~~termination or cancellation where the manufacturer or distributor is discontinuing the sale of the product line.~~ termination, cancellation, or nonrenewal which occurs as a result of any change in ownership, operation, or control of all or any part of the business of the manufacturer, factory branch, distributor, or distributor branch whether by sale or transfer of assets, corporate stock or other equity interest, assignment, merger, consolidation, combination, joint venture, redemption, operation of law or otherwise; or the termination, suspension, or cessation of a part or all of the business operations of the manufacturers, factory branch, distributor, or distributor branch; or discontinuance of the sale of the product line or a change in distribution system by the manufacturer whether through a change in distributors or the manufacturer's decision to cease conducting business through a distributor altogether.
- V. Unless the failure by the new motor vehicle dealer relates to the performance of the new motor vehicle dealer in sales or service, not more than one year after the manufacturer first acquired

- 1 knowledge of the basic facts comprising the
2 failure.
- 3 2. Notification under this section shall be in writing; shall
4 be by certified mail or personally delivered to the new
5 motor vehicle dealer; and shall contain:
- 6 I. A statement of intention to terminate, cancel or
7 not to renew the franchise;
- 8 II. A detailed statement of all of the material reasons
9 for the termination, cancellation or nonrenewal;
10 and
- 11 III. The date on which the termination, cancellation or
12 nonrenewal takes effect.
- 13 3. Notification provided in G.S. 20-305(6)c1II of 90 days
14 prior to the effective date of such termination,
15 cancellation or renewal may run concurrent with the 180
16 days designated in G.S. 20-305(6)a2II provided the
17 notification is clearly designated by a separate written
18 document mailed by certified mail or personally
19 delivered to the new motor vehicle dealer.
- 20 d. Payments. –
- 21 1. Upon the termination, nonrenewal or cancellation of any
22 franchise by the manufacturer or distributor, pursuant to
23 this section, the new motor vehicle dealer shall be
24 allowed fair and reasonable compensation by the
25 manufacturer for the:
- 26 I. New motor vehicle inventory that has been
27 acquired from the manufacturer within 18 months,
28 at a price not to exceed the original
29 manufacturer's price to the dealer, and which has
30 not been altered or damaged, and which has not
31 been driven more than 200 miles, and for which
32 no certificate of title has been issued;
- 33 II. Unused, undamaged and unsold supplies and parts
34 purchased from the manufacturer, at a price not to
35 exceed the original manufacturer's price to the
36 dealer, provided such supplies and parts are
37 currently offered for sale by the manufacturer or
38 distributor in its current parts catalogs and are in
39 salable condition;
- 40 III. Equipment, signs, and furnishings that have not
41 been altered or damaged and that have been
42 required by the manufacturer or distributor to be
43 purchased by the new motor vehicle dealer from

- 1 the manufacturer or distributor, or their approved
 2 sources; and
- 3 IV. Special tools that have not been altered or
 4 damaged and that have been required by the
 5 manufacturer or distributor to be purchased by the
 6 new motor vehicle dealer from the manufacturer
 7 or distributor, or their approved sources within
 8 five years immediately preceding the termination,
 9 nonrenewal or cancellation of the franchise.
- 10 2. Fair and reasonable compensation for the above shall be
 11 paid by the manufacturer within 90 days of the effective
 12 date of termination, cancellation or nonrenewal,
 13 provided the new motor vehicle dealer has clear title to
 14 the inventory and has conveyed title and possession of
 15 the same to the manufacturer. The manufacturer shall be
 16 obligated to pay or reimburse the dealer for any
 17 transportation charges associated with the manufacturer's
 18 repurchase obligations under this sub-subparagraph. The
 19 manufacturer may not charge the dealer any handling,
 20 restocking, or other similar costs or fees associated with
 21 items repurchased by the manufacturer under this
 22 sub-subparagraph.
- 23 3. In addition to the other payments set forth in this section,
 24 if a termination, cancellation, or nonrenewal is premised
 25 upon any of the occurrences set forth in
 26 G.S. 20-305(6)c.1.IV., then the manufacturer shall be
 27 liable to the dealer for an amount not less than the fair
 28 market value of the franchise on (i) the day prior to
 29 which the franchisor announces the action which results
 30 in termination, cancellation, or nonrenewal; or (ii) the
 31 day prior to the action which results in termination,
 32 cancellation, or nonrenewal first became general
 33 knowledge; or (iii) the day three years prior to the date
 34 on which the notice of termination, cancellation, or
 35 nonrenewal is issued, whichever amount is higher.
 36 Payment is due within 90 days of the effective date of
 37 the termination, cancellation, or nonrenewal. If the
 38 termination, cancellation, or nonrenewal is due to a
 39 manufacturer's change in distributors, the manufacturer
 40 may avoid paying fair market value to the dealer if the
 41 new distributor or the manufacturer offers the dealer a
 42 franchise agreement with terms acceptable to the dealer.
- 43 e. Dealership Facilities Assistance upon Termination,
 44 Cancellation or Nonrenewal. –

1 In the event of the termination, cancellation or nonrenewal
2 by the manufacturer or distributor under this section, except
3 termination, cancellation or nonrenewal for insolvency, license
4 revocation, conviction of a crime involving moral turpitude, or
5 fraud by a dealer-owner:

- 6 1. Subject to paragraph 3, if the new motor vehicle dealer is
7 leasing the dealership facilities from a lessor other than
8 the manufacturer, the manufacturer shall pay the new
9 motor vehicle dealer a sum equivalent to the rent for the
10 unexpired term of the lease or three year's rent,
11 whichever is less, or such longer term as is provided in
12 the franchise agreement between the dealer and
13 manufacturer; except that, in the case of motorcycle
14 dealerships, the manufacturer shall pay the new motor
15 vehicle dealer the sum equivalent to the rent for the
16 unexpired term of the lease or one year's rent, whichever
17 is less, or such longer term as provided in the franchise
18 agreement between the dealer and manufacturer; or
- 19 2. Subject to paragraph 3, if the new motor vehicle dealer
20 owns the dealership facilities, the manufacturer shall pay
21 the new motor vehicle dealer a sum equivalent to the
22 reasonable rental value of the dealership facilities for
23 three years, or for one year in the case of motorcycle
24 dealerships.
- 25 3. In order to be entitled to facilities assistance from the
26 manufacturer, as provided in this paragraph e., the
27 dealer, owner, or lessee, as the case may be, shall have
28 the obligation to mitigate damages by listing the demised
29 premises for lease or sublease with a licensed real estate
30 agent within 30 days after the effective date of the
31 termination of the franchise and thereafter by reasonably
32 cooperating with said real estate agent in the
33 performance of the agent's duties and responsibilities. In
34 the event that the dealer, owner, or lessee is able to lease
35 or sublease the demised premises, the dealer shall be
36 obligated to pay the manufacturer the net revenue
37 received from such mitigation up to the total amount of
38 facilities assistance which the dealer has received from
39 the manufacturer pursuant to sub-subdivisions 1. and 2.
40 To the extent and for such uses and purposes as may be
41 consistent with the terms of the lease, a manufacturer
42 who pays facilities assistance to a dealer under this
43 paragraph e. shall be entitled to occupy and use the
44 dealership facilities during the years for which the

- 1 manufacturer shall have paid rent under sub-subdivisions
2 1. and 2.
- 3 4. In the event the termination relates to fewer than all of
4 the franchises operated by the dealer at a single location,
5 the amount of facilities assistance which the
6 manufacturer is required to pay the dealer under this
7 sub-subdivision shall be based on the proportion of gross
8 revenue received from the sale and lease of new vehicles
9 by the dealer and from the dealer's parts and service
10 operations during the three years immediately preceding
11 the effective date of the termination (or any shorter
12 period that the dealer may have held these franchises) of
13 the line-makes being terminated, in relation to the gross
14 revenue received from the sale and lease of all
15 line-makes of new vehicles by the dealer and from the
16 total of the dealer's and parts and service operations from
17 this location during the same three-year period.
- 18 5. The compensation required for facilities assistance under
19 this paragraph e. shall be paid by the manufacturer
20 within 90 days of the effective date of termination,
21 cancellation, or nonrenewal.
- 22 f. The provisions of sub-subdivisions d. and e. above shall not be
23 applicable when the termination, nonrenewal or cancellation of
24 the franchise agreement is the result of the voluntary act of the
25 dealer.
- 26 Notwithstanding the terms of any contract or agreement, any
27 dealer's termination or resignation shall not be deemed to be
28 voluntary if that termination or resignation occurred under the
29 manufacturer's threat of nonrenewal, cancellation, or
30 termination of the franchise.
- 31 g. Duty to continue franchise. – Every manufacturer, factory
32 branch, distributor, or distributor branch that maintains a
33 network of franchised dealers in this State, and that, by any
34 means, acquires the right to seller market vehicles in this State
35 under the same line-make as dealers who either currently hold a
36 franchise for that same line-make or whose franchise was
37 terminated, cancelled, discontinued, or nonrenewed as the result
38 of any of the occurrences set forth in G.S. 20-305(6)c.1.IV.
39 above, shall be required to either: (i) continue such dealers'
40 franchises in effect under the same terms and conditions as
41 provided in the former franchise; (ii) offer each such dealer a
42 replacement franchise on such reasonable terms as may be
43 acceptable to such dealer; or (iii) compensate such dealers as
44 required in sub-subdivision d. of this subdivision to the extent

1 that any such dealer has not been fully compensated as the
2 result of the failure, refusal, or inability of the original
3 franchisor to meet its financial obligations to such dealer under
4 G.S. 20-305(6)d."

5 **SECTION 2.** If any provision of this act or its application is held invalid, the
6 invalidity does not affect other provisions or applications of this act that can be given
7 effect without the invalid provisions or application, and to this end the provisions of this
8 act are severable.

9 **SECTION 3.** This act shall apply to all franchises, contracts, and agreements
10 between motor vehicle dealers and manufacturers, factory branches, distributors, and
11 distributor branches whether franchises, contracts, and agreements were entered into
12 before or after the effective date of this act.

13 **SECTION 4.** This act becomes effective July 1, 2007.