

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2007

S

3

SENATE BILL 1351*
Commerce, Small Business and Entrepreneurship Committee Substitute Adopted
5/21/07
Third Edition Engrossed 5/23/07

Short Title: Clarify Motor Vehicle Franchise Laws.

(Public)

Sponsors:

Referred to:

March 26, 2007

A BILL TO BE ENTITLED

AN ACT TO CLARIFY MOTOR VEHICLE FRANCHISE LAWS AS THEY
RELATE TO AUTOMOBILE DEALER WARRANTY OBLIGATIONS, CIVIL
ACTIONS FOR VIOLATIONS, COERCION, AND INSTALLMENT SALES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 20-303 reads as rewritten:

"§ 20-303. Installment sales to be evidenced by written instrument; statement to be delivered to buyer.

(a) Every retail installment sale shall be evidenced by ~~an instrument~~ one or more instruments in writing, which shall contain all the agreements of the parties and shall be signed by the buyer.

(b) For every retail installment sale, Prior ~~prior~~ to or about the time of the delivery of the motor vehicle, the seller shall deliver to the buyer a written statement describing clearly the motor vehicle sold to the buyer, the cash sale price thereof, the cash paid down by the buyer, the amount credited the buyer for any trade-in and a description of the motor vehicle traded, the amount of the finance charge, the amount of any other charge specifying its purpose, the net balance due from the buyer, the terms of the payment of such net balance and a summary of any insurance protection to be effected. The written statement shall be signed by the buyer."

SECTION 2. G.S. 20-305(4) reads as rewritten:

(4) Notwithstanding the terms of any franchise agreement, to prevent or refuse to approve the sale or transfer of the ownership of a dealership by the sale of the business, stock transfer, or otherwise, or the transfer, sale or assignment of a dealer franchise, or a change in the executive management or principal operator of the dealership, or relocation of the dealership to another site within the dealership's relevant market

1 area, if the Commissioner has determined, if requested in writing by
2 the dealer within 30 days after receipt of an objection to the proposed
3 transfer, sale, assignment, relocation, or change, and after a hearing on
4 the matter, that the failure to permit or honor the transfer, sale,
5 assignment, relocation, or change is unreasonable under the
6 circumstances. No franchise may be transferred, sold, assigned,
7 relocated, or the executive management or principal operators
8 changed, unless the franchisor has been given at least 30 days' prior
9 written notice as to the proposed transferee's name and address,
10 identity, financial ability, and qualifications of the proposed transferee,
11 a copy of the purchase agreement between the dealership and the
12 proposed transferee, the identity and qualifications of the persons
13 proposed to be involved in executive management or as principal
14 operators, and the location and site plans of any proposed relocation.
15 The franchisor shall send the dealership and the proposed transferee
16 notice of objection, by registered or certified mail, return receipt
17 requested, to the proposed transfer, sale, assignment, relocation, or
18 change within 30 days after receipt of notice from the dealer, as
19 provided in this section. The notice of objection shall state in detail all
20 factual and legal bases for the objection on the part of the franchisor to
21 the proposed transfer, sale, assignment, relocation, or change that are
22 specifically referenced in this subdivision. An objection to a proposed
23 transfer, sale, assignment, relocation, or change in the executive
24 management or principal operator of the dealership may only be
25 premised upon the factual and legal bases specifically referenced in
26 this subdivision. Failure by the franchisor to send notice of objection
27 within 30 days shall constitute waiver by the franchisor of any right to
28 object to the proposed transfer, sale, assignment, relocation, or change.
29 A notice of objection sent by a franchisor which is in any part based on
30 incomplete information provided to the franchisor by the dealership or
31 proposed transferee, or upon factual or legal issues that are not
32 specifically referenced in this subdivision as being issues upon which
33 the Commissioner shall base his determination, shall not be effective
34 to preserve the franchisor's right to object to the proposed transfer,
35 sale, assignment, relocation, or change provided that the dealership, or
36 proposed transferee, has submitted written notice of the identity,
37 financial ability, and qualifications of the proposed transferee, the
38 identity and qualifications of the persons proposed to be involved in
39 executive management or as principal operators, and the location and
40 site plans of any proposed relocation. With respect to a proposed
41 transfer of ownership, sale, or assignment, the sole issue for
42 determination by the Commissioner and the sole issue upon which the
43 Commissioner shall hear or consider evidence is whether, by reason of
44 lack of good moral character, lack of general business experience, or

1 lack of financial ability, the proposed transferee is unfit to own the
2 dealership. For purposes of this subdivision, the refusal by the
3 manufacturer to accept a proposed transferee who is of good moral
4 character and who otherwise meets the written, reasonable, and
5 uniformly applied business experience and financial requirements, if
6 any, required by the manufacturer of owners of its franchised
7 automobile dealerships is presumed to demonstrate the manufacturer's
8 failure to prove that the proposed transferee is unfit to own the
9 dealership. With respect to a proposed change in the executive
10 management or principal operator of the dealership, the sole issue for
11 determination by the Commissioner and the sole issue on which the
12 Commissioner shall hear or consider evidence shall be whether, by
13 reason of lack of training, lack of prior experience, poor past
14 performance, or poor character, the proposed candidate for a position
15 within the executive management or as principal operator of the
16 dealership is unfit for the position. For purposes of this subdivision,
17 the refusal by the manufacturer to accept a proposed candidate for
18 executive management or as principal operator who is of good moral
19 character and who otherwise meets the written, reasonable, and
20 uniformly applied standards or qualifications, if any, of the
21 manufacturer relating to the business experience and prior
22 performance of executive management required by the manufacturers
23 of its dealers is presumed to demonstrate the manufacturer's failure to
24 prove the proposed candidate for executive management or as
25 principal operator is unfit to serve the capacity. With respect to a
26 proposed relocation or other proposed change, the issue for
27 determination by the Commissioner is whether the proposed relocation
28 or other change is unreasonable under the circumstances. For purposes
29 of this subdivision, the refusal by the manufacturer to agree to a
30 proposed relocation which meets the written, reasonable, and
31 uniformly applied standards or criteria, if any, of the manufacturer
32 relating to dealer relocations is presumed to demonstrate that the
33 manufacturer's failure to prove the proposed relocation is unreasonable
34 under the circumstances. The manufacturer shall have the burden of
35 proof before the Commissioner under this subdivision. It is unlawful
36 for a manufacturer to, in any way, condition its approval of a proposed
37 transfer, sale, assignment, change in the dealer's executive
38 ~~management~~ or management, principal operator, or
39 appointment of a designated successor, on the existing or proposed
40 dealer's willingness to construct a new facility, renovate the existing
41 facility, acquire or refrain from acquiring one or more line-makes of
42 vehicles, separate or divest one or more line-makes of vehicle, or
43 establish or maintain exclusive facilities, personnel, or display space. It
44 is unlawful for a manufacturer to, in any way, condition its approval of

1 a proposed relocation on the existing or proposed dealer's willingness
2 to acquire or refrain from acquiring one or more line-makes of
3 vehicles, separate or divest one or more line-makes of vehicle, or
4 establish or maintain exclusive facilities, personnel, or display space."

5 **SECTION 3.** G.S. 20-305(7)c. reads as rewritten:

6 "c. Except as otherwise provided in sub-subdivision d. of this
7 subdivision, any designated successor of a deceased or
8 incapacitated owner or principal operator of a new motor
9 vehicle dealership appointed by such owner in substantial
10 compliance with this section shall, by operation of law, succeed
11 at the time of such death or incapacity to all of the rights and
12 obligations of the owner or principal operator in the new motor
13 vehicle dealership and under either the existing
14 franchise-franchise or any other successor, renewal, or
15 replacement franchise."

16 **SECTION 4.** G.S. 20-305(18) reads as rewritten:

17 "(18) To prevent or attempt to prevent a dealer from receiving fair and
18 reasonable compensation for the value of the franchised business
19 transferred in accordance with G.S. 20-305(4) above, or to prevent or
20 attempt to prevent, through the exercise of any contractual right of first
21 refusal or otherwise, a dealer located in this State from transferring the
22 franchised business to such persons or other entities as the dealer shall
23 designate in accordance with G.S. 20-305(4). The opinion or
24 determination of a manufacturer that the existence or location of one of
25 its franchised dealers situated in this State is not viable or is not
26 consistent with the manufacturer's distribution or marketing forecast or
27 plans shall not constitute a lawful basis for the manufacturer to fail or
28 refuse to approve a dealer's proposed transfer of ownership submitted
29 in accordance with G.S. 20-305(4), or "good cause" for the
30 termination, cancellation, or nonrenewal of the franchise under
31 G.S. 20-305(6) or ~~for the rejection of grounds for the objection to an~~
32 ~~owner's designated successor appointed pursuant to G.S. 20-305(7).~~
33 ~~No manufacturer shall owe any duty to any actual or potential~~
34 ~~purchaser of a motor vehicle franchise located in this State to disclose~~
35 ~~to such actual or potential purchaser its own opinion or determination~~
36 ~~that the franchise being sold or otherwise transferred is not viable or is~~
37 ~~not consistent with the manufacturer's distribution or marketing~~
38 ~~forecast or plans."~~

39 **SECTION 5.** G.S. 20-305.1(b) reads as rewritten:

40 "(b) Notwithstanding the terms of any franchise agreement, it is unlawful for any
41 motor vehicle manufacturer, factory branch, distributor, or distributor branch to fail to
42 perform any of its warranty obligations with respect to a motor vehicle, to fail to fully
43 compensate its motor vehicle dealers licensed in this State for warranty parts other than
44 parts used to repair the living facilities of recreational vehicles, at the prevailing retail

1 rate according to the factors in subsection (a) of this section, or, in service in accordance
2 with the schedule of compensation provided the dealer pursuant to subsection (a) above,
3 or to otherwise recover all or any portion of its costs for compensating its motor vehicle
4 dealers licensed in this State for warranty parts and service either by reduction in the
5 amount due to the dealer, or by separate charge, surcharge, or other imposition, and to
6 fail to indemnify and hold harmless its franchised dealers licensed in this State against
7 any judgment for damages or settlements agreed to by the manufacturer, including, but
8 not limited to, court costs and reasonable attorneys' fees of the motor vehicle dealer,
9 arising out of complaints, claims or lawsuits including, but not limited to, strict liability,
10 negligence, misrepresentation, express or implied warranty, or rescission or revocation of
11 acceptance of the sale of a motor vehicle as defined in G.S. 25-2-608, to the extent that
12 the judgment or settlement relates to the alleged defective negligent manufacture,
13 assembly or design of new motor vehicles, parts or accessories or other functions by the
14 manufacturer, factory branch, distributor or distributor branch, beyond the control of the
15 dealer. Any audit for warranty parts or service compensation shall only be for the
16 12-month period immediately following the date of the payment of the claim by the
17 manufacturer, factory branch, distributor, or distributor branch. Any audit for sales
18 incentives, service incentives, rebates, or other forms of incentive compensation shall
19 only be for the 12-month period immediately following the date of the ~~termination of~~
20 ~~the payment of the claim by the manufacturer, factory branch, distributor, or distributor~~
21 ~~branch pursuant to a sales incentives program, service incentives program, rebate~~
22 ~~program, or other form of incentive compensation program. Provided, however, these~~
23 limitations shall not be effective in the case of fraudulent claims."

24 **SECTION 6.** G.S. 20-305.1(b1) reads as rewritten:

25 "(b1) All claims made by motor vehicle dealers pursuant to this section for
26 compensation for delivery, preparation, warranty and recall work including labor, parts,
27 and other expenses, shall be paid by the manufacturer within 30 days after receipt of
28 claim from the dealer. When any claim is disapproved, the dealer shall be notified in
29 writing of the grounds for disapproval. Any claim not specifically disapproved in
30 writing within 30 days after receipt shall be considered approved and payment is due
31 immediately. No claim which has been approved and paid may be charged back to the
32 dealer unless it can be shown that the claim was false or fraudulent, that the repairs were
33 not properly made or were unnecessary to correct the defective condition, or the dealer
34 failed to reasonably substantiate the ~~claim-claim~~ either in accordance with the
35 manufacturer's reasonable written procedures or by other reasonable means.~~A~~
36 ~~manufacturer or distributor shall not deny a claim or reduce the amount to be~~
37 ~~reimbursed to the dealer as long as the dealer has provided reasonably sufficient~~
38 ~~documentation that the dealer:~~

- 39 (1) ~~Made a good faith attempt to perform the work in compliance with the~~
40 ~~written policies and procedures of the manufacturer; and~~
41 (2) ~~Actually performed the work.~~

42 A manufacturer or distributor shall not deny a claim solely based upon a motor vehicle
43 dealer's incidental failure to comply with the manufacturer's reasonable written
44 procedures. A manufacturer may further not charge a dealer back subsequent to the

1 payment of the claim unless a representative of the manufacturer has met in person at
2 the dealership, or by telephone, with an officer or employee of the dealer designated by
3 the dealer and explained in detail the basis for each of the proposed charge-backs and
4 thereafter given the dealer's representative a reasonable opportunity at the meeting, or
5 during the telephone call, to explain the dealer's position relating to each of the
6 proposed charge-backs. In the event the dealer was selected for audit or review on the
7 basis that some or all of the dealer's claims were viewed as excessive in comparison to
8 average, mean, or aggregate data accumulated by the manufacturer, or in relation to
9 claims submitted by a group of other franchisees of the manufacturer, the manufacturer
10 shall, at or prior to the meeting or telephone call with the dealer's representative, provide
11 the dealer with a written statement containing the basis or methodology upon which the
12 dealer was selected for audit or review."

13 **SECTION 7.** G.S. 20-305.1(b2) reads as rewritten:

14 "(b2) A manufacturer may not deny a motor vehicle dealer's claim for sales
15 incentives, service incentives, rebates, or other forms of incentive compensation, reduce
16 the amount to be paid to the dealer, or charge a dealer back subsequent to the payment
17 of the claim unless it can be shown that the claim was false or fraudulent or that the
18 dealer failed to reasonably substantiate the claim either in accordance with the
19 manufacturer's reasonable written procedures or by other reasonable means."

20 **SECTION 8.** G.S. 20-308.1 reads as rewritten:

21 "**§ 20-308.1. Civil actions for violations.**

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

34 (b) Where the violation of a provision of this Article can be shown to be willful,
35 malicious, or wanton, or if continued multiple violations of a provision or provisions of
36 this Article occur, the court may award punitive damages, attorneys' fees and costs in
37 addition to any other damages under this Article. Where the violation of a provision of
38 this Article can be shown, in an administrative proceeding before the Commissioner, to
39 be willful, malicious, or wanton, or if continued multiple violations of a provision or
40 provisions of this Article occur, the Commissioner may award attorneys' fees and costs
41 in addition to any other relief available under this Article.

42 (c) A new motor vehicle dealer, if he has not suffered any loss of money or
43 property, may obtain final equitable relief if it can be shown that the violation of a

1 provision of this Article by a manufacturer or distributor may have the effect of causing
2 a loss of money or property.

3 (d) Any association that is comprised of a minimum of 400 new motor vehicle
4 dealers, or a minimum of 10 motorcycle dealers, substantially all of whom are new
5 motor vehicle dealers located within North Carolina, and which represents the collective
6 interests of its members, shall have standing to file a petition before the Commissioner
7 or a cause of action in any court of competent jurisdiction for itself, or on behalf of any
8 or all of its members, seeking declaratory and injunctive relief. Prior to bringing an
9 action, the association and manufacturer, factory branch, distributor, or distributor
10 branch shall initiate mediation as set forth in G.S. 20-301.1(b). An action brought
11 pursuant to this subsection may seek a determination whether one or more
12 manufacturers, factory branches, distributors, or distributor branches doing business in
13 this State have violated any of the provisions of this Article, or for the determination of
14 any rights created or defined by this Article, so long as the association alleges an injury
15 to the collective interest of its members cognizable under this section. A cognizable
16 injury to the collective interest of the members of the association shall be deemed to
17 occur if a manufacturer, factory branch, distributor, or distributor branch doing business
18 in this State has engaged in any conduct or taken any action which actually harms or
19 affects all of the franchised new motor vehicle dealers holding franchises with that
20 manufacturer, factory branch, distributor, or distributor branch in this State. With
21 respect to any administrative or civil action filed by an association pursuant to this
22 subsection, the relief granted shall be limited to declaratory and injunctive relief and in
23 no event shall the Commissioner or court enter an award of monetary damages."

24 **SECTION 9.** G.S. 20-305 is amended by adding a new subdivision to read:

25 "(41) Notwithstanding the terms, provisions, or conditions of any agreement
26 or franchise, to use or consider the performance of any of its
27 franchised new motor vehicle dealers located in this State relating to
28 the sale of the manufacturer's new motor vehicles or ability to satisfy
29 any minimum sales or market share quota or responsibility relating to
30 the sale of the manufacturer's new motor vehicles in determining:

- 31 a. The dealer's eligibility to purchase program, certified, or other
32 used motor vehicles from the manufacturer;
33 b. The volume, type, or model of program, certified, or other used
34 motor vehicles the dealer shall be eligible to purchase from the
35 manufacturer;
36 c. The price or prices of any program, certified, or other used
37 motor vehicles that the dealer shall be eligible to purchase from
38 the manufacturer; or
39 d. The availability or amount of any discount, credit, rebate, or
40 sales incentive the dealer shall be eligible to receive from the
41 manufacturer for the purchase of any program, certified, or
42 other used motor vehicles offered for sale by the manufacturer."

43 **SECTION 10.** This act shall be applicable to all franchises and other
44 contracts and agreements existing between motor vehicle dealers, on the one part, and

1 manufacturers, factory branches, distributors, and distributor branches, on the other part,
2 at the time of its ratification, and to all future franchises, contracts, and other
3 agreements.

4 **SECTION 11.** If any provision of this act or its application is held invalid,
5 the invalidity does not affect other provisions or applications of this act that can be
6 given effect without the invalid provisions or application, and to this end the provisions
7 of this act are severable.

8 **SECTION 12.** This act becomes effective July 1, 2007.