

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2001**

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SENATE BILL 470

Short Title: Clarify MV Dealer Franchise Laws.

(Public)

Sponsors: Senators Hoyle, Plyler, Dalton, Carter; Albertson, Allran, Ballantine, Berger, Carpenter, Cunningham, Forrester, Foxx, Garrou, Garwood, Harris, Kerr, Kinnaird, Lee, Lucas, Martin of Pitt, Purcell, Rand, Robinson, Shaw of Cumberland, Shaw of Guilford, Soles, Swindell, Thomas, Warren, Webster, Weinstein, and Wellons.

Referred to: Commerce.

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. G.S. 20-287 reads as rewritten:

"§ 20-287. Licenses required.

It shall be unlawful for any new motor vehicle dealer, used motor vehicle dealer, motor vehicle sales representative, manufacturer, factory branch, factory representative, distributor, distributor branch, distributor representative, or wholesaler to engage in business in this State without first obtaining a license as provided in this Article. It shall further be unlawful for any person, corporation, or other entity to sell, offer to sell, or, for any fee, commission, or other financial consideration, arrange for the sale of any new motor vehicle within this State unless such person, corporation, or other entity holds a current and valid franchise issued by a manufacturer, factory branch, factory representative, distributor, or distributor branch for the sale of such vehicle. If any motor vehicle dealer acts as a motor vehicle sales representative, the dealer shall obtain a motor vehicle sales representative's license in addition to a motor vehicle dealer's license. A sales representative may have only one license. The license shall show the name of each dealer or wholesaler employing the sales representative. ~~The Subject to~~ the provisions of G.S. 20-305.2, the following license holders may operate as a motor vehicle dealer without obtaining a motor vehicle dealer's license or paying an additional fee: a manufacturer, a factory branch, a distributor, and a distributor branch. Any of these license holders who operates as a motor vehicle dealer may sell motor vehicles at retail only at an established salesroom."

1 **SECTION 2.** Chapter 20 of the General Statutes is amended by adding a
2 new section to read:

3 **"§ 20-301.1. Notice of additional charges against dealer's account; informal**
4 **appeals procedure.**

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

19 (b) Upon receipt of a notice given pursuant to or in satisfaction of subdivision (a)
20 above, or in the event a new motor vehicle dealer discovers an actual or proposed
21 charge or debit for which a manufacturer should have provided prior written notice
22 under subdivision (a) above, the dealer, if he believes the charge to be unreasonable, or
23 contrary to the provisions of this Article or the franchise, may challenge the charge
24 either by filing a petition before the Commissioner as provided in G.S. 20-301(b) or, if
25 the amount in controversy is less than or equal to ten thousand dollars (\$10,000), the
26 dealer may, in his discretion, instead utilize the informal dispute resolution procedure
27 provided in subsection (c) below.

28 (c) Any franchised new motor vehicle dealer who seeks to challenge an actual or
29 proposed debit or charge to the dealer or to the dealer's account in amount less than or
30 equal to ten thousand dollars (\$10,000) may, in lieu of filing a formal petition before the
31 Commissioner as provided in G.S. 20-301(b), proceed as provided in this subsection.

32 (1) The dealer shall send a letter to the Commissioner by certified or
33 registered mail, return receipt requested, identifying the actual or
34 proposed charges the dealer seeks to challenge and the reason or basis
35 for such challenge. Unless the dealer specifically states in the letter
36 that the dealer will be represented before the Commissioner by legal
37 counsel, the matter shall be considered and heard by the Commissioner
38 without the appearance of legal counsel by either the dealer or
39 manufacturer. Upon the mailing of a letter to the Commissioner under
40 this subsection, any chargeback to or any payment required of a dealer
41 by a manufacturer shall be stayed during the pendency of the
42 determination by the Commissioner.

43 (2) Upon the receipt of the dealer's letter, the Commissioner shall forward
44 a copy of the dealer's letter to the affected manufacturer, by certified or

1 registered mail, return receipt requested, along with a notice stating the
2 date and time of a meeting to be held at the dealership at which time
3 the parties shall informally provide evidence and arguments in support
4 of their respective positions on the charges identified in the dealer's
5 letter to the Commissioner.

6 (3) At least 10 days prior to the meeting, the affected manufacturer shall,
7 by certified or registered mail, return receipt requested, send the dealer
8 and Commissioner a detailed response to the allegations raised in the
9 dealer's letter.

10 (4) The meeting at the dealership shall be conducted in an informal
11 manner under the direction of the Commissioner and the meeting shall
12 not be recorded or transcribed, nor shall any witnesses be sworn. The
13 manufacturer shall have the burden of proving that the amount of any
14 actual or proposed charge or debit challenged by the dealer is both
15 reasonable and justifiable under the law. Neither the Rules of Civil
16 Procedure nor the Rules of Evidence shall be applicable.

17 (5) If the parties fail to resolve their dispute at the meeting or within 10
18 days thereafter, the Commissioner, by certified or registered mail, shall
19 notify the parties of his determination within 30 days. The
20 Commissioner shall state the factual and legal bases of his findings
21 and, unless an appeal is taken by the manufacturer or dealer as
22 provided in this subsection, it shall be unlawful for a manufacturer to
23 require payment from a dealer or charge or debit the dealer's account
24 for any contested charge or series of charges, if the Commissioner fails
25 to determine that such charge or series of charges is both reasonable in
26 amount and justifiable under the law.

27 (6) Within 30 days after receipt of the Commissioner's determination
28 either the dealer or manufacturer may appeal the determination of the
29 Commissioner and obtain a trial de novo, in the matter by filing a
30 complaint in the General Court of Justice in the county in which the
31 dealership is located. Upon the filing of such a complaint, the
32 determination of the Commissioner shall immediately be stayed,
33 provided, however, that the manufacturer shall not require payment
34 from the dealer or debit or charge the dealer's account unless and until
35 a final judgment supporting such payment or charge has been rendered
36 by the Court. Trial de novo shall take place in the General Court of
37 Justice either with or without a jury as in the case of other civil
38 actions; either or both parties may elect to be represented by legal
39 counsel; the determination of the Commissioner shall not be presented
40 to or considered by the Court; and the parties and Court shall comply
41 with the Rules of Civil Procedure and Rules of Evidence. At the trial,
42 the manufacturer shall have the burden of proving that the amount of
43 any actual or proposed charge or debit challenged by the dealer is both
44 reasonable in amount and justifiable under the law. Appeal from the

1 final judgment of the Court may be taken by either party in the same
2 manner and in accordance with the same procedure as in other civil
3 actions."

4 **SECTION 3.** G.S. 20-305(30) reads as rewritten:

5 "~~(30) To vary the price charged to any of its franchised new motor vehicle~~
6 ~~dealers located in this State for new motor vehicles based on the~~
7 ~~dealer's purchase of new facilities, supplies, tools, equipment, or other~~
8 ~~merchandise from the manufacturer, the dealer's relocation,~~
9 ~~remodeling, repair, or renovation of existing dealerships or~~
10 ~~construction of a new facility or upon the dealer's participation in~~
11 ~~training programs sponsored, endorsed, or recommended by the~~
12 ~~manufacturer.~~

13 ~~The price of the vehicle, for purposes of this subdivision shall include~~
14 ~~the manufacturer's use of rebates, credits, or other consideration which~~
15 ~~has the effect of causing a variance in the price of new motor vehicles~~
16 ~~offered to its franchised dealers located in the State.~~

17 ~~Notwithstanding the foregoing, nothing in this subdivision shall be~~
18 ~~deemed to preclude a manufacturer from establishing sales contests or~~
19 ~~promotions which provide or award dealers or consumers rebates or~~
20 ~~incentives.~~

21 ~~Nothing contained in this subdivision shall prohibit a manufacturer~~
22 ~~from providing assistance or encouragement to a franchised dealer to~~
23 ~~remodel, renovate, recondition, or relocate the dealer's existing~~
24 ~~facilities, provided that this assistance, encouragement, or rewards are~~
25 ~~not determined on a per vehicle basis.~~

26 ~~In the event that at the time of the ratification of this act a~~
27 ~~manufacturer is currently operating a program or has in effect a policy~~
28 ~~which would violate this subdivision after October 1, 1999, it shall be~~
29 ~~lawful for that program or policy, or a program or policy similar~~
30 ~~thereto implemented after the effective date of this act, to continue in~~
31 ~~effect as to the manufacturer's franchised dealers located in this State~~
32 ~~until December 31, 2002. Any manufacturer shall be required to pay or~~
33 ~~otherwise compensate any franchise dealer who has earned the right to~~
34 ~~receive payment or other compensation under a program in accordance~~
35 ~~with the manufacturer's program or policy.~~

36 (30) To offer to sell or lease or to sell or lease any new motor vehicle or
37 accessory to any dealer at a lower actual price therefore than the actual
38 price offered to any other dealer for the same model similarly equipped
39 or accessory or to use any device, including, but not limited to, an
40 incentive, sales promotion plan, or other similar program, which
41 results in a lower actual price of a vehicle or accessory being offered to
42 one dealer and which is not offered to other dealers of vehicles of the
43 same line-make or the same accessory.

1 For purposes of this subdivision, the price of a vehicle shall include
2 the manufacturer's use of manufacturer-to-dealer rebates, incentives,
3 credits, or any other financial consideration which has the effect of
4 causing any of the manufacturer's dealers located in this State to be
5 required to pay more for any vehicle similarly equipped than any of
6 that manufacturer's other dealers located in this State.

7 The practices, policies, and programs specifically prohibited under
8 this subdivision include, but are not limited to, manufacturer-to-dealer
9 rebates, incentives, credits, or any other financial consideration paid or
10 awarded by manufacturers to new motor vehicle dealers on the basis
11 of: a dealer's acquisition of a new facility or relocation or renovation of
12 an existing facility; whether or not a dealer is dualed with one or more
13 other line-makers of vehicles; a dealer's sales volume or penetration; a
14 dealer's level of sales or service customer satisfaction; a dealer's
15 purchase of advertising materials, signage, tools, equipment, computer
16 hardware or software, communications devices, or furnishings; or a
17 dealer's participation in training, used vehicle inspection or
18 certification, or other programs sponsored or endorsed by the
19 manufacturer.

20 It shall not be unlawful under this subdivision for a manufacturer to
21 offer or provide manufacturer-to-dealer rebates, incentives, or other
22 payments to its franchised dealers located in this State, as long as the
23 same per vehicle dollar amount of any such rebate, incentive, or other
24 payment is uniformly available to all of its franchised dealers located
25 in this State without regard to the number of vehicles sold by the
26 dealer or other requirements, conditions, limitations, or restrictions. It
27 shall further not be unlawful for any manufacturer to offer or provide
28 direct manufacturer-to-consumer rebates, incentives, or other
29 payments to purchasers within this State, as long as the same dollar
30 amount of such rebates, incentives, or other payments are available
31 during any stated period of time to all purchasers of identified models
32 or series of vehicles without condition, limitation, or other restriction.
33 Nothing contained in this subdivision shall prohibit a manufacturer
34 from providing assistance or encouragement to a franchised dealer to
35 remodel, renovate, recondition, or relocate the dealer's existing
36 facilities, provided that this assistance, encouragement, or reward is
37 not determined on a per vehicle basis.

38 It is unlawful for any manufacturer to charge or include the cost of
39 any programs or policy prohibited under this subdivision in the selling
40 price of vehicles which the manufacturer sells to its franchised dealers
41 located in this State.

42 The provisions of this subdivision shall apply both to existing and
43 future programs and policies of all manufacturers that distribute new
44 motor vehicles to new motor vehicle dealers located in this State and

1 shall apply irrespective of any contrary provision contained in any
2 franchise agreement or novation; provided, however, that in the event
3 that as of October 1, 1999, a manufacturer was operating a program or
4 had in effect a policy which would violate this subdivision, it shall be
5 lawful for that program or policy to continue in effect as to the
6 manufacturer's franchised dealers located in this State until December
7 31, 2002. Any manufacturer shall be required to pay or otherwise
8 compensate any franchise dealer who has earned the right to receive
9 payment or other compensation under a program in accordance with
10 the manufacturer's program or policy."

11 **SECTION 4.** G.S. 20-305.2(b) reads as rewritten:

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

14 **SECTION 5.** Chapter 20 of the General Statutes is amended by adding a
15 new section to read:

16 "**§ 20-305.6. Unlawful for manufacturer or captive finance company to unfairly**
17 **discriminate among dealers.**

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

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

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

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

33 (b) Notwithstanding the terms of any contract, franchise, novation, or agreement,
34 it shall be unlawful for any leasing company, finance company, or other lender that is
35 owned, operated, or controlled by a manufacturer, factory branch, distributor, or
36 distributor branch, to offer less favorable terms to or treat any of the dealers franchised
37 by such manufacturer, factory branch, distributor, or distributor branch in this State with
38 whom such leasing company, finance company, or other lender engages in business on a
39 less favorable basis than it offers to or treats any of such manufacturer's other franchised
40 dealers located in this State."

41 **SECTION 6.** G.S. 20-308.1 reads as rewritten:

42 "**§ 20-308.1. Civil actions for violations.**

43 (a) Notwithstanding the terms, provisions or conditions of any agreement or
44 franchise or other terms or provisions of any novation, waiver or other written

1 instrument, any person who is or may be injured by a violation of a provision of this
2 Article, or any party to a franchise who is so injured in his business or property by a
3 violation of a provision of this Article relating to that franchise, or an arrangement
4 which, if consummated, would be in violation of this Article may, notwithstanding the
5 initiation or pendency of, or failure to initiate an administrative proceeding before the
6 Commissioner concerning the same parties or subject matter, bring an action for
7 damages and equitable relief, including injunctive relief, in any court of competent
8 jurisdiction with regard to any matter not within the jurisdiction of the Commissioner or
9 that seeks relief wholly outside the authority or jurisdiction of the Commissioner to
10 award.

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

15 Any new motor vehicle dealer who has suffered pecuniary loss or who has been
16 otherwise adversely affected because of a violation of a provision of this Article by a
17 manufacturer, factory branch, distributor, or distributor branch, notwithstanding the
18 existence of any other remedies under this Article, has a cause of action against such
19 manufacturer, factory branch, distributor, or distributor branch licensee for damages and
20 may recover damages therefore in any court of competent jurisdiction in an amount
21 equal to treble the pecuniary loss, together with costs and reasonable attorneys' fees to
22 be assessed by the court. Upon a prima facie showing by the new motor vehicle dealer
23 bringing the action that such a violation by the manufacturer, factory branch, distributor,
24 or distributor branch has occurred, the burden of proof shall then be upon the
25 manufacturer, factory branch, distributor, or distributor branch to prove that such
26 violation or unfair practice did not occur.

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

31 (d) Any association which is comprised of a minimum of 500 motor vehicle
32 dealerships, substantially all of whom are new motor vehicle dealerships located within
33 North Carolina, and which represents the collective interests of such members, shall
34 have standing to file a petition before the Commissioner or a cause of action in the
35 General Court of Justice of North Carolina for itself, or on behalf of any or all of its
36 members seeing a determination whether one or more manufacturers, factory branches,
37 distributors, or distributor branches doing business in this State has violated any of the
38 provisions of this Article, or for the determination of any rights created or defined by
39 this Article, so long as the association alleges an injury to the collective interest of its
40 members cognizable under this section. A cognizable injury to the collective interest of
41 the members of such an association shall be deemed to occur if:

- 42 (1) A manufacturer, factory branch, distributor, or distributor branch doing
43 business in this State has engaged in any conduct or taken any action
44 which actually harms or affects, or threatens to harm or affect, all of

1 the franchised new motor vehicle dealers holding franchises with that
2 manufacturer, factory branch, distributor, or distributor branch in this
3 State; or

4 (2) ~~Where there are continued violations of a provision or provisions of~~
5 ~~this Article and it can be shown that the violations are willful or~~
6 ~~wanton, the court, in addition to any other remedy or awards of~~
7 ~~damages under this Article may assess monetary penalties. An action~~
8 ~~is taken by the State of North Carolina which actually harms or affects,~~
9 ~~or threatens to harm or affect, all new motor vehicle dealers within this~~
10 ~~State."~~

11 **SECTION 7.** G.S. 20-305 is amended by adding a new subdivision to read:

12 "(38) Notwithstanding the terms, provisions, or conditions of any agreement
13 or franchise or other terms or provisions of any novation, waiver, or
14 other written instrument, to assign or change a new motor vehicle
15 dealer's area of responsibility under the franchise arbitrarily or without
16 due regard to the present or projected future pattern of motor vehicle
17 sales and registrations within the dealer's market. A new motor vehicle
18 dealer who believes that a manufacturer, factory branch, distributor, or
19 distributor branch with whom the dealer has entered into a franchise
20 has violated this subdivision may file a petition before the
21 Commissioner as provided in G.S. 20-301(b) contesting the dealer's
22 assigned area of responsibility. At the hearing before the
23 Commissioner, the affected manufacturer, factory branch, distributor,
24 or distributor branch shall have the burden of proving that all portions
25 of its current or proposed area of responsibility for the petitioning
26 dealer are reasonable in light of the present or projected future pattern
27 of motor vehicle sales and registrations within the dealer's market."

28 **SECTION 8.** If any clause or provision contained in this act shall be
29 determined to be unconstitutional or unenforceable, that unconstitutionality or
30 unenforceability shall not affect the validity of all remaining clauses or provisions not
31 specifically determined to be unconstitutional or unenforceable.

32 **SECTION 9.** This act is effective when it becomes law.