

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2001

S

3

SENATE BILL 470
Commerce Committee Substitute Adopted 4/25/01
House Committee Substitute Favorable 8/14/01

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 motor vehicle dealers located in this State, or to charge or debit the account of the franchised motor vehicle dealer for merchandise, tools, or equipment, other than the published cost of new motor vehicles, and merchandise, tools, or equipment specifically ordered by the franchised motor vehicle dealer, unless the franchised motor vehicle dealer receives a detailed itemized description of the nature and amount of each charge in writing at least 10 days prior to the date the charge or account debit is to become effective or due. For purposes of this subsection, prior written notice is required for the following charges or debits: advertising or advertising materials; advertising or showroom displays; customer informational materials; computer or communications hardware or software; special tools; equipment; dealership operation guides; Internet programs; and any additional charges or surcharges made or proposed for merchandise, tools, or equipment previously charged to the dealer.

(b) Any franchised new motor vehicle dealer who seeks to challenge an actual or proposed charge, debit, payment, reimbursement, or credit to the franchised new motor vehicle dealer or to the franchised new motor vehicle dealer's account in an amount less than or equal to ten thousand dollars (\$10,000) and that is in violation of this Article or contrary to the terms of the franchise may, prior to filing a formal petition before the Commissioner as provided in G.S. 20-301(b) or a civil action in any court of competent

1 jurisdiction under G.S. 20-308.1, request and obtain a mediated settlement conference
2 as provided in this subsection. Unless objection to the timeliness of the franchised new
3 motor vehicle dealer's request for mediation under this subsection is waived in writing
4 by the affected manufacturer, factory branch, distributor, or distributor branch, a
5 franchised new motor vehicle dealer's request to mediate must be sent to the
6 Commissioner within 75 days after the franchised new motor vehicle dealer's receipt of
7 written notice from a manufacturer, factory branch, distributor, or distributor branch of
8 the charges, debits, payments, reimbursements, or credits challenged by the franchised
9 new motor vehicle dealer. If the franchised new motor vehicle dealer has requested in
10 writing that the manufacturer, factory branch, distributor, or distributor branch review
11 the questioned charges, debits, payments, reimbursements, or credits, a franchised new
12 motor vehicle dealer's request to mediate must be sent to the Commissioner within 30
13 days after the franchised new motor vehicle dealer's receipt of the final written
14 determination on the issue from the manufacturer, factory branch, distributor, or
15 distributor branch.

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

22 (2) The franchised new motor vehicle dealer shall send a letter to the
23 Commissioner by certified or registered mail, return receipt requested,
24 identifying the actual or proposed charges the franchised new motor
25 vehicle dealer seeks to challenge and the reason or basis for the
26 challenge. The charges, debits, payments, reimbursements, or credits
27 challenged by the franchised new motor vehicle dealer need not be
28 related, and multiple issues may be resolved in a single proceeding.
29 The franchised new motor vehicle dealer shall send a copy of the letter
30 to the affected manufacturer, factory branch, distributor, or distributor
31 branch, addressed to the current district, zone, or regional manager in
32 charge of overseeing the dealer's operations, or the registered agent for
33 acceptance of legal process in this State. Upon the mailing of a letter to
34 the Commissioner and the manufacturer, factory branch, distributor, or
35 distributor branch pursuant to this subsection, any chargeback to or
36 any payment required of a franchised new motor vehicle dealer by a
37 manufacturer, factory branch, distributor, or distributor branch shall be
38 stayed during the pendency of the mediation. Upon the mailing of a
39 letter to the Commissioner and manufacturer, factory branch,
40 distributor, or distributor branch pursuant to this subsection, any
41 statute of limitation or other time limitation for filing a petition before

1 the Commissioner or civil action shall be tolled during the pendency of
2 the mediation.

3 (3) Upon receipt of the written request of the franchised new motor
4 vehicle dealer, the Commissioner shall appoint a mediator and send
5 notice of that appointment to the parties. A person is qualified to serve
6 as mediator as provided by this subdivision if the person is certified to
7 serve as a mediator under Rule 8 of the North Carolina Rules
8 Implementing Statewide Mediated Settlement Conferences in Superior
9 Court Civil Actions and does not represent motor vehicle dealers or
10 manufacturers, factory branches, distributors, or distributor branches.
11 A mediator acting pursuant to this subdivision shall have judicial
12 immunity in the same manner and to the same extent as a Judge of the
13 General Court of 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 subsection 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 branch
27 shall, by certified or registered mail, return receipt requested, send the
28 mediator and the franchised new motor vehicle dealer a detailed
29 response to the allegations raised in the franchised new motor vehicle
30 dealer's written request. The mediation may be conducted by officers
31 or employees of the parties themselves without the appearance of legal
32 counsel. However, at least 10 days prior to the mediated settlement
33 conference, either party may give notice to the other and to the
34 mediator of its intention to appear at the mediation with legal counsel,
35 in which event either party may appear at the mediation with legal
36 counsel.

37 (7) A mediation proceeding conducted pursuant to this subsection shall be
38 complete not later than the sixtieth day after the date of the
39 Commissioner's notice of the appointment of the mediator; this
40 deadline may be extended by written agreement of the parties. The
41 parties shall be solely responsible for the compensation and expenses
42 of the mediator on a fifty-fifty basis. The Commissioner is not liable

1 for the compensation paid or to be paid a mediator employed pursuant
2 to this subsection.

3 (8) A party may attend a mediated settlement conference telephonically in
4 lieu of personal appearance. If a party or other person required to
5 attend a mediated settlement conference fails to attend without good
6 cause, the Commissioner may impose upon the party or person any
7 appropriate monetary sanction, including the payment of fines,
8 attorneys' fees, mediator fees, expenses, and loss of earnings incurred
9 by persons attending the conference.

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

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

24 "(30) To vary the price charged to any of its franchised new motor vehicle
25 dealers located in this State for new motor vehicles based on the
26 dealer's purchase of new facilities, supplies, tools, equipment, or other
27 merchandise from the manufacturer, the dealer's relocation,
28 remodeling, repair, or renovation of existing dealerships or
29 construction of a new facility or upon the dealer's participation in
30 training programs sponsored, endorsed, or recommended by the
31 manufacturer.

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

37 Notwithstanding the foregoing, nothing in this subdivision shall be
38 deemed to preclude a manufacturer from establishing sales contests or
39 promotions which provide or award dealers or consumers rebates or
40 incentives.

41 Nothing contained in this subdivision shall prohibit a manufacturer
42 from providing assistance or encouragement to a franchised dealer to

1 remodel, renovate, recondition, or relocate the dealer's existing
2 facilities, provided that this assistance, encouragement, or rewards are
3 not determined on a per vehicle basis.

4 In the event that ~~at the time of the ratification of this act as of~~
5 October 1, 1999, a manufacturer ~~is currently was~~ operating a program
6 or ~~has had~~ in effect a policy that varied the price charged to its
7 franchised dealers located in this state in a manner which would
8 violate this ~~subdivision after October 1, 1999~~, subdivision, it shall be
9 lawful for that program or policy, or a program or policy similar
10 thereto implemented after the effective date of this act, to continue in
11 effect as to the manufacturer's franchised dealers located in this State
12 until December 31, ~~2002-2004~~. Any manufacturer shall be required to
13 pay or otherwise compensate any franchise dealer who has earned the
14 right to receive payment or other compensation under a program in
15 accordance with the manufacturer's program or policy."

16 **SECTION 2.1.** G.S. 20-305(30), as amended by Section 2 of this act, reads
17 as rewritten:

18 "(30) To vary the price charged to any of its franchised new motor vehicle
19 dealers located in this State for new motor vehicles based on the
20 dealer's purchase of new facilities, supplies, tools, equipment, or other
21 merchandise from the manufacturer, the dealer's relocation,
22 remodeling, repair, or renovation of existing dealerships or
23 construction of a new facility, ~~or upon~~ the dealer's participation in
24 training programs sponsored, endorsed, or recommended by the
25 ~~manufacturer~~, manufacturer, whether or not the dealer is dualed with
26 one or more other line makes of new motor vehicles, or the dealer's
27 sales penetration. Except as provided in this subdivision, it shall be
28 unlawful for any manufacturer, factory branch, distributor, or
29 distributor branch, or any field representative, officer, agent, or any
30 representative whatsoever of any of them to vary the price charged to
31 any of its franchised new motor vehicle dealers located in this State for
32 new motor vehicles based on the dealer's sales volume, the dealer's
33 level of sales or customer service satisfaction, the dealer's purchase of
34 advertising materials, signage, nondiagnostic computer hardware or
35 software, communications devices, or furnishings, or the dealer's
36 participation in used motor vehicle inspection or certification programs
37 sponsored or endorsed by the manufacturer.

38 The price of the vehicle, for purposes of this subdivision shall
39 include the manufacturer's use of rebates, credits, or other
40 consideration which has the effect of causing a variance in the price of
41 new motor vehicles offered to its franchised dealers located in the
42 State.

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

6 a. With respect to manufacturer to consumer rebates and
7 incentives, the manufacturer's criteria for determining
8 eligibility shall:

- 9 1. Permit all of the manufacturer's franchised new motor
10 vehicle dealers in this State to offer the rebate or
11 incentive; and
- 12 2. Be uniformly applied and administered to all eligible
13 consumers.

14 b. With respect to manufacturer to dealer rebates and incentives,
15 the rebate or incentive program shall:

- 16 1. Be based solely on the dealer's actual or reasonably
17 anticipated sales volume or on a uniform per vehicle sold
18 or leased basis;
- 19 2. Be uniformly available, applied, and administered to all
20 of the manufacturer's franchised new motor vehicle
21 dealers in this State; and
- 22 3. Provide that any of the manufacturer's franchised new
23 motor vehicle dealers in this State may, upon written
24 request, obtain the method or formula used by the
25 manufacturer in establishing the sales volumes for
26 receiving the rebates or incentives and the specific
27 calculations for determining the required sales volumes
28 of the inquiring dealer and any of the manufacturer's
29 other franchised new motor vehicle dealers located
30 within 75 miles of the inquiring dealer.

31 Nothing contained in this subdivision shall prohibit a
32 manufacturer from providing assistance or encouragement to a
33 franchised dealer to remodel, renovate, recondition, or relocate
34 the dealer's existing facilities, provided that this assistance,
35 encouragement, or rewards are not determined on a per vehicle
36 basis.

37 It is unlawful for any manufacturer to charge or include the
38 cost of any program or policy prohibited under this subdivision
39 in the price of new motor vehicles that the manufacturer sells to
40 its franchised dealers or purchasers located in this State.

41 In the event that as of October 1, 1999, a manufacturer was
42 operating a program or had in effect a policy that varied the

1 price charged to its franchised dealers located in this state in a
2 manner which would violate this subdivision, it shall be lawful
3 for that program or policy, or a program or policy similar
4 thereto implemented after the effective date of this act, to
5 continue in effect as to the manufacturer's franchised dealers
6 located in this State until December 31, 2004. Any
7 manufacturer shall be required to pay or otherwise compensate
8 any franchise dealer who has earned the right to receive
9 payment or other compensation under a program in accordance
10 with the manufacturer's program or policy.

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

16 **SECTION 3.** G.S. 20-305.2 reads as rewritten:

17 **"§ 20-305.2. Unfair methods of competition.**

18 (a) It is unlawful for any motor vehicle manufacturer, factory branch, distributor,
19 distributor branch, or subsidiary thereof, to directly or indirectly through any subsidiary
20 or affiliated entity, own any ownership interest in, operate, or control any motor vehicle
21 dealership in this State, provided that this section shall not be construed to prohibit:

22 ...

23 (7) The ownership, operation, or control of a dealership that sells
24 primarily recreation vehicles as defined in G.S. 20-4.01(32a) by a
25 manufacturer, factory branch, distributor, or distributor branch, or
26 subsidiary thereof, if the manufacturer, factory branch, distributor, or
27 distributor branch, or subsidiary thereof, owned, operated, or
28 controlled the dealership as of October 1, 2001.

29 (b) This section shall not apply to manufacturers or distributors of ~~trailers, motor~~
30 ~~homes, or semitrailers.~~ trailers or semitrailers that are not recreation vehicles as defined
31 in G.S. 20-4.01(32a)."

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

34 **"§ 20-305.6. Unlawful for manufacturers to unfairly discriminate among dealers.**

35 Notwithstanding the terms of any contract, franchise, novation, or agreement, it shall
36 be unlawful for any manufacturer, factory branch, distributor, or distributor branch to do
37 any of the following:

38 (1) Discriminate against any similarly situated franchised new motor
39 vehicle dealers in this State.

40 (2) Unfairly discriminate against franchised new motor vehicle dealers
41 located in this State who have dual facilities at which the vehicles
42 distributed by the manufacturer, factory branch, distributor, or

1 distributor branch are sold or serviced with one or more other line
2 makes of vehicles.

3 (3) Unfairly discriminate against one of its franchised new motor vehicle
4 dealers in this State with respect to any aspect of the franchise
5 agreement.

6 (4) Use any financial services company or leasing company owned or
7 controlled by the manufacturer or distributor to accomplish what
8 would otherwise be illegal conduct on the part of the manufacturer or
9 distributor pursuant to this section. This section shall not limit the right
10 of the financial services or leasing company to engage in business
11 practices in accordance with the trade."

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

13 **"§ 20-308.1. Civil actions for violations.**

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

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

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

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

1 bringing an action, the association and manufacturer, factory branch, distributor, or
2 distributor branch shall initiate mediation as set forth in G.S. 20-301.1(b). An action
3 brought pursuant to this subsection may seek a determination whether one or more
4 manufacturers, factory branches, distributors, or distributor branches doing business in
5 this State have violated any of the provisions of this Article, or for the determination of
6 any rights created or defined by this Article, so long as the association alleges an injury
7 to the collective interest of its members cognizable under this section. A cognizable
8 injury to the collective interest of the members of the association shall be deemed to
9 occur if a manufacturer, factory branch, distributor, or distributor branch doing business
10 in this State has engaged in any conduct or taken any action which actually harms or
11 affects all of the franchised new motor vehicle dealers holding franchises with that
12 manufacturer, factory branch, distributor, or distributor branch in this State. With
13 respect to any administrative or civil action filed by an association pursuant to this
14 subsection, the relief granted shall be limited to declaratory and injunctive relief and in
15 no event shall the Commissioner or court enter an award of monetary damages."

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

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

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

24 ...

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

1 new motor vehicle dealer's area of responsibility is included in the
2 relevant market area under the protest, any protest filed under this
3 subdivision shall be consolidated with that protest for hearing and joint
4 disposition of all of the protests.

5 (39) Notwithstanding the terms, provisions, or conditions of any agreement,
6 franchise, novation, waiver, or other written instrument, to require,
7 coerce, or attempt to coerce any of its franchised motor vehicle dealers
8 in this State to purchase or lease one or more signs displaying the
9 name of the manufacturer or franchised motor vehicle dealer upon
10 unreasonable and onerous terms or conditions or if installation of the
11 additional signage would violate local signage or zoning laws to which
12 the franchised motor vehicle dealer is subject. Any term, provision, or
13 condition of any agreement, franchise, waiver, novation, or any other
14 written instrument which is in violation of this subdivision shall be
15 deemed null and void and without force and effect."

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

20 **SECTION 8.** Section 2.1 of this act becomes effective March 1, 2003. All
21 other sections of this act are effective when they become law.