

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2001

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SENATE BILL 470
Commerce Committee Substitute Adopted 4/25/01
House Committee Substitute Favorable 8/14/01
House Committee Substitute #2 Favorable 8/30/01

Short Title: Amend MV Dealer Franchise Laws.

(Public)

Sponsors:

Referred to:

March 15, 2001

A BILL TO BE ENTITLED

1
2 AN ACT TO AMEND THE MOTOR VEHICLE DEALERS AND
3 MANUFACTURERS LICENSING LAWS TO REQUIRE NOTICE OF
4 ADDITIONAL CHARGES AGAINST DEALER'S ACCOUNTS; TO PROHIBIT A
5 MANUFACTURER FROM VARYING THE PRICE OF NEW MOTOR
6 VEHICLES BASED UPON VARIOUS FACTORS; TO ESTABLISH
7 STANDARDS FOR MANUFACTURER REBATES AND INCENTIVES; TO
8 PROHIBIT A MANUFACTURER OF RECREATION VEHICLES FROM
9 OWNING A DEALERSHIP; TO PROHIBIT A MANUFACTURER FROM
10 DISCRIMINATING AGAINST DEALERS; TO PROVIDE THAT PUNITIVE
11 DAMAGES, ATTORNEYS' FEES, AND COSTS MAY BE AWARDED WHERE
12 A VIOLATION OF THE LICENSING LAWS IS WILLFUL; TO PROVIDE THAT
13 AN ASSOCIATION REPRESENTING DEALERS HAS STANDING; TO
14 PROHIBIT THE ARBITRARY CHANGING OF A DEALER'S AREA OF
15 RESPONSIBILITY; AND TO PROTECT DEALERS FROM REQUIREMENTS
16 OR COERCION TO BUY SIGNS.

17 The General Assembly of North Carolina enacts:

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

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

22 (a) Notwithstanding the terms of any contract, franchise, novation, or agreement,
23 it shall be unlawful for any manufacturer, factory branch, distributor, or distributor
24 branch to charge or assess one of its franchised motor vehicle dealers located in this
25 State, or to charge or debit the account of the franchised motor vehicle dealer for
26 merchandise, tools, or equipment, other than the published cost of new motor vehicles,
27 and merchandise, tools, or equipment specifically ordered by the franchised motor

1 vehicle dealer, unless the franchised motor vehicle dealer receives a detailed itemized
2 description of the nature and amount of each charge in writing at least 10 days prior to
3 the date the charge or account debit is to become effective or due. For purposes of this
4 subsection, prior written notice is required for the following charges or debits:
5 advertising or advertising materials; advertising or showroom displays; customer
6 informational materials; computer or communications hardware or software; special
7 tools; equipment; dealership operation guides; Internet programs; and any additional
8 charges or surcharges made or proposed for merchandise, tools, or equipment
9 previously charged to the dealer.

10 (b) Any franchised new motor vehicle dealer who seeks to challenge an actual or
11 proposed charge, debit, payment, reimbursement, or credit to the franchised new motor
12 vehicle dealer or to the franchised new motor vehicle dealer's account in an amount less
13 than or equal to ten thousand dollars (\$10,000) and that is in violation of this Article or
14 contrary to the terms of the franchise may, prior to filing a formal petition before the
15 Commissioner as provided in G.S. 20-301(b) or a civil action in any court of competent
16 jurisdiction under G.S. 20-308.1, request and obtain a mediated settlement conference
17 as provided in this subsection. Unless objection to the timeliness of the franchised new
18 motor vehicle dealer's request for mediation under this subsection is waived in writing
19 by the affected manufacturer, factory branch, distributor, or distributor branch, a
20 franchised new motor vehicle dealer's request to mediate must be sent to the
21 Commissioner within 75 days after the franchised new motor vehicle dealer's receipt of
22 written notice from a manufacturer, factory branch, distributor, or distributor branch of
23 the charges, debits, payments, reimbursements, or credits challenged by the franchised
24 new motor vehicle dealer. If the franchised new motor vehicle dealer has requested in
25 writing that the manufacturer, factory branch, distributor, or distributor branch review
26 the questioned charges, debits, payments, reimbursements, or credits, a franchised new
27 motor vehicle dealer's request to mediate must be sent to the Commissioner within 30
28 days after the franchised new motor vehicle dealer's receipt of the final written
29 determination on the issue from the manufacturer, factory branch, distributor, or
30 distributor branch.

31 (1) It is the policy and purpose of this subsection to implement a system of
32 settlement events that are designed to reduce the cost of litigation
33 under this Article to the general public and the parties, to focus the
34 parties' attention on settlement rather than on trial preparation, and to
35 provide a structured opportunity for settlement negotiations to take
36 place.

37 (2) The franchised new motor vehicle dealer shall send a letter to the
38 Commissioner by certified or registered mail, return receipt requested,
39 identifying the actual or proposed charges the franchised new motor
40 vehicle dealer seeks to challenge and the reason or basis for the
41 challenge. The charges, debits, payments, reimbursements, or credits
42 challenged by the franchised new motor vehicle dealer need not be

1 related, and multiple issues may be resolved in a single proceeding.
2 The franchised new motor vehicle dealer shall send a copy of the letter
3 to the affected manufacturer, factory branch, distributor, or distributor
4 branch, addressed to the current district, zone, or regional manager in
5 charge of overseeing the dealer's operations, or the registered agent for
6 acceptance of legal process in this State. Upon the mailing of a letter to
7 the Commissioner and the manufacturer, factory branch, distributor, or
8 distributor branch pursuant to this subsection, any chargeback to or
9 any payment required of a franchised new motor vehicle dealer by a
10 manufacturer, factory branch, distributor, or distributor branch shall be
11 stayed during the pendency of the mediation. Upon the mailing of a
12 letter to the Commissioner and manufacturer, factory branch,
13 distributor, or distributor branch pursuant to this subsection, any
14 statute of limitation or other time limitation for filing a petition before
15 the Commissioner or civil action shall be tolled during the pendency of
16 the mediation.

17 (3) Upon receipt of the written request of the franchised new motor
18 vehicle dealer, the Commissioner shall appoint a mediator and send
19 notice of that appointment to the parties. A person is qualified to serve
20 as mediator as provided by this subdivision if the person is certified to
21 serve as a mediator under Rule 8 of the North Carolina Rules
22 Implementing Statewide Mediated Settlement Conferences in Superior
23 Court Civil Actions and does not represent motor vehicle dealers or
24 manufacturers, factory branches, distributors, or distributor branches.
25 A mediator acting pursuant to this subdivision shall have judicial
26 immunity in the same manner and to the same extent as a judge of the
27 General Court of Justice.

28 (4) The parties shall by written agreement select a venue and schedule for
29 the mediated settlement conference conducted under this subsection. If
30 the parties are unable to agree on a venue and schedule, the mediator
31 shall select a venue and schedule. Except by written agreement of all
32 parties, a mediation proceeding and mediated settlement conference
33 under this subsection shall be held in North Carolina.

34 (5) In this subsection, 'mediation' means a nonbinding forum in which an
35 impartial person, the mediator, facilitates communication between
36 parties to promote reconciliation, settlement, or understanding among
37 them. A mediator may not impose his or her own judgment on the
38 issues for that of the parties.

39 (6) At least 10 days prior to the mediated settlement conference, the
40 affected manufacturer, factory branch, distributor, or distributor branch
41 shall, by certified or registered mail, return receipt requested, send the
42 mediator and the franchised new motor vehicle dealer a detailed

1 response to the allegations raised in the franchised new motor vehicle
2 dealer's written request. The mediation may be conducted by officers
3 or employees of the parties themselves without the appearance of legal
4 counsel. However, at least 10 days prior to the mediated settlement
5 conference, either party may give notice to the other and to the
6 mediator of its intention to appear at the mediation with legal counsel,
7 in which event either party may appear at the mediation with legal
8 counsel.

9 (7) A mediation proceeding conducted pursuant to this subsection shall be
10 complete not later than the sixtieth day after the date of the
11 Commissioner's notice of the appointment of the mediator; this
12 deadline may be extended by written agreement of the parties. The
13 parties shall be solely responsible for the compensation and expenses
14 of the mediator on a 50/50 basis. The Commissioner is not liable for
15 the compensation paid or to be paid a mediator employed pursuant to
16 this subsection.

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

24 (9) If the mediation fails to result in a resolution of the dispute, the
25 franchised new motor vehicle dealer may proceed as provided in G.S.
26 20-301(b) and G.S. 20-308.1. Upon the filing of a petition pursuant to
27 G.S. 20-301(b) or a civil action pursuant to G.S. 20-308.1, the affected
28 manufacturer, factory branch, distributor, or distributor branch shall
29 not require payment from the dealer, or debit or charge the dealer's
30 account, unless and until a final judgment supporting the payment or
31 charge has been rendered by the Commissioner or court. All
32 communications made during a mediation proceeding, including, but
33 not limited to, those communications made during a mediated
34 settlement conference are presumed to be made in compromise
35 negotiation and shall be governed by Rule 408 of the North Carolina
36 Rules of Evidence."

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

38 "(30) To vary the price charged to any of its franchised new motor vehicle
39 dealers located in this State for new motor vehicles based on the
40 dealer's purchase of new facilities, supplies, tools, equipment, or other
41 merchandise from the manufacturer, the dealer's relocation,
42 remodeling, repair, or renovation of existing dealerships or

1 construction of a new facility or upon the dealer's participation in
2 training programs sponsored, endorsed, or recommended by the
3 manufacturer.

4 The price of the vehicle, for purposes of this subdivision shall
5 include the manufacturer's use of rebates, credits, or other
6 consideration which has the effect of causing a variance in the price of
7 new motor vehicles offered to its franchised dealers located in the
8 State.

9 Notwithstanding the foregoing, nothing in this subdivision shall be
10 deemed to preclude a manufacturer from establishing sales contests or
11 promotions which provide or award dealers or consumers rebates or
12 incentives.

13 Nothing contained in this subdivision shall prohibit a manufacturer
14 from providing assistance or encouragement to a franchised dealer to
15 remodel, renovate, recondition, or relocate the dealer's existing
16 facilities, provided that this assistance, encouragement, or rewards are
17 not determined on a per vehicle basis.

18 In the event that ~~at the time of the ratification of this act as of~~
19 October 1, 1999, a manufacturer is currently was operating a program
20 or has had in effect a policy that varied the price charged to its
21 franchised dealers located in this State in a manner which would
22 violate this subdivision after October 1, 1999, subdivision, it shall be
23 lawful for that program or policy, including amendments to that
24 program or policy that are consistent with the purpose and provisions
25 of the existing program or policy, or a program or policy similar
26 thereto implemented after the effective date of this act, to continue in
27 effect as to the manufacturer's franchised dealers located in this State
28 until December 31, ~~2002-2007~~. Any manufacturer shall be required to
29 pay or otherwise compensate any ~~franchise~~ franchised dealer who has
30 earned the right to receive payment or other compensation under a
31 program in accordance with the manufacturer's program or policy."

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

34 "(30) To vary the price charged to any of its franchised new motor vehicle
35 dealers located in this State for new motor vehicles based on the
36 dealer's purchase of new facilities, supplies, tools, equipment, or other
37 merchandise from the manufacturer, the dealer's relocation,
38 remodeling, repair, or renovation of existing dealerships or
39 construction of a new facility, ~~or upon~~ the dealer's participation in
40 training programs sponsored, endorsed, or recommended by the
41 ~~manufacturer.~~ manufacturer, whether or not the dealer is dualled with
42 one or more other line makes of new motor vehicles, or the dealer's

1 sales penetration. Except as provided in this subdivision, it shall be
2 unlawful for any manufacturer, factory branch, distributor, or
3 distributor branch, or any field representative, officer, agent, or any
4 representative whatsoever of any of them to vary the price charged to
5 any of its franchised new motor vehicle dealers located in this State for
6 new motor vehicles based on the dealer's sales volume, the dealer's
7 level of sales or customer service satisfaction, the dealer's purchase of
8 advertising materials, signage, nondiagnostic computer hardware or
9 software, communications devices, or furnishings, or the dealer's
10 participation in used motor vehicle inspection or certification programs
11 sponsored or endorsed by the manufacturer.

12 The price of the vehicle, for purposes of this subdivision shall
13 include the manufacturer's use of rebates, credits, or other
14 consideration which has the effect of causing a variance in the price of
15 new motor vehicles offered to its franchised dealers located in the
16 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.~~ incentives; provided, however, that the manufacturer
21 complies with all of the following conditions:

22 a. With respect to manufacturer to consumer rebates and
23 incentives, the manufacturer's criteria for determining
24 eligibility shall:

- 25 1. Permit all of the manufacturer's franchised new motor
26 vehicle dealers in this State to offer the rebate or
27 incentive; and
- 28 2. Be uniformly applied and administered to all eligible
29 consumers.

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

- 32 1. Be based solely on the dealer's actual or reasonably
33 anticipated sales volume or on a uniform per vehicle sold
34 or leased basis;
- 35 2. Be uniformly available, applied, and administered to all
36 of the manufacturer's franchised new motor vehicle
37 dealers in this State; and
- 38 3. Provide that any of the manufacturer's franchised new
39 motor vehicle dealers in this State may, upon written
40 request, obtain the method or formula used by the
41 manufacturer in establishing the sales volumes for
42 receiving the rebates or incentives and the specific

1 calculations for determining the required sales volumes
2 of the inquiring dealer and any of the manufacturer's
3 other franchised new motor vehicle dealers located
4 within 75 miles of the inquiring dealer.

5 Nothing contained in this subdivision shall prohibit a manufacturer
6 from providing assistance or encouragement to a franchised dealer to
7 remodel, renovate, recondition, or relocate the dealer's existing
8 facilities, provided that this assistance, encouragement, or rewards are
9 not determined on a per vehicle basis.

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

14 In the event that as of October 1, 1999, a manufacturer was
15 operating a program or had in effect a policy that varied the price
16 charged to its franchised dealers located in this State in a manner
17 which would violate this subdivision, it shall be lawful for that
18 program or policy, including amendments to that program or policy
19 that are consistent with the purpose and provisions of the existing
20 program or policy, or a program or policy similar thereto implemented
21 after the effective date of this act, to continue in effect as to the
22 manufacturer's franchised dealers located in this State until December
23 31, 2007. Any manufacturer shall be required to pay or otherwise
24 compensate any franchised dealer who has earned the right to receive
25 payment or other compensation under a program in accordance with
26 the manufacturer's program or policy.

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

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

32 **"§ 20-305.2. Unfair methods of competition.**

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

37 ...

38 (7) The ownership, operation, or control of a dealership that sells
39 primarily recreation vehicles as defined in G.S. 20-4.01(32a) by a
40 manufacturer, factory branch, distributor, or distributor branch, or
41 subsidiary thereof, if the manufacturer, factory branch, distributor, or

1 distributor branch, or subsidiary thereof, owned, operated, or
2 controlled the dealership as of October 1, 2001.

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

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

8 "**§ 20-305.6. Unlawful for manufacturers to unfairly discriminate among dealers.**

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

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

14 (2) Unfairly discriminate against franchised new motor vehicle dealers
15 located in this State who have dual facilities at which the vehicles
16 distributed by the manufacturer, factory branch, distributor, or
17 distributor branch are sold or serviced with one or more other line
18 makes of vehicles.

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

22 (4) Use any financial services company or leasing company owned or
23 controlled by the manufacturer or distributor to accomplish what
24 would otherwise be illegal conduct on the part of the manufacturer or
25 distributor pursuant to this section. This section shall not limit the right
26 of the financial services or leasing company to engage in business
27 practices in accordance with the trade."

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

29 "**§ 20-308.1. Civil actions for violations.**

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

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

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

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

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

34 **"§ 20-305. Coercing dealer to accept commodities not ordered; threatening to**
35 **cancel franchise; preventing transfer of ownership; granting additional**
36 **franchises; terminating franchises without good cause; preventing family**
37 **succession.**

38 It shall be unlawful for any manufacturer, factory branch, distributor, or distributor
39 branch, or any field representative, officer, agent, or any representative whatsoever of
40 any of them:

41 ...

1 (38) Notwithstanding the terms, provisions, or conditions of any agreement,
2 franchise, novation, waiver, or other written instrument, to assign or
3 change a franchised new motor vehicle dealer's area of responsibility
4 under the franchise arbitrarily or without due regard to the present or
5 projected future pattern of motor vehicle sales and registrations within
6 the dealer's market. A franchised new motor vehicle dealer who
7 believes that a manufacturer, factory branch, distributor, or distributor
8 branch with whom the dealer has entered into a franchise has violated
9 this subdivision may file a petition before the Commissioner as
10 provided in G.S. 20-301(b) contesting the franchised new motor
11 vehicle dealer's assigned area of responsibility. At the hearing before
12 the Commissioner, the affected manufacturer, factory branch,
13 distributor, or distributor branch shall have the burden of proving that
14 all portions of its current or proposed area of responsibility for the
15 petitioning franchised new motor vehicle dealer are reasonable in light
16 of the present or projected future pattern of motor vehicle sales and
17 registrations within the franchised new motor vehicle dealer's market.
18 If a protest is or has been filed under G.S. 20-305(5) and the franchised
19 new motor vehicle dealer's area of responsibility is included in the
20 relevant market area under the protest, any protest filed under this
21 subdivision shall be consolidated with that protest for hearing and joint
22 disposition of all of the protests.

23 (39) Notwithstanding the terms, provisions, or conditions of any agreement,
24 franchise, novation, waiver, or other written instrument, to require,
25 coerce, or attempt to coerce any of its franchised motor vehicle dealers
26 in this State to purchase or lease one or more signs displaying the
27 name of the manufacturer or franchised motor vehicle dealer upon
28 unreasonable and onerous terms or conditions or if installation of the
29 additional signage would violate local signage or zoning laws to which
30 the franchised motor vehicle dealer is subject. Any term, provision, or
31 condition of any agreement, franchise, waiver, novation, or any other
32 written instrument which is in violation of this subdivision shall be
33 deemed null and void and without force and effect."

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

38 **SECTION 8.** Section 2.1 of this act becomes effective March 1, 2003, and
39 applies to causes of action arising on or after that date. All other sections of this act are
40 effective when they become law and apply to causes of action arising on or after that
41 date.