

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

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SENATE BILL 914
PROPOSED COMMITTEE SUBSTITUTE S914-PCS85228-SU-47

Short Title: Clarify MV Dealer Termination Assistance.

(Public)

Sponsors:

Referred to:

March 26, 2009

A BILL TO BE ENTITLED

AN ACT TO CLARIFY DEALER TERMINATION ASSISTANCE RIGHTS.

The General Assembly of North Carolina enacts:

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

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

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

...

(6) Notwithstanding the terms, provisions or conditions of any franchise or notwithstanding the terms or provisions of any waiver, to terminate, cancel or fail to renew any franchise with a licensed new motor vehicle dealer unless the manufacturer has satisfied the notice requirements of subparagraph c. and the Commissioner has determined, if requested in writing by the dealer within (i) the time period specified in G.S. 20-305(6)c.1.II., III., or IV., as applicable, or (ii) the effective date of the franchise termination specified or proposed by the manufacturer in the notice of termination, whichever period of time is longer, and after a hearing on the matter, that there is good cause for the termination, cancellation, or nonrenewal of the franchise and that the manufacturer has acted in good faith as defined in this act regarding the termination, cancellation or nonrenewal. When such a petition is made to the Commissioner by a dealer for determination as to the existence of good cause and good faith for the termination, cancellation or nonrenewal of a franchise, the Commissioner shall promptly inform the manufacturer that a timely petition has been filed, and the franchise in question shall continue in effect pending the Commissioner's decision. The Commissioner shall try to conduct the hearing and render a final determination within 180 days after a petition has been filed. If the termination, cancellation or nonrenewal is pursuant to G.S. 20-305(6)c.1.III. then the Commissioner shall give the proceeding priority consideration and shall try to render his final determination no later than 90 days after the petition has been filed. Any parties to a hearing by the Commissioner under this section shall have a right of review of the decision



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

- 35 a. Notwithstanding the terms, provisions or conditions of any franchise
36 or the terms or provisions of any waiver, good cause shall exist for
37 the purposes of a termination, cancellation or nonrenewal when:
- 38 1. There is a failure by the new motor vehicle dealer to comply
39 with a provision of the franchise which provision is both
40 reasonable and of material significance to the franchise
41 relationship provided that the dealer has been notified in
42 writing of the failure within 180 days after the manufacturer
43 first acquired knowledge of such failure;
 - 44 2. If the failure by the new motor vehicle dealer relates to the
45 performance of the new motor vehicle dealer in sales or
46 service, then good cause shall be defined as the failure of the
47 new motor vehicle dealer to comply with reasonable
48 performance criteria established by the manufacturer if the
49 new motor vehicle dealer was apprised by the manufacturer
50 in writing of the failure; and

- 1 I. The notification stated that notice was provided of
2 failure of performance pursuant to this section;
- 3 II. The new motor vehicle dealer was afforded a
4 reasonable opportunity, for a period of not less than
5 180 days, to comply with the criteria; and
- 6 III. The new motor vehicle dealer failed to demonstrate
7 substantial progress towards compliance with the
8 manufacturer's performance criteria during such
9 period and the new motor vehicle dealer's failure was
10 not primarily due to economic or market factors
11 within the dealer's relevant market area which were
12 beyond the dealer's control.
- 13 b. The manufacturer shall have the burden of proof under this section.
- 14 c. Notification of Termination, Cancellation and Nonrenewal. –
- 15 1. Notwithstanding the terms, provisions or conditions of any
16 franchise prior to the termination, cancellation or nonrenewal
17 of any franchise, the manufacturer shall furnish notification
18 of termination, cancellation or nonrenewal to the new motor
19 vehicle dealer as follows:
- 20 I. In the manner described in G.S. 20-305(6)c2 below;
21 and
- 22 II. Not less than 90 days prior to the effective date of
23 such termination, cancellation or nonrenewal; or
- 24 III. Not less than 15 days prior to the effective date of
25 such termination, cancellation or nonrenewal with
26 respect to any of the following:
- 27 A. Insolvency of the new motor vehicle dealer, or
28 filing of any petition by or against the new
29 motor vehicle dealer under any bankruptcy or
30 receivership law;
- 31 B. Failure of the new motor vehicle dealer to
32 conduct its customary sales and service
33 operations during its customary business hours
34 for seven consecutive business days, except
35 for acts of God or circumstances beyond the
36 direct control of the new motor vehicle dealer;
- 37 C. Revocation of any license which the new
38 motor vehicle dealer is required to have to
39 operate a dealership;
- 40 D. Conviction of a felony involving moral
41 turpitude, under the laws of this State or any
42 other state, or territory, or the District of
43 Columbia.
- 44 IV. Not less than 180 days prior to the effective date of
45 such termination, cancellation, or nonrenewal which
46 occurs as a result of any change in ownership,
47 operation, or control of all or any part of the business
48 of the manufacturer, factory branch, distributor, or
49 distributor branch whether by sale or transfer of
50 assets, corporate stock or other equity interest,
51 assignment, merger, consolidation, combination, joint

- 1 venture, redemption, operation of law or otherwise; or
2 the termination, suspension, or cessation of a part or
3 all of the business operations of the manufacturers,
4 factory branch, distributor, or distributor branch; or
5 discontinuance of the sale of the product line or a
6 change in distribution system by the manufacturer
7 whether through a change in distributors or the
8 manufacturer's decision to cease conducting business
9 through a distributor altogether.
- 10 V. Unless the failure by the new motor vehicle dealer
11 relates to the performance of the new motor vehicle
12 dealer in sales or service, not more than one year after
13 the manufacturer first acquired knowledge of the basic
14 facts comprising the failure.
- 15 2. Notification under this section shall be in writing; shall be by
16 certified mail or personally delivered to the new motor
17 vehicle dealer; and shall contain:
- 18 I. A statement of intention to terminate, cancel or not to
19 renew the franchise;
- 20 II. A detailed statement of all of the material reasons for
21 the termination, cancellation or nonrenewal; and
- 22 III. The date on which the termination, cancellation or
23 nonrenewal takes effect.
- 24 3. Notification provided in G.S. 20-305(6)c1III of 90 days prior
25 to the effective date of such termination, cancellation or
26 renewal may run concurrent with the 180 days designated in
27 G.S. 20-305(6)a2II provided the notification is clearly
28 designated by a separate written document mailed by certified
29 mail or personally delivered to the new motor vehicle dealer.
- 30 d. Payments.
- 31 1. Notwithstanding the terms of any franchise, agreement, or
32 waiver, upon ~~Upon~~ the termination, nonrenewal or
33 cancellation of any franchise by the manufacturer or
34 distributor, ~~pursuant to this section,~~ the cessation of business
35 or the termination, nonrenewal, or cancellation of any
36 franchise by any new motor vehicle dealer located in this
37 State, or upon any of the occurrences set forth in
38 G.S. 20-305(6)c.1.IV., the manufacturer or distributor shall
39 purchase from and compensate the new motor vehicle dealer
40 shall be allowed fair and reasonable compensation by the
41 manufacturer for the all of the following:
- 42 I. New ~~Each new and unsold~~ motor vehicle within the
43 new motor vehicle dealer's inventory that has been
44 acquired from the manufacturer within 24 months of
45 the effective date of the termination ~~18 months,~~ at a
46 price not to exceed the original manufacturer's price to
47 the dealer, and from the manufacturer or distributor or
48 another same line-make dealer in the ordinary course
49 of business, and which has not been substantially
50 altered or ~~damaged,~~ damaged to the prejudice of the
51 manufacturer or distributor while in the new motor

- 1 vehicle dealer's possession, and which has not been
 2 driven more than 200-1,000 miles, and for which no
 3 certificate of title has been issued; issued. For purposes
 4 of this sub-subdivision, the term "ordinary course of
 5 business" shall include inventory transfers of all new,
 6 same line-make vehicles between affiliated
 7 dealerships, or otherwise between dealerships having
 8 common or interrelated ownership.
- 9 II. Unused, undamaged and unsold supplies and parts
 10 purchased from the manufacturer or distributor or
 11 sources approved by the manufacturer or distributor,
 12 at a price not to exceed the original manufacturer's
 13 price to the dealer the current catalogue price, less any
 14 applicable discounts, provided such supplies and parts
 15 are currently offered for sale by the manufacturer or
 16 distributor in its current parts catalogs and are in
 17 salable condition; condition.
- 18 III. Equipment, signs, and furnishings that have not been
 19 substantially altered or damaged and that have been
 20 required by the manufacturer or distributor to be
 21 purchased by the new motor vehicle dealer from the
 22 manufacturer or distributor, or their approved sources;
 23 and sources.
- 24 IV. Special tools that have not been substantially altered
 25 or damaged-damaged, normal wear and tear excepted,
 26 and that have been required by the manufacturer or
 27 distributor to be purchased by the new motor vehicle
 28 dealer from the manufacturer or distributor, or their
 29 approved sources within five years immediately
 30 preceding the termination, nonrenewal or cancellation
 31 of the franchise. The amount of compensation which
 32 shall be paid to the new motor vehicle dealer by the
 33 manufacturer or distributor shall be the net acquisition
 34 price if the item was acquired in the 12 months
 35 preceding the date of receipt of the dealer's request for
 36 compensation; seventy-five percent (75%) of the net
 37 acquisition price if the item was acquired between 13
 38 and 24 months preceding the dealer's request for
 39 compensation; fifty percent (50%) of the net
 40 acquisition price if the item was acquired between 25
 41 and 36 months preceding the dealer's request for
 42 compensation; twenty-five percent (25%) of the net
 43 acquisition price if the item was acquired between 37
 44 and 60 months preceding the dealer's request for
 45 compensation.
- 46 2. Fair and reasonable compensation for the The compensation
 47 provided above shall be paid by the manufacturer or
 48 distributor within not later than 90 days of the effective date
 49 of termination, cancellation or nonrenewal, after the
 50 manufacturer or distributor has received notice in writing
 51 from or on behalf of the new motor vehicle dealer specifying

1 the elements of compensation requested by the dealer;
2 provided the new motor vehicle dealer ~~has~~ has, or can obtain,
3 clear title to the inventory and has ~~conveyed~~ conveyed, or can
4 convey, title and possession of the same to the manufacturer
5 or distributor. Within 15 days after receipt of the dealer's
6 written request for compensation, the manufacturer or
7 distributor shall send the dealer detailed written instructions
8 and forms required by the manufacturer or distributor to
9 effectuate the receipt of the compensation requested by the
10 dealer. The manufacturer or distributor shall be obligated to
11 pay or reimburse the dealer for any transportation charges
12 associated with the ~~manufacturer's~~ repurchase obligations of
13 the manufacturer or distributor under this sub-subparagraph.
14 The manufacturer or distributor shall also compensate the
15 dealer for any handling, packing, or similar payments
16 contemplated in the franchise. In no event may the
17 manufacturer or distributor ~~not~~ charge the dealer any
18 handling, restocking, or other similar costs or fees associated
19 with items repurchased by the manufacturer under this
20 sub-subparagraph.

- 21 3. In addition to the other payments set forth in this section, if a
22 termination, cancellation, or nonrenewal is premised upon
23 any of the occurrences set forth in
24 G.S. 20-305(6)c.1.IV., G.S. 20-305(6)c.1.IV. _____ or
25 G.S. 20-305(6)f., then the manufacturer or distributor shall be
26 liable to the dealer for an amount at least equivalent to the fair
27 market value of the franchise on (i) the date the franchisor
28 announces the action which results in termination,
29 cancellation, or nonrenewal; or (ii) the date the action which
30 results in termination, cancellation, or nonrenewal first
31 became general knowledge; or (iii) the day 12 months prior to
32 the date on which the notice of termination, cancellation, or
33 nonrenewal is issued, whichever amount is higher. Payment is
34 due within not later than 90 days of the effective date of the
35 termination, cancellation, or nonrenewal after the
36 manufacturer or distributor has received notice in writing
37 from, or on behalf of, the new motor vehicle dealer specifying
38 the elements of compensation requested by the dealer. If the
39 termination, cancellation, or nonrenewal is due to a
40 manufacturer's change in distributors, the manufacturer may
41 avoid paying fair market value to the dealer if the new
42 distributor or the manufacturer offers the dealer a franchise
43 agreement with terms acceptable to the dealer.

- 44 e. Dealership Facilities Assistance upon Termination, Cancellation or
45 Nonrenewal.

46 In the event of the occurrence of any of the events specified in
47 G.S. 20-305(6)d.1. above: ~~termination, cancellation or nonrenewal by~~
48 the manufacturer or distributor under this section, except termination,
49 cancellation or nonrenewal for ~~insolvency,~~ license revocation,
50 conviction of a crime involving moral turpitude, or fraud by a
51 dealer-owner:

- 1 operations from this location during the same three-year
2 period.
- 3 5. The compensation required for facilities assistance under this
4 paragraph e. shall be paid by the manufacturer or distributor
5 within 90 days of the effective date of termination,
6 cancellation, or nonrenewal. after the manufacturer or
7 distributor has received notice in writing from, or on behalf
8 of, a new motor vehicle dealer specifying the elements of
9 compensation requested by the dealer.
- 10 f. ~~The provisions of sub-subdivisions d. and e. above shall not be~~
11 ~~applicable when the termination, nonrenewal or cancellation of the~~
12 ~~franchise agreement is the result of the voluntary act of the dealer.~~
13 The provisions of sub-subdivision e. above shall not be applicable
14 when the termination, nonrenewal, or cancellation of the franchise
15 agreement by a new motor vehicle dealer is the result of the sale of
16 assets or stock of the motor vehicle dealership.
17 ~~Notwithstanding the terms of any contract or agreement, any dealer's~~
18 ~~termination or resignation shall not be deemed to be voluntary if that~~
19 ~~termination or resignation occurred under the manufacturer's threat of~~
20 ~~nonrenewal, cancellation, or termination of the franchise.~~
21 The provisions of sub-subdivisions d. and e. of this subdivision shall
22 also apply, upon request of the dealer pursuant to G.S. 20-305(6)d.2.,
23 when a manufacturer or distributor provides public notice or notifies
24 one of its franchised dealers located in this State that it intends to
25 either phase out the dealer's franchise or terminate the dealer's
26 franchise at a later date, or when a manufacturer or distributor
27 provides public notice or notice to any of its franchised or licensed
28 dealers located in this State that any of the occurrences set forth in
29 G.S. 20-305(6)c.1.IV. has occurred or will occur in the future, so as
30 to either render a dealer's franchised business substantially
31 unmarketable, or saleable only at prices significantly below its fair
32 market value prior to the date of the occurrences set forth in
33 G.S. 20-305(6)c.1.IV.
- 34 g. A franchise shall continue in full force and operation notwithstanding
35 a change, in whole or in part, of an established plan or system of
36 distribution of the motor vehicles offered for sale under the franchise.
37 The appointment of a new manufacturer, factory branch, distributor,
38 or distributor branch for motor vehicles offered for sale under the
39 franchise agreement shall be deemed to be a change of an established
40 plan or system of distribution.
41 Upon the occurrence of the change, the Division shall deny an
42 application of a manufacturer, factory branch, distributor, or
43 distributor branch for a license or license renewal unless the
44 applicant for a license as a manufacturer, factory branch, distributor,
45 or distributor branch offers to each motor vehicle dealer who is a
46 party to a franchise for that line-make a new franchise agreement
47 containing substantially the same provisions which were contained in
48 the previous franchise agreement or files an affidavit with the
49 Division acknowledging its undertaking to assume and fulfill the
50 rights, duties, and obligations of its predecessor under the previous
51 franchise agreement."

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

5 **SECTION 3.** This act is effective when it becomes law.