

WATERCRAFT DEALER- MANUFACTURER AGREEMENTS

**House Bill 4808 (Substitute H-1)
First Analysis (12-3-03)**

**Sponsor: Rep. Randy Richardville
Committee: Regulatory Reform**

THE APPARENT PROBLEM:

In 1989, Public Act 88 was enacted to regulate the relationships between dealers and manufacturers of watercraft. The act prohibits watercraft manufacturers and distributors from selling to new watercraft dealers, and prohibits watercraft dealers from purchasing new watercraft from manufacturers without a dealer agreement. The dealer agreement is to include provisions related to the territory or market area; the period of time covered by the dealer agreement; performance and marketing standards; notice provisions for termination, cancellation, or nonrenewal; obligations in the preparation and delivery of the product and warranty service; disposal obligations upon termination, cancellation, or nonrenewal of inventory, equipment, furnishings, special tools, and required signs; and dispute resolution procedures.

Public Act 88 was apparently enacted amid growing concern among those within the watercraft industry about the instability of watercraft dealerships and the advantage manufacturers had over dealers in their relationships. At the time, written agreements detailing the specifics of a dealer-manufacturer relationship - like those found in the automotive industry and provided for under Public Act 118 of 1981 - were nowhere to be found in the watercraft industry. As a result, it was asserted that unfair cancellations of watercraft dealerships during the 1980's (and the corresponding financial instability of the industry as a whole) were a direct result of the lack of any written agreement between manufacturers and dealers.

Critics say that despite the enactment of Public Act 88 more than a decade ago, conditions within the watercraft industry have not markedly improved. While the statute provides for a basic structure of what should be contained in dealer agreements, dealers say the agreements continue to favor manufacturers. It was alleged during testimony before the House Regulatory Reform Committee that incidents of unfair termination of dealership

agreements continue to occur. As an example, a representative for the Michigan Boating Industries Association testified that one dealer had a 12-year relationship with a manufacturer terminated with little warning. While not knowing the specifics of the matter, he speculated that the agreement was terminated because another potential dealer promised the manufacturer greater sales. While that may very well be a good thing for the manufacturer, it leaves the dealer (and its employees) with little recourse and its customers with few protections, and contributes greatly to the instability of the watercraft industry in the state. Thus, critics of the current law have advocated that the watercraft dealer agreement law be strengthened by being more explicit in setting forth the contents and operation of watercraft dealer agreements.

THE CONTENT OF THE BILL:

The bill would enact the Watercraft Manufacturer and Dealer Act and repeal the watercraft franchise act, Public Act 88 of 1989. The provisions of the bill largely mirror the provisions of Public Act 118 of 1981, which details the relationship between automobile dealers and manufacturers.

Definitions

Among a host of other definitions, the bill defines "dealer agreement" to mean a written agreement or contract between (1) a distributor and a new watercraft dealer, (2) a manufacturer and a distributor or a new watercraft dealer, or (3) a watercraft importer and a distributor or a new watercraft dealer, that purports to establish the legal rights and obligations of the parties to the agreement or contract with regard to the purchase and sale or resale of new watercraft.

Dealer Agreements

The bill would prohibit a manufacturer, wholesaler, or representative of a manufacturer or wholesaler from offering to sell a new watercraft to a new

watercraft dealer without first entering into a written agreement and complying with the applicable provisions of the bill. Likewise, a new watercraft dealer would be prohibited from offering to purchase a new watercraft from a manufacturer, wholesaler, or representative of a manufacturer or wholesaler without first entering into a written agreement and complying with the applicable provisions of the bill.

Termination of Dealer Agreements

The bill would prohibit a manufacturer from terminating an agreement with a new watercraft dealer unless it provides adequate notice to the dealer, acts in “good faith”, and has “good cause” for terminating the agreement. “Good cause” would be defined to mean (1) a failure by the dealer within two years of the notification to terminate, to comply with a provision of the agreement that is both reasonable and of material significance or (2) a failure by the new watercraft dealer to effectively execute a provision of the agreement related the sales or service by the new watercraft dealer where the dealer was given written notice of the failure, the notice stated that the noticed failure was provided in accordance with the bill, the new watercraft dealer was afforded a reasonable opportunity to carry out the agreement, and the failure has continued for more than 180 days after the notification. “Good cause” would not include the following:

- A change of ownership in the dealership.
- A refusal of a dealer to purchase or accept delivery of any new watercraft parts, accessories, or other services and commodities that are not ordered by the dealer.
- The fact that a new watercraft owns, has an interest in, participates in the management of, or holds a dealer agreement for the sale of another make or line of new watercraft if the dealer maintains a reasonable line of credit for each make or line of watercraft and remains in substantial compliance with the provisions of the dealer agreement.
- The fact that a dealer sells or transfers ownership of the dealership to the dealer’s spouse or children, if the sale or transfer does not have the effect of a sale or assignment of the dealer agreement or a change in the principal management of the dealership without the manufacturer’s prior written consent.

In any proceeding regarding the termination of a dealer agreement, the manufacturer would have the burden of proof in showing that it has acted in good faith, that is has complied with any notification

requirements, and that there was good cause for the termination of the agreement.

Before termination of a dealer agreement, the manufacturer would have to provide written notice of the termination to the dealer. The notice would have to be provided through certified mail and contain a statement of the intention to terminate, the reasons for the termination, and the date of termination. The date by which the notice would have to be sent would vary depending on the circumstances. The notice would have to be sent at least 30 days prior to actual termination (1) if the dealer becomes insolvent, (2) the dealer fails to conduct normal sales and service operations for 30 consecutive days, (3) the dealer or its principal owners are convicted of a crime that is punishable by more than one year in prison or a crime that involves theft, dishonesty, or false statement, (4) the license necessary to operate a dealership is revoked, or (5) the dealer makes a fraudulent misrepresentation to the manufacturer in a matter that is material to the agreement. The notice would have to be provided at least 12 months prior any actual termination if the manufacturer discontinues production of the dealer’s product line or discontinues distribution of that product line to the state. If none of the circumstances that trigger a 30-day or 12-month notice requirement apply, the notice would have to be sent at least 180 days prior to actual termination.

If a dealer agreement is terminated, the manufacturer would have to pay the new watercraft dealer “fair and reasonable compensation” for all of the following:

- Each new current model year watercraft purchased from the manufacturer in the dealer’s inventory that has not been materially altered or substantially damaged.
- Each new watercraft not of the current model year purchased from the manufacturer in the dealer’s inventory that has not been materially altered or substantially damaged, if that watercraft was purchased from the manufacturer within two years prior to the date of termination.
- Any electronic or printed parts catalogs, supplies, and parts inventory purchased from the manufacturer.
- Any special tools purchased from or required by the manufacturer within three years prior to the termination.
- Any manufacturer-required dealer staff training or mandatory dealer meetings.

- Any marketing expenditures made by the watercraft dealer, based upon anticipated incentives, holdbacks on boats not refunded by the manufacturer, or similar financial promotions.

A manufacturer would be required to make such payments for watercraft to the dealer within 30 days after the termination of the agreement if the dealer meets “reasonable” requirements under the agreement related to the return of inventory. Payments for the items would have to be made within 90 days of the termination of the agreement if the dealer provides clear title to any items of personal property and meets other requirements under the agreement related to the return of personal property. If a manufacturer does not make such payments in a timely manner, interest would accrue on the amount due at an annual rate of 12 percent.

Manufacturer Requirements on Dealers

A manufacturer would be prohibited from requiring a dealer to do any of the following:

- Order or accept delivery of any new watercraft, parts, or equipment that is not required by law and is not voluntarily ordered by the dealer. (Except that a manufacturer could require a dealer to maintain a certain level of inventory of a watercraft offered for sale.)
- Order or accept delivery of any new watercraft with special features or accessories that is not included in the list price of the watercraft, as advertised by the manufacturer.
- Participate monetarily in any advertising campaign or pay any part of the costs of a discount made by or lawfully imposed by the manufacturer to a consumer, unless the dealer voluntarily agrees.
- Coerce the dealer to enter into any agreement or act by threatening to terminate a dealer agreement or other contractual agreement.
- Change the capital structure or the means by which the dealer finances the operation of the dealership, if the dealership meets any reasonable capital standards uniformly established by the manufacturer.
- Refrain from participation in the management of, investment in, or acquisition of, any other line of watercraft or related products if the dealer maintains a reasonable line of credit for each make or line of watercraft, maintains reasonable facilities, and does not change the principal management of the dealer.
- Change the location of the new watercraft dealership or its premises, unless reasonable.
- Prospectively assent to a release, assignment, novation, waiver, or estoppel that relieves any person from liability imposed by the bill, require that the law of another state govern the dealer agreement, or require referral of any controversy between the dealer and manufacturer to a person other than a court of the state or a federal court located in the state, if the referral is binding on the dealer, unless both parties agree to arbitration or to settle the controversy at a federal court located outside of the state.

Manufacturers: Prohibited Actions

A manufacturer would be prohibited from doing the following:

- Establishing a system regarding the allocation of new watercraft that is “arbitrary and capricious”.
- Failing or refusing to advise or disclose to the dealer, the basis on which the manufacturer allocated new watercraft in the state, if the dealer submits a written request for such information.
- Refusing to deliver inventory to a dealer in reasonable quantities and within a reasonable period of time after receipt of an order, if the manufacturer publicly advertises that a specific new watercraft is available for immediate delivery (except under reasonable circumstances that prevent delivery).
- Requiring a dealer to purchase necessary service tools with an aggregate purchase price of more than \$7,500 as a means to receive specific models, without providing the dealer without a good faith estimate of the number of watercraft of that model it intends to allocate to the dealer during the model year (except where the dealer does not request an estimate).
- Offering a refund or other inducement to a dealer to purchase new watercraft without providing the same incentive, upon request, to all other dealers.
- Releasing any business, financial, or personal information that the dealer provided to the manufacturer, unless required under an administrative subpoena or judicial proceeding or with the written consent of the dealer.
- Denying the dealer the right to lawfully associate with another dealer.

- Directly or indirectly owning, operating, or controlling a new watercraft dealer, except in limited circumstances.
- Selling new watercraft directly to a retail customer other than through its network of dealers.
- Preventing a dealer from changing its executive management, unless the manufacturer can demonstrate that such a change would result in the management of the dealership by persons who are not of “good moral character” or who do not meet the reasonable, pre-existing, and equitably applied standards of the manufacturer.
- Unreasonably withhold consent to the sale, transfer, or exchange of a dealer to a qualified buyer if that dealership remains within the same “relevant market area”, and fail to respond in writing to a request for consent.
- Unfairly prevent a dealer from receiving reasonable compensation for the value of the dealership.
- Failing or refusing to continue an agreement with the purchaser of an existing dealer.
- Terminating a lease of a dealer’s established place of business, except for a material breach of that lease.
- Failing to perform any warranty obligation.
- Failing to include in a written notice of any factory recall of a watercraft the date by which it expects the necessary parts and equipment will be available to correct defects.
- Failing to compensate a dealer in the state for a repair performed pursuant to a recall.

In addition, a manufacturer would be prohibited from engaging in any of the following, though they would not apply to a price increase or reduction caused by (1) the introduction of a new model or new model year, (2) adding equipment (optional or required by state or federal law), (3) revaluation of the U.S. dollar, if the watercraft or component parts are made in another country, or (4) an increase in transportation charges charged by the carrier:

- Increasing the price of a new watercraft, if the dealer orders that watercraft for a consumer prior to receiving notice of an official price increase from the manufacturer and the consumer pays for that watercraft.

- Failing to reduce the price of, or providing the rebate for, a new watercraft, if the dealer orders a watercraft for a consumer prior to receiving notice of a reduction in the price that is more than \$5 or a cash rebate for that model and if the consumer pays for that watercraft. If a manufacturer offers a price reduction of more than \$5 or a cash rebate on a model, that reduction or rebate for that model would have to be provided for all watercraft of that model and to any dealer. Each dealer could, though would not be required to, pass on that price reduction to the consumer.

Designated Family Members

The bill provides that a “designated family member” of a deceased or incapacitated new watercraft dealer could succeed the dealer in ownership or operation of the dealership under the existing agreement if (1) the family member provides written notice to the manufacturer within 120 days of the dealer’s death or incapacity, (2) agrees to the provisions of the agreement, and (3) meets the criteria for serving as a dealer. In order to help determine whether the family member meets the requirements for operating as a dealer, the manufacturer could request certain personal and financial data from the family member, who, in turn, would be required to promptly provide such information. A manufacturer could refuse to approve the succession of a designated family for “good cause.” If the manufacturer refuses to assent to the succession, it must notify the family member of its refusal (and its reasons) within 60 days of receiving notice of the intent to succeed or receiving the requested personal and financial data. However, nothing in the above provisions would preclude a dealer from designating someone as his or her successor in a written instrument filed with the manufacturer. If such an instrument is filed, it would determine the right to succession of the ownership of that dealership.

Establishment of a Dealer

Before a manufacturer establishes or relocates a dealer within the “relevant market area” of an existing dealer who sells the same make and model of watercraft, the manufacturer would have to notify in writing each dealer of that make and model in the area of its intention to establish an additional dealer or relocate an existing dealer. Within 30 days after receiving notice or at the end of any appeal procedure provided by the manufacturer, the dealer could bring an action for declaratory judgment to determine whether “good cause” exists for establishing or relocating a dealer within the relevant market area. If such an action is filed, the manufacturer would be precluded from establishing or relocating that dealer

until the circuit court has rendered its decision. The action would have precedence over all other civil matters pending on the circuit court's docket. The above provisions would not apply if a dealer is relocating to another area within two miles of its established place of business, nor would they apply to the reopening or replacement of a dealership within the relevant market that closed within the preceding year if it is within two miles of the established place of business of the closed dealership.

"Relevant market area" means the area within a radius of 50 miles of the intended site of the proposed or relocated dealer, or a radius negotiated in good faith between the manufacturer or wholesaler and the dealer, whichever is greater.

Manufacturer Obligations

A manufacturer would be required to state in writing to each dealer in the state the dealer's obligations for preparation, delivery, and warranty services on its products. The manufacturer would be required to compensate the dealer for any preparation, reparation, delivery, or warranty service it requires the dealer to perform. The manufacturer would also be required to provide dealers with a schedule of compensation that it provides dealers for parts, work, and service, and establish reasonable and adequate time allowances for the diagnosis and performances of warranty work and service.

If a dealer makes a claim to the manufacturer for the cost of labor and parts related to warranty work, the manufacturer would have to approve or disapprove the claim within 30 days. If it is not disapproved within 30 days, it would be considered to be approved and the manufacturer would have to pay the claim within 30 days.

A manufacturer would compensate a dealer for any sales or service promotional activities sponsored by the manufacturer. Like a claim for parts and service, any claim not affirmatively approved or disapproved by the manufacturer within 30 days of receipt would be considered to be approved. The manufacturer would have to pay a claim within 10 days if affirmatively approved, or 30 days if considered approved because of the manufacturers inability to affirmatively approve or disapprove within the required time.

Liability for Damages

Liability for any damage to a watercraft would depend on when that damaged occurred and who was responsible for the watercraft at the time of damage.

First, the manufacturer would be liable for any damages that occur before delivery to the carrier for transport to the dealer. Second, the dealer would be liable for any damage to a watercraft that occurred during transport if the dealer selected the method of transportation, mode of transportation, and the carrier. Otherwise the manufacturer would be responsible. Finally, the dealer would be responsible for any damage to a watercraft after transport and before purchase by a customer, except for any hidden defects. The dealer could refuse delivery of a watercraft by providing written notice to the manufacturer.

Dealer Indemnity

A manufacturer would be required to indemnify a dealer for a judgment for damages or settlement agreed to by the manufacturer, and for the court costs and reasonable attorney fees, if a complaint is based solely on (1) a defect in the watercraft that occurred during the manufacture of the watercraft and its component parts, (2) the selection by the manufacturer of parts, (3) any damage to the watercraft that occurred during transit if the manufacturer chose the carrier, or (4) any action by the manufacturer that is beyond the dealer's span of control. If the complaint also includes allegations that are solely made against the dealer, the manufacturer would only be responsible for its portion of fault. A manufacturer would not be required to indemnify a dealer if the dealer failed to provide the manufacturer with adequate written notice of the complaint.

Violations

If a manufacturer terminates a dealer agreement without good cause, the dealer could bring an action against the manufacturer to recover actual (and reasonable) damages that it incurred as a result of that termination. A manufacturer that otherwise violates the provisions of the bill would be responsible for all damages sustained by a dealer as a result of that violation, in addition to any court costs and reasonable attorney fees. A manufacturer or dealer could bring an action of declaratory judgment for determination of any controversy arising under the act. A manufacturer or dealer could apply to the circuit court and obtain appropriate injunctive relief against the termination of a dealer agreement or any other violation of the bill.

The attorney general could commence a civil action in the appropriate circuit court to enforce compliance with the provisions of the bill. In a civil action for a violation of the bill, the circuit court could assess a

civil fine of not more than \$5,000 per day for each day the violation continues. Finally, a person who violates the bill would be guilty of a misdemeanor punishable by a fine not exceeding \$5,000 per day for each day the violation continues.

Miscellaneous

The bill would only apply to dealers located within the state. Also, the bill would repeal Public Act 88 of 1989.

BACKGROUND INFORMATION:

Public Act 88 of 1989 simply requires watercraft manufacturers, distributors, and dealers to enter into a written agreement prior to purchasing and selling watercraft from one another. The act is not very specific in detailing what the agreement should specifically contain. Rather, the act provides that the agreement should contain provisions related to, but not limited, to the following: territory or market area; the period of time covered by the dealer agreement; performance and marketing standards; notice provisions for termination, cancellation, or nonrenewal; obligations in the preparation and delivery of the product and warranty service; disposal obligations upon termination, cancellation, or nonrenewal of inventory, equipment, furnishings, special tools, and required signs; and dispute resolution procedures.

The act also contains two provisions that are similar to provisions contained in the bill. These are provisions related to the manufacturer's consent to a sale or transfer of a dealership and the succession of a dealership to a "designated successor" of a deceased or incapacitated new watercraft dealer.

FISCAL IMPLICATIONS:

The House Fiscal Agency notes that the bill's fiscal impact to the state and local governmental units, including justice systems, is indeterminate. (HFA analysis 12-2-03)

ARGUMENTS:

For:

The arguments found in support of this bill can really be traced back to Public Act 88 of 1989 and Public Act 118 of 1981 (including 1999 amendments). Despite the passage of the 1989 watercraft franchise act, dealers say that watercraft manufacturers continue to strong-arm dealers into running their franchises the way the manufacturers prefer. In many

instances, these dealer agreements are not mutually agreed upon. Should a dealer disagree with a provision, there is little it can do to exclude that provision from the agreement. A dealer can disagree with a provision, and the manufacturer can threaten to cancel the agreement (and the lifeblood of that dealership). Quite simply, individual dealers do not have an equal bargaining position with larger watercraft manufacturers. Critics say that the result is dealer agreements that favor manufacturers at the expense of dealers. The bill, which is patterned after the automobile dealer-manufacturer agreement law, provides dealers with greater protections in their relationships with manufacturers, by explicitly stating what these agreements should include.

The bill includes provisions for timely notice of intent to terminate an agreement, dealer compensation for a terminated agreement, the ability of manufacturers to establish additional dealers in the relevant market area of an existing dealer, ability to file court actions, and allocation of liability for damaged watercraft, among a host of other provisions. These provisions are designed to specifically detail the relationship between dealers and manufacturers, something that may have not occurred under Public Act 88. As an example, Public Act 88 requires a dealer agreement to contain provisions related to territory or market area, and leaves the details to be worked out between the dealer and the manufacturer. However, given the uneven bargaining position of the two groups, it is likely that the provision will be crafted in such a manner so as to benefit the manufacturer. The bill, on the other hands, explicitly provides that a manufacturer should notify a dealer of its intent to establish or relocate another dealer within the same relevant market area and that a dealer can seek a declaratory ruling as to whether good cause exists for the establishment of that additional dealer.

Perhaps most important of all, the bill provides that a manufacturer cannot terminate an agreement unless it provides notice to the dealer, acts in good faith, and has good cause for terminating the agreement. This is necessary given the uneven relationship between the dealers and manufacturers. It is entirely possible that a dealer could be cited for insignificant violations of a dealer agreement, which the manufacturer could, in turn, use as an excuse to terminate the agreement. Also, manufacturers could use their power to terminate an agreement to threaten dealers in some way to get them to acquiesce to the manufacturers demands.

Against:

Opponents of the bill believe that it will harm Michigan's already struggling manufacturing sector, by placing greater burdens on the industry. It is likely that should the bill become enacted, manufacturers that also have operations in other states will shift more and more of their operations to states with laws that aren't nearly as taxing. A representative from a manufacturer in Holland noted that it won't do business in Louisiana and Georgia, two states with laws similar to this bill, and that should this bill be enacted, it's highly likely that it would shift more of its manufacturing operations to its plants in the Carolinas. A representative from the National Marine Manufacturers Association noted in written testimony that "this bill would make it extremely difficult for a boat manufacturer to respond to market pressures. It would forbid a manufacturer from rewarding superb sales and service performance with price breaks or other rewards. And just as importantly, it would make it impossible for a manufacturer to bring his boats to market in a unique way the best represents his brand."

The NMMA further noted, perhaps to distinguish the watercraft industry from the automobile industry, that "the boat business is unique. In Michigan, there are about 300 boat brands on the market and only 176 dealer members of the Michigan Boating Industry Association. Dealers have no restrictions on the number of boat brands they represent under one roof. They can even carry direct competitors if they choose. Dealers ultimately have the final say on who they represent and who they don't. It is up to them to seek out those manufacturers who offer them the best deal."

Specific problems areas in the bill, while numerous, include the definition of "good cause" in for terminating an agreement. It is believed that this provision is so vague so as to invite litigation. Also, the 50-mile market area firmly protects a dealer of a particular brand of boat from any sort of competition. Under the bill, if a dealer of brand X sells boats, there can be no other dealer selling also selling brand X within 50 miles. In essence, if the dealer is located in Lansing, there couldn't even be a dealer selling that same brand in Brighton. Is that consumer protection? Imagine if there could only be one GM dealer within a 50-mile radius. Essentially, then, this bill establishes dealer monopolies on the brands that they sell.

Also, the timelines for the notice of an intent to terminate and the actual termination are so long so as to effectively hurt manufacturers. The bill allows for

a termination to occur in anywhere from 30 days to one year after official notice of the intent to terminate is sent. While the bill, thankfully, provides for a faster turnaround time in the most egregious cases, most terminations would take at least six months to complete. In some cases, that may be too long.

The bill also provides that the dealer would be compensated for, among other things, those expenses related to its staff training, should the agreement be terminated. This effectively means that the manufacturer would have to reimburse the dealer for training its staff. Does this make sense?

Other provisions of concern are the designated-family member successor provisions and the provision that allows dealers to opt-out of joining manufacturer-dealer promotional efforts. These provisions may very well force manufacturers to continue to work with dealers who are unable or willing to do the work necessary to successfully operate in the boating industry. Should a manufacturer be required to continue to work with an ineffectual family member of a dealer simply because of the ties to a former dealer? Also, why would a manufacturer want to continue to do business with a dealer who is unwilling to assist in promoting their (that is, both the both manufacturer and the dealer) product.

POSITIONS:

The Michigan Boating Industries Association testified in support of the bill. (12-2-03)

Grand Bay Marine, a boat dealer in Traverse City, indicated that it supports the bill. (12-2-03)

Lake Fenton Marina indicated that it supports the bill. (12-2-03)

The Michigan Manufacturers Association testified in opposition to the bill. (12-2-03)

The National Marine Manufacturers Association indicated in written testimony that it opposes the bill. (12-2-03)

Tiara Yachts, a Holland-based boat manufacturer, indicated in written testimony that it opposes the bill. (12-2-03)

S2 Yachts, Inc., a Holland-based boat manufacturer, indicated in written testimony that it opposes the bill. (12-2-03)

Maurell Products, an Owosso-based boat manufacturer, indicated that it opposes the bill. (12-2-03)

Analyst: M. Wolf

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.