



Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536



Telephone: (517) 373-5383
Fax: (517) 373-1986
TDD: (517) 373-0543

Senate Bill 1308 (Substitute S-1)
Senate Bill 1309 (Substitute S-1)
Sponsor: Senator Jud Gilbert, II (S.B. 1308)
Senator Buzz Thomas (S.B. 1309)
Committee: Economic Development and Regulatory Reform

Date Completed: 6-23-10

CONTENT

The bills would amend Public Act 118 of 1981 (which regulates automobile dealer franchises) to do all of the following:

- Add to the Act's list of prohibited activities by a manufacturer.
- Prohibit a manufacturer from imposing a property use agreement on a dealer.
- Revise provisions under which a manufacturer may charge back to a dealer an approved and paid warranty claim.
- Allow a manufacturer to conduct certain audits of a dealer.
- Revise a manufacturer's liability for costs, for a violation of the Act.
- Revise requirements for a manufacturer's compensation of a dealer upon the termination of a dealer agreement.
- Specify procedures for determining compensation for a dealer's fair rental value.
- Require compensation for a dealer's goodwill and specify procedures for determining the value of that goodwill.
- Redefine "relevant market area".

The bills are tie-barred.

Senate Bill 1308 (S-1)

Prohibited Activities

The Act lists activities that a manufacturer, importer, or distributor is prohibited from doing with respect to new motor vehicle

dealers. Under the bill, the prohibitions would apply only to manufacturers. The bill would add the following to the list of prohibited activities:

- Offering incentives, rebates, bonuses, or similar benefits based on certain standards.
- Requiring unreasonable improvements to a facility.
- Authorizing a service and repair facility to do warranty repairs and recall work, unless the work was for certain purposes.
- Owning a service and repair facility, except a facility for the repair of manufacturer-owned vehicles.
- Engaging in capricious or unreasonable conduct that caused damage to a dealer.
- Imposing unreasonable standards of performance or requiring performance standards that were not applied uniformly to other similar dealers.
- Using or considering a dealer's sales performance in determining the dealer's eligibility for certain vehicles or programs.
- Establishing a performance standard or program that was not fair, reasonable, and equitable.
- Requiring or coercing a dealer that had a dealer agreement for competing vehicles to exclude or remove the sale or servicing of those vehicles.

Property Use Agreement

The bill would prohibit a manufacturer from requiring a new motor vehicle dealer, a proposed new motor vehicle dealer, or any

owner of an interest in a dealership facility to enter into or agree to a property use agreement as a condition of awarding a dealer agreement, adding a line of vehicles or a dealer agreement to an existing dealer, renewing a dealer agreement, approving a relocation of a dealer's place of business, or approving a sale or transfer of a dealership or a dealer agreement.

The prohibition would not apply to a property use agreement in which separate and adequate monetary consideration was offered and accepted for the agreement. A property use agreement would not be enforceable for more than 10 years unless renewed by the parties for additional monetary consideration.

If a dealer agreement were terminated by a manufacturer, by a successor manufacturer, or by operation of law and the manufacturer and new motor vehicle dealer were parties to a property use agreement, the property use agreement would terminate and cease to be effective at the time the dealer agreement was terminated.

If a dealer agreement were terminated by a dealer, and the manufacturer and dealer were parties to a property use agreement for which the dealer received monetary consideration, the agreement would terminate and cease to be effective if the dealer repaid a pro rata share of the monetary consideration it received from the manufacturer for the property use agreement within 60 days after the termination of the dealer agreement.

If any provision contained in a property use agreement entered into on or after the bill's effective date were inconsistent with the bill, the provision would be voidable at the election of the affected dealer, proposed new dealer, or owner of an interest in the dealership facility.

"Property use agreement" would mean an agreement that requires a dealer to establish or maintain exclusive dealership facilities, or that restricts the ability of a new motor vehicle dealer to transfer, sell, lease, or change the use of the place of business. The term would include any similar agreement commonly known as a site control agreement or exclusive use agreement.

Warranty Claims

The Act requires each new vehicle manufacturer to specify in writing to each of its new motor vehicle dealers the dealer's obligations for preparation, delivery, and warrant service on the manufacturer's products. A manufacturer must compensate a dealer for warranty service required of the dealer by the manufacturer, according to a schedule of compensation for parts, work, and service, and the time allowance for the performance of the work and service. The schedule must include reasonable compensation for diagnostic work, repair service, and labor. A manufacturer must pay a dealer's claim for labor and parts within 30 days after approval, and must approve or disapprove a claim within 30 days after receiving it.

A claim that has been approved and paid may not be charged back to the dealer unless the manufacturer can show that the claim was fraudulent, false, or unsubstantiated. A charge back for false or fraudulent claims may not be made more than two years after payment, and a charge back for unsubstantiated claims may not be made more than 15 months after payment. Under the bill, instead, a manufacturer could not charge back to a dealer a claim that it had approved and paid unless one of the following were met:

- The manufacturer showed that the claim was fraudulent or false.
- The manufacturer showed that the claim was unsubstantiated or lacked proper documentation, or that there was an improper diagnosis process or improper repair procedure.

A manufacturer could not charge back the amount paid if a claim were found to be false or fraudulent more than two years after payment. A manufacturer could not charge back the amount paid if a claim were found to be unsubstantiated, to lack proper documentation, or to be improperly diagnosed or repaired more than 12 months after payment.

In addition, under the bill, a manufacturer could not charge a claim back to a dealer after the claim was paid unless a representative of the manufacturer first met in person or by video teleconference or telephone with an officer or employee of the

dealer designated by the dealer, or responded in writing to any dealer-written request for information. The bill includes requirements for such a meeting.

Audits

The bill would allow a manufacturer to conduct an audit of a new motor vehicle dealer's records relating to a warranty or promotion claim submitted by the dealer. The audit would have to be completed within 12 months after the manufacturer received the claim.

Liability for Costs

The Act allows a dealer to bring an action against a manufacturer to recover actual damages reasonably incurred as a result of a manufacturer's termination, cancellation, failure to renew, or discontinuance of a dealer agreement without good cause. A manufacturer that violates the Act is liable for all damages sustained by a dealer as a result of a violation.

A manufacturer that violates the Act also is liable for all court costs and reasonable attorney's fees incurred by the dealer. Under the bill, instead, if a manufacturer violated the Act, the court could award the dealer its costs of litigation, including court costs and reasonable attorney and expert witness fees, if the court determined that the award was appropriate.

Senate Bill 1309 (S-1)

Compensation upon Termination

If a dealer agreement is terminated, canceled, not renewed, or discontinued, the Act requires the manufacturer or distributor to pay the new motor vehicle dealer fair and reasonable compensation for certain items. Under the bill, if a manufacturer terminated, canceled, did not renew, or discontinued a dealer agreement or if a dealer agreement were terminated, canceled, not renewed, or discontinued as a result of coercion by the manufacturer, the manufacturer would have to pay the dealer fair and reasonable compensation.

The items for which compensation must be paid include all new current model year motor vehicle inventory that has not been materially altered, substantially damaged, or

driven for more than 300 miles and all new motor vehicle inventory not of the current model year that has not been materially altered, substantially damaged, or driven for more than 300 miles, provided that the noncurrent model year vehicles were purchased from the manufacturer and drafted on the dealer's financing source or paid for within 120 days of the effective date of the termination, cancellation, or nonrenewal. The bill would delete that provision.

The bill, instead, would require the payment of fair and reasonable compensation for each vehicle in the dealer's inventory that met all of the following:

- The vehicle was new, not materially altered, and unsold.
- The vehicle was a current model year vehicle or a vehicle from the model year preceding the current model year.
- The vehicle was purchased from the manufacturer or another dealer of the same line make in the ordinary course of business before the dealer received notice of the termination, discontinuance, cancellation, or nonrenewal.
- The vehicle had less than 750 miles registered on the odometer.

The bill also would require compensation for data processing programs and equipment, including software the manufacturer required the dealer to obtain or purchase for communication of sales, service, warranty, or other information between the dealer and the manufacturer in the two years before the effective date of the termination, discontinuance, cancellation, or nonrenewal of the agreement. This requirement also would apply to any amount remaining to be paid or paid in advance on any leases of computer hardware or software used by the dealer to manage and report data to the manufacturer executed before the effective date of the termination, discontinuance, cancellation, or nonrenewal of the dealer agreement, if the remaining term of the lease on the effective date were two years or less.

In addition, the bill would require compensation for both of the following:

- The net cost of any upgrades or alterations made by the dealer to the

dealership facilities that the manufacturer recommended in writing or required and that were made in the two years before the effective date of the termination, discontinuance, cancellation, or nonrenewal of the agreement.

- Any furnishings the manufacturer required the dealer to purchase in the two years preceding the effective date of the termination, discontinuance, cancellation, or nonrenewal.

Currently, compensation for new motor vehicle inventory must be paid, if possible, within 30 days after termination, cancellation, nonrenewal, or discontinuance. Compensation for items of personal property must be paid within 90 days. Under the bill, a manufacturer would have to pay the compensation for new motor vehicle inventory and items of personal property within 60 days.

Fair Rental Value

Currently, upon termination, cancellation, nonrenewal, or discontinuance of a dealer agreement, the manufacturer must pay to a new motor vehicle dealer a sum equal to the current fair rental value of the dealer's established place of business for one year from the effective date of termination, cancellation, nonrenewal, or discontinuance, or the remainder of any lease, whichever is less. Under the bill, the manufacturer would have to pay that amount in equal monthly installments for one year.

The bill would require the manufacturer and dealer to make a good faith effort to agree to the fair rental value of the premises, taking into consideration the adequacy and desirability of the premises for dealership operations and the fair market value of the premises. If they agreed on the fair rental value within 30 days after the effective date of the termination, cancellation, nonrenewal, or discontinuance of the dealer agreement, that valuation would be conclusive and binding.

If the manufacturer and dealer could not agree to the fair rental value within 30 days, the value would have to be determined by three qualified real estate appraisers, selected as described in the bill. Within 90 days after the termination, cancellation, nonrenewal, or discontinuance, each of the

appraisers would have to complete an appraisal of the fair rental value of the premises, and the median appraisal would be the fair rental value for purposes of compensation. The manufacturer and dealer each would be responsible for 50% of the costs of the appraisals.

Compensation for Goodwill

In addition to the payment of compensation described above, the bill would require a manufacturer to pay the dealer fair and reasonable compensation for the goodwill of the dealer if the manufacturer terminated, canceled, did not renew, or discontinued a dealer agreement for any of the following reasons:

- The ownership, operation, or control of all or part of the manufacturer's business changed, whether by sale or transfer of assets, corporate stock, or other equity interest, assignment, merger, consolidation, combination, joint venture, redemption, or operation of law.
- All or part of the manufacturer's business operations were terminated or suspended or ceased.
- The manufacturer discontinued a line make.

If a successor manufacturer offered a dealer agreement to a dealer whose agreement with the manufacturer was terminated, canceled, not renewed, or discontinued and the terms of the proposed agreement were substantially similar to the terms offered by the successor manufacturer to other new motor vehicle dealers of the same line make, the manufacturer that terminated, canceled, did not renew, or discontinued the dealer agreement would not be required to pay any compensation for the dealer's goodwill. Otherwise, the manufacturer and dealer would have to make a good faith effort to agree to fair and reasonable compensation of the dealer's goodwill, based on its fair market value on the day before the termination, cancellation, nonrenewal, or discontinuance of the dealer agreement. If they agreed on fair and reasonable compensation within 30 days, the agreement would be conclusive and binding.

If the manufacturer and the dealer could not agree to fair and reasonable compensation of the dealer's goodwill within 30 days, the

amount of compensation would have to be determined by three qualified appraisers, using the same process as described above for determining fair rental value.

Relevant Market Area

Under the Act, before a manufacturer or distributor enters into a dealer agreement establishing or relocating a new motor vehicle dealer within a relevant market area where the same line make is represented, the manufacturer or distributor must notify each new motor vehicle dealer of the same line make in the relevant market area. The dealer may bring a court action for a determination of whether there is good cause for establishing or relocating the proposed new motor vehicle dealer. The manufacturer or distributor may not proceed until the court has made a decision.

For a proposed new motor vehicle dealer or a dealer who plans to relocate his or her business in a county with a population over 25,000, "relevant market area" means the area within a radius of six miles of the intended site of the proposed or relocated dealer. For a proposed new motor vehicle dealer or a dealer who plans to relocate his or her business in a county with a population of 25,000 or less, "relevant market area" means the area within a radius of 10 miles of the intended site, or the county line, whichever is closer.

Under the bill, in a county with a population over 150,000, "relevant market area" would mean the area within a radius of 10 miles of the site of the intended place of business. In a county with a population of 150,000 or less, "relevant market area" would mean the area within a radius of 20 miles of the site of the intended place of business.

MCL 445.1574 et al. (S.B. 1308)
445.1562 et al. (S.B. 1309)

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

The bills would have no impact on the Department of State and an indeterminate impact on local units of government. The bills would have an indeterminate impact on property tax revenue depending on the number of dealerships affected.

Fiscal Analyst: Bill Bowerman

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.