

1-1 By: Huffman S.B. No. 529
1-2 (In the Senate - Filed February 7, 2011; February 17, 2011,
1-3 read first time and referred to Committee on Transportation and
1-4 Homeland Security; April 14, 2011, reported adversely, with
1-5 favorable Committee Substitute by the following vote: Yeas 6,
1-6 Nays 0, 1 present not voting; April 14, 2011, sent to printer.)

1-7 COMMITTEE SUBSTITUTE FOR S.B. No. 529 By: Wentworth

1-8 A BILL TO BE ENTITLED
1-9 AN ACT

1-10 relating to the regulation of motor vehicle dealers, manufacturers,
1-11 distributors, and representatives.

1-12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-13 SECTION 1. Section 2301.002, Occupations Code, is amended
1-14 by adding Subdivision (27-a) to read as follows:

1-15 (27-a) "Property use agreement" means a contract,
1-16 other than a franchise, between a franchised dealer and a
1-17 manufacturer, distributor, or representative that grants the
1-18 manufacturer, distributor, or representative the right to regulate
1-19 the franchised dealer's use of the dealership and other facilities
1-20 covered by the franchise.

1-21 SECTION 2. Section 2301.359, Occupations Code, is amended
1-22 by amending Subsection (e) and adding Subsections (g), (h), and (i)
1-23 to read as follows:

1-24 (e) A manufacturer or distributor may not unreasonably
1-25 withhold approval of an application filed under Subsection (a).
1-26 ~~[It is unreasonable for a manufacturer or distributor to reject a~~
1-27 ~~prospective transferee who is of good moral character and who meets~~
1-28 ~~the written, reasonable, and uniformly applied standards or~~
1-29 ~~qualifications, if any, of the manufacturer or distributor relating~~
1-30 ~~to the prospective transferee's business experience and financial~~
1-31 ~~qualifications.]~~

1-32 (g) In determining whether to approve an application filed
1-33 under Subsection (a), a manufacturer or distributor may consider:

1-34 (1) the prospective transferee's financial and
1-35 operational performance as a franchised dealer, if the prospective
1-36 transferee is or has been a franchised dealer;

1-37 (2) the prospective transferee's moral character; or

1-38 (3) the extent to which a prospective transferee
1-39 satisfies any criteria developed by the manufacturer or distributor
1-40 and made available to the prospective transferee, specifically to
1-41 determine the business experience and financial qualifications of a
1-42 prospective transferee.

1-43 (h) A manufacturer or distributor may consider the criteria
1-44 developed under Subsection (g)(3) only if the criteria are in
1-45 writing, are reasonable, and are uniformly applied in similar
1-46 situations.

1-47 (i) It is unreasonable for a manufacturer or distributor to
1-48 reject a prospective transferee who is of good moral character and
1-49 who satisfies the criteria developed under Subsection (g)(3).

1-50 SECTION 3. Subsection (b), Section 2301.465, Occupations
1-51 Code, is amended to read as follows:

1-52 (b) Notwithstanding the terms of any franchise, after the
1-53 termination of a franchise, a manufacturer, distributor, or
1-54 representative shall pay to a franchised dealer or any lienholder,
1-55 in accordance with the interest of each, the following amounts:

1-56 (1) the dealer cost of each new motor vehicle in the
1-57 dealer's inventory with mileage of 5,000 miles or less, exclusive
1-58 of mileage placed on the vehicle before it was delivered to the
1-59 dealer, reduced by the net discount value of each vehicle, except
1-60 that if a vehicle cannot be reduced by the net discount value, the
1-61 manufacturer or distributor shall pay the dealer the net cost of the
1-62 vehicle;

1-63 (2) the dealer cost of each new, unused, undamaged,

2-1 and unsold part or accessory that:

2-2 (A) is in the current parts catalogue and is

2-3 still in the original, resalable merchandising package and in an

2-4 unbroken lot, except in the case of sheet metal, a comparable

2-5 substitute for the original package may be used; and

2-6 (B) was purchased by the dealer either directly

2-7 from the manufacturer or distributor or from an outgoing authorized

2-8 dealer as a part of the dealer's initial inventory;

2-9 (3) the fair market value of each undamaged sign owned

2-10 by the dealer that bears a trademark or tradename used or claimed by

2-11 the manufacturer, distributor, or representative and that was

2-12 purchased from or at the request of the manufacturer, distributor,

2-13 or representative;

2-14 (4) the fair market value of all special tools, data

2-15 processing equipment, and automotive service equipment owned by the

2-16 dealer that:

2-17 (A) were recommended in writing and designated as

2-18 special tools and equipment;

2-19 (B) were purchased from or at the request of the

2-20 manufacturer, distributor, or representative; and

2-21 (C) are in usable and good condition except for

2-22 reasonable wear and tear; ~~and~~

2-23 (5) the cost of transporting, handling, packing,

2-24 storing, and loading any property subject to repurchase under this

2-25 section; and

2-26 (6) the depreciated value of computer software that

2-27 was recommended and required in writing by the manufacturer,

2-28 distributor, or representative.

2-29 SECTION 4. Subchapter J, Chapter 2301, Occupations Code, is

2-30 amended by adding Section 2301.4651 to read as follows:

2-31 Sec. 2301.4651. ADDITIONAL PAYMENT TO FRANCHISED DEALER IN

2-32 CERTAIN SITUATIONS. (a) This section applies to a manufacturer,

2-33 distributor, or representative that:

2-34 (1) terminates or discontinues a franchise by any

2-35 means without complying with Section 2301.453; or

2-36 (2) regardless of whether the manufacturer,

2-37 distributor, or representative complies with Section 2301.453,

2-38 terminates or discontinues a franchise by:

2-39 (A) discontinuing a line-make;

2-40 (B) ceasing to do business in this state; or

2-41 (C) changing the distributor or method of

2-42 distribution of its products in this state.

2-43 (b) In addition to the duties placed on a manufacturer,

2-44 distributor, or representative by Section 2301.465, a

2-45 manufacturer, distributor, or representative to whom this section

2-46 applies shall pay to the franchised dealer the following amounts as

2-47 applicable:

2-48 (1) either:

2-49 (A) the dealer's construction costs for a new

2-50 dealership completed in the two years preceding the date of the

2-51 termination or discontinuance described by Subsection (a); or

2-52 (B) if the dealer does not have any costs

2-53 described by Paragraph (A), the fair monthly rental value of the

2-54 dealership payable in cash each month beginning on the first day of

2-55 the first month following the date of the termination or

2-56 discontinuance described by Subsection (a) and ending on the

2-57 earlier of:

2-58 (i) the first anniversary of the

2-59 termination or discontinuance date; or

2-60 (ii) the date on which the dealer no longer

2-61 owns the dealership;

2-62 (2) the dealer's costs for upgrading or substantially

2-63 altering a dealership if the upgrades or alterations were completed

2-64 or added in the two years preceding the date of the termination or

2-65 discontinuance described by Subsection (a); and

2-66 (3) an amount equal to the value of the goodwill

2-67 associated with the franchise as it existed on the day before the

2-68 earlier of:

2-69 (A) the date of the termination or discontinuance

3-1 described by Subsection (a); or
 3-2 (B) the date on which the manufacturer,
 3-3 distributor, or representative announced its intention to
 3-4 terminate or discontinue the franchise in a manner described by
 3-5 Subsection (a).

3-6 (c) A franchised dealer receiving money under Subsection
 3-7 (b)(1)(B) shall:

3-8 (1) make a reasonable effort to earn income from a
 3-9 dealership after a termination or discontinuance described by
 3-10 Subsection (a); and

3-11 (2) inform the manufacturer, distributor, or
 3-12 representative of the dealer's efforts under Subdivision (1) and of
 3-13 any income earned from the dealership.

3-14 (d) If a termination or discontinuance described by
 3-15 Subsection (a) does not involve each franchise operated by a
 3-16 franchised dealer at a single location, the amounts to be paid under
 3-17 Subsection (b)(1) or (2) to the dealer by a manufacturer,
 3-18 distributor, or representative shall be based on the percentage of
 3-19 the total square footage of the dealership, including areas
 3-20 attributable to sales, service, and parts, that was allocated to
 3-21 the franchise being terminated or discontinued at the time of the
 3-22 termination or discontinuance.

3-23 (e) A franchised dealer receiving money under Subsection
 3-24 (b)(1) or (2) shall mitigate damages by listing the dealership for
 3-25 lease or sublease with a real estate broker licensed under Chapter
 3-26 1101 not later than the 30th day after the effective date of the
 3-27 termination or discontinuance described by Subsection (a) and shall
 3-28 reasonably cooperate with the broker in the performance of the
 3-29 broker's duties.

3-30 (f) A manufacturer, distributor, or representative may
 3-31 reduce the amount of a payment made to a franchised dealer under
 3-32 Subsection (b)(1)(B) by the amount of any income earned by the
 3-33 dealer from the dealership during the month preceding the payment.

3-34 (g) The manufacturer, distributor, or representative, as
 3-35 appropriate, shall pay any amount described by Subsection
 3-36 (b)(1)(A), (b)(2), or (b)(3) not later than the 90th day after the
 3-37 date of the termination or discontinuance described by Subsection
 3-38 (a).

3-39 (h) An amount payable under Subsection (b)(1)(A) or (b)(2)
 3-40 does not include any tax depreciation benefit received by the
 3-41 franchised dealer or any amount previously paid to the franchised
 3-42 dealer by the manufacturer, distributor, or representative to
 3-43 subsidize the costs incurred by the dealer in performing the
 3-44 activities described by Subsection (b)(1)(A) or (b)(2).

3-45 SECTION 5. Section 2301.467, Occupations Code, is amended
 3-46 by amending Subsections (b) and (c) and adding Subsections (b-1)
 3-47 and (b-2) to read as follows:

3-48 (b) Notwithstanding the terms of any franchise, a
 3-49 manufacturer, distributor, or representative may not unreasonably
 3-50 require a franchised dealer to relocate, or to replace or
 3-51 substantially change, alter, or remodel the dealer's facilities.
 3-52 Except as provided by Subsections (b-1) and (b-2) [~~For purposes of~~
 3-53 ~~this subsection~~], an act is reasonable if it is justifiable in light
 3-54 of current and reasonably foreseeable projections of economic
 3-55 conditions, financial expectations, and the market for new motor
 3-56 vehicles in the relevant market area.

3-57 (b-1) It is unreasonable for a manufacturer, distributor,
 3-58 or representative to require a franchised dealer to construct a new
 3-59 dealership or to substantially change, alter, or remodel an
 3-60 existing dealership before the 10th anniversary of the date the
 3-61 construction of the dealership at that location was completed if
 3-62 the construction was in substantial compliance with standards or
 3-63 plans provided by a manufacturer, distributor, or representative or
 3-64 through a subsidiary or agent of the manufacturer, distributor, or
 3-65 representative.

3-66 (b-2) It is unreasonable for a manufacturer, distributor,
 3-67 or representative to require a franchised dealer to substantially
 3-68 change, alter, or remodel an existing dealership before the 10th
 3-69 anniversary of the date that a prior change, alteration, or remodel

4-1 of the dealership at that location was completed if the change,
 4-2 alteration, or remodel was in substantial compliance with standards
 4-3 or plans provided by a manufacturer, distributor, or representative
 4-4 or through a subsidiary or agent of the manufacturer, distributor,
 4-5 or representative.

4-6 (c) This [The prohibitions under this] section applies
 4-7 [apply] to the relationship between a manufacturer, distributor, or
 4-8 representative and:

4-9 (1) a current franchisee of the manufacturer,
 4-10 distributor, or representative; [or]

4-11 (2) a successor of a current franchisee of the
 4-12 manufacturer, distributor, or representative; or

4-13 (3) a franchised dealer who is seeking to become a
 4-14 franchisee of the manufacturer, distributor, or representative.

4-15 SECTION 6. Subchapter J, Chapter 2301, Occupations Code, is
 4-16 amended by adding Section 2301.4671 to read as follows:

4-17 Sec. 2301.4671. RESTRICTION ON DEALER'S USE OF DEALERSHIP
 4-18 PROPERTY. Notwithstanding the terms of any franchise, a
 4-19 manufacturer, distributor, or representative may not:

4-20 (1) unreasonably limit or impair the ability of a
 4-21 franchised dealer to use the dealership property as the dealer
 4-22 considers appropriate;

4-23 (2) control the use of the dealership property after
 4-24 the franchise is terminated or discontinued; or

4-25 (3) at any time exercise exclusive control over the
 4-26 use of the dealership property.

4-27 SECTION 7. Section 2301.468, Occupations Code, is amended
 4-28 to read as follows:

4-29 Sec. 2301.468. INEQUITABLE TREATMENT OF [DISCRIMINATION
 4-30 AMONG] DEALERS OR FRANCHISEES. Notwithstanding the terms of a
 4-31 franchise, a [A] manufacturer, distributor, or representative may
 4-32 not[+]

4-33 [~~(1) notwithstanding the terms of any franchise,~~
 4-34 ~~directly or indirectly discriminate against a franchised dealer or~~
 4-35 ~~otherwise] treat franchised dealers of the same line-make~~
 4-36 ~~differently as a result of the application of a formula or other~~
 4-37 ~~computation or process intended to gauge the performance of a~~
 4-38 ~~dealership or otherwise enforce standards or guidelines applicable~~
 4-39 ~~to its franchised dealers in the sale of motor vehicles if, in the~~
 4-40 ~~application of the standards or guidelines, the franchised dealers~~
 4-41 ~~are treated unfairly or inequitably[+or~~

4-42 [~~(2) discriminate unreasonably between or among~~
 4-43 ~~franchisees] in the sale of a motor vehicle owned by the~~
 4-44 ~~manufacturer or distributor.~~

4-45 SECTION 8. Subchapter J, Chapter 2301, Occupations Code, is
 4-46 amended by adding Section 2301.4749 to read as follows:

4-47 Sec. 2301.4749. MANUFACTURER OR DISTRIBUTOR INCENTIVE
 4-48 PROGRAMS: PAYMENT TO DEALER. (a) A manufacturer or distributor
 4-49 shall pay a dealer's claim filed under a manufacturer or
 4-50 distributor incentive program not later than the 30th day after the
 4-51 date the claim is approved.

4-52 (b) A claim is considered approved unless a manufacturer or
 4-53 distributor rejects the claim not later than the 31st day after the
 4-54 date of receipt of the claim by the manufacturer or distributor.

4-55 (c) The manufacturer or distributor shall provide the
 4-56 dealer with written notice of a rejection of a claim and the reasons
 4-57 for the rejection.

4-58 SECTION 9. The heading to Section 2301.475, Occupations
 4-59 Code, is amended to read as follows:

4-60 Sec. 2301.475. MANUFACTURER OR DISTRIBUTOR INCENTIVE
 4-61 PROGRAMS: AUDIT OR CHARGEBACK.

4-62 SECTION 10. Subsection (a), Section 2301.475, Occupations
 4-63 Code, is amended to read as follows:

4-64 (a) Except as provided by Subsection (b), after the first
 4-65 anniversary of the [ending] date [of] a manufacturer or distributor
 4-66 pays a claim under Section 2301.4749, the [incentive program, a]
 4-67 manufacturer or distributor may not:

4-68 (1) charge back to a dealer money paid by the
 4-69 manufacturer or distributor as a result of the incentive program;

5-1 (2) charge back to a dealer the cash value of a prize
 5-2 or other thing of value awarded to the dealer as a result of the
 5-3 incentive program; or

5-4 (3) audit the records of a dealer to determine
 5-5 compliance with the terms of the incentive program, unless the
 5-6 manufacturer or distributor has reasonable grounds to believe the
 5-7 dealer committed fraud with respect to the incentive program.

5-8 SECTION 11. Subchapter J, Chapter 2301, Occupations Code,
 5-9 is amended by adding Sections 2301.480 and 2301.481 to read as
 5-10 follows:

5-11 Sec. 2301.480. DISCLOSURE OF CERTAIN INFORMATION. A
 5-12 manufacturer, distributor, or representative may not require that a
 5-13 franchised dealer provide to the manufacturer, distributor, or
 5-14 representative information regarding a customer, except to the
 5-15 extent that a specific item of information is necessary:

5-16 (1) for the sale or delivery of a new motor vehicle to
 5-17 a customer;

5-18 (2) for reasonable marketing purposes;

5-19 (3) to validate a claim and make payment under an
 5-20 incentive program;

5-21 (4) to support a dealer's claim for reimbursement for
 5-22 repairs performed under a manufacturer's warranty; or

5-23 (5) to satisfy a product recall or safety obligation.

5-24 Sec. 2301.481. PROPERTY USE AGREEMENT. (a) A
 5-25 manufacturer, distributor, or representative may not require that a
 5-26 dealer enter into a property use agreement as a condition of the
 5-27 manufacturer, distributor, or representative:

5-28 (1) entering into a franchise;

5-29 (2) approving a franchised dealer's application to add
 5-30 a line-make;

5-31 (3) approving a franchised dealer's application to
 5-32 relocate a franchise; or

5-33 (4) approving a sale or transfer of a dealer,
 5-34 dealership, or franchise.

5-35 (b) The following provisions in a property use agreement are
 5-36 void and unenforceable:

5-37 (1) a limitation on the franchised dealer's ability to
 5-38 add a line-make; or

5-39 (2) a provision that binds a franchised dealer's
 5-40 successor.

5-41 (c) A property use agreement expires on the earlier of:

5-42 (1) the date provided by the property use agreement;

5-43 or

5-44 (2) the termination of the franchise between the
 5-45 parties to the property use agreement.

5-46 (d) This section applies to a subsidiary of, or a person
 5-47 controlled by, a manufacturer, distributor, or representative.

5-48 SECTION 12. Subsection (a), Section 2301.522, Occupations
 5-49 Code, is amended to read as follows:

5-50 (a) In an action brought against a manufacturer or
 5-51 distributor under Subchapter J [~~Sections 2301.451-2301.474~~] by a
 5-52 franchised dealer whose franchise provides for arbitration in
 5-53 compliance with this chapter, the board shall order the parties to
 5-54 submit the dispute to mediation in the manner provided by this
 5-55 subchapter.

5-56 SECTION 13. Subsection (b), Section 2301.652, Occupations
 5-57 Code, is amended to read as follows:

5-58 (b) Except as provided by Subsection (c) and Sections
 5-59 2301.6521 and 2301.6522, a person has standing under this section
 5-60 to protest an application to establish or relocate a dealership if
 5-61 the person filing the protest is a franchised dealer of the same
 5-62 line-make whose dealership is located:

5-63 (1) in the county in which the proposed dealership is
 5-64 to be located; or

5-65 (2) within a 15-mile radius of the proposed
 5-66 dealership.

5-67 SECTION 14. Subchapter N, Chapter 2301, Occupations Code,
 5-68 is amended by adding Sections 2301.6521 and 2301.6522 to read as
 5-69 follows:

Sec. 2301.6521. RIGHT TO PROTEST: CERTAIN RELOCATIONS.

(a) In this section, "affected county" means:

(1) a county with a population of one million or more;

or

(2) a county with a population of 500,000 or more but less than one million that is adjacent to a county with a population of one million or more.

(b) Notwithstanding any other provision of this chapter and except as provided by Subsection (d), a franchised dealer may protest an application to relocate a dealership from a location in an affected county to a location within the same affected county or an adjacent affected county only if the dealer is:

(1) a dealer of the same line-make as the relocating dealership and is in the affected county where the proposed dealership is being relocated and is nearest to the proposed relocation site, if no dealership of the same line-make as the relocating dealership is located within 15 miles of the proposed relocation site; or

(2) a dealer of the same line-make as the relocating dealership whose dealership location is within 15 miles of the proposed relocation site.

(c) If more than one dealership location is an equal distance from the proposed relocation site and each dealer and dealership location satisfies the requirements of Subsection (b)(1), each dealer may protest the relocation under Subsection (b)(1).

(d) A dealer may not protest an application to relocate a dealership under this section if the proposed relocation site is two miles or less from the dealership's current location.

Sec. 2301.6522. RIGHT TO PROTEST: ECONOMICALLY IMPAIRED DEALER.

(a) In this section, "economically impaired dealer" means a franchised dealer whose profitability has been, or is reasonably expected to be, substantially reduced at the dealer's current location, with no reasonable expectation of substantial improvement at that location, due to:

(1) a natural disaster;

(2) the exercise of eminent domain authority with respect to the dealership; or

(3) the sale of all or part of the dealership to a governmental entity under threat of the exercise of eminent domain authority.

(b) Notwithstanding any other provision of this chapter and except as provided by Subsections (c) and (d), a dealer may not protest the relocation of an economically impaired dealer if:

(1) the relocation is reasonably expected to be completed before the first anniversary of the date of the event described by Subsection (a); and

(2) the proposed relocation site is two miles or less from the economically impaired dealer's current location.

(c) A dealer of the same line-make as an economically impaired dealer whose dealership is nearest to the proposed relocation site of the economically impaired dealer may protest the relocation if the proposed relocation site is more than two miles closer to the protesting dealer's dealership than the site of the economically impaired dealer's current location.

(d) If more than one dealership location is an equal distance from the proposed relocation site and each dealer and dealership location satisfies the requirements of Subsection (c), each dealer may protest the relocation under Subsection (c).

SECTION 15. Subsection (a), Section 2301.805, Occupations Code, is amended to read as follows:

(a) Notwithstanding any other law, including Subchapter E, Chapter 17, Business & Commerce Code, in addition to the other remedies provided by this subchapter, a person may institute an action under Subchapter E, Chapter 17, Business & Commerce Code, or any successor statute to that subchapter, and is entitled to any procedure or remedy under that subchapter, if the person:

(1) has sustained damages as a result of a violation of Sections 2301.351-2301.354 or Section 2301.357; or

7-1 (2) is a franchised dealer who has sustained damages
7-2 as a result of a violation of:

7-3 (A) Subchapter J of this chapter [~~Sections~~
7-4 ~~2301.451-2301.474~~]; or

7-5 (B) Subchapter E, Chapter 17, Business & Commerce
7-6 Code.

7-7 SECTION 16. The change in law made by this Act applies only
7-8 to an agreement entered into or renewed under Chapter 2301,
7-9 Occupations Code, on or after the effective date of this Act. An
7-10 agreement entered into or renewed before the effective date of this
7-11 Act is governed by the law in effect on the date the agreement was
7-12 entered into or renewed, and the former law is continued in effect
7-13 for that purpose.

7-14 SECTION 17. This Act takes effect September 1, 2011.

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