



WISCONSIN LEGISLATIVE COUNCIL

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TO: SENATOR JOSEPH LEIBHAM

FROM: Don Salm, Senior Staff Attorney

RE: Analysis of LRB-3043/1, Relating to Manufacturers, Importers, and Distributors of Motor Vehicles and Franchised Motor Vehicle Dealers

DATE: September 8, 2003

This memorandum, prepared at your request, analyzes LRB-3043/1, relating to manufacturers, importers, and distributors of motor vehicles and franchised motor vehicle dealers.

CURRENT LAW

Current law:

1. **License Requirement.** Requires each manufacturer, importer, and distributor of motor vehicles in this state to be licensed by the Wisconsin Department of Transportation (DOT) (definitions of "distributor," "importer," "manufacturer," "motor vehicle," and "motor vehicle dealer" are defined, for purposes of ch. 218, Stats., relating to auto dealers, in s. 218.0101, Stats.; copies of these definitions are attached).
2. **Agreement.** Requires each manufacturer, importer, or distributor that enters into an agreement with a motor vehicle dealer to file the agreement with the DOT. Current law specifies certain provisions in an agreement that are void and prohibited.
3. **Revocation.** Allows the DOT to revoke the license of a manufacturer, importer, or distributor if the manufacturer, importer, or distributor commits certain violations with respect to a **motor vehicle dealer**. Current law specifies that a dealer may recover civil damages and attorney fees caused by such a violation (s. 218.0163, Stats., a copy of which is attached).

LRB-3043/1

LRB-3043/1 (hereafter, "the draft"):

1. **Waiver of Jury Trial Prohibited.** Makes void and prohibited any provision in an agreement that waives the dealer's or distributor's right to a jury trial. The draft includes a violation of this prohibition in the current provision permitting a dealer to recover civil damages and attorney fees.
2. **Compelling Transfer of Interest in Dealership Prohibited.** Makes void and prohibited a provision in an agreement that provides a manufacturer, importer, or distributor with the right or option to compel the dealer or any of its owners to sell or transfer an ownership interest in the dealer or assets of the dealer to the manufacturer, importer, or distributor or an assignee of the manufacturer, importer, or distributor. However, the draft specifies that notwithstanding this provision, an agreement may provide a manufacturer, importer, or distributor with the **right of first refusal** to acquire the dealer's assets in the event of a proposed change of ownership or transfer of dealership assets if all the requirements of s. 218.0134 (4) (c), Stats., are met (a copy of that provision is attached). The draft includes a violation of this prohibition in the current provision permitting a dealer to recover civil damages and attorney fees.
3. **Revocation of License for Failing to Offer for Sale Certain Models to Certain Dealers.** Permits the DOT to revoke the license of a manufacturer, importer, or distributor who fails or refuses to offer for sale to its "**same line make franchised dealers**" all models manufactured or distributed for that line make. The draft specifies that the offer for sale may be subject to the manufacturer's, importer's, or distributor's plan or system for the allocation, scheduling, and delivery of such models that complies with the requirements of s. 218.0123, Stats. (copy attached). However, the draft specifies that the failure to deliver any such motor vehicle must **not** be considered a violation of this prohibition if the failure is due to a lack of manufacturing capacity, a strike or labor difficulty, a shortage of materials, a freight embargo, or other cause beyond the control of the manufacturer, importer, or distributor. The draft also specifies that this prohibition **does not prohibit** reasonable requirements being imposed on dealers for the sale, marketing, or servicing of particular models.
4. **Revocation of License if Warranty or Delivery and Preparations Work on Certain Vehicles.**
 - a. Permits the DOT to revoke the license of a manufacturer, importer, or distributor who performs warranty service or delivery and preparation work on a motor vehicle that it does not own or who authorizes or permits a person to perform warranty service or delivery and preparation work on a motor vehicle **unless** the person is a motor vehicle dealer with who the manufacturer, importer, or distributor has entered into a franchise agreement for the sale and service of the manufacturer's, importer's, or distributor's motor vehicles. However, the draft provides that this prohibition **does not prohibit** a manufacturer, importer, or distributor from:
 - 1) Authorizing the performance of warranty service and delivery and preparation work by a fleet owner, as defined in s. 218.0116 (7) (d) 4., Stats., on its own vehicles.

- 2) If warranty service is temporarily not reasonably available to one or more owners of the manufacturer's, importer's, or distributor's vehicles, performing warranty services on such vehicles or authorizing the performance of warranty service on such vehicles by a person who is not a motor vehicle dealer with whom the manufacturer, importer, or distributor has entered into a franchise agreement for the sale and service of the manufacturer's, importer's, or distributor's motor vehicles. Warranty service may be provided or authorized by a manufacturer, importer, or distributor under this provision only during the period that warranty service is not otherwise reasonably available.
 - 3) Attempting to repair a nonconformity, as defined in s. 218.0171 (1) (f), Stats., (copy attached), to a vehicle, if the repair is reasonably necessary to prevent the manufacturer, importer, or distributor from becoming subject to the requirements of s. 218.017 (2) (b), Stats. (copy attached).
- b. Specifies that **item a.** does **not require** a manufacturer, importer, or distributor to perform warranty service, or to authorize or permit warranty service to be performed, under a warranty given by another manufacturer, importer, or distributor, or component manufacturer to a retail customer.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

DLS:wu:tlu:rv;ksm

Attachment

Pertinent Definitions in s. 218.0101 (6), Stats.

218.0101 (6) "Distributor" or "wholesaler" means a person, resident or nonresident who in whole or part, sells or distributes motor vehicles to motor vehicle dealers, or who maintains distributor representatives.

(14) "Importer" means a person who has written authorization from a foreign manufacturer of a line make of motor vehicles to grant franchises to motor vehicle dealers or distributors in this state with respect to that line make.

(20) "Manufacturer" means any person, resident or nonresident, who does any of the following:

(a) Manufactures or assembles motor vehicles.

(b) Manufactures or installs on previously assembled truck chassis, special bodies or equipment which when installed form an integral part of the motor vehicle and which constitutes a major manufacturing alteration and which completed unit is owned by the manufacturer.

(22) "Motor vehicle" means any motor-driven vehicle required to be registered under ch. 341 except mopeds.

(23) (a) "Motor vehicle dealer" means any person, firm or corporation, not excluded by par. (b) who:

1. For commission, money or other thing of value, sells, leases, exchanges, buys, offers or attempts to negotiate a sale, consumer lease or exchange of an interest in motor vehicles; or

2. Is engaged wholly or in part in the business of selling or leasing motor vehicles, including motorcycles, whether or not the motor vehicles are owned by that person, firm or corporation.

(b) The term "motor vehicle dealer" does not include:

1. Receivers, trustees, personal representatives, guardians, or other persons appointed by or acting under the judgment or order of any court.

2. Public officers while performing their official duties.

3. Employees of persons, corporations or associations enumerated in subds. 1. and 2., when engaged in the specific performance of their duties as employees of the enumerated persons, corporations or associations.

4. Sales finance companies or other loan agencies who sell or offer for sale motor vehicles repossessed or foreclosed on by those sales finance companies or other loan agencies under terms of an installment contract, or motor vehicles taken in trade on such repossessions.

5. Sales finance companies when engaged in purchasing or otherwise acquiring consumer leases from a motor vehicle dealer, or in renegotiating consumer leases previously purchased or otherwise acquired by them.

Civil Damages and Attorney Fees [s. 218.0163, Stats.]

218.0163 Civil damages. (1) Without exhausting any administrative remedy available under an agreement or ss. 218.0101 to 218.0163, except as provided in ss. 218.0116 (7) and (8) and 218.0134, a licensee may recover damages in a court of competent jurisdiction for pecuniary loss, together with actual costs including reasonable attorney fees, if the pecuniary loss is caused by any of the following:

(a) A violation by any other licensee of s. 218.0116 (1) (bm), (f), (h), (hm), (i), (km), (L), (Lm), (mm), (pm), (q), (qm), (r), (rm), (s), (sm), (t) or (u).

(b) Any unfair practice found by a licenser or the division of hearings and appeals under s. 218.0152 (1).

(c) An affected grantor's disapproval of a proposed action under s. 218.0134 (2) (b), if the division of hearings and appeals has determined that there is good cause for permitting the proposed action to be undertaken following a hearing under s. 218.0134 (2) (c). A dealer may recover under this paragraph even if the affected grantor complies with the order of the division of hearing and appeals under s. 218.0134 (3) (b). If a dealer recovers damages for pecuniary loss, actual costs under this paragraph also include actual costs, including reasonable attorney fees, incurred by the dealer in obtaining the division of hearings and appeals' determination of good cause.

(1m) If a court finds that a violation or practice described in sub. (1) (a) or (b) is willful, a licensee shall recover damages in an amount equal to 3 times the pecuniary loss, together with actual costs including reasonable attorney fees.

(2) Any retail buyer, lessee or prospective lessee suffering pecuniary loss because of a violation by a licensee of s. 218.0116 (1) (bm), (c), (cm), (dm), (e), (em), (f), (im), (m) or (p) may recover damages for the loss in any court of competent jurisdiction together with costs, including reasonable attorney fees.

Right of First Refusal [s. 218.0134 (4) (c), Stats.]

218.0134 (4) (c) The exercise by an affected grantor under an agreement of the right of first refusal to acquire the dealer's assets in the event of a proposed change of ownership or transfer of dealership assets, if all of the following requirements are met:

1. The exercise of the right of first refusal will result in the dealer and the dealer's owners receiving the same or greater consideration as they have contracted to receive in connection with the proposed change of ownership or transfer of dealership assets.

2. The proposed change of ownership or transfer of dealership assets does not involve the transfer of assets or the transfer or issuance of stock by the dealer or one or more dealer owners to one or more immediate family members of one or more dealer owners or to a qualifying member of the dealer's management or to a partnership, limited liability company or corporation controlled by those persons. In this subdivision:

a. "Immediate family member" means the spouse, child, grandchild, spouse of a child or grandchild, brother, sister or parent of the dealer owner.

b. "Qualifying member of the dealer's management" means an individual who has been employed by the dealer for at least 2 years and who otherwise qualifies as a dealer operator.

3. The affected grantor agrees to pay the reasonable expenses, including reasonable attorney fees that do not exceed the usual, customary and reasonable fees charged for similar work done for other clients, incurred by the proposed new owner or transferee before the grantor's exercise of its right of first refusal in negotiating and implementing the contract for the proposed change of ownership or transfer of dealership assets. Notwithstanding this subdivision, no payment of expenses and attorney fees shall be required if the dealer has not submitted or caused to be submitted an accounting of those expenses within 7 days after the dealer's receipt of the affected grantor's written request for an accounting.

Vehicle Allocations [s. 218.0123, Stats.]

218.0123 Vehicle allocations. No manufacturer, importer or distributor shall adopt, change, establish or implement a plan or system for the allocation, scheduling or delivery of new motor vehicles, parts or accessories to its motor vehicle dealers that is not fair, reasonable and equitable or modify an existing plan or system so as to cause the plan or system to be unreasonable, unfair or inequitable. Upon the request of any dealer franchised by it, a manufacturer, importer or distributor shall disclose in writing to the dealer the basis upon which new motor vehicles, parts and accessories are allocated, scheduled and delivered among the manufacturer's, importer's or distributor's dealers of the same line make.

Definition of "Nonconformity" [s. 218.0171 (1) (f), Stats.]

218.0171 (1) (f) "Nonconformity" means a condition or defect which substantially impairs the use, value or safety of a motor vehicle, and is covered by an express warranty applicable to the motor vehicle or to a component of the motor vehicle, but does not include a condition or defect which is the result of abuse, neglect or unauthorized modification or alteration of the motor vehicle by a consumer.

Actions After Reasonable Attempt to Repair Nonconformity [s. 218.0171 (2) (b), Stats.]

218.0171 (2) (b) 1. If after a reasonable attempt to repair the nonconformity is not repaired, the manufacturer shall carry out the requirement under subd. 2. or 3., whichever is appropriate.

2. At the direction of a consumer described under sub. (1) (b) 1., 2. or 3., do one of the following:

a. Accept return of the motor vehicle and replace the motor vehicle with a comparable new motor vehicle and refund any collateral costs.

b. Accept return of the motor vehicle and refund to the consumer and to any holder of a perfected security interest in the consumer's motor vehicle, as their interest may appear, the full purchase price plus any sales tax, finance charge, amount paid by the consumer at the point of sale and collateral costs, less a reasonable allowance for use. Under this subdivision, a reasonable allowance for use may not exceed the amount obtained by multiplying the full

purchase price of the motor vehicle by a fraction, the denominator of which is 100,000 or, for a motorcycle, 20,000, and the numerator of which is the number of miles the motor vehicle was driven before the consumer first reported the nonconformity to the motor vehicle dealer.

3. a. With respect to a consumer described in sub. (1) (b) 4., accept return of the motor vehicle, refund to the motor vehicle lessor and to any holder of a perfected security interest in the motor vehicle, as their interest may appear, the current value of the written lease and refund to the consumer the amount the consumer paid under the written lease plus any sales tax and collateral costs, less a reasonable allowance for use.

b. Under this subdivision, the current value of the written lease equals the total amount for which that lease obligates the consumer during the period of the lease remaining after its early termination, plus the motor vehicle dealer's early termination costs and the value of the motor vehicle at the lease expiration date if the lease sets forth that value, less the motor vehicle lessor's early termination savings.

c. Under this subdivision, a reasonable allowance for use may not exceed the amount obtained by multiplying the total amount for which the written lease obligates the consumer by a fraction, the denominator of which is 100,000 and the numerator of which is the number of miles the consumer drove the motor vehicle before first reporting the nonconformity to the manufacturer, motor vehicle lessor or motor vehicle dealer.



Joe Leibham

STATE SENATOR

Testimony on Senate Bill 235

Good Morning Committee Members. I am pleased to be here to testify on Senate Bill 235. As you know, the auto and truck industry has been one of the strengths in America's economy and we need to do all we can to keep it strong.

Wisconsin's 600 new car and truck dealers employ about 25,000 people and give a great deal to their local communities and to the state.

Senate Bill 235 amends Wisconsin's Motor Vehicle Dealer Franchise Law, which is Chapter 218 of the statutes. This statute regulates the relationship between auto & truck manufacturers and their dealers. The Wisconsin legislature and the U.S. Congress have both enacted laws to prevent manufacturers from using their superior bargaining power to treat dealers unfairly.

The Wisconsin Automobile and Truck Dealers Association negotiated this legislation with representatives of the manufacturers and hammered out all their differences before approaching the legislature.

Briefly this legislation:

1. Prohibits manufacturers from placing option to purchase clauses in dealer franchise agreements. With this legislation we are not allowing any contract provisions which compel the sale of ownership interests to the manufacturer, which otherwise would block a dealer or the family from an open market price.



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2. Provides that dealers who are franchised to sell vehicles of a particular brand should be permitted to sell and service all new models distributed under that brand by the manufacturers. In some cases new models have not even been offered to certain dealers franchised for the same brand; or the dealers are required to meet new requirements not directly related to the selling and servicing of the new model in order to qualify for the new franchise. This practice is unfair and will be stopped by this legislation.
3. Makes a minor change to the section of Chapter 218, which addresses Dealer Development Dealerships. These arrangements are meant to help minorities and women get into the business. Here the dealer candidate buys out the manufacturer's interest over time. This change prohibits dealer candidates from separately encumbering dealership assets to procure funds to satisfy their buyout obligations. Funds from personal loans would still be available to purchase the dealership stock.
4. Relates the damages provisions of the Chapter 218 to these new sections and provides that those sections are applicable to current franchise agreements and those entered into after the effective date of the statute. In addition, this bill prohibits contract provisions that force dealers to waive their rights to jury trial.
5. Ensures that automobile and truck dealers have the exclusive rights to perform warranty service work rather than having to compete with their own manufacturers in the event those manufacturers decide to establish their own service facilities. This section makes very good sense - dealers



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6. have a huge investment in selling and servicing vehicles and that investment depends heavily on the ability to perform warranty work for the auto and truck manufacturers.

By this legislation we are simply preserving the status quo. Right now dealers are the only place the manufacturer's warranty work is performed and we are simply assuring that warranty work remains exclusively with the dealers.

The exceptions to this provision are:

- 1) This provision would not prohibit manufacturers or fleet owners from performing warranty work on their own vehicles.
- 2) This provision also allows manufacturers, importers and distributors to perform warranty work or contract with a third party to perform warranty work in situations where warranty repairs are not reasonably available from a franchised dealer.
- 3) This provision allows manufacturers to repair or attempt to repair lemon law nonconformities.



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SB235 will help strengthen the future of over 600 family-owned businesses spread throughout the state of Wisconsin.

SB 235 has companion legislation, Assembly Bill 489 in the State Assembly lead by Representative Steve Freese. The Assembly Committee on Transportation has held a public hearing on AB 489 and passed the bill out of committee. I appreciate the attention of the Committee to this legislation and I would be happy to answer any questions. Thank you.