

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005

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HOUSE BILL 1527
Committee Substitute Favorable 5/26/05
Senate Judiciary I Committee Substitute Adopted 8/12/05

Short Title: Clarify MV Dealer Franchise Laws.

(Public)

Sponsors:

Referred to:

April 21, 2005

1 A BILL TO BE ENTITLED
2 AN ACT TO CLARIFY THE MOTOR VEHICLE DEALER FRANCHISE LAWS.
3 The General Assembly of North Carolina enacts:

4 SECTION 1. G.S. 20-297.1 reads as rewritten:

5 "**§ 20-297.1. Prefiling of franchise agreements and amendments.**Franchise-related
6 form agreements.

7 Any franchise, as defined in G.S. 20-286(8a), offered to a motor vehicle dealer in
8 this State shall provide that all terms and conditions in the agreement inconsistent with
9 any of the laws or rules of this State are of no force and effect. On or before January 1,
10 1998, every manufacturer, factory branch, distributor, or distributor branch licensed by
11 the Commissioner under this Article which uses an identical or substantially similar
12 form franchise for its dealers or distributors in this State shall file with the
13 Commissioner a copy of the franchise and all supplements. Any applicant for licensing
14 by the Commissioner as a manufacturer, factory branch, distributor, or distributor
15 branch licensed under this Article, which would use an identical or substantially similar
16 form franchise, as defined in G.S. 20-286(8a), for its dealers or distributors in this State,
17 shall, as a condition for the issuance of a license, file with the Commissioner a copy of
18 the franchise and all supplements thereto. Not later than 60 days prior to the date a
19 revision, modification, or addition to a franchise is offered generally to a licensee's
20 franchisees in this State, the licensee shall notify the Commissioner of the proposed
21 revision, modification, or addition to the franchise on file with the Commissioner and
22 include with the notification:

- 23 (1) A copy of the form franchise which incorporates all of the proposed
24 revisions, modifications, and additions;
25 (2) A separate statement which identifies all substantive revisions,
26 modifications, and additions proposed.

27 It shall be unlawful for a franchise or any addendum or supplement thereto to be offered
28 to a motor vehicle dealer in this State after January 1, 1998, until an applicant or

1 ~~licensee has complied with all of the requirements of this section. The Commissioner is~~
2 ~~authorized and directed to investigate and prevent violations of this section, including~~
3 ~~inconsistencies of any manufacturer's franchise with the provisions of this Article.~~

4 (a) All franchise-related form agreements, as defined in this subsection, offered
5 to a motor vehicle dealer in this State shall provide that all terms and conditions in the
6 agreement inconsistent with any of the laws or rules of this State are of no force and
7 effect. For purposes of this section, the term "franchise-related form agreements" means
8 one or more contracts between a franchised motor vehicle dealer and a manufacturer,
9 factory branch, distributor, or distributor branch, including a written communication
10 from a manufacturer or distributor in which a duty is imposed on the franchised motor
11 vehicle dealer under which:

12 (1) The franchised motor vehicle dealer is granted the right to sell and
13 service new motor vehicles manufactured or distributed by the
14 manufacturer or distributor or only to service motor vehicles under the
15 contract and a manufacturer's warranty;

16 (2) The franchised motor vehicle dealer is a component of the
17 manufacturer or distributor's distribution system as an independent
18 business;

19 (3) The franchised motor vehicle dealer is substantially associated with the
20 manufacturer or distributor's trademark, trade name, and commercial
21 symbol;

22 (4) The franchised motor vehicle dealer's business substantially relies on
23 the manufacturer or distributor for a continued supply of motor
24 vehicles, parts, and accessories; or

25 (5) Any right, duty, or obligation granted or imposed by this Chapter is
26 affected.

27 (b) Notwithstanding the terms of any franchise or agreement, it shall be unlawful
28 for any manufacturer, factory branch, distributor, or distributor branch to offer to a
29 dealer, revise, modify, or replace a franchise-related form agreement, as defined above
30 in this section, which agreement, modification, or replacement may adversely affect or
31 alter the rights, obligations, or liability of a motor vehicle dealer or may adversely
32 impair the sales, service obligations, investment, or profitability of any motor vehicle
33 dealer located in this State, unless:

34 (1) The manufacturer, factory branch, distributor, or distributor branch
35 provides prior written notice by registered or certified mail to each
36 affected dealer, the Commissioner, and the North Carolina Automobile
37 Dealers Association, Inc., of the modification or replacement in the
38 form and within the time frame set forth within this section and in
39 subsection (c) of this section; and

40 (2) If a protest is filed under this section, the Commissioner approves the
41 modification or replacement.

42 (c) The notice required by subdivision (b)(1) of this section shall:

43 (1) Be given not later than the 60th day before the effective date of the
44 modification or replacement;

1 (2) Contain on its first page a conspicuous statement that reads: 'NOTICE
 2 TO DEALER: YOU MAY BE ENTITLED TO FILE A PROTEST
 3 WITH THE COMMISSIONER OF THE NORTH CAROLINA
 4 DIVISION OF MOTOR VEHICLES AND HAVE A HEARING IN
 5 WHICH YOU MAY PROTEST THE PROPOSED INITIAL
 6 OFFERING, MODIFICATION, OR REPLACEMENT OF CERTAIN
 7 FRANCHISE-RELATED FORM AGREEMENTS UNDER THE
 8 TERMS OF THE MOTOR VEHICLE DEALERS AND
 9 MANUFACTURERS LICENSING LAW, IF YOU OPPOSE THIS
 10 ACTION'; and

11 (3) Contain a separate letter or statement that identifies all substantive
 12 modifications or revisions and the principal reasons for each such
 13 modification or revision.

14 (d) A franchised dealer may file a protest with the Commissioner of the offering,
 15 modification, or replacement pursuant to this section not later than the latter of:

16 (1) The 60th day after the date of the receipt of the notice; or

17 (2) The time specified in the notice.

18 (e) After a protest is filed, the Commissioner shall determine whether the
 19 manufacturer, factory branch, distributor, or distributor branch has established by a
 20 preponderance of the evidence that there is good cause for the proposed offering,
 21 modification, or replacement. The prior franchise-related form agreement, if any,
 22 continues in effect until the Commissioner resolves the protest.

23 (f) The Commissioner is authorized and directed to investigate and prevent
 24 violations of this section, including inconsistencies of any franchise-related form
 25 agreement with the provisions of this Article.

26 (g) Nothing contained in this section shall in any way limit a dealer's rights under
 27 any other provision of this Article or other applicable law."

28 **SECTION 2.** G.S. 20-305(30) reads as rewritten:

29 **"§ 20-305. Coercing dealer to accept commodities not ordered; threatening to**
 30 **cancel franchise; preventing transfer of ownership; granting additional**
 31 **franchises; terminating franchises without good cause; preventing family**
 32 **succession.**

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

36 ...

37 (30) To vary the price charged to any of its franchised new motor vehicle
 38 dealers located in this State for new motor vehicles based on the
 39 dealer's purchase of new facilities, supplies, tools, equipment, or other
 40 merchandise from the manufacturer, the dealer's relocation,
 41 remodeling, repair, or renovation of existing dealerships or
 42 construction of a new facility, the dealer's participation in training
 43 programs sponsored, endorsed, or recommended by the manufacturer,
 44 whether or not the dealer is dualed with one or more other line makes

1 of new motor vehicles, or the dealer's sales penetration. Except as
2 provided in this subdivision, it shall be unlawful for any manufacturer,
3 factory branch, distributor, or distributor branch, or any field
4 representative, officer, agent, or any representative whatsoever of any
5 of them to vary the price charged to any of its franchised new motor
6 vehicle dealers located in this State for new motor vehicles based on
7 the dealer's sales volume, the dealer's level of sales or customer service
8 satisfaction, the dealer's purchase of advertising materials, signage,
9 nondiagnostic computer hardware or software, communications
10 devices, or furnishings, or the dealer's participation in used motor
11 vehicle inspection or certification programs sponsored or endorsed by
12 the manufacturer.

13 The price of the vehicle, for purposes of this subdivision shall
14 include the manufacturer's use of rebates, credits, or other
15 consideration ~~which~~that has the effect of causing a variance in the
16 price of new motor vehicles offered to its franchised dealers located in
17 the State.

18 Notwithstanding the foregoing, nothing in this subdivision shall be
19 deemed to preclude a manufacturer from establishing sales contests or
20 promotions ~~which~~that provide or award dealers or consumers rebates
21 or incentives; provided, however, that the manufacturer complies with
22 all of the following conditions:

- 23 a. With respect to manufacturer to consumer rebates and
24 incentives, the manufacturer's criteria for determining eligibility
25 shall:
- 26 1. Permit all of the manufacturer's franchised new motor
27 vehicle dealers in this State to offer the rebate or
28 incentive; and
 - 29 2. Be uniformly applied and administered to all eligible
30 consumers.
- 31 b. With respect to manufacturer to dealer rebates and incentives,
32 the rebate or incentive program shall:
- 33 1. Be based solely on the dealer's actual or reasonably
34 anticipated sales volume or on a uniform per vehicle sold
35 or leased basis;
 - 36 2. Be uniformly available, applied, and administered to all
37 of the manufacturer's franchised new motor vehicle
38 dealers in this State; and
 - 39 3. Provide that any of the manufacturer's franchised new
40 motor vehicle dealers in this State may, upon written
41 request, obtain the method or formula used by the
42 manufacturer in establishing the sales volumes for
43 receiving the rebates or incentives and the specific
44 calculations for determining the required sales volumes

1 of the inquiring dealer and any of the manufacturer's
2 other franchised new motor vehicle dealers located
3 within 75 miles of the inquiring dealer.

4 Nothing contained in this subdivision shall prohibit a manufacturer
5 from providing assistance or encouragement to a franchised dealer to
6 remodel, renovate, recondition, or relocate the dealer's existing
7 facilities, provided that this assistance, encouragement, or rewards are
8 not determined on a per vehicle basis.

9 It is unlawful for any manufacturer to charge or include the cost of
10 any program or policy prohibited under this subdivision in the price of
11 new motor vehicles that the manufacturer sells to its franchised dealers
12 or purchasers located in this State.

13 In the event that as of October 1, 1999, a manufacturer was
14 operating a program that varied the price charged to its franchised
15 dealers in this State in a manner that would violate this subdivision, or
16 had in effect a documented policy that had been conveyed to its
17 franchised dealers in this State and that varied the price charged to its
18 franchised dealers in this State in a manner that would violate this
19 subdivision, it shall be lawful for that program or policy, including
20 amendments to that program or policy that are consistent with the
21 purpose and provisions of the existing program or policy, or a program
22 or policy similar thereto implemented after October 1, 1999, to
23 continue in effect as to the manufacturer's franchised dealers located in
24 this State until June 30, ~~2006~~2010.

25 In the event that as of June 30, 2001, a manufacturer was operating
26 a program that varied the price charged to its franchised dealers in this
27 State in a manner that would violate this subdivision, or had in effect a
28 documented policy that had been conveyed to its franchised dealers in
29 this State and that varied the price charged to its franchised dealers in
30 this State in a manner that would violate this subdivision, and the
31 program or policy was implemented in this State subsequent to
32 October 1, 1999, and prior to June 30, 2001, and provided that the
33 program or policy is in compliance with this subdivision as it existed
34 as of June 30, 2001, it shall be lawful for that program or policy,
35 including amendments to that program or policy that comply with this
36 subdivision as it existed as of June 30, 2001, to continue in effect as to
37 the manufacturer's franchised dealers located in this State until June
38 30, ~~2006~~2010.

39 Any manufacturer shall be required to pay or otherwise compensate
40 any franchise dealer who has earned the right to receive payment or
41 other compensation under a program in accordance with the
42 manufacturer's program or policy.

43 The provisions of this subdivision shall not be applicable to
44 multiple or repeated sales of new motor vehicles made by a new motor

1 vehicle dealer to a single purchaser under a bona fide fleet sales policy
2 of a manufacturer, factory branch, distributor, or distributor branch."

3 **SECTION 3.** Chapter 20 of the General Statutes is amended by adding a
4 new Article to read:

5 "Article 12A.

6 "Motor Vehicle Captive Finance Source Law.

7 **"§ 20-308.3. Regulation of motor vehicle captive finance sources.**

8 The General Assembly finds and declares that the distribution of motor vehicles in
9 the State of North Carolina vitally affects the general economy of the State and the
10 public interest and public welfare, and in the exercise of its police power, it is necessary
11 to regulate motor vehicle captive finance sources doing business in North Carolina to
12 protect and preserve the investments and properties of the citizens of this State.

13 **"§ 20-308.4. Definitions.**

14 The definitions contained in G.S. 20-286 shall be applicable to the provisions of this
15 Article.

16 **"§ 20-308.5. Prohibited contractual requirements imposed by manufacturer,**
17 **distributor, or captive finance source.**

18 It shall be unlawful for any manufacturer, factory branch, captive finance source,
19 distributor, or distributor branch, or any field representative, officer, agent, or any
20 representative of them, notwithstanding the terms, provisions, or conditions of any
21 agreement or franchise, to require any of its franchised dealers located in this State to
22 agree to any terms, conditions, or requirements that are set forth in subdivisions (1)
23 through (8) below in order for any such dealer to sell to any captive finance source
24 (defined below) any retail installment contract, loan, or lease of any motor vehicles
25 purchased or leased by any of the dealer's customers ("contract for sale or lease"), or to
26 be able to participate in, or otherwise, directly or indirectly, obtain the benefits of any
27 consumer transaction incentive program payable to the consumer or the dealer and
28 offered by or through any financial source that provides automotive-related loans or
29 purchases retail installment contracts or lease contracts for motor vehicles in North
30 Carolina and is, directly or indirectly, owned, operated, or controlled by such
31 manufacturer, factory branch, distributor, or distributor branch ("captive finance
32 source").

33 (1) Require a dealer to grant such captive finance source a power of
34 attorney to do anything on behalf of the dealer other than sign the
35 dealer's name on any check, draft, or other instrument received in
36 payment or proceeds under any contract for the sale or lease of a motor
37 vehicle that is made payable to the dealer but which is properly
38 payable to the captive finance source, is for the purpose of correcting
39 an error in a customer's finance application or title processing
40 document, or is for the purpose of processing regular titling of the
41 vehicle.

42 (2) Require a dealer to warrant or guarantee the accuracy and
43 completeness of any personal, financial, or credit information provided
44 by the customer on the credit application and/or in the course of

1 applying for credit other than to require that the dealer make
2 reasonable inquiry regarding the accuracy and completeness of such
3 information and represent that such information is true and correct to
4 the best of the dealer's knowledge.

5 (3) Require a dealer to repurchase, pay off, or guaranty any contract for
6 the sale or lease of a motor vehicle or to require a dealer to indemnify,
7 defend, or hold harmless the captive finance source for settlements,
8 judgments, damages, litigation expenses, or other costs or expenses
9 incurred by such captive finance source unless the obligation to
10 repurchase, pay off, guaranty, indemnify, or hold harmless resulted
11 directly from (i) the subject dealer's material breach of the terms of a
12 written agreement with the captive finance source or the terms for the
13 purchase of an individual contract for sale or lease that the captive
14 finance source communicates to the dealer before each such purchase,
15 except to the extent the breached terms are otherwise prohibited under
16 subdivisions (1) through (8) of this section, or (ii) the subject dealer's
17 violation of applicable law. For purposes of this section, the dealer
18 may, however, contractually obligate itself to warrant the accuracy of
19 the information provided on the finance contact, but such warranty can
20 only be enforced if the captive finance source gives the dealer a
21 reasonable opportunity to cure or correct any errors on the finance
22 contract where cure or correction is possible. For purposes of this
23 section, any allegation by a third party that would constitute a breach
24 of the terms of a written agreement between the dealer and a captive
25 finance source shall be considered a material breach.

26 (4) Notwithstanding the terms of any contract or agreement, treat a
27 dealer's breach of an agreement between the dealer and a captive
28 finance source with respect to the captive finance source's purchase of
29 individual contracts for the sale or lease of a motor vehicle as a breach
30 of such agreement with respect to purchase of other such contracts, nor
31 shall such a breach, in and of itself, constitute a breach of any other
32 agreement between the dealer and the captive finance source, or
33 between the dealer and any affiliate of such captive finance source.

34 (5) Require a dealer to waive any defenses that may be available to it
35 under its agreements with the captive finance source or under any
36 applicable laws.

37 (6) Require a dealer to settle or contribute any of its own funds or
38 financial resources toward the settlement of any multiparty or class
39 action litigation without obtaining the dealer's voluntary and written
40 consent subsequent to the filing of such litigation.

41 (7) Require a dealer to contribute to any reserve or contingency account
42 established or maintained by the captive finance source, for the
43 financing of the sale or lease of any motor vehicles purchased or
44 leased by any of the dealer's customers, in any amount or on any basis

1 other than the reasonable expected amount of future finance reserve
2 chargebacks to the dealer's account. This section shall not apply to or
3 limit (i) reasonable amounts reserved and maintained related to the
4 sale or financing of any products ancillary to the sale, lease, or
5 financing of the motor vehicle itself; (ii) a delay or reduction in the
6 payment of dealer's portion of the finance income pursuant to an
7 agreement between the dealer and a captive finance source under
8 which the dealer agrees to such delay or reduction in exchange for the
9 limitation, reduction, or elimination of the dealer's responsibility for
10 finance reserve chargebacks; or (iii) a chargeback to a dealer (or offset
11 of any amounts otherwise payable to a dealer by the captive finance
12 source) for any indebtedness properly owing from a dealer to the
13 captive finance source as part of a specific program covered by this
14 section, the terms of which have been agreed to by the dealer in
15 advance, except to the extent such chargeback would otherwise be
16 prohibited under subdivisions (1) through (8) of this section.

17 (8) Require a dealer to repossess or otherwise gain possession of a motor
18 vehicle at the request of or on behalf of the captive finance source.
19 This section shall not apply to any requirements contained in any
20 agreement between the dealer and the captive finance source wherein
21 the dealer agrees to receive and process vehicles that are voluntarily
22 returned by the customer or returned to the lessor at the end of the
23 lease term.

24 Any clause or provision in any franchise or agreement between a
25 dealer and a manufacturer, factory branch, distributor, or distributor
26 branch, or between a dealer and any captive finance source, that is in
27 violation of or that is inconsistent with any of the provisions of this
28 section shall be voidable, to the extent that it violates this section, at
29 any time at the election of the dealer."

30 **"§ 20-308.6. Powers of Commissioner.**

31 (a) The Commissioner shall promote the interests of the retail buyer of motor
32 vehicles.

33 (b) The Commissioner shall have power to prevent unfair or deceptive acts or
34 practices and other violations of this Article. Any franchised new motor vehicle dealer
35 who believes that a captive finance source with whom the dealer does business in North
36 Carolina has violated or is currently violating any provision of this Article may file a
37 petition before the Commissioner setting forth the factual and legal basis for such
38 violations. The Commissioner shall promptly forward a copy of the petition to the
39 named captive finance source requesting a reply to the petition within 30 days.
40 Allowing for sufficient time for the parties to conduct discovery, the Commissioner or
41 his designee shall then hold an evidentiary hearing and render findings of fact and
42 conclusions of law based on the evidence presented.

43 (c) The Commissioner shall have the power in hearings arising under this Article
44 to enter scheduling orders and limit the time and scope of discovery; to determine the

1 date, time, and place where hearings are to be held; to subpoena witnesses; to take
2 depositions of witnesses; and to administer oaths.

3 (d) The Commissioner may, whenever he shall believe from evidence submitted
4 to him that any person has been or is violating any provision of this Article, in addition
5 to any other remedy, bring an action in the name of the State against that person and any
6 other persons concerned or in any way participating in, or about to participate in,
7 practices or acts so in violation, to enjoin any persons from continuing the violations.

8 (e) The Commissioner may issue rules and regulations to implement the
9 provisions of this section and to establish procedures related to administrative
10 proceedings commenced under this section.

11 (f) In the event that a dealer, who is permitted or required to file a notice, protest,
12 or petition before the Commissioner within a certain period of time in order to
13 adjudicate, enforce, or protect rights afforded the dealer under this Article, voluntarily
14 elects to appeal a policy, determination, or decision of the captive finance source
15 through an appeals board or internal grievance procedure of the captive finance source,
16 or to participate in or refer the matter to mediation, arbitration, or other alternative
17 dispute resolution procedure or process established or endorsed by the captive finance
18 source, the applicable period of time for the dealer to file the notice, protest, or petition
19 before the Commissioner under this Article shall not commence until the captive
20 finance source's appeal board or internal grievance procedure, mediation, arbitration, or
21 appeals process of the captive finance source has been completed and the dealer has
22 received notice in writing of the final decision or result of the procedure or process.
23 Nothing, however, contained in this subsection shall be deemed to require that any
24 dealer exhaust any internal grievance or other alternative dispute process required or
25 established by the captive finance source before seeking redress from the Commissioner
26 as provided in this Article.

27 **"§ 20-308.7. Rules and regulations.**

28 The Commissioner may make such rules and regulations, not inconsistent with the
29 provisions of this Article, as he shall deem necessary or proper for the effective
30 administration and enforcement of this Article, provided that a copy of such rules and
31 regulations shall be mailed to each motor vehicle dealer licensee and captive finance
32 source 30 days prior to the effective date of such rules and regulations.

33 **"§ 20-308.8. Hearing notice.**

34 In every case of a hearing before the Commissioner authorized under this Article,
35 the Commissioner shall give reasonable notice of each such hearing to all interested
36 parties, and the Commissioner's decision shall be binding on the parties, subject to the
37 rights of judicial review and appeal as provided in Chapter 150B of the General
38 Statutes. The costs of such hearings shall be assessed by the Commissioner.

39 **"§ 20-308.9. Article applicable to existing and future agreements.**

40 The provisions of this Article shall be applicable to all contracts and agreements
41 existing between dealers and captive finance sources at the time of its ratification and to
42 all such future contracts and agreements.

43 **"§ 20-308.10. Jurisdiction.**

1 A new motor vehicle dealer located in this State may bring suit against any captive
2 finance source engaged in commerce in this State in the General Court of Justice in the
3 State of North Carolina that has proper venue.

4 **"§ 20-308.11. Civil actions for violations.**

5 (a) Notwithstanding the terms, provisions, or conditions of any agreement or
6 other terms or provisions of any novation, waiver, arbitration agreement, or other
7 written instrument, any person who is or may be injured by a violation of a provision of
8 this Article, or any party to an agreement who is so injured in his business or property
9 by a violation of a provision of this Article relating to that agreement, or an arrangement
10 which, if consummated, would be in violation of this Article may, notwithstanding the
11 initiation or pendency of, or failure to initiate an administrative proceeding before the
12 Commissioner concerning the same parties or subject matter, bring an action for
13 damages and equitable relief, including injunctive relief, in any court of competent
14 jurisdiction with regard to any matter not within the jurisdiction of the Commissioner or
15 that seeks relief wholly outside the authority or jurisdiction of the Commissioner to
16 award.

17 (b) Where the violation of a provision of this Article can be shown to be willful,
18 malicious, or wanton, or if continued multiple violations of a provision or provisions of
19 this Article occur, the court may award punitive damages, attorneys' fees and costs in
20 addition to any other damages under this Article.

21 (c) A new motor vehicle dealer, if he has not suffered any loss of money or
22 property, may obtain final equitable relief if it can be shown that the violation of a
23 provision of this Article by a captive finance source may have the effect of causing a
24 loss of money or property.

25 (d) Any association that is comprised of a minimum of 400 new motor vehicle
26 dealers, or a minimum of 10 motorcycle dealers, substantially all of whom are new
27 motor vehicle dealers located within North Carolina, and which represents the collective
28 interests of its members, shall have standing to file a petition before the Commissioner
29 or a cause of action in any court of competent jurisdiction for itself, or on behalf of any
30 or all of its members, seeking declaratory and injunctive relief. Prior to bringing an
31 action, the association and captive finance source shall initiate mediation as set forth in
32 G.S. 20-301.1(b). An action brought pursuant to this subsection may seek a
33 determination whether one or more captive finance sources doing business in this State
34 have violated any of the provisions of this Article, or for the determination of any rights
35 created or defined by this Article, so long as the association alleges an injury to the
36 collective interest of its members cognizable under this section. A cognizable injury to
37 the collective interest of the members of the association shall be deemed to occur if a
38 captive finance source doing business in this State has engaged in any conduct or taken
39 any action which actually harms or affects all of the franchised new motor vehicle
40 dealers holding agreements with that captive finance source in this State. With respect
41 to any administrative or civil action filed by an association pursuant to this subsection,
42 the relief granted shall be limited to declaratory and injunctive relief and in no event
43 shall the Commissioner or court enter an award of monetary damages.

44 **"§ 20-308.12. Applicability of this Article.**

1 (a) Any captive finance source who engages directly or indirectly in purposeful
2 contacts within this State in connection with the offering or advertising the availability
3 of financing for the sale or lease of motor vehicles within this State, or who has business
4 dealings within this State, shall be subject to the provisions of this Article and shall be
5 subject to the jurisdiction of the courts of this State.

6 (b) The applicability of this Article shall not be affected by a choice of law clause
7 in any agreement, waiver, novation, or any other written instrument.

8 (c) Any provision of any agreement, waiver, novation, or any other written
9 instrument which is in violation of any section of this Article shall be deemed null and
10 void and without force and effect to the extent it violates this section.

11 (d) It shall be unlawful for a captive finance source to use any subsidiary
12 corporation, affiliated corporation, or any other controlled corporation, partnership,
13 association, or person to accomplish what would otherwise be illegal conduct under this
14 Article on the part of the captive finance source."

15 **SECTION 4.** Article 12 of Chapter 20 of the General Statutes is amended by
16 adding a new section to read:

17 **"§ 20-305.7. Protecting dealership data and consent to access dealership**
18 **information.**

19 (a) No manufacturer, factory branch, distributor, or distributor branch shall
20 access or obtain dealer or customer data from or write dealer or customer data to a
21 dealer management computer system utilized by a motor vehicle dealer located in this
22 State, or require or coerce a motor vehicle dealer located in this State to utilize a
23 particular dealer management computer system, unless the dealer management
24 computer system allows the dealer to reasonably maintain the security, integrity, and
25 confidentiality of the data maintained in the system. No manufacturer, factory branch,
26 distributor, distributor branch, dealer management computer system vendor, or any third
27 party acting on behalf of any manufacturer, factory branch, distributor, distributor
28 branch, or dealer management computer system vendor shall prohibit a dealer from
29 providing a means to regularly and continually monitor the specific data accessed from
30 or written to the dealer's computer system and from complying with applicable State
31 and federal laws and any rules or regulations promulgated thereunder. These provisions
32 shall not be deemed to impose an obligation on a manufacturer, factory branch,
33 distributor, distributor branch, dealer management computer system vendor, or any third
34 party acting on behalf of any manufacturer, factory branch, distributor, distributor
35 branch, or dealer management computer system vendor to provide such capability.

36 (b) No manufacturer, factory branch, distributor, distributor branch, dealer
37 management computer system vendor, or any third party acting on behalf of any
38 manufacturer, factory branch, distributor, distributor branch, or dealer management
39 computer system vendor, may provide access to customer or dealership information
40 maintained in a dealer management computer system utilized by a motor vehicle dealer
41 located in this State, without first obtaining the dealer's prior express written consent,
42 revocable by the dealer upon five business days written notice, to provide such access.
43 Prior to obtaining said consent and prior to entering into an initial contract or renewal of
44 a contract with a dealer located in this State, the manufacturer, factory branch,

1 distributor, distributor branch, dealer management computer system vendor, or any third
2 party acting on behalf of, or through any manufacturer, factory branch, distributor,
3 distributor branch, or dealer management computer system vendor shall provide to the
4 dealer a written list of all third parties to whom any North Carolina dealer management
5 computer system data has been provided within the 12-month period ending November
6 1 of the prior year. The list shall further describe the scope of the data provided. In
7 addition to the initial list, a dealer management computer system vendor or any third
8 party acting on behalf of, or through a dealer management computer system vendor
9 shall provide to the dealer an annual list of third parties to whom said data is being
10 provided on November 1 of each year and to whom said data has been provided in the
11 preceding 12 months and describe the scope of the data provided. Such list shall be
12 provided to the dealer by January 1 of each year. Any dealer management computer
13 system vendor's contract that directly relates to the transfer or accessing of dealer or
14 dealer customer information must conspicuously state, "NOTICE TO DEALER: THIS
15 AGREEMENT RELATES TO THE TRANSFER AND ACCESSING OF
16 CONFIDENTIAL INFORMATION AND CONSUMER RELATED DATA". Such
17 consent does not change any such person's obligations to comply with the terms of this
18 section and any additional State or federal laws (and any rules or regulations
19 promulgated thereunder) applicable to them with respect to such access. In addition, no
20 dealer management computer system vendor may refuse to provide a dealer
21 management computer system to a motor vehicle dealer located in this State if the
22 dealer refuses to provide any consent under this subsection, except to the extent that
23 consent is deemed by the parties to be reasonably necessary in order for the vendor to
24 provide the system to the dealer.

25 (c) No dealer management computer system vendor, or third party acting on
26 behalf of or through any dealer management computer system vendor, may access or
27 obtain data from or write data to a dealer management computer system utilized by a
28 motor vehicle dealer located in this State, unless the dealer management computer
29 system allows the dealer to reasonably maintain the security, integrity, and
30 confidentiality of the customer and dealership information maintained in the system. No
31 dealer management computer system vendor, or third party acting on behalf of or
32 through any dealer management computer system vendor, shall prohibit a dealer from
33 providing a means to regularly and continually monitor the specific data accessed from
34 or written to the dealer's computer system and from complying with applicable State
35 and federal laws and any rules or regulations promulgated thereunder. These provisions
36 shall not be deemed to impose an obligation on a manufacturer, factory branch,
37 distributor, distributor branch, dealer management computer system vendor, or any third
38 party acting on behalf of any manufacturer, factory branch, distributor, distributor
39 branch, or dealer management computer system vendor to provide such capability.

40 (d) Any manufacturer, factory branch, distributor, distributor branch, dealer
41 management computer system vendor, or any third party acting on behalf of or through
42 any dealer management computer system vendor, having electronic access to customer
43 or motor vehicle dealership data in a dealership management computer system utilized
44 by a motor vehicle dealer located in this State shall provide notice to the dealer of any

1 security breach of dealership or customer data obtained through such access, which at
2 the time of the breach was in the possession or custody of the manufacturer, factory
3 branch, distributor, distributor branch, dealer management computer system vendor, or
4 third party. The disclosure notification shall be made without unreasonable delay by the
5 manufacturer, factory branch, distributor, distributor branch, dealer management
6 computer system vendor, or third party following discovery by the person, or
7 notification to the person, of the breach. The disclosure notification shall describe
8 measures reasonably necessary to determine the scope of the breach and corrective
9 actions which may be taken in an effort to restore the integrity, security, and
10 confidentiality of such data. Such measures and corrective actions shall be implemented
11 as soon as practicable by all persons responsible for the breach.

12 (e) Nothing in this section shall preclude, prohibit, or deny the right of the
13 manufacturer, factory branch, distributor, or distributor branch to receive customer or
14 dealership information from a motor vehicle dealer located in this State for the purposes
15 of complying with federal or State safety requirements or implementing steps related to
16 manufacturer recalls at such times as necessary in order to comply with federal and
17 State requirements or manufacturer recalls provided that receiving this information from
18 the dealer does not impair, alter, or reduce the security, integrity, and confidentiality of
19 the customer and dealership information collected or generated by the dealer.

20 (f) The following definitions apply to this section:

21 (1) "Dealer management computer system" – A computer hardware and
22 software system having dealer business process management modules
23 that provide real time access to customer records and transactions by a
24 motor vehicle dealer located in this State and that allow such motor
25 vehicle dealer timely information in order to sell vehicles, parts or
26 services through such motor vehicle dealership.

27 (2) "Dealer management computer system vendor" – A seller or reseller of
28 dealer management computer systems (but only to the extent that such
29 person is engaged in such activities).

30 (3) "Security breach" – An incident of unauthorized access to and
31 acquisition of records or data containing dealership or dealership
32 customer information where unauthorized use of the dealership or
33 dealership customer information has occurred or is reasonably likely to
34 occur or that creates a material risk of harm to a dealership or a
35 dealership's customer. Any incident of unauthorized access to and
36 acquisition of records or data containing dealership or dealership
37 customer information shall constitute a security breach.

38 (g) The provisions of G.S. 20-308.1(d) shall not apply to an action brought under
39 this section against a dealer management computer system vendor.

40 (h) This section shall apply to contracts entered into on or after November 1,
41 2005."

42 **SECTION 5.** G.S. 20-308 reads as rewritten:

43 **"§ 20-308. Penalties.**

1 Any person violating any of the provisions of this ~~Article~~ Article, except for
2 G.S. 20-305.7, shall be guilty of a Class 1 misdemeanor."

3 **SECTION 6.** G.S. 20-308.2 is amended by adding a new subsection to read:

4 "(e) The provisions of this Article shall apply to all written agreements between a
5 manufacturer, wholesaler, or distributor with a motor vehicle dealer including, but not
6 limited to, the franchise offering, the franchise agreement, sales of goods, services or
7 advertising, leases or deeds of trust of real or personal property, promises to pay,
8 security interests, pledges, insurance contracts, advertising contracts, construction or
9 installation contracts, servicing contracts, and all other such agreements between a
10 motor vehicle dealer and a manufacturer, wholesaler, or distributor."

11 **SECTION 7.** G.S. 20-286(10) reads as rewritten:

12 "**§ 20-286. Definitions.**

13 The following definitions apply in this Article:

14 ...
15 (10) Motor vehicle. – Any motor propelled vehicle, trailer or semitrailer,
16 required to be registered under the laws of this State.

17 a. "New motor vehicle" means a motor vehicle ~~which~~ that has
18 never been the subject of a completed, successful, or
19 conditional sale that was subsequently approved ~~sale~~ other than
20 between new motor vehicle dealers, or between manufacturer
21 and dealer of the same franchise.

22 b. "Used motor vehicle" means a motor vehicle other than
23 described in paragraph (10)a above."

24 **SECTION 8.** Section 3 of this act becomes effective January 1, 2006. The
25 remainder of this act is effective when it becomes law.