

**Myers & Fuller, P.A.**  
ATTORNEYS AT LAW

Robert A. Bass\*\*  
Robert C. Byerts  
Joshua J. Logan  
Shawn D. Mercer\*  
W. Douglas Moody, Jr.  
Richard N. Sox, Jr.  
Frank X. Trainor, III\*

*Founding Partners:*  
*Daniel E. Myers*  
*Loula M. Fuller*

\*\*Also admitted in Washington D.C.  
\*Only admitted in North Carolina

Respond to: Tallahassee Office

March 11, 2009

**MEMORANDUM IN SUPPORT  
RAISED BILL 6648 (TRA)**

By: Richard N. Sox, Esq.  
Myers & Fuller, P.A.  
2822 Remington Green Circle  
Tallahassee, Florida 32308

**AN ACT MAKING REVISION TO CHAPTER 739 OF THE GENERAL STATUTES WITH  
RESPECT TO AUTOMOBILE MANUFACTURERS, DISTRIBUTORS, FRANCHISES AND  
DEALERSHIPS.**

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My name is Richard Sox and I am the Managing Partner of Myers & Fuller, P.A. located in Tallahassee, Florida. For over 20 years, Myers & Fuller has represented automobile dealers and their state associations in franchise matters. We have worked with numerous state associations over the years to create and amend state franchise laws. In the last 2 years, we have assisted the automobile dealers in Colorado, Florida, North Carolina and New York in updating their franchise laws to address changes in the industry. We have been retained by the Connecticut Automobile Retailers Association to assist with the preparation of amendments to Chapter 739 which are similar to what these states and others have recently passed into law or are seeking to include in state law.

The proposed legislation would amend Chapter 739 in order to clarify provisions already in the law, address situations that were unforeseen when this law was enacted, as well as institute amendments that would ensure continued fairness, openness and accountability in the relationship between automobile manufacturers and distributors, on the one hand, and automobile franchises and dealerships, on the other.

**Sec. 1. Section 42-133r(10) – Definition of “Franchise”**

This amendment serves the purpose of clarifying the definition of “franchise” as used in this Chapter. Under the existing definition, manufacturers and distributors have been able to

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2822 Remington Green Circle \* Tallahassee, Florida \* 32308  
Telephone (850) 878-6404 \* Facsimile (850) 942-4869

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9104 Falls of Neuse Road, Suite 200 \* Raleigh, North Carolina \* 27615  
Telephone (919) 847-8632 \* Facsimile (919) 847-8633  
[www.dealerlawyer.com](http://www.dealerlawyer.com)

utilize "side" agreements and contracts to avoid having that agreement fall under the strict definition of "franchise" which is currently limited to the "official" Dealer Sales and Service Agreement.

The manufacturer and distributor side agreements come in the form of "facility agreements," "exclusive-use agreements," "site-control agreements," "market realignment agreements" and "sales performance agreements." Over time, manufacturers and distributors have begun to include within these agreements provisions that are fundamental to the franchise such as performance requirements, binding arbitration, waiver of right to protest a termination or other manufacturer action, and facility requirements.

In order for dealers to receive the intended benefit of Chapter 739, it is imperative that the definition of "franchise" no longer be limited to an agreement whereby the dealer "purchases and resells the franchise product and leases or rents the dealership premises" but is properly expanded to encompass any agreement with the manufacturer.

## **Sec. 2. Section 42-133s – Warranty Reimbursement and Manufacturer Audits**

### *Reimbursement for Warranty Work*

Another area in need of clarification involves the situation where a dealership performs repairs on vehicles under warranty. Reimbursement by the manufacturer is the way the dealership is paid for those services. The current law requires reimbursement at a "reasonable" rate. Manufacturers have been reimbursing dealers for parts and labor warranty work at a rate arbitrarily set by the manufacturer. These rates are unfairly low as compared to the rates the dealers are able to obtain in the "open market" when performing customer-paid, nonwarranty repair work. Dealers have no real recourse to pursue a fairer rate of reimbursement for warranty.

This amendment provides for a simple but certain process to establish the rate at which the dealers are to be reimbursed for warranty work using the dealer's average customer-paid, nonwarranty rate for parts and labor as the standard. This solution is equitable to both the dealer and the manufacturer while avoiding conflicts of interest in rate setting.

Lastly, this amendment prohibits the manufacturer from attempting to increase costs to the dealer in order to recover the costs of any increase in warranty reimbursement. In some other states which have passed a "retail warranty reimbursement" law, the manufacturers have simply levied a surcharge against the dealers by, for example, raising the dealer's cost of purchasing a new vehicle and, thus, reducing the dealers overall profit margin, to recover the additional warranty reimbursement cost. Such a recovery of costs *from the dealer* absolutely defeats the purpose and intent of a requirement that dealers receive additional warranty reimbursement at a level which is fair. Such a prohibition on recovery of costs has been challenged by the manufacturers in other states as an unconstitutional interference with contract but has been upheld by the courts as valid.

### *Process for Manufacturer Audits of Dealer Claims*

Following payment of warranty and sales incentive claims, a manufacturer has the right to audit the dealer's books to insure that those claims were appropriate. Under existing law, manufacturers were permitted to review claims up to 2 years old from the time of the audit and

there were no limits on which claims and how those claims could be charged back from the dealer. Without any such protection to the dealer, a manufacturer can charge a dealer back for claims directly from the dealer's "open account" with the manufacturer (the account in which the manufacturer makes debits and credits to the dealer for payment of various claims and parts).

The amendment to this section establishes a process by which the manufacturer may audit dealer claims records for up to 1 year from the time of the audit, places reasonable standards on which claims can be charged back, a right to protest any proposed chargeback and a stay of the chargeback until resolution of the protest.

### **Sec. 3. Section 42-133v – Termination of a Franchise**

The discontinuance of an entire motor vehicle linemake is something that had not regularly occurred until a few years ago when a major manufacturer discontinued a longstanding linemake, effectively terminating the franchise (Oldsmobile). In discontinuing a linemake, and all related franchises, manufacturers such as General Motors have avoided the provisions of state law by not providing the "official" notice of termination contemplated by motor vehicle franchise laws but, instead, have skirted those laws by publicly giving notice of its intent to discontinue a linemake. Most recently, General Motors has made this type of announcement as relates to the Hummer, Saturn and Saab linemakes.

The result of these public announcements is to immediately destroy the going concern value of a dealer's franchise. These public announcements cause consumers to avoid purchasing vehicles from these dealers in fear that there will be no warranty coverage for their vehicle and the stigma of buying a car that has been deemed to no longer be worthy of production by the manufacturer. The manufacturer can then delay the official termination or sale of the franchise to a point at which dealers are forced to "voluntarily" terminate the franchise because they are no longer viable.

The current law does not include this situation "discontinuance" as a "termination" under the provisions of Chapter 739. This amendment would now recognize a communication to the public as well as to the dealers as the trigger point for designating the manufacturer's act as a "termination" under the law and thus implicating related benefits to the effected dealer.

### **Sec. 4. Section 42-133w – Benefits to be Paid Upon Termination**

This section governs certain basic benefits to be paid a dealer upon the termination of a franchise such as repurchase of new vehicle inventory, unused parts and special tools. Currently, the law is not clear that such benefits are to be paid whether the dealer or the manufacturer initiates the termination. The first amendment to this section will make it clear that such benefits are to be paid in the case the manufacturer, distributor or the dealer initiate the termination.

The next amendment to this section will make it clear that the new vehicle inventory to be repurchased includes vehicles which are in the dealer's inventory as a result of a "dealer trade" which commonly takes place in the industry in order to accommodate a customer's needs. This amendment will also make it clear that certain accessories which are "customary" for that type of vehicle (i.e. side steps added to an SUV or pickup truck) will not cause that vehicle to be exempted from the manufacturer's repurchase obligation.

**Sec. 5. Section 42-133x – Additional Benefits to be Paid Upon Termination**

This section governs benefits in addition to the basic benefits of section 42-133w which are to be paid to dealers in certain termination situations. As a result of the devastating impact of a manufacturer's announcement of the unilateral discontinuance of a linemake, where the dealer has not violated any term of its dealer agreement, this section is being amended to require payment of "fair market value" of the franchise to the dealer as of the date immediately preceding the manufacturer's announcement.

**Sec. 6. Section 42-133bb – Manufacturer Prohibitions**

*Dealership Facilities*

In recent times, manufacturers have gotten increasingly involved with management decisions previously within the purview of dealers to include the exact size and image for the dealer's facility. These manufacturer facility programs are often unreasonable in the cost of the material specified for use on the building, the square footage of a particular area of the dealership and the number of service bays. Manufacturers have used the threat of a non-renewal of the dealer's franchise agreement and certain sales incentive programs to coerce construction of otherwise nonviable facilities.

The addition of a new subsection (8) would prohibit a manufacturer or distributor from requiring renovations to a dealer's facility unless the manufacturer can show the facility requirements are reasonable in light of economic circumstances.

**Sec. 7. Section 42-133cc – Manufacturer Prohibitions**

*Change in Wholesale Vehicle Price*

The amendment in subsection (4) of this section serves the purpose of clarifying that a vehicle price may not be changed by a manufacturer once a consumer has executed a sales contract for that vehicle as long as the vehicle is ultimately delivered to the customer.

*Relocation of Dealership*

The addition of new subsection (18) is intended to prohibit a manufacturer or distributor from unreasonably denying a dealer's request to relocate his or her franchise to a new location. In the current economic situation, dealers are finding that in order to remain viable they must combine franchises into one location to accomplish necessary economies of scale. Historically, manufacturers have had a policy that they prefer stand-alone facilities for their franchises despite the fact that dealers believe that combining franchises in one location provides customers with a convenient and more informative shopping experience. The luxury of providing a stand-alone facility can no longer be justified in some circumstances. This amendment, however, would allow a manufacturer to deny a relocation request if the proposed site did not meet reasonable facility requirements. This amendment provides a 60 day time frame in which a manufacturer must make a determination as to the request for relocation.

*Unfair Pricing*

The addition of new subsection (19) is intended to prohibit a manufacturer from instituting an unfair wholesale price scheme which would discriminate against some dealers in favor of others. Over the last several years, manufacturers have increasingly used incentives in an effort to increase sales volume. Unfortunately, these sales incentive programs are not always fairly applied to large and small market dealers. This provision will require that all incentives be "reasonably and practically available" to all same linemake dealers within the State of Connecticut.

*Tying Unrelated Products to Franchise*

The addition of a new subsection (20) is intended to prevent a manufacturer from coercing a dealer to purchase or sell some program or item that is not fundamental to the sale and service of the manufacturer's vehicles. Some manufacturers have begun to tie the availability of incentives or certified preowned cars to a dealer's agreement to sell products not directly related to the manufacturer's vehicles such as extended warranty programs. In many cases, these manufacturer-sponsored products are more expensive for the dealership's customers and the dealer should be free to offer a choice of product that is best for the customer.

***Additional Amendment***

*Initiation of Warranty Period*

Lastly, we would propose clarifying substitute language to the committee bill version addressing the initiation of the vehicle warranty period for the consumer. We would propose a new subsection (21) prohibiting a manufacturer from starting the vehicle warranty period, whether expressed in time or mileage, on a new vehicle until such time as purchased by a retail consumer. This amendment would relieve the situation where customers are being deprived of their full warranty period where the new vehicle has been in the dealer's inventory for several months or has accumulated mileage at the dealership or as a demonstrator vehicle.

I have attached the substitute language to this written testimony for the Committee's consideration.

Thank you for your consideration of this written testimony in support of Raised Bill 6648.