



**House
Legislative
Analysis
Section**

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DEALER AGREEMENTS

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House Bill 4784 (Substitute H-4)
First Analysis (6-7-88)

JUL 15 1988

Sponsor: Rep. Vincent J. Porreca
Committee: Marine Affairs & Port Development

Mich. State Law Library

THE APPARENT PROBLEM:

Within many industries it is common for dealers and manufacturers to maintain agreements or contracts defining their relationships and each party's responsibilities. However, written agreements specifying the nature of dealer/manufacture relationships are virtually unheard of in the state's marine industry. Agreements that do exist usually require, at the most, a thirty day notice before termination. It has been asserted that the lack of written agreements detailing dealer/manufacture relationships has led to several unfair terminations (i.e., cancellations without good cause) of verbal agreements between dealers and manufacturers.

The economic crises of the late 1970's and early 1980's affected many industries, including the marine industry. Due to economic changes in the marine industry during that period several companies have since consolidated and merged. In addition, it is maintained that unfair cancellations of dealerships have increased dramatically within the past decade because of the unstable financial conditions experienced in the industry. Many of the major, lucrative boat lines are currently held by two or three prominent companies because of the recent consolidations and mergers in the industry, and it has been suggested that many dealers whose agreements have been unfairly terminated have not been able to open new dealerships due to the unavailability of a major boat line. Some members of the marine industry have suggested that dealer agreements would help give stability to the industry by defining the responsibilities of each party in the agreement, thereby decreasing unfair cancellations of dealerships and encouraging maintenance of positive dealer/manufacture relationships.

THE CONTENT OF THE BILL:

The bill would regulate watercraft and outboard motor manufacturers, distributors, dealers and their representatives and prohibit unfair practices between the parties by requiring written agreements detailing each party's responsibilities and establishing penalties and remedies to encourage adherence to the agreements.

The bill would prohibit a manufacturer or distributor from offering a watercraft or outboard motor for sale to a dealer (or proposed dealer) without first entering into a dealer agreement and complying with all other applicable provisions of the bill. After the effective date of the bill, a manufacturer/distributor would be prohibited from locating or relocating a watercraft dealer into a relevant market area that had an existing watercraft dealer that carried the manufacturer's or distributor's product lines unless all of the manufacturer's or distributor's dealers in the relevant market area consented in writing to the location or relocation.

Good Cause To Void A Dealer Agreement. Good cause would exist for termination, cancellation, nonrenewal, or

discontinuance of a dealer agreement (also called the dissolution of a dealer agreement) if there was failure by a party to the dealer agreement to comply with a provision of the agreement. If the failure by a party to the agreement related to the performance of supplies, sales or service, good cause would exist for termination, cancellation, nonrenewal, or discontinuance of the agreement if the noncomplying party failed to carry out the performance provisions of the agreement and the following had occurred:

- the noncomplying party was given written notice of the failure of performance;
- the noncomplying party was afforded a reasonable opportunity (not to exceed 60 days) to exert good faith efforts to carry out the dealer agreement; and
- the failure to comply with the agreement continued for more than 60 days after the date notification was given of the failure of performance.

Unless provided in the agreement, the following would not constitute good cause for termination, cancellation, nonrenewal, or discontinuance of a dealer agreement:

- a change in ownership of the dealership;
- the refusal of the dealer to purchase or accept delivery of any watercraft or outboard motor parts, accessories, or any other commodity or services not ordered by the dealer;
- the fact that the dealer owned, had an investment in, participated in the management of, or held a dealer agreement for the sale of another make or line of watercraft or outboard motors;
- the fact that the dealer had established another make or line of watercraft or outboard motors in the same dealership facilities as those of the manufacturer or distributor, provided that the dealer remained in compliance with the terms and conditions of the agreement and with the reasonable facilities' requirements of the manufacturer or distributor; and
- the fact that the dealer sold or transferred ownership of the dealership with the manufacturer's or distributor's prior written consent.

Prior to the termination, cancellation, nonrenewal, or discontinuance of a dealer agreement, a manufacturer or distributor would be prohibited from entering a new dealer agreement with a different dealer in the market area serviced by the existing dealer agreement when the effective date of the new agreement would be prior to the dissolution of the existing dealer agreement. For each dissolution of a dealer agreement, the party terminating the agreement would have the burden of proof for showing that it had acted in good faith, that the notice requirements of the bill had been complied with and that there was good cause for the termination, cancellation, nonrenewal, or discontinuance of the agreement.

OVER

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Notification Requirements for Dissolution of an Agreement.

Prior to the dissolution of a dealer agreement the bill would require the party terminating the agreement to furnish notice of the action to the new watercraft dealer at least 90 days prior to the effective date of the dissolution of the agreement. Notice would be by certified mail and would contain:

- a statement of intention to terminate, cancel, not renew, or discontinue the agreement;
- a statement of the reasons for the termination, cancellation, nonrenewal, or discontinuance; and
- the date on which the termination, cancellation, nonrenewal, or discontinuance would take effect.

The bill would allow immediate notification of the dissolution of an agreement to be given for any of the following reasons:

- insolvency of the dealer or the filing of any petition by or against the dealer under any bankruptcy or receivership law;
- except in the event of catastrophic fire, natural causes, or seasonal closings specified in the agreement, failure of the dealer to conduct his or her customary sales and service operations during customary business hours for seven consecutive business days;
- conviction of the dealer or its principal owners of a felony;
- revocation of any license which the dealer was required to have to operate a dealership;
- misrepresentation by the dealer to the manufacturer or distributor; and
- failure to pay amounts due and owing a manufacturer or distributor within the time period described in the agreement.

Fair and Reasonable Compensation. Upon dissolution of an agreement without cause, the watercraft dealer would be allowed fair and reasonable compensation, not exceeding the original invoiced price and accrued floor plan interest, from the manufacturer or distributor for certain items. Fair and reasonable compensation would be given for the new current model year watercraft and outboard motor inventory purchased from the manufacturer or distributor which had not been altered, damaged, or operated as a demonstration unit; (watercraft equipped by the watercraft dealer with minor accessory equipment installed to promote safety or the watercraft marketability of the watercraft would not be considered to be "altered" under this provision.) The bill would require compensation for new current model year watercraft inventory to be paid within 30 days after the effective date of the dissolution of the agreement provided that the dealer had met all reasonable requirements of the dealer agreement with respect to the return of the repurchased property, including providing clear title. In addition, reasonable compensation for the current model inventory would not be more than the dealer's net acquisition cost.

Fair and reasonable compensation would be given for supplies and parts inventory in original packages or new condition (if not normally packaged) and purchased from the manufacturer or distributor and listed in the manufacturer's or distributors's current catalogs, within two years of the date of dissolution. Equipment, furnishings, signs and special tools purchased from and required by the manufacturer or distributor within two years of the date of dissolution of the agreement, less depreciation, would be other items for which the new watercraft dealer would be given fair and reasonable compensation. Reasonable compensation for equipment, furnishings, signs, and

special tools would be the fair market value of the personal property taking into consideration use, wear, tear and obsolescence. Compensation for items of personal property (supplies and parts inventory, equipment, furnishings, signs and special tools) would be paid within 90 days after the effective date of the dissolution of the agreement, provided that the dealer had met all reasonable requirements of the dealer agreement with respect to the return of the repurchased personal property, including providing clear title. Unless just cause could be shown for nonpayment, payment would have to be made within 90 days; interest would accrue thereafter on all amounts due the dealer at a rate of the current published prime rate in the area where the dealer was located, plus 1 and 1/2 per cent per annum. All amounts due and owing a manufacturer or distributor by a watercraft dealer would accrue interest at a rate of the current published prime rate in the area where the watercraft dealer was located, plus 1 and 1/2 percent per annum.

Warranties. Each manufacturer or distributor would specify in writing to each of its dealers the obligations of the dealer for preparation, delivery, and warranty service on its products. The manufacturer or distributor would compensate the dealer for warranty service and parts required of the dealer by the manufacturer or distributor, including reasonable compensation for diagnostic work, as well as repair, service and labor. Time allowance for the diagnosis and performance of warranty work and service would be reasonable and adequate for the work to be performed. In determining what constituted reasonable compensation under the bill, the principal factor to be considered would be the shop labor rate being paid by watercraft dealers in the community in which the dealer was doing business. The manufacturer or distributor would be required to notify a dealer of shop labor rates within 30 days after execution. A manufacturer or distributor could not do any of the following:

- fail to perform any warranty obligation;
- fail to include the expected date by which necessary parts and equipment would be available to dealers for the correction of defects in written notices of federally required factory recalls to owners and dealers; and
- fail to compensate a dealer for repairs affected by a recall.

A dealer could not do any of the following:

- fail to perform any warranty obligation;
- fail to forward written reports to the manufacturer or distributor of all repair work done on parts made by the manufacturer;
- refuse to promote any product provided for in the dealer agreement; and
- fail to pay for inventory within the time period described in the dealer agreement.

The bill would require all claims made by a dealer concerning warranty provisions of the bill to be paid within 60 days after their approval. All claims would be either approved or disapproved by the manufacturer or distributor within 60 days after their receipt on a proper form generally used by the manufacturer or distributor and containing the information usually required in the form. A claim not specifically disapproved in writing within 30 days after the receipt of the form would be considered approved, and payment would have to be made within 30 days. The manufacturer would have the right to audit the claims for five years after payment and to charge back to the dealer the amount of any false, fraudulent, or unsubstantiated claim.

Restrictions. The bill would prohibit a manufacturer or distributor from requiring a dealer to order or accept delivery of a watercraft or outboard motor, a part or accessory of a watercraft or outboard motor, equipment, or any other commodity not required by law which was not voluntarily ordered by the dealer. The bill could not be construed to prevent the manufacturer or distributor from requiring a dealer to carry a reasonable inventory of models offered for sale by the manufacturer or distributor. A manufacturer or distributor could require a dealer to carry specific quantities of a product, place advance orders for a product, and accept delivery of a product to facilitate factory production or volume discounts, if agreed upon in the dealer agreement. The bill would prohibit manufacturers or distributors from requiring a dealer to order or accept delivery of a watercraft with special features, accessories, or equipment not included in the list price of the watercraft as publicly advertised by the manufacturer or distributor. Under the bill, manufacturers and distributors would be prohibited from requiring dealers to enter into an agreement with the manufacturer or distributor or do any other act prejudicial to the dealer by threatening to terminate a dealer agreement or any contractual agreement of understanding existing between the dealer and the manufacturer or distributor. Notice in good faith to a dealer of the dealer's violation of any terms or provisions of the dealer agreement would not constitute a violation of the bill.

Manufacturers and distributors would also be prohibited from requiring a dealer to change the capital structure of the dealership or the means by or through which the dealer financed the operation of the dealership if at all times the dealership met any reasonable capital standards determined by the manufacturer or distributor in accordance with uniformly applied criteria. The bill would prohibit manufacturers and distributors from requiring dealers to refrain from participation in the management of, investment in, or the acquisition of any other line of watercraft or outboard motors, or related products, provided that the dealer remained in compliance with a reasonable facilities requirement and made no change in the principal management of the dealer. Manufacturers and distributors would also be prohibited from requiring watercraft dealers to change the location of the dealership or make any substantial alterations to the dealership premises, if to do so would be unreasonable. In addition, the bill would prohibit manufacturers or distributors from requiring a dealer to establish a dealership of the same product line or make operating under dealer agreement with the manufacturer or distributor in the relevant market area of the existing dealer.

Further, the bill would prohibit a manufacturer or distributor from withholding consent to the sale, transfer, or exchange of a dealership to a qualified buyer capable of being licensed as a dealer. The bill would also prohibit a manufacturer or distributor from failing to respond in writing to a request for consent to a sale, transfer, or exchange of a dealership within 60 days after receiving a written application from the dealer on the forms generally utilized by the manufacturer or distributor for that purpose and containing the information required in those forms. Failure to respond to the request within 60 days would be considered consent to the request. In addition, the bill would prohibit a manufacturer or distributor from terminating, canceling, failing to renew, or discontinuing any lease of the dealer's established place of business either directly or through any subsidiary, except for a material breach of the lease.

Designated Successor. Under the bill, a designated successor of a deceased or incapacitated dealer could succeed the dealer in the ownership or operation of the dealership under the existing dealer agreement if the successor gave the manufacturer or distributor written notice of his or her intention to succeed to the dealership within 60 days after the dealer's death or incapacity and agreed to be bound by all of the terms and conditions of the dealer agreement. A manufacturer or distributor could refuse to honor the existing dealer agreement with the designated successor for good cause or criteria agreed to in the existing dealer agreement. The manufacturer or distributor could request the personal and financial data from the successor that would be necessary to determine whether the existing dealer agreement should be honored, and the designated successor would supply the personal and financial data upon request. Within 60 days after receiving notice of the successor's intent to succeed the dealer in the ownership and operation of the dealership or within 60 days after receiving the requested personal financial data, the manufacturer or distributor could serve notice for refusal to approve succession upon the designated successor if the manufacturer or distributor believed good cause or other criteria existed for refusing to honor the succession. Notice of refusal to approve succession by the manufacturer or distributor would state the specific grounds for the refusal and that discontinuance of the agreement would take effect not less than 90 days after the date the notice was served. If notice of refusal was not served within the 60 days as required by the bill, the dealer agreement would continue in effect and would be subject to termination only as otherwise permitted in the bill.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill would have no fiscal implications to the state. (6-1-88)

ARGUMENTS:

For:

According to committee testimony, several watercraft dealers have had agreements with manufacturers terminated without good cause, including situations in which a manufacturer's new management decided to work with a different dealer although the existing dealer was performing quite well, or a new dealer promised the manufacturer increased sales and the manufacturer terminated its relationship with the existing dealer despite adequate performance. Dealers invest a lot of time, money and effort in their dealerships and they should have protection against termination of an agreement without good cause.

In addition, recent mergers and consolidations in the marine industry have decreased the number of major boat lines available to dealers and put many dealers out of the boat business. For example, if a manufacturer terminated its relationship with a Sea Ray dealer, the dealer would probably not find a comparable boat line to sell in the state because Sea Ray, as well as the two comparable lines sold in Michigan (Bayliner and Wellcraft), are owned by the same corporation, Brunswick. Therefore, the termination would effectively put the dealer out of the boat business. The bill would address all of the concerns mentioned by defining the nature of relationships between manufacturers/distributors and dealers and prohibiting termination of dealer agreements without good cause.

Against:

Though there is a certain amount of friction between manufacturers and dealers in the boating industry, the problems have been exaggerated. Manufacturers and distributors have an incentive to be fair to dealers, because dealers carry competing lines and they always will have the option to sell a competing the manufacturer's line. Dealers, on the other hand, have an incentive to be fair to manufacturers and distributors because manufacturers and distributors always have the option of choosing to work with a different dealer. The system is one of checks and balances inherent to the nature of the free market system. The bill would upset this balance and encourage anti-consumer practices. For example, the bill would prohibit the location of new dealerships in a market area without the consent of existing dealers. This provision would restrict the numbers of dealers in an area and cut down on competition. With fewer dealers consumers would have fewer choices, and prices of boats would probably increase. According to some manufacturers, the Federal Trade Commission has said that laws regulating dealer agreements are anti-competitive and anti-consumer.

Against:

The bill has several notification requirements and specifications relating to the dealer agreements. If the bill were to be enacted it could discourage companies from locating, or expanding, in Michigan because of these burdensome provisions. It has been suggested that the bill will cause a substantial increase in the amount of paper work required for dealers, manufacturers and distributors. It is estimated that operating costs will increase because of the extra time and effort required to complete paper work relating to the dealer agreements and that these costs will have to be passed on to the consumer. In addition, manufacturers expect their relationships between dealers to become more complicated as a result of the dealer agreements.

Response: Boating experts agree that Michigan represents 20 percent of the national market for recreational watercraft. In addition, boat dealers estimate that the boating industry provides \$2.5 billion of the \$13 billion tourism industry in Michigan. It is not likely that many manufacturers would leave such a lucrative market. Further, the bill will probably help clarify and simplify relationships between dealers and manufacturers because the agreement will require each party to specify clearly what is expected.

Against:

Negotiations between manufacturers and dealers should be conducted in the private sector through bargaining in the free market system. The bill would provide a legislative mandate which spells out the exact nature of the relationship. Competition would decrease as a result of the bill; the bill would contradict American custom.

Response: The bill would not restrict the bargaining process in any way. Manufacturers and dealers would still work out the details of their agreements. The bill would simply require both manufacturers and dealers to detail their expectations of the relationship in a written agreement. It would also prohibit unfair business practices by either party. Several industries have these types of agreements, including the automobile industry and the farm implement industry.

POSITIONS:

The Michigan Boating Industries Association strongly supports the bill. (6-2-88)

The Michigan Charter Boat Association supports the bill. (6-2-88)

The West Michigan Marine Association supports the bill. (6-2-88)

The Michigan Automobile Dealers Association supports the concept of the bill. (6-3-88)

The National Marine Manufacturers Association opposes the bill. (6-2-88)