



California New Car Dealers Association

GOVERNOR SIGNS SB 424 AS URGENCY MEASURE

Governor Schwarzenegger signed SB 424 (Padilla) on July 2, 2009. Because the bill contains an urgency clause and was approved by a 2/3 vote in both the Senate and Assembly, it took effective immediately. The final votes were 72 – 0 in the Assembly and 38 – 0 in the Senate. We would like to publicly thank the bill's author, Senator Alex Padilla (D) Pacoima, for his efforts and the co-authors: Senators Dean Florez (D) Shafter and Tom Harman (Orange); and, Assembly Members Mike Eng (D) Monterey Park, Felipe Fuentes (D) Los Angeles, and Jose Soloria (D) Santa Ana.

SB 424 adds a new Section 11713.13 to the Vehicle Code to make it unlawful for a vehicle manufacturer or recreational vehicle manufacturer to, directly or indirectly through an affiliate, do any of the following:

Dualing

Prevent, or attempt to prevent, by contract or otherwise, a dealer from acquiring, adding, or maintaining a sales or service operation for another line make of motor vehicles at the same or expanded facility at which the dealer currently operates a dealership if the dealer complies with any reasonable facilities and capital requirements of the manufacturer or distributor. In any proceeding in which the reasonableness of a facility or capital requirement is an issue, the manufacturer or distributor shall have the burden of proof.

Exclusive Facilities

Require a dealer to establish or maintain exclusive facilities, personnel, or display space if the imposition of the requirement would be unreasonable in light of all existing circumstances, including economic conditions. In any proceeding in which the reasonableness of a facility or capital requirement is an issue, the manufacturer or distributor shall have the burden of proof.

Facility Upgrades

Require, by contract or otherwise, a dealer to make a material alteration, expansion, or addition to any dealership facility, unless the required alteration, expansion, or addition is reasonable in light of all existing circumstances, including economic conditions. In any proceeding in which a required facility alteration, expansion, or addition is an issue, the manufacturer or distributor shall have the burden of proof.

Termination Assistance – Vehicle Dealers

Fail to pay a vehicle dealer, within 90 days of termination, cancellation, or nonrenewal of a franchise, all of the following:

(A) The dealer cost, plus any charges made by the manufacturer or distributor for vehicle distribution or delivery and the cost of any dealer-installed original equipment accessories, less any amount invoiced to the vehicle and paid by the manufacturer or distributor to the dealer, for all new and undamaged vehicles with less than 500 miles in the dealer's inventory that were acquired by the dealer from the manufacturer, distributor, or another new motor vehicle dealer franchised to sell vehicles of the same line-make, in the ordinary course of business, within 18 months of termination, cancellation, or nonrenewal of the franchise.

(B) The dealer cost for all unused and undamaged supplies, parts, and accessories listed in the manufacturer's current parts catalog and in their original packaging, except that sheet metal may be packaged in a comparable substitute for the original package.

(C) The fair market value of each undamaged sign owned by the motor vehicle dealer and bearing a common name, trade name, or trademark of the manufacturer or distributor if acquisition of the sign was required or made a condition of participation in an incentive program by the manufacturer or distributor.

(D) The fair market value of all special tools, computer systems, and equipment that were required or made a condition of participation in an incentive program by the manufacturer or distributor that are in usable condition, excluding normal wear and tear.

(E) The dealer costs of handling, packing, loading, and transporting any items or inventory for repurchase by the manufacturer or distributor.

Exception: The above termination requirements do not apply to a termination that is implemented as a result of the sale of substantially all of the inventory and fixed assets or stock of a franchised dealership if the dealership continues to operate as a franchisee of the same line-make.

Termination Assistance – RV Dealers

(1) A recreational vehicle manufacturer must pay to a dealer of new recreational vehicles, within 90 days of termination, cancellation, or nonrenewal of a franchise for a recreational vehicle line-make the dealer cost, plus any charges made by the manufacturer or distributor for vehicle distribution or delivery and the cost of any dealer-installed original equipment accessories, less any amount invoiced to the vehicle and paid by the manufacturer or distributor to the dealer, for a new recreational vehicle *when the termination, cancellation, or nonrenewal is initiated by a recreational vehicle manufacturer*. This requirement only applies to new and unused recreational vehicles that do not currently have or have had in the past, material damage, as defined in Section 9990, and that the dealer acquired from the manufacturer, distributor, or another new motor vehicle dealer franchised to sell recreational vehicles of the same line-make in the ordinary course of business within 12 months of the termination, cancellation, or nonrenewal of the franchise.

(2) For those recreational vehicles with odometers, paragraph (1) shall apply to only those vehicles that have no more than 1,500 miles on the odometer, in addition to the number of miles incurred while delivering the vehicle from the manufacturer's facility that produced the vehicle for delivery to the dealer's retail location.

(3) Damaged recreational vehicles shall be repurchased by the manufacturer provided there is an offset in value for damages, except recreational vehicles that have or had material damage may be repurchased at the manufacturer's option provided there is an offset in value for damages.

Fail to pay to a dealer of new recreational vehicles, as defined in subdivision (a) of Section 18010 of the Health and Safety Code, within 90 days of termination, cancellation, or nonrenewal of a franchise, all of the following:

(A) The dealer cost for all unused and undamaged supplies, parts, and accessories listed in the manufacturer's current parts catalog and in their original packaging, except that sheet metal may be packaged in a comparable substitute for the original package.

(B) The fair market value of each undamaged sign owned by the motor vehicle dealer and bearing a common name, trade name, or trademark of the manufacturer or distributor if acquisition of the sign was required or made a condition of participation in an incentive program by the manufacturer or distributor.

(C) The fair market value of all special tools, computer systems, and equipment that were required or made a condition of participation in an incentive program by the manufacturer or distributor that are in usable condition, excluding normal wear and tear.

(D) The dealer costs of handling, packing, loading, and transporting any items or inventory for repurchase by the manufacturer or distributor.

Indemnification.

SB 424 also makes it unlawful for a vehicle or recreational vehicle manufacturer to fail, upon demand, to indemnify any existing or former franchisee and the franchisee's successors and assigns from any and all damages sustained and attorney's fees and other expenses reasonably incurred by the franchisee that result from or relate to any claim made or asserted by a third party against the franchisee to the extent the claim results from any of the following:

(A) The condition, characteristics, manufacture, assembly, or design of any vehicle, parts, accessories, tools, or equipment, or the selection or combination of parts or components manufactured or distributed by the manufacturer or distributor.

(B) Service systems, procedures, or methods the franchisor required or recommended the franchisee to use if the franchisee properly uses the system, procedure, or method.

(C) Improper use or disclosure by a manufacturer or distributor of nonpublic personal information obtained from a franchisee concerning any consumer, customer, or employee of the franchisee.

(D) Any act or omission of the manufacturer or distributor for which the franchisee would have a claim for contribution or indemnity under applicable law or under the franchise, irrespective of and without regard to any prior termination or expiration of the franchise.

Liquidation of New Vehicle Inventory

Finally, SB 424 amends Vehicle Code Section 11713.1 to make a new exception to the provision that makes it unlawful for a dealer to advertise for sale, sell, or purchase for resale a new vehicle of a line-make for which the dealer does not hold a franchise. The new exception will allow rejected Chrysler and GM dealers to continue to sell existing new vehicle inventory, *as new*, under the following circumstances:

- (1) The vehicle was acquired in the ordinary course of business as a new vehicle by a dealer franchised to sell that vehicle.
- (2) The manufacturer or distributor of the vehicle files a bankruptcy petition.
- (3) The franchise agreement of the dealer is terminated, canceled, or rejected by the manufacturer or distributor as part of the bankruptcy proceedings and the termination, cancellation, or rejection is not a result of the revocation by the department of the dealer's license or the dealer's conviction of a crime.
- (4) The vehicle is held in the inventory of the dealer on the date the bankruptcy petition is filed.
- (5) The vehicle is sold by the dealer within six months of the date the bankruptcy petition is filed.

This new exception does not entitle a dealer whose franchise agreement has been terminated, canceled, or rejected to continue to perform warranty service repairs or continue to be eligible to offer or receive consumer or dealer incentives offered by the manufacturer or distributor.

Unfortunately, bankruptcy law preempts state law dealing with many of the issues contained in SB 424. Moreover, orders issued by the bankruptcy judges in both the Chrysler and General Motors cases contain specific rulings on the issue of preemption. For example, regardless of the provisions of SB 424, the 32 California Chrysler dealers who had their franchises rejected in the Chrysler bankruptcy proceeding will have no contractual or statutory right to termination assistance. Rather, their only remedy is to file an unsecured proof of claim for damage and hope to receive some type of pro rata distribution if one is ever made to unsecured creditors. Likewise, General Motors dealers that signed "Participation Agreements" and/or "Wind Down Agreements" waived, as part of those agreements, many of their contractual and state rights (although it can be argued that the waivers were coerced), dealing with termination assistance, exclusive facilities, and the right to protest add points and relocations.