

State of South Dakota

SEVENTY-SEVENTH SESSION
LEGISLATIVE ASSEMBLY, 2002

527H0262

HOUSE JUDICIARY COMMITTEE ENGROSSED NO.

SB 110 - 02/13/2002

Introduced by: Senators Munson, Albers, Diedrich (Elmer), Hagen, Olson (Ed), and Vitter
and Representatives Broderick, Abdallah, Brown (Richard), Flowers, Pummel,
and Solum

1 FOR AN ACT ENTITLED, An Act to revise certain provisions regarding the regulation of
2 vehicle dealers.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. That § 32-6B-49.1 be amended to read as follows:

5 32-6B-49.1. No franchisor may require a franchisee to agree to the inclusion of a franchise
6 agreement may include any term or condition in a franchise, ~~or in any lease or agreement~~
7 ~~ancillary or collateral to a franchise as a condition to the offer, grant or renewal of such~~
8 ~~franchise, lease or agreement~~, that:

- 9 (1) Requires the franchisee to waive trial by jury involving the franchisor;
- 10 (2) Specifies the jurisdictions, venues or tribunals in which disputes arising with respect
11 to the franchise, lease or agreement shall or may not be submitted for resolution or
12 otherwise prevents a franchisee from bringing an action in a particular forum
13 otherwise available under the law;
- 14 (3) Requires that disputes between the franchisor and franchisee be submitted to



1 arbitration or to any other binding alternate dispute resolution procedure. However,
2 any franchise, lease or agreement may authorize the submission of a dispute to
3 arbitration or to binding alternate dispute resolution if the franchisor and franchisee
4 voluntarily agree to submit the dispute to arbitration or binding alternate dispute
5 resolution at the time the dispute arises; ~~or~~

6 (4) Requires a franchisee to pay the attorney fees of a franchisor;

7 (5) Prohibits the holder of an existing franchise from being dualled with another
8 franchisor's line that does not substantially affect the current franchisor or community;

9 (6) Prohibits the holder of an existing franchise from moving to another facility within the
10 franchisee's community that is equal to or superior to the franchisee's former facility;

11 or

12 (7) Prohibits the holder of an existing franchise from making improvements to the
13 franchisee's current facility within the franchisee's community.

14 An existing franchisee shall give the franchisor prior written notice of the proposed dual
15 arrangement, relocation, or improvement described in subdivisions (5), (6), and (7). The notice
16 shall contain sufficient information for the franchisor to evaluate the proposal. Within sixty days
17 of receiving said notice, the franchisor shall send a letter to the franchisee either approving or
18 disapproving the proposal. If the franchisor does not notify the franchisee of its approval or
19 denial of the dual arrangement, relocation, or improvement within the sixty-day period, the
20 franchisee's proposal shall be deemed to have been approved. No franchisor may unreasonably
21 withhold its approval. Denial of a proposed dual arrangement or facility improvement shall be
22 supported by credible evidence that it will substantially affect in an adverse way the current
23 franchisor or community. Denial of a proposed relocation shall be supported by credible evidence
24 that the new location is not at least equal to the franchisee's former facility.

1 This section does not apply to agreements pertaining to the lease or sale of real property.

2 Section 2. That § 32-6B-76 be amended to read as follows:

3 32-6B-76. Approval by a manufacturer or franchisor of an application filed under
4 §§ 32-6B-73 to 32-6B-78, inclusive, may not be unreasonably withheld. It is unreasonable for
5 a manufacturer or franchisor to reject a prospective transferee ~~who is of good moral character~~
6 ~~and~~ who otherwise meets the manufacturer's or franchisor's written, reasonable, and uniformly
7 applied standards or qualifications, if any, relating to the prospective transferee's business
8 experience and financial qualifications.

9 Section 3. That § 32-6B-79 be amended to read as follows:

10 32-6B-79. In §§ 32-6B-79 to 32-6B-83, inclusive, the term, manufacturer, includes a
11 representative or a person or entity who is ~~affiliated with a manufacturer or representative, or~~
12 ~~who~~, directly or indirectly ~~through an intermediary~~, is controlled by, or is under common control
13 with, the manufacturer. For purposes of this section, a person or entity is controlled by a
14 manufacturer if the manufacturer has the authority directly or indirectly, by law or by agreement
15 of the parties, to direct or influence the management and policies of the person or entity.

16 Section 4. That § 32-6B-84 be amended to read as follows:

17 32-6B-84. Notwithstanding the terms of any franchise agreements, the manufacturer or
18 franchisor may exercise a right of first refusal to acquire the motor vehicle dealer's assets or
19 ownership if all of the following conditions are met:

- 20 (1) In order to exercise the right of first refusal, the manufacturer or franchisor shall
21 notify the motor vehicle dealer in writing within sixty days of its receipt of the
22 completed proposal for the sale or transfer and all related agreements;
- 23 (2) The exercise of the right of first refusal will result in the dealer receiving the same or
24 greater consideration as the dealer has contracted to receive in connection with the

- 1 proposed change of ownership or transfer;
- 2 (3) The proposed sale or transfer of the dealership's assets does not involve the transfer
- 3 or sale to a member or members of the family of one or more dealers, or to a qualified
- 4 manager with at least two years management experience at the dealership of one or
- 5 more of these dealers, or to a partnership or corporation controlled by such persons;
- 6 (4) The manufacturer or franchisor agrees to pay the reasonable expenses, including
- 7 attorney fees which do not exceed the usual, customary, and reasonable fees charged
- 8 for similar work done for other clients, incurred by the proposed owner or transferee
- 9 prior to the manufacturer's or franchisor's exercise of its right of first refusal in
- 10 negotiating and implementing the contract for the proposed sale or transfer of the
- 11 dealership or dealership assets. Such expenses and attorney fees shall be paid to the
- 12 proposed new owner or transferee at the time of closing of the sale or transfer for
- 13 which the manufacturer or franchisor exercised its right of first refusal. No payment
- 14 of such expenses and attorney fees is required if the new owner or transferee has not
- 15 submitted an accounting of those expenses within thirty days of the dealer's receipt
- 16 of the manufacturer's or franchisor's written request for such an accounting. A
- 17 manufacturer or franchisor may request such accounting before exercising a right of
- 18 first refusal; and
- 19 (5) The dealer does not have any liability to any person as to any disclosed term,
- 20 condition, or issue as a result of a manufacturer or franchisor exercising a right of first
- 21 refusal.

22 Section 5. That chapter 32-6B be amended by adding thereto a NEW SECTION to read as

23 follows:

24 A franchisor may reasonably and periodically audit a franchisee to determine the validity of

1 paid claims or chargebacks for customer or dealer incentives. An audit of incentive payments
2 may apply only to the two-year period immediately preceding the date on which the dealer was
3 notified of an impending audit. The limitations of this section do not apply if the franchisor can
4 prove fraud.