

Article 12A.

Motor Vehicle Captive Finance Source Law.

§ 20-308.13. Regulation of motor vehicle captive finance sources.

The General Assembly finds and declares that the distribution of motor vehicles in the State of North Carolina vitally affects the general economy of the State and the public interest and public welfare, and in the exercise of its police power, it is necessary to regulate motor vehicle captive finance sources doing business in North Carolina to protect and preserve the investments and properties of the citizens of this State. (2005-409, s. 3.)

§ 20-308.14. Definitions.

The definitions contained in G.S. 20-286 shall be applicable to the provisions of this Article. (2005-409, s. 3.)

§ 20-308.15. Prohibited contractual requirements imposed by manufacturer, distributor, or captive finance source.

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

- (1) Require a dealer to grant such captive finance source a power of attorney to do anything on behalf of the dealer other than sign the dealer's name on any check, draft, or other instrument received in payment or proceeds under any contract for the sale or lease of a motor vehicle that is made payable to the dealer but which is properly payable to the captive finance source, is for the purpose of correcting an error in a customer's finance application or title processing document, or is for the purpose of processing regular titling of the vehicle.
- (2) Require a dealer to warrant or guarantee the accuracy and completeness of any personal, financial, or credit information provided by the customer on the credit application and/or in the course of applying for credit other than to require that the dealer make reasonable inquiry regarding the accuracy and completeness of such information and represent that such information is true and correct to the best of the dealer's knowledge.
- (3) Require a dealer to repurchase, pay off, or guaranty any contract for the sale or lease of a motor vehicle or to require a dealer to indemnify, defend, or hold harmless the captive finance source for settlements, judgments, damages, litigation expenses, or other costs or expenses incurred by such captive finance source unless the obligation to repurchase, pay off, guaranty, indemnify, or hold

harmless resulted directly from (i) the subject dealer's material breach of the terms of a written agreement with the captive finance source or the terms for the purchase of an individual contract for sale or lease that the captive finance source communicates to the dealer before each such purchase, except to the extent the breached terms are otherwise prohibited under subdivisions (1) through (8) of this section, or (ii) the subject dealer's violation of applicable law. For purposes of this section, the dealer may, however, contractually obligate itself to warrant the accuracy of the information provided on the finance contract, but such warranty can only be enforced if the captive finance source gives the dealer a reasonable opportunity to cure or correct any errors on the finance contract where cure or correction is possible. For purposes of this section, any allegation by a third party that would constitute a breach of the terms of a written agreement between the dealer and a captive finance source shall be considered a material breach.

- (4) Notwithstanding the terms of any contract or agreement, treat a dealer's breach of an agreement between the dealer and a captive finance source with respect to the captive finance source's purchase of individual contracts for the sale or lease of a motor vehicle as a breach of such agreement with respect to purchase of other such contracts, nor shall such a breach, in and of itself, constitute a breach of any other agreement between the dealer and the captive finance source, or between the dealer and any affiliate of such captive finance source.
- (5) Require a dealer to waive any defenses that may be available to it under its agreements with the captive finance source or under any applicable laws.
- (6) Require a dealer to settle or contribute any of its own funds or financial resources toward the settlement of any multiparty or class action litigation without obtaining the dealer's voluntary and written consent subsequent to the filing of such litigation.
- (7) Require a dealer to contribute to any reserve or contingency account established or maintained by the captive finance source, for the financing of the sale or lease of any motor vehicles purchased or leased by any of the dealer's customers, in any amount or on any basis other than the reasonable expected amount of future finance reserve chargebacks to the dealer's account. This section shall not apply to or limit (i) reasonable amounts reserved and maintained related to the sale or financing of any products ancillary to the sale, lease, or financing of the motor vehicle itself; (ii) a delay or reduction in the payment of dealer's portion of the finance income pursuant to an agreement between the dealer and a captive finance source under which the dealer agrees to such delay or reduction in exchange for the limitation, reduction, or elimination of the dealer's responsibility for finance reserve chargebacks; or (iii) a chargeback to a dealer (or offset of any amounts otherwise payable to a dealer by the captive finance source) for any indebtedness properly owing from a dealer to the captive finance source as part of a specific program covered by this section, the terms of which have been agreed to by the dealer in advance, except to the extent such chargeback would otherwise be prohibited under subdivisions (1) through (8) of this section.

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

Any clause or provision in any franchise or agreement between a dealer and a manufacturer, factory branch, distributor, or distributor branch, or between a dealer and any captive finance source, that is in violation of or that is inconsistent with any of the provisions of this section shall be voidable, to the extent that it violates this section, at any time at the election of the dealer. (2005-409, s. 3.)

§ 20-308.16. Powers of Commissioner.

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

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

(c) The Commissioner shall have the power in hearings arising under this Article to enter scheduling orders and limit the time and scope of discovery; to determine the date, time, and place where hearings are to be held; to subpoena witnesses; to take depositions of witnesses; and to administer oaths.

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

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

(f) In the event that a dealer, who is permitted or required to file a notice, protest, or petition before the Commissioner within a certain period of time in order to adjudicate, enforce, or protect rights afforded the dealer under this Article, voluntarily elects to appeal a policy, determination, or decision of the captive finance source through an appeals board or internal grievance procedure of the captive finance source, or to participate in or refer the matter to mediation, arbitration, or other alternative dispute resolution procedure or process established or endorsed by the captive finance source, the applicable period of time for the dealer to file the notice, protest, or petition before the Commissioner under this Article shall not commence until the captive finance source's appeal board or internal grievance procedure, mediation, arbitration, or appeals process of the captive finance source has been completed and the dealer has received

notice in writing of the final decision or result of the procedure or process. Nothing, however, contained in this subsection shall be deemed to require that any dealer exhaust any internal grievance or other alternative dispute process required or established by the captive finance source before seeking redress from the Commissioner as provided in this Article. (2005-409, s. 3.)

§ 20-308.17. Rules and regulations.

The Commissioner may make such rules and regulations, not inconsistent with the provisions of this Article, as he shall deem necessary or proper for the effective administration and enforcement of this Article, provided that a copy of such rules and regulations shall be mailed to each motor vehicle dealer licensee and captive finance source 30 days prior to the effective date of such rules and regulations. (2005-409, s. 3.)

§ 20-308.18. Hearing notice.

In every case of a hearing before the Commissioner authorized under this Article, the Commissioner shall give reasonable notice of each such hearing to all interested parties, and the Commissioner's decision shall be binding on the parties, subject to the rights of judicial review and appeal as provided in Chapter 150B of the General Statutes. The costs of such hearings shall be assessed by the Commissioner. (2005-409, s. 3.)

§ 20-308.19. Article applicable to existing and future agreements.

The provisions of this Article shall be applicable to all contracts and agreements existing between dealers and captive finance sources at the time of its ratification and to all such future contracts and agreements. (2005-409, s. 3.)

§ 20-308.20. Jurisdiction.

A new motor vehicle dealer located in this State may bring suit against any captive finance source engaged in commerce in this State in the General Court of Justice in the State of North Carolina that has proper venue. (2005-409, s. 3.)

§ 20-308.21. Civil actions for violations.

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

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

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

(d) Any association that is comprised of a minimum of 400 new motor vehicle dealers, or a minimum of 10 motorcycle dealers, substantially all of whom are new motor vehicle dealers located within North Carolina, and which represents the collective interests of its members, shall have standing to file a petition before the Commissioner or a cause of action in any court of competent jurisdiction for itself, or on behalf of any or all of its members, seeking declaratory and injunctive relief. Prior to bringing an action, the association and captive finance source shall initiate mediation as set forth in G.S. 20-301.1(b). An action brought pursuant to this subsection may seek a determination whether one or more captive finance sources doing business in this State have violated any of the provisions of this Article, or for the determination of any rights created or defined by this Article, so long as the association alleges an injury to the collective interest of its members cognizable under this section. A cognizable injury to the collective interest of the members of the association shall be deemed to occur if a captive finance source doing business in this State has engaged in any conduct or taken any action which actually harms or affects all of the franchised new motor vehicle dealers holding agreements with that captive finance source in this State. With respect to any administrative or civil action filed by an association pursuant to this subsection, the relief granted shall be limited to declaratory and injunctive relief and in no event shall the Commissioner or court enter an award of monetary damages. (2005-409, s. 3.)

§ 20-308.22. Applicability of this Article.

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

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

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

(d) It shall be unlawful for a captive finance source to use any subsidiary corporation, affiliated corporation, or any other controlled corporation, partnership, association, or person to accomplish what would otherwise be illegal conduct under this Article on the part of the captive finance source. (2005-409, s. 3.)