

STATE OF NEW YORK

61

2017-2018 Regular Sessions

IN ASSEMBLY

(Prefiled)

January 4, 2017

Introduced by M. of A. GANTT -- read once and referred to the Committee on Transportation

AN ACT to amend the vehicle and traffic law, in relation to warranties and sales incentives and certain technical provisions therein

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 465 of the vehicle and traffic law, as amended by chapter 490 of the laws of 2008, subdivisions 1, 3, 4, 6 and 7 as amended by chapter 26 of the laws of 2014, is amended to read as follows:

§ 465. Procedures relating to warranties and sales incentives. 1. (a) Every franchisor shall properly fulfill any warranty agreement and/or franchisor's service contract and shall compensate each of its franchised motor vehicle dealers for warranty parts and labor in amounts which reflect reasonable compensation for such work. All warranty claims and/or claims under a franchisor's service contract made by franchised motor vehicle dealers shall be paid within thirty days following their approval. For the purposes of this section, warranty claims shall include voluntary recalls established by the franchisor, and any recalls pursuant to 49 U.S.C. 301. For parts reimbursement~~[-]~~ (other than components, systems, fixtures, appliances, furnishings, accessories and features of a house coach that are designed, used and maintained primarily for nonvehicular residential purposes[-]) and for labor reimbursement, reasonable compensation shall not be less than the price and rate charged by the franchised motor vehicle dealer for like parts or services to non-warranty and/or non-service contract customers.

(b) For purposes of this section, ~~[the price and rate charged by the franchised motor vehicle dealer for parts may be established]~~ the franchised motor vehicle dealer may establish its warranty reimbursement price and rate by submitting to the franchisor one hundred sequential

EXPLANATION--Matter in italics (underscored) is new; matter in brackets ~~[-]~~ is old law to be omitted.

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1 nonwarranty customer-paid service repair orders or the number of sequen-
2 tial nonwarranty customer-paid service repair orders written within a
3 ninety day period, whichever is less, covering repairs, regardless of
4 the reason for the repairs, made no more than one hundred eighty days
5 before the submission, and declaring the price and rate, including aver-
6 age markup ~~[for]~~ used by the franchised motor vehicle dealer as its
7 reimbursement rate.

8 (c) With regard to any submission by a franchised motor vehicle dealer
9 under this section, the following provisions shall apply: (i) the fran-
10 chised motor vehicle dealer shall determine the individual markup of
11 each qualifying part listed in the franchised motor vehicle dealer's
12 submission, which individual markups the franchised motor vehicle dealer
13 shall then average, which average of the individual markups shall deter-
14 mine the "average" markup to be used as the dealer's reimbursement rate;
15 (ii) the dealer may authorize any employee or representative of the
16 dealership to sign the dealer's declaration of a rate and to submit the
17 request for reimbursement by a manufacturer at that rate; (iii) it shall
18 be within the dealer's sole discretion as to the means by which the
19 necessary information is provided to the franchisor to support the aver-
20 age parts markup calculation; (iv) all manufacturers shall designate an
21 address to which their franchised dealers or representatives may submit
22 a request under this section, proof of mailing or delivery to such
23 address shall be sufficient evidence raising a presumption that such
24 request was delivered to the manufacturer; and (v) notwithstanding
25 anything contained in this section, the franchised motor vehicle dealer
26 shall include in its calculation those non-warranty customer paid-for
27 parts otherwise covered by the franchisor's warranty program, regardless
28 of the reason they were supplied to the non-warranty customer, including
29 parts routinely replaced as part of regular maintenance on a vehicle,
30 including, but not limited to belts, brakes, batteries, keys, transmit-
31 ters and transmitter batteries, windshield wipers, sealants, bulbs,
32 headlight and taillight lenses, fluids, pumps, filters and similar parts
33 provided, however, the franchised motor vehicle dealer shall not be
34 required in its submission to perform any of the following:

35 (1) list on any form, spreadsheet, or other compilation those repair
36 orders which do not contain parts that the dealer is relying on for the
37 calculation of the average markup;

38 (2) include in any calculation of its average markup tires, wheels,
39 any parts or items it actually used or provided in the repair of phys-
40 ical damage to the body or chassis of a vehicle, including, but not
41 limited to, body panels, windows (glass or other material), doors, bump-
42 ers, fenders, or similar items, or the paint or other finishing materi-
43 als for such items;

44 (3) include in any calculation of its average markup any parts or
45 items actually used or provided in the course of standard vehicle prepa-
46 ration for sale to a customer;

47 (4) include in any calculation of its average markup any parts actual-
48 ly provided internally to various departments within the franchised
49 motor vehicle dealership's business; and

50 (5) include in any calculation of its average markup any type of parts
51 provided by the franchisor only as a matter of "goodwill" rather than in
52 the course of regular warranty service.

53 (d) For purposes of this section, the price and rate charged by the
54 franchised motor vehicle dealer for labor may be established by submit-
55 ting one hundred sequential nonwarranty customer-paid service repair
56 orders, or the number of sequential nonwarranty customer-paid service

1 repair orders, written in the month preceding the submission, whichever
2 is less, covering repairs, regardless of the reason for the repairs, and
3 dividing the amount of the dealer's total labor sales for retail custom-
4 er repairs by the number of total labor hours that generated those
5 sales, and declaring the resulting average labor rate for the franchised
6 motor vehicle dealer as its reimbursement rate. The franchised motor
7 vehicle dealer shall not use in any calculation of its labor rate any
8 labor conducted in the course of standard vehicle preparation for sale
9 to a customer, or in the course of internal service performed for vari-
10 ous departments within the franchised motor vehicle dealership's busi-
11 ness.

12 (e) The reimbursement rate so declared shall go into effect thirty
13 days following the declaration ~~[and].~~ The declaration shall be presumed
14 to be ~~[reasonable, however a franchisor may rebut such presumption by~~
15 ~~showing that such rate so established is unreasonable in light of the~~
16 ~~practices of all other franchised motor vehicle dealers in the vicinity~~
17 ~~offering the same line make.]~~ accurate when submitted as set forth under
18 this section providing a detailed, complete, written explanation of any
19 part or item included or omitted from the declaration calculation that
20 is not consistent with the provisions of this section to the franchised
21 motor vehicle dealer, within fifteen days of receipt by the franchisor
22 of the submission or any material amendment thereto along with the
23 return of the repair orders upon which the manufacturer is relying for
24 its objection or objections. The franchisor waives any right to rebut
25 the submission if the franchisor fails to provide the written explana-
26 tion described in this paragraph within the fifteen day period following
27 the motor vehicle dealer's submission. The franchised motor vehicle
28 dealer may choose to correct its submission based upon the franchisor's
29 written rebuttal without being required to make a completely new
30 submission, if done so within thirty days of receiving the franchisor's
31 written rebuttal. Any such amendment to the initial submission will
32 relate back to the date of the initial submission and any resulting
33 price or rate shall be paid by the franchisor retroactively, without
34 penalty, on all claims submitted by the franchised motor vehicle dealer
35 thirty days from the date of the initial submission. If the franchised
36 motor vehicle dealer does not agree with the franchisor's rebuttal, the
37 price or rate so declared shall become effective according to this
38 section unless the franchisor institutes an action pursuant to this
39 article, claiming that the franchised motor vehicle dealer has violated
40 the provisions of this section, within thirty days from the date of the
41 franchisee's response to the franchisor's rebuttal. The burden of proof
42 in any such action shall be on the franchisor.

43 (f) The franchised motor vehicle dealer shall not request a change in
44 the reimbursement rate more often than once in each calendar year.

45 (g) A franchisor who fails to reimburse warranty and labor claims
46 established pursuant to this section shall be liable to the franchised
47 motor vehicle dealer for all such claims at the price and rate submitted
48 by the franchisee from the time such submission was made. In addition,
49 any franchisor who fails to so reimburse such claims shall be subject to
50 a penalty of five hundred dollars per claim payable to the franchised
51 motor vehicle dealer. An additional penalty of one thousand dollars per
52 claim shall be payable to the franchised motor vehicle dealer for each
53 successive ten day period thereafter in which the claim is not reim-
54 bursed as required by this section. In order to ensure timely payment of
55 claims submitted under this section, a franchised motor vehicle dealer
56 may, beginning upon the expiration of the thirty day period established

1 by this section, withhold any payments owed to a franchisor equal to the
2 claims made by the franchised motor vehicle dealer, plus the penalty,
3 until the franchisor makes warranty and labor reimbursement pursuant to
4 this section. Any dealer who exercises such right shall not be deemed in
5 default of any obligations under the franchise or any other agreement
6 with the manufacturer or any subsidiary or affiliate of the manufactur-
7 er.

8 (h) In establishing the parts reimbursement or the labor reimbursement
9 rate, the franchisor shall not require a franchised motor vehicle dealer
10 to establish said rate by a methodology, or by requiring information,
11 that is unduly burdensome or time consuming to provide[, ~~including, but~~
12 ~~not limited to, a transaction by transaction calculation~~].

13 (i) In no event may a franchisor require a dealer to accept reimburse-
14 ment for parts based on the franchisor's suggested list price (whether
15 called MSRP or known by any other designation) in lieu of determining
16 and reimbursing a dealer at the dealer's average markup pursuant to this
17 section.

18 (j) In no event shall any franchisor retaliate or threaten to retali-
19 ate against a dealer for exercising its rights under this section or
20 under any other section of this article. Retaliation shall include, but
21 not be limited to, threatening to conduct, or conducting, an audit of
22 dealership records, threatening to withhold, or withholding, products,
23 allocations, or benefits from any dealer, or imposing additional costs
24 or penalties on any dealer that the manufacturer does not impose on
25 every dealer either within or without the state.

26 (k) A franchisor may not otherwise recover from a franchised motor
27 vehicle dealer the franchisor's costs for reimbursing a franchised motor
28 vehicle dealer for warranty parts and labor claims.

29 2. For the purposes of this section, the following parts or types of
30 repairs shall be excluded from the parts and/or labor calculations and
31 the franchisor's reimbursement requirements under this section: (a)
32 parts sold at wholesale; (b) tires; (c) routine maintenance not covered
33 under any retail customer warranty such as fluids, filters and belts not
34 provided in the course of repairs; (d) vehicle reconditioning; and (e)
35 batteries replaced as part of a routine maintenance operation. If the
36 franchisor rejects the declaration or attempts to rebut the declaration
37 because of an error in the dealer's submission, the franchisor shall
38 identify with specificity the reason for rejection and identify the
39 error or errors within the submission. In the event the franchisor
40 rejects or rebuts the dealer's initial declaration, the dealer shall
41 have the opportunity, within sixty days to resubmit the full and
42 corrected declaration addressing the alleged error or errors identified
43 by the franchisor. The franchisor shall respond within sixty days. The
44 one hundred eighty day requirement for the repair orders shall be stayed
45 from the date of initial submission. In any action or proceeding held
46 pursuant to this subdivision, the franchisor shall have the burden of
47 proving that the rate declared by the dealer was unreasonable as
48 described in this subdivision and that the proposed adjustment of the
49 average percentage markup or rejection of the submission is reasonable
50 pursuant to the provisions of this subdivision.

51 [2] 3. All warranty or sales incentive claims shall be either
52 approved or disapproved, within a reasonable amount of time. A reason-
53 able amount of time shall be: No less than thirty days after [their]
54 receipt. [~~When any such claim is disapproved the franchised motor vehi-~~
55 ~~cle dealer shall be notified in writing of its disapproval within said~~
56 ~~period. Each such notice shall state the specific grounds upon which the~~

~~disapproval is based. Failure to disapprove a claim within thirty days shall be deemed approval]~~ by the franchisor of a warranty claim; and

(b) No less than five business days from the date upon which the franchised motor vehicle dealer provides notice to the franchisor certifying the completion of a sale which qualifies under a sales incentive program. A sale shall be considered completed upon delivery of the vehicle to the customer.

~~[3]~~ 4. No franchisor shall conduct an audit or charge back any warranty payment, or any sales, advertising or marketing incentive payment ("incentive payments") or otherwise hold a franchised motor vehicle dealer liable for charges more than one year, or five years in the case of fraud, after the date the franchisor made such payment to the dealer, without providing a notice to a franchised motor vehicle dealer of, or a mechanism that makes available to a franchised motor vehicle dealer, information regarding errors or issues regarding such dealer's warranty, sales, advertising or marketing incentive claims that are the subject of the audit or chargeback. Nothing in this section shall be deemed to grant a dealer the right to access any file held by the manufacturer evaluating such dealer. In connection with a claim for warranty reimbursements, the dealer's failure to document properly one part of a warranty repair that contains more than one part shall not be the sole basis to charge back the entire repair. A manufacturer shall not deny a claim submitted under this section based solely on a dealer's incidental failure to comply with a specific claim processing requirement, a clerical error, or other administrative technicality, provided that the failure does not call into question the legitimacy of the claim and that the dealer corrects the claim according to franchisor guidelines.

~~[4]~~ 5. A franchisor shall not charge a dealer back subsequent to the payment of a warranty, sales, advertising or marketing incentive claim unless a representative of the franchisor has met in person at the dealership, or by telephone, with an officer or employee of the dealer designated by the dealer and explained in detail the basis for each of the proposed charge backs and thereafter given the dealer's representative a reasonable opportunity at the meeting, or during the telephone call, to explain the dealer's position relating to each of the proposed charge backs. In the event the dealer was selected for audit or review on the basis that some or all of the dealer's claims were viewed as excessive in comparison to average, mean or aggregate data accumulated by the franchisor, or in relation to claims submitted by a group of other franchisees, the franchisor shall, at or prior to the meeting or telephone call with the dealer's representative, provide the dealer with a written statement containing the basis or methodology upon which the dealer was selected for audit or review.

~~[5]~~ 6. A franchisor shall not deny or charge back a payment for warranty work claimed by the dealer unless the franchisor satisfies its burden of proof that the dealer did not make a good faith effort to comply with the reasonable written procedures of the franchisor or that the dealer did not actually perform the work.

~~[6]~~ 7. A franchisor shall not deny or charge back a sales, advertising or marketing incentive payment made to a dealer unless the claim was materially false or fraudulent or the dealer failed to reasonably substantiate the claim in accordance with the manufacturer's reasonable procedures.

~~[7]~~ 8. After all internal dispute resolution processes provided through the franchisor have been resolved, the franchisor shall give

1 notice to the dealer of the final amount of a proposed warranty, sales,
2 advertising or marketing incentive charge back. If the dealer institutes
3 an action pursuant to this article within thirty days of receipt of such
4 notice, the proposed charge back shall be stayed, without bond, during
5 the pendency of such action and until the final judgment has been
6 rendered in an adjudicatory proceeding or action as provided in section
7 four hundred sixty-nine of this article. The franchisor shall not impose
8 the chargeback, debit the dealer's account, or otherwise seek to obtain
9 all or any part of the chargeback funds from the dealer during the thir-
10 ty-day period in which the dealer has the opportunity to file an action
11 as set forth above.

12 § 2. This act shall take effect immediately.