

SECOND REGULAR SESSION

SENATE BILL NO. 498

89TH GENERAL ASSEMBLY

INTRODUCED BY SENATOR HOWARD.

Pre-filed December 1, 1997, and 1,000 copies ordered printed.

TERRY L. SPIELER, Secretary.

S2310.011

AN ACT

To amend chapter 407, RSMo, by adding thereto nine new sections relating to merchandising practices.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Chapter 407, RSMo, is amended by adding thereto nine new sections, to be known as sections 407.600, 407.603, 407.607, 407.609, 407.612, 407.615, 407.618, 407.620 and 407.623, to read as follows:

407.600. As used in sections 407.600 to 407.623, unless the context otherwise requires, the following terms mean:

(1) "Administrative hearing commission", the body established in chapter 621, RSMo, to conduct administrative hearings;

(2) "Coerce", to force a person to act in a given manner or to compel by pressure or threat but shall not be construed to include the following:

(a) Good faith recommendations, exposition, argument, persuasion or attempts at persuasion;

(b) Notice given in good faith to any franchisee of such franchisee's violation of terms or provisions of such franchise or contractual agreement;

(c) Any other conduct set forth in section 407.618 as a defense to an action brought pursuant to sections 407.600 to 407.623; or

(d) Any other conduct set forth in sections 407.600 to 407.623 that is permitted of the franchisor or is expressly excluded from coercion or a violation of sections 407.600 to 407.623;

(3) "Franchise", a written arrangement or contract for a definite or indefinite period, in which a person grants to another person a license to use, or the right to

grant to others a license to use, a trade name, trademark, service mark, or related characteristics, in which there is a community of interest in the marketing of goods or services, or both, at wholesale or retail, by agreement, lease or otherwise, and in which the operation of the franchisee's business with respect to such franchise is substantially reliant on the franchisor for the continued supply of franchised new motorcycles, parts and accessories for sale at wholesale or retail;

(4) "Franchisee", a person to whom a franchise is granted;

(5) "Franchisor", a person who grants a franchise to another person;

(6) "Motorcycle", a motor vehicle operated on two wheels;

(7) "New", when referring to motorcycles or parts, means those motorcycles or parts which have not been held except as inventory, as that term is defined in subdivision (4) of section 400.9-109, RSMo;

(8) "Person", a sole proprietor, partnership, corporation, or any other form of business organization.

407.603. Any person who is engaged or engages directly or indirectly in purposeful contacts within the state of Missouri in connection with the offering, advertising, purchasing, selling, or contracting to purchase or to sell new motorcycles, or who, being a motorcycle franchisor, is transacting or transacts any business with a motorcycle franchisee who maintains a place of business within the state and with whom the person has a franchise, shall be subject to the jurisdiction of the courts of the state of Missouri, upon service of process in accordance with the provisions of section 506.510, RSMo, irrespective of whether such person is a manufacturer, importer, distributor or dealer in new motorcycles.

407.607. 1. Any party seeking relief pursuant to the provisions of sections 407.600 to 407.623 may file an application for a hearing with the administrative hearing commission within the time periods specified in this section. The application for a hearing shall comply with the requirements for a request for agency action set forth in chapter 536, RSMo. Simultaneously, with the filing of the application for a hearing with the administrative hearing commission, the applicant shall send by certified mail, return receipt requested, a copy of the application to the party or parties against whom relief is sought. Within ten days of receiving a timely application for a hearing, the administrative hearing commission shall enter an order fixing a date, time and place for a hearing on the record. Such hearing shall be within forty-five days of the date of the order but the administrative hearing commission may continue the hearing date up to twenty-five additional days by agreement of the parties or upon a finding of good cause. The administrative hearing commission shall send by certified mail, return receipt requested, a copy of the order to the party seeking relief and to the party or parties against whom relief is sought. The order shall also state that the party against

whom relief is sought shall not proceed with the initiation of its activity or activities until the administrative hearing commission issues its final decision or order.

2. Unless otherwise expressly provided in sections 407.600 to 407.623, the provisions of chapter 536, RSMo, shall govern hearings and prehearing procedures conducted pursuant to the authority of this section. The administrative hearing commission shall issue a final decision or order, in proceedings arising pursuant to the provisions of sections 407.600 to 407.623, within forty-five days from the conclusion of the hearing. Any final decisions shall be subject to review pursuant to a petition for review to be filed in the court of appeals in the district in which the hearing, or any part of the hearing, is held and by delivery of copies of the petition to each party of record, within thirty days after the mailing or delivery of the final decision and notice of the final decision in such a case. Review pursuant to this section shall be exclusive and decisions of the administrative hearing commission reviewable pursuant to this section shall not be reviewable in any other proceeding, and no other official or court shall have power to review any such decision by an action in the nature of mandamus or otherwise, except pursuant to the provisions of this section. The party seeking review shall be responsible for the filing of the transcript and record of all proceedings before the administrative hearing commission with the appropriate court of appeals.

3. Any franchisee receiving a notice from a franchisor pursuant to the provisions of sections 407.600 to 407.623, or any franchisee adversely affected by a franchisor's acts or proposed acts described in the provisions of sections 407.600 to 407.623, shall be entitled to file an application for a hearing before the administrative hearing commission for a determination as to whether the franchisor has good cause for its acts or proposed acts.

4. Not less than sixty days before the effective date of the initiation of any enumerated act pursuant to section 407.609 (5), (6), (7) or (14), a franchisor shall give written notice to the affected franchisee or franchisees, by certified mail, return receipt requested, except as follows:

(1) Upon the initiation of an act pursuant to section 407.609 (5), such notice shall be given not less than fifteen days before the effective date of such act only if the grounds for the notice include the following:

(a) Transfer of any ownership or interest in the franchised dealership without the consent of the motorcycle franchisor;

(b) Material misrepresentation by the motorcycle franchisee in applying for the franchise;

(c) Insolvency of the motorcycle franchisee or the filing of any petition by or against the motorcycle franchisee under any bankruptcy or receivership law;

(d) Any unfair business practice by the motorcycle franchisee after the

motorcycle franchisor has issued a written warning to the motorcycle franchisee to desist from such practice;

(e) Conviction of the motorcycle franchisee of a crime which is a felony;

(f) Failure of the motorcycle franchisee to conduct customary sales and service operations during customary business hours for at least seven consecutive business days unless such closing is due to an act of God, strike or labor difficulty or other cause over which the motorcycle franchisee has no control; or

(g) Revocation of the motorcycle franchisee's license;

(2) Upon initiation of an act pursuant to section 407.609 (7), such notice shall be given within sixty days of the franchisor's receipt of a written proposal to consummate such sale or transfer and the receipt of all necessary information and documents generally used by the franchisor to conduct its review. The franchisor's notice of disapproval shall also specify the reasonable standard which the franchisor contends is not satisfied and the reason the franchisor contends such standard is not satisfied. Failure on the part of the franchisor to provide such notice shall be conclusively deemed an approval by the franchisor of the proposed sale or transfer to the proposed transferee. A franchisee's application for a hearing shall be filed with the administrative hearing commission within fifteen days from receipt of such franchisor's notice;

(3) Pursuant to section 407.609 (14)(a) or (b), such notice shall be given within sixty days of the franchisor's receipt of a deceased or incapacitated franchisee's designated family member's intention to succeed to the franchise or franchises or of the franchisor's receipt of the personal and financial data of the designated family member, whichever is later.

5. A franchisor's notice to a franchisee or franchisees pursuant to section 407.609 (5), (6), (7) or (14) shall contain a statement of the particular grounds supporting the intended action or activity which shall include any reasonable standards which were not satisfied. The notice shall also contain at a minimum, on the first page thereof, a conspicuous statement which reads as follows: "NOTICE TO FRANCHISEE: YOU MAY BE ENTITLED TO FILE A PROTEST WITH THE MISSOURI ADMINISTRATIVE HEARING COMMISSION IN JEFFERSON CITY, MISSOURI, AND HAVE A HEARING IN WHICH YOU MAY PROTEST THE CONTENTS OF THIS NOTICE. ANY ACTION MUST BE FILED WITHIN FIFTEEN DAYS FROM RECEIPT OF THIS NOTICE."

6. When more than one application for a hearing is filed with the administrative hearing commission, the administrative hearing commission may consolidate the applications into one proceeding to expedite the disposition of all relevant issues.

7. In all proceedings before the administrative hearing commission pursuant to this section and section 407.609, where the franchisor is required to give notice

pursuant to subsection 4 of this section, the franchisor shall have the burden of proving by a preponderance of the evidence that good cause exists for its actions. In all other actions, the franchisee shall have the burden of proof.

407.609. Notwithstanding the terms of any franchise agreement, the performance, whether by act or omission, by a motorcycle franchisor of any or all of the following acts enumerated in this subsection are hereby defined as unlawful practices, the remedies for which are set forth in section 407.618:

(1) To engage in any conduct which is capricious, in bad faith, or unconscionable and which causes damage to a motorcycle franchisee or to the public; provided, that good faith conduct engaged in by motorcycle franchisors as sellers of new motorcycles or parts or as holders of security interests therein, in pursuit of rights or remedies accorded to sellers of goods or to holders of security interests pursuant to the provisions of chapter 400, RSMo, uniform commercial code, shall not constitute unfair practices pursuant to sections 407.600 to 407.623;

(2) To coerce any motorcycle franchisee to accept delivery of any new motorcycle or motorcycles, equipment, parts or accessories therefor, or any other commodity or commodities which such motorcycle franchisee has not ordered after such motorcycle franchisee has rejected such commodity or commodities. It shall not be deemed a violation of this section for a motorcycle franchisor to require a motorcycle franchisee to have an inventory of parts, tools and equipment reasonably necessary to service the motorcycles sold by a motorcycle franchisor; or new motorcycles reasonably necessary to meet the demands of dealers or the public;

(3) To unreasonably refuse to deliver in reasonable quantities and within a reasonable time after receipt of orders for new motorcycles, such motorcycles as are so ordered and as are covered by such franchise and as are specifically publicly advertised by such motorcycle franchisor to be available for immediate delivery; provided, however, the failure to deliver any motorcycle shall not be considered a violation of sections 407.600 to 407.623 if such failure is due to an act of God, work stoppage, or delay due to a strike or labor difficulty, shortage of products or materials, freight delays, embargo or other cause of which such motorcycle franchisor has no control;

(4) To coerce any motorcycle franchisee to enter into any agreement with such motorcycle franchisor or to do any other act prejudicial to such motorcycle franchisee, by threatening to cancel any franchise or any contractual agreement existing between such motorcycle franchisor and motorcycle franchisee; provided, however, that notice in good faith to any motorcycle franchisee of such motorcycle franchisee's violation of any provisions of such franchise or contractual agreement shall not constitute a violation of sections 407.600 to 407.623;

(5) To terminate, cancel or refuse to continue any franchise, directly or indirectly through the actions of the franchisor, unless such new motorcycle franchisee substantially defaults in the performance of such franchisee's reasonable and lawful obligations under such franchisee's franchise, or such new motorcycle franchisor discontinues the sale in the state of Missouri of such franchisor's products which are the subject of the franchise:

(a) Notwithstanding the terms of any franchise agreement to the contrary, good cause to terminate, cancel or refuse to continue any franchise agreement shall not be established based upon the fact that the motorcycle franchisee owns, has an investment in, participates in the management of or holds a franchise agreement for the sale or service of another make or line of new motorcycles or the motorcycle dealer has established another make or line of new motorcycles or service in the same dealership facilities as those of the motorcycle franchisor prior to February 1, 1997, or such establishment is approved in writing by the franchisee and the franchisor. However, a franchisor may require a franchisee to maintain a reasonable line of credit for each franchise and to comply with each franchisor's reasonable requirements concerning capital, management and facilities. If the franchise agreement requires the approval of the franchisor, such approval shall be requested in writing by the franchisee and the franchisor shall approve or disapprove such a request in writing within sixty days of receipt of such request. A request from a franchisee shall be deemed to have been approved if the franchisor fails to notify the franchisee, in writing, of its disapproval within sixty days after its receipt of the written request;

(b) In determining whether good cause exists, the administrative hearing commission shall take into consideration the existing circumstances, including, but not limited to, the following factors:

- a. The franchisee's sales in relation to sales in the market;**
- b. The franchisee's investment and obligations;**
- c. Injury to the public welfare;**
- d. The adequacy of the franchisee's service facilities, equipment, parts and personnel in relation to those of other franchisees of the same line-make;**
- e. Whether warranties are being honored by the franchisee;**
- f. The parties' compliance with their franchise agreement;**
- g. The desire of a franchisor for market penetration or a market study, if any, prepared by the franchisor or franchisee are two factors which may be considered;**
- h. The harm to the franchisor;**

(6) To prevent by contract or otherwise, any motorcycle franchisee from changing the capital structure of the franchisee's franchise of such motorcycle franchisee or the means by or through which the franchisee finances the operation of

the franchisee's franchise, provided the motorcycle franchisee at all times meets any reasonable capital standards agreed to between the motorcycle franchisee and the motorcycle franchisor and grants to the motorcycle franchisor a purchase money security interest in the new motorcycles, new parts and accessories purchased from the motorcycle franchisor;

(7) (a) Prevent, by contract or otherwise, any sale or transfer of a franchisee's franchise or franchises or interest or management thereof; provided, if the franchise specifically permits the franchisor to approve or disapprove any such proposed sale or transfer, a franchisor shall only be allowed to disapprove a proposed sale or transfer if the interest being sold or transferred when added to any other interest owned by the transferee constitutes fifty percent or more of the ownership interest in the franchise and if the proposed transferee fails to satisfy any standards of the franchisor which are in fact normally relied upon by the franchisor prior to its entering into a franchise, and which relate to the proposed management or ownership of the franchise operations or to the qualification, capitalization, integrity or character of the proposed transferee and which are reasonable. A franchisee may request, at any time, that the franchisor provide a copy of the standards which are normally relied upon by the franchisor to evaluate a proposed sale or transfer and a proposed transferee;

(b) The franchisee and the prospective franchisee shall cooperate fully with the franchisor in providing information relating to the prospective transferee's qualifications, capitalization, integrity and character;

(c) In the event of a proposed sale or transfer of a franchise, the franchisor shall be permitted to exercise a right of first refusal to acquire the franchisee's assets or ownership if:

a. The franchise agreement permits the franchisor to exercise a right of first refusal to acquire the franchisee's assets or ownership in the event of a proposed sale or transfer;

b. Such sale or transfer is conditioned upon the franchisor or franchisee entering a franchise agreement with the proposed transferee;

c. The exercise of the right of first refusal shall result in the franchisee and the franchisee's owners receiving the same or greater consideration and the same terms and conditions as contracted to receive in connection with the proposed sale or transfer;

d. The sale or transfer does not involve the sale or transfer to an immediate member or members of the family of one or more franchisee owners, defined as a spouse, child, grandchild, spouse of a child or grandchild, brother, sister or parent of the franchisee owner, or to the qualified manager, defined as an individual who has been employed by the franchisee for at least two years and who otherwise qualifies as

a franchisee operator, or a partnership or corporation controlled by such persons; and

e. The franchisor agrees to pay the reasonable expenses, including attorney's fees which do not exceed the usual, customary and reasonable fees charged for similar work done for other clients, incurred by the proposed transferee prior to the franchisor's exercise of its right of first refusal in negotiating and implementing the contract for the proposed sale or transfer of the franchise or the franchisee's assets. Notwithstanding the foregoing, no payment of such expenses and attorney's fees shall be required if the franchisee has not submitted or caused to be submitted an accounting of those expenses within fourteen days of the franchisee's receipt of the franchisor's written request for such an accounting. Such accounting may be requested by a franchisor before exercising its right of first refusal;

(d) For determining whether good cause exists for the purposes of this subdivision, the administrative hearing commission shall take into consideration the existing circumstances, including, but not limited to, the following factors:

a. Whether the franchise agreement specifically permits the franchisor to approve or disapprove any proposed sale or transfer;

b. Whether the interest to be sold or transferred when added to any other interest owned by the proposed transferee constitutes fifty percent or more of the ownership interest in the franchise;

c. Whether the proposed transferee fails to satisfy any standards of the franchisor which are in fact normally relied upon by the franchisor prior to its entering into a franchise, and which are related to the proposed management or ownership of the franchise operations or to the qualification, capitalization, integrity or character of the proposed transferee which are reasonable;

d. Injury to the public welfare;

e. The harm to the franchisor;

(8) To prevent by contract or otherwise any motorcycle franchisee from changing the executive management of motorcycle franchisee's business, except that any attempt by a motorcycle franchisor to demonstrate by giving reasons that such change in executive management will be detrimental to the distribution of the motorcycle franchisor's motorcycles shall not constitute a violation of this subdivision;

(9) To impose unreasonable standards of performance upon a motorcycle franchisee;

(10) To require a motorcycle franchisee at the time of entering into a franchise arrangement to assent to a release, assignment, novation, waiver or estoppel which would relieve any person from liability imposed by sections 407.600 to 407.623;

(11) To prohibit directly or indirectly the right of free association among motorcycle franchisees for any lawful purpose;

(12) To provide any term or condition in any lease or other agreement ancillary or collateral to a franchise, which term or condition directly or indirectly violates the provisions of sections 407.600 to 407.623;

(13) Upon any termination, cancellation or refusal to continue any franchise or any discontinuation of any line-make or parts or products related to such line-make by a franchisor, fail to pay reasonable compensation to a franchisee as follows:

(a) Any new, undamaged and unsold motorcycles in the franchisee's inventory of either the current model year or purchased from the franchisor within one hundred twenty days prior to receipt of a notice of termination or nonrenewal, provided the motorcycle has less than twenty miles registered on the odometer, including mileage incurred in delivery from the franchisor or in transporting the motorcycle between dealers for sale, at the dealer's net acquisition cost;

(b) The current parts catalog cost to the dealer of each new, unused, undamaged and unsold part or accessory if the part or accessory is in the current parts catalog, less applicable allowances. If the part or accessory was purchased by the franchisee from an outgoing authorized franchisee, the franchisor shall purchase the part for either the price in the current parts catalog or the franchisee's actual purchase price of the part, whichever is less;

(c) The depreciated value determined pursuant to generally accepted accounting principles of each undamaged sign owned by the franchisee which bears a trademark or trade name used or claimed by the franchisor if the sign was purchased from, or purchased at the request of, the franchisor;

(d) The fair market value of all special tools, data processing equipment and motorcycle service equipment owned by the franchisee which were recommended in writing and designated as special tools and equipment and purchased from, or purchased at the request of, the franchisor within three years of the termination of the franchise, if the tools and equipment are in usable and good condition, except for reasonable wear and tear; and

(e) The franchisor shall pay the franchisee the amounts specified in this subdivision within ninety days after the tender of the property subject to the franchisee providing evidence of good and clear title upon return of the property to the franchisor. Unless previous arrangements have been made and agreed upon, the franchisee is under no obligation to provide insurance for the property left after one hundred eighty days;

(14) To prevent or refuse to honor the succession to a franchise or franchises by any legal heir or devisee under the will of a franchisee, under any written instrument filed with the franchisor designating any person as the person's successor franchisee, or pursuant to the laws of descent and distribution of this state; provided:

(a) Any designated family member of a deceased or incapacitated franchisee shall become the succeeding franchisee of such deceased or incapacitated franchisee if such designated family member gives the franchisor written notice of such family member's intention to succeed to the franchise or franchises within forty-five days after the death or incapacity of the franchisee, and agrees to be bound by all of the terms and conditions of the current franchise agreement, and the designated family member meets the current reasonable criteria generally applied by the franchisor in qualifying franchisees. A franchisee may request, at any time, that the franchisor provide a copy of such criteria generally applied by the franchisor in qualifying franchisees;

(b) The franchisor may request from a designated family member such personal and financial data as is reasonably necessary to determine whether the existing franchise agreement should be honored. The designated family member shall supply the personal and financial data promptly upon the request;

(c) If the designated family member does not meet the reasonable criteria generally applied by the franchisor in qualifying franchisees, the discontinuance of the current franchise agreement shall take effect not less than ninety days after the date the franchisor serves the required notice on the designated family member pursuant to section 407.607.4;

(d) The provisions of this subdivision shall not preclude a franchisee from designating any person as the person's successor by written instrument filed with the franchisor, and if such an instrument is filed, it alone shall determine the succession rights to the management and operation of the franchise; and

(e) For determining whether good cause exists, the administrative hearing commission shall take into consideration the existing circumstances, including, but not limited to, the following factors:

a. Whether the franchise agreement specifically permits the franchisor to approve or disapprove any successor;

b. Whether the proposed successor fails to satisfy any standards of the franchisor which are in fact normally relied upon by the franchisor prior to the successor entering into a franchise, and which relate to the proposed management or ownership of the franchise operation or to the qualification, capitalization, integrity or character of the proposed successor and which are reasonable;

c. Injury to the public welfare;

d. The harm to the franchisor;

(15) To coerce, threaten, intimidate or require a franchisee under any condition affecting or related to a franchise agreement, or to waive, limit or disclaim a right that the franchisee may have pursuant to the provisions of sections 407.600 to 407.623. Any contracts or agreements which contain such provisions shall be deemed against the

public policy of the state of Missouri and are void and unenforceable. Nothing in this section shall be construed to prohibit voluntary settlement agreements;

(16) To initiate any act enumerated in this subsection on grounds that it has advised a franchisee of its intention to discontinue representation at the time of a franchisee change.

407.612. When a franchised dealer or manufacturer proposes to establish or relocate a motorcycle dealership within any city not within a county, the dealer or manufacturer shall make reasonable efforts to establish or relocate such dealership in an area within such city that improves the equitable distribution of dealerships within such city and is conveniently located to serve minorities who reside in such city.

407.615. The Missouri motor vehicle commission, in approving licenses for dealer franchises in any metropolitan statistical area with a population of more than one million inhabitants as defined by the federal Office of Management and Budget or its successor agency shall ensure that the community of dealer franchises shall reflect an adequate percentage of minority-owned businesses.

407.618. It shall be a defense for a motorcycle franchisor, to any action brought pursuant to sections 407.600 to 407.623 by a motorcycle franchisee, if it is shown that such motorcycle franchisee has failed to substantially comply with reasonable and lawful requirements imposed by the franchise and other agreements ancillary or collateral thereto, or if the motorcycle franchisee, or any of its officers, have been convicted of a felony relevant to business honesty or business practices, or if the motorcycle franchisee has ceased conducting its business or has abandoned the franchise, or is insolvent as that term is defined in subdivision (23) of section 400.1-201, RSMo, or has filed a voluntary petition in bankruptcy, or has made an assignment for benefit of creditors, or has been the subject of an involuntary proceeding under the federal bankruptcy act or under any state insolvency law which is not vacated within twenty days from the institution thereof, or there has been an appointment of a receiver or other officer having similar powers for the motorcycle franchisee or the motorcycle franchisee's business who is not removed within twenty days from the person's appointment, or there has been a levy under attachment, execution or similar process which is not within ten days vacated or removed by payment or bonding, and it shall be a defense to any action brought pursuant to sections 407.600 to 407.623 that the complained of conduct by a motorcycle franchisor was undertaken in good faith in pursuit of rights or remedies accorded to a motorcycle franchisor as a seller of goods or a holder of a security interest pursuant to the provisions of chapter 400, RSMo.

407.620. No franchisee or franchisor shall use any false, deceptive or misleading advertising.

407.623. In addition to the administrative relief provided in sections 407.600 to

407.623, any motorcycle franchisee may bring an action against a motorcycle franchisor with whom the franchisee has a franchise, for an act or omission which constitutes an unlawful practice as defined in section 4 of this act to recover damages sustained by reason thereof, and, where appropriate, such motorcycle franchisee shall be entitled to injunctive relief, but the remedies set forth in this section shall not be deemed exclusive and shall be in addition to any other remedies permitted by law.

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