HOUSE BILL REPORT
EHB 2439

As Passed House:
February 13, 2018

Title: An act relating to clarifying the relationship between manufacturers and new motor vehicle dealers by providing tools to resolve disparities including expanding compensation for recalled vehicles.

Brief Description: Clarifying the relationship between manufacturers and new motor vehicle dealers by providing tools to resolve disparities including expanding compensation for recalled vehicles.

Sponsors: Representatives Kirby, Vick, Barkis, Stanford, Ryu and Haler.

Brief History:
Committee Activity:
Business & Financial Services: 1/17/18, 1/26/18 [DP].
Floor Activity:
Passed House: 2/13/18, 98-0.

Brief Summary of Engrossed Bill

- Requires motor vehicle manufacturers (manufacturers) to compensate new motor vehicle dealers (dealers) for all labor and parts required to perform recall repairs.
- Requires manufacturers to compensate their dealers if parts or a remedy are not reasonably available to perform a recall service or repair on a used vehicle held for sale by the dealer in certain circumstances, at a rate tied to the average trade-in value of the vehicle.
- Establishes requirements and procedures for submitting reimbursement claims to manufacturers and for when a claim must be paid.
- Limits how manufacturers may modify their franchise agreements with dealers, and when a dealer's designated area of primary responsibility may include out of state areas.
- Modifies the relief that a dealer and a corporation or association of dealers may seek in a superior or district court, and specifies a court may increase an award by up to three times the actual damages sustained.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

- Establishes a process for the Department of Licensing (DOL) to handle an alleged violation of the motor vehicle franchise law as an adjudicative proceeding, and gives a corporation or association of dealers standing to represent itself or individual dealers before the DOL and in court.

HOUSE COMMITTEE ON BUSINESS & FINANCIAL SERVICES

Majority Report: Do pass. Signed by 11 members: Representatives Kirby, Chair; Reeves, Vice Chair; Vick, Ranking Minority Member; Walsh, Assistant Ranking Minority Member; Barkis, Bergquist, Blake, Jenkin, McCabe, Santos and Stanford.

Staff: Peter Clodfelter (786-7127).

Background:

The Department of Licensing (DOL) regulates persons who engage in business as new motor vehicle dealers (dealer) and motor vehicle manufacturers (manufacturers). The DOL has the authority to issue and deny licenses. Manufacturers maintain a franchise relationship with their dealers, and the responsibilities of each party are delineated in state law and the franchise agreement with the parties. State law generally dictates when a manufacturer may own or terminate a dealer's franchise and the compensation a manufacturer must pay a dealer for warranty work. Also, various practices are prohibited in the dealer franchise law.

For example, a manufacturer is prohibited from taking any adverse action against a dealer, including but not limited to, charge backs or reducing vehicle allocations, for sales and service performance within a designated area of primary responsibility unless the area is reasonable in light of proximity to relevant census tracts to the dealership and competing dealerships, highways and road networks, state borders, any natural or man-made barriers, demographics, including economic factors, and buyer behavior information.

Each manufacturer must specify in its franchise agreement, or in a separate written agreement, with each of its dealers licensed in this state, the dealer's obligation to perform warranty work or service on the manufacturer's products. Each manufacturer must provide each of its dealers with a schedule of compensation to be paid to the dealer for any warranty work or service, including parts, labor, and diagnostic work, required of the dealer by the manufacturer in connection with the manufacturer's products. The schedule of compensation must not be less than the rates charged by the dealer for similar service to retail customers for non-warranty service and repairs, and must not be less than the schedule of compensation for an existing dealer as of a date in 2010.

All claims for warranty work for parts and labor made by dealers must be submitted to the manufacturer within 90 days of the date the work was performed. All claims submitted must be paid by the manufacturer within 30 days following receipt, provided the claim has been approved by the manufacturer. The manufacturer must notify the dealer in writing of any disapproved claim, and must set forth the reasons why the claim was not approved. Any claim not specifically disapproved in writing within 30 days following receipt is approved,

and the manufacturer is required to pay that claim within 30 days of receipt of the claim. The manufacturer has the right to audit claims for warranty work and to charge the dealer for any unsubstantiated, incorrect, or false claims for a period of nine months following payment.

A dealer injured in the dealer's business by a violation of the motor vehicle franchise law may bring an action in superior court or district court, depending on the amount of damages, to recover the actual damages sustained by the dealer, together with the costs of the suit, including reasonable attorneys' fees if the dealer prevails.

Summary of Engrossed Bill:

A motor vehicle manufacturer (manufacturer) must compensate its new motor vehicle dealers (dealers) for all labor and parts required by the manufacturer to perform recall repairs at rates no lower than rates set in accordance with the process in the motor vehicle franchise law for determining rates paid by manufacturers to dealers for warranty work performed by dealers.

If parts or a remedy are not reasonably available to perform a recall service or repair on a used vehicle held for sale by a dealer authorized to sell new vehicles of the same line make within 15 days of the manufacturer issuing the initial notice of recall, and the manufacturer has issued a stop-sale, do-not-drive, or where the issue identified in the notice of recall could otherwise affect the safe operation of the vehicle, the manufacturer must compensate the dealer at a prorated rate of at least 1.75 percent of the average trade-in value as indicated in an independent third-party guide for the year, make, model, and mileage of the recalled vehicle, per month, or portion of a month, while the recall or remedy parts are unavailable and the order remains in effect.

A stop-sale or do-not-drive order is defined as a notification issued by a manufacturer to its franchised dealerships stating that certain used vehicles in inventory should not be sold or leased, at retail or wholesale, due to a federal safety recall for a defect or a noncompliance, or a federal or state of California emissions recall.

The new requirements apply only to used vehicles subject to safety or emissions recalls pursuant to and recalled in accordance with federal law and regulations and where a stop-sale, do-not-drive order has been issued, or where the issue identified in the notice of recall could otherwise affect the safe operation of the vehicle. Additionally, the new requirements apply only to dealers holding used vehicles for sale that are a line make that the dealer is franchised to sell or on which the dealer is authorized to perform recall repairs.

All reimbursement claims made by dealers for recall remedies or repairs, or for compensation where no part or repair is reasonably available and the vehicle is subject to a stop-sale, do-not-drive order, or where the issue identified in the notice of recall could otherwise affect the safe operation of the vehicle, is subject to the same limitations and requirements as a warranty reimbursement claim.

Claims must be either approved or disapproved within 30 days after the claims' submission to the manufacturer in the manner and on the forms the manufacturer reasonably prescribes. Any claim not specifically disapproved in writing within 30 days following receipt is approved, and the manufacturer must pay a claim within 30 days following approval.

A manufacturer may compensate its franchised dealers under a national recall compensation program provided the compensation under the program is equal to or greater than the compensation provided in the new requirements. A manufacturer may not recover all or any portion of its costs for compensating its dealers licensed in this state for recalled vehicles, parts, and service either by reduction in the amount due to the dealer or by separate charge, surcharge, or other imposition.

It is specified that a dealer's designated area of primary responsibility must contain only areas inside the state unless specifically approved by the dealer, for the purposes of determining when a manufacturer may take adverse action against a dealer such as charge backs or reducing vehicle allocations, for sales and service performance within a designated area of primary responsibility.

It is provided that a manufacturer may not modify the franchise agreement for any dealer unless the manufacturer notifies the dealer in writing of its intention to modify the agreement at least 90 days before the effective date of the modification, stating the specific grounds for the modification, and undertakes the modification in good faith, for good cause, and in a manner that would not adversely and substantially alter the rights, obligations, investment, or return on investment of the dealer under the existing agreement.

A process is established for dealers and a corporation association primarily owned by or composed of dealers and that primarily represents dealers' interests to file a petition with the Department of Licensing to have an alleged violation of the motor vehicle franchise law handled as an adjudicative proceeding. A corporation or association of dealers may also bring a cause of action for itself or on behalf of a dealer or dealers in a court of competent jurisdiction. It is provided that the relief that a dealer and a corporation or association of dealers may seek in court includes actual damages, declaratory relief, and injunctive relief. It is provided that a court may, in its discretion, increase an award of damages up to an amount not to exceed three times the actual damages sustained.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) Each part of this bill is critically important to motor vehicle dealers in the state. When a recall is issued on a used vehicle held for sale by a dealer, along with a do-not-drive or stop-sale order from the manufacturer, and there is not a prompt repair available, it leaves the dealer in a bad spot. The vehicle sits at the dealership and depreciates in value each month. This is a direct cost to the dealer but not to the manufacturer. At least one dealer has had vehicles sitting at the lot, unsellable under a safety recall, for over 600 days. This issue also arises with customer vehicle trade-ins. A dealer will understandably offer a customer less trade-in value for a customer's existing vehicle with an outstanding safety recall issue,

because the dealer will be unable to sell the vehicle. Under federal law, manufacturers must compensate dealers for safety recalls on new vehicles at a rate of 1 percent of the vehicle's value per month. State law prohibits dealers from selling used cars subject to a safety recall, but manufacturers are not required to compensate dealers for used vehicles held by a dealer under a safety recall. This bill creates a similar process in state law, but for used vehicles and only in certain circumstances. The amount of compensation requested in the bill (1.75 percent of the vehicle's trade-in value per month) is reasonable. A recent report from an independent expert, JD Power and Associates, shows that the actual depreciation cost to dealers is likely higher than 1.75 percent per month, and is more like 2.43 percent of the vehicle's value per month. Dealers can lose 10 percent to 15 percent of the value of their used vehicle inventory due to unresolved safety recalls and the related depreciation in value. Manufacturers will be motivated to make parts and repairs more quickly available to their dealers to fix safety recalls.

Additionally, dealers currently have problems enforcing their rights under the franchise law. When a dealer requests compensation from a manufacturer for warranty work, as required under current law, the manufacturer may reject the claim and tell the dealer to sue. Even if a manufacturer loses the lawsuit, they are only required to pay exactly what the manufacturer already owes the dealer under the law. And dealers may be afraid of retaliation for enforcing their rights in court. Two parts of the bill address this issue. First, the bill gives a group or association of dealers standing to represent an individual dealer in a dispute with the manufacturer. Second, the bill will also make available potential treble damages for a dealer who prevails in a dispute with a manufacturer in court. This is important because it may incentivize manufacturers to act in good faith and to not reject a claim without good cause. The part of the bill restricting a dealer's designated area of responsibility to in-state areas unless specifically agreed to by the dealer is also important. If a dealer in Vancouver, Washington does not want to be obligated to serve and market to an area in Oregon with numerous competing dealerships in the same area, the dealer should not be forced to do so. Dealers view this designated area of responsibility issue as a clarification of existing law. The bill will help consumers, dealers, and thousands of dealer employees in the state. There is a clear disparity in power between manufacturers and dealers, and this bill helps make sure the parties are on more equal footing.

(Opposed) Vehicle manufacturers agree compensation should be paid to dealers related to unrepaired used vehicles subject to safety recalls, and want to work with dealers to find solutions to this problem and other issues addressed in the bill. However, manufacturers have significant concerns with some parts of the bill that go beyond recall issues. On the recall reimbursement issue, the 1 percent compensation required to be paid by manufacturers to dealers under federal recall law is reasonable, and manufacturers would support a bill that was modeled on the federal law. But the 1.75 percent per month compensation amount in the bill is too high and is higher than dealers' actual costs from depreciation. The JD Power and Associates survey (not a study) cited by proponents had failings, and JD Power and Associates does not stand by the conclusions of the report. Manufacturers are also concerned about the reimbursement requirement starting after 15 days, which is too soon. The average used vehicle sits on a lot for about 45 days before selling. Other states that have laws on this issue have a 30-day standard, which is more reasonable. Part of the problem is that with some recalls, such as with a global airbag recall, manufacturers of the vehicles simply do not have an available part or repair when the airbag supplier operates in another county, is facing

financial problems and is subject to criminal charges, and it is physically impossible to make the new airbag parts fast enough to meet global demand. So, in some circumstances, the availability of a part or repair is not within the manufacturers' control. Manufacturers want to find fast fixes to safety recall issues, just like dealers.

Regarding the associational standing provision in section 2, the bill breaks decades of judicial precedent by granting a trade association that is not a party to a judicial dispute authority to become a party and litigate on behalf of an individual dealer against a manufacturer. Courts have developed a generally applicable three-part test, under Article III of the United States Constitution, regarding when an organization may sue another person on behalf of an individual member. There is no reason why a special exception to the general rule that applies in all other cases is needed here. If an exception is added, other groups will ask for similar changes in other laws. Similarly, the provision giving courts discretion to award treble damages to a dealer is unreasonable and will incentivize litigation against manufacturers, and discourage the parties from working together to find agreement. This sets a bad precedent to authorize treble damages for a contract dispute. And the treble damages are only available to one party; it is only fair if it applies equally to both parties. Manufacturers value their relationships with their dealers, and the success of both manufacturers and dealers is directly connected. This is the first time manufacturers have heard about problems related to dealers' designated areas of primary responsibility, and whether the area may include areas of more than one state. The parties can work this issue out without legislation. Changing this part of the law on dealers' designated areas of responsibility would be detrimental to manufacturers' ability to evaluate dealers' sales performance. The part of the bill limiting "modifications" of franchise agreements should be eliminated because there is no definition of the word "modification" and it is ambiguous. Manufacturers are confident an agreement can be reached on the recall reimbursement component of the bill, and manufacturers are working with dealers to find solutions to other problems raised.

Persons Testifying: (In support) Representative Kirby, prime sponsor; Scott Hazlegrove, Washington State Auto Dealers Association; Gary Gilchrist, Gilchrist Chevrolet, Buick, and General Motors Corporation; Jon Creedon, Vancouver Auto Group; and Bryan Imai, Washington State Auto Dealers.

(Opposed) Ryan Spiller, Auto Alliance; Curt Augustine, Alliance of Automobile Manufacturers; Ross Good, Fiat Chrysler Automobiles; and Michael Transue, Global Automakers.

Persons Signed In To Testify But Not Testifying: None.