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HOUSE BILL 6

47TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SPECIAL SESSION, 2005

INTRODUCED BY

Ray Begaye

AN ACT

**RELATING TO MOTOR VEHICLES; REQUIRING NOTICE OF THE SALE OF
MOTOR VEHICLES THAT HAVE BEEN SUBMERGED IN FLOOD WATERS.**

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

**Section 1. Section 57-16-4 NMSA 1978 (being Laws 1973,
Chapter 6, Section 4, as amended) is amended to read:**

**"57-16-4. UNLAWFUL ACTS--DEALERS.--It is unlawful for any
dealer to:**

**A. require a retail purchaser of a new motor
vehicle, as a condition of sale and delivery thereof, to
purchase special features, equipment, parts or accessories not
ordered or desired by the purchaser, provided such features,
equipment, parts or accessories are not already installed on
the new motor vehicle when received by the dealer;**

B. use false, deceptive or misleading advertising

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1 in connection with ~~[his]~~ the dealer's business;

2 C. willfully defraud any retail buyer to the
3 buyer's damage;

4 D. fail to perform the obligations placed on the
5 dealer in connection with the delivery and preparation of a new
6 motor vehicle for retail sale as provided in the manufacturer's
7 preparation and delivery agreements;

8 E. fail to perform the obligations placed on the
9 dealer in connection with the manufacturer's warranty
10 agreements;

11 F. represent or sell as a new motor vehicle any
12 motor vehicle ~~[which]~~ that has been used and operated for
13 demonstration purposes or ~~[which]~~ that is otherwise a used
14 motor vehicle; ~~[or]~~

15 G. fail to inform a distributor, representative or
16 purchaser that a motor vehicle has been submerged in flood
17 waters; or

18 ~~[G.]~~ H. intentionally fail to perform any written
19 agreement with any retail buyer."

20 Section 2. Section 57-16-5 NMSA 1978 (being Laws 1973,
21 Chapter 6, Section 5, as amended) is amended to read:

22 "57-16-5. UNLAWFUL ACTS--MANUFACTURERS--DISTRIBUTORS--
23 REPRESENTATIVES.--It is unlawful for any manufacturer,
24 distributor or representative to:

25 A. coerce or attempt to coerce a dealer to order or

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1 accept delivery of a motor vehicle, appliances, equipment,
2 parts or accessories therefor or any other commodity that the
3 motor vehicle dealer has not voluntarily ordered;

4 B. coerce or attempt to coerce a dealer to order or
5 accept delivery of a motor vehicle with special features,
6 appliances, accessories or equipment not included in the list
7 price of the motor vehicles as publicly advertised by the
8 manufacturer;

9 C. coerce or attempt to coerce a dealer to order
10 for any person any parts, accessories, equipment, machinery,
11 tools, appliances or any commodity whatsoever;

12 D. refuse to deliver, in reasonable quantities and
13 within a reasonable time after receipt of dealer's order, to a
14 motor vehicle dealer having a franchise or contractual
15 arrangement for the retail sale of motor vehicles sold or
16 distributed by the manufacturer, distributor or representative,
17 those motor vehicles, parts or accessories covered by the
18 franchise or contract specifically publicly advertised by the
19 manufacturer, distributor or representative to be available for
20 immediate delivery; provided, however, the failure to deliver a
21 motor vehicle, parts or accessories shall not be considered a
22 violation of Chapter 57, Article 16 NMSA 1978 if the failure is
23 due to an act of God, work stoppage or delay due to a strike or
24 labor difficulty, shortage of materials, freight embargo or
25 other cause over which the manufacturer, distributor or

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1 representative or an agent thereof has no control;

2 E. coerce or attempt to coerce a motor vehicle
3 dealer to enter into an agreement with the manufacturer,
4 distributor or representative or to do any other act
5 prejudicial to the dealer by threatening to cancel a franchise
6 or a contractual agreement existing between the manufacturer,
7 distributor or representative and the dealer; provided,
8 however, that notice in good faith to a motor vehicle dealer of
9 the dealer's violation of the terms or provisions of the
10 franchise or contractual agreement does not constitute a
11 violation of Chapter 57, Article 16 NMSA 1978;

12 F. terminate or cancel the franchise or selling
13 agreement of a dealer without due cause. Due cause means a
14 material breach by a dealer, due to matters within the dealer's
15 control, of a lawful provision of a franchise or selling
16 agreement. As used in this subsection, "material breach" means
17 a contract violation that is substantial and significant. In
18 determining whether due cause exists under this subsection, the
19 court shall take into consideration only the dealer's sales in
20 relation to the business available to the dealer; the dealer's
21 investment and obligations; injury to the public welfare; the
22 adequacy of the dealer's sales and service facilities,
23 equipment and parts; the qualifications of the management,
24 sales and service personnel to provide the consumer with
25 reasonably good service and care of new motor vehicles; the

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1 dealer's failure to comply with the requirements of the
2 franchise; and the harm to the manufacturer or distributor.
3 The nonrenewal of a franchise or selling agreement, without due
4 cause, shall constitute an unfair termination or cancellation
5 regardless of the terms or provisions of the franchise or
6 selling agreement. The manufacturer, distributor or
7 representative shall notify a motor vehicle dealer in writing
8 by registered mail of the termination or cancellation of the
9 franchise or selling agreement of the dealer at least sixty
10 days before the effective date thereof, stating the specific
11 grounds for termination or cancellation; and the manufacturer,
12 distributor or representative shall notify a motor vehicle
13 dealer in writing by registered mail at least sixty days before
14 the contractual term of his franchise or selling agreement
15 expires that it will not be renewed, stating the specific
16 grounds for nonrenewal in those cases where there is no
17 intention to renew, and in no event shall the contractual term
18 of any franchise or selling agreement expire without the
19 written consent of the motor vehicle dealer involved prior to
20 the expiration of at least sixty days following the written
21 notice. During the sixty-day period, either party may in
22 appropriate circumstances petition a district court to modify
23 the sixty-day stay or to extend it pending a final
24 determination of proceedings on the merits. The court may
25 grant preliminary and final injunctive relief;

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1 G. use false, deceptive or misleading advertising
2 in connection with his business;

3 H. fail to inform a purchaser that a motor vehicle
4 has been submerged by flood waters;

5 [~~H.-~~] I. offer to sell or to sell a motor vehicle to
6 a motor vehicle dealer in this or any other state of the United
7 States at a lower actual price than the actual price offered to
8 any other motor vehicle dealer in this state for the same model
9 vehicle similarly equipped or to utilize any device, including
10 sales promotion plans or programs that result in a lesser
11 actual price; provided, however, the provisions of this
12 subsection do not apply to sales to a motor vehicle dealer for
13 resale to a unit of the United States government, the state or
14 its political subdivisions; and provided, further, the
15 provisions of this subsection do not apply to sales to a motor
16 vehicle dealer of a motor vehicle ultimately sold, donated or
17 used by the dealer in a driver education program; and provided,
18 further, that the provisions of this subsection do not apply if
19 a manufacturer, distributor or representative offers to sell or
20 sells new motor vehicles to all motor vehicle dealers at an
21 equal price. As used in this section, "actual price" means the
22 price to be paid by the dealer less any incentive paid by the
23 manufacturer, distributor or representative, whether paid to
24 the dealer or the ultimate purchaser of the vehicle. This
25 provision does not apply to sales by the manufacturer,

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1 distributor or representatives to the United States government
2 or its agencies. The provisions of this subsection dealing
3 with vehicle prices in another state and defining actual price
4 do not apply to a manufacturer or distributor if all of the
5 manufacturer's or distributor's dealers within fifty miles of a
6 neighboring state are given all cash or credit incentives
7 available in the neighboring state, whether the incentives are
8 offered by the manufacturer or distributor or a finance
9 subsidiary of either, affecting the price or financing terms of
10 a vehicle;

11 ~~[I.]~~ J. willfully discriminate, either directly or
12 indirectly, in price between different purchasers of a
13 commodity of like grade or quality where the effect of the
14 discrimination may be to lessen substantially competition or
15 tend to create a monopoly or to injure or destroy the business
16 of a competitor;

17 ~~[J.]~~ K. offer to sell or to sell parts or
18 accessories to a motor vehicle dealer for use in ~~[his]~~ the
19 dealer's own business for the purpose of repairing or replacing
20 the same or a comparable part or accessory at a lower actual
21 price than the actual price charged to any other motor vehicle
22 dealer for similar parts or accessories for use in ~~[his]~~ the
23 dealer's own business; provided, however, in those cases where
24 motor vehicle dealers have a franchise to operate and serve as
25 wholesalers of parts and accessories to retail outlets or other

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1 dealers, whether or not the dealer is regularly designated as a
2 wholesaler, nothing in this section prevents a manufacturer,
3 distributor or representative from selling to the motor vehicle
4 dealer who operates and services as a wholesaler of parts and
5 accessories such parts and accessories as may be ordered by the
6 motor vehicle dealer for resale to retail outlets at a lower
7 actual price than the actual price charged a motor vehicle
8 dealer who does not operate or serve as a wholesaler of parts
9 and accessories;

10 [K-] L. prevent or attempt to prevent by contract
11 or otherwise a motor vehicle dealer from changing the capital
12 structure of [~~his~~] the dealer's dealership or the means by or
13 through which [~~he~~] the dealer finances the operation of [~~his~~]
14 the dealership, if the dealer at all times meets any reasonable
15 capital standards agreed to between the dealer and the
16 manufacturer, distributor or representative, and if the change
17 by the dealer does not result in a change in the executive
18 management control of the dealership;

19 [L-] M. prevent or attempt to prevent by contract
20 or otherwise a motor vehicle dealer or an officer, partner or
21 stockholder of a motor vehicle dealer from selling or
22 transferring a part of the interest of any of them to any other
23 person or party; provided, however, that no dealer, officer,
24 partner or stockholder shall have the right to sell, transfer
25 or assign the franchise or power of management or control

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1 thereunder without the consent of the manufacturer, distributor
2 or representative except that the manufacturer, distributor or
3 representative shall not withhold consent to the sale, transfer
4 or assignment of the franchise to a qualified buyer capable of
5 being licensed in New Mexico and who meets the manufacturer's
6 or distributor's uniformly applied requirement for appointment
7 as a dealer. Uniform application shall not prevent the
8 application of a separate standard of consent for sale,
9 transfer or assignment to minority or women dealer candidates,
10 and shall not require the application of an identical standard
11 to all persons in all situations. The requirement of uniform
12 application shall be met if the manufacturer applies the same
13 set of standards, which takes into account business performance
14 and experience, financial qualifications, facility requirements
15 and other relevant characteristics; provided that, if two
16 dealers, persons or situations are identical, given the
17 characteristics considered in the standards, the two dealers,
18 persons or situations shall be treated identically, except as
19 provided in this subsection. Upon request, a manufacturer or
20 distributor shall provide its dealer with a copy of the
21 standards that are normally relied upon by the manufacturer or
22 distributor to evaluate a proposed sale, transfer or
23 assignment. A manufacturer, distributor or representative
24 shall send a letter by certified mail approving or withholding
25 consent within sixty calendar days of receiving the completed

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1 application forms and related information requested by a
2 manufacturer or distributor as provided below. A manufacturer,
3 distributor or representative shall send its existing motor
4 vehicle dealer the necessary application forms and identify the
5 related information required within twenty calendar days of
6 receiving written notice from the existing motor vehicle dealer
7 of the proposed sale or transfer. No manufacturer, distributor
8 or representative shall require any information not requested
9 in the twenty-day period, and submission of the information
10 requested within that period together with a completed form of
11 the application provided shall constitute a completed
12 application form. Any request for consent shall be deemed
13 granted, and the manufacturer, distributor or representative
14 shall be estopped from denying the consent, if the consent has
15 not been expressly withheld during the applicable sixty-day
16 period;

17 ~~[M.]~~ N. obtain money, goods, services, anything of
18 value or any other benefit from any other person with whom the
19 motor vehicle dealer does business on account of or in relation
20 to the transactions between the dealer and the other person,
21 unless the benefit is promptly accounted for and transmitted to
22 the motor vehicle dealer;

23 ~~[N.]~~ O. require a motor vehicle dealer to assent to
24 a release, assignment, novation, waiver or estoppel that would
25 relieve any person from liability imposed by Chapter 57,

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1 Article 16 NMSA 1978;

2 [Ø-] P. require any motor vehicle dealer to provide
3 installment financing with a specified financial institution;

4 [P-] Q. establish an additional franchise,
5 including any franchise for a warranty or service facility
6 outside of the relevant market area of the dealer establishing
7 the facility, but excluding the relocation of existing
8 franchises, for the same line-make in a relevant market area
9 where the same line-make is presently being served by an
10 existing motor vehicle dealer if such addition would be
11 inequitable to the existing dealer; provided, however, that the
12 sales and service needs of the public shall be given due
13 consideration in determining the equities of the existing
14 dealer. The sole fact that the manufacturer, distributor or
15 representative desires further penetration of the market is not
16 grounds for establishing an additional franchise; provided,
17 further, that the manufacturer, distributor or representative
18 shall give a ninety-day written notice by registered mail to
19 all same line-make dealers in a relevant market area of its
20 intention to establish an additional franchise;

21 [Ø-] R. offer to sell, lease or to sell or lease
22 any new motor vehicle to a person, except a distributor, at a
23 lower actual price therefor than the actual price offered and
24 charged to a motor vehicle dealer for the same model vehicle
25 similarly equipped or to utilize any device that results in a

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1 lower actual price;

2 ~~[R.]~~ S. sell, lease or provide motorcycles, parts
3 or accessories to any person not a dealer or distributor for
4 the line-make sold, leased or provided. The provisions of this
5 subsection ~~[does]~~ do not apply to sales, leases or provisions
6 of motor vehicles, parts or accessories by a manufacturer,
7 distributor or representative to the United States government
8 or its agencies or the state or its political subdivisions;

9 ~~[S.]~~ T. offer any finance program, either directly
10 or through any affiliate, based on the physical location of the
11 selling dealer or the residence of the buyer. The provisions
12 of this subsection do not apply to a manufacturer or
13 distributor that has no dealer within fifty miles of a state
14 line or if all of the manufacturer's or distributor's dealers
15 within that fifty miles are given all cash or credit incentives
16 available in the neighboring state, whether the incentives are
17 offered by the manufacturer or the distributor or a finance
18 subsidiary of either, affecting the price or financing terms of
19 a vehicle;

20 ~~[F.]~~ U. force a dealer to sell or relocate a
21 franchise with another manufacturer located at the same
22 physical location or consider the existence of another line-
23 make at a dealership for product allocation, successorship,
24 location approval and capitalization; provided that a
25 manufacturer or distributor may require:

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1 (1) that the dealer meet the manufacturer's
2 capitalization requirements;

3 (2) that the dealer meet the manufacturer's
4 facilities requirements; and

5 (3) that the dealer not have committed
6 fraudulent acts;

7 [~~U.~~] V. enforce a right of first refusal or option
8 to purchase the dealership by a manufacturer or distributor or
9 to require a dealer to grant a right or option to a
10 manufacturer or distributor;

11 [~~V.~~] W. be licensed as a dealer or perform warranty
12 or other service or own an interest, directly or indirectly, in
13 a person licensed as a dealer or performing warranty or other
14 service; provided that a manufacturer or distributor may own a
15 person licensed as a dealer for a reasonable time in order to
16 dispose of an interest acquired as a secured party or as part
17 of a dealer development program;

18 [~~W.~~] X. fail to recognize and approve the transfer
19 of a dealership to a person named as a successor, donee,
20 beneficiary or devisee in a valid testamentary or trust
21 instrument; provided that a manufacturer or distributor may
22 impose standards or criteria used in a transfer;

23 [~~X.~~] Y. impose capitalization requirements not
24 necessary to assure that the dealer can meet its financial
25 obligations; or

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1 ~~[Y.]~~ Z. compel a dealer through a finance
2 subsidiary of the manufacturer or distributor to agree to
3 unreasonable operating requirements or directly or indirectly
4 to terminate a dealer, except as allowed by Subsection F of
5 this section, through the actions of a finance subsidiary of
6 the manufacturer or distributor. This subsection shall not
7 limit the right of a financing entity to engage in business
8 practices in accordance with the usage of the trade in which it
9 is engaged. "

10 Section 3. Section 57-16A-3.1 NMSA 1978 (being Laws 2003,
11 Chapter 216, Section 3) is amended to read:

12 "57-16A-3.1. USED MOTOR VEHICLES. --

13 A. Unless a seller is a used motor vehicle dealer,
14 before the seller attempts to sell a used motor vehicle, the
15 seller shall possess the title to the used motor vehicle and
16 the title shall be in the seller's name.

17 B. Except as otherwise provided in the Motor
18 Vehicle Quality Assurance Act, a used motor vehicle dealer
19 shall not exclude, modify or disclaim the implied warranty of
20 merchantability prescribed in Section 55-2-314 NMSA 1978 or
21 limit the remedies for a breach of the warranty before midnight
22 of the fifteenth calendar day after delivery of a used motor
23 vehicle or until a used motor vehicle is driven five hundred
24 miles after delivery, whichever is earlier. In calculating
25 time under this subsection, a day on which the warranty is

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1 breached and all subsequent days in which the used motor
2 vehicle fails to conform with the implied warranty of
3 merchantability are excluded. In calculating distance under
4 this subsection, the miles driven to obtain or in connection
5 with the repair, servicing or testing of the used motor vehicle
6 that fails to conform with the implied warranty of
7 merchantability are excluded. An attempt to exclude, modify or
8 disclaim the implied warranty of merchantability or to limit
9 the remedies for a breach of the warranty in violation of this
10 subsection renders a purchase agreement voidable at the option
11 of the purchaser.

12 C. An implied warranty of merchantability:

13 (1) is met if:

14 (a) a used motor vehicle functions
15 substantially free of a defect that significantly limits the
16 use of the used motor vehicle for the ordinary purpose of
17 transportation on any public highway; and

18 (b) the used motor vehicle has not been
19 submerged in flood water; and

20 (2) [The implied warranty of merchantability]
21 expires at midnight of the fifteenth calendar day after
22 delivery of a used motor vehicle or until a used motor vehicle
23 is driven five hundred miles after delivery, whichever is
24 earlier. In calculating time, a day on which the implied
25 warranty of merchantability is breached is excluded and all

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1 subsequent days in which the used motor vehicle fails to
2 conform with the warranty are also excluded. In calculating
3 distance, the miles driven to obtain or in connection with the
4 repair, servicing or testing of the used motor vehicle that
5 fails to conform with the implied warranty of merchantability
6 are excluded.

7 D. An implied warranty of merchantability does not
8 extend to damage that occurs after the sale of the used motor
9 vehicle that results from:

- 10 (1) off-road use;
- 11 (2) racing;
- 12 (3) towing;
- 13 (4) abuse;
- 14 (5) misuse;
- 15 (6) neglect;
- 16 (7) failure to perform regular maintenance;

17 and

18 (8) failure to maintain adequate oil, coolant
19 and other required fluids or lubricants.

20 E. If the implied warranty of merchantability
21 described in this section is breached, the consumer shall give
22 reasonable notice to the seller within thirty days of the date
23 of the breach. Before the consumer exercises another remedy
24 pursuant to Chapter 55, Article 2 NMSA 1978, the seller shall
25 have a reasonable opportunity to repair the used motor vehicle.

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1 The consumer shall pay one-half of the cost of the first two
2 repairs necessary to bring the used motor vehicle into
3 compliance with the warranty. The payments by the consumer are
4 limited to a maximum payment of twenty-five dollars (\$25.00)
5 for each repair.

6 F. The maximum liability of a seller pursuant to
7 this section is limited to the purchase price paid for the used
8 motor vehicle, to be refunded to the consumer or lender, as
9 applicable, in exchange for return of the vehicle, unless the
10 seller knew or should have known of the defect given the
11 circumstances in which the vehicle was acquired or sold and the
12 seller did not disclose that defect or unless the seller knew
13 or should have known that the motor vehicle had been submerged
14 in flood water.

15 G. An agreement for the sale of a used motor
16 vehicle by a used motor vehicle dealer is voidable at the
17 option of the consumer unless it contains on its face the
18 following conspicuous statement printed in boldface, ten-point
19 or larger type set off from the body of the agreement:

20 "New Mexico law requires that this vehicle will be
21 fit for the ordinary purposes for which the vehicle
22 is used for fifteen days or five hundred miles after
23 delivery, whichever is earlier, except with regard
24 to particular defects disclosed on the first page of
25 this agreement. You (the consumer) will have to pay

1 up to twenty-five dollars (\$25.00) for each of the
2 first two repairs if the warranty is violated."

3 H. The inclusion in the agreement of the statement
4 prescribed in Subsection G of this section does not create an
5 express warranty.

6 I. A consumer of a used motor vehicle may waive the
7 implied warranty of merchantability only for a particular
8 defect in the vehicle and only if all of the following
9 conditions are satisfied:

10 (1) the used motor vehicle dealer fully and
11 accurately discloses to the consumer that because of
12 circumstances unusual to the business of the used motor vehicle
13 dealer, the used motor vehicle has a particular defect;

14 (2) the consumer agrees to buy the used motor
15 vehicle after disclosure of the defect; and

16 (3) before the sale, the consumer indicates
17 agreement to the waiver by signing and dating the following
18 conspicuous statement that is printed on the first page of the
19 sales agreement in boldface ten-point or larger type and that
20 is written in the language in which the presentation was made:

21 "Attention consumer: sign here only if the dealer
22 has told you that this vehicle has the following
23 problem(s) and you agree to buy the vehicle on those
24 terms:

25 1. _____

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2. _____
3. _____."

J. A used motor vehicle dealer has the burden to prove by a preponderance of the evidence that the dealer complied with Subsection I of this section.

K. A consumer or seller that is aggrieved by a transaction pursuant to this section and that seeks a legal remedy shall pursue an appropriate remedy prescribed in Chapter 55, Article 2 NMSA 1978 and shall comply with the requirements prescribed in that article."