

Act No. 86
Public Acts of 1995
Approved by the Governor
June 20, 1995
Filed with the Secretary of State
June 20, 1995

**STATE OF MICHIGAN
88TH LEGISLATURE
REGULAR SESSION OF 1995**

Introduced by Reps. Weeks, Kukuk, Goschka, LeTarte, Voorhees, Hill and Geiger

ENROLLED HOUSE BILL No. 4352

AN ACT to amend the title and sections 2, 3, 4, 5, 6, 7, 8, 9, and 10 of Act No. 341 of the Public Acts of 1984, entitled as amended "An act to provide for the repurchase by a manufacturer of farm tractors and equipment and utility tractors and equipment subject to a dealer, wholesaler, or distributor agreement; to provide for the repurchase of repair parts; to impose certain duties and responsibilities; and to provide remedies," as amended by Act No. 296 of the Public Acts of 1989, being sections 445.1452, 445.1453, 445.1454, 445.1455, 445.1456, 445.1457, 445.1458, 445.1459, and 445.1460 of the Michigan Compiled Laws; and to add section 7a.

The People of the State of Michigan enact:

Section 1. The title and sections 2, 3, 4, 5, 6, 7, 8, 9, and 10 of Act No. 341 of the Public Acts of 1984, as amended by Act No. 296 of the Public Acts of 1989, being sections 445.1452, 445.1453, 445.1454, 445.1455, 445.1456, 445.1457, 445.1458, 445.1459, and 445.1460 of the Michigan Compiled Laws, are amended and section 7a is added to read as follows:

TITLE

An act to provide for the compensation for or repurchase of certain farm tractors, attachments, equipment, and utility tractors and equipment by certain manufacturers or suppliers subject to certain dealer, wholesaler, or distributor agreements; to provide for the repurchase of certain repair parts; to impose certain duties and responsibilities on certain persons; and to provide certain remedies.

Sec. 2. As used in this act unless the context clearly requires otherwise:

(a) "Attachments" means machinery or any part of a piece of machinery designed to be used on or in conjunction with farm tractors, farm equipment, utility tractors, and utility equipment.

(b) "Current net price" means the price listed in the supplier's printed price lists, catalogs, microfiche, price tapes, invoices, or any other printed or electronically recorded data in effect at the time an agreement is canceled or discontinued, less all applicable discounts.

(c) "Dealer" means a person engaged in the business of the retail sale of farm tractors and equipment, utility tractors and equipment, or the attachments to or repair parts for that equipment. Dealer includes retail dealers, wholesalers, and distributors that obtain inventory from another person for resale.

(d) "Equipment" means motorized machines designed for or adapted and used for agriculture, horticulture, livestock raising, forestry, grounds maintenance, lawn and garden, construction, materials handling, and earth moving.

(e) "Agreement" means a written, oral, or implied contract, sales agreement, security agreement, or franchise agreement between a supplier and a dealer by which the dealer is authorized to engage in the business of the retail sale and service, wholesale sale and service, or the distribution of tractors and equipment as an authorized outlet of the supplier or in accordance with methods and procedures provided for or prescribed by the supplier.

(f) "Inventory" means farm tractors, utility tractors, equipment, and accessories for attachments to and repair parts for those tractors and that equipment.

(g) "Net cost" means an amount equal to the original invoice price that the dealer paid for the merchandise to the supplier, less all applicable discounts allowed and received, plus the freight cost incurred by the dealer from the location of the supplier to the location of the dealer.

(h) "Person" means a sole proprietorship, partnership, corporation, or any other form of business organization.

(i) "Supplier" means a manufacturer, wholesaler, or distributor of farm and utility tractors and farm and utility equipment, or the attachments to or repair parts for that equipment. Supplier includes any component member of a controlled group of corporations of which a supplier is a component member, or a successor in interest of a supplier, including any person who or which acquires more than 25% of the assets, stock, good will, or trade name of a supplier, any surviving corporation resulting from a merger or liquidation, any receiver or assignee, or any trustee of a supplier.

(j) "Usage for demonstration" means usage, not prohibited by an agreement, to demonstrate the function of equipment or inventory to potential customers, but does not include use by a buyer who subsequently rescinds the purchase of the inventory or equipment.

(k) "Usage for rental" means usage by a customer of the dealer, not prohibited by the agreement, under a rental contract or nonfinancing lease.

(l) "Dealer supplies" means any display, machinery, signage, book, manual, computer, microfiche, microfilm, communication device, or tool that a dealer purchased from a supplier, or from a third party upon the request or requirement of the supplier, and which is used by the dealer to facilitate the sale or repair of inventory furnished by the supplier and no other product line sold or serviced by the dealer.

(m) "Controlled group of corporations" means any of the following:

(i) A parent-subsidiary controlled group.

(ii) A brother-sister controlled group.

(iii) A combined group.

(iv) A group having constructive ownership of 1 or more corporations.

(n) "Parent-subsidiary controlled group" means 1 or more chains of corporations connected through stock ownership with a common parent corporation if all of the following exist:

(i) Stock possessing at least 80% of the total combined voting power of all classes of stock entitled to vote or at least 80% of the total value of shares of all classes of stock of each of the corporations, except the common parent corporation, is directly owned by 1 or more of the other corporations or stock subject to constructive ownership by the corporation.

(ii) The common parent corporation owns or has constructive ownership of stock possessing at least 80% of the total combined voting power of all classes of stock entitled to vote or at least 80% of the total value of shares of all classes of stock of at least 1 of the other corporations, excluding, in computing such voting power or value, stock owned directly by such other corporations.

(o) "Brother-sister controlled group" means 2 or more corporations if 5 or fewer persons who are individuals, estates, or trusts own or have constructive ownership of stock possessing both of the following:

(i) At least 80% of the total combined voting power of all classes of stock entitled to vote or at least 80% of the total value of shares of all classes of the stock of each corporation.

(ii) More than 50% of the total combined voting power of all classes of stock entitled to vote or more than 50% of the total value of shares of all classes of stock of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation.

(p) "Combined group" means 3 or more corporations each of which is a member of a parent-subsidiary controlled group or a brother-sister controlled group and 1 of which is both of the following:

(i) Is a common parent corporation included in a parent-subsidiary controlled group.

(ii) Is included in a brother-sister controlled group.

(q) "Constructive ownership" means any or all of the following:

(i) A person who has an option to acquire stock. For purposes of this subparagraph, an option to acquire is an option, and each 1 of a series of such option, is considered an option to acquire such stock.

(ii) Stock owned, directly or indirectly, by or for a partnership. Constructive ownership includes ownership by any partner having an interest of 5% or more in either the capital or profits of the partnership in proportion to his or her interest in capital or profits, whichever such proportion is the greater.

(iii) Stock owned, directly or indirectly, by or for an estate or trust. Constructive ownership includes ownership by any beneficiary who has an actuarial interest of 5% or more in such stock, to the extent of such actuarial interest. For purposes of this subparagraph, the actuarial interest of each beneficiary shall be determined by assuming the maximum exercise of discretion by the fiduciary in favor of such beneficiary and the maximum use of such stock to satisfy his or her rights as a beneficiary.

(r) "Consumer warranty" means the promise of a supplier to repair or replace any inventory after the inventory is sold or leased by a dealer.

Sec. 3. If a dealer enters into an agreement with a supplier and the agreement is subsequently terminated, the supplier shall repurchase any inventory of the dealer as provided in this act. The dealer may choose to keep the inventory if there exists a contractual right to do so.

Sec. 4. (1) The supplier shall pay 100% of the net cost of all undamaged and complete tractors, equipment, and attachments, which were purchased within 30 months of the termination of the agreement, less an allowance for usage for demonstration or usage for rental, provided the dealer's demonstration and rental programs are not in conflict with the supplier's agreement or written policies, and 90% of the current net price of all new, unused, and undamaged repair parts. The supplier shall pay the dealer 5% of the current net price on all new, unused, and undamaged repair parts returned to cover the cost of handling, packing, and loading. The supplier may perform the handling, packing, and loading in lieu of paying the 5% for services.

(2) The supplier shall purchase or repurchase, at the dealer's book value net of depreciation on the date of termination, all dealer supplies, except that:

(a) No electronic device more than 5 years old is required to be purchased.

(b) The supplier shall assume the dealer's lease obligations with respect to any dealer supplies that are leased.

(c) The supplier shall pay the dealer at least 75% of the supplier's net price last published for any new dealer supplies purchased from the supplier.

(d) No specialized repair tool that is not complete and in usage condition is required to be purchased.

(3) Upon payment of the repurchase amount to the dealer, the title and right of possession to the repurchased inventory shall transfer to the supplier.

(4) The supplier may subtract from the sums due under subsection (1) or (2) the amount of debts owed by the dealer to the supplier.

(5) With or without the prior consent or authorization of a supplier, a dealer may ship all inventory suitable for repurchase to the supplier, not less than 60 days after the supplier has notified the dealer, or the dealer has notified the supplier by certified mail, that the agreement between them has been terminated. The supplier shall inspect a dealer's inventory within 30 days of termination of the agreement and designate portions of that inventory to be not returnable under this act. However, such a designation received by the dealer more than 30 days after the termination is not effective.

(6) Not more than 90 days from the termination of the agreement, the dealer may ship inventory to any location from which inventory of like kind has been shipped to the dealer in the 12 months preceding the shipment, or if no shipment of such type of inventory has occurred in that time period, to any place of business maintained by the supplier. Freight to such destination shall be paid by the dealer. The supplier shall accept a shipment made pursuant to this subsection.

(7) If a properly shipped shipment is undeliverable, or not accepted by the supplier, the dealer may order the inventory returned, may order it stored for the supplier's account, or may order it liquidated or abandoned by the carrier. All risk of loss to properly shipped but undeliverable or unaccepted goods is the supplier's, including, but not limited to, losses from exposure, liquidation, abandonment, or theft. A supplier's acceptance of a shipment does not constitute an admission that the inventory inspected by the supplier before shipment pursuant to subsection (5) and declared not returnable must be repurchased, but that all properly shipped inventory that is not deliverable or not accepted is considered to have been properly submitted for repurchase, and the supplier is liable to pay the repurchase amount for that inventory.

(8) Instead of the return of the inventory to the supplier under the terms of subsection (7), a dealer may notify a supplier by certified mail that the dealer has inventory that the dealer intends to return. The notice of the dealer's intention to return shall be in writing, sworn to before a notary public as to the accuracy of the listing of inventory and the suitability of the items for repurchase. The notice shall include the name and business address of the person or business who has possession and custody of the inventory and the location where the inventory may be inspected and

the list of inventory may be verified. The notice must also state the name and business address of the person or business who has the authority to serve as the escrow agent of the dealer, to accept payment or a credit to the dealer's account on behalf of the dealer, and to release the machinery and parts to the supplier. The notice constitutes the appointment of the escrow agent to act on the dealer's behalf regarding the activities described in this subsection. The escrow agent shall be a person or business that is independent of the dealership, dealer principal, or any employees of the dealership or supplier.

(9) The supplier has 30 days from the date of the mailing of the notice described in subsection (8) in which to inspect the inventory and verify the accuracy of the dealer's list. The supplier shall, within 10 days after inspection, do 1 of the following:

(a) Pay the escrow agent.

(b) Give evidence that a credit to the account of the dealer has been made if the dealer has outstanding sums due the supplier.

(c) Send to the escrow agent a credit list and shipping labels for the return of the inventory to the supplier that are acceptable as returns.

(10) If the supplier sends a credit list to the escrow agent, payment or a credit against the dealer's indebtedness in accordance with subsection (9) for the acceptable returns shall accompany the credit list. Upon receipt of the payment, evidence of a credit to the account of the dealer, or the credit list with payment, the title to the inventory acceptable as returns passes to the supplier making the payment or allowing the credit and the supplier is entitled to keep the inventory. The escrow agent shall ship or cause to be shipped the inventory acceptable as returns to the supplier unless the supplier elects to personally perform the inventorying, packing, and loading.

(11) When the inventory has been received by the supplier, notice of the receipt of the inventory shall be sent by certified mail to the escrow agent who shall then disburse 90% of the payment he or she has received, less its actual expenses and a reasonable fee for his or her services, to the dealer. The escrow agent shall keep the balance of the funds in the dealer's escrow account until he or she is notified that an agreement has been reached as to the nonreturnables, after which the escrow agent shall disburse the remaining funds and dispose of any remaining inventory as provided in the settlement.

(12) Whenever an agreement provides for a dealer to service consumer warranties by repairing, returning, or replacing inventory, the supplier shall pay any warranty claim made by or through the dealer for warranty parts or service within 90 days after the notice of termination of the agreement. If a claim is not specifically disapproved in writing during the 90-day period after notice of termination of an agreement, stating in detail the reasons for the disapproval, the claim shall be considered approved and the supplier shall pay the dealer for all parts and service applied to the servicing of the warranty claim.

(13) If a warranty claim is approved or considered approved under subsection (12) but repairs are not made, the supplier is not obligated to pay the dealer. However, the supplier shall accept for return by the dealer any inventory purchased, received, or set aside by the dealer for servicing of the claim unless, while in the possession of the dealer, the inventory has ceased to be in appropriate condition for return.

(14) Inventory in possession of a supplier and identified to a warranty claim made by or through a dealer on the date of the notice of termination of the agreement may be shipped by the supplier, at the dealer's option, provided that if the dealer directs the supplier to ship the inventory after notice of termination of the agreement, that inventory shall not be returnable.

Sec. 5. (1) The provisions of this act are supplemental to any agreement between the dealer and the supplier governing the return of inventory and the dealer may elect to pursue either a contract remedy or the remedy provided in this act. With respect to a dealer located in this state, a remedy provided for in this act shall not be limited by any agreement or contract between a supplier and a dealer.

(2) An election by the dealer to pursue a contract remedy does not bar the right of the dealer to the remedy provided in this act as to that inventory not affected by pursuit of the contract remedy.

(3) Notwithstanding anything contained in this act, the rights of a supplier to charge back to the dealer's account amounts previously paid or credited as a discount incident to the dealer's purchase of the inventory repurchased shall not be affected.

Sec. 6. The provisions of this act shall not require the repurchase of the following by a supplier from a dealer:

(a) Any perishable repair part included in a list of parts with shelf lives published by the supplier and provided to the dealer before termination, the shelf life of which has elapsed before the termination, or which shows evidence of deterioration.

- (b) Any single repair part that is priced as, or is only sold as, a set of 2 or more items.
- (c) Any repair part that, because of its condition, is not resalable as a new part.
- (d) Any inventory for which the dealer is unable to furnish evidence, satisfactory to the supplier, of title free and clear of all claims, liens, and encumbrances.
- (e) Any inventory that the dealer chooses to keep and has a contractual right to keep.
- (f) Any farm tractors and equipment, utility tractors and equipment, and equipment, or attachments that are not in new, unused, undamaged, complete, and salable condition. This subdivision does not apply to those resalable items described in section 4(1) that were used for demonstration or rental.
- (g) Any farm tractors and equipment, utility tractors and equipment, or attachments purchased 30 or more months prior to notice of termination of the contract.
- (h) Any inventory that was ordered by the dealer on or after the date of notification of termination of the contract.
- (i) Any inventory that was acquired by the dealer from any source other than the supplier.

Sec. 7. (1) If any supplier fails or refuses to pay or credit the account of the dealer for any inventory required to be repurchased by section 3 within 90 days after receipt by the supplier of that inventory, he or she shall be liable for 100% of the net cost of all tractors, equipment, and attachments returned or the current net price of all repair parts returned plus any freight charges paid by the dealer and interest on the current net price computed at the legal interest rate from the sixty-first day after receipt of the inventory.

(2) A dealer located in this state shall not waive his or her right to bring any action under this act in the courts of this state. A dealer is not, by virtue of entering into an agreement with a supplier in another state, considered to be doing business in the other state. An action arising under provisions of this act shall be brought in the circuit court of the county in which the dealer has its principal place of business in Michigan.

Sec. 7a. (1) A supplier shall not terminate, cancel, fail to renew, or substantially change the competitive circumstances of an agreement without good cause. A supplier shall provide a dealer at least 90 days' prior written notice of termination, cancellation, nonrenewal, or substantial change in competitive circumstances. The notice shall state the reasons or deficiencies for the action, and the dealer has 90 days to submit a plan to correct the stated reasons or deficiencies that is acceptable to the supplier or to correct the stated reasons or deficiencies. Failure by a dealer to comply with the requirements imposed upon the dealer by the supplier's agreement shall be cause for termination, provided the requirements are not different from those requirements imposed by the supplier on other similarly situated equipment dealers within the state.

(2) The notice described in subsection (1) shall state all the reasons for termination, cancellation, nonrenewal, or substantial change in competitive circumstances and shall provide that the dealer has 90 days in which to rectify any claimed deficiency. If a plan to rectify is submitted or the deficiency is rectified within 90 days, the notice is considered void.

(3) The notice provisions of this section shall not apply if the reason for termination, cancellation, or nonrenewal is insolvency, the occurrence of an assignment for the benefit of creditors, bankruptcy, or material misrepresentation and falsification of records. If the reason for termination, cancellation, nonrenewal, or substantial change in competitive circumstances is nonpayment of sums due under the agreement, the dealer shall be entitled to written notice of default in payment and shall have 10 days from the date of delivery of posting of the notice in which to remedy the default. A supplier shall be liable to a dealer for damages caused to the dealer by the supplier's breach of subsection (1).

Sec. 8. (1) Upon the death of the dealer or the majority stockholder of a corporation or a partner in a partnership operating as a dealer, the supplier shall, at the option of the heirs, repurchase the inventory from the surviving spouse or the heir or heirs of the dealer or majority stockholder as if the contract had been terminated.

(2) The heir or heirs shall have 200 days from the date of the death of the dealer or majority stockholder to exercise their options under this act. The repurchase of an inventory is not required if the heirs or the supplier enter into an agreement to operate the dealership, wholesale business, or distributorship on substantially similar terms to those of the deceased dealer.

Sec. 9. The provisions of this act shall not be construed to affect in any way any security interest which any financial institution, person, or supplier has in the inventory of the dealer and any repurchase shall not be subject to article 6 of the uniform commercial code, Act No. 174 of the Public Acts of 1962, being sections 440.6101 to 440.6111 of the Michigan Compiled Laws.

Sec. 10. The provisions of this act shall apply to all agreements, contracts, sales agreements, security agreements, or franchise agreements written or implied in force and effect on or after January 2, 1990.

This act is ordered to take immediate effect.

Clerk of the House of Representatives.

Secretary of the Senate.

Approved -----

Governor.