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# HOWARD MARKLEIN

STATE SENATOR • 17<sup>TH</sup> SENATE DISTRICT

**September 25, 2019**

## **Senate Committee on Transportation, Veterans and Military Affairs Testimony on Senate Bill 304**

Good Morning!

Thank you Chair Petrowski and committee members for hearing Senate Bill 304 (SB 304), which makes changes to the statutes for prohibited practices of motor vehicle manufacturers, importers, and distributors.

SB 304 would prohibit manufacturers from assessing surcharges on Wisconsin motor vehicle dealers for utilizing the Wisconsin statutory formula for reimbursement of warranty work. There are currently 18 states that prohibit manufacturer's retaliatory surcharges.

I authored this bill at the request of local automobile dealers in my Senate District whom have had difficulty working with General Motors (GM) within the confines of current law. They have asked us to consider changes to state statute to further protect businesses in our state and ensure that our laws do not put them at a competitive disadvantage with neighboring states.

In 2011 the Wisconsin legislature passed Senate Bill 96, which updated and amended the Wisconsin Motor Vehicle Franchise law. The bill was signed into law as 2011 Wisconsin Act 91.

One provision of 2011 Act 91 includes a warranty reimbursement formula that calls for manufacturers to reimburse dealers for repairs performed under the manufacturer's warranty at the same rate that customers who no longer have a valid warranty would pay for similar repairs. Requiring a manufacturer to compensate a dealer at the average customer pay rate prevents Wisconsin consumers from subsidizing the manufacturer's warranty repair obligations.

In October of 2018, General Motors began assessing a surcharge between \$178 and \$279 per vehicle sold on select GM dealers who had requested to be reimbursed at the statutory reimbursement rate. Nissan also currently surcharges all of their dealers \$75 per vehicle.

My district covers a large portion of southwestern Wisconsin, bordering both Illinois and Iowa. The surcharge puts in-brand dealers and those on state borders at a competitive disadvantage and ultimately Wisconsin consumers pay more for the purchase price of a new vehicle as well as more for non-warranty repairs.

Thank you again for hearing SB 304, and your timely action on this proposal.



# JOAN BALLWEG

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CO-CHAIR, JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES

41<sup>st</sup> ASSEMBLY DISTRICT

**Senate Bill 304: Prohibited practices of motor vehicle manufacturers, importers, and distributors and providing a penalty**

**Testimony of State Representative Joan Ballweg**

**Senate Committee on Transportation, Veterans and Military Affairs**

**September 25, 2019**

Thank you, Chair Petrowski, and members of the Senate Committee on Transportation, Veterans and Military Affairs for holding this public hearing on SB 304. This bill prohibits auto manufacturers from assessing a surcharge on auto dealers in order to protect auto dealers and consumers throughout Wisconsin.

When a car owner brings their car in for warranty work, the dealer performs the work on behalf of the manufacturer. The rates at which the dealer is reimbursed are determined through the dealer's contract and franchise law. In October of 2018, General Motors began assessing a surcharge between \$178 and \$279 per vehicle sold on select GM dealers who had requested to be reimbursed at the statutory reimbursement rate. Nissan also currently surcharges all of their dealers \$75 per vehicle.

This action by GM and Nissan attempts to coerce their dealers into waiving their right to fair compensation as negotiated in 2011 Act 91. This puts in-brand dealers and those on state borders at a competitive disadvantage and ultimately Wisconsin consumers pay more for the purchase price of a new vehicle as well as more for non-warranty repairs. The cost for warranty work is already built into the price of the vehicle from the manufacturer to the dealer. It is not a free market when a surcharge allows the manufacturer to pick and choose dealers to selectively raise the price of a new vehicle, rather than raising the invoice price to all dealers.

Currently, an individual dealer does not have an ability to negotiate these surcharges with the manufacturer through their contract. That is why the parameters of these contracts need to be set on a statewide basis through franchise law. SB 304 levels the playing field, and it gives auto dealers the ability to negotiate reasonable compensation for warranty work with the manufacturers. This legislation would prohibit manufacturers from assessing surcharges on Wisconsin motor vehicle dealers as retaliation for utilizing the Wisconsin law. There are currently 18 states that prohibit manufacturer's retaliatory surcharge. Requiring a manufacturer to compensate a dealer at the average customer pay rate protects Wisconsin consumers from subsidizing the manufacturer's warranty repair obligations.

The Wisconsin Automobile and Truck Dealers Association, Inc. and the Wisconsin Recreational Vehicle Dealers Alliance registered in support of this bill.

Thank you for your consideration of SB 304. Please feel free to contact my office with any questions that you may have.



September 25, 2019

The Honorable Jerry Petrowski, Chair  
Senate Committee on Transportation, Veterans and Military Affairs  
State Capitol  
Madison, WI 53703

Dear Chairman Petrowski:

On behalf of the Alliance of Automobile Manufacturers, thank you for the opportunity to present the Alliance's opposition to Senate Bill 304. The Alliance is a trade association representing twelve leading car and light duty truck manufacturers: BMW Group, FCA US LLC, Ford Motor Company, General Motors Company, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche, Toyota, Volkswagen Group of America and Volvo Cars North America. Together, Alliance members represent more than 70% of the car and light duty trucks sold in the United States each year.

SB 304 exacerbates an existing problem in Wisconsin's motor vehicle franchise law. This problem is unique to Wisconsin and dramatically different than every other state's law. The law, §218.0125(3m), requires the manufacturer to pay the dealer at its retail rate for parts and labor used to repair a vehicle that is under warranty. Basic math teaches that the hourly rate for such labor would be calculated by taking the dollars charged to retail customers and dividing by the number of hours billed to those customers. The problem is that §218.0125 does not do that and uses a flawed formula instead. The law calculates the rate as dollars charged to retail customers divided by the number of hours that would have been billed if the dealer had used the manufacturer's warranty time guide, which is tailored to warranty repairs not general retail service. Warranty repairs and general retail service should not be conflated. The vehicles are different in terms of their makes, their age, the types of problems, the availability of special tools, and complications such as rusted or stripped parts. Because of those differences, a warranty repair time guide is likely to have shorter time amounts than a time guide designed for general retail repairs. By calculating the rate as dollars charged divided by the warranty guide instead of the hours actually billed, Wisconsin's law divides by a smaller number. Thus the statutory formula results in an hourly rate that is incorrect and higher than what retail customers actually pay, yet it is what manufacturers are forced to pay under the law. Wisconsin is the only state in the nation with this problem in its automobile franchise law. It is unreasonable and costly for manufacturers.

SB 304 makes the problem worse because it prohibits manufacturers from utilizing a surcharge to recover those unreasonable, Wisconsin-specific costs. Even worse, SB 304 includes several vague provisions that seem designed to encourage litigation. For example, it prohibits nonrandom audits of a dealer and limiting vehicle allocations if they are "in retaliation" for a dealer using the problematic warranty reimbursement law. But there are many valid business



reasons for manufacturers to conduct a nonrandom audit (e.g. red flags triggered in the system) or limit vehicle allocations (e.g. limited availability) and SB 204 would create a chilling effect on those business decisions if anything that could be alleged to be retaliatory could trigger a lawsuit. SB 304 also forbids manufacturers from increasing prices “for the purpose of recovering costs of compensating dealers under s. 218.0125.” In other words, the law causes costs to go up, but also prohibits prices from going up as a result of those costs. That is not a reasonable way to regulate commerce.

The Alliance respectfully asks this committee not to report SB 304, which would make Wisconsin’s uniquely unreasonable warranty reimbursement law even worse.

Sincerely,

David E. Bright  
Attorney

## Sub Amendment to Senate Bill 304/Assembly Bill 335

1. **PROHIBITS SURCHARGES** – Prohibits a manufacturer, importer, or distributor from assessing any penalties, fees, or surcharges against an individual dealer for the purpose of recovering costs associated with compensating for labor warranty work.
2. **PROVIDES RETAIL/MARKET RATES FOR PARTS** – This benefits all dealerships and is potentially much more lucrative than labor rate.
3. **ALLOWS EXTRA TIME FOR WARRANTY WORK** – A dealer may request additional time allowance for either diagnostic or repair work on a specific vehicle covered under the manufacturer's warranty in the manner and with all documentation and information as reasonably required by the manufacturer. The request shall not be unreasonably denied by the manufacturer.
4. **RESTORES LABOR RATE THAT IS USED BY MAJORITY OF DEALERSHIPS** – Wisconsin's rate would be in line with 39 other states.



State of Wisconsin  
2019 - 2020 LEGISLATURE

LRBs0099/P1  
EVM:cdc

**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**  
**SENATE SUBSTITUTE AMENDMENT ,**  
**TO SENATE BILL 304**

1     **AN ACT to amend** 218.0125 (3m) (a), 218.0125 (3m) (b), 218.0125 (3m) (c) 1. and  
2           218.0125 (5); and **to create** 218.0125 (8) of the statutes; **relating to:**  
3           compensation of motor vehicle dealers by manufacturers, importers, or  
4           distributors for certain service work.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

5           **SECTION 1.** 218.0125 (3m) (a) of the statutes is amended to read:  
6           218.0125 (3m) (a) Subject to sub. (4m), a manufacturer, importer, or  
7           distributor, except a manufacturer, importer, or distributor of motorcycles with  
8           respect to a dealer of the manufacturer's, importer's, or distributor's motorcycles,  
9           shall reasonably compensate a dealer who performs work to rectify the product or  
10          ~~warranty defects of~~ under a warranty or recall issued by the manufacturer, importer,

1 or distributor ~~or to satisfy delivery and preparation obligations of the manufacturer,~~  
2 ~~importer, or distributor~~ or who performs any other repair work required, requested,  
3 or approved by the manufacturer, importer, or distributor ~~or~~ for which the  
4 manufacturer, importer, or distributor has agreed to pay.

5 **SECTION 2.** 218.0125 (3m) (b) of the statutes is amended to read:

6 218.0125 (3m) (b) Reasonable compensation under par. (a) for labor is equal  
7 to the dealer's effective nonwarranty labor rate multiplied by the number of hours  
8 allowed for the repair under the manufacturer's, importer's, or distributor's time  
9 allowances used in compensating the dealer for warranty work. A dealer may  
10 request that the time allowance for work on a specific vehicle include an additional  
11 amount of time for diagnostic or repair work performed on the vehicle. The request  
12 shall be made in the manner and with all the documentation and information  
13 reasonably required by the manufacturer, importer, or distributor. A request for an  
14 additional amount of time allowance under this paragraph may not be unreasonably  
15 denied by the manufacturer, importer, or distributor. Reasonable compensation  
16 under par. (a) for parts is equal to the dealer's cost for the parts multiplied by the  
17 dealer's average percentage markup over dealer cost for parts.

\*\*\*\*NOTE: Please note, this provision was a little unclear to me. Please review the revised language and let me know if it does not meet your intent.

18 **SECTION 3.** 218.0125 (3m) (c) 1. of the statutes is amended to read:

19 218.0125 (3m) (c) 1. The effective nonwarranty labor rate is determined, using  
20 the submitted substantiating orders under sub. (4m) (a) 2., by dividing the total  
21 customer labor charges for qualifying nonwarranty repairs in the repair orders by  
22 the total number of hours that ~~would be allowed for the repairs if the repairs were~~  
23 ~~made under the manufacturer's, importer's, or distributor's time allowances used in~~

1 ~~compensating the dealer for warranty work generated the total customer labor~~  
2 ~~charges as indicated in the repair orders.~~

3 SECTION 4. 218.0125 (5) of the statutes is amended to read:

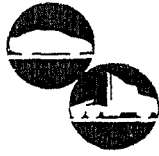
4 218.0125 (5) A manufacturer, importer, or distributor who fails to compensate  
5 a dealer for parts or labor at an amount not less than the amount the dealer charges  
6 its other retail service customers for parts or labor used to perform similar work shall  
7 not be found to have violated this section if the manufacturer, importer, or distributor  
8 shows that, for a manufacturer, importer, or distributor of motorcycles with respect  
9 to a dealer of the manufacturer's, importer's, or distributor's motorcycles, the  
10 amount is not reasonably competitive to the amounts charged to retail service  
11 customers by other similarly situated franchised motor vehicle dealers in this state  
12 for the same parts or labor when used by those dealers to perform similar work or,  
13 for any other manufacturer, importer, or distributor, the amount is not reasonably  
14 competitive to the amounts charged to retail service customers by other similarly  
15 situated franchised motor vehicle dealers in this state in performing qualifying  
16 nonwarranty repairs.

17 SECTION 5. 218.0125 (8) of the statutes is created to read:

18 218.0125 (8) A manufacturer, importer, or distributor may not assess any  
19 penalty, fee, or surcharge against an individual dealer for the purpose of recovering  
20 costs associated with compensating the dealer under this section. This subsection  
21 does not prohibit a manufacturer, importer, or distributor from increasing the price  
22 charged for goods or services in the ordinary course of business.

\*\*\*\*NOTE: Do you want to specify an initial applicability for this amendment, e.g.  
"first applies to work performed on the effective date?"





## Wisconsin Automobile & Truck Dealers Association

WILLIAM A. SEJIC  
President

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April 10, 2018

### Hold That Check, We Need to Talk

The 2017-18 Wisconsin legislative session ended in frustration for the Wisconsin Automobile and Truck Dealers Association. However, there are some very valuable takeaways to keep in mind in the immediate and protracted future.

The main piece of legislation that WATDA pushed this session was an anti-surcharge bill. If passed, it would have added a provision to the motor vehicle franchise law that would prohibit manufacturers from assessing surcharges on vehicles dealers purchase from the manufacturer, to compensate the manufacturer for following the law regarding warranty reimbursement. There are currently 18 states that have such provisions.

But alas, a few Milwaukee-area "free market" republicans decided allowing manufacturers to go unchecked and engage in the practice of punishing their dealers via a surcharge, purely for utilizing the law in seeking fair compensation for warranty work, should be left up to negotiation between dealers and their manufacturers. Many stating, "if the dealer doesn't like the way their manufacturer is treating them, then they should just sell and get out of the business." The irony here is that these are legislators who view themselves as pro-business and economic development champions and yet they supported an out-of-state company that no longer has a presence in Wisconsin, over long-standing local dealerships that pay local property and state payroll and income taxes while employing over 25,000 Wisconsinites throughout the state.

We didn't ask for this fight. In 2011, WATDA worked to pass a franchise bill that made several amendments to the law. The provisions within that bill were the product of negotiation and compromise between the dealers and manufacturer representatives. The warranty reimbursement formulas for both parts and labor were a part of that compromise and agreement. There were several amendments made to the bill during its legislative passage (including taking out an anti-surcharge provision) and the warranty reimbursement formulas were never an issue. Four years later, in the end of October 2015, GM informed WATDA that they did not like the warranty reimbursement formula for labor and demanded that we agree to repeal the law.

After consulting with the WATDA Executive Committee, a few select multi-point dealers and the full Board of Directors, it was decided that one manufacturer should

not dictate changes to a law that was working. As the 2015-16 legislative session came to an end, WATDA agreed to amend a provision in the law, but that was not enough for GM, who continued to demand a repeal of the formula. Senate Majority Leader Scott Fitzgerald (R-Juneau) asked us to try and work something out with them over the legislative break. However, GM had no intention of negotiating or compromising and in September of 2016 they threatened their dealers who were receiving warranty reimbursement under the state formula, that they would be surcharged \$389 per vehicle. Some of those dealers joined together and filed a lawsuit in federal court to challenge GM's surcharge. The question to be answered by the court is not whether GM can surcharge, but who can they surcharge. Can they cherry pick individuals or do they have to surcharge their whole dealer body in Wisconsin. (That case currently does not have a decision).

Under that setting, WATDA, asked Representative Joan Ballweg (R-Markesan) and Senator Luther Olsen (R-Ripon) to sponsor a bill that would prohibit a manufacturer from surcharging dealers. With the help of 5 different dealers testifying and many more making calls to their legislators, the bill passed through both the Assembly Consumer Protection and Senate Transportation committees unanimously and passed the full Assembly on a voice vote. However, in the senate, despite securing 27 out of 32 possible votes, we ran into road blocks in the form of unwritten party rules and free market philosophies and the bill never made it to the senate floor for a vote.

In this day and age, especially in Wisconsin, party politics rules. The unwritten rule is, to get a bill to the floor for a vote, it must have the support of enough legislators within the majority party to pass. In other words, Wisconsin has 33 senators, so you need to have 17 republican senators support a bill to have it considered to reach the floor for a vote. In our situation, one republican senator took an administration job leaving 32 senators, 18 republicans and 14 democrats. The problem in the senate consisted of 4 express no votes from free market senators: David Craig (R-Vernon), Dewey Stroebel (R-Saukville), Chris Kapenga (R-Delafield) and Leah Vukmir (R-Brookfield) coupled with Senate Majority Leader Fitzgerald's decision not to allow it to be voted on by the full senate body.

Free marketers, Craig, Kapenga and Stroebel were in the assembly in 2011 when our last franchise bill passed. Craig and Kapenga voted against that bill. Stroebel, voted for the bill, but was on record as a no vote for the anti-surcharge bill (however, he did make a request to have the anti-surcharge bill brought to the floor for a vote). Vukmir was the only senator to vote against the 2011 bill and she requested a roll call vote, so that she could be on record as voting against it. This time around, she made herself unavailable time and again to speak with us about the bill. State Senator Vukmir has her sights set on the U.S. Senate seat and didn't want to be held accountable for a position on the anti-surcharge bill. (An important side note for the dealers in the 5<sup>th</sup>

Senate district [Vukmir's current seat], Assemblyman Dale Kooyenga (R-Brookfield) is running to replace her. Rep. Kooyenga, a free marketer, voted against the 2011 bill and indicated through his staff that he did not support the anti-surcharge bill and that he did not need nor want to talk to us about it.

It is not the typical practice of WATDA to be so candid about the sausage making process that working a bill through the legislature is, however, we do here for the purpose of educating our members about who in the legislature supports your business and who does not. Very soon (if it hasn't already started) legislators and hopeful candidates are going to be calling and mailing you seeking support from you to help them with their campaign. When you are solicited by candidates, talk to them, ask them about their position on franchise laws.

When speaking to legislators, find out how much they really know about the franchise system. They may not be aware that your Sales and Service Agreement is a take it or leave it document that manufacturers reserve the right to unilaterally modify from time to time as they see fit. In which case, the Wisconsin Motor Vehicle Franchise Law is the only mechanism you have, to effectively negotiate with the manufacturers. Walking away from your franchise investment is not a practical solution. Every state has a motor vehicle franchise law for a reason. Franchise laws regulate the dealer-manufacturer relationship, the dealer and customer relationship and the manufacturer and customer relationship. They ensure fair intra-brand and Interbrand competition throughout the state, which directly enables smaller dealers in more rural areas to survive and service those communities.

Warranty reimbursement is a perfect example. While some manufacturers compensate their dealers fairly, others view it as purely an expense that needs to be constantly monitored, controlled and reduced. Forty states have provisions that require the manufacturer to reimburse their dealers at the average customer pay rate. Twenty-seven states use the same formula for warranty parts reimbursement that Wisconsin does. While a majority of dealers accept the reimbursement formula that their manufacturer has decided is fair, others have opted to choose to be reimbursed under the statutory formula. The franchise law guarantees the dealers a choice. *It's just a shame that some legislators feel that it's OK to let manufacturers punish a dealer for exercising that choice (a choice they voted to provide you).*

In the upcoming months WATDA staff will be traveling throughout the state and meeting with our dealers. We are hoping that when we are in your area, you take the time to come and meet with us. It is a great opportunity for both WATDA staff and our members to meet and discuss the issues that are affecting your business.

## States Prohibiting Surcharges to Recoup Cost of Warranty Reimbursement

The following 19 states contain provisions in their dealer franchise law that prohibit surcharges to recoup the cost of warranty reimbursement:

Arizona	North Carolina
Connecticut	North Dakota
Florida	Ohio
Georgia	Oregon
Hawaii	Utah
Idaho	Vermont
Maine	Virginia
Montana	Washington
New Mexico	West Virginia
New York	

(**Not listed:** Alabama, Alaska, Arkansas, California, Colorado, Delaware, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Wisconsin and Wyoming)