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STATE of SOUTH CAROLINA

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Columbia 29211

April 5, 2000

The Honorable W. Greg Ryberg
Senator, District No. 24
512 Gressette Building
Columbia, South Carolina 29202

Dear Senator Ryberg:

You have asked our opinion concerning the constitutionality of H.4450, a Bill to "Prohibit Ownership, Operation, or Control of Competing Dealerships By A Manufacturer or Franchisor Except Under Certain Circumstances ..." It is our opinion that the Bill unconstitutionally creates a monopoly for South Carolina car dealers.

H.4450 finds that "the distribution of motor vehicles in the State of South Carolina vitally affects the general economy of the State and its public interest and public welfare. In the exercise of its police power, it is necessary for the State to regulate motor vehicle manufacturers, distributors, dealers, and their representatives doing business in South Carolina to prevent frauds and other abuses upon its citizens."

Specifically, the legislation essentially bars auto manufacturers, such as Ford or GM or their subsidiaries or interests, from owning or operating car dealerships or repair centers in this State. The Bill forbids competition by a manufacturer against a franchisee.

In addition, pursuant to the Bill, a manufacturer or franchisor "is conclusively presumed to be competing unfairly if it gives preferential treatment to a dealer or dealership in which an interest is directly or indirectly owned, operated or controlled by the manufacturer or franchisor ...." This conclusive presumption specifically applies to preferential treatment in the costs of repairs, the provision of services, rebates, warranties, etc.

Further, the Bill makes it unlawful for a manufacturer or franchisor "... to own a facility that engages primarily in the repair of motor vehicles ... ." Moreover, except within

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Request Letter

certain narrow exceptions, "a manufacturer or franchisor may not offer to sell or sell, directly or indirectly, a motor vehicle to a consumer in this State, except through a new motor vehicle dealer holding a franchise for the line that includes the motor vehicle ... ."

Other provisions in the Bill require a franchisor in order to establish a new dealership or relocate an existing one within a ten mile market area to give written notice to the existing dealership by certified mail. The Bill creates a right of action to enjoin the location of the new dealership upon receipt of notice. The Bill requires the court to "enjoin or prohibit the establishment of the new or relocated dealership within the relevant market area of the existing dealership unless the franchisor shows by a preponderance of the evidence that the existing dealership is not providing adequate representation of the line - make motor vehicle in the existing dealership's relevant market area and that the new or relocated dealership is necessary to provide the public with reliable and convenient sales and service within that area."

Strikingly, the Bill also seeks to prohibit manufacturers or franchisors from selling automobiles over the Internet except through dealers. Section 4 of the Bill succinctly provides that "[t]his chapter does not prohibit a dealership located in this State from contracting with an on-line electronic service to provide motor vehicles to consumers in this State."

Law / Analysis

The Bill offends numerous provisions of both the federal and State Constitution. For example, the severe restrictions upon Internet sales renders the Bill particularly vulnerable constitutionally under the Commerce Clause. In American Libraries Assn. v. Pataki, 969 F.Supp. 160, 171 (S.D.N.Y. 1997), the Court held that "New York has deliberately imposed its legislation on the Internet and, by doing so, projected its law into other states whose citizens use the Net." Id. at 177. Likewise, in Cyberspace Communications Inc. v. Engler, 55 F.Supp.2d 737 (E.D. Mich. 1999), the Court stated that the relevant statute "would subject the Internet to inconsistent regulations across the nation" inasmuch as a "publisher of a web page cannot limit the viewing of his site to everyone in the country except for those in Michigan." Id. at 751, 752. Similarly, the Court in Lorillard Tobacco Co. v. Reilly, Nos. Civ. A. 99-11118WGY, Civ. A. 99-11270WGY, 2000 WL 110650 at 23 (D. Mass. Jan. 24, 2000) stated that "the fact that Internet-based advertising is targeted at no state in particular, but all states in general." Thus, certainly the Internet portion of the Bill would undoubtedly be struck down by a court as violating the Commerce Clause. Other portions of the Bill, particularly the provision prohibiting a manufacturer or franchisor from operating a

dealership, would likely also fall as discriminating against interstate commerce. See, e.g. Maine v. Taylor, 477 U.S. 131, 138 (1986) [facial discrimination against interstate commerce violates the Commerce Clause unless the State demonstrates a "legitimate local purpose" which cannot be served as well by nondiscriminatory means.]

Portions of the Bill could also be struck down under the Takings Clause of the 5th Amendment which bans the taking of "private property ... for public use, without just compensation." The Bill's barring of dealerships owned or operated by manufacturers would undoubtedly constitute a taking, particularly where existing contractual relationships are undermined or affected.

Furthermore, the Bill likely would also not be able to withstand scrutiny under the 14th Amendment's Due Process Clause which provides that no State shall "deprive any person of life, liberty or property, without due process of law." While the constitutional standard for substantive due process analysis would simply require that the law be "supported by a legitimate legislative purpose furthered by rational means," Pension Benefit Gurantee Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984), in our opinion, the Bill could not meet even this minimal standard. In effect, the proposed legislation puts manufacturers operating dealerships "out of business." Courts elsewhere have struck down similar measures. See e.g., Santos v. City of Houston, 852 F.Supp. 601, 608 (S.D. Tex. 1994) (invalidating as irrational a city ordinance that "classified] jitneys out of business"); Brown v. Barry, 710 F.Supp. 352, 355-56 (D.D.C. 1989) (prohibitions against vending permits for shoeshine stands in a public place lacks rational basis).

Legislation similar to H.4450 was deemed to be violative of the Due Process Clause in opinions of this Office, dated April 12, 1972 and April 21, 1972. In that instance, a manufacturer, distributor or wholesaler in the relevant market area was deemed not to be competing against an existing dealership only in certain very limited circumstances, those virtually identical to the ones specified in H.4450. We concluded there that such legislation would "tend to create limited monopolies, would exclude otherwise qualified persons from obtaining dealerships and would interfere with the right of manufacturers to establish additional dealerships for their cars." Therefore, in our opinion, that proposed legislation violated the Due Process Clause of the 14th Amendment.

For many of those same reasons, the Bill also would likely violate the Equal Protection Clause of the 14th Amendment. Clearly, the Bill unlawfully and unconstitutionally discriminates against car manufacturers and in favor of car dealers. See, Villages of

Willowbrook v. Olech, _____ U.S. _____, 120 S.Ct. 1073 (2000). A court, based upon standard Equal Protection analysis would thus find the legislation arbitrary and capricious.

Conclusion

In our opinion, H.4450 is patently unconstitutional. A court would conclude that the bill violates not only the Commerce Clause and the Takings Clause, but also the Due Process and the Equal Protection Clauses.

This legislation is anti-competitive, anti-free market and anti-consumer. It is pro-protectionist, pro-special interest and unconstitutional.

Particularly offensive to the Constitution is the portion of the Bill prohibiting car sales over the Internet, except through an authorized dealer. The South Carolina General Assembly does not constitutionally own and cannot constitutionally control legitimate commerce over the Internet. Automobile dealers are, after all, simply selling the product the manufacturer has designed, built and marketed. If a manufacturer cannot sell his own product, but must constitutionally pass that product through a "middle man," then our understanding of the free market system is way off base. The Internet is a worldwide web for trade, not a local instrument for protectionism. The Constitution does not permit the placement of a cyberspace cop at the gate of the Internet to determine who can and who cannot pass through. If manufacturers in Detroit can sell cars cheaper over the Internet than dealers in Columbia or Charleston, government should stay out of the way and let them do it.

Sincerely,

Charlie Condon
Attorney General

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