

## CHAPTER 144

## (HB 305)

AN ACT relating to retail agreement contracts and declaring an emergency.

*Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

Section 1. KRS 365.800 is amended to read as follows:

As used in KRS ~~365.800~~~~[365.805]~~ to 365.840, unless the context requires otherwise:

- (1) "Current net price on parts" means the price listed by *a supplier*~~[the wholesaler, manufacturer or distributor of farm implements, tractors, farm machinery, utility and industrial equipment, including lawn and garden equipment, attachments or repair parts for such equipment]~~ in a price list or catalogue in effect at the time *a retail agreement*~~[the contract is terminated]~~~~[canceled or discontinued]~~, less any applicable trade and cash discounts;
- (2) "Retailer" means any person, firm, or corporation, *including heirs, personal representatives, guardians, trustees, assignees, or receivers of the person, firm, or corporation*, engaged in the business of selling and retailing *inventory*~~[farm implements, tractors, farm machinery, utility and industrial equipment, including lawn and garden equipment, attachments, and repair parts for such equipment]~~, but shall not include retailers of petroleum ~~or~~~~[,]~~ motor vehicle and related automotive care and replacement products normally sold by such retailers. The term "retailer" shall also include any person engaged in the aforementioned business, his heirs, personal representatives, or his guardian;
- (3) "Inventory" means farm implements, tractors, farm machinery, *consumer products*, utility and industrial equipment, *construction and excavating equipment, and any*~~[including lawn and garden equipment,]~~ attachments,~~[and]~~ repair parts, *or superseded parts* for *the*~~[such]~~ equipment;~~[and]~~
- (4) "Net cost" means the price ~~a~~~~[the]~~ retailer paid for the inventory to *a supplier*~~[the wholesaler, manufacturer or distributor of such inventory]~~, less all discounts allowed;
- (5) "*Consumer products*" means *machines designed for or adapted and used for horticulture, floriculture, landscaping, grounds maintenance, or turf maintenance, including but not limited to lawnmowers, rototillers, trimmers, blowers, and other equipment used in both residential and commercial lawn, gardening, or turf maintenance, installation, or other applications;*
- (6) "*Superseded parts*" means *any part that will provide the same function as a currently available part as of the date of termination of a retail agreement contract; and*
- (7) "*Supplier*" means *any wholesaler, manufacturer, or distributor of inventory, or any purchaser of assets or stock of any surviving corporation resulting from a merger or liquidation, or any receiver, assignee, or trustee of the original wholesaler, manufacturer, distributor, or corporation.*

Section 2. KRS 365.805 is amended to read as follows:

*If a*~~[Whenever any]~~ retailer enters into a *retail*~~[franchise]~~ agreement *contract, written or unwritten*, with a *supplier where*~~[wholesaler, manufacturer or distributor of inventory wherein]~~ the retailer agrees to maintain an inventory and the contract is terminated, *the supplier*~~[then such wholesaler, manufacturer or distributor]~~ shall repurchase the inventory as provided in KRS ~~365.800~~~~[365.810]~~ to 365.840. The retailer may keep the inventory if *the retailer*~~[he]~~ desires. If

the retailer has any outstanding debts to the *supplier*,~~[wholesaler, manufacturer or distributor then]~~ the repurchase amount may be credited to the retailer's account.

Section 3. KRS 365.810 is amended to read as follows:

- (1) (a) The *supplier*~~[wholesaler, manufacturer or distributor of inventory]~~ shall repurchase~~[that]~~ inventory previously purchased from *the supplier*~~[him]~~ and held by the retailer on the date of termination of the *retail agreement* contract. The *supplier*~~[wholesaler, manufacturer or distributor of inventory]~~ shall pay one hundred percent (100%) of the net cost, plus any freight charges paid, of all new, unsold, undamaged, and complete farm implements, tractors, farm machinery, utility and industrial equipment, *construction and excavating equipment, consumer products*,~~[including lawn and garden equipment]~~ and *any* attachments *for the equipment*, and one hundred percent (100%) of the current net price of all new, unused, and undamaged repair parts *or superseded parts*.
- (b) *The supplier shall repurchase inventory used in demonstrations, including inventory leased or rented primarily for demonstration or lease purposes, at its agreed depreciated value, if the equipment is in like-new condition and has not been damaged.*
- (2) The *supplier*~~[wholesaler, manufacturer or distributor]~~ shall pay the retailer five percent (5%) of the current net price on all new, unused, and undamaged repair parts *or superseded parts* returned to cover the cost of handling, packing, and loading. The *supplier may perform*~~[wholesaler, manufacturer or distributor shall have the option of performing]~~ the handling, packing, and loading in lieu of paying the five percent (5%) of the current net price for these services.
- (3) (a) *The supplier shall purchase from the retailer, at its amortized value, any specific data processing hardware and software and telecommunications equipment that the supplier required the retailer to purchase within five (5) years of the termination of the retail agreement contract.*
- (b) *The supplier shall repurchase from the retailer, at seventy-five percent (75%) of the net cost, specialized repair tools purchased within three (3) years of the date of the termination of the retail agreement contract, and, at fifty percent (50%) of the net cost, specialized repair tools purchased more than three (3) but less than six (6) years of the date of the termination of the retail agreement contract, if:*
  1. *The supplier required the purchase;*
  2. *The retailer held the tools on the date of the termination of the retail agreement contract;*
  3. *The tools were unique to the supplier's product line; and*
  4. *The tools were in complete and resalable condition.*
- (4) *The supplier shall purchase from the retailer, at its amortized value, any specific signage incorporating the supplier's name, logo, tradename, trademark, or other information identifying the supplier or the products manufactured or distributed by the supplier which the supplier expressly required the retailer to purchase in connection with the retail agreement contract.*

- (5) *If, in a retail agreement contract, the supplier requires the retailer's employees to participate in training programs sponsored or promoted by the supplier, then the supplier shall reimburse the retailer for any out-of-pocket expenses incurred by the retailer. The reimbursement shall only be required if the training took place within one (1) year of the termination of the retail agreement contract.*
- (6) *The supplier shall purchase from the retailer, at its amortized value, all trade fixtures and other improvements to the business premises of the retailer that the supplier expressly required the retailer to purchase or acquire in connection with the retail agreement contract.*

Section 4. KRS 365.815 is amended to read as follows:

Upon payment of the repurchase amount to the retailer, the title and right of possession to the repurchased inventory shall transfer to the **supplier**~~[wholesaler, manufacturer or distributor of such inventory]~~. *Annually, at the end of each calendar year after the termination of a retail agreement contract, the retailer's reserve accounts for recourse contracts shall not be debited by a supplier or lender for any deficiency unless the retailer has been given at least seven (7) business days notice by registered U.S. mail, return receipt requested, of any proposed sale of the equipment financed and has been given an opportunity to purchase the equipment. The former retailer shall be given quarterly status reports on any remaining outstanding recourse contracts. As the recourse contracts are reduced, any reserve account funds shall be returned to the retailer in direct proportion to the liabilities outstanding.*

Section 5. KRS 365.820 is amended to read as follows:

The provisions of KRS 365.800 to 365.840 shall not require the repurchase from a retailer of:

- (1) Any repair part *or superseded part* which has a limited storage life or is otherwise subject to deterioration, such as rubber items, gaskets, or batteries;
- (2) Any repair part *or superseded part* which is in a broken or damaged package;
- (3) Any single repair part *or superseded part* which is priced as a set of two (2) or more items;
- (4) Any inventory for which the retailer is unable to furnish evidence, satisfactory to the **supplier**~~[wholesaler, manufacturer or distributor]~~, of clear title, free and clear of all claims, liens, and encumbrances;
- (5) Any inventory which the retailer desires to keep, provided the retailer has a contractual right to do so;
- (6) Any inventory which is not in a new, unused, and undamaged condition, *except that inventory used in demonstrations or leased, as provided in Section 3 of this Act, shall be considered new and unused*;
- (7) Any inventory which was ordered by the retailer on or after the date of notification of termination of the contract; ~~or [and]~~
- (8) Any inventory which was acquired by the retailer from any source other than the **supplier**~~[wholesaler, manufacturer or distributor]~~.

Section 6. KRS 365.825 is amended to read as follows:

If any **supplier fails**~~[wholesaler, manufacturer or distributor of inventory shall fail]~~ or **refuses**~~[refuse]~~ to repurchase any inventory covered under the provisions of KRS 365.800 to 365.840 within sixty (60) days after shipment of ~~the~~~~[such]~~ inventory to the **supplier**~~[wholesaler,~~

~~manufacturer or distributor~~, **the supplier**~~[he]~~ shall be liable in a civil action for one hundred percent (100%) of the current net price of the repair parts **and superseded parts** inventory plus five percent (5%) for handling, packing, and loading, if applicable, and one hundred percent (100%) of the net cost of all other inventory, plus any freight charges paid by the retailer, the retailer's reasonable attorney's fees, court costs, and interest on the current net price computed at the legal interest rate from the sixty-first day after shipment.

Section 7. KRS 365.830 is amended to read as follows:

- (1) *In the event of the death of a retailer or the majority owner of the equity interests of the entity operating as a retailer, the supplier shall, at the option of the heirs of the retailer or the majority owner, repurchase the inventory from the heirs as if the supplier had terminated the retail agreement contract. The heirs shall have one (1) year from the date of the death of the retailer or majority owner to exercise their option regarding the repurchase. No repurchase of any inventory shall be required if the heirs and the supplier enter into a new retail agreement contract to operate the retail dealership. As used in this section, "heir" means a spouse, child, son-in-law, daughter-in-law, or lineal descendant of the retailer or majority owner of the dealership.*
- (2) *A supplier shall have ninety (90) days in which to consider and make a determination on a request by an heir to enter into a new retail agreement contract to operate the retail dealership. In the event the supplier determines that the request is not acceptable, the supplier shall provide the heir with a written notice of its determination with the stated reasons for nonacceptance. This section does not entitle an heir to operate a dealership without the specific written consent of the supplier.*
- (3) *If a supplier and a retailer or majority owner of the equity interests of the entity operating as a retailer have previously executed an agreement concerning succession rights prior to the retailer's or majority owner's death, and if the agreement had not been revoked, the agreement shall be observed even if it designates someone other than the surviving heirs of the decedent as the successor*~~[In the event of death or incapacity of the retailer or insolvency of the corporation operating as a retailer, the wholesaler, manufacturer or distributor of inventory shall, at the option of the heir, personal representative, guardian or receiver, repurchase the inventory from such heir, personal representative, guardian or receiver as if the wholesaler, manufacturer or distributor had terminated the contract. The heirs, personal representative, guardian or receiver shall have up to one (1) year from the date of death, incapacity or insolvency to exercise their option under KRS 365.800 to 365.840. Nothing in this chapter shall require the repurchase of any inventory if the heir, personal representative, guardian, receiver or retailer and wholesaler, manufacturer or distributor enter into a new contract to operate the retail dealership].~~

Section 8. KRS 365.835 is amended to read as follows:

The provisions of KRS 365.800 to 365.840 shall not be construed to affect in any way any security interest which the **supplier**~~[wholesaler, manufacturer or distributor of inventory]~~ may have in the inventory of the retailer, and any repurchase~~[hereunder]~~ shall not be subject to the provisions of the bulk sales law. The retailer **or supplier**~~[wholesaler, manufacturer or distributor of inventory]~~ may, **in person or through a representative**,~~[furnish a representative to]~~ inspect all **inventory**~~[parts]~~ and certify **its**~~[their]~~ acceptability when **it is** packed for shipment **to the supplier under a repurchase arrangement. Failure of the supplier to provide a representative to inspect the inventory within sixty (60) days of the notice of termination shall result in automatic acceptance by the supplier of all returned items.**

Section 9. KRS 365.840 is amended to read as follows:

The provisions of KRS 365.800 to ~~365.840~~~~[365.835]~~ shall apply to all **retail agreement** contracts **entered into before the effective date of this Act**~~[now in effect, contracts]~~ which have no expiration date and are a continuing contract, and all other contracts entered into or renewed **on or after the effective date of this Act**~~[as of February 28, 1986]~~. Any contract in force **before the effective date of this Act**~~[and effect after February 28, 1986]~~, which by its own terms will terminate on a date **after the effective date of this Act**~~[subsequent thereto]~~ shall be governed by the law as it existed prior to **the effective date of this Act**~~[February 28, 1986]~~.

SECTION 10. A NEW SECTION OF KRS 365.800 TO 365.840 IS CREATED TO READ AS FOLLOWS:

- (1) *No supplier, directly or through an officer, agent, or employee, shall terminate or substantially change the competitive circumstances of a retail agreement contract without good cause. As used in this subsection, "good cause" means the failure by a retailer to comply with requirements imposed upon the retailer by the retail agreement contract if the requirements are not different from those imposed on other retailers similarly situated in this state. In addition, good cause exists if:*
- (a) *There has been a closeout or sale of a substantial part of the retailer's assets related to the equipment business, or there has been a commencement of a dissolution or liquidation of the retailer;*
  - (b) *The retailer has changed its principal place of business or added additional locations without prior approval of the supplier, which shall not be unreasonably withheld;*
  - (c) *The retailer has substantially defaulted under a chattel mortgage or other security agreement between the retailer and the supplier, or there has been a revocation or discontinuance of a guarantee of a present or future obligation of the retailer to the supplier;*
  - (d) *The retailer has failed to operate in the normal course of business for seven (7) consecutive days or has otherwise abandoned the business;*
  - (e) *The retailer has pleaded guilty to or has been convicted of a felony affecting the relationship between the retailer and supplier; or*
  - (f) *The retailer transfers an interest in the dealership; or a person with a substantial interest in the ownership or control of the dealership, including an individual proprietor, partner, or major shareholder, withdraws from the dealership or dies; or a substantial reduction occurs in the interest of an individual proprietor, partner, or major shareholder in the dealership. Good cause does not exist if the supplier consents to an action described in this subsection.*
- (2) *No supplier, directly or through an officer, agent, or employee, shall terminate or substantially change the competitive circumstances of a retail agreement contract based on high unemployment in the dealership market area, a labor dispute, the results of a natural disaster, including a sustained drought, or other circumstances beyond the retailer's control.*
- (3) *Except as provided in paragraphs (a) to (f) of subsection (1) of this section, a supplier shall provide a retailer with at least ninety (90) days written notice of termination of a retail agreement contract. The notice shall also contain a sixty (60) day written notice to*

*cure the deficiency. The notice shall not be required if the termination is enacted for reasons included in paragraphs (a) to (f) of subsection (1) of this section. The notice shall state all reasons constituting good cause for action. In the case where termination is enacted due to market penetration, a reasonable period of time, not less than one (1) year, shall have existed where the supplier has worked with the retailer to gain the desired market share.*

SECTION 11. A NEW SECTION OF KRS 365.800 TO 365.840 IS CREATED TO READ AS FOLLOWS:

*No supplier shall:*

- (1) Coerce any retailer to accept delivery of inventory which the retailer has not ordered voluntarily, except as required by any applicable law, or unless parts or attachments are safety parts or attachments required by a supplier;*
- (2) Condition the sale of additional inventory to a retailer on a requirement that the retailer also purchase other goods or services, except that a supplier may require the retailer to purchase those parts reasonably necessary to maintain the quality of operation of the inventory used in the retailer's designated trade area; or*
- (3) Coerce a retailer into refusing to purchase inventory manufactured by another supplier.*

SECTION 12. A NEW SECTION OF KRS 365.800 TO 365.840 IS CREATED TO READ AS FOLLOWS:

- (1) Claims filed by a retailer for payment under warranty agreements shall be approved or disapproved within thirty (30) days of receipt by the supplier. All claims for payment shall be paid within thirty (30) days of their approval. If any claim is disapproved, the supplier shall notify the retailer within thirty (30) days stating the specific grounds upon which the disapproval is based. If a claim is not specifically disapproved within thirty (30) days of receipt, it shall be deemed approved and payment by the supplier shall be within thirty (30) days.*
- (2) If, after termination of a retail agreement contract, a retailer submits a claim to the supplier for warranty work performed prior to the effective date of the termination, the supplier shall accept or reject the claim within thirty (30) days of receipt. All claims for payment shall be paid within thirty (30) days of their acceptance. If any claim is rejected, the supplier shall notify the retailer within thirty (30) days stating the specific grounds upon which the rejection is based. If a claim is not specifically rejected within thirty (30) days of receipt, it shall be deemed accepted and payment by the supplier shall be within thirty (30) days.*
- (3) Warranty work performed by a retailer shall be compensated in accordance with the reasonable and customary amount of time required to complete the work, expressed in hours and fractions of hours, multiplied by the retailer's established customer hourly retail labor rate, which shall have previously been made known to the supplier.*
- (4) Expenses expressly excluded under the supplier's warranty to the customer shall not be included nor required to be paid on requests for compensation from a retailer for warranty work performed.*
- (5) Expenses for all parts used by a retailer in performing warranty work shall be paid to the retailer in the amount equal to the retailer's net price for parts used, plus a minimum of fifteen percent (15%). The percentage additive is to reimburse the retailer for reasonable*

*costs of doing business in performing warranty service on the supplier's behalf, including, but not limited to, freight and handling costs incurred.*

- (6) *The supplier has the right to adjust for errors discovered during audit, and if necessary, to adjust claims paid in error.*
- (7) *A retailer may accept the manufacturer's reimbursement terms and conditions in lieu of the other provisions provided by this section.*

SECTION 13. A NEW SECTION OF KRS 365.800 TO 365.840 IS CREATED TO READ AS FOLLOWS:

*The provisions of KRS 365.800 to 365.840 shall not be waivable in any retail agreement contract, and any attempted waiver shall be void.*

Section 14. Whereas the early spring is the most important time for the farming industry and any relief to farm equipment dealers offered by this bill would be negated by a later effective date, an emergency is declared to exist, and this Act takes effect upon its passage and approval by the Governor or upon its otherwise becoming a law.

**Approved April 22, 2004**