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# NEWSLETTER

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www.dealersalliance.org

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## New Jersey Ford and Lincoln-Mercury Dealers Fight Back!

On September 4, 2002, the Ford Motor Company was served with a lawsuit representing thirty-seven New Jersey Ford and Lincoln-Mercury dealers. The twelve-count lawsuit challenges Ford's defiance of New Jersey franchise law by its June 1, 2002, imposition of a \$125 surcharge per retail vehicle. The surcharge, Ford explained, was necessary as a means to recoup its "additional cost of doing business in the State of New Jersey" as a result of the increase of warranty parts reimbursement to its dealers to retail levels.

The premise of the lawsuit is relatively simple. Ford warranties the vehicles it manufactures against manufacturing defects. The cost of warranty coverage is collected by Ford in its wholesale price to dealers, as well as the Manufacturer's Suggested Retail Price (MSRP). In other words, warranties, issued by Ford, run directly from Ford to the purchasers of the motor vehicles.

The Ford dealer is required to make repairs, replacements and adjustments on any vehicle under Ford warranty. In recent years, Ford has acknowledged its obligation to compensate the dealer for labor on warranty service at approximately each dealer's individual prevailing retail (customer-paid) labor

rate. By contrast, however, Ford historically **did not pay its dealers the full retail rate** for parts used in warranty. Instead, Ford deeply "discounted" the amount it would pay dealers for parts. By means of **this enforced "discount,"** Ford has shifted to the dealer a substantial portion of the cost of repairs or replacement parts for manufacturing defects.

Under New Jersey franchise law, manufacturers are required to reimburse their dealers for parts used in warranty at a dealer's retail rate. For approximately three years, and only after a long legal battle (*See Background below*), Ford Motor Company was forced to obey the law by reimbursing its dealers for parts at retail levels. Ford's recent imposition of a surcharge negates the warranty provision under franchise law. By reimbursing dealers for parts at retail level and consequently taking it back with a surcharge, Ford makes a mockery of the retail reimbursement requirement. It is unlawful.

### Background

In 1998, Liberty Lincoln-Mercury won a lawsuit seeking retail rate warranty parts reimbursement against Ford Motor Company as required under New



Jersey franchise law. The Court characterized the surcharge imposed by Ford on Liberty Lincoln-Mercury as an “end-run around the New Jersey Franchise Practices Act, which essentially nullified [Ford’s] compliance,” as a “shell game” to avoid the costs of complying with the NJFPA, and contrary to the legislative intent.

For a year or so, **only Liberty Lincoln-Mercury benefited** from the Court’s decision until March of 1999 when the New Jersey Legislature amended the warranty provision to clarify the manufacturer’s reimbursement obligation for parts used in warranty and to establish a procedure for determining the dealer’s prevailing retail rate. Until that time, Ford had required a retail part by warranty part comparison in order to substantiate the retail rate—a procedure so onerous that few dealers contemplated even attempting it.

Consequently, many New Jersey Ford and Lincoln-Mercury dealers, using the newly established methodology, requested and began collecting for warranty parts at their prevailing retail rate and have been doing so ever since.

In April 2002, following a few years of attempted negotiations with Ford, top Ford Motor Company officials invited and met with Ford and Lincoln-Mercury dealers to discuss possible solutions to recouping its “additional costs of doing business in the State of New Jersey.” Ford introduced the following options:

- Accept a similar deal given to New Jersey GM dealers, which involves an increase in the percentage of the mark-up with corresponding surcharges depending on the model;
- Be surcharged, if New Jersey law remains as is; or
- Accept the “Illinois and Indiana Solution”—a proposed amendment to New Jersey law, which involves a 50 percent mark-up with no surcharge.

On May 21, 2002, Ford sent a letter to every Ford and Lincoln-Mercury dealer stating that effective June 1, 2002, a “\$125 surcharge would be applied to all retail vehicles.” It was the consensus of the dealers in the State of New Jersey that we have all worked too hard to strengthen New Jersey franchise laws to allow Ford Motor Company to simply ignore the New Jersey statute, and it was their recommendation to Ford that it simply obey the New Jersey law. The lawsuit was filed in federal court on August 23, 2002.

## The Illinois and Indiana Solution

It is our understanding that the Ford Dealer Council has been recruited by Ford Motor Company to approach the almost thirty state associations that have similar warranty provisions and encourage each to consider the “Illinois and Indiana Solution” to warranty parts reimbursement in those states.

Sometimes the battle for fair and equitable treatment by manufacturers may seem overwhelming to many of us, and to accept the “Illinois and Indiana Solution” may seem like the road of least resistance. However, please be aware that although Ford Motor Company will agree to a 50 percent markup with no surcharge, should a majority of dealers agree to sign a separate three-year contract (only a 30 percent majority is required in Indiana), **you will be forced to amend your franchise law.** That is a big part of the agreement.

Although the law will continue to allow dealers to submit for reimbursement of warranty parts at retail levels, the franchise law amendment required by Ford will **legalize surcharges in your state.** Our biggest fear is that because Ford has the ability to manipulate the warranty system by lowering time standards, by reducing parts prices that effect your gross profit as Ford has done with parts used in recalls, etc., your new found 50 percent may

become meaningless—moreover, the warranty provision of your franchise law for reimbursement of warranty at retail will be rendered meaningless. Remember, the contract lasts three years; the change to your state's franchise law will last indefinitely.

We do not have all the answers; however, we would like to suggest that we wait and see what happens with the lawsuit in New Jersey. Should the dealers prevail, it may go a long way in helping you to force manufacturers to obey the law in your state. (*See State by State Warranty Franchise Provisions*).

## State by State Warranty Statutory Franchise Provisions

The two charts below list those states that currently have warranty reimbursement provisions at retail levels for parts and/or labor. Please note these lists were compiled by NADA in approximately 1999. A few states may have had these laws tested in court, i.e., Maine. You may use the charts as a guide, but you should check with your state association for verification of any changes in your state.

Many dealers have contacted the FDA to inquire why New Jersey Ford and Lincoln-Mercury dealers have been one of the few groups to be successful in collecting warranty parts reimbursement at retail levels. In other words, if your state has a similar provision in your state law, why are you not collecting?

There are a few possible answers to that question. First, the New Jersey statute includes a procedure for substantiating a dealer's retail rate. The wording of that procedure is as follows:

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*"The motor vehicle franchisee may establish average percentage markup under this section by submitting to the motor vehicle franchisor 100 sequential customer paid service repair orders or 90 days of customer paid service repair orders, whichever is less, covering repairs made no more than 180 days before the submission and declaring what the average percentage markup is... Only retail sales not involving warranty repairs, parts covered by subsection of this section, or parts supplied for routine vehicle maintenance shall be considered in calculating average percentage markup."*

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Should you want to discuss this with your individual state association, the full warranty section is available to states through the NADA web site.

Secondly, fear of a surcharge following the manufacturer reimbursing for warranty parts at retail and, therefore, negating the intent of the franchise law has also been a deterrent for many dealers. Hopefully, the New Jersey lawsuit will help in that arena.

Lastly, manufacturers are formidable opponents. Many dealers fear challenging their manufacturer. Therefore, dealers have not even requested from manufacturers what they are entitled to under franchise law.



States with Retail Parts  
Authorized

Alabama  
Arkansas  
Florida  
Georgia  
Illinois  
Indiana  
Kentucky  
Louisiana  
Maine  
Maryland  
Minnesota  
Montana  
Nebraska  
Nevada  
New Hampshire  
New Jersey  
New Mexico  
New York  
North Carolina  
Ohio  
Oklahoma  
Oregon  
Rhode Island  
Texas  
Utah  
Vermont  
Virginia  
West Virginia  
Wisconsin

States with Retail Labor  
Authorized

Alabama  
Arkansas  
Connecticut  
Delaware  
Florida  
Georgia  
Hawaii  
Illinois  
Indiana  
Kentucky  
Louisiana  
Maine  
Maryland  
Massachusetts  
Michigan  
Minnesota  
Mississippi  
Missouri  
Montana  
Nebraska  
Nevada  
New Hampshire  
New Jersey  
New Mexico  
New York  
North Carolina  
Ohio  
Oklahoma  
Oregon  
Pennsylvania  
Rhode Island  
South Dakota  
Tennessee  
Texas  
Utah  
Vermont  
Virginia  
West Virginia  
Wisconsin  
Wyoming

Source: NADA

Source: NADA

## The New York Warranty Case

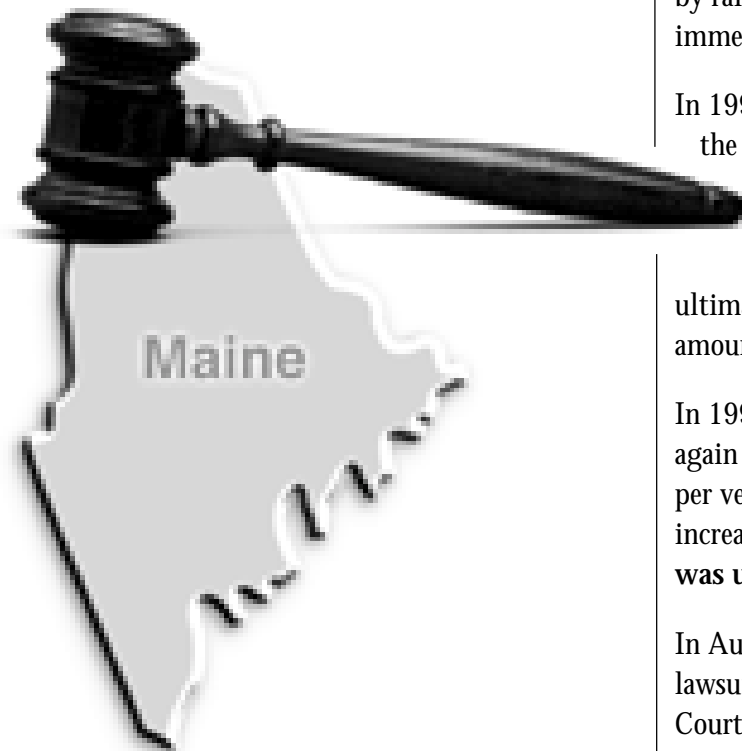
In the State of New York, the warranty reimbursement lawsuits against the Big 3 may soon be joined by dealers from ten foreign automakers—Honda, Hyundai, Isuzu, Lexus, Mazda, Nissan, Saab, Subaru, Toyota and Volkswagen.

Last year, lawsuits were filed against the Big 3 as a result of a court decision involving Ralph Oldsmobile, Inc. v. General Motors Corp. The case alleged that GM violated the law by failing to pay the dealer for warranty parts at retail rates and prices customarily charged in a dealer's community. The Court denied GM's request to dismiss the case, shifting the burden of proof from the dealer to the manufacturer.

Manufacturers have routinely argued that due to the dealers' failure to request reimbursement for warranty parts at the prevailing market rate, the dealer is prohibited from seeking reimbursement at higher rates at a later time. The Court rejected this argument stating that any such requirement on the part of the dealers was not specifically set forth in the statute. Accordingly, the Court found that the statute permits this particular dealership to go back six years and recover the difference between what it should have been paid despite the fact that the dealer never previously objected to the reimbursement rate.

Mr. Leonard Bellavia, an attorney representing the dealers, stated that he was only "weeks away" from attempting to convert the lawsuits to a class action lawsuit. All New York dealers have been invited to join these lawsuits. If successful, the monetary

recovery could be significant. Mr. Bellavia has stated openly that the damages per dealer could reach and exceed \$700,000 for several years of damages.



## The Maine Decision

In 1993, Darling's Bangor Ford was the first dealer in the state to request warranty reimbursement at his prevailing retail rate; a right afforded by franchise law. Although Ford increased its reimbursement, it simultaneously announced the imposition of a \$160 "warranty parity surcharge" on cars and trucks "sold" in the state. As a result, the dealers filed a lawsuit, Acadia Motors, Inc. v. Ford Motor Company in the U.S. District Court claiming that the surcharge was illegal. The dealers prevailed. The Court determined that although Ford was entitled to recover its "increased costs of doing business" in Maine, it could only do so by increasing the wholesale sticker price and not by imposing a surcharge on the dealer.

Ford Motor Company appealed the decision, and, unfortunately, the U.S. Court of Appeals affirmed a

portion of the District Court's decision that the warranty statute does not prohibit Ford from recovering its costs of compliance, but it vacated that portion of the decision requiring Ford to do so by raising the wholesale sticker price. Ford did not immediately reimpose the surcharge.

In 1995, Darling's Bangor Ford filed a complaint in the Superior Court of Maine that Ford did not meet the requirements under franchise law to reimburse for parts and labor at the rate charged to retail customers. Both parties ultimately settled the dispute for an undisclosed amount in 1998.

In 1999, Ford informed the dealers that it would again impose a "warranty parity surcharge" of \$150 per vehicle with the expectation that it would soon increase the surcharge to \$250. **The surcharge was ultimately increased to a staggering \$500.**

In August 1999, the Maine dealers again filed a lawsuit against Ford Motor Company in Superior Court claiming that the surcharge collected on the part's statement violated Maine franchise law. Upon Ford's request, the Superior Court entered a partial summary judgment concluding that the surcharge did not violate the Maine statute. The dealers appealed to the Maine Supreme Judicial Court.

On June 25, 2002, a decision was rendered by the Court. The decision is a bit confusing but, in essence, it states that because both prior court decisions held that Ford could recoup its "additional costs of doing business in the state" and because the statute itself is silent with respect to Ford's ability to impose a surcharge, the Court would accept a surcharge as a means for Ford to recoup its costs.

The Maine dealers are currently examining possible legislative remedies.

## Conclusion

Obviously, there is no one more aware than the Ford Dealers Alliance of how difficult manufacturers have made it for dealers to receive fair reimbursement on warranty work. The shortfall in warranty reimbursement is why we originally organized back in 1967. It was as a means to force Ford to increase the warranty labor rate from \$3.50 an hour.

We have continued to revisit the warranty issue for over thirty-three years. For us, this particular warranty battle began with our June 1989 Survey, which demonstrated dealers were losing money per RO on warranty parts and service. At that time only five states had warranty provisions that required manufacturers to reimburse dealers for warranty at retail levels. Most manufacturers had a 30 percent parts markup.

With the help of many dealers, state associations, and the NADA, we were able to force the manufacturers to rethink their position, and after a few years of stonewalling dealer demand, Ford Motor Company increased its parts markup from 30 percent to 40 percent on new models. It was one of the few times that Ford took the lead and GM and Chrysler followed. In addition, many states began working on strengthening the warranty provisions of their franchise laws to require warranty reimbursement at retail rates. To date, almost thirty states have modified their law.

Today, over a decade later, Ford Motor Company and most manufacturers continue to markup parts at the same pitiful 40 percent. Yet the cost of performing warranty continues to sky-rocket due to ever-increasing requirements by manufacturers, by the shifting of warranty costs by manufacturers onto its dealers, added to the overall increase in the cost of doing business particularly with the advent of new technology.

In a recent article in the Wall Street Journal, Ford divulges its plan for the future in this statement:

***“After reporting losses of \$5.45 billion for last year, Ford is in the midst of a major restructuring, including a target of cutting vehicle costs by a total of \$700 per vehicle by 2005.”***

Does anyone want to guess on how much of that savings will be transferred onto the backs of its dealer body? Can any of us afford to give up any rights afforded us under current franchise law? We should all to be working towards strengthening our laws and insuring that manufacturers obey them. Thirty-seven brave New Jersey dealers (soon to be joined by several more) are trying to accomplish just that.

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