

Reducing Models and Reducing Dealers

by : Rich Sox

We have heard the plan before; reduce overlap in product which will lead to financial recovery for the manufacturer. Chrysler is the latest manufacturer to realize that building virtually the same vehicle on the same platform and selling it under various brand names doesn't create a net increase in sales. The *Wall Street Journal* recently reported that, like General Motors before it, Chrysler is going to produce only passenger cars to be sold under the Chrysler nameplate, restrict the sale of trucks to the Dodge brand and limit Jeep to selling the traditional Jeep product and SUVs. The *Journal* article quoted a Chrysler representative as saying that the reduction in models in each linemake will result in the elimination of some 1,000 dealers.

Similar to what GM has done with the Buick, Pontiac and GMC linemakes, Chrysler plans to use the reduction in model offerings in each of its linemakes to force dealers to combine the Chrysler, Dodge and Jeep linemakes under one roof in order to be viable. In a small to medium-size market, a single line Chrysler, Dodge or Jeep dealer may not be able to survive if they are restricted to a limited number of vehicle segments for the sale of their products. Although this strategy may make good business sense to the manufacturer and the long-term viability of the dealer body, many dealers don't get to enjoy that long-term benefit. In these dealer body consolidations we have seen over and over again that there is always an odd-man (or two) out. There will inevitably be the Dodge dealer, for example, whose father or grandfather started the business years ago but may not be in a predominantly truck market. Although the Dodge dealer will not longer be viable selling exclusively truck products, he does not want to sell out to the neighboring Chrysler, Jeep dealer who needs the Dodge franchise to round out the trifecta. Likewise, the Chrysler, Jeep dealer who can at least survive with the passenger car and Jeep vehicle lineup, doesn't want to sell to the Dodge dealer. In this example, the Chrysler, Jeep dealer has no incentive to pay big dollars for the Dodge franchise (even if the Dodge dealer would sell) so the Chrysler, Jeep dealer can simply wait out the Dodge dealer until he slowly dies on the vine.

What can a dealer do who finds himself in the situation of this fictitious Dodge dealer? Through numerous lawsuits brought on behalf of our Oldsmobile clients, and more recently a couple of Buick clients, the lawyers of Myers & Fuller established a claim for 'constructive termination'. Constructive termination is defined as a termination which is not accomplished by formal, written notice to the dealer as required by franchise law but, instead, by some action(s) which results in the dealer's inability to continue to operate the franchise. This claim is based on your state franchise law, which prohibits termination of your franchise without good cause.

Applying the constructive termination concept to Chrysler's latest plans, if the reduction in model offerings causes a dealer to no longer be able to maintain a viable level of sales then Chrysler has illegally terminated your franchise. A dealer in this situation will be in a position to take advantage of his/her state franchise protections. In order to protect yourselves, we recommend that dealers document their circumstances in writing to Chrysler. It is important to create a paper trail which documents things like (i) your attempts to acquire the missing franchise(s) to complete the trifecta and the results of those attempts; (ii) the fact that the reduction of models will threaten the viability of your dealership and, importantly; (iii) your request to be appointed a dealer for the missing brands in order to maintain your viability. I know, Chrysler won't grant that last request but it is important to document that you have tried to do all you can to help yourself avoid financial ruin.

Once this paper trail is laid, the best approach is for the dealer to bring the constructive termination claim only after the reduction of models has occurred and sales have dropped as a result. It is critical in these claims to be able to show the Judge that the reduction in models has in fact caused you to lose sales, which, in turn, cannot support the ongoing viability of the dealership.

Are you eligible for Nissan's new GT-R vehicle?

According to Carlos Ghosn it will depend on your performance. At the Los Angeles Auto Show last week, Ghosn announced that the new GT-R vehicle would be available to only certain Nissan dealers. In particular, the GT-R would only be allocated to dealers who met 'strict certification standards'. The clear implication was that those standards would primarily focus on a dealer's sales performance. Can Nissan pick and choose which dealers receive a new model vehicle? In almost every state, the answer is "No!"

Most state franchise protections require that a manufacturer's vehicles be 'fairly' allocated to its dealers. Some states go so far as to expressly require that any new model manufactured under a particular brand must be made available to each dealer having a franchise agreement for that linemake. In either case, it is clear under the vast majority of state franchise laws that a new model to be offered under a particular brand must be allocated fairly to each dealer holding a dealer agreement for that franchise.

A few months ago you may recall that Audi announced a number of requirements for dealers to meet before they would receive the new R8 vehicle, the least of which was payment of \$100,000 as a 'participation fee'. Other requirements included meeting certain performance and facility criteria. After several state automobile dealer associations and individual dealers wrote letters on behalf of their Audi dealers objecting to these onerous requirements, to its credit, Audi backed off their position and made the R8 available to any dealer paying a \$25,000 fee. This payment amount was more in line with what is permitted under most state franchise law. Payment for display and advertising material, specific training related to the new product and special tools for service of the new product are all appropriate.

What manufacturers cannot do is exactly what Nissan is attempting to do: discriminate amongst its dealers in determining who will receive the advantage of selling the GT-R. The franchise laws are set up to prevent a manufacturer from using a new vehicle offering as a 'carrot' to obtain certain levels of performance or facility upgrades which are not otherwise reasonably required within your dealer agreement.

Don't fall into the trap of agreeing with the manufacturer by saying, "Well, it is only fair that a dealer who is performing exceptionally well in sales and service and/or has upgraded the image on his facility to have the exclusive right to sell that new product." The reward for exceptional sales is inherently taken care of in the manufacturers' allocation system by providing more vehicles each month to dealers who sell more vehicles. The punishment for poor sales performance or a failure to upgrade a facility is already addressed in the dealer agreement and state franchise laws. If a manufacturer believes a dealer is not performing in these areas then they can give notice of default and, if not cured within a certain time frame, seek a termination. Manufacturers don't want to go this route, for the most part, because the standard that has to be met in a termination proceeding is 'good cause' and, in many cases a dealer can explain that his sales are not up to par due to factors outside his control or due to a faulty measuring system used by the manufacturer. Likewise, a dealer can, in many cases, explain why the facility is adequate to meet the needs of a particular market or that a recent upgrade, completed before the latest image program, is more than sufficient for the time being.

All dealers, those meeting all manufacturer requirements as well as those that aren't, should as a rule stand up in objection to any manufacturer program that favors one dealer over another. For those dealers who currently meet all manufacturer requirements, you never know when you will find yourself having to make the argument that some incentive or new vehicle model should be made available to you even though you no longer meet a certain requirement because you have chosen not to spend millions on the latest, greatest image program or, due to changes in your market, your sales no longer meet the

manufacturer's standard.

Nissan dealers and their state associations should obtain the assistance of an experienced franchise lawyer to write to Mr. Ghosn citing applicable state franchise protections and objecting to Nissan's plan to limit the availability of the GT-R.

Rich Sox is a lawyer with the firm of Myers & Fuller PA, with offices in Tallahassee, Florida and Raleigh, North Carolina. The firm's sole practice is the representation of automobile dealers in their quest to establish a level playing field when they deal with automobile manufacturers.