

## What Should Saturn, Hummer and Saab Dealers Do?

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As most dealers know by now, General Motors confirmed in a letter dated February 17, 2009 to all Saturn, Hummer and Saab dealers that GM does not plan to produce vehicles for those lines beyond the 2011 model year. The letter states that no new products are planned but that GM continues to attempt to sell the brands to a third-party buyer. What does this mean for dealers who have made an investment in these franchises?

### Termination of franchise

Not surprisingly, GM's letters also claim that its communication is not intended to be notice of termination of the dealers' franchise agreements. In fact, the attorneys at Myers & Fuller believe that the Saturn, Hummer and Saab franchises have been constructively terminated by the actions of General Motors.

For Hummer dealers, GM's actions resulting in an effective termination of the franchise started in the summer of 2008 when GM first announced to the world that the Hummer brand was under "strategic review." Everyone in the industry knows that "strategic review" is code for "slated to be sold or discontinued." Similar Saturn and Saab announcements came in the winter of 2008. Each of these announcements had the effect of destroying any going concern value these franchises had, as well as causing potential customers to be much less likely to consider purchasing a Saturn, Hummer or Saab vehicle. It is hard to imagine that GM has not made these announcements with the express purpose of forcing the "natural" destruction of these franchises. GM has to know that telling the world that these franchises will eventually be sold or discontinued is going to result in a stigma being attached to Saturn, Hummer and Saab vehicles, which will keep consumers from considering buying a car or truck that "may not have a manufacturer to cover the warranty." GM also had to know that competing dealerships would use GM's announcement to scare customers away from Saturn, Hummer and Saab dealerships. Surely GM was aware that these public announcements would cause a rapid devaluation of Saturn, Hummer and Saab vehicles. Likewise, GM had to know that floorplan lenders would begin to look much less favorably on these franchises with the market value of their collateral rapidly declining.

### Sale of brand

In its correspondence to dealers, GM has kept dealers on the hook by continuing to state that it is looking for a buyer of the Saturn, Hummer and Saab linemakes. Presumably such a buyer would be located overseas with an interest in obtaining an existing distribution network in the United States. The attorneys at Myers & Fuller have two concerns with this option. First, it is extremely difficult to envision a buyer for these brands under the current economic conditions. Second, if a foreign (e.g., Chinese or Indian) vehicle manufacturer was to acquire the rights to one of these brands, the question remains would the resulting product line adequately replace the revenue stream that Saturn, Hummer and Saab dealers enjoyed prior to GM's public announcements?

In short, despite GM's representations that current product will be provided through their current life-cycle and the chance of a sale of Saturn, Hummer or Saab to another manufacturer, the bottom line is that GM has failed to live up to its end of the bargain contained in the franchise agreement. Saturn, Hummer and Saab dealers were promised unique and innovative products for their franchises as long as they were in compliance with the terms of their franchise agreement. In exchange for that promise, these dealers agreed to provide stand-alone, branded facilities for the Saturn, Hummer and Saab linemakes at tremendous expense.

### Strategy going forward

At this juncture, Saturn, Hummer and Saab dealers have two choices.

1. The first course of action is to wait out the potential opportunity of another manufacturer acquiring the brand to determine if that manufacturer will adequately replace the Saturn, Hummer and Saab vehicles historically provided by GM. One concern with this approach is the potential that dealers will continue to lose money while waiting such that you reach the point of not having the financial wherewithal to pursue your legal rights. This is exactly the position in which GM wants to place each dealer.
2. The second course of action is to bring a lawsuit against GM for the wrongful termination of your franchise. There are several viable legal claims, which dealers could bring against GM, including the constructive termination claim discussed above. This claim centers on the contention that even though the manufacturer has not formally notified you of its intent to terminate your franchise, it has taken certain actions which result in the effective termination of the dealer's franchise. In the case of Saturn, Hummer and Saab, following GM's announcement last year and to Congress in February, coupled with the letters sent to dealers from GM, the dealers' franchise likely has little or no blue sky value and customers are much less likely to buy a vehicle from a dealership which is slated to be discontinued or sold.

### **Unique provision of the Saturn retailer agreement**

Unlike other GM linemakes, Saturn dealers entered into a franchise agreement with a separate corporation known as Saturn Distribution Corporation. Unfortunately, because SDC's liabilities undoubtedly exceed its assets, it would not be difficult for GM to simply take that entity into a Chapter 7 bankruptcy liquidation. For this same reason, bringing a lawsuit against SDC alone would likely not result in payment of any judgment ultimately obtained. As a result, it will be imperative to include GM as a defendant in the lawsuit by Saturn dealers in order to have a realistic opportunity to obtain a judgment, which can be collected upon or to settle the litigation for a fair amount.

Under most state franchise laws, using the definitions of franchisor and manufacturer, combined with the termination provisions under each state's franchise law, a strong argument can be presented that GM should be named as a defendant. Likewise, due to the increased involvement GM has had with SDC in the last three years, a strong argument can be put forth that GM has taken on the role of the franchisor or, at the least, has acted as an agent of SDC and conspired with SDC to eliminate the Saturn brand.

A second unique aspect of the Saturn Retailer Agreement is that it calls for binding arbitration to resolve any dispute. As you may recall, federal law was amended on November 2, 2002, which prohibited binding arbitration in franchise agreements. This federal law prohibition applies to all Hummer and Saab dealers because each entered into a dealer sales and service agreement after the new law was in effect and, therefore, binding arbitration will be prohibited for these dealers. However, the Saturn Retailer Agreement had a perpetual term and, unlike the GM dealer agreement, was not renewed every five years. Therefore, it will have to be determined if the Saturn dealer's Retailer Agreement was entered into or amended following November 2, 2002, in order to avoid binding arbitration of the dealer's legal claims. If not, those claims may have to be brought in arbitration.

### **Form of litigation**

Litigation against GM will likely be brought in each dealer's own state federal court either by a single dealer or along with other dealers within the same state. In the case of more than one dealer joining together in a single lawsuit, each dealer will be a named plaintiff and will be seeking his or her individual damages resulting from the elimination of the linemake. The latter approach may allow dealers to enjoy significant cost savings but should be discussed in further detail before deciding on this approach. A similar option is for dealers to file separate federal court actions and seek to have them joined under one judge pursuant to the "multi-district" litigation rules, which allow a sharing of pre-trial

costs before each case is again separated for purposes of trial.

A lawsuit in the form of a national class action is probably not the best approach for Saturn, Hummer and Saab dealers because in such an action the dealers won't be able to bring claims under their individual state franchise laws.

#### **Voluntary termination by dealer**

Many dealers have asked if voluntarily terminating their franchise in order to stop the financial bleeding will negatively impact future litigation. Dealers have a duty under the law to mitigate the damages being sustained in the form of financial losses. Although it will require research under each dealer's state franchise law, it doesn't appear that a dealer who no longer holds a franchise will be barred from claiming a violation under the motor vehicle franchise laws for acts by the manufacturer that occurred during the time the dealer was a franchisee. In fact, being forced to voluntarily terminate the franchise may actually enhance certain legal claims associated with GM's effective termination of the franchise.

Saturn, Hummer and Saab dealers should speak with an experienced franchise lawyer to determine the best strategy for dealing with these very difficult issues.

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