

The Post-Mortem on Chrysler and GM Dealers: *Hope is Alive* by Richard Sox



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quest to establish a level playing field when they deal with automobile manufacturers.

Now that New Chrysler and New GM are up and running and the dust is settling on Old Chrysler and Old GM, what is the status of Florida dealers' franchise rights?

Chrysler Dealers Going Forward

Chrysler dealers who were chosen to go forward with Chrysler were issued a "standard" Dealer Sales and Service Agreement which did not, in and of itself, interfere with the dealer's state franchise law rights. For a going-forward Chrysler dealer offered one of the missing Chrysler brands, however, that dealer was presented with a 30 year site

control agreement full of onerous terms. One such term is the restriction on adding another franchise to the Chrysler facility, which is in direct conflict with Florida franchise law.

Chrysler dealers forced to agree to the 30 year site control agreement, which have the opportunity and need to bring in an additional franchise to remain viable, have a claim that Florida law is being violated when Chrysler moves to enforce the site control agreement. The question will come down to whether the dealer received adequate compensation in exchange for the site control agreement (i.e. receipt of another Chrysler brand franchise) and whether that agreement was entered into voluntarily.

Chrysler Dealers Rejected in Bankruptcy Proceedings

Chrysler dealers who have had their Dealer Agreement rejected in the Chrysler bankruptcy proceeding will not have an opportunity to challenge that rejection under Florida's franchise laws. Instead, these dealers have

their best hope in the federal legislation (H.R. 2743) which proposes to restore the rights of all Chrysler and GM dealers who had franchises in place at the time those companies filed for bankruptcy protection. H.R. 2743 recently passed the House Appropriations Committee (July 7, 2009).

General Motors Dealers Receiving a Wind-Down Agreement

All Pontiac dealers and many Buick, GMC, Chevrolet and Cadillac dealers received a Wind-Down Agreement from GM which offered a relatively small payment of money in exchange for the dealer's agreement to give up the franchise no later than October 31, 2010. With the Wind-Down Agreement, GM purports to provide dealers with a soft landing by providing the dealer with time to sell off vehicle and parts inventory in a more controlled fashion. The dealer agrees to waive all rights to order new vehicles, to receive termination benefits and to protest the addition or reloca-

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Post Mortem continued...

tion of a same-linemake dealership into the dealer's market area.

The Wind-Down Agreement conflicts with Florida franchise laws in a number of respects including the termination of the franchise without a showing of "good cause," the dealer's waiver of a right to order vehicles, the dealer's waiver of termination benefits and the dealer's waiver of protest rights. As described above under the Chrysler site-control agreement discussion, whether GM will be able to enforce the Wind-Down Agreement will come down to whether the dealer received adequate compensation in exchange for the Wind-Down Agreement (i.e. receipt of cash payment) and whether that Agreement was entered into voluntarily. This argument is made more difficult if the dealer accepts and utilizes the monies paid by GM as consideration under the Wind-Down Agreement. Instead, a dealer wishing to challenge the Wind-Down Agreement would be best served to "reject" the receipt of those monies.

GM included one additional provision in the Wind-Down Agreement which will add a potential hurdle to bringing a claim and that

is an agreement by the dealer that the bankruptcy court will continue to have jurisdiction over any dispute which arises out of the Wind-Down Agreement. Under Florida franchise laws, dealers aggrieved by a violation of the franchise law may bring a claim before the Florida Department of Administrative Hearings or a Florida court. Thus, by attempting to keep jurisdiction in the bankruptcy court, GM is trying to short circuit state law protections through a procedural roadblock.

General Motors Dealers Receiving a Participation Agreement

GM dealers who were retained by GM received a Participation Agreement (which was slightly amended by a subsequent Letter Agreement). The Participation Agreement purports to be a supplement to the standard Dealer Sales and Service Agreement and contains a number of restrictions which are contrary to Florida franchise law. These provisions include an agreement to accept the delivery of whatever number of new vehicles GM deems appropriate for your dealership, an agreement to provide exclusively-GM facilities,

an agreement to not protest an add point or relocation outside of 6 miles from the dealership for a period of 4 years and a waiver of the right to protest a termination for failure to meet any term of the Participation Agreement or Dealer Sales and Service Agreement.

The GM bankruptcy court made rulings in its Order approving the sale of the assets to New GM which have a direct bearing on a challenge to the Participation Agreement. On the one hand, the court ruled that the Participation Agreements were not entered into by coercion. On the other hand, the bankruptcy court ruled that it was not going to make any determination of the validity of any provision within the Participation Agreement and a challenge as to the validity of any provision would be ruled on in a court other than the bankruptcy court (i.e. state courts). The bankruptcy court's order opens the door to challenge any attempt by New GM to enforce the numerous terms of the Participation Agreement which are in conflict with Florida franchise law.