

# Protect Your Dealership in These Tough Economic Times

Presented by  
the Auto Dealers Practice Group  
at

**Fraser Trebilcock**<sup>®</sup>  
LAWYERS

## Auto Dealers Practice Group

- Edward J. Castellani
- Michael H. Perry
- Michael P. Donnelly
- Kenneth S. Wilson
- Brandon W. Zuk
- Loukas P. Kalliantasis

# Edward J. Castellani:

## Edward J. Castellani, C.P.A., J.D.

- Chair of the Auto Dealers Practice Group at Fraser Trebilcock.
- Has represented dealerships in Michigan in their legal, regulatory and business needs for over twenty-five years.

# Bankruptcy Basics:

- Chapter 11 is a business reorganization
  - Reorganize the corporation's affairs so it can operate profitably
  - Amounts owned at date of bankruptcy filing will be reduced by bankruptcy court
  - Dealership will emerge as a stronger operating company

# Bankruptcy Court:

- ❑ Reject or assume any agreement
- ❑ Credit Balance Agreement
- ❑ Dealer rebates, incentives, and holdbacks
- ❑ Terminate Franchise Agreement

## What a Manufacturer Must Purchase On Termination:

- ❑ New vehicles with less than 300 miles
- ❑ Parts and supplies
- ❑ Equipment, furnishings, and signs
- ❑ Special tools purchased within 3 years

# Dealership Rights:

## The Michigan Motor Vehicle Finance Act & The Automobile Dealers' Day In Court Act

### Michael H. Perry -

- Graduated with honors from Wayne State University Law School He is a member of the law firm's litigation department
- Mr. Perry was named a "Super Lawyer" in the area of Environmental Litigation in the years 2006, 2007, and 2008
- He was also named as a fellow of the Litigation Counsel of America, a national honorary society of litigation attorneys

## Michael Perry's Automobile Dealer Representation:

- Represented automobile dealers in matters involving the manufacturers and their captive finance companies, as well as on Michigan use tax and signage issues.
- Successfully represented a number of dealerships before the Michigan Supreme Court, the Michigan Court of Claims and the Michigan Tax Tribunal in regard to the Treasury Department's wrongful imposition of use tax upon vehicles which the dealerships had purchased for resale.
- Currently represents a dealer in a matter which is about to be filed in the Michigan Supreme Court on the issue of whether the Michigan Motor Dealers Act and the federal Automobile Dealers Day in Court Act govern claims against one of the Big 3's captive finance companies.

# Federal Law – Automobile Dealers Day in Court Act:

15 United States Code, sections 1221 – 1226

- Good Faith - fair and equitable:
  - freedom from coercion, intimidation, threats
- Recommendation, endorsement, exposition, persuasion, urging, argument are not lack of good faith
- Direct and irreconcilable conflict

## Lawsuit in Federal District Court:

- Regardless of amount
- Damages and legal fees/costs
- Lack of good faith in termination, cancellation, or non-renewal of franchise
- Lack of good faith in performance of franchise agreement
- Dealer's lack of good faith as defense
- 3 years to file suit after claim accrues

# Arbitration as an Option:

15 United States Code, sections 1226

- "May" arbitrate
- Contract
- All parties consent
- Written explanation of factual and legal basis for decision

# Michigan Law – Michigan Motor Dealer Act:

Michigan Compiled Laws 445.1561 to 445.1582a

- Good Faith
- Honesty in fact, observation of reasonable commercial standards of fair dealing in the trade

## Cancellation, Termination, Nonrenewal, Discontinuance of Dealer Agreement:

- 90 days notice/15 days in special cases
- 12 months notice if product line discontinued
- Act in good faith
- Constructive Termination
- Good cause to terminate, cancel, discontinue

# Good Cause to Terminate:

- Failure to comply with term of agreement
- Term is reasonable and of material significance
- Manufacturers knew of noncompliance within 2 years of notice date
- Notice and opportunity to cure re: sales/service
- Manufacturer's burden of proof

## Not Good Cause:

- Change in ownership
- Refusal to accept non-ordered products
- Agreement re: other product line

# Compensation:

- Statutory elements
- Time to pay – 30/90 days and 12% interest
- Common law damages
- Attorney fees and litigation costs
- Injunction to prevent termination
- Time to file suit

# Captive Financing Entity:

- Subject to the state or federal statutes?
- Court opinions
- Michigan Court of Appeals and Supreme Court

# Dealership Rights if Brand is Terminated:

## Michael P. Donnelly

- Managing shareholder of Fraser Trebilcock's Detroit Office.
- Undergraduate degree from James Madison College at Michigan State University and his law degree from the University of Detroit.
- Practices in the areas of complex commercial litigation and antitrust.
- Has represented clients throughout the United States, including auto dealers, on a variety of litigations matters.

# Brand Termination:

**Ohio.com**  
March 25, 2009

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Wednesday, March 25, 2009

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February 17, 2009, 2:09 PM

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By RICHARD S. CHANG

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[GM.CarBuyingDiscounts.com](#)

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[GM.PriceShopping.com](#)

# Possible Scenarios for Brand Termination:

- Congressional Action
- Immediate Termination by OEM
- Announcement of Phase Out

# Oldsmobile:



- GM announces it was going to “phase out” its Oldsmobile Division
- No formal notice of termination
- Many dealers sued
- Two cases of note:
  - Basil v. GM
  - Crippen v. GM

## Key Issues in Those Cases:

- Statute of Limitation
- Constructive v. Actual Termination
- Reliance on Statements of OEM's outside Franchise Agreement

# Voluntary Termination of Your Franchise:

## Closing Your Dealership

Loukas P. Kalliantasis, J.D.

- represents auto dealers and auto dealer trade associations
- Advises clients on regulatory compliance issues, as well as addressing financial, real estate, and other business needs

# Terminating of Your Franchise Agreement:

- ❑ No statutory limitations on voluntary termination by auto dealers
- ❑ Contractual limitations possible
- ❑ Enter into a termination agreement
- ❑ Entitled to compensation upon termination
- ❑ No obligation to sign a release of claims

# Other Matters to Consider:

## When Closing Your Dealership -

- ❑ Inventory
- ❑ Employee Contracts
- ❑ Real Estate
- ❑ Bank loans
- ❑ Personal guarantees on debt
- ❑ LIFO reserve recapture

# Fraser Trebilcock<sup>®</sup>

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