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WORKING PAPER NO. 09-017

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PENN JOUR. BUS. L. 11 (2009)

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The Case for Federal Preemption of State Dealer Franchise Laws: Lessons Learned from General Motors’ Oldsmobile Litigation and Other Market Withdrawals

By Leonid Feller

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I. Introduction

The collapse of the American automotive industry in late 2008 forced Detroit’s Big Three automakers to seek billions of dollars in federal aid to survive. The government ultimately agreed to provide billions of dollars in emergency financing to General Motors Corp. (“GM”), Chrysler LLC, and their financial arms, but conditioned the funds on the automakers’ submission of detailed restructuring plans to establish their continued viability. As part of their resulting proposals and subsequent bankruptcy filings, the manufacturers committed to sell or eliminate multiple vehicle line-makes and to concomitantly shrink their dealer networks.

The mass elimination of brands and dealers – even in bankruptcy, under legislation presently pending in Congress – will lead to litigation under state dealer franchise acts around the country. And while the capital infusions supplied by the government have been conditioned on a variety of restrictions, none of those addressed the need
to control the flood of lawsuits certain to arise as American companies reorganize their businesses to compete with their Asian and European rivals.

In evaluating how to manage the consequences of multiple brand terminations for the judicial system, it is worth looking to GM’s successful phase-out of its Oldsmobile line earlier this decade. As a result of decreasing sales—from over one million cars annually in the mid-1980s to only a few hundred thousand in the late 1990s—GM announced it was phasing out the brand on December 12, 2000.¹ In less than five years, Oldsmobile was gone, as were its 2,800 dealers.² And thanks to a carefully executed Transition Financial Assistance Package (TFAP), the company was able to limit dealer lawsuits to a relative handful (only about 100), thereby reducing the cost of doing away with the 106-year-old brand to “only” between $1.2 and $2.3 billion.³

A review of the Oldsmobile litigation provides five key lessons for dealing with litigation arising from future automotive brand withdrawals.

First, dealers are best compensated for the termination of their dealer agreements through a voluntary transition trust fund, on the order of TFAP. GM’s program allowed it to dispose of 97 percent of potential Oldsmobile claims without a single civil complaint ever being filed. To the extent that a portion of financial resources allocated to a broader restructuring plan can be reserved for a transition allowance, this provides the most efficient way to resolve dealer claims arising from future brand terminations.

Second, in the Oldsmobile litigation, a substantial number of cases were diverted to arbitration through contractual provisions contained in ancillary agreements between GM and its dealers. This is also likely to be true in litigation arising from future brand withdrawals despite recent amendments to the Automobile Dealer Suits Against Manufacturers Act (ADSAMA). As in all forms of alternative


dispute resolution, arbitration will lead to early settlement and reduced costs as compared to traditional litigation.

Third, for those cases not subject to arbitration, Oldsmobile courts regularly dismissed high-value tort and equitable claims early in the case through traditional common law rules such as the economic loss doctrine. Such early dismissals cabined dealers’ expectations and reduced the uncertainty GM faced in the litigation, thereby leading to timely settlement of cases.

Fourth, dealers’ contract-based claims generally survived GM’s motions to dismiss in the Oldsmobile litigation. Any provable damages from such claims—not an insignificant hurdle when considering a money-losing brand—provided the best measure of dealers’ expectancy of future income and lost profits from a brand termination.

Fifth, dealers’ state statutory franchise act claims also regularly survived GM’s motions to dismiss in the Oldsmobile litigation. Unlike contract claims, however, dealer act claims had the potential to overcompensate dealers through treble damage provisions intended for egregious manufacturer conduct in case-by-case disputes, not a broad-based market withdrawal. In addition, these claims raised the fundamental question, still unsettled
after twenty-five years of litigation around the country, of whether a broad-based market withdrawal is a defense to a state law termination claim. Because the law was uncertain, different courts reached diametrically opposed outcomes in the Oldsmobile litigation, thereby creating uncertainty for the litigants and hindering settlement.

The lessons drawn from the Oldsmobile phase-out experience can be applied to the present-day restructuring of the Big Three and the business necessity of eliminating vehicle brands and reducing the number of dealerships. In achieving this restructuring, a salutary public policy goal should be to devise a mechanism that fairly compensates, without overcompensating, dealers for the loss of their contractual expectancy in selling a terminated brand while reducing the litigation and transaction costs to the manufacturers and the courts.

This article proposes that in exchange for the manufacturers’ commitment to create dealer transition trust funds on the order of TFAP, Congress should allow for brand termination in bankruptcy and, for non-bankrupt manufacturers, should preempt state dealer act claims in favor of the federal Automobile Dealers’ Day In Court Act (“ADDICA”). Even with federal preemption, and in the
absence of a state remedy, dealers still would be fairly compensated and wholesale litigation avoided.

Following this Introduction, Part II of this article chronicles the collapse of the American automotive industry in late 2008 and considers the problem of brand overlap, a significant factor leading to the failure of the Detroit automakers as independent going-concerns. Part III provides a retrospective on the Oldsmobile litigation, including consideration of the claims brought by Oldsmobile dealers, GM’s approach to defending against those claims, and an analysis of how courts around the country went about resolving the cases. Part IV examines the jurisprudence and literature available about other market withdrawals. Part V tracks the history and language of the ADDICA, including its requirement that any claim for termination under the statute include proof of coercion or intimidation.\(^5\) Finally, Part VI details the author’s proposal to preempt state dealer act claims under the ADDICA, as well as the public policy benefits likely to result.

II. The Collapse of the American Automotive Industry
and the Problem of Brand Overlap

On November 7, 2008, the plight of American automobile manufacturing fundamentally was transformed from an issue of local concern in Detroit and the industrial Midwest to a burgeoning national crisis.

Early that morning, two of Detroit’s Big Three automakers announced not only staggering losses but, more significantly, the depletion of cash reserves to levels approaching “the minimum necessary to run the business.”

General Motors recorded a $4.2 billion operating loss for its fiscal third quarter and burned through $6.9 billion in cash. That left the world’s largest car company with $16.2 billion in readily available assets, on the brink of bankruptcy since “GM needs a minimum of $11 billion to $14 billion to operate,” and the manufacturer was in danger of falling below that level by the end of 2008.

Ford Motor Co.’s operating loss, $2.7 billion, was smaller than that of its largest rival, but its third-

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6 Christine Tierney et al., Cash Crunch: GM, Ford Burn Reserves, Face Liquidity Crisis, The Detroit News, Nov. 8, 2008, at 8A.
7 Id. at 1A.
quarter cash burn was greater at $7.7 billion.\textsuperscript{9} And although Ford’s stockpile of $29.6 billion made its circumstances less dire in the near term, the hoard was amassed when the company leveraged all of its real estate and intellectual property holdings in 2007.\textsuperscript{10} At a burn rate of $2 billion per month, $30 billion would buy Ford barely a year to right its ship.\textsuperscript{11}

As for Chrysler, November 7 marked the “suspension” of merger talks with GM, less than a week after Renault-Nissan announced it too had pulled out of the bidding.\textsuperscript{12} The company’s owner, Cerberus, remained in continuing discussions with a number of companies about a sale or strategic partnership, culminating several months later in a proposed “no-cash” alliance with Fiat SpA of Italy.\textsuperscript{13}

\textsuperscript{9} Bryce Hoffman, Blue Oval Treads In Deepening Water, \textit{The Detroit News}, Nov. 8, 2008, at 9A. Three months later, Ford announced a fourth-quarter loss of $5.9 billion with a cash burn of $5.5 billion. See Bryce G. Hoffman, Ford: Feds can do More to Lift Sales, \textit{The Detroit News}, Jan. 30, 2009, at 1A, 6A (explaining that, for all of 2008, Ford depleted its cash reserve by $19.5 billion, leaving about $24 billion in available liquidity).

\textsuperscript{10} Id.

\textsuperscript{11} See Tierney et al., supra note 6, at 1A.

\textsuperscript{12} Alisa Priddle, Cerberus Still Seeks Takers For Automaker, \textit{The Detroit News}, Nov. 8, 2008, at 1A.

\textsuperscript{13} On January 20, 2009, Chrysler announced that Fiat SpA would acquire a 35 percent stake in the automaker in exchange for providing access to Fiat’s fuel-efficient small car platforms and engines. Critically, no money was meant to change hands as part of the non-binding agreement, meaning Fiat was free to withdraw its support at any time.
barring a capital infusion or outright takeover, industry analysts predicted that “Chrysler will not remain intact.”

Within hours of the Detroit automakers’ November 7 announcements, then President-Elect Barack Obama convened his first post-election press conference. And despite the nation’s focus on the continuing credit crisis afflicting the financial markets, Obama began by focusing attention on the auto industry, calling it “the backbone of American manufacturing.” Michigan Governor Jennifer Granholm, flanking Obama at the press conference (and the only member of his 17-person economic advisory council to be singled out by name), was blunt with reporters: “under these extraordinary conditions, the industry cannot continue its progress alone.”

The very survival of American automobile manufacturing, it became clear, was dependent, at a minimum, on substantial government intervention--far in excess of the conditional $25 billion in low-cost “section...
136”\textsuperscript{17} loans previously approved by Congress for retooling of advanced technology plants. On December 2, GM revealed that it needed an immediate capital infusion of $4 billion to avert bankruptcy before the end of the year and an additional $6 billion to survive through March 31, 2009.\textsuperscript{18} Chrysler, meanwhile, requested aid of $7 billion over the same time period.\textsuperscript{19}

On December 19, 2008, after the American automakers’ chief executives twice came away empty-handed after appearing before congressional committees, the Bush Administration authorized the distribution of $17.4 billion to GM and Chrysler from $700 billion previously reserved for financial institutions under the Troubled Asset Relief Program (TARP).\textsuperscript{20} Over the following four weeks, an additional $7.5 billion in TARP loans was approved for the automakers’ financing arms, GMAC LLC and Chrysler

Federal assistance was conditioned on a variety of restrictions, including limits on executive compensation, the prioritization of government debt, the issuance of warrants for non-voting stock, veto power on transactions exceeding $100 million, and a prohibition against dividends while federal loans were outstanding. But even as the initial slices of federal aid were doled out, it was apparent that government intervention alone, at any level, would not be enough to save the auto companies in the long-term. “The time to make the hard decisions to become viable is now,” President George W. Bush stated in announcing the federal loans, “or the only option will be bankruptcy.”

The former President’s prediction proved accurate as, on February 17, 2009, GM and Chrysler requested an additional $21.6 billion to avert a near-term Chapter 11 filing. On March 30, the Obama Administration approved $500 million in aid for Chrysler and $5 billion for GM – of

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21 David Shepardson and Alisa Priddle, Chrysler Finance Arm gets $1.5B, The Detroit News, Jan. 17, 2009, at 1B.
22 Shepardson, supra note 20, at 1A.
23 Tom Walsh, Long Day’s Journey to Deal: Millions Hold Their Breath as Talks Play Out, Detroit Free Press, Dec. 21, 2008, at 15A.
which $2 billion was doled out on April 24.  

Chrysler was given 30 days to wrap-up a merger with Fiat and GM was allowed 60 days to submit a revised viability proposal.  

As one local commentator put it, “the Team Obama auto task force has put Chrysler on a week-to-week death watch and extended GM’s lifeline a little longer.”

The Chrysler “death watch” came to an end on April 30, when the company filed for bankruptcy, the sixth largest in U.S. history.  

As part of the reorganization, the Obama Administration committed another $8 billion to the automaker for debtor-in-possession and exit financing.  

On June 10, after just 42 days under court supervision, a “new” Chrysler Group LLC emerged under Chapter 363 of the Bankruptcy Code, with Fiat holding an initial ownership stake of 20 percent, slated to increase to 35 percent upon production benchmarks being achieved.

On June 1, just as Chrysler was preparing to emerge from bankruptcy protection, GM collapsed into its own

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26 Id.

27 Manny Lopez, Talk of auto bankruptcy unavoidable, The Detroit News, April 16, 2009, at 6B.


29 Id.

30 Alisa Priddle, Fiat boss orders changes at Chrysler, The Detroit News, June 11, 2009, at 20A.
government-sponsored reorganization.\textsuperscript{31} The cost to taxpayers would be an additional $30 billion, with GM closing 17 factories and eliminating 20,000 jobs.\textsuperscript{32}

The GM and Chrysler bankruptcies make clear that continuing installments of federal loans failed to allow the automakers to correct the fundamental structural impediments and inefficiencies that led to staggering losses for all three Detroit manufacturers: GM -- $82 billion since 2005;\textsuperscript{33} Ford -- $24 billion since 2005;\textsuperscript{34} Chrysler -- $16.8 billion in 2008 alone.\textsuperscript{35} These causes predate the current recession and include: union contracts and legacy costs substantially in excess of those paid by foreign competitors; a crushing debt burden; a lack of responsiveness to consumer demand spurred by world oil prices for smaller, more fuel-efficient vehicles; a negative perception of the American brands' performance, reliability, and service; and, most significant for the present analysis, manufacturing too many overlapping models

\textsuperscript{32} Id.
\textsuperscript{34} Bryce G. Hoffman, Ford Builds Image as Strongest of Big 3, \textit{The Detroit News}, Dec. 17, 2008, at 4C.
\textsuperscript{35} Shepardson, New Lease, supra note 28, at 13A.
sold under different brand-names through over-sized dealer networks.

Perhaps the best example of the latter phenomenon is GM’s line of Lambda-platform midsize crossovers.36 GM released four different versions of fundamentally the same vehicle within the past eighteen months--the GMC Acadia, the Buick Enclave, the Saturn Outlook, and the Chevrolet Traverse.37 With the exception of exterior badging for and cosmetic differences between each of the four nameplates, the cars are nearly identical, are priced within a few thousand dollars of each other, and serve the same market. But, in order to comply with franchise agreements requiring a “mix of models,” GM spends enormous sums to manufacture and supply different versions of the same vehicles to its individual dealer constituencies, thereby sacrificing the economies of scale available by selling, for instance,


400,000 units of one vehicle rather than 100,000 units each of four different brands.\textsuperscript{38}

While GM is surely the worst purveyor of multi-brand overlap (the Chevrolet Trailblazer, GMC Envoy, and Saab 97; and the Chevrolet Silverado and GMC Sierra 1500\textsuperscript{39} are other examples of multi-branding), Ford and Chrysler are guilty of the same. The moderately popular Ford Edge has a twin in the slightly more upscale Lincoln MKX.\textsuperscript{40} The Ford Fusion is replicated in the high-end Lincoln MKZ and low-end Mercury Milan.\textsuperscript{41} The Dodge Caravan minivan is nearly indistinguishable from the Chrysler Town & Country and the

\textsuperscript{38} Leonid Feller, What the Auto Industry Needs to Survive; The Big Three Must Whittle Their Brands, Get Their Deals Networks Under Control, \textit{Detroit Free Press} (Nov. 12, 2008), at 15A.

\textsuperscript{39} The specifications for the 2009 Chevrolet Silverado and the GMC Sierra 1500, which are identical except for a $1,030 price differential, are telling:

\begin{tabular}{|l|l|}
\hline
\textbf{Chevrolet Silverado} & \textbf{GMC Sierra 1500} \\
\hline
Base Price & $40,075 \\
Engine & 6.2 liter V-8 \\
Transmission & 6-speed \\
Horsepower & 403 \\
Torque & 417 \\
Towing Capacity & 9600 \\
EPA Fuel Economy & 12/19 \\
\hline
\end{tabular}

\textsuperscript{40} Scott Burgess, Pickup Showdown, \textit{The Detroit News}, November 19, 2008, at 1F.

\textsuperscript{41} Id.
Dodge Caliber was rolled out side-by-side with the Jeep Compass.\textsuperscript{42}

If the American manufacturers hope to compete with their Asian and European counterparts, the need to reduce models is self-evident. Toyota, which has surpassed GM as the world’s largest-volume automaker, carries approximately 29 individual models sold under three brands (Toyota, Lexus and Scion).\textsuperscript{43} GM has nearly twice as many nameplates—about 48 models—across eight brands.\textsuperscript{44} And the dealer network differentials are starker yet: There are fewer than 1,500 Toyota dealers in the United States, each selling about 1,800 vehicles per year;\textsuperscript{45} GM has more than 6,200 dealers.\textsuperscript{46}

each of which sells – like the average Ford and Chrysler dealer – only 500 vehicles annually.47

In the midst of the current economic crisis, General Motors, at least, has recognized and acknowledged the need to eliminate brands, nameplates, and dealers. As part of its reorganization, GM has made clear its intent to sell or phase-out the Pontiac, Saturn, Hummer, and Saab brands, to eliminate approximately 2,600 dealers, and to reduce its model offerings from 48 to 34 nameplates, all by 2010.48

For its part, Chrysler closed 789 of its nearly 3,200 dealerships while under bankruptcy protection but kept alive each of its three brands: Chrysler, Dodge, and Jeep.49 In the near-term, under an initiative called “Project Genesis,” intended to do away with duplicate Chrysler, Dodge, and Jeep vehicles, Chrysler has announced that it will cease production of either the Dodge Nitro or its “near twin,” the Jeep Liberty, on top of eliminating four other models—the Dodge Magnum, Chrysler Crossfire, PT

Honda (1,290), and Nissan (1,251)) have slightly fewer dealerships than Chrysler (3,585), about the same number as Ford (4,056), and only two-thirds as many as GM. Snell, supra note 3, at 9A.

48 Robert Snell and David Shepardson, GM’s plan would cut deeper, quicker, The Detroit News, April 28, 2009, at 10A.
49 David Shepardson and Alisa Priddle, Court delays Chrysler sale, The Detroit News, June 9, 2009, at 1A.
Cruiser Convertible, and Pacifica.\textsuperscript{50} In the long run, despite Chrysler’s decision not to eliminate any brands while in bankruptcy, “Dodge and Chrysler cars likely would be winnowed or morphed into something completely different in a Fiat alliance.”\textsuperscript{51}

As to Ford, the only Detroit automaker to avoid bankruptcy told Congress on December 2, 2008 that it intended to divest its Volvo brand.\textsuperscript{52} In addition, industry commentators believe that “Ford is starving Mercury of product”\textsuperscript{53} and the eventual elimination of that brand, while


\textsuperscript{51} Daniel Howes, Ford banks on its rivals’ misfortune, \textit{The Detroit News}, April 16, 2009, at 8B.


\textsuperscript{53} Bryce G. Hoffman, A New Kind of Lincoln, \textit{The Detroit News}, Jan. 13, 2009, at 1B.
not formally announced, has long been both rumored and expected.\(^{54}\)

It is by no means clear that the automakers will be successful in selling their extraneous brands. Although Ford was able to convince India’s Tata Motors to buy Jaguar and Land Rover for $2.3 billion in March 2008, the credit market has deteriorated catastrophically in the past year.\(^{55}\) Preliminary agreements to sell Saturn and Hummer have yet to be consummated and, at least with respect to Hummer, require regulatory approval before China’s Sichuan Tengzhong Heavy Industrial Machinery Co. can acquire the American icon.\(^{56}\) And if it is true that “the register will ring up ‘no sale’ when General Motors Corp. and Ford Motor Co. are done evaluating their Swedish subsidiaries,”\(^{57}\)


the companies simply may have to eliminate, rather than
divest, the brands.⁵⁸

And even as the automakers have embraced the need to
terminate dealers and line-makes to compete with their
Asian and European rivals, politics may interfere with
economic necessity. On June 8, 2009, House Majority Leader
Steny Hoyer and dozens of co-sponsors introduced the
Automobile Dealer Economic Rights Restoration Act of 2009.⁵⁹
Premised on the unsupported claim that “the automakers will
see no immediate costs savings from closing dealers,” the
legislation would retroactively restore the franchise
rights of the approximately 2,600 GM dealers and almost 800
Chrysler dealerships terminated as part of the companies’
bankruptcies.⁶⁰ “This legislation says that the dealers’
contracts should be honored, and any closings should be

⁵⁸ On February 20, 2009, Saab—organized by GM as a Swedish
corporate subsidiary—filed for bankruptcy protection in a
district court in Vänersborg, Sweden. The goal of the
filing (which did not impact GM’s contractual obligations
to Saab dealers in the United States) was, with Swedish
backing, “to pave the way for private investors to buy all
or part of the company.” Carter Dougherty & Micheline
Maynard, Saab Distances Itself From G.M., N.Y. Times,
February 20, 2009, available at
saab.html. But neither government assistance nor the
availability of a buyer is “a certainty.” Id.
⁶⁰ David Shepardson, GM to cut dealer closings, The
Detroit News, June 11, 2009, at 5B.
done in accordance with those contracts and state law,” Hoyer told the media. 61

All told, in the current market environment and based on the American automakers’ announcements to date, as many as eight brands and their dealer networks—Saturn, Hummer, Saab, Pontiac, Volvo, Mercury, Chrysler, and Dodge—may be terminated in the near-term. And in the absence of line-makes being eliminated during bankruptcy reorganization—a path that may be legislatively blocked—an avalanche of state court litigation is sure to result under current law.

III. The Oldsmobile Litigation

Any review of the Oldsmobile litigation must begin with GM’s TFAP program, an innovative attempt to avoid wholesale lawsuits through a preemptive compensation program. TFAP offered each Oldsmobile dealer a standard margin—a median of $2,100 per car—for its best year’s sales in the past three. 62 In a simple case, a dealer that

61 Id.
62 Kevin Adler, Oldsmobile Dealers, GM Remain At Odds, LJN’s Franchising & Business Law Alert, Aug. 2005, available at http://www.dealerlawyer.com/articles/LJN_080505.pdf. The exact amount paid to each dealer per vehicle sold, between $1,200 and $3,000, depended on the percentage of the dealership’s sales attributable to Oldsmobile. A stand-alone Oldsmobile dealer was eligible for the full $3,000.
sold 500 vehicles was eligible to receive about $1 million under TFAP. Dealers facing “special circumstances,” those with substantial current expenditures for constructing or renovating a dealership or that had only recently bought into the Oldsmobile brand, were eligible for additional stipends.63 The dealers were free to do what they wanted with the money—they could retire, buy into other GM or competitors’ brands, or open an entirely different business.64

With TFAP as the default option, out of a network of 2,800 Oldsmobile dealers, fewer than 100 turned down the program and sued.65 For this group and their lawyers, the Oldsmobile litigation presented a new paradigm. While lawsuits by automobile dealers against manufacturers are commonplace around the country, such litigation typically deals with individual dealer issues, such as vehicle supply to a particular dealership or the relocation of a neighboring store encroaching on a plaintiff’s sales area. The elimination of an entire brand, Oldsmobile, raised novel issues, and plaintiffs’ firms had to develop a plan

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63 See id.
64 Id.
65 Id.
of attack. And whether through consultation with one another or through inadvertent convergence, most firms settled on four primary categories of claims: (1) statutory claims under state dealer acts; (2) contract claims for breach of the Oldsmobile Sales and Service Agreement, a/k/a the Oldsmobile Dealer Agreement, and breach of the implied covenant of good faith and fair dealing; (3) tort claims for fraud, negligent misrepresentation, and breach of fiduciary duty; and (4) equitable claims for unjust enrichment.

For its part, GM sought to avoid state and federal courts in favor of alternative dispute resolution. Although GM’s standard dealer contract did not include a provision mandating arbitration, ancillary agreements

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between GM and plaintiff dealers often did, such as those providing financial assistance by the manufacturer to the dealer for relocation, facility improvements, or the purchase of a neighboring dealership.  

Where litigation was inevitable, GM sought to winnow down the claims it would have to defend itself against in court. A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) or its state analog was filed in the typical non-arbitral case. Although no court dismissed a complaint outright, GM, buoyed by a Michigan choice-of-law provision in its dealer contract that typically was held to govern all but statutory claims, had almost uniform success in eliminating tort and equitable claims and in narrowing the surviving statutory and contract claims.

By the time litigation passed the motion to dismiss stage, plaintiff dealers had paid significant sums to their attorneys, were feeling at least some trepidation about having left the “easy money” available through TFAP on the table, and had seen significant portions of their cases

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68 See infra Part III.A (discussing cases involving the difference between standard dealer contracts and ancillary agreements).
69 See, e.g., Crippen, No. 02-1107-CZ, slip op. at 2 (stating “[GM] seeks summary disposition of Plaintiff Crippen’s Complaint”).
70 Id.
71 Id. at 11-13.
72 Id. at 5-6.
eviscerated before discovery got underway. As a result, plaintiffs faced a strong incentive to settle, and only two cases proceeded as far as summary judgment. One was dismissed and the other resulted in a directed verdict for the manufacturer.

Each phase of the Oldsmobile litigation, as well as the courts’ resolution of the different types of claims, is described in detail below.

A. Avoiding Litigation Through Arbitration

The dealers hardest hit by Oldsmobile’s termination, and therefore the most difficult cases to resolve through the TFAP process, were those that had only recently invested in the brand. The Trapp dealership in Houma, Louisiana, for example, had been selling Chevrolet cars and trucks since 1971. In 1999, a year before the phase-out announcement, Trapp was approached by the Cournoyer dealership, the town’s Oldsmobile and Cadillac dealer,


about buying the latter’s assets and consolidating all three brands under one roof.\textsuperscript{76} Trapp agreed.\textsuperscript{77} In June 1999, the two dealers executed an Asset Purchase Agreement.\textsuperscript{78} Concomitantly, GM and Trapp signed an Assumption Agreement whereby Trapp would take over Cournoyer’s Oldsmobile and Cadillac dealer agreements.\textsuperscript{79} The Assumption Agreement contained a broad arbitration provision mandating that “any and all claims, disputes, and controversies between [GM and Trapp] arising under or relating to this Agreement and its negotiation, execution, administration, modification, extension or enforcement” be submitted to binding arbitration.\textsuperscript{80}

When Trapp sued GM in federal court in the Eastern District of Louisiana, GM moved to compel arbitration, relying on the arbitration clause in the Assumption Agreement.\textsuperscript{81} Trapp objected, arguing that its claims arose out of the continuing execution of its Oldsmobile Sales and

\begin{itemize}
  \item \textsuperscript{76} Id.
  \item \textsuperscript{77} Id.
  \item \textsuperscript{78} Id.
  \item \textsuperscript{79} Id.
  \item \textsuperscript{80} Id. at *2.
  \item \textsuperscript{81} Id.
\end{itemize}
Service Agreement, not the Assumption Agreement by which it had acquired the right to sell the Oldsmobile brand.⁸²

The Louisiana federal district court sided with GM. It relied on Section 2 of the Federal Arbitration Act (FAA), which provides that “[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable . . . .”³³ In Moses H. Cone Memorial Hospital v. Mercury Construction Corp., the Supreme Court broadly interpreted the FAA as “a congressional declaration of a liberal federal policy favoring arbitration agreements.”⁸⁴ As a result, subsequent decisions have mandated arbitration “unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation” that would include the claims at issue, with all doubts concerning the scope of coverage of an arbitration clause to be resolved in favor of arbitration.⁸⁵

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⁸² See id. (making several assertions, including that arbitration is voluntary under the Dealer Sales and Service Agreement).
⁸⁴ 460 U.S. 1, 24 (1983).
⁸⁵ Pennzoil Exploration and Prod. Co. v. Ramco Energy Ltd., 139 F.3d 1061, 1067 (5th Cir. 1998) (internal quotations and citation omitted).
The Trapp court rejected the dealer’s argument that its claims arose exclusively from its Dealer Agreement, which did not contain an arbitration clause, rather than the Assumption Agreement.\textsuperscript{86} Trapp’s damage claims, after all, “stem[med] from the cost of building a new facility from which to sell and service the Oldsmobile and Cadillac lines—a requirement under the Assumption Agreement.”\textsuperscript{87} Moreover, “when parties consent to an arbitration clause that governs all disputes ‘arising under’ or ‘relating to’ their agreement, they are expressing their intent that the arbitration clause reach all aspects of their relationship.”\textsuperscript{88}

An Indiana federal court reached the same result in Tom Naquin Chevrolet, Inc. v. General Motors Corp.\textsuperscript{89} There, the plaintiff Chevrolet and Nissan dealer negotiated the purchase of a neighboring Oldsmobile-Cadillac dealership in June 2000, less than six months before the phase-out announcement.\textsuperscript{90} Pursuant to an Agreement and Business Plan containing a broad arbitration provision, General Motors provided Naquin with $400,000 in financial

\textsuperscript{86} Trapp, 2002 WL 1163611, at *6.  
\textsuperscript{87} Id. at *5.  
\textsuperscript{88} Id. at *11.  
\textsuperscript{90} Id. at *1.
assistance to complete the deal (and relocate its Nissan sales facility). As in Trapp, the court granted GM’s motion to shift the dealer’s claims for loss arising from termination of its Oldsmobile Dealer Agreement to arbitration. 

A plaintiff dealer on the west coast fared no better in Today Chevrolet Co. v. General Motors Corp. There, a Chevrolet (and Jeep) franchisee in Washington State agreed to buy the Oldsmobile-Cadillac assets of a nearby dealership only four months before the phase-out announcement, in August 2000. As in Naquin Chevrolet, GM contributed $250,000 to induce the Today dealership to relocate its business and create a stand-alone facility for its GM models (so as to separate them from its Jeep models). The Relocation Agreement and Business Plan included an arbitration clause. The federal court found that Today’s claims “at the very least, ‘relate to’ the Relocation Agreement” and ordered arbitration.

91 Id. at *1-2.  
92 Id. at *15.  
94 Id. at *2.  
95 Id. at *2-3.  
96 Id. at *3.  
97 Id. at *6.
In sum, consistent with both the congressional and Supreme Court mandates favoring arbitration, GM’s strategy of moving the Oldsmobile litigation from the courthouse to alternative dispute resolution was largely successful. But whether a similar approach would be equally effective in future brand terminations is complicated by Congress’ amendment of the Automobile Dealer Suits Against Manufacturers Act (ADSAMA), effective November 2, 2002.98 ADSAMA now provides:

Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy.99

In other words, even where a mandatory arbitration provision is contained within a dealer agreement, it is

99 Id. (emphasis added).
effective only if the dealer expressly consents to arbitration after its particular claim for damages arose.

Although the Naquin and Today dealers both raised ADSAMA as a defense to GM’s motion to compel arbitration, it was apparent in both cases that the claims arose out of GM’s Oldsmobile phase-out announcement of December 12, 2000, which predated the ADSAMA amendment by nearly two years.100 “[T]he statute could only reasonably have been intended to apply to controversies arising thereafter rather than before the modification. ‘Else the statute would have a retroactive application that Congress clearly hadn’t intended.’”101

But even putting the specifics of those claims aside, ADSAMA will not serve as a defense to arbitration in a future round of brand elimination so long as the arbitration provision is contained in an ancillary agreement rather than the dealer’s core franchise agreement. A Maine federal court reached this result in a post-ADSAMA Oldsmobile case, Brown Pontiac-Olds, Inc. v.

100 See Brown Pontiac-Olds, Inc. v. Gen. Motors Corp., No. 05-204-P-H, 2006 WL 318827, at *1, *5 n.1 (D.Me Feb. 9, 2006) (noting that the Dealer Agreement in Naquin was not subject to the ADSAMA unless it was both modified and the controversy arose after the effective date of the statute).
101 Id. (internal citations).
General Motors Corp. There, the plaintiff dealer used its TFAP allowance to buy a neighboring Buick dealership, then sued GM when the automaker adopted a “channel strategy” that mandated the consolidation of Buick, Pontiac, and GMC dealerships under one roof. Although Brown’s claims were brought under its ADSAMA-protected Buick Dealer Agreement, GM moved to compel arbitration under the Agreement and Business Plan by which Brown had acquired its Buick franchise. The Maine federal court compelled arbitration, finding that “at least portions of the present dispute fall within the scope of [the Agreement and Business Plan]. . . . Because some of the plaintiff's claims are subject to mandatory arbitration, all of its claims should be submitted in the first instance to an arbitrator.”

B. State Dealer Act Claims

Unlike Trapp, Naquin, Today, and other dealers that had entered into recent ancillary agreements, those plaintiffs subject only to GM’s standard Sales and Service

102 Id.
103 Id. at *2.
104 Id. at *3.
105 Id. at *6.
Agreement had no arbitration clause with which to contend. For these plaintiffs, the starting point for their lawsuits against GM was their state dealer act, the codification of an automobile dealer’s rights and remedies under state law. Twenty-four states have such statutes providing specific protections to dealers, distributors, and franchisees.\textsuperscript{106} Many such dealer acts provide for the award of treble damages to the successful plaintiff.\textsuperscript{107}

Although the overwhelming number of state dealer acts do not specifically address the possibility of market withdrawal,\textsuperscript{108} dealer lawyers seized on two sets of provisions typically contained within each state statute: (1) that a dealer agreement not be terminated without the required notice and in good faith; and (2) that the

\textsuperscript{106} J. Michael Dady, Evaluating the Termination Decision – Common Law and Statutory Considerations, 1526 PLI/Corp 387, 405 (2006).


\textsuperscript{108} See Zeidman, supra note 63, at 608-10 (discussing whether market withdrawal satisfies the “good cause” requirement for dealership termination found in many state statutes in the absence of explicit statutory language).
manufacturer allocate vehicles among its dealers nondiscriminatorily.

In Crippen Auto Mall, Inc. v. General Motors Corp.,\textsuperscript{109} the plaintiff dealership in Eaton County, Michigan brought suit soon after the Oldsmobile phase-out announcement under both types of provisions contained in the state’s Motor Vehicle Dealers, Distributors, and Manufacturers Act.\textsuperscript{110} Michigan’s dealer termination law provides that a manufacturer “shall not cancel, terminate, fail to renew, or refuse to continue any dealer agreement” unless the manufacturer provides notice, acts in good faith, and has good cause to terminate the dealer agreement.\textsuperscript{111} The state’s non-discrimination law prohibits a manufacturer from “adopt[ing], chang[ing], establish[ing], or implement[ing] a plan or system for the allocation and distribution of new motor vehicles . . . that is arbitrary or capricious, or modify[ing] an existing plan or system that causes the plan or system to be arbitrary or capricious.”\textsuperscript{112}

\textsuperscript{110} Crippen, No. 02-1107-CZ, slip op. at 2-6.
As to the termination claim, the threshold issue was whether the dealer’s claim was ripe. GM argued in its motion for summary disposition—equivalent to a federal motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)—that no termination had yet occurred.\textsuperscript{113} Although the December 12, 2000 phase-out notice had stated GM’s intent to eventually eliminate the division, the notice also promised that GM would “continue to produce and sell current Oldsmobile products until the end of their current model life cycles . . . .”\textsuperscript{114} Under such circumstances, the manufacturer asserted, no termination had yet occurred and the dealer’s claim was not yet ripe.\textsuperscript{115}

The court sided with GM on this narrow point, finding that the phase-out announcement was “not an express cancellation, termination, failure to renew, or refusal to continue the dealer agreement within the meaning of [Section 445.1567 of the Act].”\textsuperscript{116} But the court held that the narrow ruling simply begged the question of whether GM’s anticipatory announcement gave rise to a claim for

\begin{itemize}
  \item \textsuperscript{113} Crippen, No. 02-1107-CZ at 5.
  \item \textsuperscript{114} Id. at 2-3.
  \item \textsuperscript{115} Id.
  \item \textsuperscript{116} Id. at 3-4.
\end{itemize}
constructive or de facto termination, and if so, whether the plaintiff had stated such a claim? 117

In a 15-page opinion, the Crippen court answered both questions in the affirmative: 118 “[A] trier of fact could

117 Id.
118 In doing so, the court relied on a two-decades-old Michigan appellate court opinion. Auto Elec. & Serv. Corp. v. Rockwell Int’l Corp., 314 N.W.2d 592 (Mich. Ct. App. 1981). The defendant, a snow-mobile parts manufacturer had assigned its contract with the plaintiff distributor to a third-party. Id. at 294-95. When the third-party failed to perform, the plaintiff distributor sued, claiming constructive termination by the original manufacturer. Id. at 295. Following a jury award, the appellate court affirmed: “[T]here is sufficient support for the trial court's finding that defendant had de facto terminated the contract. It was impossible for plaintiff to operate successfully unless it could give prompt service to its customers.” Id. at 298. In addition to Auto Electric, dealers’ lawyers around the country relied upon a standard collection of cases that recognized constructive termination claims under various state dealer and franchise statutes. Petereit v. S.B. Thomas, Inc., 63 F.3d 1169 (2d Cir. 1995) (citing the Connecticut Franchise Act); Cabriolet Porsche Audi, Inc. v. American Honda Motor Co., Inc., 773 F.2d 1193 (11th Cir. 1985) (citing the Florida Motor Vehicle Dealer Act); Freedman Truck Center, Inc. v. Gen. Motors Corp., 784 F. Supp. 167 (D. N.J. 1992) (citing the New Jersey Franchise Practices Act); and In re Kirkwood Kin Corp. v. Dunkin' Donuts, Inc., No. 94C-03-189-WTQ, 1997 WL 529587 (Del.Super. Jan. 29, 1997) (citing the Delaware Franchise Security Law). The reasoning set forth by these courts, best laid out in the Petereit decision, is that “[i]f the protections the . . . legislature afforded to franchisees were brought into play only by a formal termination, those protections would quickly become illusory. We think it reasonable therefore to believe it was the legislature’s aim to have the umbrella of the Act's protection cover constructive as well as formal termination. To hold otherwise would allow franchisors to accomplish indirectly that which they are prohibited from doing directly.” Petereit, 63 F.2d at 1182.
find that Defendant’s conduct in phasing out Oldsmobile products amounts to a **de facto** termination because the phasing out of these products makes Plaintiff’s performance under the contract a practical impossibility.\footnote{Crippen, No. 02-1107-CZ, slip op. at 5.} Therefore, the dealer’s statutory termination claim survived GM’s motion for summary disposition.

As to the state discrimination claim, the plaintiff dealer argued that GM was unfairly prejudicing Oldsmobile dealers in the distribution of new vehicles vis-à-vis other GM-branded dealers (e.g. Chevrolet and Pontiac).\footnote{Id. at 5-6.} That is, the dealership claimed that while GM continued to produce new makes and models for its other brands, the Oldsmobile phase-out had the effect of discriminating against Oldsmobile dealers by gradually “starving” the brand, with only four models planned for 2003, down to three by 2004.\footnote{Id. at 5.} GM, in turn, countered that what the statute prohibited was **intra**-brand discrimination (i.e. failing to distribute an appropriate number of cars among various Oldsmobile dealers) rather than **inter**-brand discrimination (i.e. continuing to produce new models for Cadillac but not Oldsmobile).\footnote{Id. at 6.}
This time, the Crippen court sided with GM:

The clear import of this subsection of the statute is to prevent a manufacturer, importer, or distributor from favoring certain dealers over others in an arbitrary or capricious manner. It does not apply to the situation where the manufacturer, importer or distributor has adopted a plan for discontinuing the sale of a particular make of vehicles to all dealers.\textsuperscript{123}

The results reached by the Crippen court were replicated almost uniformly around the country, with statutory termination claims surviving GM’s motion to dismiss and discrimination claims either being dismissed or not being brought in the first place. Federal courts in the Northern District of New York,\textsuperscript{124} the Western District of New York,\textsuperscript{125} the Northern District of West Virginia,\textsuperscript{126}

\textsuperscript{123} Id.
\textsuperscript{126} See, e.g., LaPosta Oldsmobile, Inc. v. Gen. Motors Corp., 426 F. Supp. 2d 346, 350 (N.D.W.Va. 2006); Bob
the Middle District of Florida,127 the Central District of Illinois,128 the District of South Dakota,129 and the District of Arizona130 all permitted a plaintiff dealer’s statutory claim for constructive termination arising from the Oldsmobile phase-out to survive GM’s motion to dismiss.131


131 Perhaps mindful of the fate of statutory unfair allocation claims in Crippen, other dealers rarely pursued such claims in the Oldsmobile litigation. Thus, no statutory discrimination claim was brought in Crest Cadillac Oldsmobile, Inc. v. Gen. Motors Corp., No. 5:05-CV-00051, 2005 WL 3591871, at *2 (N.D.N.Y. Dec. 30, 2005), Robert Basil Motors, Inc. v. Gen. Motors Corp., No. 03-CV-315A, 2004 WL 1125164, at *4-5 (W.D.N.Y. April 17, 2004), Andrews, No. 8:02-CV-1715-T-27MSS, Biddulph, No. CIV 02-1914-PHX-EHX, Holler, No. 6:04-CV-457-ORL-31KRS, Lokey, No. 8:03-CV-1512-T-17-EAJ, or Robinson, No. 5:01CV145. Such a claim did appear in Sullivan, No. 03-2032, where it survived GM’s motion to dismiss because “[a]lthough GM’s reading of the statute is supported by intuition, Sullivan-Parkhill is correct that the statute does not limit the definition of motor vehicle dealers and that arbitrary and capricious decisions could be made among the various line-makes.” Id. at 4.
In doing so, however, these courts simply held that the dealers adequately had pleaded a claim for wrongful termination under a state dealer act.132 None of the courts addressed, at the motion to dismiss stage, the core legal issue of whether a market withdrawal—the discontinuation of a line-make due to insufficient consumer demand—is a defense to a statutory termination claim. That fundamental question was preserved for the two Oldsmobile cases to reach summary judgment, as discussed in Part E below.

C. Mixed Results on Contract Claims

Dealers’ statutory claims—premised on generic allegations of wrongful termination and unfair allocation—were mimicked in their contract claims, as were GM’s defenses. In bringing suit, the plaintiffs generally

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132 One exception was Bert Smith Oldsmobile, Inc. v. Gen. Motors Corp., No. 8:04CV2666T-27EAJ, 2005 WL 1210993 (M.D.Fla. May 20, 2005), in which a federal court in Tampa granted GM’s motion to dismiss plaintiff’s statutory claim for unlawful termination. Id. at *3. The court reasoned that because “[t]he parties continue to perform under the Dealer Agreement, even during the pendency of this lawsuit,” there was no termination, de facto or otherwise. Id. The court also held that by providing more than ninety days notice of the phase-out through its December 12, 2000 announcement, GM had satisfied the requirements of the Florida statute for termination. Id.
seized upon three provisions in the standard Oldsmobile Dealer Sales and Service Agreement:

• The Dealer Agreement’s renewal provision, which provided that the dealer is “assured of an opportunity to enter into a new Agreement at the expiration date if General Motors determines that Dealer has fulfilled its obligations under this Agreement.”\textsuperscript{133} Although this provision would not become effective until November 1, 2005 in the standardized Oldsmobile contract, dealers contended that GM had anticipatorily breached the renewal clause by announcing the Oldsmobile phase-out in December 2000.\textsuperscript{134}

• The Dealer Agreement’s reasonable rate of return provision, which stated that the Oldsmobile network of authorized dealers “must be appropriate in number, located properly, and have proper facilities to represent and service General Motors Products competitively and to permit each dealer the opportunity to achieve a reasonable return on

\textsuperscript{133} Id. at *5.  
\textsuperscript{134} Id.
investment if it fulfills its obligations under its Dealer Agreement."\(^{135}\)

- The Dealer Agreement’s supply provision, requiring GM “to make available” vehicles “in quantities adequate to enable Dealer to fulfill its obligations in its Area of Primary Responsibility.”\(^{136}\)

And even if the phase-out announcement did not violate these specific terms of the contract expressly, dealers contended, it at least breached the implied covenant of good faith and fair dealing.\(^{137}\)

For its part, GM renewed its statutory defenses, arguing that both it and the dealers continued to perform under the Sales and Service Agreement, that the renewal provision had not yet come due, and that the supply provision prevented GM from favoring dealers intra-brand, not inter-brand.\(^{138}\)

The choice of law provision included in the Dealer Agreement proved critical to the courts’ resolution of the contract-based claims. By its express terms, the contract

\(^{135}\) Id.
\(^{136}\) Id. at *4.
\(^{137}\) Id. at *6.
\(^{138}\) Id. at *4-6.
was “governed by the laws of the State of Michigan.”139

Without significant consideration, courts uniformly upheld the Agreement’s choice of law provision.140 In Bert Smith Oldsmobile, Inc. v. General Motors Corp., for example, as in almost every other case, the district court simply quoted the contractual language and proceeded to analyze the plaintiff’s contract claim under Michigan law.141

The only cogent choice of law analysis that emerged from the Oldsmobile litigation came from an Arizona federal district court in Biddulph Arrowhead, LLC v. General Motors Corp..142 Relying on Section 187 of the Restatement (Second) of Conflict of Laws, the court looked to whether “(1) the parties have no substantial relationship with” Michigan, or whether “(2) the law of [Michigan] would be contrary to the fundamental public policy . . . .” of Arizona.143 Finding that neither criterion foreclosed the choice of law provision’s application, particularly since

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139 Id. at *4.
143 Id. at 2.
GM maintained its headquarters in Detroit, “Michigan law will therefore govern Plaintiffs’ contract claims.”

The courts’ instinctive approval of the choice of law clause was important because Michigan law places significant restrictions on claims for anticipatory breach of contract. “[I]n order to enable the [plaintiff] to sue on such an anticipatory breach, he must accept it as such, and consider the contract at an end. If he elects to consider the contract still in force, he cannot recover . . . .” Because each of the plaintiff Oldsmobile dealers continued in business with GM, the manufacturer argued that the plaintiff dealers were foreclosed from claiming any breach of the Sales and Service Agreement while it was still in force. Courts agreed with near unanimity,

144 Id. at 3.
145 Hettrick Mfg. Co. v. Waxahachie Cotton Mills, 1 F.2d 913, 919 (6th Cir. 1924); see also Stoddard v. Manufacturers Nat’l Bank, 593 N.W.2d 630, 640 (Mich. Ct. App. 1999) (holding that “[u]nder the doctrine of repudiation or anticipatory breach, if, before the time of performance, a party to a contract unequivocally declares the intent not to perform, the innocent party has the option to either sue immediately for the breach of contract or wait until the time of performance”).
holding that dealers could not pursue a claim of anticipatory breach of the renewal provision while continuing to perform under the Dealer Agreement.\footnote{See, e.g., Andrews Oldsmobile Datsun, Inc. v. Gen. Motors Corp., No. 8:02-CV-1715-T-27MSS, slip op. at 9 (M.D.Fla. Mar. 27, 2003) (stating “[h]ere, it is undisputed that Plaintiff and Defendant continue to operate under the Dealer Agreement. Plaintiff cannot maintain that its Dealer Agreement is in effect while at the same time argue that the agreement has been anticipatorily breached”).}

Beyond that single issue, however, no pattern emerged in the courts’ ultimate dispositions of the dealers’ remaining contract claims. In\cite{Crest Cadillac Oldsmobile} for instance, a Syracuse federal court allowed all of the plaintiff’s contract claims to survive GM’s motion to dismiss.\footnote{Crest Cadillac Oldsmobile, Inc. v. Gen. Motors Corp., No. 5:05-CV-00051, 2005 WL 3591871, at *3 (N.D.N.Y. Dec. 30, 2005).} It did so even though, eighteen months earlier, a neighboring federal court in Buffalo dismissed half the dealer’s contract-based claims, including the renewal provision and the implied covenant of good faith and fair dealing (while allowing reasonable rate of return and supply-based claims to go forward) in Robert Basil Motors, Inc. v. General Motors
Even more disparately, an Orlando court in Florida’s middle district dismissed all contract-based claims in *Holler Enters., Inc. v. General Motors Corp.*\(^{150}\) while a Tampa court in the same district permitted all but the dealer’s renewal claim to survive in *Lokey Oldsmobile, Inc. v. General Motors Corp.*\(^{151}\).

Despite the lack of uniformity as to which particular claims survived, with only rare exceptions, some part of each plaintiff dealer’s complaint charging breach of contract survived GM’s motion to dismiss. And regardless of the specific contractual provision on which suit was allowed to proceed, the broad outline of the measure of damages was the same—the dealer’s lost economic expectancy from future sales of the Oldsmobile brand. Although disputes often arose as to the proper measure of this lost expectancy, there at least existed a common starting point for GM and its dealers to negotiate the resolution of plaintiffs’ contract-based claims.

\(^{151}\) Lokey Oldsmobile, Inc. v. Gen. Motors Corp., No. 8:03-CV-1512-T-17-EAJ, slip op. at 4-6 (M.D.Fla. Nov. 26, 2003).
D. Tort and Equitable Claims Dismissed

As with the contract claims, the Michigan choice-of-law provision in the Dealer Agreement also had great impact on courts’ resolution of dealers’ tort and equitable claims, which were disposed of almost uniformly. The dealers’ tort claims generally included fraud, negligent misrepresentation, breach of fiduciary duty, and the equitable claim typically charged as unjust enrichment. These claims were alleged by the plaintiffs to arise from GM’s false assurances that “the longevity of the Oldsmobile line was assured,” when in fact GM knew—according to the dealers—that it intended to eliminate the Oldsmobile division long before the phase-out announcement was made.152

However, Michigan law allows little room for these sorts of claims, particularly in litigation between two sophisticated parties to a contract. In Neibarger v. Universal Coop., Inc., the Michigan Supreme Court adopted the economic loss doctrine, which prohibits recovery in tort where losses are contractual and allocated by the

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parties.\textsuperscript{153} “[T]ort law is a superfluous and inapt tool for resolving purely commercial disputes. We have a body of law designed for such disputes. It is called contract law.”\textsuperscript{154} An analogous rule bars equitable claims for unjust enrichment where an express contract exists between the litigants.\textsuperscript{155}

Michigan law also precludes fraud and negligent misrepresentation claims where a contract between the parties contains an integration clause, such as the one contained in the Oldsmobile Dealer Agreement, expressly stating that “there are no other agreements or understandings either, oral or written, between the parties affecting this Agreement or relating to any of the subject matters covered by this Agreement.”\textsuperscript{156}

Michigan equally frowns on breach of fiduciary claims arising out of a contractual relationship. Indeed, in a dealer suit unrelated to the Oldsmobile phase-out, a

\begin{footnotesize}
\begin{enumerate}
\item Id. at 616 (quoting Miller v. United States Steel Corp., 902 F.2d 573, 574 (7th Cir. 1990)).
\item “Any . . . recovery under the theory of unjust enrichment is precluded by our finding of [a] . . . contract because the existence of [a] . . . contract, which provides a legal remedy, will bar a claim of unjust enrichment, which seeks an equitable remedy.” Kingsley Assoc., Inc. v. Moll Plasticrafters, Inc., 65 F.3d 498, 506 (6th Cir. 1995).
\item Robert Basil Motors, Inc., 2004 WL 1125164 at *7.
\end{enumerate}
\end{footnotesize}
Michigan appellate court held that no fiduciary relationship existed between GM and the Bero Motors dealership: “Here, the parties' existing and continued relationship is driven by profits. Plaintiff's mere expression that it relied on GM to effect the oral promise is unconvincing against a commercial backdrop where sophisticated commercial entities, such as here present, regulate the minutiae of their relationship through written contracts.”  

Thus, with only isolated exceptions, every court to confront Oldsmobile dealers’ tort and equitable claims dismissed them. “Allowing Robinson to recover in tort for what is essentially a contract claim is barred by the

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157 Bero Motors v. Gen. Motors Corp., No. 224190, 2001 WL 1167533, at *5 (Mich. Ct. App. Oct. 2, 2001). It is likely that the result would have been the same in most jurisdictions, where fiduciary duty claims are regularly rejected in the franchise context. See, e.g., Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 348 (4th Cir. 1998) (refusing “to superimpose fiduciary duties on a franchisor-franchisee relationship” and finding that franchisees are adequately protected by contractual and statutory remedies); Original Great Am. Chocolate Chip Cookie Co., Inc. v. River Valley Cookies, Ltd., 970 F.2d 273, 280 (7th Cir. 1992) (holding that “parties to a contract are not each other’s fiduciaries . . . even if the contract is a franchise”); Keys Jeep Eagle, Inc. v. Chrysler Corp., 897 F. Supp. 1437, 1443 (S.D.Fla. 1995) (holding upon summary judgment that a manufacturer owed no fiduciary duty to a dealership); Jimmy Dan, Inc. v. Chrysler Credit Corp., 643 F. Supp. 368, 369 (W.D.Mo. 1986) (granting a motion to dismiss a breach of fiduciary duty claim).

economic loss doctrine,” a West Virginia federal district court held in Bob Robinson Chevrolet-Oldsmobile-Cadillac, Inc. v. General Motors Corp.. The Crippen court held that “the alleged misrepresentations are barred by the integration clause.” “No fiduciary relationship existed between Plaintiff and Defendant,” a Tampa district court concluded in Andrews Oldsmobile Datsun Inc. v. General Motors Corp. And an Illinois district court held in Sullivan-Parkhill Holdings, Inc. v. General Motors Corp. that “[i]t is well-settled that unjust enrichment is not appropriate when the parties have an express written contract.”

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E. The Market Withdrawal Defense in the Oldsmobile Litigation

Out of 2,800 Oldsmobile dealers doing business in December 2000, less than 100 brought suit and of that number, only two reached summary judgment.

In Hubbard Auto Center, Inc. v. General Motors Corp., the Indiana district court confronted directly the fundamental issue at stake in the Oldsmobile litigation: whether an automobile manufacturer violates state law when it makes the business judgment to withdraw from a market by terminating production of an unpopular and money-losing brand; and under such circumstances, is the manufacturer required to compensate its dealers?163

Without resort to any market withdrawal precedent, discussed in Part IV, infra, the Hubbard court held that a manufacturer had an absolute right to end production and concomitantly terminate its dealers without compensation: “The undisputed evidence in this case demonstrates that GM's discontinuation of the Oldsmobile Division and non-renewal of the Dealer Agreement with Hubbard did not

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violate Indiana law. GM did not produce any more Oldsmobiles for sale after the phase-out and applied the phase-out to all Oldsmobile dealers equally. 164 Having rejected its TFAP allowance, and having spent tens of thousands of dollars (or more) in litigation costs, the Hubbard dealership was left with nothing after the demise of its Oldsmobile franchise.

A West Virginia district court reached a contrary conclusion in C&O Motors, Inc. v. General Motors Corp., although again without any consideration of prior market withdrawal cases. 165 In C&O Motors, the West Virginia dealer statute prohibited a manufacturer from “[f]ail[ing] to deliver new motor vehicles or new motor vehicle parts or accessories within a reasonable time and in reasonable quantities relative to the new motor vehicle dealer's market area and facilities.” 166 In setting the case for trial, the district court held simply that “[f]rom the parties' positions it again appears questions of fact remain as to whether GM's conduct was reasonable.” 167

164 Id. at *4.
167 C&O Motors, Inc., 2006 WL 3487648 at *12. Additional statutory claims not directly related to the Oldsmobile phase-out (having to do with the commingling of Chevrolet and Nissan assets by the dealership) also survived summary
IV. Other Market Withdrawal Litigation

The fact that the two Oldsmobile courts that considered market withdrawal defenses under state franchise statutes--Hubbard and C & O Motors--reached conflicting results is not surprising. Indeed, there is relatively little settled jurisprudence in the field and the few reported decisions are inconsistent with one another.

The first significant cases to address the market withdrawal defense were Kealey Pharmacy & Home Care Service, Inc. v. Walgreen Co.\(^\text{168}\) and St. Joseph Equipment v. Massey-Ferguson,\(^\text{169}\) decided only months apart in the Western District of Wisconsin.

In Kealey, Walgreens decided to terminate all 1,400 of its independently-operated drug stores in favor of its judgment. \textit{Id.} at *9-13. The respite ultimately proved a brief one for the dealership, however. After C&O Motors put in its case-in-chief at trial, the district court granted GM’s motion for directed verdict because the plaintiff had failed to prove any damages. \textit{Id.} at 14. Indeed, after the Oldsmobile phase-out announcement, the dealership had acquired a Nissan franchise to fill the space that was substantially more profitable than the Oldsmobile brand. \textit{Id.} at *13 (stating “C&O actually bettered its condition by acquiring the Nissan dealership”). The Fourth Circuit affirmed. No. 08-1157, 2009 WL 891033 (4th Cir. April 1, 2009).

\(^{168}\) 539 F. Supp. 1357 (W.D.Wis. 1982).

\(^{169}\) 546 F. Supp. 1245 (W.D.Wis. 1982).
company-owned operations.\footnote{Kealey, 539 F. Supp. at 1360-61.} When a group of Wisconsin franchisees sued under the state’s Fair Dealership Law, Walgreens argued “that the legislature's concern was directed solely at the discriminatory termination of one dealership or of a small number of dealerships without statutory good cause, and not about the nondiscriminatory, evenhanded, and impartial terminations at issue here.”\footnote{Id. at 1365.} Finding that “nothing in the language of the statute compels the interpretation defendant suggests,”\footnote{Id. at 1368.} the district court held to the contrary:

\begin{quote}
[T]he law was intended to, and does, cover nondiscriminatory, across-the-board terminations of dealerships even if those terminations are undertaken because the grantor decides to withdraw from an entire geographic area, or to cease production of the products sold by its dealers, or to change its marketing structure, or for any other business reason.\footnote{Id. at 1368.}
\end{quote}

Three months later, a different judge analyzing the same statute reached the opposite conclusion in St. Joseph
There, Massey-Ferguson was sued after it terminated its dealer agreements “[i]n response to substantial annual losses on the sale of construction machinery as well as a declining market share in that product line.”

Expressly rejecting Chief Judge Crabb’s analysis in *Kealey*, Judge Terence Evans reasoned:

Is a company with a poorly-selling product compelled to keep making and/or selling it, even at a loss, because [the statute] won't permit it to drop the product? Must a company desirous of withdrawing from a particular geographic market--the entire North American continent, for example--continue operating in that market, even at a loss, because the effect of such a withdrawal on dealership's would be impermissible under the Act?

Judge Evans concluded, “I am of the opinion that the [Dealer Law’s] prohibitions are not applicable in cases where, as here, the grantor undertakes a non-discriminatory

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175 *Id.* at 1246.
176 *Id.* at 1247-48.
withdrawal from a product market on a large geographic
scale.”177

The Kealey/St. Joseph divide has continued unabated for over 25 years. While some courts have held that a market withdrawal does not provide “good cause” for termination, an equal number have reached the opposite result.178

177 Id. at 1247.

The fault for this divergence lies not with the courts or their individual judges. Rather, the underlying problem is that, while each state franchise and dealer act requires “good,” “just,” or “reasonable” cause for termination, these terms’ definitions differ among the statutes and, as a result, so do state and federal courts’ interpretations of them.179

More to the point, with only isolated exceptions, state dealer and franchise laws do not expressly address whether a market withdrawal satisfies the “good cause” standard.180 As a result, “[t]he ambiguity produced by these laws leads to conflicting ideas and decisions and

306 (1st Cir. 1990) (same); Hechler Chevrolet, Inc. v. Gen. Motors Corp., 337 S.E.2d 744 (Va. 1985) (same).

leaves room for judicial interpretations based on the judge's individual values."\textsuperscript{181}

One commentator has explained the different outcomes in the market withdrawal cases through divergent judicial philosophies--the “protectionist view” and the “law and economics view.”\textsuperscript{182} The “protectionist view,” which rejects the market withdrawal defense, advocates that courts should defend the franchisee against being taken advantage of by the franchisor, regardless of the latter’s economic necessity for a broad-based termination.\textsuperscript{183} In contrast, the “law and economics view” allows for “efficient breach” of a dealer agreement in the case of a franchise relationship that is no longer profitable for the manufacturer, providing exclusively for contractual damages as compensation to the dealer.\textsuperscript{184}

The dichotomy between the protectionist and the law and economics views fairly explains the Kealey/St. Joseph divide, that is, the divergence between those cases recognizing a market withdrawal defense and those that do not. But most importantly for purposes here, both the

\textsuperscript{182} See \textit{id.} at 800-10 (explaining the different views and their outcomes).
\textsuperscript{183} \textit{Id.} at 800-01.
\textsuperscript{184} \textit{Id.} at 804-10.
theoretical explanation and the jurisprudential history of these cases predict different and unpredictable results in any future brand elimination litigated under state dealer laws.

V. Good Faith under ADDICA

Unlike the definition of “good cause” pursuant to the various state dealer statutes, there is no similar ambiguity under the federal Automobile Dealers' Day In Court Act (“ADDICA”), which was first adopted in 1956 “to provide automobile dealers with a federal cause of action against automobile manufacturers engaged in unfair business practices.” ADDICA is “a remedial statute enacted to redress the economic imbalance and unequal bargaining power between large automobile manufacturers and local dealerships, protecting dealers from unfair termination and other retaliatory and coercive practices.”

The protection afforded by the federal statute is limited, however. ADDICA broadly requires the manufacturer “to act in good faith . . . in terminating, canceling, or

186 Northview Motors, Inc. v. Chrysler Motor Corp., 227 F.3d 78, 92 (3d Cir. 2000).
not renewing” a dealer’s franchise agreement.\textsuperscript{187} The definition of “good faith” is restricted, however, to “freedom from coercion, intimidation, or threats of coercion or intimidation” by the manufacturer.\textsuperscript{188}

Thus, to pursue a wrongful termination claim under ADDICA, “[the] case law plainly requires a plaintiff to present evidence of actual, or threatened, coercion or intimidation.”\textsuperscript{189} Put another way, the Act “does not protect dealers against all unfair practices, but only against those breaches of good faith evidenced by acts of coercion or intimidation.”\textsuperscript{190}

Except in the extraordinary dealer-specific case, no showing of coercion or intimidation will be possible in the context of a broad-based market withdrawal. The point is best illustrated by \textit{Beck Motors, Inc. v. General Motors Corp.},\textsuperscript{191} the only lawsuit arising from the Oldsmobile phase-out to allege an ADDICA claim. In that case, where the exception proves the rule, the Beck dealership’s ADDICA claim survived GM’s motion to dismiss because it specifically alleged that GM had threatened and coerced it into trading its Pontiac franchise for the right to sell

\begin{footnotesize}
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\item \textsuperscript{187} 15 U.S.C. §1222 (1956).
\item \textsuperscript{188} 15 U.S.C. §1221(e) (1956).
\item \textsuperscript{189} \textit{Northview Motors}, 227 F.3d at 95-96.
\item \textsuperscript{190} \textit{Id.} at 95 (internal quotations and citation omitted).
\item \textsuperscript{191} No. 01-3014, slip op. (D.S.D. Mar. 29, 2002).
\end{itemize}
\end{footnotesize}
Oldsmobiles two years prior to the phase-out announcement. 192 Except for such individual outliers, ADDICA’s requirement of coercion or intimidation will be prohibitive for the overwhelming majority of dealers.

VI. Conclusion: The Case for Federal Preemption of State Dealer Acts Under ADDICA

The inconsistency in results in both the Oldsmobile litigation and broader market withdrawal jurisprudence is ultimately the result of the simple fact that state dealer statutes were not intended to “address those situations in which a franchisor terminates its franchisees because of a system-wide change in its marketing strategy or its withdrawal from a geographic market area.” 193 Various commentators have suggested amendments to state legislation to deal with this omission, from provisions expressly authorizing franchisor market withdrawal 194 to the creation

192 Id. at 5.
194 See id. at 807 (arguing that an explicit authorization is needed because franchisors have no statutory protection for market withdrawal, and to balance the franchisor's business needs with the franchisee's interest in continuing the franchise).
of “an objective judicial administrative body” to judge whether the manufacturer has good cause for termination.\textsuperscript{195}

But for the Big Three, there is no time for piecemeal state legislation. If the Detroit manufacturers are to survive, they must swiftly eliminate brands and dealers, and they must be able to do so without incurring staggering litigation costs. Yet, under the current balkanized system of state dealer acts and conflicting judicial opinions, dealer lawyers will race to the courthouse the moment the next line-make withdrawal is implemented.

To avoid this result, Congress should reject the Automobile Dealer Economic Rights Restoration Act, which would reverse much of what GM and Chrysler were able to accomplish in bankruptcy. Further, to allow Ford the necessary breathing room to complete its restructuring outside of Chapter 11, Congress should amend ADDICA to provide for federal preemption of state dealer acts for terminations based on brand withdrawal. Because ADDICA requires a plaintiff dealer to prove coercion or intimidation, and because any wholesale line-make termination is necessarily driven by market necessity,

\textsuperscript{195} See Hurwitz, supra note 176, at 26 (stating “an objective body may balance the equities of the competing interests involved in a given situation and give a ‘real world’ meaning to the amorphous good cause standard.”).
federal preemption would eliminate any statutory claim and appropriately would limit dealers’ recovery to their contractual expectancy.

To secure congressional acquiescence to federal preemption, the automakers should agree to create trust funds providing for a reasonable transition allowance --on the order of TFAP--for dealers affected by brand terminations. GM adopted such a strategy shortly after filing for bankruptcy, offering from $100,000 up to $1 million to each of the 2,600 dealers slated for closure.¹⁹⁶ Although hardly trivial, the cost of a TFAP-type program is (1) inexpensive compared to the alternative of nationwide litigation with every affected dealer and (2) relatively inconsequential in the current market environment. The high-end estimate of $2.3 billion that GM spent to phase-out Oldsmobile, after all, is only one-third of the $6.9 billion in capital it burned through in its 2008 third quarter.

Assuming that allocable shares of a transition trust fund reasonably approximate a dealer’s lost contractual expectancy, most litigation will be avoided. As the Oldsmobile cases demonstrate, high-value tort and equitable

claims are likely to be dismissed at the pleading stage. As a result, with federal preemption of state dealer statutes precluding the possibility of treble damages, dealers’ only court-based remedy will be for contract-based relief. If a reasonably approximated sum can be secured through an administrative trust fund, there is no reason for plaintiff dealers to resort to the courts and thereby incur unnecessary litigation costs. And, if dealers use trust-fund dollars to acquire or augment surviving brand dealerships, the manufacturers can retain these putative plaintiffs as partners rather than as courtroom adversaries.

As to those few dealers who do pursue litigation despite federal preemption and the availability of a transition allowance, the Oldsmobile precedent provides a roadmap for those claims. Dealerships with recent ancillary agreements mandating arbitration will be forced to settle for alternative dispute resolution. The remainder will litigate their contract-based claims in disparate courts around the country. These few cases can be managed without significant difficulty for either the automakers or the judicial system. And GM, Ford, and Chrysler will be able to restructure their businesses outside state courthouses, with substantial certainty, and
without squandering billions of dollars in litigation costs to eliminate unviable brands.