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Automotive Industry Roundtable “Facilities Requirements”

Presented by

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III

Dealer vs. Manufacturer

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Vehicle Code Section 11713.13

“It is unlawful and a violation of this code for any manufacturer, manufacturer branch, distributor, or distributor branch licensed under this code to do, directly or indirectly through an affiliate, any of the following:

(a) Prevent, or attempt to prevent, by contract or otherwise, a dealer from acquiring, adding, or maintaining a sales or service operation for another line make of motor vehicles at the same or expanded facility at which the dealer currently operates a dealership if the dealer complies with any reasonable facilities and capital requirements of the manufacturer or distributor.

(b) Require a dealer to establish or maintain exclusive facilities, personnel, or display space if the imposition of the requirement would be unreasonable in light of all existing circumstances, including economic conditions. In any proceeding under this subdivision or subdivision (a) in which the reasonableness of a facility or capital requirement is an issue, the manufacturer or distributor shall have the burden of proof.

(c) Require, by contract or otherwise, a dealer to make a material alteration, expansion, or addition to any dealership facility, unless the required alteration, expansion, or addition is reasonable in light of all existing circumstances, including economic conditions. In any proceeding in which a required facility alteration, expansion, or addition is an issue, the manufacturer or distributor shall have the burden of proof.

Exclusivity



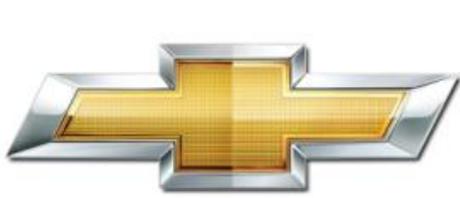
Dual Facility



Factory's Facility Image and Upgrade Requirements



Illustration: GM Program



GMC



GM Facility Size Requirements

- Based on registration data for dealer's market area - 3 to 5 year average – Net Planning Volume (“NPV”) developed
- Based on market's NPV, dealer's facility size requirements are established. Dealer size requirements fall into 8 specific expected sale ranges and dealership sizes ranging from “micro” (a dealer with less than 150 NPV), “medium” (a dealer with 800-1000 NPV), up to “extra large” (a dealer with 2000 plus NPV)
- A corresponding number of required square feet and/or “stalls” is then assigned
 - Interior – Showroom stalls, parts department, service stalls, customer reception, office
 - Exterior – New vehicle display stalls, storage stalls, used vehicle display, customer and employee parking
- Used by GM for reviewing proposed dealership facilities to ensure they have sufficient space to handle expected business

GM Imaged Facilities

- The issue of properly sized facilities is separate and apart from the issue of appearance or “image” of the facilities
- GM’s Facility Image Program is part of its Essential Brand Elements Program
- Each GM channel – Chevrolet, Buick-GMC and Cadillac - has its own unique Image elements
- The EBE Program is completely voluntary and there are no “upfront” costs to enroll – totally up to dealer if it elects to enroll
- Once enrolled, if the dealer’s participation is on track or “green”, dealer is eligible for quarterly EBE payments which are calculated in relation to dealer’s retail shipments

Essential Brand Elements

- Designed as a “Tool” to motivate Dealers to have the:
 - RIGHT Facility Image
 - RIGHT Location
 - RIGHT Customer Communication
 - RIGHT Customer Digital Interface
 - RIGHT Training
- GM’s focus is to incentivize dealers to have modern, imaged facilities – since it is GM’s view that it is good business for both parties

EBE has 4 Elements

Dealer Qualifiers

Customer Sales & Service Retention and Data share



Digital Marketing



Training



Facility



Facility Image Requirements

Facility Assessments

- Assessments and pictures for all GM dealerships were input into the GM facility website in November of 2009
 - Assessments note NON-GM dual status
 - Assessment data was uploaded to the EBE website

Non-GM Dual Status

- To be EBE compliant starting in Q4 2009, Dealers had to separate Non-GM operations from the Showroom
- To be EBE compliant starting in Q3 2010, Dealers also need to separate Non-GM operations from customer facing areas of Service Write-up and Waiting Area
- Shared service departments (non-customer facing) and administrative areas are acceptable for EBE purposes

Facility Image Upgrades

- Participating Dealers are assigned to “waves” or time periods for GM Facility Image Program execution, i.e. approved plans, beginning work, and completion

EBE Facility 2010 – Wave Assignments

- Once a Dealer is assigned to a facility wave they must enroll in and complete the Facility Image Program to remain compliant with the Facility Element of EBE



- Dealers that do not enroll in the Facility Image Program by their assigned start date will not be eligible for EBE payments – but again, totally up to dealer to do so
- Dealers that miss a facility “gate” will become Yellow status until they are caught up (EBE payments not made but set aside and paid later if dealer gets back on “track”); if still Yellow at the end of the timeline (typically 2 years or less) the status will go Red and all pending EBE Payouts will not be made
- Average timeline from enrollment to completion is 24 months

Chevrolet Buick GMC Cadillac Facility Images



Before and After



















How Far Can Image Requirements Go?



Service Center

Service Entrance

Service Entrance

Express Service

STARBUCKS COFFEE



SKATE PARK



Office Building



HONDA GO CART TRACK



What About Storage Space?



Manufacturer's Burden



“(B) In any proceeding under this subdivision or subdivision (a) in which the reasonableness of a facility or capital requirement is an issue, the manufacturer or distributor shall have the burden of proof.”

“(C) In any proceeding in which a required facility alteration, expansion, or addition is an issue, the manufacturer or distributor shall have the burden of proof.”

Retroactive Application of Statute

- **No retroactivity without clear intent**
 - Intent can be determined from either the language of the statute itself or, if the extrinsic sources are sufficiently clear, legislative history.

- **Pro:**
 - Legislative intent provides that statute is to “update laws” already regulating manufacturers.

 - Statute’s purpose was to give dealers flexibility in running their dealerships during economic hard times.

- **Con**
 - Legislature said intent of the bill was to ensure reasonable facility requirements are imposed. Requirements can only be imposed at the time of initial contract.

US Constitution (Article 1, Section 10)

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

CA State Constitution (Article 1, Section 9)

A bill of attainder, ex post facto law, or law impairing the obligation of contracts may not be passed.

Western Security Bank v. Superior Ct.
15 Cal. 4th 232 (1997)

- **Facts:**
- **Bev. Hills Bus. Bank loaned \$3.25 mil to Vista Place Associates (3 limited partners) to buy property including shopping center.**
- **Partnership went into default on loan and they modified loan terms to give general partners unconditional, irrevocable standby letters of credit in favor of the bank as additional collateral. Partnership went into default again and bank foreclosed on property.**
- **Issuer brought action for declaratory relief stating it wasn't obligated to honor bank's tender of letters or, alternatively, that if it was required to honor the letters, the partners were obligated to reimburse issuer.**

Western Security Bank v. Superior Ct.
15 Cal. 4th 232 (1997)

- Courts eventually found that under CCP section 580d (Anti-deficiency law), issuer may decline to honor it after getting notice it's to be used to discharge deficiency following non-judicial foreclosure on property.
- Legislature then enacted urgent legislation stating an otherwise conforming draw on letter of credit doesn't contravene anti-deficiency laws those laws allow no basis for refusal to honor a draw.
- Appeals Court reconsidered in light of urgent legislation and found it constituted substantial change in existing law and thus was prospective only.
- Supreme Court reversed judgment of Court of Appeals and remanded. It found the Legislature's action was a clarification of state law before the Court of Appeals decision, rather than a change in law, the statute had no impermissible retroactive consequences.

Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach
86 Cal.App.4th 534 (2 Dist. 2001)

- **Facts:**
- **Oil company entered into lease agreement with city for oil and gas exploration/production on city-owned property.**
- **Voters enacted initiative reinstating total ban on oil drilling within city.**
- **City continued to perform under lease and organizations opposed to project filed lawsuit for declaratory and injunctive relief to require city to apply proposition to oil company's project.**
- **Trial court found for city and oil company.**

Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach
86 Cal.App.4th 534 (2 Dist. 2001)

- **Court of Appeals reversed judgment and remanded case back to trial court. Appeals Court also declared proposition to ban oil drilling was valid exercise of city's police power and didn't amount to unconstitutional impairment of a contract, nor the lease agreement.**
- **Initiative was adopted and ban was necessary to preserve environment and protect public health, safety and welfare.**
- **Lease also anticipated regulatory change impacting the project, leading the court to give deference to the legislative judgment made by voters.**

Bullard v. California State Auto. Assoc.
129 Cal.App.4th 211 (2005)

- **Facts:**
- **Insureds were injured in collision with uninsured motorist.**
- **Insureds petitioned to compel their insurer to arbitrate claim under insureds' uninsured motorist coverage.**
- **Superior Court denied petition, finding it was untimely. Insureds appealed.**
- **Court of Appeals held that an amendment extending the limitations period for a claim on uninsured motorist coverage was not retroactive because statute did not expressly provide for retroactivity, legislative history did not indicate intent for retroactive application, and Legislature did not adopt amendment as emergency legislation.**

Constitutionality of Retroactive Application under Contracts Clause

- **Retroactivity is unconstitutional when it abridges existing contract rights.**
- **Pro:**
 - Although the language of the Contract Clause is facially absolute, the clauses (Federal and State) should not be read literally.
 - Modern contract law analysis= the inquiry standard is whether the application of the law has resulted in a substantial impairment of a contractual relationship.
 - Substantial impairment is difficult to show when the parties' contract operates in a heavily regulated industry.
- **Con**
 - Legislature made no specific date for applicability, suggesting prospective application.
 - Manufacturer's reasonable expectations would be impaired by the retroactive application of the statute.

Facts:

Coal companies brought an action challenging the Pennsylvania Subsidence Act, which requires that 50% of coal beneath certain structures be kept in place to provide surface support.

District Court upheld the Act; coal companies appealed.

Court of Appeals affirmed District Court ruling.

Supreme Court found that public interests in the legislation were adequate to justify the impact of the Act on coal companies' contractual agreements with surface owners.

Energy Reserves Group, Inc. v. Kansas Power & Light Co.
459 U.S. 400 (1983)

Facts:

- Natural gas supplier brought suit seeking determination it had the right to terminate two purchase contracts because of the public utility's refusal to redetermine the price.**
- Utility counterclaimed for declaratory judgment find the contracts were still in effect.**
- District Court granted summary judgment in favor of utility; Supplier appealed.**
- Supreme Court held that Kansas Natural Gas Price Protection Act did not impair supplier's contracts in violation of contract clause, and therefore, contract price could be escalated under indefinite price escalator clauses only to ceiling price set by Natural Gas Policy Act for categories of natural gas not covered by other sections of the Act.**

Facts:

Part-time school teacher (who claimed status as probationary employee) brought action against school district to set aside alleged wrongful dismissal without a hearing and other relief.

Trial Court granted summary judgment for defendant on grounds that plaintiff was temporary employee and thus, terminable at will.

Supreme Court reversed, finding plaintiff acquired status of probationary teacher and was deprived of right to pre-termination hearing.

Court refused to apply Cal. Ed. Code section 13337.5 which precluded classification of certain teachers as probationary employees, either retroactively or prospectively, to strip plaintiff of such status which he had acquired before its enactment.

Court held that generally statutes are not to be given retroactive effect unless the Legislature's intent cannot otherwise be satisfied. This general rule doesn't apply to legislation which only clarified existing law.

