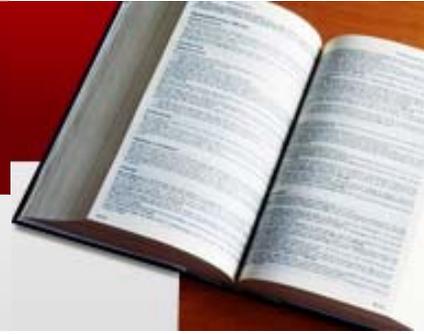


# The Bankruptcy Weekly

June 24, 2009

*Brought to you by the National Association of Dealer Counsel*



**Dear Aaron,**

The NADC Board of Directors continues to work hard to provide our members with timely information during these tumultuous times. We hope that both this newsletter and the [manufacturers bankruptcy](#) section of the NADC website keep you up-to-date on the issues.



As for *The Bankruptcy Weekly*, I would like to extend my continued gratitude to Venable, LLP for providing such quality material.

Sincerely,

Rob Cohen  
President  
National Association of Dealer Counsel

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## M&T Bank Pushes for Enforcement of Foreclosure Rights

By Lawrence A. Katz, Esq.

In bankruptcy, secured creditors often have to wait on line like everyone else to be paid, albeit, at the front of the line rather than at the rear. However, when a secured creditor's collateral is in jeopardy, the creditor has a right to seek relief from the automatic stay, thereby allowing it to step out of line entirely and pursue its contractual remedies.

A recent motion by flooring lender, Manufacturers and Traders Trust Company for relief from the automatic stay in the GM bankruptcy case highlights yet another problem that dealers may face in the weeks and months

### Co-editor of The Bankruptcy Weekly:

Lawrence A. Katz



Larry Katz is a senior partner in Venable's Bankruptcy and Creditors' Rights Group, where he

ahead. M&T provided floor plan financing to a Pontiac dealer in New York State back in 2004, memorialized by all of the standard loan documents. The dealership has now been closed and at GM's direction, the dealer returned its entire inventory to GM. Pursuant to the Dealership Agreement, upon receipt of the returned vehicles, GM should have paid M&T the net prices and charges that it had previously received when the vehicles were purchased by the dealer with the M&T financing. Of course, GM did not make the payment to either the dealer or to M&T. M&T was faced with several options. It could chase after the dealer for the amount owed and it could also seek relief from the automatic stay to recover the vehicles themselves or the proceeds of sale of the vehicles.

For the moment, M&T has chosen to seek relief from the stay, arguing to the Bankruptcy Court that the value of its collateral is diminishing with time and therefore its secured interest in the collateral is not adequately protected. It is also asserting that GM has no equity in the vehicles because the aggregate liens exceed the value of the vehicles themselves and that GM does not need the vehicles in order to reorganize. GM has until June 29, 2009 to object to the lifting of the stay; if it does not, an Order will be entered on July 1, 2009 granting M&T's request.

This scenario is bound to be played out over and over by floor-plan financing providers and will have a profound impact on all dealers. If relief from the automatic stay is granted M&T and the vehicles have been redistributed to other dealers, what happens to those dealers when M&T seeks to repossess the vehicles? How will it affect that dealer's obligations to its own floor plan financing provider? If relief is not granted M&T, how does the original Pontiac dealer protect itself when M&T comes after it for the amount outstanding? How will the claims against GM relating to these transactions be dealt with under GM's proposed plan of reorganization? Some of these important issues may be answered next week when M&T's motion for relief from the automatic stay is considered by the Court.

*Dealers may face closure of their business or liquidation of their inventory due to the bankruptcy of GM and/or Chrysler. Rejected or wind-down dealers using the last-in first-out (LIFO) inventory valuation method will need to address LIFO with their accountants. We thank the accounting firm of Crowe Horwath LLP for this contribution and thank Brett Richardson, the Director of Legal and Regulatory Affairs of the RVDA for bringing this article to our attention. This article was originally published in Dealership Flash, a publication of Crowe Horwath LLP and is reprinted with permission.*

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**Dedication to the  
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during difficult times.**

With Chrysler and General Motors in bankruptcy, the need for competent bankruptcy and litigation

## Dealership LIFO Benefits May Be Lost: Legislative Changes and Loss of Franchises May Affect Tax Benefits Sooner Than Expected

by **Joe Magyar, Bob Zwiers and Stephen Bedell**  
of the accounting firm **Crowe Horwath LLP**

### The Future of LIFO

The availability of the LIFO benefit may end sooner than expected. As the federal government looks for ways to reduce the budget deficit, discontinuing the LIFO method might be a potential source of tax revenue. It has even been proposed that taxpayers currently using the LIFO method be required to recapture their LIFO inventory benefits in the first taxable year beginning after Dec. 31, 2011. The increase in gross income attributable to recapturing the LIFO reserve would be spread over eight years. While the future of LIFO is uncertain, dealers should remain informed about potential legislative and regulatory changes and the impact on their businesses.

Various trade and professional organizations are lobbying to preserve the LIFO method. The LIFO Coalition is concerned that representatives in Washington are not well-informed about the LIFO method of accounting and the effect discontinuing the method would have on taxpayers, including dealers. Dealers nationwide should consider sending a letter to their U.S. senator to share the impact a loss of the LIFO method would have on their business.

### Closing Franchises and the LIFO Effect

Dealers across the country are facing the reality of losing their LIFO benefits as franchises are terminated and inventories are eliminated. If a dealer has other franchises, he or she might be able to combine the inventories to limit the tax effect.

counsel - with a focus on the auto industry - is increasing. Venable's national team has worked in the automotive industry for many years and is providing insight in identifying issues and mitigating risks involved for dealers, suppliers and other creditors in the auto manufacturers' business reorganization and restructuring. Venable's auto industry bankruptcy team is led by Larry Katz and Aaron Jacoby, with additional contributions to this week's newsletter by associates Kristen Burgers and Melanie Joo.

### Disclaimer.

This newsletter is published by the National Association of Dealer Counsel with content provided by the law firm of Venable LLP. It is intended to provide timely summaries of recent events that may impact dealers and should not be construed as providing legal advice or legal opinions. You should consult an attorney for any specific legal questions or to address dealer-specific fact situations.

## Participation Agreement May Run Counter to Regulatory Enforcement Scheme

by **Aaron Jacoby, Esq.**

The National Association of Motor Vehicle Boards and Commissions is taking a stand with the National Association of Attorneys General against GM's proposed modification of franchise agreements as a threat to a consistent regulatory enforcement scheme. On June 19th, Roy Dockum, the President of the NAMVBC

Another option may be to terminate using the LIFO method and spread the tax effect over four years if a dealer can manage to continue the business - for instance, via a used-car operation. The entire amount of a dealer's LIFO reserve must be reported as income for the current tax year if the dealer loses all of his or her franchises and does not remain in business. Unfortunately, franchise terminations happen quickly, leaving little time to plan for the many technical aspects of tax law that must be considered. Dealers should also consider accumulating cash now to fund the future tax liability.

Dealers should consult their tax professionals to determine the potential impact LIFO termination would have on their particular circumstances. Dealers required to begin recapturing their LIFO inventory benefits in the coming years should consider the various options available to help soften the blow.

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## The Week At A Glance

Summaries Compiled by Kristen Burgers, Esq.

### Chrysler

**Assumptions and Assignment of Unexpired Leases and Executory Contracts** - The Chrysler Debtors continue to file notices indicating which unexpired leases and executory contracts will be assumed and assigned to Fiat. This week, the Chrysler Debtors filed the following pleadings in connection with assumption and assignment: Notice of Filing of Schedule of Certain Designated General Agreements and Cure Costs Related Thereto [Docket Nos. 4093, 4220, and 4263], Notice of (I) Assumption by Debtors and Assignment to Purchaser of Certain Executory Contracts and Unexpired Leases and (II) Cure Costs Related Thereto [Docket Nos. 4033,

circulated an announcement about the organization's opposition to GM's attempt to amend current agreements in a way that would invalidate certain states' laws for manufacturers and dealers. The group of regulatory agencies believes that the bankruptcy court could create an unfair and chaotic regulatory enforcement scheme by having some licensees exempted from laws that others must follow.

According to Mr. Dockum, approximately 35 NAMVBC members have been actively working with their respective Attorneys General to file Limited Objections with the bankruptcy court. The Limited Objections, prepared by the National Association of Attorneys General (NAAG), raise several issues regarding the adverse effect on the various states' franchise laws in the post-bankrupt GM world if the proposed Participation Agreements, as modified, are approved. The NAMVBC also raises several legal issues regarding the reach of a bankruptcy court in post-bankruptcy franchise agreements. The Louisiana Motor Vehicle Commission sent a letter to its licensees, and published a position paper, that warns of the possibility of denial of a license if a franchise agreement is proposed that attempts to circumvent Louisiana law.

The current President of the NAMVBC is Roy Dockum, the Executive Director of the Oklahoma Motor Vehicle Commission, located at 4334 NW Expressway, Suite 183, Oklahoma City, OK 73116-1515.

### Will Cash for Clunkers

4089, 4172, 4180, 4197 and 4230], Notice of Filing of Schedule of Certain Designated Labor Agreements and Cure Costs Related Thereto [Docket No. 4043] and Notice of Filing of Schedule of Certain Designated Supplier Agreements and Cure Costs Related Thereto [Docket Nos. 4095 and 4222]. These notices have generated another wave of objections from non-debtor contract parties.

**Rejection of Unexpired Leases and Executory Contracts** - On June 19, 2009, the Court issued a Written Opinion Regarding Authorization of Rejection of All Executory Contracts and Unexpired Leases with Certain Domestic Dealers and Granting Certain Related Relief [Docket No. 4145]. In its 43-page opinion, the Court addresses the issues of business judgment and state law pre-emption before ultimately concluding that rejection of the dealer contracts and unexpired leases (the "Agreements") is appropriate and necessary based on the evidentiary record, that the Debtors exercised sound business judgment in rejecting the Agreements, and that, to the extent that any state dealer statutes conflict with the order, such statutes are preempted by the Bankruptcy Code. This week, the Chrysler Debtors have filed eight Omnibus Motions of Debtors and Debtors in Possession Pursuant to Section 365 of the Bankruptcy Code and Bankruptcy Rule 6006, for an Order Authorizing the Rejection of Certain Executory Contracts [Docket Nos. 4086-4083 and 4133 - 4137].

**Appeal of the Sale Order** - The Notice of Appeal of the Sale Order [Docket No. 3915] filed on June 11, 2009, by a group of 32 dealers identified as the "Affected Dealers" has been withdrawn.

**Monthly Fee Statements** - Pursuant to the order establishing interim compensation procedures for these Chapter 11 cases [Docket No. 1334] dated May 20, 2009, the professionals retained by the Chrysler Debtors and the Official Committee of Unsecured Creditors (the "Committee") have filed their first monthly statements for services rendered and expenses incurred in May. Jones Day, counsel to the Chrysler Debtors, has rendered services in the amount of \$12,445,718.50 and incurred expenses in the amount of \$256,471.69 [Docket No. 4231]. Capstone Advisory Group, LLC, financial advisors to the Chrysler Debtors, has rendered services in the amount of \$1,795,140.00 and incurred expenses in the amount of \$134,505.14 [Docket No. 4232]. The monthly statements of other professionals include: Kramer Levin Naftalis & Frankel LLP, counsel to the Committee, fees in the amount of \$2,487,741.00 and expenses in the amount of \$30,659.59 [Docket No. 4227]; Mesirow Financial Consulting LLC, financial advisor to the Committee, fees in the amount of \$382,188.00 and expenses in the amount of \$3,940.00

## Generate New Sales?

by Aaron Jacoby, Esq.

As dealers wait through the bankruptcy process and wade through the muck of the economy generally, will Cash for Clunkers generate cash for dealers? Maybe. The NADA issued a bulletin and [fact sheet](#) regarding the passage of the Bill and its major elements on June 18th. Judging from the NADA chart and NADC chatter, the Bill may generate as much confusion as cash. (Regulations to be drafted by NHTSA within 30 days may clarify certain provisions.)

Provisions that may need clarification include that the cash provided is in the form of a credit and not cash. Also, the credit is in lieu of the value of the vehicle, not in addition thereto. (Therefore, it is truly cash for a clunker, not just any trade-in.) What is "drivable" condition? Does that simply mean that it rolled in without a tow truck? What happens if the "clunker" happens to be worth \$6,500 and the dealer credits the deal only for the \$3,500 or \$4,500? Will that generate a claim against the dealer by the consumer? I like Mike Charapp's tax question, which is, "[I]n those states that tax the trade difference, is the vehicle being taken in for government credit a trade [and taxed accordingly]?" We agree with Mr. Charapp that we need this and other answers before getting too excited. As he said, "[W]e don't want dealers to sell dozens of cars only to find out that the government wants its additional \$100 - \$300 per car."

## Industry Wire Chatter

Compiled by Melanie Joo, Esq.

[Docket No. 4228]; and Roth & Zabel LLP, special counsel to the Chrysler Debtors, fees in the amount of \$3,613,827.50 and expenses in the amount of \$54,821.20 [Docket No. 4218].

### **General Motors**

**\*Motion to Lift the Automatic Stay** - Of special interest this week is the motion for relief from stay by Manufacturers and Traders Trust Company ("M&T"), which filed a motion to lift the automatic stay [Docket No. 2083] to pursue an allegedly out-of-trust dealer. M&T provided flooring financing for new GM vehicles to a dealership in New York. The dealership was terminated and has not made any payments on its M&T loan. M&T is requesting relief from the stay to pursue repayment or return of the vehicles from the GM Debtors, based on (i) the GM Debtors' pledge to provide "termination assistance" in the Dealership Agreement and (ii) M&T's belief that the vehicles are in the GM Debtors' possession. Objections are due by June 29, 2009, and a hearing on the motion has been scheduled for July 1, 2009, at 9:00 a.m.

**Sale of Assets Pursuant to Master Sale and Purchase Agreement** - The deadline for filing objections to the GM sale was June 19, 2009. Many objections were filed by various constituent groups. The states of Louisiana, Mississippi, Montana, Connecticut, Illinois, California, Kansas, Kentucky, Maryland, Minnesota, Missouri, Nebraska, North Dakota, and Vermont have filed objections to the sale [Docket Nos. 1926, 2065 and 2150] on the grounds that the proposed sale will divest consumers of their legal rights to be compensated for death or serious injuries caused by defects in GM products. The Ad Hoc Committee of Asbestos Personal Injury Claimants and the Ad Hoc Committee of Consumer Victims of General Motors have also filed objections to the sale, arguing that the release of New GM from any successor liability is inappropriate [Docket No. 1971 and 1997, respectively]. The Unofficial Committee of Family & Dissident GM Bondholders also filed an objection, claiming that family and dissident bondholders are being treated unfairly compared with the other stakeholders [Docket No. 1969]. The deadline for filing competing bids was June 22, 2009. A hearing to approve the sale is scheduled for June 30, 2009.

**U.S. Trustee Objections to Retention of Professionals** - The Office of the U.S. Trustee has filed objections to the GM Debtors' applications to employ Evercore Group L.L.C. as investment banker and financial advisor and AP Services, LLC as crisis managers and Albert A. Koch as Chief Restructuring Officer [Docket Nos. 2188 and 2189, respectively]. The U.S. Trustee is objecting

### **June 17, 2009**

1. "Sports Car Maker Koenigsegg Will Buy Saab from GM" - Saab returns to Swedish Control after Koenigsegg Automotive AB wins bid linked with \$600 loan backed by the European Investment Bank. [Los Angeles Times, June 17, 2009]

### **June 18, 2009**

2. Car Crash Victims Collide with Chrysler Bankruptcy" - The "new Chrysler" exempted from past product liability claims. [Los Angeles Times, June 18, 2009]

### **June 19, 2009**

3. The President of the National Association of Motor Vehicle Boards and Commissions urges support of Limited Objection Petitions to GM Bankruptcy filed by various state Attorney Generals. [June 19, 2009 Letter]

### **June 20, 2009**

4. "Snag in GM Asset Sale" - Objections to bankruptcy plan to sell GM's assets filed by 10 states (Connecticut, Kentucky, Maryland, Minnesota, Missouri, Nebraska, North Dakota, Ohio, Vermont and W. Virginia), union retirees and small bondholders.

to the applications on the grounds that Evercore is requesting a \$17.9 million "success fee" and AP Services is requesting a \$13 million "success bonus," both based on the closing of the same sale. The U.S. Trustee argues that a combined \$30.9 million bonus - in addition to regular fees earned prior to and during the bankruptcy - is too high in light of the fact that this is a sale to a government-sponsored purchaser and neither entity had to identify and cultivate the buyer.

**Rejection of Unexpired Leases and Executory Contracts** - On June 19, 2009, the GM Debtors filed the Notice of Debtors First Omnibus Motion Pursuant to 11 U.S.C. § 365 to Reject Certain Executory Contracts [Docket No. 2077]. The rejected contracts are generally promotional, sponsorship, and advertising contracts. The deadline to file responses is July 6, 2009.

## About NADC

The National Association of Dealer Counsel (NADC) is a professional organization of attorneys who represent automobile and other vehicle dealers.

The NADC provides a forum for members to share information, common experience, advice, help and answers to questions on manufacturer franchise issues, lemon laws, vehicle financing, regulatory complexities, insurance laws, tax laws, buy/sell agreements, employment laws, and the many other legal issues facing dealers and their counsel today.

NADC members find common ground at meetings and in on-line communication. With the proliferation of legislation and uncertain futures of manufacturers, questions and challenges multiply. Members can rely on thoughtful answers, creative strategies and solid advice from colleagues who face the same issues.

Please visit [www.dealercounsel.com](http://www.dealercounsel.com) for more information and to apply for membership.

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[The Detroit News, June 20, 2009]

5. "Ohio AG objects to GM Bankruptcy" - Objections grounded in workers' compensation benefits liability, reconciling bankruptcy with state law regulating dealerships and lemon law. [Dayton Business Journal, June 22, 2009]

6. "Toyota Asks How Many Times Toyota Errs Emulating GM Failures" - Reverting back to basic goals of enhanced quality and economy. [Bloomberg, June 22, 2009]

7. "GM Will Hold Ad Budget Steady." - The "New GM" advertising budget expected to be \$40-\$50 million while in bankruptcy proceedings. [The Wall Street Journal, June 22, 2009]

## June 23, 2009

8. "Beijing Auto Said to Hold Opel Talks as GM, Magna Prepare Sale." Priority to be given to Magna, however, competing bidders include Chinese company Beijing Automotive Industry Holding and Italy's Fiat Spa. [Bloomberg, June 23, 2009]

9. "Opel Allows All Bidders to View Its

Books, Handelsblatt Reports." - Opel's financial details are now available for review by all interested bidders while Magna aims to complete talks within 3 weeks. [Bloomberg, June 23, 2009]

10. "GM to Cut 4,000 More White-Collar Jobs by Year End." - GM gives notice of reduction plans to its U.S. white-collar workers. [Associated Press, June 23, 2009]

11. "Trustee Objects to Fees for GM Advisors." - Two GM consultants seek more than \$130 million for one year of work. [The New York Times, June 23, 2009]

For additional information go to the manufacturer bankruptcy page on the [NADC](#) website.



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