



## Participation Agreements and State Law:

by Aaron Jacoby, Esq. and Larry Katz, Esq.

In the typical bankruptcy case, the debtor assumes or rejects an agreement "As Is", just like the buyer of a used car. As we all know, however, this is not your father's Oldsmobile. GM now seeks to modify its franchise agreement with dealers by way of the Participation Agreement ("PA") and then assume that agreement, with multiple terms that are at odds with state law. The question is what will happen when New GM seeks to enforce the agreement against dealers post-bankruptcy?

As much of the online banter has recognized, the PA is at odds with state law. Some of the more onerous provisions are:

- **Exclusivity:** The "Exclusivity" provision requires that "Dealer shall cease all non-GM Dealership Operations at the Dealership Premises on or before December 31, 2009."
- **Enhanced Termination Rights for GM:** "Notwithstanding anything to the contrary in the Dealer Agreements, state law or otherwise, if Dealer fails to cure any default under this Section 4 within thirty (30) days of written notice of default from GM or the 363 Acquirer, GM or the 363 Acquirer shall be entitled to ... terminate the Dealer Agreements." In Section 8, the PA purports to reduce the typical state's standard statutory termination notice to thirty days.
- **Reduced Relevant Market Area Radius:** The PA also reduces the relevant market area radius for relocation and add point protests to six miles
- **Added Inventory Requirements:** Requires the Dealer to "order and accept from the 363 Acquirer additional new Motor Vehicles of the Existing Model Lines to meet or exceed the sale guidelines provided by the 363 Acquirer relating to Dealer's increased sales expectations."
- **Continuing Jurisdiction of the Bankruptcy Court:** The PA divests the state new motor vehicle boards and agencies of their jurisdiction in favor of a new, contractually based, in-personam jurisdiction for the bankruptcy court, which typically has only subject matter jurisdiction.

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Aaron Jacoby is Chair of Venable's Automotive Industry Group. He focuses his practice on class actions and consumer litigation, unfair competition, federal and state regulatory matters and government investigations affecting the automotive industry. Mr. Jacoby's industry focus and broad-based litigation and business experience enable him to counsel clients on a wide variety of operational, regulatory and litigation avoidance issues and to offer pragmatic solutions to the legal challenges they face.

In most states, a provision of a sales and service agreement that purports to waive the Dealer's rights under the state's statutory framework is void. While GM remains in bankruptcy, certain aspects of state law are preempted, at least with respect to the debtor. Post-bankruptcy, state law is again the Dealer's friend.

Let's use exclusivity as our hypothetical example. Assume that a Dealer that has both GM and Toyota on its dealership premises signs the PA. Reinvented GM emerges on or before August 31, 2009 as the PA contemplates. December 31, 2009, pursuant to the PA, Dealer has to terminate Toyota. Okay, stop laughing. Dealer decides not to terminate Toyota, but wants to keep GM as well and fails to "cure" within 30 days. Will GM be permitted to give only a 30-day termination notice if 60 are required by state law? Will the Dealer lose its Protest rights given the waiver under the PA? Will GM be permitted to rely solely on the PA rather than the good cause requirements set forth for termination in most states? Where will these issues be litigated and what law will apply?

GM can reinvent itself, but cannot reinvent rules about the application of state law post-bankruptcy. State new motor vehicle boards and agencies were established to serve an important function and, although parties can agree by contract to grant personal jurisdiction to a particular forum, they cannot, by agreement, either grant or divest a court or administrative body of subject matter jurisdiction.

Therefore, the path back to jurisdiction in the bankruptcy court would not be an easy one-unless Reinvented GM heads down that path the old fashioned way again.

## Dealership Land Valuation and Alternative Use of Dealership Property

by **Dana Nifosi, Esq.**

Due to the GM and Chrysler bankruptcies, rejected or "wind down" dealers may face the difficult reality of having to sell the dealership land. As noted last week, a key valuation issue will be site control. Dealers will need to develop a strategy to resolve

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**Dedication to the  
automotive industry  
during difficult times.**

With Chrysler and General Motors in bankruptcy, the need for competent bankruptcy and litigation 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 partners Michael Volpe and Ken Murphy, Senior Legislative Advisor Jake Seher and associates Kristen Burgers and Melanie Joo.

### **Disclaimer.**

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or remove site control restrictions or risk devaluation of the property.

The environmental condition of the dealership property is another important valuation issue. Underground and above-ground storage tanks for diesel, gasoline and waste oil, as well as oil-water separators all are common sources of petroleum contamination of soil and groundwater underlying dealership property. Depending on the extent, such contamination can affect significantly the value of the real property as well as impose regulatory obligations - sometimes costly - for site investigation and remediation. (It should be noted, however, that many states have reimbursement programs for remediation of petroleum releases from underground storage tanks, although such programs may suffer in the short-term from a lack of funding given the current budget issues facing many states.)

If a dealer of a closing facility owns the underlying property and decides to sell it, the dealer will need to consider various strategies for addressing the potential contamination issues, such as when soil and groundwater testing should be conducted, and by whom, if/when to remove any existing underground or above-ground storage tanks, and/or whether/when to conduct or fund any necessary remediation. Deciding upon a strategy to maximize the sale value of the property will be fact-specific and depend on such factors as the requirements of applicable state and local environmental laws, the historical uses of the property and surrounding area, the record of regulatory compliance of the dealership, and any known prior releases of petroleum products or other substances at the dealership.

As an alternative to selling the land, a dealer may want to identify other potential uses of the dealership property. The existing zoning applicable to a dealership property may adversely affect its value if it severely restricts the types of permissible alternative uses of the property. It is common for local zoning ordinances to restrict land uses in designated zones only to car dealer facilities or other automotive uses, thereby affecting a dealer's ability to assign its lease or sell the property for other-than-auto use unless a rezoning of the property or special exception can be obtained. A dealer will need to consult with counsel regarding current land use restrictions on the property, such as zoning and comprehensive plans, to determine what types of alternative uses are permitted, and what effect the current land use

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.

### Other Contributors to This Edition

**Dana Nifosi**, a partner in Venable's Government Division, counsels public and private entities on environmental, transportation and land use matters. Ms. Nifosi has extensive experience with legal, financial and political issues relating to complex transportation and development projects, including transit facilities, airports and telecommunications facilities. In particular, she has proficient knowledge in the use of public-private partnerships for project delivery. Additionally, Ms. Nifosi has significant civil litigation experience involving environmental, land use and project finance issues relating to transportation infrastructure development, and also represents individuals and corporations in environmental criminal matters

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**Stephen Gallagher**, a partner in Venable's Litigation Group, focuses on commercial litigation and bankruptcy litigation, and has been recognized as one of the nation's best bankruptcy law attorneys. He represents clients in a variety of matters in federal and state courts, including:

- technology issues;
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- trusts and estates;
- contract disputes;
- real estate;
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- eminent domain;
- business conspiracy; and
- construction matters.

restrictions have on the resale value of the property. Practical strategies for marketing the property may include evaluation of the rezoning, variance or special exception process and/or meeting with local planning department and elected officials.

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## Will Supreme Court Fiat Block Chrysler's Race to a Deal?

Apparently Not.

by Stephen Gallagher, Esq.

### Supreme Court of the United States

No. 08A1096  
INDIANA STATE POLICE PENSION TRUST, ET AL.,  
Applicants,

v.  
CHRYSLER LLC, ET AL.

#### ORDER

UPON CONSIDERATION of the application of counsel for the applicants, and the responses filed thereto, IT IS ORDERED that the orders of the Bankruptcy Court for the Southern District of New York, case No. 09-50002, dated May 31 and June 1, 2009, are stayed pending further order of the undersigned or of the Court.

/s/ Ruth Bader Ginsburg  
Associate Justice of the Supreme  
Court of the United States  
Dated this 8th  
day of June 2009.

The Chrysler bankruptcy case has only been pending since April 30, 2009. On June 8, 2009, Justice Ruth Bader Ginsburg issued an unprecedented order stopping Chrysler's proposed section 363 sale to Italy's Fiat Group. In a single sentence, Justice Ginsburg ordered that the sale is "stayed pending further order." Yet, in breaking news, the Wall Street Journal's online service reports, "High Court Won't Block Chrysler-Fiat Deal" - Supreme Court lifts temporary stay allowing the Fiat Deal to Proceed. [Wall Street Journal, June 9, 2009]. SCOTUS giveth and taketh away.

The Supreme Court stay could have jeopardized the deal that must be completed by June 15, 2009 at the risk of paying Fiat a break-up fee of \$35 million.

## Legislative Corner

by Jake Seher, Senior  
Legislative Advisor

June 09, 2009

The Oversight and  
Investigations

Subcommittee, chaired  
by Rep. Bart Stupak (D-

MI) will hold a hearing  
at 10 a.m. on Friday,

June 12, 2009 to  
examine the recent auto

dealership closures  
announced by Chrysler

and General Motors.  
Chrysler plans to close

789 dealerships this  
week and GM wants to

eliminate approximately  
2,500 of its 6,000

dealerships by the end  
of next year.

"The Subcommittee will  
hear from Chrysler and

GM on the criteria used  
in determining which

dealerships to close  
and what options were

offered to those  
dealerships slated for

closure," said Rep.  
Stupak. "Auto dealers

are significant  
employers in local

communities across the  
country and the

economic impact of  
these closures must be

carefully considered. I

Reports indicate that Fiat may not walk away, though.

In a Supplemental Statement filed by the Attorney General of Indiana today, the Indiana retirement and pension funds maintain that the case moved so quickly because of the threatened loss of the Fiat deal. Today's pleading states that the "Debtors (and the United States) have advanced the position throughout the case that the section 363 sale at issue here had to close before June 15 or Fiat would exercise its right to withdraw and the entire transaction would collapse." The pleading then argues that the threat of a lost deal "no longer provides a basis for driving the timing of these proceedings" and directs the Court to a quote by Fiat CEO Sergio Marchionne: "We would never walk away. . . .Never. . . . We should just be patient and let the system work."

<sup>1</sup> An authoritative decree, sanction, or order. Not to be confused with Fabbrica Italiana Automobili Torino (What we know as Fiat.)

## The Week At A Glance

Summaries Compiled by Kristen Burgers, Esq.

### Chrysler

**Assumptions and Rejections** - The following activity related to assumption and rejection of unexpired leases and executory contracts occurred this week:

- On June 9, 2009, the Court entered an order authorizing the rejection of executory contracts and unexpired leases with certain domestic dealers and granting related relief. By this order, the Chrysler Debtors have rejected dealer agreements and ancillary agreements (such as leases) affecting 789 dealers. Pursuant to the order, as of June 9, 2009, the affected dealers are no longer allowed to undertake

look forward to hearing from our witnesses and learning more about the role auto dealerships play in our local economies and how closures fit in to the larger mission of restructuring the auto industry."

### Invited Witnesses:

- Fritz Henderson, CEO, General Motors
- James Press, President, Chrysler LLC
- John McEleney, Chairman, National Automobile Dealers Association
- Additional witnesses may be added later.

**When:** 10:00 a.m. on Friday, June 12

**Where:** 2322 Rayburn House Office Building

## Industry Wire Chatter

Compiled by Melanie Joo, Esq.

June 6, 2009

1. "Racing Magnate Penske to Buy Saturn from GM" - Tentative deal with Penske will

any advertising, sales repair or service of any of the Chrysler Debtors' products as an Authorized Dealer. The Chrysler Debtors have implemented a reallocation program under which the remaining Authorized Dealers will purchase vehicles from the affected dealers. The deadline for affected dealers to file rejection claims is the general claims bar date or such other deadline as may be established by the Court.

- On June 4, 2009, the Chrysler Debtors filed their Third Omnibus Motion Authorizing the Rejection of Certain Executory Contracts. A hearing is scheduled on June 18, 2009.

**Supply Contracts Issues** - The following pleadings were filed this week concerning supplier-related issues:

- On June 4, 2009, the Chrysler Debtors filed a complaint for injunctive relief and turnover against Logghe Stamping Co. Logghe had a supply contract with Chrysler, whereby Logghe used tools owned by the Chrysler Debtors to manufacture parts for the Chrysler Debtors. After the Chrysler Debtors terminated the supply contract, Chrysler made demand for the tools, so that the Chrysler Debtors could transfer the tools to another supplier. Logghe refused to return the tools, prompting Chrysler to file the complaint. A hearing on the Chrysler Debtors' motion for a preliminary injunction was held on June 9, 2009.
- On June 5, 2009, Wolverine Tool & Engineering, Inc., filed for relief from the automatic stay to commence enforcement of a statutory lien against certain special tooling manufactured by Wolverine for use by Benteler Automotive Corporation. Benteler uses the tooling to produce parts for Chrysler, which is the owner of the tooling. Wolverine asserts that it has not been paid approximately \$147,000 for the design and manufacture of the special tooling and accordingly seeks to enforce its statutory lien rights.

**Retention of Professionals** - The following pleadings were filed this week concerning the retention of professionals:

- On June 3, 2009, the Court entered an order authorizing the retention of Greenhill & Co., LLC as the Chrysler Debtors'

save jobs, preserve the Saturn brand and keep Saturn dealers in business. [The Washington Post, June 6, 2009]

June 7, 2009

2. "What Would Mao Drive? A Little Red...Hummer" - A cultural shift from bicycles to Hummers. [The New York Times, June 7, 2009]

June 8, 2009

3. "Lenders Ask Supreme Court to Review Chrysler's Sale" - Lenders join consumer protection groups, tort claimants and other objectors to Chrysler sale threatening Obama's rescue plan for the auto industry. [The Washington Post, June 8, 2009]

4. "GM to End Medium-Duty Truck Production, Couldn't Find Buyer" - After four years of unsuccessfully searching for a buyer for its medium-duty truck production, GM cuts Chevy Kodiak, GMC Topkick and other GM models. [Wall Street Journal, June 8, 2009]

5. "GM Bankruptcy May Turn on \$13 Million in

investment banker. The Chrysler Debtors selected Greenhill because of its expertise in advising troubled companies with asset sales and related relief.

- On June 8, 2009, the Chrysler Debtors filed an Application to Retain PriceWaterhouseCoopers LLP ("PwC") as Tax Advisors, Information Technology Advisors and Special Accountants. The Chrysler Debtors assert that they selected PwC because of PwC's significant experience with the restructuring of underperforming manufacturers in the automotive industry. The Application to Retain PwC is scheduled for hearing on June 30, 2009.

### General Motors

In the GM bankruptcy, only two substantive motions were filed, both of which requested the appointment of "Official Committees." In Chapter 11 bankruptcy proceedings, the Office of the U.S. Trustee may appoint official committees to represent the interests of certain constituent groups, such as general unsecured creditors or equity holders. Official committees may hire professionals such as lawyers and accountants to advise them, and the debtors are required to pay the fees and expenses of these professionals, subject to court approval.

In the GM bankruptcy, an official committee has not yet been appointed. However, it appears that creditors are aligning themselves into informal committees. Court filings refer to an Ad-Hoc GM Noteholders Group, as well as a smaller Informal Noteholder Group. Two other groups, the Ad Hoc Committee of Asbestos Personal Injury Claimants (the "Asbestos Committee") and the Unofficial Committee of Family & Dissident GM Bondholders (the "F&D Committee"), have filed motions requesting appointment as official committees. The F&D Committee claims to have "been communicating with over 1,500 bondholders representing holdings in excess of \$400 million." The Asbestos Committee purports to represent the interests of unknown future asbestos claimants. Both the Asbestos Committee and the F&D Committee have requested expedited hearings on their motions.

The next scheduled hearing date in the GM bankruptcy is June 18, when the GM Debtors'

Donations" - \$13 Million in political campaign contributions by auto dealers in the last ten years surpassed all other groups but electricians and realtors, and investment is helping garner attention for dealers on Capitol Hill. [Bloomberg, June 8, 2009]

6. "Chrysler says it needs flexible buys for \$67 million ad budget" - Advertising budget slashed and marketing team recommends sitting out TV buying practice this year. [Automotive News, June 8, 2009]

June 9, 2009  
7. "Chrysler, Fiat, US Urge Court to Permit Asset Sale" - Stay is granted by the Supreme Court despite Chrysler's alleged losses of \$100 million a day in borrowed funds and potential jeopardy of Fiat Deal. [Bloomberg, June 9, 2009]

8. "High Court Won't Block Chrysler-Fiat Deal" - Supreme Court lifts temporary stay allowing the Fiat Deal to Proceed. [Wall Street Journal, June 9, 2009]

9. "Judge OKs Chrysler



motion to reject aircraft and airport leases will be heard.

Plan to Terminate Franchises" - Effective immediately eliminated dealers can no longer act as Chrysler, Dodge and Jeep dealers. [The Associated Press, June 9, 2009]

10. "Chrysler Running Short of Cash, Options as Sale Delayed" - Chrysler will run out of the \$4.1 billion financing and \$400 million in cash collateral by July 4 if Fiat deal is delayed. [Wall Street Journal, June 9, 2009]

11. "Chrysler Guarantees Rejected Dealers Place for Autos" - Chrysler guarantees 100% redistribution of unsold inventory of 789 eliminated dealers. [Bloomberg, June 9, 2009]

12. "Clock Ticking for Chrysler" - Fiat claims that it will not walk away despite possible delay in sale, but in the meantime, suppliers left without cash and consumers without parts. [CNNA.com, June 9, 2009]

13. "In China, A Roaring Debate over Hummer" - China's debate focuses on how the deal to acquire

Hummer is counterproductive to China's auto policy while Off Road Enthusiasts see the beginning of a new era. [NPR, June 9, 2009].

For additional information go to the manufacturer bankruptcy page on the NADC website.

## About the 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  
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more information and to  
apply for membership.

