

The Bankruptcy Weekly

July 8, 2009



Brought to you by the National Association of Dealer Counsel

Dear Aaron,

As always, Venable has provided good, topical material for our weekly manufacturers' bankruptcy update. We are grateful to Peter Hoffman of Sierra Autocars for sharing a dealer's perspective.



Sincerely,

Rob Cohen
President
National Association of Dealer Counsel

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Section 363 of the Bankruptcy Code Reigns Supreme

by Larry Katz, Esq.

If there were any lingering doubts as to the power of the supremacy clause following the approval of Chrysler's - I mean Old Carco's -- sale of assets to Fiat, they are certainly gone for good in the wake of Judge Gerber's much-awaited ruling on the sale of assets from Old GM to New GM. With the exception of a few hard-fought concessions by New GM, discussed below, the Bankruptcy Court's decision firmly establishes that when a sale free and clear is the only way to avoid a liquidation that would wipe out unsecured creditors, put your money on approval of the sale.

A total of 850 objections to the sale were filed, and 850 objections were overruled. Of particular interest to dealers was the knockout punch dealt the Dealers Associations, one of which tried to argue that the Participation Agreements and Deferred Termination Agreements were coerced and thus unlawful. Not only did the Bankruptcy Court reject this challenge, it held that the Association lacked standing to object and that the position taken by the Association was contrary to the best interests of GM dealers.

The Court drew a distinction between what the Association labeled as "coercion" and what courts have recognized as nothing more than "leverage." Indeed, in response to the Association's objection to GM's use of Participation Agreements as a means to modify

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existing dealer agreements, Judge Gerber found that the Association's position was antithetical to the very notion of bankruptcy reorganizations:

"[T]he last thing bankruptcy courts should be doing is to be forcing debtors and their contract counterparties into situations where rejection is the only lawful alternative, subjecting other creditors to dilution on their recoveries by running up rejection damages, and subjecting contract counterparties to the full hardships of an executory contract rejection. ...Disapproving contractual modifications of the type here would be squarely inconsistent with the goals of corporate reorganization."

In like fashion, the Court rejected the argument that the contract modifications proposed by GM could not be approved because they ran afoul of state franchise laws, holding that to the extent such laws "impair the ability to reject, or to assume and assign, they must be trumped by federal bankruptcy law." Quoting from Judge Gonzales' ruling in Chrysler, Judge Gerber systematically rejected state-imposed termination notice periods, buy-back requirements, good cause hearings, blocking rights and strict limitations on grounds for nonperformance, finding that all of these dealer protections improperly interfere with the debtor manufacturer's rights under the Bankruptcy Code with respect to the assumption or rejection of executory contracts.

As for the concessions, they were few in number but potentially significant. First, pursuant to a settlement reached with Attorneys General of approximately 45 states, GM agreed to changes in both the Master Sale and Purchase Agreement ("MPA") and the sale order to the effect that the Bankruptcy Court would make no finding as to the enforceability of the waivers of rights that dealers were required to accept, leaving this issue to be resolved locally. In addition, the MPA was modified to provide that New GM would assume liability for all products liability claims arising or occurring after the closing on the asset sale, regardless of when the product was purchased, thereby providing less incentive for consumers to sue the dealers.

Running a full 87 pages in length, the Bankruptcy Court's Order addresses many other important issues. While an appeal is probably likely, reversal is probably not, given that many of the Court's rulings rest squarely on the rulings of Judge Gonzales in the Chrysler case, which have already been upheld by the Second Circuit.

Remember Vehicle Advertising? Remember the Rules of the Road by Ken Murphy, Esq.

The Chrysler bankruptcy train is in the station. The GM Express has some crossings ahead, and the signs indicate green lights ahead. The passengers, the franchised dealers, have businesses to run, employees to pay, facilities to maintain and only one way to get the money to get this done - sell and service their vehicles. So, what do they want to do? Advertise.

With the economy in the doldrums, many dealers severely cut back their advertising, following the old saw - "you cannot force the market." Customers were not even looking for, much less buying, Chrysler and General Motors products. But times are changing--again. Whether it's confidence, boredom, an undrivable car, a desire to do something (anything?) positive - there are signs that people are ready to spend some money for new cars. There is also pressure from the bankruptcy journey. Dealers have new vehicle inventory to sell within stated wind-down periods of time or suffer adverse financial consequences. And there is the stimulus-generated "Cash for Clunkers" program. (Our prior articles and NADC emails recognize the challenges of marketing this financing tool before the rules are drafted.)

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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

Ads in the newspaper and on the Internet provide evidence that dealers are again telling their story. Those who are not affected by the bankruptcy proceedings are understandably announcing that fact while pushing the expected competitive messages of product quality and price. Chrysler and GM dealers must compete while attempting to overcome the negative connotation of bankruptcy while at the same time moving metal. There is fierce competition for the vehicle customer's dollars. The voice that is not speaking cannot be heard and may not be visited. There is a temptation to use bankruptcy proceedings as a new sales promotion. This can take a dealer into uncharted waters as to substance and terminology.

Now is a good time for dealer counsel to remind their clients that, although the bankruptcy proceedings took a lot away, they did not remove the requirements for advertising compliance. Remember that:

- The Federal Trade Commission is enforcing its guidelines to prohibit unfair competition, including false and misleading advertising.
- Regulation M (vehicle leases) and Z (vehicle purchase contracts) impose specific advertising requirements on the respective transactions.
- State attorneys-general and regulators continue to enforce laws and regulations about the form and content of advertising.
- Terms such as "free" and "liquidation sale" must be used carefully and accurately.
- Limitations remain on contacting customers by postal mail or electronic mail; the ubiquitous "e-mail blast" is not exempt.
- That new and exciting promotion that appears so attractive because no one else has tried it might be the step that is over the line.

Industry experts have commented that the new Chrysler and GM companies, as the survivors of the bankruptcies, must come out with hot and heavy marketing programs to bring about the sales results that will enable financial success. Jobs, government revenue and, perhaps, political careers depend upon it. Marketing promoters and media will be pushing hard for dealer advertising that has so long contributed to their financial success. Courage to move forward is essential, but, as always, caution and good counsel must be companions.

Spectator Sport by Peter Hoffman, Dealer, Sierra Autocars

You may be able to guess what lately reminded me of a priest I once knew who told me about a guy named George. George had come to the priest with serious problems - most of which were financial. He had lost his job, used up his savings, hadn't paid his bills in a while and was going to lose his house and car. The priest had advised George to consult the Bible and put his faith in God. About a year later, the priest was walking down the street and George drove up in a new car. He was very well dressed, tan and looked to be quite happy. The priest asked George how he had made such a dramatic transformation. George said that he had done exactly as the priest had suggested. He got his Bible out and opened to a random page, closed his eyes and put his finger on the page. His inspiration derived from the words his finger had landed on. The priest was impressed and asked what those words had said. George beamed and said: "Chapter 11."

I heard this joke on the radio years ago, but it certainly has renewed its relevancy lately. Most dealers find out that they are not going to get their money from someone because the person or business they are trying to collect from disappears. We put on a skip trace and move along. Sometimes - more now than we were used to - we get an official notice from an attorney saying that our debtor has filed under one of the chapters. Maybe we put in a claim, but it never seems to mean much, so sometimes we don't bother. Some

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 David Meyer, a Venable partner specializing in business transactions, Ken Murphy, Of Counsel with Venable LLP's Auto Industry Group, associates Kristen Burgers and Melanie Joo and Peter Hoffman, of Sierra Autocars.

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.

Silver Lining by David Meyer, Esq.

Despite the widely publicized woes of the auto industry, there are some industry players that see this as a time to take advantage of unprecedented acquisition opportunities. Surviving dealers and dealer groups have trimmed their existing operations to adjust for weak consumer demand and are now looking to build for the future through the acquisition of franchises and real property at fire-sale prices. There has been a dramatic decline in the prices being paid for "blue-sky" or the goodwill of existing dealerships. Dealers who are losing money are desperate to stop the bleeding, creating extraordinary "buying" opportunities for those who can weather the storm. Given the breadth of the industry's troubles, prime and coveted locations are becoming available for the first time in many years at dramatically reduced prices.

Manufacturers are seeking to consolidate their dealership body and are receptive to seeing stronger players fill the void caused by the downturn in the business. Another factor at play is that operators of multiple dealerships may often operate at a lower cost structure than single point dealers by sharing centralized corporate services. At the same time, when they take over an

of us got caught up in the bankruptcies of factory-sponsored dealer vendors - like Honda's dealer sign vendor and the Phil natural gas vendor. But there was nothing much for most of us to do about it. So we just watched to see what would happen.

In the last couple of months, however, GM and Chrysler/Jeep/Dodge dealers were confronted with something a little bit more daunting. These chapter filings would require us to really do something. We are involved and it is a big deal to us. We would have to get in there and press our cases. Most of us knew that bankruptcy is inherently unfair. Debts would be forgiven; some contracts would be rejected. There was, however, some sense that bankruptcy had priorities, preferences and order. It was quite a surprise for most of us to find that the process would be capricious, so fast as to moot any reaction and used openly as a pretext for accomplishing ancillary, non-financial factory goals. NADA has put forth a lot of effort on dealers' behalf; both behind closed doors with the factories and in Congress. Some state associations have tried to mitigate the impacts as well. But aside from the clarification agreement for GM's Wind Down and Participation Agreements, it looks like Chrysler's fatal shots took out the dealers before they could draw their guns and GM's overall play presented dealers with the Godfather's offer - not much to think about. In all but a very few circumstances, it was an offer we couldn't refuse.

So here we are, a month into GM's finger stab on the Bible and nine weeks into Chrysler's. 789 Chrysler/Jeep/Dodge dealers are history and with them thousands of customers have been stranded or abandoned. GM has given its terminated dealers 17 months to wind down. The joke there, of course, is that for much of GM's history bad policies were greeted by dealers with the thought that it was just a matter of time before the people in charge at the factory went away and the policies would change or be forgotten. Market clearing and mass dealer terminations are certainly bad policies. At least for GM, there is time, and maybe a strong probability that new leaders are coming with different ideas. So we watch, with a little help from NADA and some legislative sympathy, but with little role to play. When the economy turns around, as it surely will some day, let's hope that those of us who are surviving are witnessing the rebirth of the Phoenix, rather than Icarus's melting wings.

The Week At A Glance

Summaries Compiled by Kristen Burgers, Esq.

Chrysler

Creditor Access to Information - The Official Committee of Unsecured Creditors (the "Committee") filed a Motion for Entry of an Order (A) Approving a Stipulation with the Debtors Regarding Creditor Access to Information Pursuant to Sections 105(a), 1102(b)(3) and 1103(c) of the Bankruptcy Code and (B) Authorizing Retention of Kurtzman Carson Consultants LLC as Committee Website Agent Pursuant to Section 105(a) of the Bankruptcy Code [Docket No. 4489]. Pursuant to the Motion, the Committee requests court approval for a stipulation it has reached with the Chrysler Debtors whereby (1) the members of the Committee acknowledge that they are not authorized to disclose certain confidential information provided to the Committee by the Chrysler Debtors; (2) the Committee has agreed to establish procedures for disseminating information to unsecured creditors, including the establishment of a dedicated e-mail address for creditor inquiries, the establishment of a dedicated website to provide non-confidential information, such as highlights of significant events in the case and responses to creditor questions; and (3) the Committee has agreed to establish procedures for promptly responding to creditor requests for information, including requests for confidential information. Objections to the Motion are due by 4:00 p.m. on July 13, 2009, and a hearing is scheduled for July 16, 2009, at 10:00 a.m.

Rejection of Executory Contracts and Unexpired Leases of Real Property - The Chrysler Debtors continue to file motions to reject executory contracts and unexpired leases of real property. On

existing dealership, they can examine the overall cost structure and find savings. These cost-saving strategies, post-acquisition, may allow stronger dealers to turn operating losses into slim profits, even in the short term. In several instances, savvy dealers are persuading cash strapped municipalities to give subsidies to facilitate acquisitions and ongoing operations in order to preserve jobs and increase the business and sales tax base. All-in-all, transaction values are down, the number of transaction opportunities is up. Eventually, consumers will come back to buy new cars. When they do, the acquisitive dealers and dealer groups will be there to reap the profits.

Industry Wire Chatter

Compiled by Melanie Joo, Esq.

July 2, 2009

1. "State AGs Reach Tentative Agreement with General Motors" - GM agrees to honor express warranties, comply with state lemon laws and acknowledge state franchise and dealer laws for new GM dealers. [Legal Newswire, July 2, 2009]

2. "Ford Gains U.S. Market Share While Cutting Incentives" - Ford's secret weapon is to keep inventory at the right levels. [Bloomberg, July 2, 2009]

July 3, 2009

1. "Chrysler Wants to Cut GEM Dealers" - Chrysler seeks to reject 64 GEM dealership agreements because dealers have failed to sell GEM low speed battery-powered vehicles. - [Detroit Free Press, July 3, 2009]

July 5, 2009

1. "Car Dealer Fights Chrysler Over Franchise" - Local Jeep Dealer believes basis for Chrysler rejection is retaliation for his protest to Chrysler's unsuccessful request to establish additional area dealership. [The Associated Press, July 5, 2009]

July 6, 2009

1. "Bankruptcy Judge OKs GM Plan Sale, Appeal Looms" - GM expected to receive \$50 billion in taxpayer funds in exchange for 61% ownership interest; tight window for appeal by July 9, 2009. [The Associated Press, July 6, 2009]

2. GM to comply with Texas law and decisions by Texas Department of Transportation on dealer participation agreements disputes. [Press Release by Texas Attorney General, July 6, 2009]

July 2, 2009, the Chrysler Debtors filed their Fifteenth Omnibus Motion Pursuant to Section 365 of the Bankruptcy Code and Bankruptcy Rule 6006 for an Order Authorizing the Rejection of Certain Leases of Non-Residential Real Property [Docket No. 4491]. Objections to the Fifteenth Omnibus Motion are due by 12:00 p.m. on July 13, 2009, and a hearing is scheduled for July 16, 2009, at 10:00 a.m. The Chrysler Debtors also filed a Notice of (I) Assumption by Debtors and Assignment to Purchaser of Certain Executory Contracts and Unexpired Leases and (II) Cure Costs Related Thereto [Docket No. 4482] on July 2, 2009 and a Notice of Filing of Schedule of Certain Designated Real Property Leases and Cure Costs Related Thereto [Docket No. 4499] on July 6, 2009.

Monthly Operating Report - Chapter 11 Debtors are required to file monthly operating reports with the Office of the U.S. Trustee, which is responsible for overseeing all Chapter 11 bankruptcy cases. The Chrysler Debtors filed their first monthly operating report ("MOR") on June 30, 2009, for the time period of May 1 through May 31, 2009 [Docket No. 4430]. The MOR is publicly available and provides a statement of operations, consolidated balance sheet, statement of cash flows, and other current financial information.

General Motors

***Sale of Assets Pursuant to Master Sale and Purchase Agreement**

- On July 5, 2009, the Court entered an order approving the GM Debtors' Motion Pursuant to 11 U.S.C. §§ 105, 363(b), (f), (k), and (m), and 365 and Fed. R. Bankr. P. 2002, 6004, and 6006, to (I) Approve (A) the Sale Pursuant to the Master Sale and Purchase Agreement with Vehicle Acquisition Holdings LLC, a U.S. Treasury-Sponsored Purchaser, Free and Clear of Liens, Claims, Encumbrances, and Other Interests; (B) the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (C) Other Relief; and (II) Schedule Sale Approval Hearing [Docket No. 2968]. The Sale Order included a four-day stay of the sale closing until July 10, 2009. Two informal groups - individual accident litigants and asbestos claimants - filed notices of appeal [Docket Nos. 2970 and 2988, respectively] and motions requesting that the Bankruptcy Court certify an immediate appeal of the Sale Order to the U.S. Court of Appeals for the Second Circuit and/or grant a further stay of the Sale Order (the "Direct Appeal Motions") [Docket Nos. 2990 and 2989, respectively]. On July 7, 2009, the Bankruptcy Court entered an order requesting that interested parties be prepared to present evidence on the size of the bond which would be appropriate if the Court were to grant a further stay of the Sale Order [Docket No. 2996]. Several entities have filed objections to the Direct Appeal Motions, including the United States of America [Docket No. 3026], the Official Committee of Unsecured Creditors [Docket No. 3028], and the GM Debtors [as amended, Docket No. 3035]. Following a hearing on the Direct Appeal Motions held at 7:00 p.m. on July 7, 2009, the Bankruptcy Court issued a bench ruling and order denying the Direct Appeal Motions [Docket No. 3046]. The appeals will now be heard by the U.S. District Court for the Southern District of New York.

***Motion to Lift the Automatic Stay** - On July 2, 2009, the Bankruptcy Court entered a Stipulation and Agreed Order between the Debtors and Manufacturers and Traders Trust Company Providing for the Turnover of Certain Vehicles [Docket No. 2923]. On June 19, 2009, Manufacturers and Traders Trust Company ("M&T") 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 requested relief from the stay to pursue repayment or return of the vehicles from the GM Debtors, based on (1) the GM Debtors' pledge to provide "termination assistance" in the Dealership Agreement and (2) M&T's belief that the vehicles are in the GM Debtors' possession. *Pursuant to the Stipulation and Agreed Order, the GM Debtors have agreed to deliver all manufacturers' certificates of origins for the vehicles to M&T and to make written request that the auction facility currently holding the vehicles turn over the vehicles to the out-of-trust dealer or M&T's authorized designee, at M&T's direction.

3. "Beijing Auto Offers \$923 Million for Opel" - Magna remains front-runner for Opel, but Beijing Auto increases competition by requesting less state aid. [Automotive News, July 6, 2009]

4. "Naming 5 New Members, Reborn Chrysler Fills Board" - Chrysler Board Members include former Northwest Airlines chief executive, investment bankers, former Michigan governor and top officials from Fiat Group. [The Associated Press, July 6, 2009]

5. Cars for Clunkers Program Update - NHTSA to create new office to find balance between prompt dealer payment, fraud prevention and preservation of records [Cars.gov update, July 6, 2009]

July 7, 2009

1. "GM and U.S. Backers Face Rough Road Ahead" - GM continuing to lose market share and spending almost \$500 more per vehicle on industry average in sales incentives, while voters eager to see return on huge taxpayer investment in auto companies. [The Wall Street Journal, July 7, 2009]

2. "General Motors Will Face Old and New Challenges" - GM's challenges include weak car market, existing competitors and new competitors who used to belong to GM. [The Los Angeles Times, July 7, 2009]

3. "Fiat Finds New China Partner, Ending Two-Year Hiatus" - Fiat SpA to build cars in China with Guangzhou Automobile Group Company, and combined investment in venture totals \$559 million dollars. [Bloomberg, July 7, 2009]

4. "What About GM's Brands?" - GM's focus is on Buick, Chevrolet, Cadillac and GMC brands. [The Washington Post, July 7, 2009]

5. "Beijing Auto is Not Such an Eccentric Opel Suitor: Wei Gu" - What Beijing Auto has to offer to GM. [Reuters, July 7, 2009]

July 8, 2009

1. "GM Asks to Drop Holdout Dealers" - GM Asks Judge to cancel 38 dealer contracts to eliminate remaining dealer holdouts and save \$2.4 billion per year in subsidies, advertising support, incentives and other expenses. [The Wall Street Journal, July 8, 2009]

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

About NADC

Rejection of Unexpired Leases and Executory Contracts with Certain Domestic Dealers - On July 6, 2009, the GM Debtors filed a Notice of Debtors' Motion Pursuant to 11 U.S.C. §365 Authorizing (A) the Rejection of Executory Contracts and Unexpired Leases with Certain Domestic Dealers and (B) Granting Certain Related Relief [Docket No. 2995], whereby the GM Debtors request (1) authorization to reject Dealer Franchise Agreements and ancillary related agreements with dealers who did not accept Wind-Down or Participation Agreements, effective as of July 10, 2009 and (2) a determination that the Bankruptcy Code pre-empts state dealer laws. Objections to the Motion are due by 4:00 p.m. on July 28, 2009, and a hearing is scheduled for August 3, 2009, at 9:45 a.m.

Debtor-in-Possession Financing - On July 5, 2009, the Bankruptcy Court entered an order granting the GM Debtors' motion to amend the debtor-in-possession credit facility to provide that adequate funds be set aside for the wind-down of the GM Debtors pursuant to a Chapter 11 plan of liquidation [Docket No. 2969].

Retention of Ordinary Course Professionals - On July 1, 2009, the Bankruptcy Court entered an order authorizing the GM Debtors to employ professionals in the ordinary course of business [Docket No. 2900]. These "ordinary course professionals" are primarily law firms which provide a variety of legal services including transactions work, warranty litigation defense, product liability litigation defense, asbestos litigation defense, and intellectual property litigation.

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 for more information and to apply for membership.

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