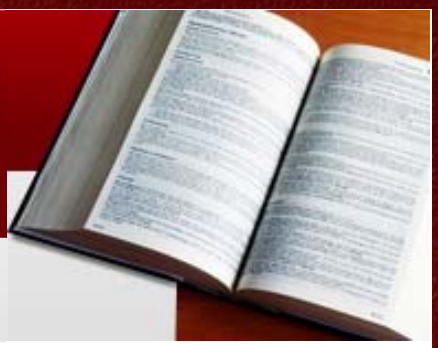
The Bankruptcy Weekly

June 3, 2009



Brought to you by the National Association of Dealer Counsel

Dear Aaron,

I am proud to announce the first edition of The Bankruptcy Weekly, another member benefit from the National Association of Dealer Counsel.

Each week we will provide our members with an update related to the recent manufacturer bankruptcies. In addition, we will provide you with dealer "street level" information that will help you counsel your clients during these uncertain times.

We thank you for being part of the NADC.

Sincerely,

Rob Cohen
President
National Association of Dealer Counsel

In This Issue

Accept Modification or Face Rejection?

by Larry Katz, Esq.

Cadillac, Chevy, Buick and GMC dealers with strong track records and high hopes of having their dealer franchise agreements assumed by GM discovered within the first 48 hours of GM's

This edition of The Bankruptcy Weekly was co-authored by:

Lawrence A. Katz

bankruptcy that they are facing a true Hobson's Choice: agree to modifications of the franchise agreements or face contract rejection. In a typical chapter 11, the debtor chooses which executory contracts are essential to its reorganization effort and it either assumes those contracts or it assumes and assigns them, but the terms of the contracts remain the same. Sometimes, the debtor will seek to renegotiate some of its executory contracts on a case-by-case basis.

But this, of course, is not a typical chapter 11 case. As GM explained in its asset sale motion, the Master Sale and Purchase Agreement provides that GM will enter into Participation Agreements that modify their franchise agreements, such that each franchise agreement, as modified by the Participation Agreement is deemed to be an "Assumable Executory Contract" for bankruptcy purposes. If the dealer is not willing to sign on to the Participation Agreement, it will instead be forced to accept a short-term deferred voluntary termination agreement, thereby losing its dealership.

Dealers will have to make the difficult decision of how to respond to GM's "take it or leave it" position, and it is doubtful that they will find much in the way of protection under the Bankruptcy Code. Of course, the post-bankruptcy analysis of the modified agreements under the statutory framework of the various states may present a different and brighter outcome.

Site Control and Manufacturer Bankruptcy

by Aaron Jacoby, Esq.

As the Chrysler and GM bankruptcies unfold, many dealers may find themselves grappling with site control, which is the contractual prohibition against using dealership property for any purpose other than as a site for a particular brand. Site control can be a disaster when the dealership's line make - Hummer, Saturn, Pontiac or Saab - is being eliminated, or when the dealer's franchise agreement is rejected. A dealer may need a Hummer to navigate the potholes on the path to resolution of this frustrating issue.

The dealer's legal assault on site control will rely primarily upon the Doctrine of Impossibility. This

Larry Katz is a senior partner in Venable's Bankruptcy and Creditors' Rights Group, where he concentrates his practice on complex Chapter 11 proceedings, workouts, business restructurings, and commercial litigation.

lakatz@Venable.com
Washington, DC Office
t 703.760.1921
f 703.821.8949

This edition of The Bankruptcy Weekly was co-authored by:

Aaron H. Jacoby

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.

ajacoby@Venable.com
Los Angeles Office
t 310.229.9940
f 310.229.9901

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legal argument would be used in an attempt to invalidate site control when it is impossible for the dealer to replace a discontinued line, like Hummer, with another GM franchise. The impossibility would arise when each remaining GM line is already represented in the dealer's market area. Impossibility would also exist if a dealer's franchise agreement is rejected in bankruptcy proceedings; i.e., it may not be possible for a rejected GM Franchisee to become a GM Franchisee for a different line. In either situation, a dealer may not be released from the site control restriction without a fight.

The forum for arguing these issues will be either the court handling the Chrysler or GM bankruptcies or a court handling the dealer's own competing bankruptcy filing. Anti-assignment and site restriction clauses may be invalidated in a dealer's bankruptcy, to allow a dealer to freely assign its lease to the dealer's own "Newco" or to a buyer without the site control restriction. (The Bankruptcy Code permits the bankruptcy trustee to invalidate certain provisions of a lease in order to maximize the value of the assets.)

Of course, each dealer's situation will vary. The source of the site control restriction may be through a lease or in a free standing site control agreement, notwithstanding the dealer's ownership of the land. Elimination and rejection may create impossibility for some, while others will find franchise replacement opportunities that meet the site control restrictions. In other words, given the numerous rejections and line eliminations, market clearance may not present a hurdle to finding a substitute franchise for the property. For example, a Hummer dealer may be able to replace the Hummer line with a Buick, GMC dealership, which becomes available in the relevant market area due to a rejection.

There is no "one size fits all" solution and each dealer will need to plan its own course of action with regard to site control and bankruptcy issues in general. Bankruptcy counsel for any of the collective groups of GM or Chrysler franchisees, even sub-groups for rejected dealers, cannot represent the interests of individual dealers with regard to site control or other individualized claims.

Rejection Letters and the WARN Act- Does the Dealer

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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.

"WARN" Employees Now?

by Mike Volpe, Esq.

The federal WARN law - Workers Adjustment and Retraining Notification Act - requires companies to give 60 calendar days notice in advance of a closing when there will be a loss of more than 50 employees at any individual employment site or a loss of 500 or more employees. The law does not apply to businesses with fewer than 100 people, and there are exceptions for companies suffering from unforeseeable business circumstances. However, it may be difficult for a dealer to argue that layoffs are unforeseeable in the context of these massive bankruptcies, which may entail multiple rounds of dealer cuts.

If your business is a covered entity (check state and local statutes for coverage even where federal law does not apply) be certain that WARN obligations do not "kick-in" because of a recent communication or correspondence from your manufacturer or due to an actual or upcoming rejection notice that will mean closing the dealership and layoffs of all of the dealer's employees. It may make sense to give WARN notices to employees (and union representatives where applicable) as a defensive measure in certain circumstances. Practical advice will include issuing rolling notices as the unforeseeable becomes certain. These are harsh realities that must be considered in these times.

Product Liability and Lemon Law Indemnification

by Larry Katz, Esq.

One of the most important issues raised by the Chrysler sale motion is the ability of the purchaser, "New Chrysler", to be protected from product liability lawsuits arising from vehicles built by "Old Chrysler." The language of the Master Transaction Agreement made it clear that New Chrysler was assuming "all Product Liability Claims arising from the sale after the Closing of Products or Inventory manufactured by Sellers or their Subsidiaries in whole or in part prior to the Closing" [¶ 2.08(h)], but that it was not assuming "All Product Liability Claims arising from the sale of Products or Inventory prior to the Closing" [¶ 2.09(i)] or "all Liabilities in strict liability, negligence, gross negligence or recklessness for acts or omissions situations.

Objections to Inaccurate Cure Amounts

by Larry Katz, Esq.

When a debtor seeks to assume and assign an executory contract in a chapter 11 proceeding, as Chrysler has done with roughly 2/3 of its dealer franchise agreements, the debtor must cure, or give adequate assurance that it will promptly cure, any monetary defaults. The proposed cure amount is therefore of critical importance to the dealer, and due process requires that the dealer be given proper notice of the proposed cure amount and a reasonable opportunity to object if it has a basis to believe that the proposed cure amount is incorrect.

In the case of Chrysler, the odds were high that the proposed cure amounts were, in fact, incorrect, given that Chrysler scheduled the cure amounts of every dealer as zero. Any dealer who believed that it had a claim against Chrysler for rebates, parts credits, warranty work, etc., had to file a timely objection to the cure amount or run the risk that even though its contract was being assumed, it had lost all of its claims against Chrysler. The deadline for filing such objections was May 27, 2009 and it remains to be seen what will become of the claims of those dealers who did not file

arising prior to or ongoing at the Closing." [¶ 2.09 (j)]. Thus, the legal issue posed by the sales agreement was whether the assets could be sold pursuant to section 363 of the Bankruptcy Code to New Chrysler, free and clear of products liability claims for products sold by Old Chrysler-leaving lemon law and product liability claimants and dealers to fend for themselves. Rosemary Shahan, the President of Consumers for Auto Reliability and Safety, put it bluntly, saying, in effect, "Fiat to American car buyers: drop dead."

The courts are somewhat split on this issue. Section 363 only provides for sales free and clear of "interests" in the assets being sold, and not all claims are interests. Liens are clearly interests, but products liability claims are not necessarily interests. Nevertheless, in approving the sale to New Chrysler, Judge Gonzales expressly approved the sale free and clear of products liability claims. The Court chose to follow the 2003 decision of the Third Circuit in the Trans World Airlines bankruptcy case, holding that such claims can be cut off pursuant to section 363(f)(5) of the Bankruptcy Code. Judge Gonzales further held that even if the claims are treated as in personam claims, they can be extinguished by the sale transaction pursuant to section 363(f).

Finally, the Court rejected the due process challenge that was raised with respect to potential future tort claims, finding that the publication of the proposed sale in newspapers of wide circulation was sufficient notice to satisfy due process considerations.

What will happen to dealer defendants who are typically indemnified by the manufacturer for product and lemon law claims? If a dealer's franchise agreement is rejected and the tort claim arose prior to the Closing, dealers may be left holding the bag, notwithstanding the argument that indemnification may survive the rejection. Rejected dealers will need to consider their insurance coverage and future tail coverage needs carefully to protect against this unpleasant outcome.

Final score:
New Chrysler: 1
Products Liability Claimants: 0
Dealers: -1

timely objections. They could simply be out of luck.

As this same process will be followed in the GM case, it behooves all GM dealers who are allowed to stay on to review their records as quickly as possible and to compare those records to the cure amounts proposed by GM in its pleadings. It will come as no surprise if GM, like Chrysler, chooses not to review its own records and accurately schedule the cure amounts, but rather to schedule the amounts at zero.

GM Participation and Wind Down Agreements

by Ken Murphy, Esq.

We have learned that GM Zone Managers were summoned to Detroit last Friday to discuss the distribution of legal documents relating to dealers' future GM relationships. Dealers can expect a scripted phone call from GM in the immediate future describing agreements to be provided and requesting the signing of those agreements by no later than June 12th.

Some dealers have already received two agreements to be signed and returned by the June 12th deadline. (A message concurrently delivered to one dealer asked for the signed documents by the end of the day.) The "Participation Agreement" offers assumed dealers with continuing line-makes (as opposed to

Motions and Other Filings

In re General Motors Corp., et al.

History of the Case

First Day Motions - On June 1, 2009, General Motors Corporation and three of its affiliates, including Chevrolet-Saturn of Harlem, Inc., Saturn, LLC, and Saturn Distribution Corporation (collectively, the "GM Debtors"), filed petitions in the United States Bankruptcy Court for the Southern District of New York seeking relief under Chapter 11 of the United States Bankruptcy Code. In conjunction with their Chapter 11 bankruptcy petitions, the GM Debtors filed 24 "first day" motions. The first day motions fell into three general categories, procedural/administrative, operational, and supplier. A hearing was held on June 1, 2009 to consider these motions.

Procedural/Administrative Motions - The GM Debtors filed six procedural or administrative motions, including a motion for joint administration of the cases, which administratively consolidates the cases so that pleadings only need to be filed in the "lead" case and a motion to approve form and manner of notice to creditors, which requires a mailing to all known creditors as well as publication in national newspapers. Both of these procedural motions have been granted.

Operational Motions - Many of the first day motions filed by the GM Debtors were substantive in nature and sought relief which would allow the GM Debtors to continue normal day-to-day operations without interruption. These motions included the following: motion for authority to honor prepetition obligations to customers and dealers and continue warranty and other customer and dealer programs; motion for authority to pay prepetition employee wages and benefits; motion for authority to use cash collateral; motion for authority to continue insurance programs; motion to approve ratification agreement with GMAC; motion for authority to pay prepetition sales and use taxes; motion to provide adequate assurance to utilities; motion to approve debtor-in-possession financing; and motion for authority to use existing cash management system and approve investment guidelines. All operational motions were approved by final order of the bankruptcy court, other than the debtor-in-Hummer, Pontiac, Saab or Saturn) a franchise relationship through October 31, 2010 (at the latest), subject to earlier termination if there is no "New GM" by August 31, 2009. However, the Participation Agreement also alters the terms of the dealers' existing franchise agreements and then seeks assumption of those altered terms, e.g., with increased inventory commitments, and other requirements-not the way bankruptcy usually works, but likely to be pushed through here. (See companion piece by Larry Katz regarding Assumption.) The "Wind-Down Agreement" provides for termination of the franchise with respect to discontinued line-makes after a short-term wind-down of operations, terminating some time between January 1 and October 31, 2010. Dealers who have continuing and discontinued lines, e.g. BPG dealers who are assumed but who will lose their "P", will be required to sign both agreements. Dealers who are winding down may receive compensation under the Wind-Down Agreement, though in dollar amounts far short of anything that can be called "termination assistance" intended to make dealers whole.

Auto Industry Wire Chatter

MAY 30, 2009

1. "Key Elements of Magna-led takeover of Opel" - Canadian based Magna takes over ownership structure, including German

possession financing motion and cash management motion, which were approved on an interim basis.

Supplier Motions - Of the first day motions filed by the GM Debtors, six motions sought relief necessary to assure vendors of payment and protect the supply chain. The supplier motions were as follows: motion to grant administrative expense status to undisputed obligations to vendors for goods and services ordered prepetition but delivered postpetition; motion to establish reclamation procedures; motion to establish 503(b)(9) procedures; motion for authority to pay common carriers, warehouse liens, customs duties, tooling charges, and mechanics liens; motion for authority to pay prepetition claims of certain essential suppliers and vendors; and motion for authority to pay prepetition obligations to foreign creditors. All supplier motions were approved by final order of the bankruptcy court, other than the motion to pay essential supplier and vendors and the motion to pay foreign creditors, both of which were granted on an interim basis.

Sale Motion - On June 1, 2009, in conjunction with the first day motions, the GM Debtors filed their motion to approve the sale pursuant to the Master Sale and Purchase Agreement with Vehicle Acquisition Holdings LLC, free and clear of liens, claims, interests and encumbrances and to assume and assign certain executory contracts and unexpired leases. Vehicle Acquisition Holdings LLC, also known as "New GM," is sponsored by the U.S. Treasury. Pursuant to the motion, "Old GM" will sell substantially all its assets to "New GM." In conjunction with the sale, the U.S. Treasury and the Canadian and Ontario governments will provide funds to administer the wind down of Old GM's remaining assets and the closing of the Chapter 11 cases. The sale procedures were approved by bankruptcy court order dated June 1, 2009. The deadline for filing objections to the sale is June 19, 2009, and the deadline for filing competing bids is June 22, 2009. A hearing to approve the sale is scheduled for June 30, 2009.

In re Chrysler LLC, et al.

History of the Case

First Day Motions - On April 30, 2009, Chrysler LLC and twenty-four (24) of its affiliates (collectively, the "Chrysler Debtors") filed petitions in the United States Bankruptcy Court for the

and European plants and employees. [Reuters, May 30, 2009]

JUNE 1, 2009

2. "GM Will Require Dealers to Sign 'Participation' Pacts or lose franchises" - GM leaves dealers with little choice but to sign participation agreements or termination letters/wind-down agreements by June 12th, or face franchise termination. [Automotive News, June 1, 2009]

3."Rejected Chrysler Dealers Opt for Fire Sales" - Some dealers unload vehicles at fire sale prices rather than risk getting paid in bankruptcy dollars. [Automotive News, June 1, 2009]

4. "GM plays a role in SHV swimming pool shortage" - The ripple effect of General Motors' bankruptcy on sales tax revenue for states, counties and cities requires cuts in municipal services. [www.ksla.com, June 1, 2009]

5. "GM Bankruptcy Forever Linked to Harlem Dealership" - GM's venue selection is made through its Harlem-based Chevrolet/Saturn store. [Reuters, June 1, 2009]

6. "Senators to Grill GM, Chrysler Execs about Dealerships on Wednesday" - Questions for executives include insufficient time period for closure, inventory, job losses and manufacturer assistance. [Wall Street Journal, June 1, 2009]

7. "In Ray of Good News,

Southern District of New York seeking relief under Chapter 11 of the United States Bankruptcy Code. In conjunction with their Chapter 11 bankruptcy petitions, the Chrysler Debtors filed 25 "first day" motions. Some of these motions were procedural in nature, such as the motion for joint administration of the cases, which administratively consolidates the cases so that pleadings only need to be filed in the "lead" case, rather than in all 25 Chrysler-related bankruptcy cases. Most of the motions sought relief which would allow the Chrysler Debtors to continue normal operations without interruption, such as the authority to pay prepetition employee wages and benefits; authority to use their existing cash management systems; authority to pay prepetition taxes; authority to honor pre-petition warranty claims; authority to honor prepetition obligations to dealers and customers; and the authority to retain "ordinary course" professionals (i.e., accountants and non-bankruptcy counsel) with whom the Chrysler Debtors have established working relationships. Although seven of the motions were opposed all but one has been granted, the Chrysler Debtors' motion for an order authorizing adequate protection procedures for potential holders of possessory liens on production tooling.

Sale Motion - On May 3, 2009, the Chrysler Debtors filed their motion for authority to sell substantially all their assets free and clear of liens, claims, interests and encumbrances to Fiat SpA for approximately $2 billion. A number of states raised objections to the proposed sales. The objections raised concerns about honoring state lemon laws, protections for workers' compensation benefits, and protections for dealers who were slated to lose their dealerships in connection with the sale. Three Indiana pension funds (the "Pension Funds") filed objections alleging that the federal government overstepped its authority and violated federal law when it assisted in negotiating Chrysler's sale to Fiat and seeking to convert the case to Chapter 7 or appoint a Chapter 11 trustee. The Pension Funds sought to have their objections heard in federal district court, rather than the bankruptcy court. After the federal district court declined to hear the objection, the sale hearing commenced on May 27, 2009 and finally ended on May 29, 2009. On May 31, 2009, the bankruptcy court entered an order approving the sale. On June 1, 2009, the bankruptcy court entered an order shortening the period for stay pending appeal from ten days to four days, which would allow the sale to close as early as Friday. The Pension Funds have filed an appeal, which was fast-tracked

Ford Will Increase Production" - Ford claims its production increase is not a reaction to General Motors' bankruptcy filing. [Automotive News, June 1, 2009]

8. "Ford on GM: Will Work with US Administration to Ensure 'Level Playing Field'" - Ford is concerned about maintaining the auto industry's competitive dynamics. [CNN Money.com, June 1, 2009]

JUNE 2, 2009

9. "GM Said to Have Agreement with Sichuan Tengzhong on Hummer Sale" - Chinese-based private company is identified as Hummer's tentative buyer. [Bloomberg, June 2, 2009]

10. "Ford, Nissan U.S. May Sales Fell Less Than Estimates" - Industry report and outlook for sales rates. [Bloomberg, June 2, 2009]

11. "What to Consider before Buying GM Cast-Off Brands" - Consumers are considering parts replacement, service and resale value. [Chicago Tribune, June 2, 2009]

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

to the Second Circuit Court of Appeals by bankruptcy court order dated June 2, 2009.

Motion to Assume or Reject Executory Contracts and Unexpired Leases with Certain Dealers - On May 14, 2009, the Chrysler Debtors filed their amended Motion to Assume or Reject Executory Contracts and Unexpired Leases with Certain Dealers. The motion included an attachment identifying 789 dealers whose dealer agreements and ancillary agreements (such as leases) the Chrysler Debtors sought to reject. Over 50 objections have been filed to the motion, including one filed by the "Committee of Chrysler Affected Dealers," an unofficial committee composed of approximately 300 dealers from 45 different states. In its objection, the Committee argues, among other things, that dealers (i) produce revenue, not expense, for Chrysler; (ii) absorb inventory risk; and (iii) invest in facilities and customer service, thereby enhancing Chrysler's chances for a successful reorganization. The motion is scheduled for hearing on June 3, 2009.

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.