



Mercury Dealers' Settlement – Know Your Rights Before Settling

June 14, 2010

Ford Motor Company has officially announced that it intends to discontinue the Mercury brand and has sent Mercury dealers a settlement offer to close the franchise. It is very important for dealers to understand their franchise rights under the Ford Sales and Service Agreement and state law before proceeding with any settlement discussions.

Mercury dealers began receiving settlement packages on June 2, 2010, from Ford. Within these packages, Ford gave the dealer notice that the franchise will be terminated no later than December 31, 2010. Additionally, Ford provides a Settlement Agreement which calculates a settlement payment for the discontinued Mercury franchise, which is based upon average new Mercury sales over the last 3 years combined with the dealer's Mercury parts inventory. In exchange for accepting the settlement offer, Mercury dealers agree to a broad release of any right the dealer has to any other benefits or damages associated with the termination of the Mercury franchise.

It is not clear whether Ford is willing to pay dealers for "extraordinary circumstances" such as recent facility upgrades or the recent purchase of the Mercury franchise.

Termination Benefits under the Ford Sales and Service Agreement

The Ford Sales and Service Agreement provides that when Ford terminates the Agreement it will repurchase current model year vehicles acquired from Ford or another Mercury dealer, certain unused parts, signage and special tools. In addition, Ford offers to pay a terminated dealer the equivalent of 12 months fair market rent on the facility with certain restrictions.

However, before Ford will repurchase the above items and provide facilities assistance, the Sales and Service Agreement states that the dealer must agree to a full release of any liability on the part of Ford associated with the termination of the franchise.

Remember that a full release prevents a dealer from bringing any claim against Ford in the future having anything to do with the Mercury franchise, whether or not the circumstances of that claim are known at this time.

Termination Benefits under State Motor Vehicle Franchise Laws

Most states will require that terminated Mercury dealers be paid for various items, which may add up to more than is being offered in the settlement package.

- Dealer cost for any new vehicles remaining in inventory upon termination;
- Dealer cost for supplies, parts and accessories in original packaging;
- The fair market value of each Mercury sign owned by the dealer;

- The fair market value of all special tools and equipment Ford required the dealer to purchase;

In addition to these basic repurchase obligations, as a result of the GM and Chrysler bankruptcies a number of states have amended their franchise laws to include enhanced termination benefits such as payment of the cost of the lease (or rent equivalent if owned by the dealership) for the dealership facilities and the fair market value of the terminated franchise.

Mercury dealers should be very careful not to agree to Ford's settlement offer without first determining the value of the termination payments required under their state franchise laws. Dealers should consider calculating the value of these items and, if higher than the settlement offer, utilize that number as the basis for a settlement counteroffer.

Keep in mind that Ford has stated that they plan to place generous incentives on Mercury vehicles which will likely result in dealers having very little, if any, new Mercury inventory remaining to be repurchased. Likewise, Ford has stated that Mercury dealers will be permitted to continue to perform Mercury warranty service work through their Ford and/or Lincoln franchises so there will likely be no need to have Ford repurchase parts inventory or special tools.

Importantly, if a Mercury dealer seeks the termination benefits provided under the dealer's state law instead of accepting the settlement offer, the dealer will not be required to agree to a release of claims in order to obtain those benefits.

Recovery of Lost Value of Mercury Franchise

In the event a dealer wishes to seek the lost value of the Mercury franchise above and beyond what is offered within your state's termination benefits, a dealer has a right to seek damages against Ford for losses suffered as a result of the termination of the Mercury franchise under the provisions of state motor vehicle franchise law.

Like in past line-make terminations, Mercury dealers considering such a claim should determine the fair market value of the Mercury franchise as of a date prior to receipt of the termination notice on June 2nd in determining the lost value of the franchise. The opportunity to continue to perform service work on Mercury vehicles as well as the possibility that Ford will rebadge certain Mercury models into the Ford or Lincoln brands will potentially cause a reduction in the lost value of the Mercury franchise.

CAUTION: If a dealer ultimately reaches a settlement with Ford, it is critical to understand that signing the Settlement Agreement as currently written will cause a termination of the dealer's Mercury franchise upon Ford's countersignature on the Agreement. At that point in time, under most state laws dealers will not be able to sell any remaining new Mercury vehicles in their inventory. Thus, *dealers should time the execution of the Settlement Agreement such that the dealer has had the opportunity to take advantage of any additional incentives placed upon Mercury vehicles and has sold as many Mercury vehicles as possible.*