

## Floorplan Financing Credit Crisis

by : Richard N. Sox, Jr.

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First it was GMAC and Chrysler Financial threatening a dealer here or there with termination of their floorplan if they didn't add some working capital into the dealership. Next, we heard that Chrysler Financial was asking dealers to eliminate their aged inventory or risk losing their floorplan financing. Then some smaller dealers had their floorplan financing pulled with no real option to cure the alleged deficiency. Our take on these floorplan lender actions at the time was that the manufacturers were using them to run certain dealers out of business to accomplish dealer consolidation or some other end. I don't think we can say that anymore.

Now, dealers as large as Bill Hurd Enterprises are having their floorplan financing abruptly terminated due to concerns over "financial losses." I am not sure I understand that one. I would guess that Bill Hurd, as the largest volume Chevrolet dealer, is suffering "financial losses" not much different than most other GM dealers. Even with all the devious things we have seen the manufacturers do to their dealers, we can't believe that the manufacturers intended to run the number of dealers out of business that GMAC and Chrysler Financial now appear to be terminating. At any rate, we know that nine times out of 10, these dealers who are cut off by their floorplan lender aren't able to obtain floorplan financing from any other source and, thus, aren't able to continue operating their franchise. This ain't pretty!

There is no coincidence that GMAC and Chrysler Financial have primarily been the financial institutions that are shutting dealers down. GMAC and Chrysler Financial are both controlled by Cerebus Capital Management. General Motors and Chrysler LLC no longer control them, respectively. Historically, GM and Chrysler would use their captive finance companies to insure dealers had sufficient funds to buy as many vehicles as GM and Chrysler could shove down the dealers' throats. Even if GMAC and Chrysler Financial had to overlook certain "financial losses" or charge favorable floorplan rates, GM and Chrysler would enjoy a net benefit when you factored in their profits from the dealers' sale of new cars and trucks. That balancing act does not exist anymore. It now appears that GM and Chrysler's short-term goal of generating cash from the sale of a majority interest in their captive finance companies is having a very negative long-term impact on them and their dealers.

The lawyers of Myers & Fuller first waded into this morass when we began representing the largest Ford dealer in the country, Duncan Ford, in its financing dispute with Ford Credit over three years ago. Since that time, we have represented several GM and Chrysler dealers in situations where GMAC and Chrysler Financial were threatening or had, in fact, terminated the dealers' floorplan financing.

What can a dealer do that is in the position of being threatened with termination of their floorplan financing and, ultimately, their franchise? There are no easy answers. We do know it is very difficult to force a financing source to continue to extend credit. Therefore, the issue usually comes down to legal action against the financing company and, sometimes, the manufacturer for the lost value of the franchise. It certainly makes a difference in which state the dealer is located and whether the financing company is controlled by a manufacturer. Some states make the captive finance company subject to the franchise protections that are applicable to the manufacturers. In the case of a finance company abusing a dealer, these franchise protections give us the ability to state relatively strong claims against a captive finance company.

Many dealers react to the loss of floorplan financing by filing for corporate and/or bankruptcy protection when replacement financing cannot be obtained. Several dealers have called us for help in pursuing a lawsuit against the financing source and, in some circumstances, the manufacturer while in the midst of slogging their way through the bankruptcy court. Don't file for bankruptcy protection before calling an experienced franchised attorney. We have repeatedly found that bringing separate legal claims in state or

Federal court against the finance company and/or manufacturer in these circumstances is extremely difficult. It is difficult because the bankruptcy judge or trustee has complete control over all assets of the bankrupt dealership. This means that those legal claims against the finance company and/or manufacturer are grabbed by the bankruptcy judge or trustee and put under their complete control. When the primary creditors in the bankruptcy, the finance company and manufacturer, are defendants in the civil lawsuit inevitably the bankruptcy judge or trustee will work out a "deal" with the finance company and manufacturer to eliminate some relatively small portion of the debt owed to them in exchange for settlement of the lawsuit. The dealership and its owners get nothing out of this settlement and lose the potential for a damage lawsuit that would allow them to recover the value of the lost franchise.

One last point of warning is to make sure that dealers avoid agreeing to any personal guarantees or cross-collateralization with other dealerships when entering into a floorplan financing arrangement. These items of securitization cannot always be avoided but dealers should certainly attempt to eliminate or minimize these types of provisions.

In these very unsure times of floorplan financing, we encourage you to have experienced franchise legal counsel review any new floorplan financing documentation and to immediately contact experienced franchise legal counsel for guidance as soon as you see trouble on the horizon with your financing source.

**Rich Sox** is a lawyer with the firm of Myers & Fuller PA, with offices in Tallahassee, Florida and Raleigh, North Carolina. The firm's sole practice is the representation of automobile dealers in their quest to establish a level playing field when they deal with automobile manufacturers.