Chrysler Bankruptcy: Going Down Fighting
by : Richard N. Sox, Jr., Esq.

When the calls came in from Chrysler dealers who found themselves on the "rejected dealer list," they asked what could be done – if anything. Our answer – you can go out fighting or you can go out on your knees!

We were as frustrated as our dealer clients with the reality that bankruptcy court appeared to provide Chrysler with a free pass to do what it wanted in terminating dealers. But we needed to do something. The only relief rejected dealers could seek was to file an objection to the rejection of their dealer agreement and hope the bankruptcy judge would come to his senses.

After associating with a top-notch bankruptcy firm in New York City to represent the interests of our dealer clients, a total of 21 dealers joined the fight. We first filed an objection to the sale of Chrysler's assets to New Chrysler because to our amazement the bankruptcy judge had scheduled the approval of the sale in advance of the deadline to file objections to the rejection of our client's dealer agreements. It wouldn't do any good to argue over a dealer's status as "rejected" in hopes of getting them on the "good list" if New Chrysler was going to be able to proceed with purchasing the brand assets and taking only the original "good list" dealers with it.

The hearing on our objection to the sale motion, along with objections from various state attorney generals, NADA/Chrysler Dealer Council's designated group bankruptcy firm and the State of Indiana Pension Fund, was held May 27-29. At the hearing, our bankruptcy counsel was able to elicit testimony from the Fiat representative that a reduction in the dealer network was never a precondition placed on Chrysler by Fiat as part of the purchase of the brand assets. Chrysler's CEO, Bob Nardelli, further testified that he could not say how the reduction in the dealer body was a benefit to Chrysler or New Chrysler (the test in bankruptcy is whether the rejection of a contract benefits the bankrupt entity). Mr. Nardelli, of course, stated that a reduction in dealers would strengthen the remaining dealers – but that is not the test in bankruptcy.

Other parties objecting to the sale demonstrated that unsecured creditors (i.e. the UAW) were receiving a better deal than secured creditors like the bondholder – pension funds. Despite this and other damning testimony, on Sunday evening (May 31), the Judge issued an order approving the sale. That ruling has been appealed by the Indiana Pension Fund the Second Circuit Court of Appeals. The Appeals Court denied the motion.

The hearing on our objection to the rejection of various dealer agreements began yesterday and is expected to conclude early next week. Unfortunately, the bankruptcy judge has already indicated he believes that Chrysler can pretty much do what it wants and that, in any case, New Chrysler does not intend to assume dealer agreements that were not on the original "good list." We are, nevertheless, going to keep fighting until the bitter end.

Dealers that are ultimately approved for rejection will not be able to sell their vehicle inventory or perform warranty repair work beyond June 9. That means these dealers had approximately three weeks from the time they became aware of their proposed elimination to sell off all their vehicle inventory and parts. At the time I write this article, Chrysler's efforts to "redistribute" rejected dealers' vehicle inventory is less than certain.

General Motors' bankruptcy: The good and the bad

On the same day we became aware of the Chrysler judge's ruling approving the sale, GM followed Chrysler into bankruptcy court. GM's approach as everyone knows by now is very different from

Chrysler's. There is some good and some bad, relatively speaking, in what GM has done.

Instead of outright rejecting dealers, GM offered each rejected dealer a "wind-down agreement," which allows the dealer to wind down his or her inventory over a limited period of time with a final termination date of no later than October 31, 2010. GM offers to pay these dealers a sum of money in exchange for the dealer's agreement to waive and release GM of any possible claim, as well as in exchange for the right to the dealer's customer list and service records. Although the summary elimination of any dealer agreement is abhorrent, GM's approach is a better one than Chrysler's.

In contrast, GM's approach in dealing with the dealers it intends to retain is arguably much worse than Chrysler's. Whereas New Chrysler appears to be simply issuing "standard" dealer agreements to its dealers, New GM has asked each dealer to sign a participation agreement, which includes supplemental provisions to the existing standard dealer agreement. These provisions, which include facility requirements, sales performance requirements, vehicle inventory requirements, an agreement by the dealer not to protest the addition of a same line-make dealer more than six miles from the dealership for four years and an exclusivity requirement, are a clear attempt by GM to circumvent hard-fought dealer protections around the country. In this participation agreement, the dealer is forced to expressly waive all rights under state franchise laws.

Dealers have been told that they must sign and return the wind-down and participation agreements by next Friday, June 12, or they will be put on the "rejected dealer list."

We believe that in many states, dealers will have a strong argument that any provision in the supplemental terms under the participation agreement, which are contrary to state franchise laws will be unenforceable by GM. This is because in most states the franchise laws expressly state that a manufacturer cannot force a dealer to waive his or her rights under those franchise laws. With the only option being a rejection of your dealer agreement, it can hardly be said that a dealer was not forced to agree to the participation agreement. Dealers moving forward with New GM should plan to challenge the participation agreement the first time New GM attempts to enforce any provision of that agreement which is contrary to your state franchise law. This fight is just beginning.

Richard 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. If you wish to discuss this article with the author, please e-mail him at rsox@Dealer-magazine.com.