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## **CHRYSLER DEALER ALERT**

*A Roadmap for Dealers*

As we are all painfully aware, Chrysler Motors, LLC filed for Chapter 11 bankruptcy protection at 12:16 p.m. on April 30, 2009.

Chrysler's initial filings indicate that its Chapter 11 proceedings are going to take the form of a "363 sale of major assets" and a liquidation of the remainder of the Company. In a 363 sale, an outside entity ("New Chrysler") acquires the assets (in this case brand-related assets) and theoretically takes those assets free and clear of associated liabilities. This entity could be a pre-existing company such as Fiat or could be a newly created company with the UAW and U.S. Government as primary shareholders.

New Chrysler would pick and choose which dealers, suppliers, etc. it wants to take with it going forward. Those that are not fortunate enough to move over to New Chrysler will be left to fight over the monies paid by the outside entity for the brand assets as well as the liquidated value of the remaining assets of the bankruptcy estate.

The following answers some of the most frequently asked questions and provides dealers with a roadmap as to what they should be preparing for in the coming weeks.

### **What Happens to Monies that a Dealer is Owed as of the Time of the Bankruptcy Filing?**

The bankruptcy filing protects Chrysler from being required to make timely payment of monies owed to dealers *as of the time of the filing*. If New Chrysler intends to assume your dealer agreement then you will probably not need to file a proof of claim for the amounts you are owed but will, instead, negotiate the payment of those amounts as part of the assumption of your dealer agreement. On the other hand, if you are a dealer who will not have his or her dealer agreement assumed by New Chrysler, you will be considered an unsecured creditor and will be required to file a proof of claim in the bankruptcy court listing the amounts owed for incentives, rebates, warranty payments, etc. We will discuss proofs of claims in more detail below.

**In either situation, all dealers, regardless of whether their dealer agreement is assumed by New Chrysler, need to gather an accurate list of the monies owed to their dealership by Chrysler.**

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It appears that in its initial filings with the bankruptcy court, Chrysler has proposed to continue to pay warranty reimbursements which became due prior the bankruptcy filing to all dealers. Chrysler also asked the bankruptcy court to give it discretion in paying sales incentives only to those dealers it deems viable. In other words, the viable dealers are those dealers it intends to pass on to the new company. The bankruptcy judge agreed to all of Chrysler's requests. With regard to other payments owed, there is the chance that dealer representatives could convince the bankruptcy judge that some of these payments are critical to maintaining the viability of the dealer network which, in turn, maintains the viability of the bankrupt entity. However, most believe this will be an uphill battle.

There will likely be a distinction in treatment between the dealers who are offered dealer agreements with the purchaser of Chrysler brand assets and those that are not. Those dealers who have their Dealer Agreement assumed are technically required to have all outstanding monies paid current. **We expect, however, that dealers will be asked to take something less in exchange for being offered a new Dealer Agreement.**

### **Should Dealers Continue to Perform Warranty Work and Sell Vehicles and What Happens to Monies that a Dealer is Owed for Those Items?**

Because Chrysler will be paying all warranty reimbursement claims while in bankruptcy, there appears to be no reason not to continue to perform warranty work. With regard to sales incentives, although you may or may not be paid on the sale of vehicles, dealers need to keep in mind that it is in their best interest to reduce vehicle inventory as quickly as possible.

### **What Steps Should a Dealer Take Immediately?**

#### *Prepare an Accurate List of Monies Owed by Chrysler*

The first thing a Chrysler, Dodge or Jeep dealer should do is contact an experienced franchise lawyer and your accountant. These professionals should work as a team to assist you in preparing a detailed list of monies owed to you by Chrysler. This list of monies owed will be used in negotiations by the dealers who are having their dealer agreements assumed by New Chrysler and will be used by the remaining dealers as the basis for the filing of a proof of claim in the bankruptcy court. **Whether or not you expect to have your Dealer Agreement assumed, you should gather the appropriate data to identify exactly what you are owed by Chrysler as part of your overall planning.**

For dealers who will not have their dealer agreement assumed, your team of professionals will be essential in putting together an accurate proof of claim to be filed with the bankruptcy court. The proof of claim will include the following:

- Amounts owed to the dealer by Chrysler in the ordinary course (incentives, rebates, warranty reimbursement, holdbacks, etc.) as of the time of the filing;
- Amounts owed to the dealer by Chrysler that are out of the normal course of business (monies owed for facilities assistance, etc.); and
- Damages which will result if your Dealer Agreement is not assumed.

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The damage component of the proof of claim will take on two aspects. First, it will include monies that you are due under your state franchise laws in the case your Dealer Agreement is not assumed. Second, it will include a calculation of the lost value of your franchise. For this component, **it is absolutely critical that your professionals understand what your state franchise laws provide in the way of “termination benefits” as well as how to value the loss of your franchise.** This valuation will include losses associated with out-of-pocket expenses such as facility upgrades, loss of value of dealership property and lost future profits.

#### *Prepare a Business Plan to Support Assumption of Dealer Agreement*

Although everyone expects that New Chrysler has its mind made up as to which dealers it proposes to assume, we believe that the process of negotiation will open up opportunities for some dealers to convince New Chrysler to add them to the “good list.” In conjunction with their professional team, it will be important for dealers to prepare a detailed business plan to support their contention that their Dealer Agreement should be assumed by New Chrysler. Items to be addressed will include:

- historic sales and CSI performance
- facilities and brand alignment
- working capital and stability of floorplan financing
- access to additional capital to acquire brand(s) needed to create Genesis dealership
- dealership location

Many parts of this business plan could also be used as support for any valuation of the dealership as part of a proof of claim in the case where the dealer agreement is not assumed by New Chrysler.

#### *Negotiate with Chrysler Financial and GMAC*

Chrysler Financial has stopped lending any money for the purchase of additional inventory and has frozen dealers’ cash management accounts. **We recommend that dealers consider seeking an agreement with Chrysler Financial whereby Chrysler Financial applies monies in your cash management account to the amount owed on the sale of a new Chrysler vehicle.** In this scenario, the dealer would retain the proceeds from the sale of vehicles instead of making payment on the floorplan line. Dealers should not be required to pay down their floorplan line with proceeds from the sale of vehicles while Chrysler Financial sits on the dealer’s cash management account funds.

GMAC has sent Chrysler dealers a proposed retail installment lender agreement. GMAC is reportedly going to be sending Chrysler dealers a proposal to write their floorplan but we don’t know if (i) GMAC intends to assume the old Chrysler Financial floorplan balance; and (ii) whether a floorplan agreement will be offered to all dealers currently floored with Chrysler Financial. We have our doubts about both.

In any case, **dealers should involve their dealer lawyer in a review of, and potential negotiation over, the terms of both the retail financing agreement and any forthcoming floorplan agreement.**

#### *Prepare a Plan for Communicating with Your Employees, Customers, Vendors and Lenders*

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As a part of the immediate preparations which should take place, all Chrysler dealers should sit down with their professional team and discuss **what can and cannot be said to your employees, customers, vendors and lenders** concerning the bankruptcy of Chrysler and the long-term viability of your dealership.

Dealers may be tempted to institute new advertising campaigns to reassure customers amid Chrysler's bankruptcy. Any such advertising campaign should be scrutinized in advance by your professional team.

#### *Prepare to Defend Clawback of Payments made during Preference Period*

The other immediate task which dealers should undertake is to begin to gather documentation related to all payments received from Chrysler during the 90 day period prior to the bankruptcy filing. This is important because **creditors in a bankruptcy regularly seek to have the bankruptcy judge order the "claw back" of any payments made by the bankrupt entity during the 90 day "preference period" immediately preceding the bankruptcy filing.**

Organizing these documents will allow the dealer's lawyer to properly defend against a motion seeking the return of those monies. The proper documentation will assist in demonstrating that the payments fall under the exceptions to the preference period rule (i.e. payments made in the normal course and payment made for new value).

#### **What Steps Should a Dealer Take to Prepare for Longer-Term Issues?**

The answer to this question will depend upon whether or not you are notified that your Dealer Agreement will be assumed or rejected.

#### *If Dealer Agreement is Proposed to be Assumed*

For dealers who are lucky enough to have their Dealer Agreement assumed there will still be work to do to protect your interests. There is little doubt that New Chrysler will want to assume your dealer agreement only after attempting to negotiate the most favorable terms for itself. These negotiations are likely to include requests for (i) a waiver of the amounts listed on the proof of claim to include a reduction in the amount of pre-bankruptcy monies owed that the dealer will accept; (ii) a release of liability for the bankrupt entity; (iii) an agreement to take on additional inventory from dealers being eliminated; (iv) an agreement to create a fully-imaged and properly aligned store; and (v) anything else that would benefit the manufacturer.

**Dealers will need experienced franchise counsel to assist in the negotiations over the proposed new Dealer Agreement.**

#### *If Dealer Agreement is Being Rejected*

A dealer who has their Dealer Agreement rejected will have the opportunity to object to that rejection and have a hearing on whether Chrysler has met the "business judgment" rule standard for rejecting your Dealer Agreement. Your professional team will need to be prepared to make the appropriate comparisons among dealers in the market to demonstrate that your dealership excels in sales performance, CSI scoring, facility, franchise-alignment, working capital and location.

For the dealers who are not going to have their Dealer Agreements assumed and don't prevail in an objection to the elimination of their Dealer Agreement, there will be a need to prosecute the proof of claim and participate in any negotiations which may occur related to one of or more of the claim items within the bankruptcy proceedings.

Outside of the bankruptcy proceedings, these dealers will require the assistance of their professional team to **make a determination as to whether the dealer can remain viable as a non-franchised, independent dealer.** If a dealer cannot do so then, with the help of his or her professional team, the dealer will need to begin winding down the dealership's business affairs. **As part of these wind-down activities, dealers will need to be proactive in working with their floorplan and other lenders in an effort to negotiate a reduced loan payoff.** The ultimate goal will be to limit exposure of the dealer's personal assets and other business ventures which arise from various security agreements, including personal guarantees and cross-collateralization agreements. Experienced legal counsel will again be critical in this process. Under certain circumstances, discussion with regard to the possible advantages of a dealership bankruptcy filing will be necessary as part of the wind-down planning process.

### *Litigating the Proof of Claim*

It will take the bankruptcy court some time to review and rule on the proofs of claim. If the bankruptcy court rejects some or all of a claim, the dealer's franchise and bankruptcy attorney will need to be prepared to litigate that claim before the judge by presenting evidence supporting each component of the claim, including the damage component. It will be very helpful for your legal counsel to have experience in litigating franchise terminations in defending the proof of claim before the bankruptcy judge.

### **Action Plan for Chrysler Dealers**

Myers & Fuller, P.A. strongly recommends that Chrysler dealers take the following action steps:

1. Retain an experienced automotive franchise lawyer, a bankruptcy lawyer and automotive accountant;
2. Prepare and file a thorough proof of claim;
3. Prepare a business plan promoting the strengths of the dealership;
4. Negotiate use of CMA funds for payment on Chrysler Financial floorplan;
5. Negotiate new retail installment and floorplan lender agreements;
6. Prepare a plan of communication to employees, customers, vendors and lenders;
7. Gather documents evidencing payments made during the 90 day preference period;
8. Negotiate the assumption of your Dealer Agreement, if applicable;
9. Object to the elimination of your Dealer Agreement, if applicable;
10. Consider the viability of continuing as a non-franchise, independent dealer;
11. Prepare and execute a wind-down plan, if applicable, which mitigates the dealer's financial loss and exposure to lenders; and
12. Negotiate, and possibly litigate, portions of your proof of claim in the bankruptcy proceedings.

**The foregoing information is provided for educational purposes only and is not to be construed or interpreted as legal advice.**