by Scott Silverman

# Feeling the Pain:
## How Inequity for Dealers Became the Rule

Scott Silverman is an attorney for McCarter & English, LLP.

A few years ago my wife and I were in England and rented a car to visit Stonehenge. That the car was a stick shift with the driving wheel on the right-side complicated the situation. This is the best analogy I could think of when assessing how the Obama Administration has handled auto industry issues over the last year.

Essentially, they are in a foreign land, driving a piece of machinery they don't know how to operate. For those that would argue that the administration is not inexcusably uneducated about the auto industry and the ramifications of its programs, they are assuming that it was abundantly aware of, and accepted, the collateral damage caused to thousands of dealers and independent entrepreneurs. This would also mean that the Chrysler and GM bankruptcies were strategically staggered to bypass due process and minimize what would normally be legitimate and justified objections by long-standing dealers that, for decades, have served as the backbone of the industry.

It is more than alarming that a group of unsecured creditors of these two companies, who could easily have been blamed as the anchor for both, came out with an ownership interest in the companies while secured creditors -- and the dealers who have subsidized their operations -- were sacrificed for the "greater good." An interesting analysis would be to calculate the number of jobs allegedly saved by protecting these two companies (including those in related companies such as vendors and suppliers) versus the number of jobs lost at dealerships that were terminated. Is it really worth the tens of billions of taxpayer dollars that were spent?

For thousands of dealers, the ramifications of the GM bankruptcy process will play out over the next few months, with many of the "wind down" dealerships ceasing operations before the 2010 deadline. Thse wind down dealers are hoping that GM lives up to the spirit of its agreements to pay the remaining 75 percent of the wind down payments they were promised to keep them muzzled.

### 'Bigger, Larger and More Profitable'

Meanwhile, GM's financing arm, subsidized by the Obama Administration with a low-interest loan, continues squeezing dealers to further reduce the ranks. When President Obama said everyone will "need to take a haircut," he implied there would be sacrifice across the board. In reality, the process has been inequitable and unfair, with a select group taking the vast majority of the pain. In some maniacal way, manufacturers were able to plant the seed in the mind of the public and the Obama Administration that the mere volume of domestic dealers was part of the reason for their decline in performance. However, the manufacturers drafted the blueprint for their dealer networks. The manufacturers orchestrated everything. With limited freedom, dealers have been the parties making the investments in real estate and facilities -- saving each manufacturer billions.

Unfortunately, this idea of a reduced dealer count is nothing more than a marketing theory with little (possibly zero) cost benefit. Certainly, any insider knows the phrase "bigger, larger and more profitable" is, to a large extent, an oxymoron. Often times, especially with sales what they are right now, a drastically increased mortgage that would be necessary to fund a manufacturer-demanded mausoleum would severely limit profitability.

Then there was "Cash for Clunkers." But for Congress tripling the funding on short notice, this would have been a fiasco. Many saw this coming and began to implement safeguards early in the process to protect dealers from the extensive exposure that could arise if the funds for the program were exhausted. How the administration did not anticipate this is once again very troubling. There are still thousands of already cash strapped dealers waiting for reimbursement money.

### Lingering Concerns

Unfortunately, because this is now the second auto industry issue where the administration has revealed a lack of understanding, it may have irreparably strained its credibility on auto industry issues. In turn, consumer confidence could be hurt rather than strengthened. Along these lines, while the "Cash for Clunkers" program has helped to invigorate sales in the short term, a failure to properly administer the program could still cause thousands of dealers to contend with consumer disputes that will give the industry another black eye.

The question remains, once the bankruptcies are in the rear-view mirror, how are things going to work in the auto industry? Given the government's extensive mishandling, what are the new rules? All of this remains in the air. Some have suggested that manufacturers will try to implement a federal auto franchise statute. This would appease lawmakers that are still struggling with the idea that state level franchise laws were pre-empted by the bankruptcies. While at the same time, manufacturers could take advantage of their political clout on a national, as opposed to state, level.

We all hope that the current programs, the benefit of bankruptcies and the other financial stimulus initiatives established by the Obama Administration will significantly outweigh the drawbacks. However, at this point, reasonable skepticism cannot be avoided.