

by Scott Silverman

# A Second Chance for Discharged Dealers



ATTORNEY SCOTT SILVERMAN IS A PARTNER AT MCCARTER & ENGLISH, LLP.

At the time of this writing, Congress was in the process of approving legislation that would provide more than 2,000 GM and Chrysler dealers that were decimated by the OEM bankruptcies a legitimate opportunity to have their voices heard before their future is set in stone.

During the summer, several Chrysler dealers attempted to challenge their termination decisions in their own states, where state franchise laws have traditionally protected dealers. However, the federal bankruptcy court mandated all such dealers dismiss their state law claims or face a penalty of \$10,000 per day. Accordingly, without this legislation there was no hope for any discharged dealer.

Within the last two weeks Chrysler and GM both broke off negotiations with dealer representatives and offered what NADA termed a “sham” process where each discharged dealer would only be allowed an opportunity to ensure that Chrysler and GM abided by their own skewed benchmarks and metrics. However, the “foundation” of these plans was skewed so as to assist getting to a magic number of terminations, rather than weighing all the criteria that should be involved with closing an automobile dealership.

One issue is now perfectly clear - Congress has apparently overcome the political power of the manufacturers and established a process that should provide some semblance of due process for those who want a more legitimate chance at saving their franchises. Dealers who felt they were on the short end of an unfair decision will soon be able to make their case to an independent set of arbitrators who will decide whether

they get a new lease on life.

The process will permit discharged dealers to present arguments and facts that were ignored during the bankruptcies. All of the critical issues that can only be known by a business working in the market (as opposed to bureaucrats unfamiliar with the auto world) will now be heard and hopefully given due consideration. However, every discharged dealer must prepare their filing - there will be no third bite at the apple, and this opportunity cannot be ignored.

MSADA has already disseminated information about the process and will provide more details as they are disclosed. Many dealers have legitimate arguments that

**“There will be no third bite at the apple, and this opportunity cannot be ignored.”**

would have been compelling in any proceeding other than bankruptcy. Those that would seemingly be in the best position to succeed with any arbitration/appeal will be dealers who lost their franchise only to see GM/Chrysler begin attempts to re-appoint a new dealer in the same market area.

## How will the arbitrations end?

An important point to keep in mind - 90 percent of lawsuits never make it to trial. Instead, they are settled because neither side wants to risk a complete loss and the headache of adjusting their plans to accommodate an unexpected variable. Along these lines, protesting dealers can expect to see most of these arbitrations settled so that GM and Chrysler can continue to implement their plans and control their markets

rather than be “burdened” with dealers they publicly rejected.

## Is it too late?

No one knows how many dealers will be reinstated. Countless dealers have, justifiably, moved on both emotionally and financially - with the lucky few securing new tenants for their premises. Many dealers have already shut down. There are others who have lost their financing or are operating during a finance wind-down. One of many flaws with this legislation is the failure to address the financing issue. Without a financing commitment - many dealers who were discharged or squeezed out by their finance source will be left in the same position of being unable to finance their operations to continue as a new car dealer even if the arbitrators found in their favor.

Similarly, as we approach the new year, many dealers have already disclosed their wind-down status and may not feel confident they can overcome the stigma the public may associate with a discharged dealer. GM is already interfering with some of its “chosen” dealers incorrectly sending notices to their “allegedly” orphaned customers that GM will help them now that their dealer is going out of business. One such letter reads “now that your dealer is no longer an authorized dealership . . .” GM has moved quickly to fix this situation; however, it raises just one of many issues that must be addressed.

What every “Rejected” Dealer must contemplate:

1. Decide whether to initiate an arbitration. This will be a quick and dirty process. If you have any legitimate grounds, you should seriously consider filing;
2. Compile all of your data, statistics, correspondence and other written material and contact your legal representatives to prepare your “case”; and
3. Don’t rely on any expectation that you will be reinstated - every dealer must continue to prepare and plan for life without a franchise.