

A Practical Guide: What the new law allowing rejected Chrysler and GM Dealers to seek arbitration does and what it means for eligible dealers.

By Eric L. Chase

As of its December 2009 enactment, a new federal law affords the approximately 2,000 rejected Chrysler and GM eligible dealers an opportunity, through arbitration, for reinstatement. The pro-Debtor “business judgment” rule, previously applied by the Bankruptcy Court in providing *no* relief to *any* rejected dealers, no longer matters. Instead, the language of this legislation is intended to, and does on the face of it, provide a fair standard for dealers to seek reinstatement through binding arbitration. As a *practical* matter, and as outlined below, the passage of time and changes in circumstances have lessened the likelihood that many dealers covered by the new law can make use of the process. For those who are in a position to return to business, however, there is genuine hope.

Eligible dealers with a realistic hope for reinstatement should prepare to act right away, because the time frame is limited, and because the criteria may exclude dealers whose circumstances have changed in ways that preclude reinstatement. They should be ready to file with the American Arbitration Association (AAA) as soon as they receive notice from GM or Chrysler.

This primer is intended to set forth the nuts and bolts of the law in a practical way to help eligible dealers consider whether to take advantage of their right to arbitrate.

I. Practical Overview of the Law

Dealers Eligible to Arbitrate. Chrysler and GM dealers whose franchise agreements were rejected, and whose brands still operate, may trigger binding arbitration under the law to seek reinstatement as a franchised dealer (*e.g.*, Chrysler, Dodge, Jeep, Chevrolet, Buick, Cadillac, GMC).

Dealers Not Covered. Dealers whose *brands* are being terminated are not eligible (*e.g.*, Saturn, Pontiac).

What the Dealer May Seek in Arbitration. The dealer may seek “continuation, or reinstatement of a franchise agreement, or to be added as a franchisee to the dealer network of the covered manufacturer in the geographical area where the...dealership was located when its franchise agreement was terminated, not assigned, not renewed, or not continued.”

Limit on Remedy: No Money from Arbitration. The statute specifically allows reinstatement, but does not permit the arbitrator to award monetary compensation. But see

the next item.

Negotiated Agreements Permissible. The law provides that an eligible dealer and its manufacturer may *negotiate* other kinds of solutions, *outside the scope of arbitration*. This obviously means that monetary compensation can be negotiated and agreed to, even though it cannot be awarded by the arbitrator.

How the Process is Initiated by GM and Chrysler. Within thirty (30) days of the date of the enactment of the law, Chrysler and GM must give notice to affected dealers of their rights “and the specific criteria pursuant to which such dealer was terminated, was not renewed, or was not assumed and assigned to a covered manufacturer.”

How the Dealer Pursues His Right to Arbitrate. The dealer must elect to arbitrate within forty (40) days of the law’s enactment. Then, “the arbitration process must commence as soon as practicable thereafter with the selection of the arbitrator and conclude with the case being submitted to the arbitrator for deliberation within 180 days of the date of [the law’s enactment].”

The Arbitrator’s Standard. “The arbitrator shall balance the economic interest of the covered dealership, the economic interest of the covered manufacturer, and the economic interest of the public at large and shall decide, based on that balancing, whether or not the covered dealership should be added to the dealer network....”

Factors to be Considered by the Arbitrator.

- (1) The covered dealership’s profitability in 2006, 2007, 2008, and 2009,
- (2) The covered manufacturer’s overall business plan,
- (3) The covered dealership’s current economic viability,
- (4) The covered dealership’s satisfaction of the performance objectives established pursuant to the applicable franchise agreement,
- (5) The demographic and geographic characteristics of the covered dealership’s market territory,
- (6) The covered dealership’s performance in relation to the criteria used by the covered manufacturer to terminate, not renew, not assume or not assign the covered dealership’s franchise agreement, and
- (7) The length of experience of the covered dealership.

The Arbitrator's Decision. The arbitrator has to issue a written decision within seven business days after full submission of the case. "At a minimum, the written determination shall include: (1) a description of the covered dealership, (2) a clear statement indicating whether the franchise agreement at issue is to be renewed, continued, assigned or assumed by the covered manufacturer, (3) the key facts relied upon by the arbitrator in making the determination, and (4) an explanation of how the balance of economic interest supports the arbitrator's determination."

Choosing an Arbitrator. The law specifically designates the AAA as the institution to be used. (Upon receiving notice, a dealer who choose to arbitrate should file a claim with the AAA.)

Discovery. The parties can request documents specific to the covered dealership, but there will be no depositions.

Cost. "The parties shall be responsible for their own expenses, fees, and costs, and shall share equally all other costs..., such as arbitrator fees, meeting room charges, and administrative costs."

Note: AAA-administered arbitrations can be *very* expensive, sometimes even beyond the normal costs of litigation.

Place of Arbitration. It will take place in the state where the covered dealership is located. The parties have the option of conducting the arbitration electronically and telephonically, by mutual agreement.

Arbitration Award. The only remedy for the dealer is reinstatement. The arbitrator cannot award compensatory, punitive or exemplary damages.

II. Comments on the Dealer's Decision to Arbitrate or Not

- ▶ All dealers who are still in a position to operate a franchised dealership should seriously consider invoking his rights under this new law.
- ▶ Consider the costs of the proceeding, which will include half the administrative costs of the AAA, as well as half the cost of the arbitrator, in addition to the dealer's own attorneys' fees. Further, you may

need an expert.

- ▶ Consider whether you have a reasonable likelihood of success. Be realistic in assessing the seven factors to be considered by the arbitrator, as well as the overall standard of the arbitrator. Your answers to the following questions should be key to your consideration:
 - Do you have the financial resources to fund your participation?
 - What is your level of experience?
 - Do you still have adequate facilities?
 - How profitable (or not) were you in 2006, 2007, 2008 and 2009?
 - How well did you fulfill performance objectives?
 - How do you fit into the manufacturer's overall business plan?
 - Will you be (are you) economically viable?
 - Are the area's demographics and geography consistent with reinstatement?
 - How do you stack up to "normal" termination/nonrenewal criteria?
- ▶ If your franchise has already been "replaced," consider filing anyway, if you have a solid case. Perhaps you will have an opportunity to negotiate a monetary settlement. ❖

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