

Automotive News

NEWS ANALYSIS

A big win -- with many pitfalls

If rejected stores are closed, arbitration might be too late

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Dealers, don't get your hopes up too soon.

House approval of legislation that would give broader arbitration rights to 2,150 dealers rejected by General Motors Co. and Chrysler Group is welcome news to those retailers. The legislation is expected to pass the Senate this week and be signed by President Barack Obama.

But only a fraction of the dealers are likely to get their stores back.

Most of the Chrysler stores and many of the GM stores already are out of business or closing. To determine reinstatement, arbitrators would consider the store's "current economic viability" and other criteria. That could make getting a store back difficult, even for those dealers who have continued to operate.

Richard Carpenter of Oroville Motors, a rejected Chrysler store in a small city north of Sacramento, Calif., said he will pursue arbitration. He remains open as a used-car dealership and is optimistic he would prevail in arbitration. But others won't have that chance.

The timeline

Here are the deadlines that would apply if, as expected, the dealer arbitration legislation becomes law.*

- Within 30 days: GM and Chrysler must give each rejected dealership a summary of its arbitration rights and the criteria used to terminate it or wind it down.
- Within 40 days: Rejected dealerships must decide whether to pursue arbitration.
- Within 180 days: Arbitration must be completed.
- Within 180 days + 7 business days: Arbitrator must issue written decision.
- Within 180 days + 14 business days: If arbitrator rules for dealer, automaker must provide a letter of intent to enter into a sales and service agreement.

*Arbitrator may extend time periods for up to 30 days.

Source: Legislation

Just the 'hard core'

"It's going to come down to just the real hard-core group," said Carpenter, 48. "With these stores that have been terminated, everything has been disbanded. There's nothing left to reinstate."

Auto analyst Paul Melville agrees.

"For the dealers, it's a glimmer of hope," said Melville, a partner in Grant Thornton's automotive practice. "In practice, are hundreds of dealers going to be reinstated? Probably not."

Dealer advocates who lobbied for reinstatement are more optimistic. But even the leaders of the Committee to Restore Dealer Rights, a rejected-dealers group, say only a third of the 2,150 rejected stores will pursue arbitration.

Committee member Alan Spitzer estimated that about 500 rejected dealerships would be reinstated once arbitration cases are completed in mid-2010. GM dealers are more likely than Chrysler dealers to appeal, said Spitzer and fellow committee leader Tammy Darvish.

"GM dealers are still up and running, and they still have floorplan lines," Darvish said. "Who's going to approve the former Chrysler dealers for floorplan financing? Many of them are also bitter and don't want anything to do with Chrysler."

GM spokeswoman Ryndee Carney said about 300 of the 1,350 rejected GM dealers have asked the automaker to accelerate their wind-down payments. The rejected GM stores can operate through October 2010. Rejected Chrysler stores were stripped of their franchises this past June, and most have shut down.

Ready to fight

One Michigan dealer who lost GM and Chrysler franchises said she intends to pursue arbitration. "I have a lawyer, I have assets, and I have working capital," said Colleen McDonald, 44, of suburban Detroit. "I also still have a lot of former employees who want to come back to work."

Other rejected Chrysler dealers said they wouldn't seek arbitration.

"Our credibility as a car dealership has already been destroyed," said Buzz Poland, 59, of Martinsburg, W.Va., whose grandfather started selling Dodges in 1915. "It would be all but impossible to restart the business."

Another former Chrysler dealer said he didn't want his franchise back but would pursue arbitration for "moral and personal" reasons.

"I just want them to see my face and hear my voice," said Charles Pompey, 52, of Kingston, Pa. "I'd be a fool to tie up everything in Chrysler after what they did to me."

No one knows whether GM and Chrysler will throw up legal challenges. Carney said GM would study the final law and consider the business implications.

A legal battle would further delay resolution for dealers.

As dealers wait, they should document their cases by compiling financial histories and gathering data about their distance to brand competitors, said Samuel Chorches, a former dealer and Connecticut lawyer who hears arbitration cases.

Rural stores where customers otherwise would have to drive long distances for service work may stand a better chance in arbitration, said Chorches, who stressed he is maintaining neutrality on the disputes.

Settlements likely

Most arbitration cases will be settled before arbitrators reach a decision, predicted Chris DeVito, a Cleveland lawyer who represents dealers in termination cases.

The arbitration criteria set up by Congress are favorable to dealers, giving automakers an incentive to try to settle, DeVito said. Among the criteria that tilt the process toward dealers are those compelling arbitrators to consider the dealership's experience, profitability over the past four years and local demographics, he said.

Under the bill, arbitrators can't award payments to dealerships, only decide whether the dealer gets the franchise back. But GM and Chrysler could decide to pay compensation as part of a settlement, DeVito said.

One knotty legal problem likely to face Chrysler in particular is what to do if arbitrators reinstate dealerships near a competitor. In many cases, rejected dealerships had franchises removed and given to a competitor down the road.

Said DeVito: "It will open a Pandora's box for manufacturers."

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1 SEC. 747. (a) DEFINITIONS.—For purposes of this
2 section the following definitions apply:

3 (1) The term “covered manufacturer” means—

4 (A) an automobile manufacturer in which
5 the United States Government has an owner-
6 ship interest, or to which the Government has
7 provided financial assistance under title I of the
8 Emergency Economic Stabilization Act of 2008;
9 or

10 (B) an automobile manufacturer which ac-
11 quired more than half of the assets of an auto-
12 mobile manufacturer in which the United States
13 Government has an ownership interest, or to
14 which the Government has provided financial
15 assistance under title I of the Emergency Eco-
16 nomic Stabilization Act of 2008.

17 (2) The term “covered dealership” means an
18 automobile dealership that had a franchise agree-
19 ment for the sale and service of vehicles of a brand
20 or brands with a covered manufacturer in effect as
21 of October 3, 2008, and such agreement was termi-
22 nated, not assigned in the form existing on October
23 3, 2008 to another covered manufacturer in connec-
24 tion with an acquisition of assets related to the man-

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1 manufacture of that vehicle brand or brands, not re-
2 newed, or not continued during the period beginning
3 on October 3, 2008, and ending on December 31,
4 2010.

5 (b) A covered dealership that was not lawfully termi-
6 nated under applicable State law on or before April 29,
7 2009, shall have the right to seek, through binding arbi-
8 tration, continuation, or reinstatement of a franchise
9 agreement, or to be added as a franchisee to the dealer
10 network of the covered manufacturer in the geographical
11 area where the covered dealership was located when its
12 franchise agreement was terminated, not assigned, not re-
13 newed, or not continued. Such continuation, reinstatement,
14 or addition shall be limited to each brand owned
15 and manufactured by the covered manufacturer at the
16 time the arbitration commences, to the extent that the cov-
17 ered dealership had been a dealer for such brand at the
18 time such dealer's franchise agreement was terminated,
19 not assigned, not renewed, or not continued.

20 (c) Before the end of the 30-day period beginning on
21 the date of the enactment of this Act, a covered manufac-
22 turer shall provide to each covered dealership related to
23 such covered manufacturer a summary of the terms and
24 the rights accorded under this section to a covered dealer-
25 ship and the specific criteria pursuant to which such deal-

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1 er was terminated, was not renewed, or was not assumed
2 and assigned to a covered manufacturer.

3 (d) A covered dealership may elect to pursue the right
4 to binding arbitration with the appropriate covered manu-
5 facturer. Such election must occur within 40 days of the
6 date of enactment. The arbitration process must com-
7 mence as soon as practicable thereafter with the selection
8 of the arbitrator and conclude with the case being sub-
9 mitted to the arbitrator for deliberation within 180 days
10 of the date of enactment of this Act. The arbitrator may
11 extend the time periods in this subsection for up to 30
12 days for good cause. The covered manufacturer and the
13 covered dealership may present any relevant information
14 during the arbitration. The arbitrator shall balance the
15 economic interest of the covered dealership, the economic
16 interest of the covered manufacturer, and the economic
17 interest of the public at large and shall decide, based on
18 that balancing, whether or not the covered dealership
19 should be added to the dealer network of the covered man-
20 ufacturer. The factors considered by the arbitrator shall
21 include (1) the covered dealership's profitability in 2006,
22 2007, 2008, and 2009, (2) the covered manufacturer's
23 overall business plan, (3) the covered dealership's current
24 economic viability, (4) the covered dealership's satisfaction
25 of the performance objectives established pursuant to the

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1 applicable franchise agreement, (5) the demographic and
2 geographic characteristics of the covered dealership's mar-
3 ket territory, (6) the covered dealership's performance in
4 relation to the criteria used by the covered manufacturer
5 to terminate, not renew, not assume or not assign the cov-
6 ered dealership's franchise agreement, and (7) the length
7 of experience of the covered dealership. The arbitrator
8 shall issue a written determination no later than 7 busi-
9 ness days after the arbitrator determines that case has
10 been fully submitted. At a minimum, the written deter-
11 mination shall include (1) a description of the covered
12 dealership, (2) a clear statement indicating whether the
13 franchise agreement at issue is to be renewed, continued,
14 assigned or assumed by the covered manufacturer, (3) the
15 key facts relied upon by the arbitrator in making the de-
16 termination, and (4) an explanation of how the balance
17 of economic interests supports the arbitrator's determina-
18 tion.

19 (e) The arbitrator shall be selected from the list of
20 qualified arbitrators maintained by the Regional Office of
21 the American Arbitration Association (AAA), in the Re-
22 gion where the dealership is located, by mutual agreement
23 of the covered dealership and covered manufacturer. If
24 agreement cannot be reached on a suitable arbitrator, the
25 parties shall request AAA to select the arbitrator. There

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1 will be no depositions in the proceedings, and discovery
2 shall be limited to requests for documents specific to the
3 covered dealership. The parties shall be responsible for
4 their own expenses, fees, and costs, and shall share equally
5 all other costs associated with the arbitration, such as ar-
6 bitrator fees, meeting room charges, and administrative
7 costs. The arbitration shall be conducted in the State
8 where the covered dealership is located. Parties will have
9 the option of conducting arbitration electronically and tele-
10 phonically, by mutual agreement of both parties. The arbi-
11 trator shall not award compensatory, punitive, or exem-
12 plary damages to any party. If the arbitrator finds in favor
13 of a covered dealership, the covered manufacturer shall as
14 soon as practicable, but not later than 7 business days
15 after receipt of the arbitrator's determination, provide the
16 dealer a customary and usual letter of intent to enter into
17 a sales and service agreement. After executing the sales
18 and service agreement and successfully completing the
19 operational prerequisites set forth therein, a covered deal-
20 ership shall return to the covered manufacturer any finan-
21 cial compensation provided by the covered manufacturer
22 in consideration of the covered manufacturer's initial de-
23 termination to terminate, not renew, not assign or not as-
24 sume the covered dealership's applicable franchise agree-
25 ment.

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1 (f) Any legally binding agreement resulting from a
2 voluntary negotiation between a covered manufacturer and
3 covered dealership(s) shall not be considered inconsistent
4 with this provision and any covered dealership that is a
5 party to such agreement shall forfeit the right to arbitra-
6 tion established by this provision.

7 (g) Notwithstanding the requirements of this provi-
8 sion, nothing herein shall prevent a covered manufacturer
9 from lawfully terminating a covered dealership in accord-
10 ance with applicable State law.