OUTSIDE PERSPECTIVES

# Collateral Damage In The Wake Of The GM Restructuring

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The following represents a departure from my announced sequence of articles. For this month's article, I was going to discuss the alleged immunity from creditor attack of so-called "Special-Purpose Vehicles" or "Bankruptcy-Remote Entities" that had become a commonplace party in recent securitization transactions. I may address this subject in a later installment in this series. For this month's article, I have chosen instead to discuss a more topical subject -- one of the many disturbing and thought-provoking issues that have arisen in connection with the General Motors bankruptcy.

One of the remarkable array of powers enjoyed by a debtor in possession or trustee in a bankruptcy case is the power to "reject" an executory contract or unexpired lease. Simply defined, an executory contract is a contract in which both the debtor and its counter-party (the other party to the contract) have unfulfilled remaining obligations. The Bankruptcy Code allows a debtor in possession to reject such a contract if it can demonstrate, to the satisfaction of the bankruptcy judge, that such rejection is in the business interest of the debtor, its estate, and its creditors. If the debtor in possession can demonstrate to the satisfaction of the bankruptcy court, for instance, that the price that the debtor had previously contracted to pay under a particular executory contract had become, in light of changed business conditions, higher than the current market price for the subject goods or services, it can reject the contract.

The non-debtor has little or no "say" in the outcome of the rejection issue. While a minority of courts have taken into account the impact of rejection upon the counterparty, the majority or prevailing viewpoint of the courts is that the impact of rejection on this party is utterly irrelevant. The counter-party to a rejected executory contract is left with only an unsecured claim in the amount of its damages – a claim that may be worth nothing or only a fraction of its face value.

Within the past few weeks, I met with the owner of a major Buick and Pontiac dealership in the Chicago area to discuss some correspondence that he had recently received from General Motors. This dealer had profitably sold Buicks from the same site for more than 30 years, providing many jobs to salespeople, mechanics, and others. Indeed, only eight months earlier, relying upon this old and presumably rock-solid relationship as well as the thinly-veiled threat of termination of the Buick dealership, GM had compelled my client and his wife to incur more than $1 million in personal debt (secured by, among other things, their long-time personal residence) to purchase and incorporate a nearby Pontiac dealership with its large inventory of automobiles and parts, without disclosing the fact that Pontiac was soon to join Oldsmobile in the GM dinosaur tar pit (a fact that simply *had to be known* to GM at the time), thereby rendering the inventory largely unsalable.

When I looked at the documents, which the dealer had sent me in advance of our scheduled meeting so that I could prepare in advance, I was shocked at my discovery – a form, non-personalized, June 1, 2009 letter giving my client ten calendar days *(YES, YOU HAVE READ THIS CORRECTLY. THERE IS NO MISPRINT HERE – EXACTLY 10 DAYS!)* to choose its manner of death. The client was provided with two options, both noxious: Option 1 – lose the dealership, accept a modest credit for sums allegedly due to GM, and waive all rights and claims against GM, or Option 2 – just lose the dealership. So ended a 30-year relationship with GM.

The letter did not even begin with a greeting like "Dear Fred," "Dear Mr. Jones," or "Dear GM Dealer." Instead, it began with the words, "This letter is to advise you that the Pontiac, Buick, GMC Truck Dealer Agreements between GM and your dealer company will not be continued by GM on a long-term basis." It was signed, not by a human being, but by "GENERAL MOTORS CORPORATION." It attached as an exhibit a 13-page, single-spaced, "Wind-Down Agreement" containing extensive releases of claims and waivers of rights against GM. This agreement had very obviously been carefully-crafted by GM's attorneys over a great period of time. No layman could have concocted the language of these releases and waivers. It went on to say, "In order for us to provide you with this assistance [the "assistance" allegedly provided in the Wind-Down Agreement], you must execute, and GM must receive, the enclosed agreement on or before June 12, 2009 [just ten days after my client received the letter]."

In a later sentence of the letter, GM attempted to blame the unconscionable ten-day deadline on the "bankruptcy process: "Due to extremely short deadlines in the Bankruptcy process, we must receive the enclosed agreement on or before June 12, 2009." This claim is utterly and completely disingenuous. Nothing in the bankruptcy law or bankruptcy process required GM to provide its dealers with only ten-days notice of their fate. GM had months to prepare for bankruptcy. The "Wind-Down Agreements" themselves had probably been in the works for months. It would not surprise me to learn that the decision to offer dealers so little time to respond was a tactical decision that was designed to prevent any negotiation of the draft Wind-Down Agreement or any organized opposition to this tactic.

GM offered no words of regret or contrition to my client. To the contrary, at the end of the letter, it proudly reported "…we are pleased that we are able to offer you the enclosed agreement to allow you to wind down your … dealership business and to sell your … inventory in an orderly fashion." GM's pride, and its announced "pleasure," are seriously misplaced. It and its lawyers (and our government, which is in many respects driving the GM reorganization train) should be ashamed of themselves. As noted above, nothing in the bankruptcy law or bankruptcy process required this callous treatment of dealers and their employees.

This is not to say that the termination of the Pontiac line and the termination of many dealership agreements is either unlawful or wrongful from the standpoint of the overall GM reorganization. I do not know enough about the issue to comment about it. The issue that I am addressing relates to humanity and process. A GM dealer contract may be an executory contract of the type that can be rejected by an automobile manufacturer. Perhaps, however, it would be appropriate for the courts to give greater attention to the impact of rejection on this large class of creditors and their employees.

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