BUY-HERE PAY-HERE VEHICLE DEALERS

CUSTOMER IN BANKRUPTCY?

HOW TO GET PAID!

HOW TO GET YOUR COLLATERAL BACK!

Obligatory Non-representation Disclosures

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Unless specifically agreed to in a writing signed by Barry Broughton, **the scope of representation that may be offered does not include a review of documents for regulatory compliance**. A thorough, deliberate review of sale and credit documents for compliance with regulatory schemes imposed by state and federal law and administrative pronouncements is an intensely time-consuming undertaking, usually done by attorneys for trade associations or forms publishers. Such a review is beyond the scope of typical engagement of a lawyer by vehicle dealer or financer in a specific bankruptcy case filed by a specific customer.

Rules regulating the practice of law by Texas lawyers dictate that I give the following notice:

NOTICE TO CLIENTS: The State Bar of Texas investigates and prosecutes professional misconduct committed by Texas attorneys. Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar Office of General Counsel will provide you with information about how to file a complaint. For more information, please call 1-800-932-1900. This is a toll-free call.

Barry Broughton
Attorney at Law
3201 Grasshopper Drive
Austin, Texas 78748

P. O. Box 152404
Austin, Texas 78715
Telephone: 1.512.472.3028
Telecopier: 1.512.472.3059
Email: barrybroughton@yahoo.com

HOW TO MAXIMIZE A DEALER'S RECOVERY WHEN A CUSTOMER FILES A BANKRUPTCY

A customer owes a financing vehicle Dealer on a financed vehicle sale. The customer files bankruptcy, and wants to hang on to the collateral AND re-write (or not pay at all) the motor vehicle retail installment sales contract.

As of the filing of the customer bankruptcy, the Dealer has a loss. Steps can be taken to put some or all of that loss back onto the Dealer's bottom line. Careful business choices are called for, and I propose to help management make those decisions with the goal of adding to the Dealer's bottom line.

DON'T BE INTIMIDATED

Steps ranging from few-and-simple (and fairly inexpensive) to complex (and not so inexpensive, perhaps) are available to financing Dealers to recover losses. If a bankruptcy is filed by a customer, the loss has happened. If anything can be recovered net of recovery expenses, that is all profit.

Few-and-simple are called for, if the customer cooperates after filing bankruptcy, or if the collateral has little value and the customer has few assets or little income. If the money at stake justifies the cost of a service or set of services, management should consider pressing forward.

CONTROL YOUR LOSS-RECOVERY COSTS

I offer a set of specific bankruptcy services for set prices, so that a Dealer as a creditor has a better idea of what expenses should be.

Menu of Fixed Price Legal Services for Vehicle Dealers (and Disclosure of Services Not Appropriate for Fixed-Price Representation)

Some or many of the following services are appropriate for Dealers facing a bankruptcy by one of the Dealer's financing customers. Seldom if ever will all of the items on the menu be appropriate, particularly for a consumer (non-business) debtor.

What actions might be appropriate, at least initially, for any particular situation should be determined at an initial consultation.

Fixed prices (including official filing fees) are subject to change.

FIXED PRICE LEGAL SERVICES

1.	Initial consultation with Dealer, including a review of documents regarding a bankrupt customer or a Dealer's dispute with a customer.	$50.00
2.	Clerk's fee to download official documents from a bankruptcy court web site; document review included in consultation fee	pass-through at cost; usually 10¢ per page
3.	Establish client objectives with respect to dispute with a customer	included in the consultation fee
4.	Filing a *Notice of Appearance* in the bankruptcy case – monitoring a customer bankruptcy case to watch for activity detrimental to a Dealer's interests, or for opportunities to reach a Dealer's objectives	$50.00
5.	Preparing and filing a *Proof of Claim*	$125.00
6.	Preparing and filing a defense to an *Objection to a Proof of Claim* – NOTE: a hearing may require a trial fee	$125.00 – may be waived, case-by-case
7.	Preparing and filing a *Reaffirmation Agreement* (after Proof of Claim filed in the case)	$50.00
8.	Preparing and filing a *Reaffirmation Agreement* (no Proof of Claim filed in the case)	$125.00

9.	Preparing a *Motion to Modify the Automatic Stay*, for permission to foreclose or to require the customer to provide adequate protection or insurance – NOTE: a hearing may require a trial fee	$150.00
	Official filing fee for Motion to Modify the Automatic Stay (to terminate, annul, modify, or condition the automatic stay)	pass-through at cost, presently $181.00
10.	Preparing a *Stipulation or Agreement for Modification of the Automatic Stay* (no official filing fee required)	$150.00
11.	Prepare *Notice of Default of Conditions or Agreements for Continuation of the Automatic Stay* – Terminating the stay without further order of the Court	$50.00
12.	Preparing and filing an *Objection to the Confirmation of Debtor's Proposed Chapter 13 Plan* – NOTE: a hearing may require a trial fee	$150.00
13.	Preparing and filing a *Motion for Adequate Protection*, to require payments on secured debt before plan confirmation in a Chapter 13 case – NOTE: a hearing may require a trial fee	$150.00
14.	Preparing and filing a *Motion to Dismiss a Bankruptcy Case* – NOTE: a hearing may require a trial fee	$150.00
15.	Attending a creditor meeting (a meeting required by 11 U.S.C. §341)	$100.00
16.	Preparing and filing a *Transfer of Claim* (selling or buying a claim in a bankruptcy case)	$75.00
	Official filing fee to file a Transfer of Claim	pass-through at cost, presently $25.00
17.	Preparing and filing a *Motion to Compel a Trustee to Abandon Property* (trustee, not a debtor, has property Dealer wants) – NOTE: a hearing may require a trial fee	$181.00
	Official filing fee for a Motion to Compel a Trustee to Abandon Property	pass-through at cost, presently $176.00

TRIAL FEE FOR COURTROOM APPEARANCES FOR FIXED-PRICE LEGAL SERVICES

It is appropriate to set fixed prices for preparing documents and other tasks that can generally be performed from an attorney's office. Some of these documents – motions, objections, applications, and the like– can trigger a need for hearings. The usual practice in the world of consumer bankruptcy is for most of these "contested matters" to be settled before the hearing date. When that happens, no trial fee is appropriate.

Some of these contested matters are not be resolved by settlement. Each side must then decide whether to fight or surrender. If both sides are willing to fight, a contested matter must be heard by the court and decided by the judge. A contested matter that is called for a hearing before the court is subject to a trial fee of:

$250.00,

if the hearing, including waiting for the hearing to be called on the docket, takes one-half day or less. If the hearing requires more than one-half day, the trial fee is $250.00, per half-day.

SERVICES NOT APPROPRIATE FOR FIXED-PRICE REPRESENTATION

Routine disputes in bankruptcy cases, particularly when the amount of money in dispute is relatively small, are usually resolved by settlement. If there is no settlement, routine disputes are typically heard by the bankruptcy court as "contested matters". Many of the most common routine disputes are reflected on the **Menu of Fixed-Price Legal Services**. But not all. There are simply too many matters that can arise for everything to be listed on such a menu.

Fixed prices for "routine" disputes that are fairly unusual can be discussed in advance, with the likelihood that fixed prices can be set.

Some disputes in bankruptcy cases result in **Adversary Proceedings**. Adversary Proceedings are nothing less than federal court trials, with federal court pre-trial and discovery rules applied (and the possibility of a jury trial). It is impossible to set a fair fixed price in advance for - representation in an Adversary Proceeding. Court filing fees are $350.00, effective June 1, 2015.

Therefore, fees for serious disputes in bankruptcy court should be estimated as best as can be on a case-by-case basis, and appropriate arrangements for fee-payment made. Legal fees generated by Adversary Proceedings tend to be quite high.

Appeals can be even more expensive than Adversary Proceedings. "Small" appeals can result in litigation costs starting in the five figures, and commonly reach well beyond five-figures.

NO MENU OR OTHER LIST OF FEES FOR SERVICES CAN BE ALL-INCLUSIVE – NO SUGGESTED LEGAL FEE IS OFF-LIMITS FOR EXPLANATION OR NEGOTIATION

FIRST STEP – DOCUMENT CHECK

To know where a Dealer stands when a customer files bankruptcy and proposes to not pay as agreed for goods or services previously provided to the customer, 2 sets of documents must be looked over.

DEALER'S CUSTOMER FILE

It is important to review correct, complete copies of these documents from the customer's file, as soon as possible after learning of a bankruptcy:

☐ motor vehicle installment sales contract (including all the standard language on "form" documents), or any other document that creates the customer's obligation to pay

☐ any document added to (or in lieu of) a standard contract, concerning the agreement between the dealer and the customer

☐ certificate of title or application for certificate of title

☐ accounting ledger showing principal balance due (any "unearned" interest should be backed out) as of the date of the bankruptcy filing– this ledger ideally shows the balance financed and payments, but also additional charges such as late charges, NSF check charges, dealer-financed repairs, repossession charges, legal expenses, and the like

☐ documentation showing status of collision/casualty insurance on the collateral, particularly if insurance is required by the sales contract

☐ any documentation of customer complaints, demands, or lawsuits, or of any compliments

OFFICIAL COURT FILE – can be downloaded from the Court's web site; the Court Clerk charges 10¢ per page – this is not an exclusive list of possible official documents that should be reviewed.

☐ Order Combined with Notice of Bankruptcy Case, Meeting of Creditors, & Deadlines

☐ Bankruptcy Schedules

☐ Bankruptcy Statement of Financial Affairs

☐ Debtor's Statement of Intentions (Chapter 7 only)

☐ Debtor's Plan (Chapter 11, 12, or 13 only)

SECOND STEP – DETERMINE DEALER OBJECTIVES

The fundamental questions for a vehicle financer in a consumer bankruptcy case is:

☐ **Is the bottom line for the Dealer best served by getting the collateral back as soon as possible?**

Generally, the answer to this question is YES IF:

- ♦ the collateral is being driven without collision and casualty insurance
- ♦ the collateral is about to vanish, or otherwise lose recoverable value

AND

- ♦ if the collateral is worth enough to justify the cost of going to court

☐ **Is the bottom line for the Dealer best served by working with the customer to try to get paid without repossession?**

Generally, the answer to this question is YES IF

- ♦ the customer is keeping the collateral is insured against collision or casualty loss;
- ♦ the customer is willing to pay according to terms (or close);
- ♦ the customer's Chapter 13 plan (or, rarely, Chapter 11 or Chapter 12 Plan) is confirmed or likely to be confirmed;

OR

- ♦ the value of the collateral to the Dealer is not worth the expense of going to court.

At their first consultation, the Dealer's management and lawyer should reach a clear understanding about goals; where the Dealer wants to be when the bankruptcy case is over. This is important to budget resources, and to avoid where possible the waiver of rights that may turn out to be important.

Impossible goals should be identified and ruled out. Realistic possibilities should be explored.

Circumstances change over the course of the bankruptcy case. Objectives may have to change as well.

THIRD STEP – DETERMINE WHAT LEGAL SERVICES ARE AVAILABLE AND COST EFFECTIVE IN A SPECIFIC SITUATION?

The entire laundry list set forth in the *Menu of Fixed Price Legal Services* (and possible appropriate services that are not on the list) will never be appropriate in any single bankruptcy case. The Dealer's goals and budget should determine what possible action, if any, is pursued in each unique case..

These steps are usually a good place to start.

☐ File a *Notice of Appearance*, so that someone on the Dealer's side knows what is going on in the case.

☐ Have a lawyer monitor the case, as the person receiving notices.

☐ File a *Proof of Claim* in situations where appropriate..

☐ Consider presenting the Debtor customer with a *Reaffirmation Agreement* in Chapter 7 cases. Not spending the money on a reaffirmation agreement is a good idea in many Chapter 7 cases, but any waiver of the right to a reaffirmation should be deliberate, not inadvertent.

☐ File a *Motion to Modify the Automatic Bankruptcy Stay* if the facts of the situation and the dollars involved justify the expense.

☐ File an *Objection to Plan Confirmation* in a Chapter 13 case if the facts and the dollars involved justify the expense.

☐ File a *Creditor's Motion to Dismiss Case* in circumstances involving serious violations of the law by a Debtor, if the dollars involved justify the expense.

These are the most common steps that should be considered by a Dealer that is pulled into a consumer bankruptcy case filed by one of the Dealer's customers. These are not the only steps that might be profitable, or might help avoid unnecessary losses, but they are among the ones commonly used.

FOURTH STEP – FILING A NOTICE OF APPEARANCE

Someone concerned about a specific bankruptcy case (a "creditor" or a "party-in-interest") can file a *Notice of Appearance* in the official file for the case. This entitles the filer to receive copies of documents filed in the case that could be warnings indicating action is needed.

Filing a *Notice of Appearance* should NOT be done automatically, but only after a review of documents on the "Document Check" list. Appearing in the case will be appropriate in the great majority of consumer bankruptcy cases filed by a Dealer's customers. The rare exceptions test the rule.

If litigation is possible, threatened, or pending, and the creditor does NOT want to consent to trying a lawsuit in bankruptcy court instead of state court (or in some situations, U.S. District Court), an appearance is not a good idea.

It is not necessary that a lawyer be named as the person receiving document copies and other notices, although having notice go directly to the lawyer is usually convenient for all concerned.

Requests for "duplicate notice" are sometimes filed for creditors, with the idea that notice will go not only to the lawyer but to the Dealer's management, too. When the Dealer has an attorney of record in the case, participants in the case may decline to communicate with the Dealer except through the Dealer's lawyer. This results in requests for notice to the Dealer and the lawyer frequently being ignored, and notice being sent only to the lawyer.

Appearing and requesting notice entitles the person filing the *Notice of Appearance* to receive copies of almost all documents that anyone, including the Customer, any trustee in the case, other creditors, and the court itself, automatically. If the notice is sent electronically by the court, the 10¢-per-page charge mentioned in the "Document Check" list is generally waived.

Electronic copies arrive by email as Adobe Acrobat files, and require the person receiving them to have a PACER account with the court in which the bankruptcy is pending. Forms to obtain PACER accounts can be obtained on a court web site.

Filing a *Notice of Appearance* (or a Proof of Claim) usually entitles creditors in Chapter 13 cases to obtain permission to access the Chapter 13 Trustee's case record on line. Checking the Trustee's records enables a creditor to determine what is being paid to the Trustee, and who (and how much) the Trustee is paying with the debtor's funds. This information can be extremely helpful in getting a Dealer paid.

FIFTH STEP – PROOF OF CLAIM

Filing a proper proof of claim is not a risk in most bankruptcy cases, but in a few it is.

It is essential for a successful recovery in some cases (Chapter 13, primarily), and it may be a complete waste of resources in some cases (Chapter 7, primarily).

When to NOT File a Proof of Claim

In Chapter 7 cases, creditors receive a copy of an *Order Combined with Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines* from the Bankruptcy Court.

Usually in the bottom third of the first page of the Order, one will find either a notice of bar date for filing proofs of claims (deadline for filing claims), OR a recital "Please Do Not File a Proof of Claim Unless You Receive a Notice To Do So." The later recital means that there are no assets available to distribute to creditors– a "No Asset" (or "No Distribution") case.

In a "No Asset" case, do not file a proof of claim unless you receive a notice to do so. The notice will arrive, if at all, after you receive the Order Combined with Notice (of the filing of the bankruptcy case).

If litigation between the Debtor and the dealer is possible, or if a lawsuit has been filed, check with your lawyer before you file a proof of claim or a notice of appearance.

WHEN TO FILE A PROOF OF CLAIM

In most bankruptcy cases, it is important to file a proof of claim. A creditor may not be allowed to reclaim collateral (until the bankruptcy case is over; that's a problem if the case is a 5-year Chapter 13 and the collateral is a vehicle) without filing a proof of claim. In a Chapter 13 case a creditor will not be paid by the Trustee unless a proof of claim is on file.

There is a deadline set by the Bankruptcy Code and the court to file proofs of claims (the "bar date" for claims). Missing that deadline usually but not always results in an ineffective proof of claim.

So most of the time, a proof of claim before the deadline is a good idea, and filing if the deadline is already past is sometimes worthwhile.

HOW TO FILE A PROOF OF CLAIM
(or, one reason the lawyer wants all those papers from your file)

Bankruptcy notices sent to creditors listed in the case usually include a form proof of claim, particularly in Chapter 13 cases. Forms for proofs of claims can be found on most bankruptcy court web sites. Many office supply stores and web sites provide them for a small charge (or free).

If you file a proof of claim without a lawyer, read the form and follow the instructions very carefully. Reading the appropriate sections of the Bankruptcy Code and the Bankruptcy Rules is advisable.

Attach copies of supporting documents. Usually a vehicle Dealer should attach AT A MINIMUM to the form proof of claim, copies of:

- the complete motor vehicle sales contract
- evidence of perfection of the lien (certificate of title or application for certificate of title)
- a ledger, showing ALL charges and credits to the debtor's account, including charges such as repossession costs, legal fees, and like; MAKE SURE that any prepaid or otherwise "unearned" interest that is payable after the date the bankruptcy case was filed is BACKED OUT of the balance due (as of the date of filing), so that the principal amount of the proof of claim is nothing but principal as of the date of filing plus other pre-petition charges
- copies of invoices for repossession charges, lawyer fees, etc., if they are available
- attach a list of "other charges" as required by the proof of claim form
- send copies of the proof of claim, and attach a "certificate of service" showing each person that received a copy, to everyone that national and local rules require get such copies– usually any Trustee in the case, the debtor, and the debtor's lawyer. Copies to others may be required, determined on a case-by-case basis

It ain't as easy as it may seem at first impression, to do it right. Doing it wrong may cost money.

I am honored to prepare proofs of claims for my clients. The client has to provide copies of the necessary documents from its files (or a truthful reason that copies are unavailable, usually destroyed or lost).

A FORK IN THE ROAD – CHAPTER 7 REAFFIRMATION AGREEMENTS

If a bankruptcy is a Chapter 13 case, this section does not apply. Otherwise, read on.

CONVENTIONAL WISDOM – DEMAND A REAFFIRMATION

A reaffirmation agreement has the effect of making a Chapter 7 bankruptcy discharge inapplicable to the specific claim that is reaffirmed. At some point in time (depending on the specifics of the particular case), the creditor can repossess and sue for a deficiency if one is established, if a reaffirmation agreement is in place.

If there is no reaffirmation agreement, in most situations repossession can occur at the same time it could happen with a reaffirmation agreement, but no attempt to collect any deficiency is usually permitted by law. This can cause a serious loss for the Dealer if the vehicle is destroyed or disappears, and the creditor's interest in the collateral is not covered by collision/casualty insurance.

The Bankruptcy Code has elaborate provisions purporting to force debtors to either sign a reaffirmation agreement or surrender the collateral. Many lawyers (not me) counsel vehicle creditors to always demand a reaffirmation from a Chapter 7 debtor. I believe (and I may be in a minority of lawyers representing vehicle creditors, but I still think I am right) that reaffirmation agreements should be used rarely against Texas debtors (no opinion expressed as to non-Texas debtors), because it is so tough to collect a deficiency from Texas debtors after bankruptcy that a reaffirmation agreement may not be worth the cost of obtaining it.

The Dealer should have a quick trigger for repossession after the point in time when repossession is permitted, if the Debtor customer permits collision and casualty insurance to lapse.

A creditor should insist on a reaffirmation agreement (in my opinion) if:

- it is worth the trouble to sue the debtor on a deficiency– in situations with real money at stake six months or so after the bankruptcy filing (debt considerably larger than the value of the collateral, for example), AND the debtor can be forced to pay after completing a Chapter 7 bankruptcy (many if not all of a debtor's assets will not be available to satisfy deficiency claims after Chapter 7 bankruptcy)

- a co-signer on the motor vehicle contract is the Dealer's good customer, and the Dealer wants to be able to try to collect from the Debtor customer before turning to the co-signer

- the debtor is NOT seriously behind on the note, or otherwise in default (no insurance, for example) so that a motion to modify the stay to repossess might not be successful

OR

- ♦ the Dealer wants to encourage the debtor to surrender the collateral and close the books on this contract.

The Dealer should not insist on a reaffirmation agreement if:

- ♦ it has no intention of attempting to collect a deficiency after repossession

- ♦ any immediate problem can be better addressed with a motion to modify the automatic stay to permit immediate repossession (or quicker repossession than would be possible without a motion to modify the stay).

If the account is seriously behind or the collateral may disappear, a motion to modify the stay to permit repossession is probably the more effective use of the Dealer's litigation resources.

ANOTHER FORK IN THE ROAD – CHAPTER 13 BANKRUPTCY
PROTECTING RIGHTS IN COLLATERAL
AND COLLECTING ON THE CLAIM

If a bankruptcy is a Chapter 7 case, this section does not apply. If it is a Chapter 13 case, read on.

File a Notice of Appearance Immediately
File a Proof of Claim As Soon As a Complete Claim Can Be Prepared

These subjects are discussed elsewhere.

WHAT A CHAPTER 13 PLAN CAN DO TO A CREDITOR

The plan can establish a **value for collateral**, that will determine how much and when a Dealer is paid for his vehicle. Basically, a secured creditor should be paid 100% of the value of the collateral, with interest, up to the full amount that the Debtor customer owes.

If the customer owes more than the number set for collateral value by a confirmed Chapter 13 plan, the amount of the Dealer's claim that exceeds the value of the collateral is paid as an unsecured claim. No interest is paid on an unsecured claim. Unsecured claims can be paid as little as nothing; 0% of the claim amount. Therefore it is important that the plan valuation of the collateral is fair to the Dealer. If the valuation number is too low, the Dealer may be paid less than what is owed per the terms of the original motor vehicle installment sales contract.

If the Dealer disagrees with the plan value that the Debtor customer proposes in the plan, the Dealer is put to a choice. The Dealer can waive opposition to the Debtor's proposed plan value, and waive a part of its secured claim. Or the Dealer can file an *Objection to the Confirmation of Debtor's Proposed Chapter 13 Plan*, and negotiate or litigate for a higher plan value for the collateral, and a more generous dividend through the bankruptcy system.

The decision on filing an objection to plan confirmation should turn, in part, on how much money is at stake. A big dispute over small dollars usually benefits no one.

Filing an objection to plan valuation does not necessarily obligate a Dealer to go to trial. In most situations, this sort of objection is resolved by negotiation and usually by compromise, sort of a poker game if the amount at issue is relatively small. The expense of filing the objection is the ante. A trial fee (and possibly the expense of providing a trial witness or witnesses) is the raise.

If a negotiated settlement is not reached, then a creditor may consider whether further pursuit of a higher collateral value is worth the expense, and possibly fold.

A Dealer should never file an objection if it is clear at the beginning that the objection will not be taken to trial if necessary to get a better plan valuation. Making a final decision as to trial strategy at the very beginning of the objection process is not required, and it is frequently a good

idea to see how the other side reacts to a plan objection before making a final decision on taking an objection meeting resistance to trial, or not.

Adequate Protection

"Adequate Protection" refers to a payment amount that is required to protect a secured creditor from the collapse of the value of its collateral. Adequate protection payments can be set in motion in several ways. These payments should be made to the Dealer in specific amounts that will usually pay the Dealer more than "pro rata" payments, discussed below.

If a plan provides for classes of creditors that will all be paid the same cents-on-the-dollar on their claims ("Pro rata" payment amounts), a Dealer's claim can be diluted so that it is paid very slowly and over a long period of time (if at all). Claims that dilute the Dealer's payments could be claims such as

- a huge arrearage on a home mortgage (the home probably will not depreciate as fast as a motor vehicle)
- a huge child support arrearage (no collateral at all, except perhaps the Debtor's freedom)
- or even another vehicle creditor with a large amount due.

All of these creditors could be paid cents-on-the-dollar with the Dealer as members of a "pro rata" class of creditors, and the amount of their dollars might be enough to make sure that it takes 5 full years to pay the Dealer, who has collateral that may be rapidly depreciating and a right to be protected against such depreciation.

A Creditor with a Lien in a Vehicle Has at Least 3 Shots at "Adequate Protection"

Early in the case, a *Motion for Adequate Protection* can be filed. If successful, a monthly payment amount can be ordered paid to the vehicle creditor, pending confirmation of the Chapter 13 plan. The relief granted by this motion is no longer effective if and when a Chapter 13 plan is confirmed by the Court. This can happen as early as 60 days after the case is filed.

This is an attractive option if:

- the customer/debtor is following the rules of Chapter 13, so that a Motion to Modify the Automatic Stay is unlikely to be successful, particularly in the first month or so of the Chapter 13 plan, BUT
- the customer/debtor's path to a confirmed Chapter 13 plan is difficult enough that a quick confirmation is unlikely, OR
- the customer/debtor is making very large Trustee payments in the first month or so of the

proposed plan (turning over a non-exempt savings account or investment to the Trustee, for example).

A more cost-effective option can be a *Motion to Modify the Automatic Stay*, seeking to require the customer/debtor to take certain steps, including dedicating specific payment amounts to a secured creditor with a lien in depreciating property. This motion is more expensive that a motion for adequate protection because the payment of an official filing fee for the stay motion is required. However, the relief granted can last until the case is over, and that can be as long as 60 months after the date the case is filed.

A customer/debtor has to be violating the rules of Chapter 13 badly, for a motion to modify the stay is likely to be granted in the early months of the case. Filing a motion to modify, a creditor can win half-a-loaf– an order that leaves the stay in place (preventing foreclosure) but requires the debtor to make payments regularly and keep the collateral insured in order to prevent foreclosure. A violation of an order conditioning the Automatic Stay can provide for termination of the stay, and foreclosure, without further order of the court.

These motions can be brought after the plan is confirmed, if the customer/debtor violates the rules of Chapter 13 again, after the Plan is confirmed.

Requiring that the plan confirmation order provide for adequate protection may be necessary, with or without an order for adequate protection arising from a motion for adequate protection or a motion to modify the automatic stay.

Objecting to plan confirmation alone is usually the thriftiest use of out-of-pocket resources, although the flow of adequate protection payments to the Dealer may begin later in the case that would otherwise happen, if the Dealer also files one of the other motions.

HOW TO COLLECT EXPENSES OF DEFAULT OR BANKRUPTCY FROM A CUSTOMER

Collect what?

- Skip-trace fees
- Repossession fees
- Storage fees
- Official Court costs including filing fees
- Attorney and other professionals' fees
- This is hardly an exclusive list, but this will cover most Dealer expenses when a customer defaults or files bankruptcy.

DOCUMENT YOUR EXPENSES

- Have invoices available
- Post expenses to a customer's ledger or other record of charges and payments, preferably soon after an expense is incurred.

WHAT CAPS A DEALER'S RECOVERY OF EXPENSES?

Simple version of the answer: the value of the collateral AND the customer's willingness to retain the collateral as opposed to giving it back.

910 Day Rule: If a vehicle was purchased by an individual for personal use, and the Dealer is a purchase-money lender, the customer will have to pay the principal balance of the contract (as of the date of filing), and necessary, reasonable, and documented expenses as of the date of filing, ***IF*** the sale closed within 910 calendar days before a bankruptcy filing.

910 Day Rule Does Not Apply: If a vehicle was purchased by a corporation or other nonhuman, ***or*** for business use, ***or*** the Dealer did not finance the purchase to create the claim (not a purchase-money claim), ***or*** if the sale closed earlier than 910 days before the bankruptcy filing, the vehicle can be valued as of the date of the filing of the bankruptcy (Chapter 7, usually) or the date of plan confirmation (Chapter 11, 12, or13) at an amount a hypothetical buyer would have to pay reduced by a seller's make-ready cost and overhead. Whether this value is retail, whole-sale, or something else depends on the type and nature of the property, and whether or not the customer is a "consumer".

If the customer is a consumer, then the collateral is valued at its replacement cost for the customer, "replacement cost" meaning the price a retail merchant would charge considering the age and condition of the collateral as of the date the bankruptcy was filed.

Obviously it benefits the Dealer to take steps to force a valuation for bankruptcy purposes as early in a bankruptcy case as is practical. Trying to collect more than the collateral is worth to the customer can result in the customer returning the collateral. If collateral is returned, the credit due on the Dealer's claim is a matter for argument and will vary from case-to-case.

In any event, a deficiency claim is generally an unsecured claim. The vast majority of deficiency claims are general unsecured claims without priority. A very few will be treated as priority unsecured claims that should be paid 100¢ on the dollar of principal. Occasionally, a deficiency claim is treated as a secured claim. How a deficiency claim is determined to be a priority claim or entitled to treatment as a secured claim is beyond the scope of this discussion.

HOW TO ACTUALLY COLLECT A DEALER'S EXPENSES

Include them in a Proof of Claim, with proper documentation to discourage or defeat an objection to the expenses as part of the claim.

Make a deal with the customer. Most (perhaps I should say all) competent lawyers will encourage their debtor-clients to settle disputes, consistent with their clients' exposure to possible liability, and their clients' ability to pay.

Litigate: In a Chapter 13 case, or any other reorganization case, the most common ways to get expenses judicially recognized and ordered paid include an objection to a plan, a motion to modify the automatic stay, a motion for adequate protection, or by defending an objection to the Dealer's proof of claim, usually filed by the Debtor but sometimes by the Chapter 13 Trustee. This list is by no means exclusive.

In a Chapter 7 case, the most common ways to get paid include "doing nothing" (actually, monitoring the case and taking any necessary steps for a legal repossession if the customer stops paying), requiring and obtaining a reaffirmation agreement (and enforcing it, if necessary), or filing a motion to modify the stay or to force a trustee to "abandon" the collateral if it is not exempt.