

Bulletin to Virginia Mercury Dealers

As a Mercury dealer, you have undoubtedly already received written notification from Ford Motor Company that it is discontinuing the Mercury brand. The notification to you consists of four documents, all of which are dated June 2, 2010.

1. The opening letter introduces the package and confirms the June 2 announcement of the termination of Mercury. It notes that an offer, a formal notice of termination, and a settlement agreement and release are attached.
2. Notice of Termination. This is a notice under the Mercury dealer agreement notifying you that Mercury is being discontinued.
3. Detailed Offer. There is a monetary offer determined by a sales activity credit and a parts return credit. There is also a limited offer for assistance with signage.
4. Agreement and Release. There is an agreement that implements the offer, and the agreement contains a general release by the dealer of Ford Motor Company of claims relating to Mercury.

As a Mercury dealer, you may have many questions about how you should deal with this. What follows is a discussion of some questions we have received. This is not legal advice. This is simply background information to assist you in considering this package sent to you by Mercury in consultation with your legal adviser and financial adviser.

Questions

- How do I evaluate the sufficiency of this offer?

Each dealer must make his or her own determination concerning the sufficiency of the offer based on advice from the dealer's legal adviser and financial adviser. In the course of this document, we will discuss the applicable state law and some principles that will apply. However, each dealer must make his or her own decision, and the impact of this decision may be dramatically different for a Ford Lincoln Mercury dealer than it will be for a Lincoln Mercury dealer.

- Does the release in the agreement affect my rights as a dealer?

Absolutely. Except for payments due you for warranty work and sales incentives and except for indemnification in the event of lawsuits for product liability, your dealership releases all other claims against Ford Motor Company related to Mercury.

- I don't agree with the offer. What must I do?

As the first step, you must appeal to the Ford Policy Board. The Board's decision will be binding on Ford, but it will not be binding on you. You should not skip this step. Your dealer

agreement states that appeal to the Ford Policy Board is a necessary prerequisite to any other legal action you may take.

Because the decision of the Ford Policy Board is not binding on you, if you are still dissatisfied with the Policy Board decision, you can take further legal action, either with a request for a hearing to the Department of Motor Vehicles or by filing a legal action. If you fail to file for Ford Policy Board consideration, you give Ford a potential argument to challenge any legal action you take. Eliminate this potential roadblock by filing with the Policy Board.

- Isn't the period for requesting review by the Ford Policy Board limited?

Normally, under the Ford dealer agreement, one has fifteen days from notification to request Policy Board review. In this case, however, Ford issued a letter to all Mercury dealers dated June 8, 2010 clarifying that it will not require compliance with the fifteen day deadline because of the unusual circumstances. Ford has announced that it will permit dealers up to fifteen days before the date of termination of the brand (which is December 31, 2010) to file a request with the Ford Policy Board. Therefore, the notice must be filed no later than December 16, 2010. It is important to note, however, that Ford's decision to extend the deadline by which the appeal must be filed does not excuse a dealer who wishes to protest the offer from filing to contest the offer with the Ford Policy Board. You should file with the Ford Policy Board before seeking any other relief.

- Is the offer consistent with Virginia law?

Not necessarily.

Virginia Code section 46.2-1569(5c) provides substantial rights to a dealer when the dealer's franchise is terminated as a result of the cessation of a line-make as is being done by Ford Motor Company. In that circumstance, a dealer is entitled to the fair market value of its franchise in addition to compensation for the contribution of the line-make to payment of rent if the franchise is not the only one the dealer has, which is the case for both Ford Lincoln Mercury and Lincoln Mercury dealers. In addition, under Virginia Code 46.2-1559(5b), the dealer is entitled to return vehicles acquired within 18 months, is entitled to return parts and accessories, is entitled to fair market value for signs purchased at the request of the franchisor, is entitled to return special tools, and is entitled to the reasonable cost of transporting, handling, packaging and loading of the various returnable items.

The offer to Virginia Mercury dealers is certainly not calculated as specified by these sections of the Code. Dealers will have to look carefully at their rights under the Code and determine the compensation they believe is appropriate. Any challenge will have to be backed up by expert opinion of the value of rights lost by the dealer as a result of this broad termination. That will be a very important, and expensive, step in putting together any claim a dealer may have.

- Are there any other legal implications of this notice?

Yes. In addition to the state statutory rights, this notice is a breach of contract. Under the dealer agreement, Ford Motor Company has made a number of commitments to a dealer, including the

obligation to supply vehicles. Without breaching any of its commitments, a dealer will suffer damages as a result of the voluntary decision by Ford Motor Company to stop supplying vehicles and other benefits to Mercury dealers under the agreement. Because of the state law which provides that a dealership has the right to renewal of its dealer agreement unless there are grounds that would justify termination pursuant to state law, the dealer has an ongoing right to performance by the manufacturer. As such, Ford's decision is a breach of contract with potential damages for the dealers.

- Are the losses because of the termination of my Mercury franchise my only damages?

Not necessarily. There are Lincoln Mercury dealers who are seriously concerned about their ability to function as stand-alone Lincoln dealers. By taking this action, Ford Motor Company may have not just terminated the Mercury franchise, it may have constructively terminated the Lincoln franchise if the dealer cannot operate profitably as a stand-alone Lincoln dealer. There is a potential for additional damages as a result of that.

- What are my options beyond the Ford Policy Board?

A dealer that is dissatisfied with the results or the Ford Policy Board appeal can either file for a hearing with the DMV or can file a legal action.

Because of Virginia Code §46.2-1569(5b) and (5c), the Commissioner of Motor Vehicles has the authority to order Ford to pay a dealer as required by law. A dealer that prevails before the DMV is entitled to recover its attorneys fees in a legal action against Ford pursuant to Virginia Code §46.2-1573.01. To be safe, a dealer should provide notice to DMV of its request for a hearing (subject to a stay for the Ford Policy Board proceeding) within sixty days of the June 2 notice by Ford to Mercury dealers.

A dealer can also file a legal action directly in court, but the dealer may not be able to recover its attorney's fees if it does not first file for a hearing with DMV.

- How should I begin considering whether to challenge Ford's offer?

You should start by discussing the offer with your attorney and your financial adviser. If your financial adviser is not comfortable giving you an opinion concerning the damages you have suffered, you may also have to consult with an expert in dealer valuation. You must individually decide whether you are satisfied with Ford's offer (and you should understand the tax impact). Or do you prefer to engage Ford to seek further payments? In that case you must consider (1) the damages you will suffer as a result of the termination, (2) your chance of prevailing in a legal action, (3) the cost to you of taking legal action (and whether your attorneys' fees can be recovered), and (4) the time and attention you will have to give to any legal action.