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AUTO SUPPLIER NEWSLETTER

May 2007 Issue

Preference Action Filings on the Increase

Several of the important automotive bankruptcy cases reported on in this newsletter over the last several months are now moving into a new phase of activity. Several of the cases – Collins & Aikman, Meridian and Tower – are now old enough that the debtors or the creditors' trusts have filed preference recovery cases. Thus, a great number of creditors, who supported each of these companies during the time they were sliding into bankruptcy, are now being asked to return the payments received. As a result, we have included at the end of this month's update a discussion of the defenses available to defendants when sued in an avoidance action. Attorneys in Barnes & Thornburg LLP's Finance, Insolvency and Restructuring Department have devoted time to defending companies involved in preference actions throughout the country. For more information, contact any one of us at our offices listed to the right.

Materials on Insolvent Automotive Supplier Cases Still Available

The Finance, Insolvency and Restructuring Department has prepared materials for sellers of goods to and buyers of goods from insolvent auto suppliers -- both before these suppliers become subjects of bankruptcy cases and after they file bankruptcy petitions. These materials have been published by the American Bankruptcy Institute. Further information about the publication is available at www.abiworld.org.

About this Publication

Barnes & Thornburg LLP's Finance, Insolvency and Restructuring Department publishes this monthly summary of the history and current status of important bankruptcy cases in the automotive industry. We hope that you find this newsletter informative and helpful. If you have any comments on published articles or suggestions for future pieces, please contact any of us at our offices listed to the right. If you have colleagues you wish to receive this newsletter, please send their e-mail addresses to jennifer.whitley@btlaw.com.

For additional information, please contact:

Chicago, Illinois:
Deborah Thorne
Kevin Driscoll
312-357-1313

Grand Rapids, Michigan:
Patrick Mears
John Gregg
616-742-3930

Indianapolis, Indiana:
Alan Mills
Mike McCrory
Wendy Brewer
Mark R. Owens
317-236-1313

Washington, D.C.:
Richard Streeter
202-289-1313

South Bend, Indiana:
Mike Watkins
574-233-1171

Fort Wayne, Indiana:
Steve Fink
260-423-9440

Elkhart, Indiana:
Geoff Church
574-293-0681

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In re Dura Automotive Systems, Inc.,

Case No. 06-11202 (Bankr. D. Del.)

Background:

On October 30, 2006, Dura Automotive Systems, Inc. and 42 of its affiliates (collectively, "Dura") filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. The bankruptcy judge presiding over the jointly administered cases is the Honorable Kevin J. Carey.[1] The Court has set the next Omnibus Hearing date for May 23, 2007.

Update:

OFFICIAL COMMITTEE OF UNSECURED CREDITORS APPOINTED

An Official Committee of Unsecured Creditors was appointed on November 8, 2006. The Committee has established a web site where certain non-confidential and non-privileged information may be found, including certain pleadings, transcripts of public hearings and other general case information. The web site is http://www.ch11committees.com/dura.

MOTION TO AUTHORIZE KEY MANAGEMENT INCENTIVE PLAN

On May 8, 2007, the Bankruptcy Court entered an interim order authorizing key management incentive plan payments. The approval was made over the objection of the United Auto Workers but with the agreement of the Committee. The payments which are authorized provide an aggregate of $553,793 in junior participant interim payments for the period of January 1 through March 31, 2007 and $1,212,970 in senior participant interim payments for the periods of September 25 through December 31, 2006 and January 1 through March 31, 2007. The payments are tied to certain benchmarks having been met. Dura announced that it intended to file another motion for incentive payment authority for hearing on May 30, 2007. Although the Bankruptcy Code Amendments that became effective in October 2005 prohibited "key employee retention agreements," Dura argued and the Court accepted that "incentive" agreements were in the ordinary course of Dura's business and authorized under the Bankruptcy Code.

DURA REQUESTS ADDITIONAL TIME TO FILE LITIGATION AGAINST SECOND LIEN GROUP

Dura has disputed the validity of the second lien holders' liens since the commencement of this case. In the original debtor-in-possession financing order, Dura was granted 120 days to object to the second liens. Dura has requested and obtained extensions since the expiration of the first 120 days. The Bankruptcy Court granted an order on May 3, 2007 allowing Dura until July 24 to file a complaint to avoid or disallow the second liens. The Court in granting this order also stated that if on July 24, the order is not modified, Dura will have 15 days in which to file a complaint and if Dura does not file a complaint, the Committee will have the right to file a complaint 15 days thereafter. The effect of filing a complaint would be to seek an order avoiding the second liens as preferential or otherwise disallow the liens and possibly providing a greater distribution for unsecured creditors.

BAR DATE

The Bar Date was May 1, 2007.

CLAIMS TRADING

Dura claims are currently trading at approximately $.40.

1 On the petition date, the Bankruptcy Court entered an order for the joint administration of these cases under case number 06-11202.

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In re Delphi Corp.,

Case No. 05-44481 (Bankr. S.D.N.Y.)

Background:

On October 8, 2005, Delphi Corporation and several of its affiliates (collectively, "Delphi") filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York.[2] The bankruptcy judge presiding over the jointly administered cases is the Honorable Robert D. Drain.[3] Shortly after the petition date, the Official Committee of Unsecured Creditors was appointed by the United States Trustee. The Creditors Committee has retained counsel to represent it in these cases. No proposed disclosure statement or Chapter 11 plan of reorganization or liquidation has yet been filed in the case.

On March 31, 2006, Delphi filed a motion to (i) reject its collective bargaining agreements with its labor unions, including the UAW, and (ii) modify retiree health benefits. To date Delphi has been unsuccessful in its negotiations with its labor union, as well as General Motors Corporation, to reach a consensual resolution to the proposed rejection of the collective bargaining agreements and modification of retiree health benefits. A hearing on the motion has been adjourned indefinitely. Members of the United Auto Workers union have already voted to authorize a strike against Delphi, if necessary.

In the motion to reject the collective bargaining agreement and modify retiree health benefits, Delphi has disclosed that as part of its restructuring efforts, it intends to close or sell 21 of its 29 U.S-based manufacturing plants and cut approximately 80 percent of its U.S. hourly work force. Delphi also previously disclosed that it intends to reduce its supplier base from approximately 6,000 suppliers to only approximately 750 suppliers.

Delphi has filed a motion to reject over 5,000 unprofitable supply contracts with General Motors, for which a hearing has been adjourned indefinitely. The Creditors Committee has filed a statement with the Bankruptcy Court that supports Delphi's motion to reject the unprofitable contracts. The hearing on this motion has been adjourned to a date yet to be determined by the Bankruptcy Court.

On May 12, 2006, the Bankruptcy Court entered an order approving an hourly attrition agreement between Delphi, the UAW and General Motors. Under the plan, General Motors has agreed to assume the financial obligations related to the lump sum payments to be made to Delphi U.S. hourly employees who have accepted normal or voluntary retirement incentives and certain post-retirement employee benefit obligations related to Delphi employees. On June 9, 2006, Delphi announced a supplemental agreement with the UAW expanding existing retirement incentives and establishing a buyout program.

On June 29, 2006, the Bankruptcy Court authorized Delphi to enter into a special attrition program by and among Delphi, the IUE-CWA and General Motors, which is similar to the agreement Delphi reached with the UAW and General Motors. Under the program, some U.S. hourly employees were offered lump sum payments of $35,000 to retire.

According to various sources, the programs with the IUE-CWA and the UAW will cost Delphi and General Motors approximately $135 million each. Delphi is continuing discussions with the USW and other unions to offer similar attrition programs for their members. According to various sources, approximately 20,000 hourly workers have agreed to buyouts or early retirement under the attrition programs.

2 It should be noted that, to date, Delphi's foreign affiliates have not filed bankruptcy petitions or the equivalent thereof under section 304 of the Bankruptcy Code (which was replaced by Chapter 15 of the Bankruptcy Abuse and Consumer Protection Act of 2005), nor have they sought similar relief in foreign jurisdictions.

3 On the petition date, the Bankruptcy Court entered an order for the joint administration of these cases under case number 05-44481.

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In re Delphi Corp., continued

Delphi has reported that the acceptance rate for the buyouts and retirement incentives among UAW employees was 85 percent.

On July 28, 2006, the Creditors Committee filed a motion seeking the authority to prosecute Delphi's claims against General Motors. The motion alleges that Delphi is unlikely to pursue claims against General Motors for its improper spin-off of Delphi in order to divest General Motors of burdensome labor, pension and benefits liabilities. The Creditors Committee has suggested that Delphi lacks incentive to pursue these claims because it is currently negotiating various labor-related issues with General Motors, and, therefore, the Creditors Committee should be vested with standing to pursue the claims on behalf of Delphi's estate. The Official Committee of Equity Security Holders has estimated the aggregate amount of such claims to be as high as $26 billion. The Equity Committee has argued that the constituency of the Creditors Committee has a limited financial interest, and, therefore, should not be granted the authority to pursue claims on behalf of Delphi, as requested in the Creditors Committee's motion. A hearing on the motion has been adjourned indefinitely.

On December 7, 2006, the Bankruptcy Court approved procedures governing objections to claims. The order entered by the Bankruptcy Court requires that a party responding to any objection to its claim include certain criteria in its response. The order also scheduled certain hearing dates for resolving objections to claims.

On December 18, 2006, Delphi announced that Appaloosa Management LP, Cerberus Capital Management LP, Harbinger Capital Partners, Merrill Lynch & Co., and UBS Securities LLC have agreed to invest up to $3.4 billion in Delphi. The agreement is conditioned upon, among other things, resolution to disputes with both General Motors and Delphi's labor unions. The agreement includes a potential $4.5 billion dollar exit financing commitment by JP Morgan Chase Bank. The Bankruptcy Court approved the agreement on January 12, 2007, overruling the objection of Highland Capital, who had presented a competing proposal. The agreement, which is essentially the framework for approaching the remaining issues in Delphi's reorganization, is supported by General Motors, Delphi's labor unions, and the Creditors Committee.

Update:

Cerberus Capital Management LP is rumored to be considering abandonment of its plan to invest half of the $3.4 billion Delphi is seeking to exit bankruptcy after Cerberus and Delphi were unable to agree on Delphi's value once it loses Chapter 11 protection. However, there are several companies rumored to be willing to put up Cerberus' portion of the financing. Regardless of which private equity funds control Delphi, the current funds have stated in a U.S. Securities and Exchange Commission filing that they may sell more than 70 percent of the acquired share to additional investors.

The cause attributed to Cerberus' expected pull-out is the ongoing labor disputes with labor unions, most notably the UAW, which allow the private equity firm to back out if no agreement had been reached by mid-March. Delphi's union contracts are set to expire in September, and though the unions have threatened to strike, many industry analysts believe they have little leverage. Among the unions' largest concerns are pension obligations, which former parent GM is only obligated to guarantee until October (though GM has indicated it will not withdraw its support).

In mid-March, electronic switch maker InPlay Technologies announced it had sold its allowed $7.5 million claim for an undisclosed amount. InPlay received the general unsecured non-priority claim after the bankruptcy court approved a settlement in February.

Other recent developments include: (i) the filing of Delphi's 12th and 13th omnibus objections to claims; (ii) the entry of orders granting Delphi's

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In re Delphi Corp., continued

eighth, ninth, 10th and 11th omnibus objections to claims; (iii) the entry of orders granting Delphi's motion to extend time to assume or reject unexpired leases and remove actions; the entry of an order approving the sale of Delphi's brake and hose business.

In re Dana Corp.,

Case No. 06-10354 (Bankr. S.D.N.Y.)

Background:

On March 3, 2006, Dana Corporation and 40 of its U.S. subsidiaries[4] voluntarily filed for protection under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (Manhattan). Dana's European, South American, Asia-Pacific, Canadian and Mexican subsidiaries as well as DCC, Dana's lease financing subsidiary, were not included in the bankruptcy filing.

The United States Bankruptcy Court Judge that is presiding over Dana's bankruptcy cases is The Honorable Burton R. Lifland. The bankruptcy cases are being jointly administered under case number 06-10354. The United States Trustee appointed an Official Committee of Unsecured Creditors, an Official Committee of Equity Security Holders (disbanded effective as of February 9, 2007) and an Official Committee of Non-Union Retirees. As part of the "first day" orders entered in this case, the Bankruptcy Court entered an Order approving limited notice to parties-in-interest that requires that notices of certain of Dana's bankruptcy proceedings only be sent to parties on established service lists. Certain procedures are in place for parties-in-interest to be placed on these service lists. Additionally, certain "hotlines" have been established for both domestic and international vendors and employees/retirees.

According to Dana, the company intends to use the bankruptcy process to implement long-term solutions that will position Dana for a stable and profitable future. To accomplish this goal and operate the company, Dana has obtained and the Bankruptcy Court has approved debtor-in-possession financing in the amount of $1.65 billion (consisting of a $750 million revolving credit facility and a $900 million term loan). Some of the reasons given for the filing of the bankruptcy cases are a decline in revenues, decreasing market share and production levels of Dana's largest domestic customers, and increases in commodity and energy prices.

Update:

- On March 23, 2007, the Debtors filed the First Omnibus Objection of Debtors and Debtors-in-Possession Seeking to Disallow Certain Satisfied Claims Relating to Assumed Leases (Tier II - Books and Records). Objections were due by April 17, 2007. A hearing was held on May 2, 2007. On May 2, 2007, the Bankruptcy Court entered an Order disallowing certain satisfied claims related to assumed leases as requested in the objection.

4 The forty (40) related debtors are: Dakota New York Corp.; Brake Systems, Inc.; BWDAC, Inc.; Coupled Products, Inc.; Dana Atlantic LLC; Dana Automotive Aftermarket, Inc.; Dana Brazil Holdings I LLC; Dana Brazil Holdings LLC; Dana Information Technology LLC; Dana International Finance, Inc.; Dana International Holdings, Inc.; Dana Technology Inc.; Dandorr L.L.C.; Dorr Leasing Corporation; Echlin-Ponce, Inc.; EFMG LLG; EPE, Inc.; ERS LLC; Flight Operations, Inc.; Friction Inc.; Friction Materials Inc.; Glacier Vandervell Inc.; Dana Risk Management Services, Inc.; Dana World Trade Corporation; DTF Trucking Inc.; Hose and Tubing Products, Inc.; Lipe Corporation; Long Automotive LLC; Long Cooling LLC; Long USA LLC; Midland Brake, Inc.; Prattville Mfg., Inc.; Reinz Wisconsin Gasket LLC; Spicer Heavy Axle & Brake, Inc.; Spicer Heavy Axle Holdings, Inc.; Spicer Outdoor Power Equipment Components LLC; Torque-Traction Integration Technologies, LLC; Torque-Traction Manufacturing Technologies, LLC; Torque-Traction Technologies, LLC; and United Brake Systems Inc.

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In re Dana Corp., continued

- On March 23, 2007, the Debtors filed the Second Omnibus Objection of Debtors and Debtors-in-Possession Seeking to Disallow Certain Duplicate Claims (Tier I - Duplicate Claims). Objections were due by April 17, 2007. A hearing was held on May 2, 2007. On May 2, 2007, the Bankruptcy Court entered an Order disallowing certain duplicate claims as requested in the objection.
- On March 23, 2007, the Debtors filed the Second Omnibus Objection of Debtors and Debtors in Possession Seeking to Disallow Certain Amended and Superseded Claims (Tier I - Amended and Superseded). Objections were due by April 17, 2007. A hearing was held on May 2, 2007. On May 2, 2007, the Bankruptcy Court entered an Order disallowing certain amended and superseded claims as requested in the objection.
- On March 28, 2007, the Debtors filed a motion seeking approval of bidding and sale procedures in order to sell certain assets and stock relating to the Debtors' Fluid Products Group free and clear of liens, claims, interests and encumbrances. The sale motion also seeks authority for the Debtors to assume and assign certain executory contracts and unexpired leases in connection with the sale. Orhan Holding, A.Ş. has been identified as the stalking horse to purchase the European portion of the Fluid Products Group and certain assets of the North American segment of the Fluid Products Group for $70 million in cash (subject to certain adjustments) plus the assumption of certain liabilities. On April 10, 2007, the Debtors filed a revised set of bidding procedures for this sale. On April 12, 2007, the Bankruptcy Court entered an Order approving Bidding Procedures, which provide in part that: bids are due by May 29, 2007 at 12:00 p.m. (Prevailing Eastern Time); objections to the sale are due by May 29, 2007 at 4:00 p.m. (Prevailing Eastern Time); an auction is scheduled for June 4, 2007; and the hearing to approve the sale is scheduled for June 6, 2007 at 10:00 a.m. (Prevailing Eastern Time).
- On March 28, 2007, the Debtors filed their Monthly Operating Report for the month of December 2006 indicating monthly disbursements totaling $492 million and a monthly net loss of $188 million.
- On March 28, 2007, the Debtors filed their Monthly Operating Report for the month of January 2007 indicating monthly disbursements totaling $484 million and a monthly net loss of $29 million.
- On March 29, 2007, Dune Capital c/o Dune Capital Management LP filed a motion for entry of an order approving specified information blocking procedures and permitting trading of the securities of and claims against the Debtors upon establishment of a screening wall. April 11, 2007 was the deadline to object to this motion and a hearing was scheduled for April 25, 2007. An Order has not yet been entered with respect to this motion.
- On February 13, 2007, the Debtors filed a motion to terminate unvested non-pension benefits of non-union retirees and non-union active employees. On March 30, 2007, the Bankruptcy Court entered an Order authorizing the Debtors to terminate unvested non-pension benefits of non-union active employees. Pursuant to the Order, the Debtors were authorized to terminate all non-pension retiree benefits of non-union active employees that have not retired on or before March 31, 2007, effective as of April 1, 2007. On May 7, 2007, the Debtors filed a notice seeking approval of a stipulation between the Debtors and the Official Committee of Non-Union Retirees concerning modifications to the non-pension retiree benefits of non-union retirees. Objections to this stipulation are due by May 18, 2007 at 4:00 p.m. (Prevailing Eastern Time) and the Order approving the stipulation will be presented to the Bankruptcy Court for approval on May 21, 2007 at 10:00 a.m. (Prevailing Eastern Time).

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In re Dana Corp., continued

- On March 30, 3007, the Debtors filed a notice of proposed assumption and assignment of additional agreements in connection with the sale of the Debtors' Engine Products Group, which was approved by an Order entered on April 19, 2007.
- On March 30, 2007, the Debtors filed their Monthly Operating Report for the month of February 2007 indicating monthly disbursements totaling $421 million and a monthly net loss of $26 million.
- On April 10, 2007, the Bankruptcy Court entered an order approving a stipulation among the Debtors and the Official Committee of Unsecured Creditors regarding the Debtors' April 13, 2007 pension funding contribution and partial September 14, 2007 pension funding contribution. In sum, the Official Committee of Unsecured Creditors asserted that post-petition pension fund contributions on account of pre-petition services are not required under the Bankruptcy Code. On the other hand, the Debtors desired to make the contributions. After reserving their respective rights, the parties agreed that the foregoing contributions would be made.
- On April 13, 2007, the Debtors filed an Agreed Order approving a settlement agreement between the Debtors and the International Association of Machinists and Aerospace Workers, which was approved by an Order entered on April 27, 2007.
- On April 16, 2007, the Debtors filed a notice of the proposed sale of the assets related to the Advanced Pumps Engineering Group to Pierburg, Inc. Objections to this motion were due by April 26, 2007 at 5:00 p.m. (Prevailing Eastern Time).
- On April 25, 2007, the Bankruptcy Court entered an Order authorizing the Debtors to pay certain secured pre-petition real and personal property taxes.
- By Order entered on April 26, 2007 and Written Opinion/Memorandum Decision signed on April 19, 2007, the Bankruptcy Court granted Dana's motion for an order determining that the reclamation claims asserted against Dana had no value. This Order has been appealed by numerous parties-in-interest.

The Bankruptcy Court held that the pre-petition credit facility which was not less than $381 million at the petition date was paid off by the post-petition credit facility. Both the pre-petition and the post-petition facilities were secured by the same liens in substantially all of Dana's assets. The largest of the reclamation claims asserts a liability totaling approximately $9.6 million. Dana asserted that because the pre-petition indebtedness exceeds the value of each individual reclamation claim, the reclamation claims were valueless. Dana also asserted that the reclamation claims were valueless because the goods subject to reclamation had been disposed of as part of the transaction to repay the pre-petition lienholder's claims. The reclamation creditors argued (1) that the reclamation rights were subject only to the pre-petition lien; (2) that the pre-petition debt was satisfied from a source other than the reclaimed goods; and (3) therefore, the reclaimed goods were liberated from the prior lien and reclamation claims should be valued in full.

The Bankruptcy Court held that the amended reclamation section of the Bankruptcy Code was intended to be a limitation on avoiding powers. While a trustee cannot avoid state law rights of reclamation, the amendments did not create a federal right of reclamation as some of the creditors argued. In addition, the Bankruptcy Court rejected the arguments of many of the creditors that the reclamation rights were not extinguished by the existence of prior liens but were only rendered subordinate to the prior lien and that the pre-petition lenders were oversecured and thus the reclamation claimants should recover from any excess in value. Reclamation is an *in rem* remedy and reclaiming creditors do not have a right to compel a lienholder to satisfy its claim from other collateral. Based upon this discussion, the Court found

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In re Dana Corp., continued

the reclamation creditors (those holding claims for goods delivered during the 45 - 21 days prior to the petition date) without value.

- On May 3, 2007, the Debtors filed a motion to approve alternative dispute resolution procedures with respect to the resolution of certain pre-petition claims. Objections to this motion were due by May 16, 2007 at 4:00 p.m. (Prevailing Eastern Time) and a hearing is scheduled for May 23, 2007 at 10:00 a.m. (Prevailing Eastern Time).
- On May 4, 2007, the Debtors filed their ninth omnibus objection to reject certain executory contracts and unexpired leases. Objections to this motion are due by May 18, 2007 at 4:00 p.m. (Prevailing Eastern Time) and a hearing is scheduled for May 23, 2007 at 10:00 a.m. (Prevailing Eastern Time).
- On May 8, 2007, the Debtors filed a motion seeking authority to (i) repurchase plants located in Stockton, California and Danville, Kentucky from nondebtor Dana Commercial Credit Corporation ("DCCC") and (ii) terminate related leases held by DCCC concerning the two plants. This repurchase is part of DCCC's winddown process. Objections to this motion are due by May 18, 2007 at 4:00 p.m. (Prevailing Eastern Time) and a hearing is scheduled for May 23, 2007 at 10:00 a.m. (Prevailing Eastern Time).
- On May 11, 2007, the Debtors filed their Monthly Operating Report for the month of March 2007 indicating monthly disbursements totaling $480 million and a monthly net loss of $37 million.
- The next omnibus hearing in the Debtors' bankruptcy cases is scheduled for May 23, 2007 at 10:00 a.m. (Prevailing Eastern Time) at the United States Bankruptcy Court for the Southern District of New York.
- General Unsecured Claims are reportedly trading as high as 87 percent in this case.

In re Tower Automotive, Inc.,

Case No. 05-10578 (Bankr. S.D.N.Y)

Background:

On February 2, 2005, Tower Automotive and 25 of its related entities ("Tower") filed voluntary petitions under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. The bankruptcy judge presiding over the jointly administered cases is the Honorable Allan L. Gropper. The Official Committee of Unsecured Creditors (the "Committee") was appointed by the United States Trustee and has retained counsel to represent it in these cases. An Official Committee of Retired Employees has also been appointed.

Update:

FILING OF PLAN AND DISCLOSURE STATEMENT

Tower and its related entities filed a plan and disclosure statement on May 1, 2007. The Bankruptcy Court has extended the Debtors' exclusive period until June 11, 2007. Tower has asked the Bankruptcy Court to set a confirmation hearing for July 11, 2007.

SUMMARY OF CLAIMS AGAINST TOWER

To date, approximately $10.8 billion in general unsecured and approximately $1.1 billion in secured and priority proofs of claim have been filed against the Tower estates and Tower has objected to approximately $2 billion of such claims on the grounds that they should be reduced and allowed or reclassified, disallowed or reclassified. To date, approximately $1.3 billion in general unsecured claims and approximately $550 million in secured and priority claims have been determined as disallowed claims or

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In re Tower Automotive, continued

withdrawn. Claim objections remain pending with respect to approximately $225 million in general unsecured and approximately $45 in secured and priority claims.

The plan provides for payment in full of secured claims, including obligations under the debtor-in-possession facility as well as payment in full of administrative and priority claims. The plan also provides for assumption of the company's pension plan. The payment to unsecured creditors will come from the proceeds of an "Unsecured Creditors Trust" which will be established on the effective date of the plan. The Creditors Trust will contain $12 million initially plus the proceeds of the avoidance actions currently being prosecuted. According to the disclosure statement filed on May 1, unsecured creditors with claims against R.J. Tower are estimated to recover 0.3 percent and all other general unsecured creditors are expected to recover an estimated >0.1 percent.

Tower and its related entities will ask the Court to substantively consolidate certain of their assets and liabilities. The substantively consolidated debtors do not include Tower Automotive, Inc. or R.J. Tower or the International Holding Company Debtors (Tower Automotive International, Inc. and Tower Automotive International Holdings Inc.). This means that as Tower emerges from its liquidation, all claims against any of the substantively consolidated entities will be considered as against one large consolidated entity, and all claims against creditors will be consolidated as well. Although the plan does not state it, presumably defenses to avoidance actions would include new value for any of the substantively consolidated entities.

The basis of the plan is the proposed sale of substantially all the assets to Cerberus Capital Management L.P. described below.

PROPOSED SALE OF SUBSTANTIALLY ALL ASSETS

On April 6, 2007, the Bankruptcy Court entered an Order authorizing entry into a "Restructuring Term Sheet" with Cerberus Capital Management L.P. to acquire substantially all of the assets of Tower. The term sheet which provides a general description of the sale contemplated, provides for value to the Tower estate of approximately $1 billion. Tower estimates that this value is adequate to pay Tower's pre-petition and post-petition secured creditors, including second lien lenders as well as to provide sufficient funds to confirm a Plan. The offer provides for assumption of Tower's pension plans, which have minimum funding commitments of approximately $40 million. The Term Sheet also provides $10 million in cash for unsecured creditors. Avoidance actions are not being sold. In addition, the Term Sheet provides a commitment to fund the costs and expenses of the unsecured creditor liquidating trust in an amount not to exceed $2 million.

The proposed sale will be subject to higher and better bids. On April 6, the Bankruptcy Court approved a marketing protocol under which Tower will auction itself to eligible bidders. All other bids will match the Term Sheet with Cerberus but will be for overbid amounts of at least $10 million initially and thereafter for at least $5 million over the previous bid. The auction will be conducted on June 25, 2007 if other qualified bidders emerge.

CLOSURE OF KENDALLVILLE, INDIANA PLANT

On April 26, 2007, the Court entered an Order approving the Transition Agreement with the UAW for the closure of the Kendallville Plant. Tower expects that production will cease in June 2007 and that minimal wind-down activities will continue through August 2007. The Transition Agreement with the Union was previously ratified by the Union membership.

TOWER FILES MORE THAN 400 ADVERSARY PROCEEDINGS TO AVOID AND RECOVER IN EXCESS OF $260 MILLION

Tower filed in excess of 400 adversaries during the months of January and February 2007 seeking to avoid alleged preferential transfers. It has already

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In re Tower Automotive, continued

entered into a number of tolling agreements for other adversaries that otherwise would have been required to be filed prior to the running of the two-year statute of limitations. The Scheduling Order provides that no defendant will be required to appear at the initial pretrial conference unless the defendant objects to the "Streamlined Procedures". The Order also states that the mandatory meeting before scheduling conference and discovery plans are set will not be required in any of the avoidance action complaints; certain required disclosures will not be required until after the date an answer is filed unless extended by agreement of the parties; and no motions may be made in the avoidance actions without prior approval from the Court. The procedures provide certain guidelines for settlement approval allowing Tower to settle matters under $1 million with notice to the Committee and other parties. Settlements will be approved unless the Court grants an objection to the settlement.

COMMITTEE APPEALS UNION SETTLEMENTS

Tower settled with its retired Milwaukee workers and many of its other retired workers. The settlements were approved by Judge Gropper. Each of the settlement orders were appealed by the Committee. The appeals have been consolidated. In December 2006, the District Court affirmed the Bankruptcy Court Orders approving the settlements. The Committee filed an appeal to the Second Circuit Court of Appeals.

BAR DATE

The Bankruptcy Court previously entered an order setting May 31, 2005 as the bar date for all non-governmental claims.

Currently there is very little interest in purchasing Tower unsecured claims.

In re Collins & Aikman, Inc.,

Case No. 05-55927 (Bankr. E.D. Mich.)

Background:

On May 17, 2005, Collins & Aikman, Inc. and several of its affiliates (collectively, "Collins & Aikman") filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Michigan. The bankruptcy judge presiding over the jointly administered cases is the Honorable Steven W. Rhodes.[5] Shortly after the petition date, the Official Committee of Unsecured Creditors was appointed by the United States Trustee. The Creditors Committee has retained counsel to represent it in these cases.

The Creditors Committee has filed a motion for the entry of an order allowing the Creditors Committee to conduct an examination of Collins & Aikman's largest customers, Ford Motor Company, General Motors Corporation, and DaimlerChrysler AG. According to the Creditors Committee, Ford, General Motors and DaimlerChrysler "unlawfully coordinated" their behavior both prior and subsequent to Collins & Aikman's bankruptcy. The Creditors Committee is seeking information related to the terms and conditions of contracts with Ford, General Motors and DaimlerChrysler, especially whether Collins & Aikman received reasonably equivalent value in exchange for the contracts. The hearing on this motion has been rescheduled to an as of yet undetermined date.

In a separate filing, the Creditors Committee has requested approval to investigate the actions of Ford, General Electric Capital Corporation and General Electric Capital De Mexico in relation to GE Capital De Mexico's efforts to foreclose on the assets of Collins & Aikman Automotive Hermosillo, a non-

5 On the petition date, the Bankruptcy Court entered an order for the joint administration of these cases under case number 05-55927.

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In re Collins & Aikman, continued

debtor affiliate of Collins & Aikman. The Hermosillo facility is Collins & Aikman's largest revenue producing plan, with approximately $300 million in revenue each year. The proposed investigation would focus on whether Ford encouraged GECC to initiate foreclosure proceedings as a result of the default that occurred under credit facilities when Collins & Aikman filed for bankruptcy. The hearing on this motion has been rescheduled to an as of yet undetermined date.

General Motors has filed a motion for relief from the automatic stay to obtain possession of tooling, and a motion for relief from the stay to effectuate setoff, which has yet to be scheduled for hearing.

On December 20, 2006, Collins & Aikman announced that it has entered into an agreement with major automakers that requires those automakers to expedite payments and support Collins & Aikman's ongoing efforts to liquidate its assets.

In order to facilitate the sale of assets through a plan of liquidation, the Bankruptcy Court approved an arrangement between Collins & Aikman and General Motors, Ford, DaimlerChrysler and Auto Alliance, Inc. (a joint venture between Ford and Mazda) to allow Collins & Aikman to continue operating its plastics and convertibles unit while the businesses are marketed.

Collins & Aikman recently stated that it planned to close plants located in Americus, Georgia, Dover, New Hampshire, Farmington, New Hampshire, Gananoque, Ontario and Scarborough, Ontario by the end of March. Closing these plants will eliminate approximately 1,100 jobs.

Update:

Collins & Aikman's liquidation took another step forward in early April as Cadence Innovation agreed to purchase Collins & Aikman's Plastics Business, provided several approvals are received. A hearing on the sale is scheduled for May 21, 2007. Numerous creditors have filed objections to the proposed sale. In late April, International Automotive Components Group made a $134 million deal to acquire Collins & Aikman's carpet and acoustics division. In addition, the court has approved many sales of de minimis assets to third parties.

In mid-April, Collins & Aikman and the Pension Benefit Guaranty Corp. agreed to $96 million settlement that relieves Collins & Aikman of its pension plan payment obligations. While still requiring approval based on the reorganization plan confirmation, Collins & Aikman's Canadian properties no longer face potential liens from the PBGC.

Though not directly related to the bankruptcy proceedings, Collins & Aikman has also drawn attention for the criminal charges brought against former chief executive and Reagan budget director, David A. Stockman. After a two-year investigation, Stockman has been indicted by the U.S. Attorney and Securities and Exchange Commission with making incomplete disclosures and overseeing improper accounting practices. In addition, Collins & Aikman workers took control of a plant in Toronto in early April during a protest over severance pay, in part to prevent equipment from being removed.

Other recent developments include: (i) the filing of Collins & Aikman's 14th omnibus objections to claims; (ii) the entry of orders granting the 13th omnibus objections to claims; (iii) the entry of an order extending the deadline to vote on and object to the debtor's Chapter 11 Plan; and (iv) the filing for protection from creditors by Collins & Aikman's Canadian unit under the companies' Creditors Arrangement Act.

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EDITOR'S NOTE:

In the last few weeks, hundreds of preference actions have been filed by representatives of the respective estates of Meridian, Tower Automotive and Collins & Aikman. In fact, over a period of several days, preference actions were filed in the Collins & Aikman case at a rate of one complaint per minute. Therefore, we thought it would be helpful to review some of the basic defenses to preferential transfers, as discussed below.

For more information on the preference actions filed in Meridian and Collins & Aikman and the defenses to those actions, please contact the following:

John T. Gregg
Patrick E. Mears
Grand Rapids, Michigan
(616) 742-3930
jgregg@btlaw.com
pmears@btlaw.com

Deborah Thorne
Chicago, Illinois
(312) 214-8307
dthorne@btlaw.com

Mark Owens
Indianapolis, Indiana
(317) 236-1313
mowens@btlaw.com

PREFERENCE OVERVIEW

Section 547(b) of the Bankruptcy Code sets forth the elements of a preferential transfer. In order for a transfer during the Preference Period to constitute a preferential transfer, and thus be recoverable by the plaintiff, the plaintiff must demonstrate that the payment was the transfer of property of the debtor (i) which occurred within ninety (90) days before the bankruptcy filing (or one year if it is to an insider) (ii) to or for the benefit of a creditor (iii) on account of an existing debt (iv) while the debtor was insolvent and (v) that allows the creditor to receive more than it would have received in a Chapter 7 liquidation. If a pre-petition transfer does not meet each of these basic criteria, the plaintiff should not file a complaint to recover the amount transferred.

1. Partial Defenses to Preference Actions

In addition to the "complete" defenses set forth below, section 547(c) of the Bankruptcy Code provides certain statutory, "partial" defenses. The first two defenses, the "ordinary course" defense and the "contemporaneous exchange for new value" defense, exempt certain types of transfers from the definition of section 547(b). The third defense, the "new value" defense, permits a creditor who received a preferential transfer to mitigate the amount of its exposure by offsetting the value of goods or services provided to the debtor after transfer of the preferential payment.

(a) Payment made in the ordinary course of business[6]

The Bankruptcy Code does not penalize creditors who receive allegedly preferential transfers if those payments were made according to the "ordinary course of business or financial affairs." While the phrase "ordinary course" appears, on its face, to be a relatively simple standard to establish, characterizing a payment as "ordinary" pursuant to the Bankruptcy Code is deceptively difficult.

Specifically, the Bankruptcy Code requires that three elements be established in order to meet the requirements of the ordinary course defense. First, the payment must be for a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee. Simply stated, this element requires that the debt was incurred due to a type

6 Because Meridian, Collins & Aikman and Tower filed for bankruptcy prior to October 17, 2005, the BAPCPA amendments to the ordinary course of business defense are inapplicable. However, in bankruptcy cases filed on or after October 17, 2005, the BAPCPA amendments will apply.

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of transaction in which both the debtor and creditor are commonly engaged. Of the three elements required to prove the ordinary course defense, this element is often the easiest to demonstrate.

Second, the payment must be made in the ordinary course of business or financial affairs between the instant debtor and creditor. This is often referred to as the "subjective component." The basis for proving this element requires the creditor to demonstrate some consistency with other business transactions between itself and the debtor. However, a precise legal test which can be applied to determine whether payments were made in the ordinary course of business does not exist. Rather, courts must engage in "a peculiarly factual analysis." Generally, a comparison of the past payment history and the timing of the preferential transfers between the debtor and creditor will suffice to demonstrate that the alleged preferential payments were similar to those made prior to the preference period. Factors that militate against a finding of ordinary course pursuant to the subjective component include untimeliness of payment, change in method of payment (i.e. by cashiers check rather than corporate check) and payments made pursuant to unusual economic pressure and unusual debt collection efforts or payment practices.

Third, the preferential payments must be made according to ordinary business terms. This requirement is commonly referred to as "objective component" of the ordinary course defense. This component requires that the timing of allegedly preferential payments be similar to the timing of payments made within the relevant industry. Courts have explained the objective component of the ordinary course defense as referring to:

> the *range* of terms that encompasses the practices in which firms similar in some general way to the creditor in question engage, and that only dealings so idiosyncratic as to fall outside that broad range should be deemed extraordinary and therefore outside the scope [of the objective component].

Although the relevant industry is a critical consideration, the more "cemented (as measured by its duration)" the pre-preference period relationship between the debtor and creditor, the more the creditor will be allowed to vary its credit terms from the industry norm, yet still satisfy the objective component. For example, if suppliers in the industry typically receive payment by check from their vendors, a debtor's preference period payment by cashiers or certified check will be viewed as outside the industry standard, unless the creditor can prove its relationship with the debtor is so firmly established as to provide some leeway from the objective component.

Creditors should not immediately be deterred by their perceived inability to satisfy a precise industry standard, especially with respect to the range in which payments within the industry are typically made. The objective component allows creditors "considerable latitude in defining what the relevant industry is, and even departures from that relevant industry's norms which are not so flagrant as to be 'unusual' remain within [the industry standard's] protection."

(b) Contemporaneous exchange for new value

The Bankruptcy Code also recognizes that vendors and service providers may demand that a company make immediate payment for goods received, especially in instances where the vendor has reason to doubt the purchaser's ability to pay. The Bankruptcy Code exempts these transactions from subsequent attack as preferential transfers in order to encourage vendors to deal with struggling companies so that the reorganization process will not be preempted.

In order to establish a valid contemporaneous exchange for new value defense, a creditor must extend new value (i.e., new goods or services) to the debtor. Second, the parties must intend that the new value be contemporaneous with the receipt of the payment. Finally, the exchange must be "substantially" contemporaneous. Therefore, a transaction that was intended to occur contemporaneously but because of some form of inadvertence or unanticipated delay does not occur is protected by the fact that it was *intended* as contemporaneous and was *substantially* contemporaneous,

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but for the *unintended* delay.

The most obvious example of a contemporaneous exchange is payment for goods by "cash on delivery." However, even this simple example becomes somewhat convoluted when the debtor and creditor agree to a transaction, but, for example, the debtor forgets his money. In this situation, the parties intended for the consideration on both ends of the transaction to be contemporaneous, but an unforeseen event prevented the transaction from being truly contemporaneous. If only a reasonable time expires before the debtor produces payment (i.e., a few hours or one day), courts are likely to find that the transaction was substantially contemporaneous and therefore within the realm of the defense. However, a delay of several weeks is not likely to be deemed substantially contemporaneous.

(c) Supplier provided subsequent "new value"

The value of any goods or services the defendant provided to the debtor *after* receipt of the apparent preferential transfers provides another partial defense and is an effective tool to reduce a defendant's alleged exposure. This defense is commonly referred to as the "new value" defense because, although the creditor may have received a preferential payment, the creditor provided subsequent new value after receipt of such payment. Like the "contemporaneous exchange" defense, the "new value" defense encourages suppliers to continue to work with troubled companies by protecting the continuing supply of certain goods and services.

2. Complete Defenses to Preference Actions

(a) Defendant's contract was assumed

Payments that were made by the debtor pursuant to a contract that was later assumed by the debtor cannot be recovered by the plaintiff. The rationale is straightforward: when a debtor assumes a contract, it must cure any defaults under that contract by paying all amounts due, including pre-petition arrearages. Therefore, even payments that meet the statutory definition of a preferential transfer would have had to be paid by the debtor upon assumption and cannot be recovered.

Contracts are often assumed by the debtor in order to continue its post-petition operations or by the debtor at the direction of the purchaser of the debtor's assets. In either instance, the assumption of the contract provides the creditor whose contract is assumed a complete defense to any subsequent preference attack. It should be noted, however, that although one of the contracts between the debtor and the defendant is assumed, alleged preferential transfers made under non-assumed contracts will not receive the benefit of this defense.

(b) Alleged preference not made for the benefit of the defendant

The plaintiff cannot recover payments that were made by the debtor to the creditor for the benefit of third parties. Another way of stating this defense is that the plaintiff cannot recover from the creditor if it is not the initial transferee, but merely a conduit through which some third party receives the benefit of the transfer. In this instance, the third party, not the conduit initial transferee, is the proper defendant for the preference action.

This defense often comes into play when the creditor is a broker or an insurance administrator. Brokers are often paid the full amount of the goods and services which a third party arranged to provide to the debtor. The plaintiff, having failed to adequately investigate the transaction with its client, may mistakenly allege that the entire amount of such transfers are recoverable from the conduit initial transferee.

(c) Debtor was not insolvent at the time of the alleged preference

According to the Bankruptcy Code, a payment that benefits a creditor is not considered a preference unless the debtor was insolvent at the time the transfer was made. Unfortunately for creditors, a very burdensome presumption exists in favor of the debtors which provides that a debtor is presumed insolvent during the preference period. If a creditor who is alleged to have received certain preferential payments presents

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sufficient evidence of the debtor's solvency during the preference period, the debtor must then prove that it was in fact insolvent at the time alleged preferential payments were made.

Proving that the debtor was not insolvent during the preference period is typically an extremely time consuming and expensive process. Creditors considering whether to contest solvency may wish to initially review the debtor's financial statements or SEC filings if available. A creditor seeking to contest solvency may wish to approach other preference defendants about potentially sharing the cost of analyzing whether the debtor was insolvent during the preference period.

(d) Alleged preference made pursuant to statutory lien

When a debtor makes an alleged preferential payment in order to free itself from a statutory lien asserted by the lienholder, the debtor is not entitled to recover that payment. A statutory lien is a lien arising solely by law, but does not include security interests or judicial liens. The most common example of a statutory lien is a mechanic's lien, where certain improvements are made by the creditor. In order to ensure payment, the creditor is entitled to assert a statutory lien over the property by keeping possession of the property until payment is remitted.

Creditors asserting statutory lien-based defenses must prove the lien had value at the time the payment in satisfaction of the lien was made. Therefore, as long as the alleged preferential payment in satisfaction of the lien is greater or equal to the value of the lien, the creditor will be entitled to a complete defense to the complaint to avoid the preferential transfers.

(e) Alleged preference made from funds "earmarked" for creditor

The "earmarking doctrine" is not a defense listed in the Bankruptcy Code. Nonetheless, it is commonly recognized by bankruptcy courts as a valid defense to alleged preferential transfers. The earmarking doctrine applies where a third party lends money to a debtor for the specific purpose of paying a selected creditor. The payment is actually funded by a new creditor loaning money to pay the old creditor.

The doctrine may only be successfully asserted, however, where the debtor is merely holding the money in trust or acting as a conduit for the money to pass through to the creditor. If the debtor is allowed control over disbursement of the funds, the defense is defeated. Where application of the earmarking doctrine is appropriate, the old creditor will not suffer liability from a preference. However, the new creditor (the creditor that loaned the money to the debtor) will only have a claim against the debtor's estate.

3. Conclusion

Early and effective communication with the plaintiff regarding the creditor's defenses to the preference action is essential. While the example provided in this article is straightforward, the application of these defenses can be complicated in practice. An accurate analysis of defenses, articulately presented to the plaintiff, can go a long way toward settling the preference action with minimum legal expense. Failure to present these defenses or, worse yet, misapplying the defenses, will only serve to confuse the issues, delay resolution of the dispute, and increase legal and administrative costs.