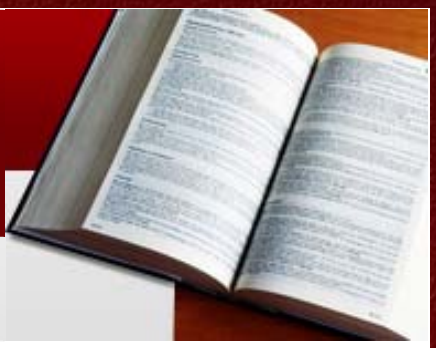
The Bankruptcy Weekly

July 1, 2009



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Dear Aaron,

The auto industry continues to dominate the business news, and the NADC continues to deliver relevant news directly to our members.

We are indebted to Venable, LLP for providing good, solid, timely articles every week to The *Bankruptcy Weekly*.

Sincerely,

Rob Cohen
President
National Association of Dealer Counsel

In This Issue

Product Liability Assumed

by Aaron Jacoby, Esq. and Larry Katz, Esq.

GM's recent filings indicate that it has agreed to assume responsibility for product liability claims for vehicles sold pre as well as post-BK after it emerges from bankruptcy as a new company. Apparently, the resolution of this issue was a result of negotiations with the several states attorneys general who filed objections in the GM bankruptcy. Our view is that this is an important issue for redeveloping consumer confidence in "Reinvented GM". Imagine the consumer confusion and disgust with a manufacturer that would not stand behind its product?

Of course, GM initially pursued a harder line, relying on provisions of the Bankruptcy Code that provide greater successor liability protection than is normally available under common law. Section 363(f) of the Bankruptcy Code provides that in certain circumstances, the debtor may sell its assets "free and clear of any interest in such property..." Although this provision, by its express terms is limited to "interests," a term that the Code does not even define, sale orders entered pursuant to Section 363(f) routinely provide that the debtor's property is being sold free and clear of creditor claims, including product liability claims of consumers. Several circuit courts, including the Fourth Circuit in *In re Leckie Smokeless Coal Co.*, 99 F.3d 573 (4th Cir. 1996), *cert. denied sub nom., United Mine Workers of America 1992 Benefit Plan v. Leckie Smokeless Coal Co.*, 520 U.S. 1118 (1997), the Third Circuit in

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United States v. Knox-Schillinger (*In re Trans World Airlines, Inc*.), 322 F.3d 283 (3rd Cir. 2003), and the Eighth Circuit in *Cibulka v. Trans World Airlines, Inc.*, 92 Fed. Appx. 366, 368 (8th Cir. 2004), have upheld such an expansive reading of Section 363(f) when the claims themselves were directly tied to the debtor's use of the assets being sold.

As for previously filed and/or litigated product liability claims, GM filings indicate that such claims will not be assumed and consumers/plaintiffs in those actions will be left to fend for themselves against Old GM. The court is likely to allow GM to leave such claims behind and emerge as "Reinvented GM" with a clean slate. (Chrysler left both pre and post bankruptcy filing product liability claims and unwanted dealers with its old estate.)

Objections by consumers regarding a purported $1.25 billion in personal injury and product liability claims remain to be heard. The likelihood of success may ultimately rest on the success of GM's plan of reorganization. Unlike section 363(f), section 1141(c) of the Bankruptcy Code specifically provides for the transfer of assets free and clear of claims as well as interests. Thus, there have been numerous chapter 11 cases in which all product liability claims have been effectively cut off. Usually, the success of such efforts turns on the amount of notice provided to the pool of potential litigants, both known and unknown, and is largely determined on principals of due process.

But for the bankruptcy proceedings and the protection provided by sections 363(f) and 1141(c) of the Bankruptcy Code, it would be hard to imagine how Reinvented GM could limit its exposure to products liability claims under traditional common law concepts of successor liability, and there is no doubt that dealers will be affected, both directly and indirectly, by the level of responsibility that new GM ultimately assumes for such claims.

Cash for Clunkers

by Aaron Jacoby, Esq.

Last week, we wrote about the government's "Cash for Clunkers" Bill, asking "will Cash for Clunkers generate cash for dealers?" This week, many dealers eager for sales are asking how to implement the program and get the cash RIGHT NOW, or at least by July 1st. They are forgetting or ignoring the fact that the NHTSA will not issue rules regarding the program until July 24th, which may come later than usual this year if there are any delays in writing the rules. As of the writing of this piece, the hotline clerk indicates that there are more unknowns than knowns at this time. As a primary example, if a form or format will be required for the clunker trade-in, it is not yet developed and the elements are not known. How will a clunker's scrap value be determined? What evidence will be required to be submitted to confirm the purchase and the scrapping of the clunker?

It is certainly possible for a dealer to move forward on July 1st using the NADA chart summary of the law's expected elements. However, dealers will need to be aware that they are running ahead of the crowd at their own risk and that risk is measured at $3,500 or $4,500 per vehicle. Dealers may respond that the current business crisis requires that greater risk be taken to get ahead of competitors to stay afloat in a down market. Yet, at a minimum, dealers will need to engage in a careful weighing process and carefully set forth the known elements of the program and ensure that their employees follow the dealer's set of rules verbatim. (Imagine the lawyer's response to the client's request to draft those rules.) Let's hope that dealers running ahead of the game are not running on empty when it comes time to turn in the clunkers, or provide evidence that the clunkers have been scrapped. Of course, the more prudent course is for a dealer to follow the lawyer's advice, which will be to avoid the risk and wait for the rules of the road.

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This edition of the Bankruptcy Weekly is sponsored by:

VENABLE® LLP

Dedication to the automotive industry during difficult times.

With Chrysler and General Motors in bankruptcy, the need for competent bankruptcy and litigation counsel - with a focus on the auto industry - is increasing. Venable's national team has worked in the automotive industry for many years and is providing insight in identifying

Time to Review Arbitration Agreements
by Rebecca Aragon, Esq.

Uncertain times may call for careful consideration of the legal issues involved with closing of a business. If your company is winding down or ceasing operations, bear in mind that your company, including its owners, may not be immune from employee suits post-closure. Your company should explore implementing a mandatory arbitration agreement or, to the extent your company already has an arbitration agreement, updating it to ensure that it remains enforceable. Arbitration agreements are excellent risk-reduction vehicles for some employers. Arbitration of employment-related disputes has many advantages. It is often a faster, cheaper and more confidential way to resolve a dispute. Also, an employer eliminates the risk of a "runaway jury" delivering a grossly excessive verdict. These important advantages will be lost if your company has not updated its arbitration agreement to comply with your state's arbitration-related laws. For example, in California, an arbitration agreement may be rendered unenforceable if it is buried in an employee handbook, or if it requires that employees waive their right to bring employment-related class actions, or shortens the statute of limitations for certain claims, or mandates that employees share in the arbitration costs. In recent years, the increased number of employment-related suits, including a rash of wage and hour claims, underscores the need to ensure that your company's arbitration agreement withstands judicial scrutiny.

The Week At A Glance
Summaries Compiled by Kristen Burgers, Esq.

Chrysler

Rejection of Unexpired Leases and Executory Contracts - Tarbox Motors, Inc., and Tarbox Chrysler Jeep, LLC (collectively, "Tarbox") have filed an appeal of the Bankruptcy Court's order authorizing the rejection of executory contracts and unexpired leases with certain domestic dealers and written opinion in support thereof [Docket Nos. 3802 and 4145, respectively]. Among other issues, Tarbox raises on appeal the issue of the propriety of preemption of state dealer statutes. Specifically, Tarbox has asked the U.S. District Court to determine if the Bankruptcy Court's ruling that the Bankruptcy Code preempts the Rhode Island dealer statutes and state law rights held by Tarbox is correct. Tarbox also questions the Bankruptcy Court's determination that the Chrysler Debtors exercised sound business judgment in rejecting Tarbox's franchise agreements. Tarbox's Designation of Record on Appeal and Statement of Issues is Docket No. 4382.

Assumptions and Assignment of Unexpired Leases and Executory Contracts - The Chrysler Debtors continue to file notices indicating which unexpired leases and executory contracts will be assumed and assigned to Fiat [Docket Nos. 4334 and 4366]. Many of the objections to the Chrysler Debtors' proposed cure amounts have been withdrawn as the Chrysler Debtors work with the non-debtor contract parties to resolve these disputes. However, it appears as though the Chrysler Debtors are willing to conduct hearings on objections which cannot be resolved. On June 30, 2009, the Bankruptcy Court entered an order scheduling a hearing on August 26, 2009, to resolve the cure amount dispute with TRW Automotive U.S. LLC [Docket No. 4404].

Procedures for Lemon Law Claims - The Chrysler Debtors filed a motion on June 30, 2009, proposing procedures to implement the lemon law provisions in the order approving the sale of substantially all the Chrysler Debtors' assets [Docket No. 4414]. Several state attorney generals and consumer groups objected to the proposed sale on the grounds that consumer rights pursuant to state lemon laws were not adequately protected in the sale. The Chrysler Debtors worked with these objecting parties to resolve their concerns through the lemon law provisions in the sale order.

issues and mitigating risks involved for dealers, suppliers and other creditors in the auto manufacturers' business reorganization and restructuring. Venable's auto industry bankruptcy team is led by Larry Katz and Aaron Jacoby, with additional contributions to this week's newsletter by partner Rebecca Aragon and associates Kristen Burgers and Melanie Joo.

Industry Wire Chatter
Compiled by Melanie Joo, Esq.

June 25, 2009
1 "Chrysler's Law Firm Jones Day Bills Automaker for $12.7 Million" - Jones Day seeks "super-priority" status to be paid before financial advisors. [Bloomberg, June 25, 2009]

June 29, 2009
1. "A Happier GM? Billions in Costs Disappear" - The "new GM" will eliminate approximately $12.5 billion in costs by closing US plants and reducing capacity. [Automotive News, June 29, 2009]

2. "Pontiac, Michigan Feels Brunt of GM's Pain" - Michigan cities and other cities nationwide feel the domino effect of sliding revenues and unemployment. [Reuters, June 29, 2009]

3. "Toyota Leads Japan Output Drop as Sales, Exports Fall" - Japanese exports plunge as government incentives attempt to mitigate decline in domestic auto sales. [Bloomberg, June 29, 2009]

4. "GM, Tengzhong to Talk with China Regulators on Hummer - Questions as to Tengzhong's experience and expertise prompt early meeting between Chinese regulators, GM and Tengzhong for government approval of Hummer sale. [Reuters, June 29, 2009]

June 30, 2009
1. "GM CEO Makes Case for

Through this motion, the Chrysler Debtors seek court approval to implement those provisions, which include providing a "Notice Package" to all known lemon law claimants.

Employment of Professionals - After a hearing held on June 30, 2009, the Bankruptcy Court entered orders approving the retention of PriceWaterhouseCoopers LLP as Tax Advisors, Information Technology Advisors and Special Accountants to the Chrysler Debtors and approving the retention of The Siegfried Group, LLP as Accounting Resource Providers to the Chrysler Debtors [Docket Nos. 4408 and 4409, respectively].

General Motors

Sale of Assets Pursuant to Master Sale and Purchase Agreement - The hearing on the GM Debtors' Motion Pursuant to 11 U.S.C. §§ 105, 363(b), (f), (k), and (m), and 365 and Fed. R. Bankr. P. 2002, 6004, and 6006, to (I) Approve (A) the Sale Pursuant to the Master Sale and Purchase Agreement with Vehicle Acquisition Holdings LLC, a U.S. Treasury-Sponsored Purchaser, Free and Clear of Liens, Claims, Encumbrances, and Other Interests; (B) the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (C) Other Relief; and (II) Schedule Sale Approval Hearing [Docket No. 92] began on June 30, 2009. The hearing was adjourned, however, due to problems with the courtroom communications system which prevented attorneys from participating telephonically. The Notice of Agenda of Matters Scheduled for Hearing on June 30, 2009 [Docket No. 2753] contained a 108-page attachment identifying all objections filed to the motion, including objections from the creditors committee, a group of dissenting bondholders, those with liability and asbestos claims against the company, unions and dealerships. The hearing is expected to last several days.

Debtor-in-Possession Financing - On June 25, 2009, the Bankruptcy Court entered a final order authorizing the GM Debtors to use $33.3 billion in debtor-in-possession ("DIP") financing from the U.S. and Canadian governments [Docket No. 2529] to fund the GM Debtors' operations and the administration of the Chapter 11 bankruptcy cases through the consummation of the sale of substantially all the GM Debtors' assets. On June 29, 2009, the GM Debtors filed a motion to amend the DIP credit facility with respect to the funds set aside for the wind-down of the GM Debtors and the Chapter 11 cases [Docket No. 2755]. Currently, the order provides for a "Wind-Down Facility" in an amount not less than $950,000. Through the motion, the GM Debtors request additional provisions to provide the GM Debtors' sufficient liquidity to administer the estates and pursue a plan of liquidation.

Rejection of Unexpired Leases and Executory Contracts - On June 26, 2009, the GM Debtors filed the Notice of Debtors' Motion to Reject Certain Unexpired Leases of Nonresidential Real Property [Docket No. 2643]. The leases which the GM Debtors seek to reject in this motion are for regional office spaces that are no longer needed for the GM Debtors' continued business operations. The deadline to file responses is July 15, 2009.

Retention of Professionals - On June 25, 2009, the Bankruptcy Court entered orders approving the retention of the following professionals in connection with the GM bankruptcy cases: Weil, Gotshal & Manges LLP as attorneys for the Debtors [Docket No. 2546]; AP Services, LLC as crisis managers and Albert A. Koch as Chief Restructuring Officer [Docket No. 2534]; Honigman Miller Schwartz and Cohn LLP as special counsel for the Debtors [Docket No. 2548]; and Garden City Group, Inc. as notice and claims agent [Docket No. 2549].

Bankruptcy Asset Sale" - GM's CEO claims that without court approval of GM's asset sale, including Chevrolet and Cadillac, to the new "GM," GM will be forced to liquidate. [Reuters, June 30, 2009]

2. "GM, Magna rejects Opel Dealers' Investment Offer" - Dealers' offer to buy up to 20% of new Opel turned down despite continuing talks with other foreign bidders. [Automotive News, June 30, 2009]

3. "GM Broadens Product-Liability Pact" - New GM will take on future product-liability claims in response to objections filed by more than a dozen state attorney generals and various consumer groups. [The Wall Street Journal, June 30, 2009]

4. "Germany's State Bank Rejects Porsche Loan" - Porsche Automobil Holding SE to seek alternate refinancing of 9 billion euro debt acquired in failed attempts to takeover Volkswagen AG. [Automotive News, June 30, 2009]

5. "Car-Sales Rebound Seen for June" - Ford plans for increased production as outlook for auto sales improve with increased consumer confidence and decline in market uncertainty. [The Wall Street Journal, June 30, 2009]

6. "GM to Pull Out of Joint Venture with Toyota at California Plant" - The future of Fremont plant uncertain as GM halts production of Pontiac Vibe and Toyota evaluates high costs of manufacturing and distant parts suppliers. [Los Angeles Times, June 30, 2009]

For additional information go to the manufacturer bankruptcy page on the NADC website.

About NADC

The National Association of Dealer Counsel (NADC) is a professional organization of attorneys who represent automobile and other vehicle dealers.

The NADC provides a forum for members to share information, common experience, advice, help and answers to questions on manufacturer franchise issues, lemon laws, vehicle financing, regulatory complexities, insurance laws, tax laws, buy/sell agreements, employment laws, and the many other legal issues facing dealers and their counsel today.

NADC members find common ground at meetings and in on-line

communication. With the proliferation of legislation and uncertain futures of manufacturers, questions and challenges multiply. Members can rely on thoughtful answers, creative strategies and solid advice from colleagues who face the same issues.

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