

Memorandum

April 1, 2008

Effectiveness of Power of Attorney Provisions in Claim Purchase Agreements in Bankruptcy - Delphi Bankruptcy Case Raises Issues

By Michael Friedman, Joon P. Hong, Patricia C. O'Prey and Keith N. Sambur

A recent ruling in the Delphi Corporation, et al. ("Delphi") bankruptcy case calls into question the effectiveness of power of attorney provisions found in many claim purchase agreements. Specifically, on February 26, 2008, United States Bankruptcy Judge Robert D. Drain, presiding over the Delphi bankruptcy proceeding, held that claims purchasers could not submit cure notices in reliance on powers of attorney.

DELPHI SENT CURE NOTICES ONLY TO CONTRACT COUNTERPARTIES

As previously reported in our January 25, 2008 memorandum (the "January Memorandum"),¹ Delphi obtained bankruptcy court permission to assume material supply contracts by sending cure notices directly to its contract counterparties. The cure notices identified contracts Delphi intended to assume and set forth, for each contract, the dollar amount of pre-petition arrearages required to be "cured" by Delphi in order to assume such contract, thereby having the effect of elevating the priority of the arrearage claims purchased by many claims purchasers. In order to satisfy the requirement that such arrearage claims be "cured" prior to contract assumption, Delphi gave contract counterparties the option of having the prepetition arrearages paid in cash or stock of reorganized Delphi. If contract counterparties wished to receive the cure amount in cash, they had to properly and timely return the cure notice to Delphi. The failure to properly or timely return the cure notice would result in the cure amount being treated as a general unsecured claim and the contract counterparty receiving stock in reorganized Delphi. Because the market was valued the stock of reorganized Delphi that would be distributed on account of each dollar of claim significantly less than the amount of cash that would be distributed for each dollar of claim, the latter result could have a material adverse impact on the value of an arrearages claim.

Notwithstanding the fact that claims purchasers bought arrearages claims and the right to receive "cure" payments, the bankruptcy court's Solicitation Procedures Order² provided that claims purchasers would have no right or recourse against Delphi with respect to the cure amount. Solicitation Procedures Order ¶ 44.

¹ The relevant memorandum is available on our website at http://www.rkollp.com/Cure_Claims_in_Bankruptcy_-_Delphi_Bankruptcy.pdf. In addition, links to the pleadings filed in the case may be found at www.delphidocket.com.

Upon receiving their cure notices, many contract counterparties, in accordance with the terms of their claim purchase agreements, immediately sent the cure notice to their claims purchasers in recognition of the fact that the cure amounts no longer belonged to them. Many claims purchasers, reasonably interpreting the broad powers of attorney contained in their claim purchase agreements to permit them to act on the contract counterparty's behalf, completed and returned the cure notices as attorney in fact in a timely fashion.

DELPHI MOVED TO STRIKE CURE NOTICES SUBMITTED UNDER POWERS OF ATTORNEY

In moving to strike cure notices submitted by claims purchasers (even those timely submitted pursuant to a valid power of attorney), Delphi took the position that (i) the Solicitation Procedures Order prohibited claims purchasers from returning the cure notices and (ii), even if claims purchasers could act under a power of attorney, they had to provide evidence of such authority at the time they returned the cure notice.

THE COURT RULED THAT THE SOLICITATION PROCEDURES ORDER PREVENTED CLAIMS PURCHASERS FROM SUBMITTING CURE NOTICES ON BEHALF OF CONTRACT COUNTERPARTIES

At hearings held on February 21, 2008 and February 26, 2008, Judge Drain indicated that in order to prevent third parties from interfering with Delphi's right to assume executory contracts under Bankruptcy Code section 365, the Solicitation Procedures Order had voided the broad power of attorney provisions contained in claim purchase agreements and only permitted contract counterparties - and not their

attorneys in fact - to return the cure notices. These rulings were made despite (i) the Solicitation Procedures Order's apparent inconsistency with Federal Rule of Bankruptcy Procedure 9010(a) ("Rule 9010(a)") which permits an attorney in fact or authorized agent to perform any act not constituting the practice of law³ and (ii) the lack of any explicit provision, in either the Solicitation Procedures Order or the cure notice itself, indicating that parties could not rely upon Rule 9010(a).

Notwithstanding his ruling that the Solicitation Procedures Order only permitted contract counterparties to return cure notices, under the theory of "excusable neglect"⁴ Judge Drain did, however, require Delphi to accept certain cure notices submitted by claims purchasers in reliance on their attorney in fact status. Judge Drain ruled that "excusable neglect" was generally present where documentary evidence of a party's authority to act was submitted contemporaneously with a timely submitted cure notice or within a short time period following the deadline for submission of the cure notices.

To the extent subsequent courts similarly prohibit parties other than contract counterparties from completing and submitting cure notices in order to protect debtors' rights under Bankruptcy Code section 365, claims purchasers should not rely on a power of attorney (whether such authority is contained in a purchase agreement or stand alone document) to complete cure notices. Although Judge Drain did require Delphi to accept some cure notices submitted under a power of attorney, it is difficult to determine the circumstances under which a court will permit non-compliance with an order based upon "excusable neglect."

2 Order Approving (I) Disclosure Statement, (II) Record Date, Voting Deadline, and Procedures for Temporary Allowance of Certain Claims, (III) Hearing Date to Consider Confirmation of Plan, (IV) Procedures for Filing Objections to Plan, (V) Solicitation Procedures for Voting on Plan, (VI) Cure Claim Procedures, (VII) Procedures for Resolving Disputes Relating to Postpetition Interest, and (VIII) Reclamation Claim Procedures, entered on December 10, 2007 (Docket No. 11389) ("Solicitation Procedures Order").

3 Although section 105(a) of the Bankruptcy Code provides the bankruptcy court with authority to enter such orders as equity requires, that authority may not be used in a way which contradicts the bankruptcy rules. *FDIC v. Colonial Realty Co.*, 966 F.2d 57, 59 (2d Cir. 1992) (provision of Bankruptcy Code authorizing bankruptcy court to issue any order necessary for administration of case cannot be used in manner inconsistent with other commands of Bankruptcy Code); *In re One Times Square Associates Ltd. Partnership*, 159 B.R. 695, 702 (S.D.N.Y. 1993) (section 105 may be used sparingly to supplement, not to supplant, the Bankruptcy Code).

4 In finding "excusable neglect", the court focused on the following factors articulated by the United States Supreme Court in *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380 (1993): (i) danger of prejudice to the debtor, (ii) whether the movant acted in good faith, (iii) the length of the delay in failing to act properly, (iv) its potential impact on judicial proceedings and (v) the reason for the delay, including whether it was within the reasonable control of the movant.

RECOMMENDATIONS

In light of these additional rulings by the court, claims purchasers should consider the following measures, in addition to those highlighted in the January

Memorandum, in order to protect potential cure claims:

- Object to a solicitation procedures order that only permits contract counterparties to complete and return cure notices or does not explicitly permit an authorized agent or attorney in fact to complete and return cure notices. Even if the objection is unsuccessful, parties will have greater certainty and clarity which was lacking in the Delphi proceeding;
- Notify any contract counterparty of the cure claims procedures so that cure notices are more likely to be completed in a timely and proper fashion;
- At the time the trade closes, have the contract counterparty execute a notarized power of attorney which conforms substantially to official form number 11 (a sample is attached as Exhibit A) specifically providing the purchaser or its assignee with the right to take all action with respect to the claim, including completing any forms or notices on account of "cure" or similar rights arising from Bankruptcy Code section 365 in the event an attorney in fact can complete the cure notice under the governing order; and
- To the extent a contract counterparty refuses, or is unable, to submit the required cure notice, the claims purchaser should then submit the cure notice and sign such cure notice as "attorney in fact" for the contract counterparty and attach to such notice proof of the power of attorney referenced in clause (c) above.

The preceding recommendations should assist claims purchasers in responding to issues raised by cure claims, as it is likely that other debtors will employ a similar process to the one utilized by Delphi and rely on Judge Drain's ruling to restrict claims purchasers from submitting cure notices in the future.

QUESTIONS

If you have questions about the matters discussed in this memorandum, please call your usual contact at Richards Kibbe & Orbe LLP or one of the persons listed below.

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Exhibit A

Memorandum Regarding Effectiveness of Power of Attorney Provisions in Claim Purchase Agreements in
Bankruptcy – Delphi Bankruptcy Case Raises Issues – Dated April 1, 2008

[Insert Case Caption]

POWER OF ATTORNEY

STATE OF [])

) ss:

COUNTY OF [])

The undersigned (the "Grantor") hereby appoints [Claim Purchaser] (and all officers, managers, employees, agents, attorneys, successors or assigns, including without any limitation any successive owner of the [Claim or Transferred Rights (as those terms are defined in that certain [Claim Purchase Agreement dated as of [] by and between Grantor and [Claim Purchaser]] designated by [Claim Purchaser], collectively, the "Agent"), with full power of substitution, as its true and lawful attorney in fact and authorized agent to appear and to act in the Grantor's name, place, and stead, and grants Agent the authority to take any and all actions necessary: (a) with respect to any cure claim notice(s) or similar notice issued under Bankruptcy Code section 365, and the corresponding cure claim(s); (b) take any and all other action necessary or desirable to accomplish the foregoing; (c) complete, submit and execute any such cure notice(s); and (d) delegate any or all of the foregoing powers to any person or persons (each, an "Additional Agent") that Agent (or any such Additional Agent) shall select.

The Grantor further grants to Agent (and each Additional Agent, if any) full power and authority to do and perform all acts necessary or desirable to carry into effect the powers granted by or under this Power of Attorney as fully as Grantor might or could do with the same validity as if all and every such act had been herein particularly stated, expressed, and especially provided for, and hereby ratifies and confirms each and every act that Agent (and each Additional Agent, if any) shall lawfully do or cause to be done by virtue of the powers and authority granted and contemplated hereby.

Dated: _____, 200_

Signed: _____

By: _____

Title: _____

Address: _____

Acknowledged before me on _____, 200_ by _____, who says that s/he is _____ of the corporation named above and is authorized to execute this power of attorney in its behalf.

Sworn to before me this _____ day of _____, 200_

Notary Public