THREATS & OPPORTUNITIES IN THE RETAIL SECTOR

Racing against time in Chapter 11

BY NEIL B. GLASSMAN

Everything is accelerating in today's hurried world, especially in Chapter 11 cases. There are multiple forces at work, both market driven and legislative, but the result is a perfect storm of accelerated timelines. This is especially true in retail cases where the enterprise is the proverbial 'melting ice cube'. But this compression of timelines is happening in virtually all 'sale cases', i.e., cases where the debtor's assets will be addressed through a sale rather than a reorganisation of the debtor's financial affairs and if necessary operational affairs. Today, most cases are sale cases.

The tightened credit markets, and unrelenting administrative costs are the primary reasons sales are being scheduled to occur so early in Chapter 11 cases. Until approximately 12-18 months ago, it was not common for a 363 sale to occur within the first two months of a Chapter 11 case. However, the *Inphonic* case in Delaware provided an insight into the 'new paradigm.' In that case, filed at the end of 2007, but like so many cases now, a hedge fund acquired the bank debt of the debtor, an internet reseller of telecom products and services. The hedge fund wanted to acquire the enterprise by credit bidding its secured claim while minimising the expense of funding the debtors' Chapter 11 case. It negotiated to be the stalking horse in a 363 sale to occur approximately 4-5 weeks after the petition date. The court, realising that there was no alternative, was accommodating and scheduled the hearing for approximately one month later.

The case was off to the races. Eventually a settlement was reached with the creditors committee, the debtors and the buyer/DIP lender, but it all happened very quickly.

With institutions exiting the DIP financing market, there is now even more pressure to sell quickly. The cases abound, including, but not limited to: *Mervyn's Holdings, LLC* (D. Del.), *Linens Holding Co.* (D. Del.), *Tweeter Opco , LLC* (D. Del .), *Fortunoff Holdings, LLC* (S .D N.Y.), *Steve & Barry's* (S D N.Y.).

This compression is enhanced by relatively recent statutory changes to the Bankruptcy Code under (BAPCPA). Two changes have really made a difference. One is the restriction on how long a debtor-in-possession retains the exclusive right to propose a plan under section 1121. The time period was shortened from the possibility of multiple extensions for an unlimited time period to no more than 18 months. More significant, however, are the limitations imposed on extensions of time to assume or reject leases under BAPCPA section 365. Whereas multiple extensions of the time to assume or reject used to be permissible, no more than 210 days are allowed under the current scheme without lessor consent, which severely limits a lessee's time to review and consider whether to reject or assume leases. This truncation of the 365(d)(4) time period has caused retailers to make many of their strategic leasing decisions before filing their Chapter 11 petitions. Unfortunately it is increasingly difficult to make effective leasing decisions since the market for retail properties is changing as rapidly as consumers' buying habits.

So hurry up and get your sale done, if you can. ■

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