

Can This Holiday Be Saved? Retail Distress in the 2015 Buying Season



In the ramp up to this holiday season, the record number of retail and mall closures and bankruptcies should put retailers and their vendors on alert. Several retail icons have sought or considered bankruptcy protection. Some retail debtors have emerged from bankruptcy as healthier, more prosperous businesses, leaving behind obsolete operations and debts. Others have sold assets or operations, getting top dollar for what was sold. Other financially troubled retailers restructured their debts and operations, without the need to file for bankruptcy or shut down.

The traditional advice to troubled retailers had been to wait until after the holidays to file for protection in the hopes of achieving maximum liquidity. That is no longer true. As holiday spending continues to gravitate to online retailers, the end-of-year sales surge and post-holiday cash surplus are no longer a predictable seasonal fixture.

Suppliers, vendors, landlords, employees and mall operators are all impacted by a retailer's distress. For healthier retailers, related bankruptcies and liquidations—even those involving fellow retailers—can create new and inviting opportunities, such as well-priced real property and intellectually property acquisitions.

Retailers in Financial Distress

Amid this atmosphere, retailers finding themselves debt laden or short on cash should consider several different steps, as shared below. Retailers should explore Chapter 11 and other restructuring options as an opportunity to achieve favorable results, such as these:

- Reject burdensome leases and other executory agreements
- Obtain improved credit and supply terms
- Establish critical vendor programs to keep important suppliers delivering their goods and keep them happy to continuing to do so
- Discharge pre-filing debts and deleverage the balance sheet
- Effectively address reclamation and similar claims and issues
- Retain important employees at the company, consider employee retention programs

- Find new and creative sources of financing
- Sell obsolete inventory at the best possible prices
- Close underperforming stores, limiting resulting claims
- Conduct going-out-of-business sales, despite lease prohibitions
- Monetize little-used intangible and other property
- Obtain new capital free of existing encumbrances
- Implement improved rental terms
- Structure consignment and revenue sharing agreements to improve cash flow and limit risk
- Avoid cash draining COD and adequate assurance demands

When a Retailer's Landlord, Vendor or Supplier Is in Trouble

Retailers are not alone in finding themselves in financial distress. A retailer's financial wherewithal can be harmed by the troubles of its vendors, landlords and licensors. Given the recent wave of retail bankruptcies, some vendors lost important customers and some landlords have much vacant space, resulting in reduced revenues and increased obligations.

Retailers can limit the risks they suffer as a result of the financial problems of others. Retailers should consider the following:

- Assess risks of specific supplier, licensor, licensee and landlord bankruptcies and other financial troubles
- Identify and modify, as needed, key contracts that might be impacted by the contracting party's bankruptcy, through assumption, assignment, rejection and otherwise
- Enforce and seek to amend delivery, payment, default, cure and termination terms in existing contracts
- Carefully craft delivery, payment, default, cure and termination terms in contracts under negotiation
- Create and enforce rights in connection with goods in transit
- Review and amend a supplier's ability to assume and assign a contract, over the retailer's objection—regardless of what a contract may say—in the event of the supplier's bankruptcy

- Enhance the ability to terminate purchase and supply agreements in the event of, and in advance of, a supplier bankruptcy or other financial distress
- Establish technology escrows with intellectual property licensors
- Structure new and improved consignment and revenue-sharing terms
- Create, enforce and improve setoff, recoupment, default and termination rights, before a bankruptcy filing by a vendor
- Review and potentially revise or craft consignment and similar contracts

Can This Holiday Be Saved?

This holiday season will once again be a do-or-die scenario for certain retailers. While nobody wants to be the bearer of bad news while the world is filled with merriment, the likelihood of holiday shoppers delivering year-end salvation decreases as the traditional retail model becomes less tolerant and margins grow thinner. By considering the above issues and seeking counsel from experienced professionals at an early stage, retailers can act to halt downward spirals, and retailers that are financially strong can position themselves to take advantage of new opportunities presented in the current retail flux.

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