THE DISAPPEARANCE OF RETAIL REORGANIZATION IN THE POST-BAPCPA ERA

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"Lehman Brothers, Sharper Image, Bennigan's, and Beyond:
Is Chapter 11 Bankruptcy Working?"

The Disappearance of Retail Reorganization In the Post-BAPCPA Era

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> *To the extent we understand the law of corporate reorganizations as providing a collective forum in which creditors and their common debtor fashion a future for a firm that would otherwise be torn apart by financial distress, we may safely conclude that its era has come to an end.*[2]

The year was 2002, nearly three years before President George W. Bush signed into law the Bankruptcy Abuse Prevention and Consumer Act of 2005, S. 256 ("BAPCPA"), when Professors Baird and Rasmussen published this epitaph mourning the passage of chapter 11 as a means by which companies could restructure debt and emerge from bankruptcy as reorganized and rehabilitated entities. According to Baird and Rasmussen, structural changes in the U.S. economy over the preceding twenty-five years, including the national shift from a manufacturing economy to a service economy, the globalization of financial markets, and the increasing significance of intangible assets and intellectual capital, combined to leave the Chapter 11 process ill-suited for the twenty-first century.[3]

The factors cited by Baird and Rasmussen are certainly important to any macroscopic analysis of Chapter 11 reorganization, particularly in view of the significant "intangible asset" bankruptcies of Enron, WorldCom and Adelphia that dominated headlines years ago. But the systemic decline of Chapter 11 reorganization has also invaded the retail sector, where "hard assets" are no less prevalent today than they were in the 1990s, a time when many distressed

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[2] Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN L. REV. 751, 753 (2002).

[3] *See generally* id.

retailers used the significant powers and protections of the Chapter 11 process to resuscitate their businesses.[4]

Today, retailers almost invariably begin the Chapter 11 process with little hope of emergence. Numerous economic factors – the credit crunch, the subprime lending crisis, the slowdown of the housing market and eroding value of retail commercial leases – have clearly contributed to this downward spiral. But to pin the disappearance of retail reorganization solely on one or more of these economic factors would be to ignore the devastation wrought by BAPCPA in the healthier economic climates of 2006 and 2007.[5] Indeed, since the enactment of BAPCPA in late 2005, no more than two retailers have successfully emerged from Chapter 11 as reorganized entities.

It is our experience that BAPCPA, with its numerous provisions impacting corporate insolvencies, has made it nearly impossible for retailers to emerge from Chapter 11 under any economic conditions. BAPCPA's amendment to, and introduction of, some of the more crucial Bankruptcy Code sections affecting the retailer's ability to meet its liquidity needs and obtain necessary postpetition financing – the lynchpin to any successful retail reorganization effort – has had a devastating effect on the retailer's ability to reorganize. Now almost three years removed from the enactment of BAPCPA and having observed its impact on numerous retail Chapter 11 cases, we can objectively say that BAPCPA has so negatively impacted the retailer's ability to meet its liquidity needs in Chapter 11 that the decline of retail reorganization should be expected to continue even in healthier economic times.

Liquidity is the lifeblood of reorganization. Absent the ability to pay certain postpetition debts as they come due, including sums owed employees, vendors, common carriers, utility providers and estate professionals to name just a few, the prospect of a retail reorganization is little more than a pipe dream. Moreover, the question of whether these obligations can be met is rarely left to the discretion of the debtor. Most retailers contemplating a Chapter 11 filing have experienced sustained periods of liquidity problems and have relied on the secured lending of banks and other financiers for years preceding their bankruptcy filings.[6] Consequently, at the

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[4] The Federated Department Stores case (*In re Federated Dep't Stores, Inc.*, Case No. 90-10130 (BP) (Bankr. S.D. Ohio 1990) symbolizes the highly successful retail restructurings of that decade. Before its Chapter 11 case, Federated was saddled with $7.5 billion of debt after its purchase as part of a highly leveraged takeover by Canada's Campeau Corporation in 1988. Faced with a declining business and loss of confidence among its vendors, Federated filed for Chapter 11 protection in 1990, where it was forced to quickly sell various key assets, including a portion of its real estate interests. Despite these problems, Federated was able to restructure its debt and triumphantly emerge from bankruptcy as a reorganized entity in 1992 by swapping $5 billion in debt and other liabilities for new notes and equity. Federated went on to acquire Macy's in connection with Macy's Chapter 11 case in 1994 and by 1998 Federated's debt was rated as "investment" grade by the major rating agencies.

[5] Although BAPCPA was signed into law on April 20, 2005, most of its provisions did not become effective until October 17, 2005. It is telling that a number of large companies that have either reorganized or are in the process of reorganizing, including Delta, Northwest and Delphi, filed their Chapter 11 cases in the month prior to BAPCPA's effective date.

[6] The growth of the second lien lending market over the past five years has compounded these liquidity problems for distressed retailers. Not only must retailers position themselves to pay the present value of the often substantial secured claims of their senior lenders upon confirmation of a Chapter 11 plan, but many now face a relatively new and additional layer of secured debt that must also be paid in full upon emergence. Second lien

commencement of most cases, substantially all of a retailer's assets will be subject to the prepetition liens of its lenders and may not be used or sold without their consent.

Lenders are disinclined to permit the use and disposition of their collateral and, just as important, to extend additional financing, absent a firm belief in a debtor's capacity to effectively reorganize and thereby avoid any diminution in the value of their collateral. Lenders have little to gain from the reorganization process unless it yields sufficient funds to repay the present value of their indebtedness, which, in most instances, includes significant amounts of outstanding prepetition loans. Where a prepetition lender does not possess the requisite level of confidence in a given debtor prior to or during the Chapter 11 process, it will inevitably attempt to force a sale of the collateralized assets pursuant to section 363(b)[7] of the Bankruptcy Code.

As discussed herein, BAPCPA's amendments to the Bankruptcy Code have stifled prospective retail reorganizations at the ground floor and beyond. New restraints on a debtor's liquidity reserves have quelled the appetites of already cautious lenders to provide the requisite levels of postpetition financing to even attempt reorganization. Furthermore, new provisions expanding the universe of claims entitled to administrative priority treatment have created an atmosphere of doubt as to whether a retailer could possibly possess enough cash at the end of a reorganization to pay such claims in full at confirmation. But perhaps the most troubling aspect of BAPCPA is its revision to section 365(d)(4)[8] of the Bankruptcy Code.

Prior to BAPCPA, section 365(d)(4) of the Bankruptcy Code was a powerful tool used by retailers to downsize operations while simultaneously adding considerable value to the estate. Under the old regime, a debtor had 60 days to decide whether to assume or reject its commercial real estate leases, without the consent, and often over the objection, of its lessors. This 60-day period was subject to extension "for cause." Such extensions were routinely granted by courts presiding over mid-size and larger cases, where the requesting debtor was continuing to perform its lease obligations. Furthermore, the Bankruptcy Code placed no limit on the duration or number of extensions that could be sought.

Perhaps the past practice of providing unlimited extensions of the assumption/rejection period was unnecessary. It is clear that this practice created a substantial backlash among landlords and others that ultimately produced the truncated assumption/rejection period provided under BAPCPA. But the pendulum has swung too far. As discussed below, the fixing of an

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lending originated in the early 1990s when the debt market stalled as a result of increased conservatism among banks and other traditional senior lenders. Second lien holders, in contrast to mezzanine loan holders, invariably play an active role in the Chapter 11 process because, in the event of a borrower default, the second lien holder can exercise its remedies (including foreclosure) against the debtor. While the second lien market has benefited distressed retailers by providing new channels of liquidity, it has also created more difficulties for those companies attempting rehabilitation in the face of both senior and second lien debt. Second lien loans have increasingly become a favorite investment vehicle of private equity firms that are judged by their internal rate of return on investments. These firms profit from generating quick returns on investment and, accordingly, are even less willing to endure the reorganization process than banks and other financial institutions.

[7] 11 U.S.C. § 363(b).

[8] 11 U.S.C. § 365(d)(4).

immutable deadline for the assumption or rejection of commercial real estate leases has dealt a knockout blow to prospective retail reorganizations.

From a lender's perspective, a retailer's ability to routinely obtain extensions of the assumption/rejection period provided two critical protections. First, a lender could be assured that the retailer was provided with sufficient time to analyze the value of each individual store lease before making the critical decision to assume or reject the lease. Second, lenders were also assured that they would be provided with enough time to conduct a "going-out-of-business" ("GOB") sale on the premises in the event a decision was subsequently made to terminate the reorganization process. Although both protections play important roles in a lender's decision to provide postpetition financing, it is the latter protection which is most crucial. Absent the ability to conduct a GOB sale from the debtor's store locations, a lender is deprived of the most commercially viable location to liquidate the collateralized inventory.

BAPCPA revises section 365(d)(4) to place an outside limit of 210 days on the time by which a debtor must assume or reject a commercial real estate lease. Specifically, section 365(d)(4) now provides that a commercial real estate lease is deemed rejected if not assumed by the debtor by the earlier of (i) 120 days after the petition date; or (ii) confirmation of a plan. Courts are authorized to extend the 120-day period for up to an additional 90 days for cause shown. Extensions beyond 210 days – irrespective of whether the retailer operates 10 stores or 1,000 stores – are not within the discretion of the bankruptcy courts and may only be granted upon the consent of the landlord. The effects of revised section 365(d)(4)'s limitations on the time and manner by which commercial leases must be assumed or rejected has dramatically reduced the debtor's ability to obtain postpetition financing sufficient to fund a reorganization. The 210-day limit leaves little room between the commencement of a case and the time by which a GOB sale must be implemented so as to conclude within the 210-day limit. Consequently, most prepetition lenders now refuse to provide any more postpetition financing than necessary to fund an immediate sale or liquidation process.

Moreover, a lender's traditional willingness to advance postpetition financing was rooted in part on the value of a debtor's commercial leases that could be monetized in the event of a failed reorganization effort. Prior to BAPCPA, lenders were far more willing to finance a debtor's reorganization, partly because the Bankruptcy Code essentially provided them with an indefinite period of time to assign the debtor's below-market commercial leases to third parties at a premium in the course of a subsequent liquidation. Revised section 365(d)(4) appreciably lessens the residual value of a debtor's commercial leases because lenders are left without sufficient time to market those leases in the event the reorganization stalls.

Retail cases filed over the past three years have invariably taken one of two forms: either the case is filed as a liquidation or the debtor is given a window of no more than three to four months to complete a reorganization process that history dictates takes at least three times that amount of time to accomplish. The most compelling explanation for this development is that both retailers and their lenders are acutely aware that even a full seven months in the life of a retail debtor is not a long time, as most retailers and their lenders cannot judge the vitality of the business without going through at least one Christmas season. Absent the ability to extend the assumption/rejection period beyond the 210-day limit, a debtor will often be forced into the impossible position of having to prematurely determine whether to assume or reject its

commercial leases – decisions of critical importance to the ultimate success of any reorganization. Accordingly, even in those cases where the lender has agreed to provide financing on a preliminary, "wait-and-see" basis, such willingness has invariably been tempered – if not extinguished – by the very nature of the retail industry. Lenders are simply not willing to bear the risks associated with financing a reorganization for fear that the retailer may lose its store leases before a GOB sale is completed.

Beyond the impact of commercial lease issues on the reorganization process, retail reorganizations have traditionally been guided by the interplay between a debtor's liquidity needs and a lender's confidence in positioning the debtor to meet those needs. BAPCPA places new and severe handicaps on a retailer's liquidity at the very beginning of a case - the time at which liquidity is most crucial - through various amendments, including those concerning the treatment of trade creditors, utility providers, *ad valorem* tax claims and employee wage priorities.

Revised section 366[9] of the Bankruptcy Code represents another new and significant liquidity hurdle that a retailer must clear on its path to emergence. Revised section 366 provides that a debtor must, within 20 days of the filing, provide its utility providers (e.g., electric, gas, water, telephone) with adequate "assurance of future payment" in the form of a cash deposit or other security in order to prevent the discontinuation of service. Courts have interpreted this provision as requiring a debtor to provide each utility provider with a cash deposit in an amount generally ranging from two weeks to two months of service, calculated based on the debtor's historical average use. Moreover, payment of a cash deposit does not relieve a debtor of its obligation to remain current with respect to services provided by utility providers subsequent to the filing. Accordingly, a debtor with a significant number of stores is now required to disburse what could be millions of dollars to utility providers, and deal with the associated administrative burdens of making and tracking such deposits, within the first 20 days of its case and without any corresponding offset to its obligation to pay such providers on account of their postpetition services.

BAPCPA's revision of section 366 abrogates the long-standing practice that adequate assurance of future payment does not require a guarantee of payment, as courts routinely held that administrative priority claims granted to utility providers were sufficient assurances of future payment. Revised section 366 expressly prohibits the granting of an administrative priority claim as adequate assurance of future payment. The effects of this revision on a debtor's liquidity at the very beginning of a case are severe, particularly for retail debtors with numerous locations requiring multiple utility services.

BAPCPA also makes notable changes to the Bankruptcy Code provisions governing the subordination and priority of *ad valorem* tax liens on a debtor's real and personal property. Prior to the passage of BAPCPA, the payment of *ad valorem* taxes was usually subordinated to prior-filed secured claims. However, pursuant to amended section 503(b)(1)(B)[10] of the Bankruptcy Code, *ad valorem* tax claims incurred postpetition may prime secured and administrative priority

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[9] 11 U.S.C. § 366.

[10] 11 U.S.C. § 503(b)(1)(B).

claims, regardless of whether the claim is secured or unsecured or whether the liability for the property tax is *in rem* or *in personam*. The revisions to the Bankruptcy Code sections governing *ad valorem* tax liens further compress liquidity, as pospetition *ad valorem* tax claims are afforded a greater priority for distribution purposes. Accordingly, a lender would likely reserve against loan availability an amount up to one year of a debtor's estimated *ad valorem* taxes, at the expense of cash made available to finance a reorganization.

Revised sections 507(a)(4)[11] and (a)(5)[12] of the Bankruptcy Code further compress the debtor's initial liquidity by raising the aggregate monetary limits on employee wage and pension benefit priority claims. Formerly, the aggregate amount that an employee could assert as a priority wage or pension benefit claim was limited to $4,925 in wages and pension benefits earned within 90 days prior to the filing. BAPCPA increases the aggregate cap to $10,950 for wages and pension benefits earned within 180 days prior to the filing. While it may be difficult to protest this revision from a moral perspective, the ramifications of revised section 507(a) on a debtor's liquidity are obvious, as these claims are generally paid within the first days of a Chapter 11 case.[13]

The addition of section 503(b)(9)[14] of the Bankruptcy Code creates an administrative claim, not available prior to BAPCPA, for goods actually received by the debtor within the 20 days prior to the Chapter 11 filing. For large retailers receiving high volumes of inventory with a reasonable turnover (often a significant portion of a retailer's trade debt arises in the month prior to bankruptcy) this new provision creates a large class of administrative claims that gives rise to severe liquidity concerns. Because the so-called absolute priority rule prohibits the confirmation of a plan of reorganization where administrative priority claims are paid less than full value at confirmation, section 503(b)(9) creates an enormous obstacle to any retail reorganization effort.

Prior to BAPCPA, a debtor's failure to pay for goods received within the 20 days preceding the commencement of its case gave rise to an unsecured prepetition claim, subject to very limited reclamation rights. These prepetition claims would ordinarily be paid by a debtor on the same *pro rata* basis as other unsecured claims under a confirmed plan. Now, however, a debtor is required to have available funds sufficient to cover these new, and potentially massive, administrative priority claims.

Lenders are simply disinclined to finance a retailer's bid for reorganization in light of the fact that a debtor must now be positioned to pay in full at confirmation a massive class of claims traditionally entitled to no more than a discounted unsecured distribution. And, as noted above, to the extent that lenders continue to refrain from providing sufficient postpetition financing, the

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[11] 11 U.S.C. § 507(a)(4).

[12] 11 U.S.C. § 507(a)(5).

[13] The disappearance of retail reorganization as a result of BAPCPA has resulted in devastating job losses in the retail sector. For example, the inability of The Bombay Company to reorganize earlier this year resulted in the loss of approximately 3,800 jobs. The liquidations of Sharper Image and Wickes Home Furniture resulted in the loss of approximately 2,200 and 1,500 jobs, respectively.

[14] 11 U.S.C. § 503(b)(9).

benefits of section 503(b)(9) will rarely be reaped by trade creditors simply because retailers will be deprived of the requisite funding needed to attain administrative solvency at confirmation.

BAPCPA has left retailers without adequate time and money to effectuate operational initiatives and cost cutting measures needed to resuscitate their businesses. Retailers now enter the Chapter 11 arena with little choice but to narrowly tailor their strategy to ensure that their lenders are not deprived of the substantial benefits and protections conferred by section 363(b) of the Bankruptcy Code, which authorizes the use, sale or lease of estate property outside the ordinary course of business upon court approval. Section 363(b) offers the unique ability to cleanse the assets of a distressed company by permitting debtors to convey assets "free and clear," thereby maximizing value by removing the uncertainty of such stigmas as successor liability, fraudulent transfer claims and lien issues that often accompany asset purchases. Prepetition lenders, cognizant of this powerful liquidating tool and mindful of the numerous liquidity hurdles that the debtor must clear as a result of BAPCPA, have little to gain by risking their collateral in pursuit of a reorganization process now widely perceived as hopeless.

Indeed, the constricted time frames and liquidity problems created and imposed by BAPCPA have effectively eliminated the need for existing lenders to provide any more financing than necessary to position the debtor to liquidate its assets in the first few months of the case. Today, the debtor is no longer "in possession" of its assets or its future upon the commencement of its Chapter 11 case. BAPCPA's constrictive liquidity provisions and the enormous leverage handed to secured lenders as a result thereof have eliminated the ability of retailers to control the Chapter 11 process as a "debtor-in-possession." Rather, the process is now controlled almost exclusively by prepetition lenders, who have essentially assumed the role of "creditor-in-possession."

The increasing influence of prepetition lenders has fundamentally changed the reorganization dynamic, with wide-ranging and far-reaching effects both prior to and during the Chapter 11 case. Because retailers that file for Chapter 11 protection today increasingly have balance sheets that are encumbered by ever growing amounts of secured debt, there is virtually no ability for these companies to survive on cash collateral alone. Retailers today invariably need to turn to postpetition financing (or "DIP financing") immediately upon the commencement of the case. DIP financing agreements generally take the form of a revolving credit facility, with amounts borrowed due on a regular and relatively short-term basis, and typically include regular reporting requirements to allow the lenders to evaluate the debtor's performance frequently and to determine whether the loan should be "rolled over" (i.e., to apply the proceeds of the lender's postpetition loans against the lender's prepetition indebtedness).

As a result of the liquidity and timing problems imposed by BAPCPA, negotiations over DIP financing agreements have become more and more one-sided, with lenders' leverage substantially enhanced by their vast prepetition liens and security interests. Such leverage has enabled DIP lenders to impose increasingly severe conditions on retailers and their activities. Lenders now routinely negotiate critical provisions into DIP financing agreements that either direct the retail case towards an immediate liquidation or include covenants or borrowing reserve rights that effectively permit the lender to cease lending only a few months into the case. Although the latter scenario provides a temporary breathing spell for the retailer, the reality is

that three or four months into a Chapter 11 case is vastly insufficient for the retailer to even attempt to restructure its business and gain the support of its various creditor constituencies.

The three most recent large retail filings illustrate the various paths taken by lenders to reach the common destination of a section 363(b) asset sale. It is important to note that each of these cases is currently pending and, accordingly, their ultimate disposition has not yet been determined. However, these cases provide helpful illustrations of the different ways in which lenders have assumed the reigns of the retail Chapter 11 process from the outset.

A. Steve & Barry's

Steve & Barry's[15] filed a voluntary petition for chapter 11 protection in the Southern District of New York on July 9, 2008. On the petition date, together with their other first day motions, the Debtors filed a motion requesting authorization to use cash collateral. On July 11, 2008 (well before the creditors' committee was appointed and provided an opportunity to weigh in), the court entered an interim order granting the Debtors' cash collateral motion. The order provided that the Debtors' failure to perform any of the following "sale trigger events" by their respective dates would constitute an event of default:

- On or before July 24, 2008, unless the prepetition revolver agent and the Debtors agree otherwise, the Debtors, after consultation with the creditors' committee and the prepetition revolver agent, must have accepted a stalking horse bid from a stalking horse that is reasonably acceptable to the prepetition revolver agent.

- On or before July 29, 2008, the court must have approved and entered a sale procedures order with respect to a going concern sale or full chain liquidation, in form and substance satisfactory to the prepetition revolver agent.

- On or before August 12, 2008, the Debtors must complete the auction for a going concern sale or full chain liquidation.

- On or before August 14, 2008, the Debtors must receive the approval of the court for a going-concern sale or full chain liquidation, and the order approving such a going concern sale or full chain liquidation must be in form and substance satisfactory to the prepetition revolver agent.

- On or before August 15, 2008, the Debtors must have executed all of the agency documents, to the extent applicable, or purchase agreements and all other relevant documents in connection with a going-concern sale or full chain liquidation.

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[15] *In re* Steve & Barry's Manhattan LLC *et al.*, Case No. 08-12579 (ALG) (Bankr. S.D.N.Y. July 9, 2008).

- On or before August 15, 2008, to the extent applicable, the going- concern sale shall have been consummated, or the full chain liquidation shall have commenced.

Pursuant to the interim order entered by the bankruptcy court, upon the occurrence of an event of default, the lenders were entitled to declare a termination, reduction or restriction of the ability of the Debtors to use any cash collateral, and any automatic stay otherwise applicable would be modified so that five business days after the lenders' notice of such termination, the lenders would be entitled to exercise their rights and remedies to satisfy any obligations under the interim order.

The Steve & Barry's case exemplifies the fast-track liquidation approach now taken by many retail lenders. As illustrated above, the sale transaction of Steve & Barry's as either a going concern entity or through an orderly liquidation under section 363(b) was required to be consummated *barely a month* into the case. The company was provided with no breathing spell, no chance to implement strategic initiatives that might attract new financing, and no opportunity whatsoever to emerge as a rehabilitated company under existing management.

B. Mervyn's

In other instances, lenders have been more willing to provide distressed retailers with an opportunity to reorganize, provided that such efforts do not interfere with the lender's ability to liquidate its collateral in a section 363(b) sale. For example, in the Mervyn's case[16], filed in the District of Delaware on July 29, 2008, the retailer's senior lender agreed to provide DIP financing to the company through the continuation of a prepetition revolving credit facility under which the company's borrowing availability was calculated as a percentage of its inventory value. Importantly, however, the DIP financing agreement, as ultimately approved by the bankruptcy court, empowers the lender to create various "reserves" against the company's borrowing availability under the credit facility. Specifically, the senior lender was permitted to, at any time and in any increment, establish a reserve:

> To reflect the value of inventory at leased locations with respect to which the lease therefore has not been assumed commencing on the date that is ten (10) weeks prior to the end of the one hundred twenty (120) day lease rejection/assumption period, as such period may be extended by the Bankruptcy Court or shortened by the Bankruptcy Court.

This reserve is the direct result of BAPCPA's condensed time frame within which a debtor must assume or reject its commercial real estate leases. The purpose of this reserve is to ensure that the lender will be well positioned to liquidate Mervyn's inventory through GOB sales before such leases are rejected in the context of a liquidation. The reserve effectively provides the lender with the unfettered right to stop lending to Mervyn's on the date that is 10 weeks prior to

16 *In re* Mervyn's Holdings, LLC, *et al.*, Case No. 08-11586 (KG) (Bankr. D. Del. July 29, 2008).

the conclusion of the 210-day lease assumption/rejection period.[17] Thus, in order to stave off a lender-driven liquidation of its assets, Mervyn's, a company that recorded net sales of approximately $2.5 billion during the fiscal year ending February 2, 2008, would have no more than four months to, among other things, develop and initiate operational initiatives and cost-cutting measures sufficient to attract exit financing and entice its vendors to continue manufacturing and shipping product on customary credit terms.

C. Boscov's

The postpetition financing arrangement approved by the bankruptcy court in the Boscov's case provides an example of the liquidation-oriented covenants that now regularly appear in DIP financing agreements. Boscov's[18], which filed its Chapter 11 in the District of Delaware on August 4, 2008, became obligated under the court-authorized DIP financing agreement to possess certain minimum levels of inventory, and to incur expenses no greater than 110% of the amounts specified in the accompanying budget, commencing on August 16, 2008. Further, beginning on September 6, 2008, Boscov's became obligated to achieve operating cash receipts of not less than 90% of the amounts specified in the budget. Failure to meet these covenants would constitute an event of default under the DIP financing agreement that would permit the lenders to terminate the credit facility.

Importantly, each of these covenants was tied to Boscov's actual experience during the weeks *preceding* its Chapter 11 filing. For example, Boscov's actual expenses would be measured against the expenses projected in the budget for the preceding four-week period. Because this multi-week "look back" would include the date of Boscov's Chapter 11 filing, the company was required under the DIP financing agreement to achieve specified results for periods shortly before and after the bankruptcy filing, many of which were utterly unworkable given the disruption to Boscov's business that had been caused by the bankruptcy filing. In fact, Boscov's was plainly in default of these covenants *before* the bankruptcy court even approved the DIP financing agreement because the company was clearly not positioned to even approach these targets until late September. The inclusion of these covenants in the court-authorized DIP financing agreement effectively positioned Boscov's as a borrower under an "at will" credit facility, with the lenders positioned to call the loan and effectuate a liquidation process at any moment they perceive a risk to the value of their collateral base.

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[17] Mervyn's request for a 90-day extension of the lease assumption/rejection period was authorized by order of the bankruptcy court. As noted above, as a result of BAPCPA's revision of section 365 of the Bankruptcy Code, the bankruptcy court is expressly prohibited from authorizing any further extension of this period.

[18] *In re* Boscov's, Inc., *et al.*, Case No. 08-11637 (KG) (Bankr. D. Del. August 4, 2008).